

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ALBANIA ESPADA</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 827322
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2012 and 2013.	:	

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Petitioner, Albania Espada, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2012 and 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion dated June 23, 2016, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i), and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, responded to the Division's motion on July 18, 2016. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, 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 November 3, 2015, petitioner, Albania Espada, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Conciliation Order (CMS number 264741), issued by the Bureau of Conciliation and Mediation Services (BCMS) on June 5, 2015.

2. On June 23, 2016, the Division of Taxation (Division) brought a motion seeking an order dismissing the petition or, in the alternative, summary determination on the basis that the petition was not filed within 90 days of the issuance of the conciliation order. To show proof of proper mailing of the conciliation order dated June 5, 2015, the Division submitted, among other documents, (i) the affidavit of Michele W. Milavec, Esq., an attorney employed in the Office of Counsel of the Division, dated June 22, 2016; (ii) the affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated June 6, 2016; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked June 5, 2015; (iv) a copy of the conciliation order, cover letter and cover sheet, dated June 5, 2015, and copy of the three-windowed mailing envelope; (v) an affidavit, dated June 6, 2016, of Bruce Peltier, Stores and Mail Operations Supervisor in the Division’s mail room; and (vi) petitioner’s Request for Conciliation Conference, dated January 15, 2015, showing petitioner’s address as 255 Pennsylvania Avenue, Apartment 6B, Brooklyn, New York. The address as listed for petitioner on the request for conciliation conference is the same address indicated on the conciliation order cover letter and cover sheet for petitioner and was petitioner’s last known address on the date of the issuance of the conciliation order.

3. The affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS’s receipt of a postmarked copy of the CMR.

4. 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.

5. 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). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

6. 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.

7. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers and taxpayers' representatives with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

8. 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.”

9. 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 case “6-5-15” is written in the upper right corner of each page of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of June 5, 2015.

10. The CMR, along with the envelopes containing 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 the USPS.

11. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on June 5, 2015. This CMR lists 55 certified control numbers. Each such certified control number is assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number is a reference/CMS number, and the name and address of the addressees. There are no deletions from the list.

12. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0478 9990 is reference/CMS number 000264741, along with petitioner’s name and the 255 Pennsylvania Avenue, Apartment 6B, Brooklyn, New York, address that is identical to the address on petitioner’s request for conciliation conference.

13. The cover sheet bearing petitioner's name and the Brooklyn, New York, address that is identical to the address on petitioner's request for conciliation conference and on the CMR shows the same certified control number, 7104 1002 9730 0478 9990, as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

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

15. In this particular instance, the postal employee affixed a postmark dated June 5, 2015 to, and also wrote his or her signature or initials on, each page of the six-page CMR. The postal employee also circled the preprinted number "55" corresponding to the heading "Total Pieces and Amounts." The circling of the Total Pieces and Amounts number was done at the Division's specific request and is intended to indicate that all 55 pieces of mail listed in the CMR were received at the post office.

16. Mr. Peltier's affidavit states that 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 Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

17. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on June 5, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at 255 Pennsylvania Avenue, Apartment 6B, Brooklyn, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on June 5, 2015 for the records of BCMS. Mr. Peltier 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 piece of certified mail to petitioner on June 5, 2015.

#### ***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 (*see e.g. 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.

B. The Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b) on the basis that petitioner failed to file a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order Dismissing Request. Where the timeliness of a taxpayer's protest against a conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993; *Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

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 (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establish the Division's standard mailing procedure. Additionally, the CMR, together with copies of the conciliation order, conciliation order cover sheet and cover letter, and the affidavits of Mr. Farrelly and Mr. Peltier show that the Division's standard mailing procedure was followed in this instance. 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 mail cover sheet bears petitioner's name and a Brooklyn, New York, address that is identical to the address on petitioner's request for conciliation conference and on the CMR and shows the same certified control number as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order. The Division has sufficiently established that the address indicated for petitioner, as it appears on the mail cover sheet, was the address appearing through the windowed envelope and was the address to which the order was mailed on June 5, 2015. The Division has thus established that the conciliation order at issue was mailed as addressed to petitioner on June 5, 2015.

E. The address to which the conciliation order was mailed is the address designated by petitioner on the request for conciliation conference. At no time did petitioner provide BCMS with notice of any new or alternative address. The order was thus properly addressed.

F. The 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing of the conciliation order, June 5, 2015. The petition in this matter, having been filed on November 3, 2015, was beyond the 90-day limitations period and was therefore untimely.

G. As it has been determined that petitioner's petition protesting the conciliation order was filed beyond the applicable statute of limitations, the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition.

H. The petition of Albania Espada is dismissed.

DATED: Albany, New York  
October 13, 2016

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE