

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DAVID R. LAWENDA AND KEVIN A. MENARD : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 831290
New York State and New York City Personal Income :
Taxes under Article 22 of the Tax Law and the :
Administrative Code of the City of New York for the :
Years 2013 through 2015. :

Petitioners, David R. Lawenda and Kevin A. Menard, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2013 through 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), brought a motion on August 20, 2024, seeking dismissal of the petition or, in the alternative, summary determination pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by SAX LLP (Richard Goldstein, Esq., of counsel), filed a response by September 19, 2024, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Osborne K. Jack, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely 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. 000334575, dated January 20, 2023, to petitioners, David R. Lawenda and Kevin A. Menard, at an address in Water Mill, New York. The conciliation order sustained a September 21, 2021, notice of deficiency issued to petitioners for the tax years 2013, 2014 and 2015.

2. Petitioners' representative at the time, David Weiss, filed a petition, on behalf of petitioners, with the Division of Tax Appeals in protest of the conciliation order. The petition was received by the Division of Tax Appeals on May 8, 2023. The envelope in which the petition was mailed bears a machine-metered (NEOPOST) stamp, dated April 17, 2023. The date on the petition next to Mr. Weiss' signature is "4/07/23." There is no United States Postal Service (USPS) postmark on the envelope.

3. To show proof of proper mailing of the conciliation order, the Division provided the following documents: (i) an affirmation of Colleen M. McMahon, Esq., an attorney in the Office of Counsel of the Division, dated August 20, 2024; (ii) an affidavit, sworn to on August 2, 2024, of Joseph DiGaudio, Assistant Director of BCMS; (iii) a "CERTIFIED RECORD FOR MANUAL MAIL - CMS - 37 - BCMS Order" (CMR), postmarked January 20, 2023; (iv) a copy of an email sent by Mr. Weiss to the Division on December 2, 2022, advising the Division that his address had changed to 1040 Avenue of the Americas, 16th Floor, New York, New York 10018, the address to which BCMS mailed the conciliation order; (v) the request for conciliation

conference, filed December 14, 2021, listing a Water Mill, New York, address for petitioners; (vi) copies of the conciliation orders, cover letters and cover sheets addressed to petitioners and petitioners' representative, dated January 20, 2023; (vii) an affidavit, sworn to on August 5, 2024, of Susan Ramundo, manager of the Division's mail room; and (viii) an affidavit, sworn to on August 15, 2024, of Beth Levy, a legal assistant in the Office of Counsel. The Water Mill, New York, address was petitioners' last known address at the time BCMS issued the conciliation order.

4. The affidavit of Joseph DiGaudio sets forth BCMS' general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in BCMS mailing the conciliation orders by USPS, via certified mail, and confirming such mailing through receipt by BCMS of a postmarked copy of the CMR.

5. 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. The conciliation conferee, in turn, submits the orders and cover letters to the conference supervisor for final approval.

6. 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, addressee'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 addressees 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." The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents, along with the conciliation orders and cover letters, are delivered to the BCMS clerk assigned to process conciliation orders.

8. The clerk's regular duties include associating each cover sheet, cover letter, and conciliation order. The clerk verifies the names and addresses of the addressees 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 addressee appear.

9. 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 "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the CMR.

10. 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, "1-20-23" was written in the upper right corner of each page of the CMR.

11. An employee of the Division's mail processing center picks up the CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, from BCMS.

12. Mr. DiGaudio attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the conciliation orders issued by BCMS on January 20, 2023. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number or CMS

number and the name and address of the addressee.

13. Information regarding the conciliation order issued to petitioners is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 3071 1069 is reference number 000334575, along with the names and last known address of petitioners. The Water Mill, New York, address listed on the CMR is the same address listed on the request for conciliation conference. Additionally, information regarding the conciliation order issued to petitioners' representative is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 3071 1076 is reference number 000334575, along with the name and last known address of Mr. Weiss. The 1040 Avenue of the Americas, 16th floor, New York, New York, address listed on the CMR is the same address that Mr. Weiss provided to the Division in his December 2, 2022, email updating his address.

14. Ms. 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.

15. Here, the postal employee affixed a postmark, dated January 20, 2023, to each page

of the five-page CMR. The postal employee wrote the number “60” and initialed page five to indicate the total pieces of mail received at the post office.

16. 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, a member of Ms. Ramundo's staff collects the CMR at the post office on the day after its initial delivery and delivers it to the originating office, in this case, BCMS. BCMS maintains the CMR in the regular course of business.

17. Based upon her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto and the CMR, Ms. Ramundo averred that, on January 20, 2023, an employee of the mail processing center delivered: (1) an item of certified mail addressed to petitioners at the Water Mill, New York, address; and (2) an item of certified mail addressed to Mr. Weiss at 1040 Avenue of the Americas, 16th floor, New York, New York, to a branch of the USPS in the Albany, New York, area in sealed postpaid envelopes for delivery by certified mail. She stated 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 January 20, 2023, for the records of BCMS. Ms. Ramundo asserted 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 pieces of certified mail to petitioners and Mr. Weiss on January 20, 2023.

18. Petitioners filed a response to the subject motion on September 13, 2024. The response included: (i) an affidavit of David Weiss, CPA, sworn to on September 6, 2024; (ii) an affidavit of Kevin Menard, sworn to on September 12, 2024; (iii) an affidavit of David Lawenda, sworn to on September 12, 2024; and (iv) an affirmation, dated September 13, 2024, of Richard

Goldstein, Esq., petitioners' representative before the Division of Tax Appeals in this matter.

19. Mr. Weiss stated that “[i]n the regular course of business whenever documents need to be mailed, we deposit the envelopes with the documents with the United State [sic] Post Office on the same day the NEOPOST machine metered the envelope.” He asserted that “[t]he NEOPOST machine metered the envelope containing the petition for the above captioned matter on April 17, 2023, and the envelope was deposited with the United States Post Office on the same day.” He added that “[t]he envelope was deposited in the mail before the last collection of the mail on April 17, 2023.”

20. In his affidavit, Mr. Menard discussed his qualifications as an acupuncturist and stated that his office had always been located in Sag Harbor, New York, and never in New York City. Mr. Menard attached a copy of the lease agreement for an office location in Sag Harbor, copies of his acupuncturist certificates, as well as examples of the some of the services he provided.

21. In his affidavit, Mr. Lawenda stated that he worked for Univision from September 1, 2007, until September 1, 2012, and was hired by Facebook on October 1, 2013. He asserted that while working for Facebook, he worked from home unless he needed to travel for work. He stated that they moved to a home on Cooks Lane, Water Mill, New York, on May 5, 2000, and that this was their primary residence “no later than September 1, 2012, when [he] separated from Univision.”

22. Mr. Lawenda stated that, in 2011, they moved the contents from their apartment located in New York, New York, to the Cooks Lane address and that the New York City apartment was uninhabitable during a gut renovation, which began on January 25, 2012, and was completed on March 17, 2014. He stated that “[a]fter Hurricane Sandy, in 2012, we spent little

time in New York City.” He also stated that they moved to the Water Mill address to which the conciliation was mailed, in 2018 when construction was completed on the residence.¹

23. Mr. Goldstein filed petitioners’ Reply in Opposition to the Division’s motion. Attached to the response is a power of attorney form signed by petitioners and Mr. Goldstein on May 21, 2024, granting the latter permission to represent petitioners before the Division of Tax Appeals. Regarding the mailing of the petition in this matter, Mr. Goldstein stated that “[h]ere the document was deposited in the mail on April 17, 2023, before the document’s final deadline. (See Exhibit 1 Affidavit David Weiss).” He added that “[t]he alleged delay in receipt of the petition was beyond the control of the petitioner.” Mr. Goldstein explained that “[d]uring April and May 2023 there were disruptions of service at the United States Postal Service (‘USPS’) related to USPS understaffing, low worker moral and protests by USPS employees across the country. (See Exhibit II Screenshots Articles).” He concluded that “Res Ipsa Loquitur; the alleged delay in receipt of the petition was caused by disruptions of service at the USPS and the department’s Motion to Dismiss should be denied.” In paragraph 1 of his affirmation, Mr. Goldstein stated that his knowledge of the facts involved in this matter is based on communications with his clients and his review of the documents provided by his clients.

24. The first article attached to Mr. Goldstein’s affirmation is a blog, dated April 30, 2023, titled “USPS Employees Protest Across the Nation.” In relevant part, the blog stated the following:

“4/30/23 - On Workers Memorial Day, April 28th, postal employees across the nation began protesting. Their demand? They state they are protesting for dignity, respect, and adequate staffing to get the job done. It is our belief that the APWU, American Postal Workers Union, officers/members sought volunteers in major cities to take part in this protest. Media coverage in major cities regarding

¹ The Lawenda affidavit confirmed that the Water Mill address was petitioners’ address at the time the conciliation order was mailed. The remainder of the Lawenda and Menard affidavits addressed the merits of their underlying claim and had no bearing on the timeliness issue.

the protests started soon after. Some media state that the protest is a strike – well, USPS employees cannot strike.”

25. The second article, “More USPS Employees are Quitting and Workers are Protesting Understaffing,” was published on May 3, 2023. In relevant part that article stated:

“Postal employees across the country staged protests outside their facilities in recent days, saying poor treatment of staff and a lack of priority on hiring has led to toxic work environments. Particularly within post offices and other forward-facing positions, they said, staffing shortfalls have caused longer wait times and otherwise reduced service for customers.”

26. The articles attached to Mr. Goldstein’s affirmation are timestamped 9/10/24, 9:40 AM and 9/10/24, 9:41 AM.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). “A motion to dismiss, rather than a motion for summary determination, is appropriate where . . . the threshold issue is whether a petition has been timely filed with the Division of Tax Appeals” (*Matter of Marrero*, Tax Appeals Tribunal, May 21, 2020). This determination shall address the instant motion as such.

B. The standard of review on a motion to dismiss is the same as that for summary determination (*see Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). A motion for summary determination is properly 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]).

Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman v City of New York*, 49 NY2d at 562).

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 in the Division of Tax Appeals 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 at the taxpayer’s last known address (*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.*, Tax Appeals Tribunal, September 13, 2012).

D. Where the timeliness of a petition following the mailing 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 (*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). 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. While the Tax Law does not specifically provide for service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period

for filing a petition or request for conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v Frank*, 43 NY2d 168, 173 [1977]).

G. In this case, the Division has met its burden of establishing both the standard procedure used by the Division for mailing of conciliation orders and that the procedure was followed in this instance by proper mailing of the conciliation orders with the accompanying cover sheets and cover letters. Specifically, BCMS was required to mail the conciliation orders to petitioners' and Mr. Weiss' last known addresses. 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 orders at issue, along with the cover sheets and cover letters, were mailed to petitioners and Mr. Weiss by certified mail on January 20, 2023, 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 copies of the orders 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 orders issued to petitioners and Mr. Weiss. Petitioners' and Mr. Weiss' names and addresses, as well as the numerical information on the face of the conciliation orders, appear on the CMR, which bears a USPS postmark of January 20, 2023. There are 60 certified control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "60," that the post office received 60 items for mailing. Accordingly, the Division established that it mailed the conciliation orders by certified mail on

January 20, 2023 (*see Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995).

H. Here, the conciliation orders were properly mailed when they were delivered into the custody of the USPS on January 20, 2023, properly addressed to petitioners and Mr. Weiss at their last known addresses, 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.

I. The question is whether petitioners timely filed their petition with the Division of Tax Appeals. Pursuant to Tax Law § 170 (3-a) (e) and Tax Law § 689 (b), petitioners had 90 days from the mailing of the conciliation order - that is, until April 19, 2023 - to file a petition with the Division of Tax Appeals. The mailing rules governing the timely filing of documents by USPS mail with the Division of Tax Appeals are contained in section 3000.22 (a) (2) of the Rules and provide, in relevant part, that the envelope containing the petition “must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid” (*see* 20 NYCRR 3000.22 [a] [2] [ii]), and the envelope must bear a date stamped by the USPS which is within the prescribed period granted for filing such document (*see* 20 NYCRR 3000.22 [a] [2] [iii]). If the postmark stamped by the USPS does not bear a date which falls within such period, the document will not be considered timely filed regardless of when deposited in the mail (*id.*). However, as in this case, if an envelope is missing a postmark which should have been affixed by the USPS, then whether the envelope was mailed in accordance with the rules will be determined solely by applying the provisions of sections 3000.22 (a) (3) and (b) (1) (ii) of the Rules. Such rules provide that the document must be received by the Division of Tax Appeals at its address not later than the time when an envelope which is properly addressed, mailed and sent by the same class of mail “would ordinarily be received if it were postmarked at the same point of origin by the United States

Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document)” (*see* 20 NYCRR 3000.22 [b] [1] [iii]). In *Matter of Harron’s Elec. Serv., Inc.* (Tax Appeals Tribunal, February 19, 1988), the Tribunal adopted the rule that five days for mailing would be an ordinary time span for delivery of mail under these circumstances. Here, the petition was date-stamped as received by the Division of Tax Appeals on May 8, 2023, a date beyond the April 19, 2023, filing date and beyond the five-day rule established by *Harron’s*.

Section 3000.22 (b) (2) of the Rules provides that:

“In case the document is received after the time when a document so mailed and so postmarked by the United States Postal Service would ordinarily be received, such document will be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received, if the person who is required to file the document establishes:

- (i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;
- (ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and
- (iii) the cause of such delay.”

J. Petitioners have not established any of the foregoing and, therefore, have failed to demonstrate that there are material issues of fact in dispute. First, petitioners have not established that the petition was deposited in the mail on or before the prescribed date for filing. The only evidence provided by petitioners on this issue is Mr. Weiss’ bare affidavit claiming that the envelope containing the petition was deposited in the mail with the USPS on April 17, 2023. The affidavit is conclusory and uncorroborated by any evidence in the record. Mr. Weiss does not describe his office’s general mailing procedure. For instance, he does not explain who was

responsible for placing the petition in the envelope, sealing the envelope, affixing the NEOPOST stamp to the envelope and depositing the envelope with the USPS. Critically, Mr. Weiss did not explain who performed any of those functions in this case. Specifically, Mr. Weiss did not explain the chain of custody over the petition after he signed it on April 7, 2023. Similarly, he did not explain why the petition was dated April 7, 2023, but was not mailed until April 17, 2023. While Mr. Weiss claims that the envelope was deposited with the USPS on April 17, 2023, there is no postmark or any other evidence on the envelope, or in the record, to support his claim (*see Matter of Brenner*, Tax Appeals Tribunal, March 1, 1990). Accordingly, it must be concluded that Mr. Weiss' affidavit does not establish that the petition was deposited with the USPS on April 17, 2023.

Second, petitioners have not established that the delay in receiving the petition was due to a delay in the transmission of the mail. On this point, Mr. Goldstein's affirmation states that "[d]uring April and May 2023 there were disruptions of service at the United States Postal Service ("USPS") related to USPS understaffing, low worker moral and protests by USPS employees across the country. (See Exhibit II Screenshots Articles)." There is nothing in the record that supports Mr. Goldstein's allegation that there were disruptions in the mail service, let alone, that the alleged disruptions resulted in a delay in the transmission of the mail. Mr. Goldstein has no firsthand knowledge of the circumstances surrounding the mailing of the petition in this matter. In paragraph 1 of his affirmation he states that he has "knowledge of the facts involved in this matter based on [his] communication with [his] clients and based on the review of the documents submitted by [his] clients." However, he fails to explain from which of these two sources he obtained the information to conclude that disruptions at the USPS delayed the transmission of the petition. The articles attached to Mr. Goldstein's affirmation are

timestamped 9/10/24, 9:40 AM and 9/10/24, 9:41 AM. He does not explain how he obtained these articles. In any event, the articles do not state that mail service was disrupted. The articles speak generally about staffing issues and protests at the USPS but mention nothing about disruptions in mail service. Accordingly, it must be concluded that petitioners failed to establish that the delay in the receipt of the petition by the Division of Tax Appeals was due to a delay in the transmission of the mail.

Finally, since petitioners failed to establish that the delay in receiving the petition was due to a delay in the transmission of the mail, it is axiomatic that petitioners cannot establish the cause of such alleged delay. However, for the sake of completeness, this determination will address that point. The petition in this matter was allegedly mailed on April 17, 2023. Based on the five-day rule adopted by the Tribunal in *Harron's*, the petition would have been due to the Division of Tax Appeals by April 22, 2023.² The first article attached to Mr. Goldstein's affirmation is dated April 30, 2023. It stated that the protest that allegedly disrupted the mail service began on April 28, 2023. The second article, dated May 3, 2023, stated that postal workers across the nation staged protests outside their facilities over the past days. Thus, even if petitioners had established that mail service was disrupted, based on these articles, April 28, 2023, is the earliest date that any such disruption would have occurred. Because that date is beyond the date when the petition was due to the Division of Tax Appeals, the articles do not explain petitioners' failure to timely file the petition. Finally, petitioners have not challenged the Division's proof of mailing of the conciliation orders with any evidence or arguments. Therefore, it must be concluded that petitioners have not met their burden of proof.

² The five-day due date fell on Saturday, April 22, 2023. Therefore, the petition was due to the Division of Tax Appeals on the next business day, April 24, 2023.

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).

K. The Division of Taxation's motion to dismiss is granted, and the petition of David R. Lawenda and Kevin A. Menard is dismissed.

DATED: Albany, New York
December 12, 2024

/s/ Osborne K. Jack
ADMINISTRATIVE LAW JUDGE