

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANATOLY LEDNYAK : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 829682
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2013 through February 29, 2016. :

Petitioner, Anatoly Lednyak, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2013 through February 29, 2016.

On December 11, 2019, 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 timely filed, and that the Division of Tax Appeals therefore lacked jurisdiction to hear the merits of the petition. The parties were given until February 25, 2020 to respond to said notice, which date commenced the 90-day period for issuance of this determination. On January 8, 2020 and on February 25, 2020, petitioner, appearing by DiVenti & Lee, CPAs, PC (George S. Lee, III, CPA), submitted documents in opposition to dismissal. On February 11, 2020, the Division of Taxation, appearing by Amanda Hiller, Esq. (Elizabeth J. Lyons, Esq., of counsel), submitted documents in support of dismissal. The due date for issuance of this determination was extended, as a result of the COVID-19 pandemic, until August 24, 2020 (*see* 20 NYCRR 3000.5). Based upon the notice of intent to dismiss, the documents submitted in response thereto, and all pleadings and documents submitted in

connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Anatoly Lednyak, filed a petition that is date-stamped as received by the Division of Tax Appeals on November 27, 2019. The petition, dated as having been signed on September 20, 2019, was filed by United States Postal Service (USPS) certified mail, and the envelope in which the petition was contained bears a USPS post mark dated November 21, 2019.

2. The petition indicates that it challenges a sales tax notice of determination bearing assessment number L-047411517, assessing tax in the amount of \$253,976.88, plus penalty and interest. The petition indicates, by a checked box at page three, section IX thereof, that petitioner had requested a conciliation conference with the Division of Taxation's (Division) Bureau of Conciliation and Mediation Services (BCMS).

3. A cover letter from petitioner's representative, dated September 20, 2019, accompanied the petition. That letter states the following:

“Per recent communications between this office and the [Division of Taxation's Bureau of Collections], this office was advised that Anatoly Lednyak. did not file a petition with the Division of Tax Appeals within 90 days of the Conciliation Order issued on August 17, 2018, resulting in the loss of protest rights and liens being placed on both Aled Technologies, Inc., as well as Anatoly Lednyak personally.

Please be advised that while a Conciliation Order was issued, it was attached to a cover letter to Anatoly Lednyak stating ‘please take notice of the enclosed Conciliation Default Order’ and that Mr. Lednyak failed to appear at the BCMS Conference.

After receipt of this communication by the Vendor, this office emailed [the auditor] assigned to Case ID: X665529877 (B-20-3824870), [and he] responded on November 15, 2018 as follows:

‘Hi George, I think this letter was sent out in error. The letter probably should have been the same as the one that was sent out for the actual business. Regardless, there will not be anyone trying to collect from Anatoly until after the appeals process is complete and a final determination is made. Thanks, [the auditor]’”

The letter goes on to assert that the combination of the default letter, BCMS order, and the auditor’s responding email “resulted in a scenario where the Taxpayer and this Power of Attorney expected an additional Conciliation Order which would never come,” and requests that protest rights for Aled Technologies, Inc., and Anatoly Lednyak be reinstated.

4. Attachments to the petition included a letter dated December 18, 2017, issued by the Division to “Anatoly Lednyak, Aled Technologies, Inc.,” indicating the foregoing amount of tax due (\$253,976.88), as well as a printed copy of the auditor’s above-referenced November 15, 2018 email in response to petitioner’s representative’s inquiry. In addition, the petition was accompanied by a consolidated statement of tax liabilities, dated August 5, 2019, addressed to Anatoly Lednyak, referencing assessment number L-047411517 for the period ended February 29, 2016, showing tax due in the amount of \$253,976.00, plus penalty and interest (less payments/credits), and indicating that, without payment, the same was subject to the accrual of additional penalty and/or interest.

5. Also attached to the petition was a BCMS conciliation order (order), dated August 17, 2018, and bearing CMS No. 000301722. The order is captioned as pertaining to petitioner, Anatoly Lednyak, covers sales and use taxes for the period spanning March 1, 2013 through February 29, 2016, and references assessment number L-047411517. The order states that a BCMS conference was held on June 7, 2018, that the captioned individual (Anatoly Lednyak)

did not appear personally or by representative at the conference, and that “[b]ased upon the determination reached in the associated matter of Aled Technologies, Inc., it is ordered that the statutory notice(s) issued by the Department of Taxation be sustained and the matter be dismissed.”

6, The foregoing order included a cover letter, dated August 17, 2018 and addressed to Anatoly Lednyak. The cover letter references the above-described order, and provides as follows:

“If you have a reasonable excuse for failing to appear at the conference you may request to have this order vacated. You must file a written request with the conciliation conferee to vacate the order within 30 days from the date of the order.

Alternatively, you may file a petition with the Division of Tax Appeals within 90 days from the date of this order. To obtain [petition forms, Rules of Practice and Procedure] visit [Division of Tax Appeals Website]. You may also contact: [Division of Tax Appeals address and telephone number].

The enclosed order will be final if you do not file a petition within the time required.”

7. On October 21, 2019, the Division of Tax Appeals received a letter from petitioner’s representative. The letter is dated September 20, 2019, indicates that it is in reference to both petitioner, Anatoly Lednyak, and to Aled Technologies, Inc., and requests reinstatement of protest rights for each. The letter includes a copy of an August 27, 2019 request for reinstatement of protest rights for petitioner and for Aled Technologies, Inc., and the letter dated September 20, 2019 requesting reinstatement of protest rights for Anatoly Lednyak. The latter (September 20, 2019) correspondence is essentially a copy of the earlier (August 27, 2019) correspondence.

8. By a letter dated October 24, 2019, the Division of Tax Appeals responded to the foregoing correspondence, as follows:

“Currently, there is one petition filed with DTA for Aled Technologies, Inc., DTA # 829538. Should you wish to file a petition for Anatoly Lednyak, you must complete a separate petition, form TA-100, a copy of which is enclosed. A copy of the conciliation order issued to Mr. Lednyak and a fully executed power of attorney in Mr. Lednyak’s name must be included with any petition forms you submit on his behalf.

Additionally, you did not submit a power of attorney with the petition for Aled Technologies, Inc. As you are the signatory on the petition, this matter cannot go forward without a fully executed power of attorney, form TA-105, in the name of Aled Technologies, Inc., a copy of which is enclosed herewith.”

9. In response to the foregoing October 24, 2019 correspondence, the Division of Tax Appeals received what appears to be a corrected petition for Aled Technologies, Inc., and the petition, referenced above at finding of fact 1, for Anatoly Lednyak. This submission, dated November 21, 2019, was made by USPS certified mail, is date-stamped as having been received by the Division of Tax Appeals on November 27, 2019, and follows a November 19, 2019 submission of the same documents to the Division of Tax Appeals by facsimile. As is relevant for this submission:

a) Pages one and three of the petition for Aled Technologies, Inc., are identical to the petition as described initially above (see finding of fact 2), but page two differs in that it identifies the tax assessment number as L-047388893 as opposed to L-047411517. In addition, the attached conciliation order thereto, dated August 17, 2018, bears CMS No. 000-301213, as opposed to CMS No. 000301722. The order is captioned as pertaining to Aled Technologies, Inc., as opposed to Anatoly Lednyak, covers sales and use taxes for the period spanning March 1, 20113 through February 29, 2016, but (like page two of the petition) references assessment number L-047388893, as opposed to assessment number L-047411517. The order states that a BCMS conference was held on June 7, 2018, that the captioned requester, Aled Technologies, Inc., was represented by George S. Lee, and that “[a]fter giving due consideration to the evidence presented, the request is denied and the statutory notice(s) is sustained,” as opposed to the statement in the initially attached order pertaining to Anatoly Lednyak indicating that Mr. Lednyak did not appear personally or by representative at the conference (*see* finding of fact 5).

b) Page two of the petition for Anatoly Lednyak is identical to the petition as described initially above (*see* finding of fact 2). However page one differs in that

the captioned petitioner is identified as Anatoly Lednyak, and page three differs in that it is dated as signed on September 20, 2019. In addition, this petition includes an attached consolidated statement of tax liabilities, dated August 5, 2019, issued to Anatoly Lednyak, referencing the foregoing assessment (L-047411517), and indicating that the same was subject to collection action and the accrual of additional penalty and interest.¹

10. The cover letter accompanying the conciliation order pertaining to Anatoly Lednyak (CMS No, 000-301722) sets forth the language quoted above at finding of fact 6.

11. On December 11, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition (notice of intent) with respect to the aforementioned petition. The notice of intent states, in sum, that conciliation order number 000301722 sustaining assessment number L-0474411517 appears to have been issued by the Division to petitioner, Anatoly Lednyak, on August 17, 2018, that a petition challenging that order was received by the Division of Tax Appeals on September 3, 2019, and that the certified mail envelope in which the petition was filed bears a USPS postmark dated August 30, 2019. The notice of intent states that as the petition was filed in excess of 90-days after issuance of the conciliation order, the Division of Tax Appeals lack jurisdiction to address the merits of the matter and the petition is therefore subject to dismissal.² Written comments in

¹ Having received two separate petitions, as detailed hereinabove, the Division of Tax Appeals treated the petitions as involving separate (though obviously related) matters. Thus, the petition for Anatoly Lednyak was assigned DTA No. 829682, and is addressed herein, while the petition for Aled Technologies, Inc., was assigned DTA No. 829538, and is addressed in a separate determination. Each such determination is issued on the same date.

² While the conciliation order is in the name of petitioner, Anatoly Lednyak, the petition itself, as initially filed, is captioned in the name of Aled Technologies, Inc. The assessment referenced in the conciliation order appears to be an assessment issued against petitioner as a person responsible for the liabilities assessed against Aled Technologies, Inc. Consistent with the provisions of Tax Law § 1138 (a) (3) (B), this filing would be treated as a challenge to the conciliation order issued with respect to Anatoly Lednyak. As such, the threshold question presented nonetheless remains whether the petition challenging that order was timely filed such that the Division of Tax Appeals has jurisdiction to address the underlying merits of the case.

response to the notice of intent were to be filed within 30 days. In response to the Division's letter-request dated January 3, 2020, the response period was extended until February 24, 2020.

12. In response to the issuance of the notice of intent, and to show proof of proper mailing of the conciliation order, the Division provided the following: (i) an affidavit, dated February 10, 2020, of Elizabeth J. Lyons, Esq., an attorney employed in the Division's Office of Counsel; (ii) a copy of a request for a BCMS conference filed by Aled Technologies, Inc., dated as signed by Anatoly Lednyak on January 15, 2018 and stamped as received by BCMS on January 19, 2018; (iii) a copy of a BCMS letter, dated March 12, 2018, advising that the foregoing BCMS request filed for Aled Technologies, Inc., also constituted a protest for petitioner as a person responsible for the liabilities of Aled Technologies, Inc.; (iv) an affidavit, dated January 28, 2020, of Joseph DiGaudio, Assistant supervisor of Tax Conferences of BCMS; (v) a "Certified Record for Manual Mail – CMS-37 – BCMS Order" (CMR), postmarked August 17, 2018; (vi) a copy of the conciliation order issued to Anatoly Lednyak, together with a cover letter and cover sheet, dated August 17, 2018, as well as a copy of the three-windowed mailing envelope used to mail conciliation orders; and (vii) an affidavit, dated February 4, 2020, of Fred Ramundo, a supervisor in the Division's mail room – stores and mail operations supervisor.

13. The above-referenced March 12, 2018 BCMS letter issued to Mr. Lednyak provides:

"The Bureau of Conciliation and Mediation Services (BCMS) was informed that you received a department notice as a responsible person for Aled Technologies, Inc. Because this business entity has filed a formal protest with BCMS in response to its related notice, your notice is considered protested as well. You do not need to take any action at this time. However, you may submit additional information if you wish.

We will schedule a conciliation conference as soon as possible. We usually hold the conference for the business entity and individual at the same time. You will receive written notice of the date, time and location of the conference. If an attorney

or agent will appear on your behalf, you must submit a POA-1, Power of attorney. The POA-1 is available on our website.

For more information on the conciliation conference process visit our website shown below”

14. Joseph DiGaudio has been the BCMS Assistant Supervisor of Tax Conferences since November 2014. Prior thereto he served as a BCMS conciliation conferee since April 2010. As a result, Mr. DiGaudio is fully familiar with the operations and practices of BCMS, including specifically the procedures employed in the preparation and mailing of conciliation orders, and his affidavit details the same. These procedures culminate in the mailing of conciliation orders by the USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

15. Conciliation orders mailed within the United States are sent by certified mail, and the caption of each order bears the number assigned thereto by BCMS, referred to as the CMS NO. or the BCMS Number. 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 review, who in turn submits the conciliation order and covering letter to the conference supervisor for final approval. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

16. The name, mailing address, order date, and BCMS number for each conciliation order are 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, taxpayer’s name, mailing address, BCMS number, certified control number, and certified control number bar code. The AFP Unit also

generates a computer printout, here entitled “Certified Record for Manual Mail – CMS-37 – BCMS Order.” 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 number is recorded under the heading “reference no.” The AFP Unit prints the CMR, cover sheets and cover letters to a printer located in BCMS, and these documents, along with the conciliation orders are delivered to the BCMS clerk assigned to process conciliation orders.

17. The BCMS clerk, as part of her regular duties, associates each cover sheet, conciliation order and covering letter. The clerk verifies the taxpayer’s name and address 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 where the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear.

18. The “Total Pieces and Amounts” is indicated on the last page of the CMR. The clerk in BCMS stamps on the bottom left corner “Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT,” and also stamps on 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 the date that the conciliation orders were mailed, in this case “8-17-18.” The CMR, along with the envelopes containing the cover sheets, covering letters and conciliation orders are then picked up in BCMS by an employee of the Division’s Mail Processing Center, which is responsible to delivering the CMR along with the envelopes containing the cover sheets, covering letters and conciliation orders to the USPS.

19. The CMR in the present matter consists of three pages, and lists 13 certified control numbers along with corresponding assessment numbers, names and addresses on page one, 12 such numbers, names and addresses on page two, and 5 such numbers, names and addresses on page three, for a total of 30 pieces of certified mail. The copy of the CMR that is attached to Mr. DiGaudio's affidavit has been redacted to preserve the confidentiality of the names and information relating to other taxpayers listed thereon who are not involved in this proceeding.

20. Page two of the CMR reflects that a conciliation order was mailed to petitioner, Anatoly Lednyak, on August 17, 2018. Specifically, page two of the August 17, 2018 CMR indicates that certified control number 7104 1002 9735 4371 3241 was used for the conciliation order mailed to petitioner, Anatoly Lednyak at his Fulton Street, New York, New York, address. The covering letters and the corresponding mailing cover sheets attached to the DiGaudio affidavit bear the same certified control number, name and address. As of the asserted August 17, 2018 date of issuance of the conciliation order, petitioner had not executed a power of attorney appointing an authorized representative to appear or represent him personally and individually, as opposed to the power of attorney specifically appointing a representative for the corporate entity, Aled Technologies, Inc.

21. The affidavit of Fred Ramundo, who has been a supervisor in the Division's mail room since December of 2013, states that he is currently a stores and mail operations supervisor. He is also specifically designated as the unit employee responsible for assisting the Office of Counsel with mailing cases, including verification of mail room procedures relevant to the mailing of conciliation orders. Consequently, Mr. Ramundo is fully familiar with the practices of the mail room, and he attests herein to the general operations and procedures within the Division's mail room on that basis.

22. Conciliation orders are received in the mail room, and are placed in an “Outgoing Certified Mail” basket, from which a mail room staff member retrieves the same, weighs and seals each envelope, and affixes postage and fee amounts thereon. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR.

23. Thereafter, a member of the mail room staff delivers the stamped envelopes to a branch of the USPS in the Albany, New York area. In accordance with the standard practice requested by the Division’s mail room, a postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the USPS. The mail room staff member further requests that the USPS employee confirm the total number of pieces received, by either circling the total number of pieces received, or by writing the number on the CMR. According to Mr. Ramundo, the affixation of the USPS postmark on each page of the CMR, and the USPS employee’s circling “30” on the last page of the CMR, together with the employee’s initialing of that page, indicate that all of the 30 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on August 17, 2018. The CMR is returned, post-mailing, to BCMS, and is kept by BCMS as a permanent record in the regular course of its business. According to both the DiGuadio and Ramundo affidavits, a copy of the notice was mailed to petitioner on August 17, 2018, as claimed.

24. On January 8, 2020, petitioner responded to the subject motion, submitting copies of the foregoing described documents (including copies of the corrected separate petitions for Anatoly Lednyak and for Aled Technologies Inc.). This response was accompanied by a cover letter, stating that at the conclusion of the BCMS conference the only issue remaining in contest was statutory interest and penalties, and reiterating the claim alleging confusion between Aled

Technologies Inc's. representative and the auditor, as set forth in the correspondence quoted earlier (*see* finding of fact 3). On February 25, 2020, petitioner further responded by reiterating the same allegation as to confusion, and by asserting that the Division's proof of mailing is inadequate in that the Division has not produced a copy of a certified mail receipt with respect to the mailing of the conciliation order at issue, that is signed by petitioner's representative so as to confirm delivery and receipt of the same, and reiterating the claim alleging confusion between Aled Technologies Inc's. representative and the auditor, as set forth in the correspondence earlier (*see* finding of fact 3). On February 25, 2020, petitioner further responded by reiterating the same allegation as to confusion described above, and by asserting that the Division's proof of mailing is inadequate in that the Division has not produced a copy of a signed certified mail receipt with to the conciliation order at issue confirming delivery and receipt thereof by petitioner.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals 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 "shall 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 (Tax Law § 2000 [4]; *see Matter of Chimiak*, Tax Appeals Tribunal, September 19, 2019; *Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Victory Bagel Time, Inc.*).

D. Where the timeliness of a taxpayer’s petition following the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see 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 (*see 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 (*see 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 (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. The initial question presented is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the order to petitioner’s last known address (*see*

Matter of Katz, Tax Appeals Tribunal, November 14, 1991).³ To meet its burden, the Division must show proof of a standard procedure it uses for the issuance of statutory notices, including conciliation orders, by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in the particular instance in question (*see Matter of Katz; Matter of New York Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *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, affidavits, or documentary evidence of mailing (*see Matter of Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has met its burden of establishing proper mailing of the conciliation order. Specifically, BCMS was required to mail the order to petitioner at his last known address. As indicated by the CMR, and by the affidavits of Joseph DiGaudio and Fred Ramundo, 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, along with the cover sheet and covering letter, were actually mailed to petitioner by certified mail on August 17, 2018, the date appearing on the CMR. The affidavits describe the various stages of producing and mailing orders, and attest to the authenticity and accuracy of the copy of the order and the CMR submitted as evidence of

³ Since petitioner had not, as of the date of issuance of the conciliation order, executed a power of attorney appointing an authorized representative to appear on his behalf, the Division was not obligated to issue a copy of the conciliation order to anyone other than petitioner, Anatoly Lednyak (*see* findings of fact 13 and 20; *Matter of Shamim*, Tax Appeals Tribunal, January 11, 2018; *Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003).

actual mailing. These documents establish that the general mailing procedures described in the DiGaudio and Ramundo 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 August 17, 2018 on each of its three pages. There are 30 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "30," that the post office received 30 items for mailing. This properly completed CMR constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The order was mailed to the same address for petitioner as appears on the conciliation request, as well as on petitioner's form IT-201 resident income tax return for the year 2016, filed on October 13, 2017 and being the last return filed by petitioner prior to the issuance of the conciliation order, which satisfies the "last known address" requirement. In sum, the Division established that it mailed the order by certified mail on August 17, 2018 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 2005).

G. The conciliation order was properly mailed when it was delivered into the custody of the USPS on August 17, 2018, properly addressed to petitioner at his last known addresses, with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which a protest had to be filed. 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*).

H. For his part, petitioner does not deny receipt of the order, but rather claims that he was somehow misled by the language of the order that allegedly indicates this petitioner “did not appear personally or by representative at the conference,” and that “[b]ased upon the determination reached in the associated matter of Aled Technologies, Inc, it is ordered that the statutory notice(s) issued by the Department of Taxation be sustained and the matter be dismissed” (*see* finding of fact 5). The cover letter accompanying the conciliation order clearly advises petitioner that in order to contest the order, a petition must be filed with the Division of Tax Appeals within 90 days after issuance of the order (*see* findings of fact 6 and 10). This advice is entirely consistent with the language of Tax Law § 170 (3-a) (e), and the statutory time limit set forth therein. Even assuming some level of confusion on petitioner’s part, there is no authority to ignore the statutory time mandate imposed under the foregoing provision, so as to reinstate the protest rights of the petitioner. In short, if petitioner was dissatisfied with the outcome of the conciliation conference, he should have challenged the same by filing a petition within 90 days thereafter. Petitioner’s challenge simply does not fall within that time period. Further, and to the extent petitioner claims the Division’s proof is flawed for lack of a signed certified mail receipt proving delivery of the conciliation order, that assertion is rejected. The Division’s proof included a properly completed CMR, as described, establishing delivery of the conciliation order at issue into the custody of the USPS for mailing (*see* conclusion of law F). The Division’s CMR serves as its record of such delivery and, hence, mailing by certified mail.

As noted, where a conciliation order is, as here, properly mailed, and hence has been properly issued, actual receipt is not required (*see* conclusion of law G).

I. In sum, the Division has established that the conciliation order, with the accompanying cover sheet and covering letter, was properly mailed as addressed to petitioner, and to its representative, on August 17, 2018. Having established that the order was properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition in this case was not filed until August 30, 2019, a date that falls more than 90 days after the issuance of the conciliation order. Accordingly, the petition is untimely, and the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

J. The petition of Anatoly Lednyak is hereby dismissed.

DATED: Albany, New York
August 20, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE