

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DANIEL J. GARCIA	:	DETERMINATION DTA NO. 826489
for Review of a Notice of Suspension, Refusal to Register or Other Disciplinary Action Dated May 23, 2014 Pursuant to Article 1 of the Tax Law.	:	

Petitioner, Daniel J. Garcia, filed a petition for review of a notice of suspension, refusal to register, or other disciplinary action dated May 23, 2014 pursuant to Article 1 of the Tax Law.

On October 3, 2014, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Petitioner, appearing by Steven J. Homayoon, Esq., filed an affidavit and documents on December 15, 2014 in opposition to the notice of intent to dismiss the petition. On December 15, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich, Esq.), submitted an affidavit and documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on December 15, 2014. After due consideration of the documents and arguments submitted, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of the conciliation default order.

FINDINGS OF FACT

1. Petitioner, Daniel J. Garcia, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). On the request for conciliation conference, petitioner listed his address in Ronkonkoma, New York.

2. The request was in response to a notice of suspension, refusal to register, or other disciplinary action dated May 23, 2014, which suspended petitioner's registration as a New York State tax preparer.

3. BCMS issued to petitioner a conciliation default order (CMS#262510) dated August 8, 2014 denying petitioner's request based upon his failure to appear at the scheduled conference. The conciliation default order indicated that notice of the conference was mailed to petitioner on July 1, 2014.

4. Petitioner filed a petition with the Division of Tax Appeals dated September 6, 2014 by U.S. Postal Service First Class Mail. The U.S. Postal Service postage-paid stamp is dated September 10, 2014. The petition was received by the Division of Tax Appeals on September 15, 2014.

5. On October 3, 2014, Supervising Administrative Law Judge Daniel Ranalli issued to petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petition, on the basis that the petition had not been timely filed.

6. In support of dismissal and to show proof of proper mailing of the Conciliation Default Order on August 8, 2014, the Division provided the following: (i) an affidavit, dated December 12, 2014, of Leo Gabovich; (ii) an affidavit, dated November 26, 2014, of Robert Farrelly, the Assistant Supervisor of the BCMS; (iii) an affidavit, dated November 26, 2014, of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room; (iv) the "Certified Record for

Presort Manual Mail - BCMS Cert. Letter” (CMR); and (v) a copy of petitioner’s Request for Conciliation Conference (Request), the a notice of suspension, refusal to register, or other disciplinary action being challenged via the Request, and the Conciliation Default Order and cover letter issued in response thereto.

7. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS Data Management Services Unit prepared and forwarded the conciliation orders, together with their accompanying cover letters, to the particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward the order and cover letter to the BCMS clerk assigned to process conciliation orders.

8. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division’s Advanced Function Printing Unit (AFP), which in turn assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer’s name, mailing address, BCMS number, certified control number and certified control number bar code for each order. The AFP Unit generates a CMR listing those taxpayers and representatives to whom conciliation orders are being sent on a particular day. The certified control numbers are recorded on the CMR under the heading “CERTIFIED NO,” and the BCMS numbers are recorded under the heading “Reference No.” Each Reference No. is preceded by three zeroes. The AFP Unit assigns the CMR and cover sheet data to a printer located in BCMS and these documents are printed there and delivered to the BCMS clerk assigned to process conciliation orders.

9. The BCMS clerk’s regular duties included associating each cover sheet, conciliation order and covering letter, and verifying the names and addresses of taxpayers and their representatives, per BCMS records, with the information listed on the CMR and on the cover

sheet. The clerk then folds and places the cover sheet, covering letter and conciliation order into a three-windowed envelope such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear. The run of orders to be mailed, denominated "Total Pieces and Amounts," is indicated on the last page of the CMR, along with the preprinted heading "Total Pieces Received at Post Office." The BCMS clerk stamps the bottom left corner of the last page of the CMR "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT", and stamps the bottom right corner of the last page "POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas." The clerk then inserts on the top of each page of the CMR the date that the conciliation orders were mailed.

