

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ISAAC M. BILLER : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NO. 827542
and Use Taxes under Articles 28 and 29 of the Tax Law for :
the Periods Ended February 28, 2013, November 30, 2013, :
February 28, 2014 and August 31, 2014. :
:

Petitioner, Isaac M. Biller, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended February 28, 2013, November 30, 2013, February 28, 2014 and August 31, 2014.

On May 4, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On July 15, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on July 21, 2016. After due consideration of the documents submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Isaac M. Biller, responded to some eight notices issued by the Division of Taxation (Division) by electronically filing requests for conciliation conferences with the Division's Bureau of Conciliation and Mediation Services (BCMS). The notices, identified below by their assessment ID numbers, and the filing (transaction) dates and times of petitioner's requests for BCMS conferences, are as follows:

Assessment ID: L-042393740-2	01/30/15 @ 12:36 PM
Assessment ID: L-042393741-1	01/28/15 @ 12:43 PM
Assessment ID: L-042393742-9	01/28/15 @ 12:45 PM
Assessment ID: L-042393743-8	01/28/15 @ 12:41 PM
Assessment ID: L-042393744-7	01/30/15 @ 12:34 PM
Assessment ID: L-042393745-6	01/28/15 @ 12:20 PM
Assessment ID: L-042393746-5	01/30/15 @ 12:32 PM
Assessment ID: L-042393747-4	01/28/15 @ 12:26 PM

On each of the foregoing electronic responses, petitioner affirmatively specified that he would like to file a request for a conciliation conference with BCMS (as opposed to filing a petition with the Division of Tax Appeals), that the address listed on the bill (assessment) he received is correct, that he would not be represented regarding his protest, and that the conference location would be in Brooklyn, New York.

2. In response to the foregoing, a BCMS conciliation conference was held in Brooklyn, New York, on April 21, 2015. Thereafter, BCMS issued a conciliation order to petitioner, dated July 17, 2015, denying his requests and sustaining the notices identified above. The conciliation

order bears CMS case number 264852. The cover letter accompanying the conciliation order lists petitioner's address as 1279 52nd St., Brooklyn, New York 11219-3876.

3. Petitioner filed a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner on March 7, 2016, the envelope in which the petition was mailed by United States Postal Service (USPS) first class mail bears a USPS postmark dated March 8, 2016, and the petition and envelope are date stamped as received by the Division of Tax Appeals on March 10, 2016. Petitioner lists the same address on the petition as that set forth above on the cover letter accompanying the conciliation order.

4. The petition specifically identifies (at item five thereof) the first four of the above-listed eight assessment identification numbers as the assessments at issue, and states the amount of tax contested as \$1,256,673.85. In addition to briefly stating the substantive basis upon which the petition was filed, petitioner further states (at item six thereof) "I don't have a copy of the original assessment." The petition indicates (at item seven thereof) that a BCMS conciliation conference was requested, followed by the handwritten note "I don't know what happened. It was never resolved."

5. Attached to the petition was a Consolidated Statement of Tax Liabilities, dated March 2, 2016 and addressed to petitioner at the above-noted Brooklyn address, setting forth a list of unpaid bills. This statement lists the same four assessment ID numbers as are specified in the petition, as well as the tax type, tax periods, and amounts of tax assessed, as follows:

Tax Type	Assessment ID	Tax Period Ended	Tax Amount Assessed ¹
Sales	L-042393743-8	2/28/13	\$252,004.39
Sales	L-042393742-9	11/30/13	\$414,722.00
Sales	L-042393741-1	2/28/14	\$93,688.82
Sales	L-042393740-2	8/31/14	\$331,136.58

The statement sets forth the total amount due (tax, penalties and interest) as \$1,256,673.85, i.e., the same amount as is set forth in the petition.

6. On May 4, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of a conciliation order, CMS number 264852, issued to petitioner on July 17, 2015, and that the petition was filed on March 8, 2016, or some 235 days later, and was therefore untimely. As a result, according to the Notice of Intent to Dismiss Petition, the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition.

7. In order to prove mailing of the conciliation order for CMS number 264852 to petitioner on July 17, 2015, the Division provided the following documents: (i) an affidavit, dated June 14, 2016, of Robert Farrelly, the Supervisor of Tax Conferences of BCMS; (ii) a four-page "Certified Record for Presort Mail - BCMS Cert Letter" (CMR), each page of which is legibly postmarked July 17, 2015; (iii) an affidavit, dated June 16, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) a copy of the July 17, 2015 conciliation order for CMS number 264852 with cover letter and the associated mailing cover

¹ The "Tax Amount Assessed" reflects tax only, and is exclusive of penalty and interest amounts set forth on the Consolidated statement of tax liabilities.

sheet, and (v) a copy of petitioner's New York State Resident Personal Income Tax Return for the year 2014.

8. Mr. Farrelly's affidavit sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the U.S. Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

9. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

10. The name, mailing address, order date and BCMS number for each conciliation order to be issued is electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). 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, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

11. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

12. The clerk's regular duties include associating each cover sheet, conciliation order and cover letter. The clerk verifies the names and addresses of taxpayers 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 through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

13. It is the general office practice that the BCMS clerk stamps "Mailroom: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the lower left area of the last page of the CMR. The clerk also stamps "Hand write total # of pieces and initial. **Do Not** stamp over written areas" on the lower right area of the last page of the CMR.

14. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "7-17-15" is written in the upper right corner of each page of the CMR.

15. 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.

16. Mr. Farrelly attests to the truth and accuracy of the copy of the four-page CMR, which contains a list of the 39 conciliation orders issued by the Division on July 17, 2015. The CMR also lists 39 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 number, the name and address of the addressee.

17. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Corresponding to certified control number 7104 1002 9730 0508 5503 is reference number 000264852, along with the name and last known address of petitioner. Mr.

Farrelly's affidavit states that the BCMS clerk noted on page two of the CMR next to Isaac Biller's name, "Order ret./unclaim. Addr. Ok. Remailed (reg.): 8/31/15." On August 31, 2015, BCMS mailed a copy of the Conciliation Order to Isaac Biller by regular mail. Mr. Farrelly avers that it is BCMS policy to re-mail by regular mail any orders returned by the Post Office.

18. Mr. Peltier's 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. He states that 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 affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified mail 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.

19. Here, the postal employee affixed a postmark date of July 17, 2015 to each page of the four-page CMR. The postal employee also wrote his or her initials and circled the pre-printed number "39" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page four of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR, indicating that 39 pieces of mail were actually received.

20. Mr. Peltier 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.

21. Based upon his review of Mr. Farrelly's affidavit and the exhibits attached thereto, including the CMR and cover sheet, Mr. Peltier states that on July 17, 2015, an employee of the Mail Processing Center delivered a piece of certified mail addressed to: Isaac Biller, 1279 52nd St., Brooklyn, NY, 11219-3876, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Peltier states that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on July 17, 2015 for the records of BCMS. He asserts that the procedures described in his affidavit were 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 July 17, 2015.

22. Petitioner filed Form IT-201 (New York State Resident Income Tax Return) for the year 2014. This was the last return filed by petitioner with the Division prior to April 1, 2014. On it, petitioner listed his address as "1279 52nd Street, Brooklyn, New York, 11219," which is consistent with petitioner's address as appearing on the list of unpaid bills (Statement of Consolidated Tax Liabilities), the petition, and acknowledged as his correct address on his requests for conciliation conferences.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tribunal held that the standard to employ for reviewing a Notice of Intent To Dismiss Petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

C. Tax Law § 170(3-a)(e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Victory Bagel Time, Inc.*).

D. 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). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170[3-a]; 20 NYCRR 4000.1[c]). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its proper mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*; *Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, 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 bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. 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). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. 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*). 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 July 17, 2015, 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 copy 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 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 July 17, 2015. There are 39 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "39," that the post

office received 39 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on July 17, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. In this case, the order was properly mailed when it was delivered into the custody of the USPS on July 17, 2015, properly addressed and with the requisite amount of postage affixed, and it is this date which commenced the 90-day period within which protests had to have been filed. In fact, the cover letter that accompanied the conciliation order here apprised petitioner of the 90-day time frame for filing a petition following issuance of the conciliation order. Where a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order by the taxpayer. Specifically, that section provides that a conciliation order affirming a written notice described in section 170 (3-a) is binding unless a petition is filed “within ninety days after the conciliation order is issued.” As noted previously, issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*). Hence, notwithstanding that the conciliation order issued to petitioner was returned to the Division as unclaimed (*see Finding of Fact 17*), the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, i.e., on July 17, 2015 (*Matter of Dean*). Petitioner’s nonreceipt of such order does not act to toll the statute (*Matter of Dean*), nor does BCMS’s practice of re-mailing unclaimed orders via regular mail act to restart the 90-day period within which to petition a properly issued order.

H. In sum, the Division has established that conciliation order CMS number 264852, relating to assessment ID numbers L-042393740-2, L-042393741-1, L-042393742-9 and L-042393743-8, was properly mailed as addressed to petitioner at his last known address on July 17, 2015. As noted, petitioner did not respond to the Notice of Intent to Dismiss Petition in any

manner, including specifically submitting any challenge or evidence to counter the Division's proof of mailing of the conciliation order, as described above. Since the petition was filed on March 8, 2016, or more than 90 days after the July 17, 2015 date of issuance of the conciliation order, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Isaac M. Biller is hereby dismissed.

DATED: Albany, New York
October 20, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE