

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RHONDA MOORE-PACE	:	DETERMINATION
		DTA NO. 831378
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Year 2018.	:	

Petitioner, Rhonda Moore-Pace, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2018.

On December 13, 2024, the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner pursuant to 20 NYCRR 3000.9 (a) (4). By letter, dated January 15, 2025, the date by which the parties could file responses to the notice of intent to dismiss was extended to February 27, 2025. On February 21, 2025, the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of the dismissal. Petitioner, appearing pro se, did not submit a response by February 27, 2025, which date began the 90-day period for the issuance of this determination.

After due consideration of the documents submitted, Donna M. Gardiner, Supervising 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 default order.

FINDINGS OF FACT

1. The Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) issued a conciliation default order, CMS No. 000319171, dated November 5, 2021 (conciliation order), to petitioner, Rhonda Moore-Pace, at an address in Rochester, New York. The conciliation order sustained a notice of disallowance, dated July 31, 2019, issued to petitioner for the tax year 2018.

2. On July 27, 2023, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order.

3. On December 13, 2024, a notice of intent to dismiss petition was issued 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. On February 21, 2025, in response to the issuance of the notice of intent to dismiss petition, and to show proof of proper mailing of the conciliation order, the Division submitted, among other documents: (i) an affirmation, dated February 21, 2025, of Christopher O'Brien, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, sworn to on January 23, 2025, of Carla Podlucky, Assistant Supervisor of Tax Conferences of BCMS; (iii) a "CERTIFIED RECORD FOR MANUAL MAIL - CMS-37- BCMS Order" (CMR), postmarked November 5, 2021; (iv) a copy of the request for conciliation conference, date-stamped received March 2, 2020, wherein petitioner listed a Rochester, New York, address and requested that the Division update her address in its records; (v) a copy of the conciliation order and associated cover letter, dated November 5, 2021, that listed the same Rochester, New York, address that petitioner listed in her request for conciliation conference; and (vi) an affidavit, sworn to on January 27, 2025, of Justin Lombardo, a manager of the Division's mail room.

5. Mr. O'Brien asserts in his affirmation that the Rochester, New York, address was petitioner's last known address when the conciliation order was issued.

6. The affidavit of Ms. Podlucky sets forth the general practice and procedure of BCMS for preparing and mailing conciliation orders. The procedure culminates with BCMS mailing the conciliation orders by United States Postal Service (USPS), via certified mail, and confirming such mailing through receipt by BCMS of a postmarked copy of the CMR.

7. 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.

8. 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.

9. The AFP Unit also produces a computer-generated CMR. The CMR is a listing of addresses 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.

10. 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.

11. The “TOTAL PIECES AND AMOUNTS” is indicated on the last page of the CMR next to which is the preprinted number “97.” 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.

12. 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, “11-5-21” was written in the upper right corner of each page of the CMR.

13. 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.

14. Ms. Podlucky attests to the truth and accuracy of the copy of the eight-page CMR, which contains a list of the conciliation orders issued by BCMS on November 5, 2021. Each such certified control number is assigned to an item of mail listed on the eight pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or BCMS number, and the name and address of the addressee.

15. Information regarding a conciliation order issued to petitioner is contained on page seven of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 1167 2136 is reference number 000319171, along with petitioner’s name and her Rochester, New York, address. The Rochester, New York, address listed on the CMR is the same address

listed on the request for conciliation conference.

16. Mr. Lombardo, a manager of the Division's mail room since 2016 and currently an Associate Administrative Analyst whose duties include the management of the mail processing center staff, attested 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 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.

17. Here, the postal employee affixed a postmark, dated November 5, 2021, to each page of the eight-page CMR. The postal employee circled and wrote the number "97" and initialed or signed the last page to indicate the total pieces of mail received at the post office.

18. Mr. Lombardo 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 Mr. Lombardo'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.

19. Based upon his review of the affidavit of Ms. Podlucky, the exhibits attached thereto and the CMR, Mr. Lombardo avers that on November 5, 2021, an employee of the mail processing center delivered an item of certified mail addressed to petitioner at her Rochester,

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. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to, and accepted by, the post office on November 5, 2021, for the records of BCMS. Mr. Lombardo asserts that the procedures described in his affidavit are the regular procedures followed by the mail processing center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioner on November 5, 2021.

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

CONCLUSIONS OF LAW

A. In ***Matter of Victory Bagel Time*** (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 files a petition 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*).

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 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 to petitioner at her last known address. As indicated by the CMR, and by the affidavits of Ms. Podlucky and Mr. Lombardo, 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 was mailed to petitioner by certified mail on November 5, 2021, the date appearing on the CMR. The affidavits described 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 Podlucky and Lombardo 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 November 5, 2021. There are 97 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "97," that the post office received 97 items for mailing. In short, the Division established that it mailed the conciliation order by certified mail on November 5, 2021 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Further, the address to which the conciliation order was mailed is the address designated by petitioner in her request for conciliation conference. As such, the address used satisfies the "last known address" requirement (*Matter of Katz*).

H. In this case, the conciliation order was properly issued when it was delivered into the custody of the USPS on November 5, 2021, properly addressed to petitioner at her last known address. Hence, the 90-day period for filing a petition in this matter commenced as of the date of

mailing, i.e., November 5, 2021. Here, the petition was filed on July 27, 2023, a date that falls well beyond the 90-day statutory period and, thus, was untimely filed (*see* Tax Law § 170 [3-a] [e]). Accordingly, the Division of Tax Appeals lacks jurisdiction to address the merits of the petition (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Rhonda Moore-Pace is dismissed.

Dated: Albany, New York
May 15, 2025

Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE