

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EILEEN VANDERBORG : DETERMINATION
DTA NO. 827281
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Year 2013.:

Petitioner, Eileen Vanderborg, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2013.

On January 15, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In response to a request for additional time, the parties were granted until April 1, 2016 to respond to the proposed dismissal.

Petitioner, appearing pro se, did not submit a response to the proposed dismissal. On March 4, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), submitted 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 April 1, 2016. After due consideration of the documents submitted, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. On October 19, 2015, petitioner, Eileen Vanderborg, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Conciliation Order (CMS No. 264580), issued by the Bureau of Conciliation and Mediation Services (BCMS) and dated May 15, 2015.

2. On January 15, 2016, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. This notice indicates that the Conciliation Order in this matter was issued to petitioner on May 15, 2015, but that the petition was not filed until October 19, 2015, or 157 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, (i) the affidavit of Mary Hurteau, an attorney employed by the Office of Counsel of the Division, dated March 4, 2016; (ii) a copy of the Conciliation Order, dated May 15, 2015; (iii) a copy of the Notice of Intent to Dismiss Petition, dated January 15, 2016; (iv) petitioner's Request for Conciliation Conference, received by BCMS on January 2, 2015, and showing petitioner's address as 7921 147th Street, Apartment F6, Flushing, New York 11367, and her representative's address as 32-52 80th Street, Apartment 1F, East Elmhurst, NY 11370; (v) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated February 26, 2016; (vi) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked May 15, 2015; and (vii) the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room, dated February 29, 2016.

4. The affidavit of Robert Farrelly sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of orders by United States Postal Service (USPS) certified mail and confirmation of the mailing through

BCMS's receipt of a postmarked copy of the CMR.

5. In order to commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

6. Next, the name, mailing address, order date, and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit 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.

7. The AFP Unit also produces a computer-generated CMR. The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

8. The clerk, as part of her regular duties, associates and combines each individual and matching conciliation order, cover sheet, and cover letter. The clerk then verifies the names and addresses of the relevant taxpayers and representatives using the information listed on the CMR and the appropriate cover sheet. Next, the clerk folds and places the cover sheet, cover letter, and conciliation order, in that order, into a three-windowed envelope where the BCMS return

address, certified control number, bar code, and name and address of the taxpayer appear.

9. The “Total Pieces and Amounts” is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps “Mailroom: Return Listing To: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT.”

10. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this particular case, “5-15-15” is written in the upper right corner of pages one through four of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of May 15, 2015.

11. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division’s Mail Processing Center. The Division’s Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters, and conciliation orders to USPS.

12. Mr. Farrelly attested to the truth and accuracy of the four-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on May 15, 2015. This particular CMR lists 40 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number as well as the names and addresses of the addressees. There are no deletions from this list.

13. Information regarding the Conciliation Order relevant to this case is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0459 8431 is reference or CMS number 000264580, along with petitioner’s name and a Flushing, New York, address that is identical to petitioner’s address contained on her Request for

Conciliation Conference. Additionally, a copy of the Conciliation Order was issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002 9730 0459 8448 is reference or CMS number 000264580, along with the name of petitioner's representative and an East Elmhurst, New York, address, both of which are identical to the name and address of petitioner's representative listed on petitioner's Request for Conciliation Conference.

14. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by Mr. Peltier's staff in the ordinary course of business of delivering outgoing mail to branch offices of USPS. Further, after a conciliation order is placed in the specifically designated, "Outgoing Certified Mail," basket in the Mail Processing Center, a staff member weighs, seals, and places postage and fee amounts on each envelope. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a staff member delivers the stamped envelopes to a branch of USPS in Albany, New York. A postal employee then affixes a postmark and either his or her initials or signature to the CMR, thereby indicating receipt by USPS.

15. In this case, the postal employee affixed a postmark dated May 15, 2015 to, and also wrote his or her initials on, pages one through four of the CMR. The postal employee also wrote the number "40" corresponding to the heading "Total Pieces and Amounts" and the preprinted number 40, contained on the fourth and last page of the CMR. The postal employee rewrites the "Total Pieces and Amounts" number at the Division's specific request, and this is intended to indicate that all of the 40 pieces of mail listed on the CMR were received at USPS.

16. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the relevant branch of USPS by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, which, in this case, is BCMS. Additionally, the CMR is maintained by BCMS in the regular course of business.

17. Based upon his review of Mr. Farrelly's affidavit, the exhibits attached thereto, and the CMR, Mr. Peltier avers that on May 15, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at her Flushing, New York, address and an item of certified mail addressed to petitioner's representative at his East Elmhurst, New York, address to a branch of USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. He also states that a member of his staff obtained a copy of the CMR delivered to and accepted by USPS on May 15, 2015 for the records of BCMS. Mr. Peltier lastly asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner and her representative on May 15, 2015.

18. In this case and according to Mr. Farrelly's affidavit, a clerk noted on the CMR, next to petitioner's name, "Order Ret./unclaim. Addr. ok/add zip exten.remailed (reg.): 8/5/15." This means that petitioner never claimed the certified mailing. As a result, BCMS mailed petitioner the Conciliation Order by regular mail on August 5, 2015, as it is the policy of BCMS to remail by regular mail any conciliation orders returned by USPS. A similar note was found next to

petitioner's representative's name on the CMR as well, only the Conciliation Order was mailed to him by regular mail on June 17, 2015. No explanation for this was offered by petitioner, as she did not respond at all to the Notice of Intent to Dismiss Petition.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). This deadline is strictly enforced and protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Accordingly, a conciliation order is binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Thus, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

B. Where, as here, the timeliness of a Request for Conciliation Conference is at issue, the initial inquiry is whether or not the Division has carried its burden of demonstrating the fact and date of mailing of the conciliation order to the petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by either direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal,

August 12, 1993).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

D. In this case, the CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establishes the Division's standard mailing procedure. Additionally, the CMR has been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus established that the Conciliation Order at issue was mailed as addressed to petitioner and her representative on May 15, 2015.

E. The address to which the conciliation order was mailed is the address designated by petitioner on her Request for Conciliation Conference. This same address appears on the petition filed by petitioner in this matter. At no time did petitioner provide notice of any new or alternative address. The order was thus properly addressed and petitioner does not dispute that the conciliation order was mailed to the proper address.

F. Even though petitioner asserted that the reason for her late-filed petition was that she received the conciliation order on August 9, 2015, the Division has established proper mailing of the Conciliation Order at issue. The Division has no control over whether petitioner claims her mail or not. In fact, when an order is found to have been properly mailed to the taxpayer's last

known address, the petitioner then bears the burden of demonstrating that the petition was timely filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

G. The 90-day period for the filing of a petition in this matter commenced as of the date of mailing of the conciliation order, May 15, 2015. The petition in this matter, having been filed on October 19, 2015, or 157 days after the issuance of the order, was therefore untimely. As such, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

H. The petition of Eileen Vanderborg is hereby dismissed.

DATED: Albany, New York

June 2, 2016

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE