

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ELMO A. BERKEL</b>	:	<b>DETERMINATION</b> <b>DTA NO. 831237</b>
for Review of a Notice of Proposed Driver	:	
License Suspension Referral under Article 8 of	:	
the Tax Law for the Year 2019.	:	

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Petitioner, Elmo A. Berkel, filed a petition for review of a notice of proposed driver license suspension referral under article 8 of the Tax Law for the year 2019.

On June 23, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Nelson Colberg), submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by September 7, 2023, which date began the 90-day period for the issuance of this determination. After due consideration of the documents submitted, Alexander Chu-Fong, Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

1. The Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS No. 000315905 (conciliation order), dated

June 10, 2022, to petitioner at his address in Brooklyn, New York. The conciliation order sustained the notice of proposed driver license suspension referral for the tax year 2019.

2. On September 14, 2022, petitioner, Elmo A. Berkel, filed a petition with the Division of Tax Appeals in protest of a conciliation order.

3. On June 23, 2023, the supervising administrative law judge issued a notice of intent to dismiss petition to petitioner. The notice of intent to dismiss petition stated that the petition appeared to be untimely filed as it was filed more than 90 days after the issuance of the conciliation order.

4. In response to the issuance of the notice of intent to dismiss petition, and to show proof of proper mailing of the conciliation order, dated June 10, 2022, the Division submitted, among other documents: (i) an affidavit, dated August 3, 2023, of Nelson Colberg, an employee in the Division's Office of Counsel; (ii) an affidavit, dated July 24, 2023, of Joseph DiGaudio, Assistant Director of BCMS; (iii) a "Certified Record for Manual Mail - CMS – 37 – BCMS Order" (CMR) postmarked June 10, 2022; (iv) a copy of the request for a conciliation conference, dated October 31, 2019, wherein petitioner listed his Brooklyn, New York, address; (v) a copy of the conciliation order, cover letter and cover sheet, dated June 10, 2022; and (vi) an affidavit, dated June 25, 2023, of Susan Ramundo, manager of the Division's mail room.

5. The affidavit of Joseph DiGaudio sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of the conciliation orders by United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

6. 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.

7. 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 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.

8. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Manual Mail." The CMR is a listing of taxpayers 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 (000). 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.

9. The clerk's regular duties include associating each cover sheet, cover letter, and conciliation order. 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.

10. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the CMR.

11. 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, “6-10-22” was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, are picked up from BCMS by an employee of the Division’s mail processing center.

13. Mr. DiGaudio attests to the truth and accuracy of the copy of the six-page CMR, which contains a list of the conciliation orders issued by the Division on June 10, 2022. 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 or CMS number and the name and address of the addressee.

14. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 1831 1205 is reference number 000315905, along with the name and last known address of petitioner. Specifically, the Brooklyn, New York, address listed on the CMR is the same address listed on the request for conciliation conference.

15. The affidavit of Susan Ramundo, a manager in the Division’s mail room since 2017 and currently an associate administrative analyst, whose duties include the management of the mail processing center staff, attested to the regular procedures followed by her staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. She stated 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 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 the Albany, New York, area. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

16. In this particular instance, the postal employee affixed a postmark, dated June 10, 2022, to each page of the six-page CMR. The postal employee wrote the number “67” and initialed page six to indicate the total pieces of mail received at the post office.

17. Ms. Ramundo stated 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 Ms. Ramundo’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.

18. Based upon her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto and the CMR, Ms. Ramundo avers that on June 10, 2022, an employee of the mail processing center delivered an item of certified mail addressed to petitioner at his Brooklyn, New York, address to a branch of the USPS in the Albany, New York, area in a sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to, and accepted by, the post office on June 10, 2022, for the records of BCMS. Ms. Ramundo asserts that the procedures described in her 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 10, 2022.

19. Petitioner did not submit a response to the notice of intent to dismiss petition.

### ***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 (*see 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 (*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 (*see* Tax Law § 170 [3-a]). 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 evidence required of the Division, in order to establish proper mailing, is twofold: 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 the particular instance in question (*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. Petitioner did not respond to the notice of intent to dismiss petition and, thus, has offered no evidence to contest the facts asserted in the Division's documents supporting dismissal. Accordingly, those facts are deemed admitted (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]).

G. In this case, the Division has met its burden of establishing proper mailing of the conciliation order with the accompanying cover sheet and cover letter. Specifically, BCMS was required to mail the conciliation order to petitioner's last known address. As indicated by the CMR, and by the affidavits of Joseph DiGaudio and Susan 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 at issue, along with the cover sheet, and cover letter was actually mailed to petitioner by certified mail on June 10, 2022, 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 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 conciliation order, appear on the CMR, which bears a USPS postmark of June 10, 2022. There are 67 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "67," that the post office received 67 items for mailing. In short, the Division established that it mailed the conciliation order by certified mail on June 10, 2022 (*see Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995).

H. In this case, the conciliation order was properly mailed when it was delivered into the custody of the USPS on June 10, 2022, properly addressed to petitioner at his last known address, and with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which to file a petition. Hence, the 90-day limitations period for filing a petition in this matter commenced as of the date of mailing, i.e., on June 10, 2022. However, the petition was not filed until September 14, 2022, a date that falls beyond 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).



I. The petition of Elmo A. Berkel is dismissed.

DATED: Albany, New York  
November 30, 2023

/s/ Alexander Chu-Fong  
ADMINISTRATIVE LAW JUDGE