

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARK MELFA	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 825801
Personal Income Tax under Article 22 of the Tax Law for	:	
the Year 2006.	:	

Petitioner, Mark Melfa, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2006.

On September 9, 2013, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On October 2, 2013, petitioner, appearing pro se, submitted a letter with attachments in opposition to dismissal. On October 9, 2013, the Division of Taxation filed a letter requesting an extension of time within which to file its response. The Division of Tax Appeals granted an extension until November 25, 2013 for the Division of Taxation to respond to the Notice of Intent to Dismiss Petition. On November 12, 2013, the Division of Taxation, by Amanda Hiller, Esq. (Clifford Peterson, Esq., of counsel) submitted affidavits and other documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on November 12, 2013.

After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Default Order.

FINDINGS OF FACT

1. In protest of Notice of Deficiency L-037147339, petitioner, Mark Melfa, filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS). On his request for conciliation conference, petitioner's preprinted address was listed as an East Rochester, New York, post office box.

2. A BCMS conference was scheduled before Edward J. Hayes III, Conciliation Conferee, on November 6, 2012. The notice of the Conciliation Conference was mailed to petitioner on October 1, 2012. Petitioner failed to appear personally or by representative.

3. BCMS issued a Conciliation Default Order (CMS No. 252693) to petitioner dated November 16, 2012. This Conciliation Default Order states, in part: "[a] Default has been duly noted. It is ordered that the statutory notice(s) issued by the Department of Taxation and Finance, which is the subject of this request, be sustained and the request be dismissed."

4. On July 29, 2013, the Division of Tax Appeals received a petition in this matter. The petition lists petitioner's address as the East Rochester, New York, address. The envelope in which the petition was mailed indicates that it was sent by United States Postal Service (USPS) Certified Mail and reflects the date of mailing as "Jul 26, 13." Attachments to this petition included, among other documents, copies of pages one and four of Notice of Deficiency L-037147339; copies of the subject Conciliation Default Order and the accompanying cover letter from Mr. Hayes, the conciliation conferee, dated November 16, 2012; and a copy of a letter, dated December 13, 2012, from petitioner.

5. On September 9, 2013, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the relevant conciliation order was issued on November 16, 2012, but that the petition was not filed until July 26, 2013 or 252 days later.

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavit of its representative, Clifford Peterson, Esq., along with the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted, among other documents, copies of petitioner's petition and the envelope in which it was sent to the Division of Tax Appeals, a copy of petitioner's Request for Conciliation Conference sent to BCMS, a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on November 16, 2012, and a copy of the subject November 16, 2012 conciliation default order.

7. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS since 2002, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. 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 order and cover letter to a BCMS clerk assigned to process the conciliation orders.

9. 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.

10. The AFP Unit also produces a computer-generated CMR entitled "CERTIFIED RECORD FOR PRESORT MAIL - BCMS CERT LETTER." The CMR is a listing of taxpayers and representatives to whom conciliation orders are 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 zeroes. The AFP Unit prints the CMR and cover sheets and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter and conciliation order into a three-windowed envelope such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear.

12. The "TOTAL PIECES AND AMOUNTS" is indicated on the last page of the CMR. The BCMS clerk stamps the bottom left corner of the last page of the CMR "**MAILROOM: RETURN LISTING TO: BCMS BLDG 9 (RM 180) ATT: CONFERENCE UNIT.**" The BCMS clerk also stamps the bottom right corner of the last page "**POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.**"

13. 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, "11-16-12" is written in the upper right corner of each page of the CMR.

14. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center, which is responsible for delivering the CMR, along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

15. A piece of mail may be "pulled" from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so "pulled" will be segregated from the remaining group of conciliation orders for correction or issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

16. In this case, a review of the CMR indicates that two pieces of mail were pulled. The two pulled pieces are listed on page six of the CMR. A line was placed through the entries for these taxpayers by the clerk after the orders were pulled. There is no such line on or near the listing information for the piece of mail related to petitioner. The preprinted number on page seven of the CMR is 74. This number is crossed out and the handwritten number 72 has been inserted after the listing for "TOTAL PIECES RECEIVED AT POST OFFICE."

17. Mr. Farrelly attested to the truth and accuracy of the seven-page CMR attached to his affidavit that contains a list of conciliation orders issued by the Division on November 16, 2012. This CMR lists 74 certified control numbers and as noted there are 2 deletions, each of which is on page 6, from the list for a total of 72 pieces. Each such certified control number is assigned to an item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number and the name and address of the addressee.

18. Information regarding the conciliation order issued to petitioner is contained on page six of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1417 6070 is reference/CMS number 000252693, along with the name and address of petitioner, Mark Melfa, East Rochester, NY 14445-0047. This was the address listed on petitioner's Request for Conciliation Conference, i.e., petitioner's last known address.

19. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently a Principal Mail and Supply Supervisor in the Division's Mail Processing Center (Center) attests to the regular procedures followed by Center staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, 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 places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A USPS employee affixes a postmark and his or her initials or signature to the CMR, indicating receipt by the post office. The Center further requested that the USPS either circle the number of pieces received or indicate the number of pieces received by writing the number on the last page of the CMR.

20. In this particular instance, the postal employee affixed a postmark dated November 16, 2012 of the Stuyvesant Plaza branch of the USPS to each page of the seven-page CMR. On page seven, the postal employee also wrote the number "72" and wrote and circled his or her initials.

21. Mr. Peltier states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and

procedures of the Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

22. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on November 16, 2012, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Mark Melfa, East Rochester, NY 14445-0047, to a branch of the USPS in Albany, New York, 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 16, 2012 for the records of BCMS. Mr. Peltier 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 petitioners on November 16, 2012.

23. Petitioner responded to the Notice of Intent to Dismiss Petition by letter dated October 2, 2013, indicating that on December 13, 2012, he filed a request to vacate the order in accordance with the instructions contained in the cover letter from conciliation conferee, Edward J. Hayes III, that accompanied the Conciliation Default Order dated November 16, 2012. He further indicated that he never received a response to the request to vacate the order, and after waiting for a response that never came, he then filed the petition at issue. Petitioner requests an explanation as to why the petition is under consideration for dismissal when he followed the conciliation conferee's instructions and made a request that the order be vacated, which request has gone unanswered. Attached to petitioner's response letter were copies of the November 16, 2012 letter from the conciliation conferee and a December 13, 2012 letter from petitioner.

24. A letter from the conciliation conferee, Edward J. Hayes III, that accompanied the Conciliation Default Order stated, in part, that:

[i]f there is a reasonable excuse for your non-appearance, you may request that the order be vacated. A request to vacate the order must be filed with the undersigned within thirty (30) days from the date of this order.

In the alternative to requesting that the order be vacated, you may file a petition within ninety (90) days from the date of this order. Petition forms and the Rules of Practice and Procedure may be obtained from the Division of Tax Appeals website . . . or by contacting:

NYS Division of Tax Appeals
Agency Building 1
Empire State Plaza
Albany, NY 12223
Phone: (518) 266-3000

If you fail to either request that the order be vacated or file a petition within the above time limits, the enclosed order will be final.

BCMS's W.A. Harriman Campus, Albany, New York 12227, address appears at the top of Mr. Hayes's letter.

25. A letter from petitioner, dated December 13, 2012, containing an inside address "[t]o: New York Division of Tax Appeals, Agency Building 1, Empire State Plaza, Albany, NY 12223" and the salutation "[t]o Edward J. Hays [sic] III", references a "[r]equest to Vacate Conciliation Default Order." The body of this letter sets forth petitioner's reasons why the Conciliation Default Order should be vacated. Although this letter refers to attached documents, none are attached. Petitioner did not submit any proof of mailing of this letter.

CONCLUSIONS OF LAW

A. There is a strict 90-day statutory time limit for filing a petition following issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer

(*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation default order and the underlying assessment in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. “The standard for reviewing a Notice of Intent To Dismiss Petition is the same as reviewing a motion for summary determination” (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

C. As provided in section 3000.9(b)(1) of the Rules, 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.”

D. Section 3000.9(c) of the Rules of Practice and Procedure 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 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, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [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, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [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, 206 NYS2d 879 [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, 582 NYS2d 170, 173 [1992] *citing Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

E. Where the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and

issuing conciliation orders, establish the Division's standard mailing procedure. Additionally, the CMR has been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus established that the Conciliation Default Order at issue was mailed as addressed to petitioner on November 16, 2012.

H. When an order is found to have been properly mailed by the Division, a presumption arises that it was delivered to the intended recipient (*see Matter of Chung*, Tax Appeals Tribunal, September 22, 2011). That is, "[o]nce the Division has introduced adequate proof to establish a presumption of receipt by the taxpayer, the burden is on petitioner to rebut that presumption by introducing evidence of non-receipt" (*Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011, *rearg denied* April 19, 2012). In this case, however, petitioner did not introduce evidence of non-receipt. Rather, petitioner admitted that he received the protested Conciliation Default Order. In response to the Notice of Intent to Dismiss the petition as being filed beyond the 90-day time limit, petitioner asserted that on December 13, 2012, he filed a request to vacate the order in accordance with the instructions contained in the conciliation conferee's cover letter that accompanied the subject Conciliation Default Order. In support of his assertion, petitioner submitted a copy of his letter dated December 13, 2012. Review of this letter indicates it was addressed to the Division of Tax Appeals, not BCMS as claimed by petitioner. There is also no mailing evidence for this letter. Even if this letter was sent to the Division of Tax Appeals in December of 2012, it can not reasonably be construed as constituting a petition. In this letter, petitioner specifically addresses the reasons why the conciliation default order should be vacated by the conciliation conferee, Mr. Hayes. The Division of Tax Appeals does not have power to vacate a conciliation default order, rather, that power lies with BCMS

(*see* 20 NYCRR 4000.5[b][3]). The record clearly shows that petitioner mailed his petition to the Division of Tax Appeals on July 26, 2013.

I. A conciliation order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011). In this case, the Conciliation Default Order was properly mailed when it was delivered into the custody of the USPS on November 16, 2012, and it is this date which commenced the 90-day period within which the protest had to have been filed. Ninety days after the November 16, 2012 date of mailing was February 14, 2013, and in order to be considered timely petitioner's protest had to have been filed on or before such date. Petitioner's petition was mailed on July 26, 2013, or 162 days late. The law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Furthermore, the Division of Tax Appeals has no authority to waive the filing period in particular cases (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). Accordingly, as the petition was untimely filed, the Division of Tax Appeals is without jurisdiction to consider the merits of petitioner's protest.

J. The petition of Mark Melfa is hereby dismissed.¹

DATED: Albany, New York
January 30, 2014

/s/ Winifred M. Maloney _____
ADMINISTRATIVE LAW JUDGE

¹ Petitioner is not entirely without recourse. That is, petitioner may pay the disputed tax and within two years of payment, file a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).