10. In this instance, certified control number 7104 1002 9730 0272 7215 and reference number 000262510 were assigned to the conciliation default order to be mailed to petitioner, at his Ronkonkoma, New York, address. The foregoing information appears on page six of the seven-page CMR pertaining to this mailing. The date "8/8/14" is handwritten in the upper right corner of each of the seven pages of the CMR, signifying the date on which the conciliation orders set forth on the CMR were mailed.

11. A piece of mail may be "pulled" from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of conciliation orders being mailed, so as to allow for correction and issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

12. The CMR in this case reflects that two pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for total pieces received at the post office. The specific pulled items appear on pages one and three, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listing pertaining to petitioner. The preprinted number “73,” as appearing next to the heading “Total Pieces and Amounts,” on the last page of the CMR was crossed out and replaced with the handwritten number “71” to reflect the 2 pieces pulled from the run.

13. The affidavit of Bruce Peltier, Principal Mail and Supply Clerk in the Division’s Mail Processing Center (mail room), describes the mail room’s general operations and procedures. The mail room receives the items to be mailed in an area designated for “Outgoing Certified Mail.” A staff member retrieves the windowed envelopes, containing the cover sheet, covering letter and conciliation orders to be mailed, and then weighs, seals and affixes postage and fee amounts on each envelope. A clerk counts the envelopes and verifies the names and certified mail numbers on those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. In this case, the USPS employee affixed a postmark dated August 8, 2014 and initialed each page of the CMR. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS employee complied with this request by circling the handwritten “71” on the last page next to the heading “Total Pieces Received at Post Office.”

14. The CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Center, each CMR would be picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

15. Petitioner responded to the notice of intent to dismiss with a letter and attachments in opposition to the proposed dismissal including the affidavit of petitioner's office manager, Lisa Hendrickson. Ms. Hendrickson avers that she mailed the petition in this matter on September 6, 2014 at the United States Post Office in Ronkonkoma, New York.

CONCLUSIONS OF LAW

A. There is a 30-day statutory limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order sustaining the revocation of a tax preparer registration (Tax Law § 170[3-a][e], [h]; 20 NYCRR 4000.5[c]). Pursuant to Tax Law § 170(3-a)(e), (h), the conciliation default order and the underlying notice would be binding upon petitioner unless he timely filed a petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a late filed petition (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued. (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 1, 2014; *Matter of Cato*; *Matter of DeWeese*). When an order is found to have been properly

mailed by the Division to the taxpayer's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Robert Farrelly and Bruce Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by certified mail on August 8, 2014, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Peltier affidavits were followed with respect to the conciliation default order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of August 8, 2014. There are 71 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "71" on the line stating "total

pieces received at post office,” that the post office received 71 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on August 8, 2014 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. In this case, the last day of the 30-day filing period was September 8, 2014.¹ The date appearing on the U.S. Postal Service postage-paid stamp on the envelope in which the petition was mailed is September 10, 2014, which date is deemed the date of filing (*see* 20 NYCRR 3000.22). While petitioner has submitted an affidavit from his office manager attesting that she brought the petition to the United States post office on September 6, 2014, such evidence is insufficient to establish that the petition was timely filed given the United States Postal Service postage paid date of September 10, 2014 (*Matter of Western New York Flying Club, Inc.*, Tax Appeals Tribunal, January 25, 1991; *Matter of Price*, Tax Appeals Tribunal, June 17, 1999). Accordingly, the petition was late filed and the Division of Tax Appeals is without jurisdiction to address the merits.

E. The petition of Daniel J. Garcia is dismissed.

DATED: Albany, New York
February 26, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE

¹Since the 30th day to file a petition fell on Sunday, September 7, 2014, petitioner had until Monday, September 8, 2014, to timely file his petition (*see* General Construction Law § 25-a).