

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**WINSTON THAW** : ORDER  
 : DTA NO. 826684  
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 2008. :

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Petitioner, Winston Thaw, 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 2008.

On February 26, 2015, 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 was not filed in a timely manner. Petitioner responded to the Notice by letter, dated March 23, 2015. The Division of Taxation filed its response to the Notice of Intent to Dismiss Petition, including affidavits and other documents in support of dismissal, by the extended deadline of May 14, 2015, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich). After due consideration of the documents and arguments submitted by the parties, Joseph W. Pinto, Jr., 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 order.

***FINDINGS OF FACT***

1. A notice and demand for payment of tax due, notice number L-040704470-7, dated July 2, 2014, was issued to petitioner by the Division of Taxation (Division), assessing additional personal income taxes in the amount of \$1,805.00 plus penalty and interest for the year 2008.

2. Petitioner filed a request for conference in the Bureau of Conciliation and Mediation Services (BCMS) on July 24, 2014, in response to the notice and demand. A Conciliation Order was issued on August 8, 2014, which dismissed the request because it was deemed late filed. Petitioner filed a petition with the Division of Tax Appeals on December 15, 2014.

3. On February 26, 2015, the Supervising Administrative Law Judge of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated as follows:

“You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 170(3-a)(e), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a BCMS conciliation order.

In this case, the conciliation order, CMS No. 262846, was issued on August 8, 2014. However, the petition in this matter was not filed with the Division of Tax Appeals until December 15, 2014, or one hundred and twenty-nine days (129) later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.”

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted the following: affidavits of three Division employees, Leo Gabovich, the Division’s representative, Bruce Peltier, the Mail and Supply Supervisor in the Division’s Mail Processing Center, and Robert Farrelly, the Assistant Supervisor of Tax Conferences of BCMS of the New

York State Department of Taxation and Finance; a copy of the petition filed with the Division of Tax Appeals on December 15, 2014; a copy of the conciliation order issued on August 8, 2014; a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on August 8, 2014; petitioner's 2008 personal income tax return; and the notice and demand, dated July 2, 2014.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted a letter, dated March 23, 2015, which stated that he did not believe his petition should be dismissed due to the "technicality of missed deadlines, deadlines with untraceable time lines, rather than the substance and facts of the case." Petitioner maintained that his 2008 personal income tax return, filed jointly with his spouse, was "accurate and true."

6. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

7. The BCMS Data Management Services Unit prepared and forwarded 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, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

8. The name, mailing address, order date and BCMS number for each Conciliation Order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover

sheet that indicated the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

9. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The BCMS numbers were recorded on the CMR under the heading "Reference No." and were preceded by three zeros. The AFP Unit printed the CMR and cover sheets via a printer located in BCMS and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk, as part of her regular duties, associated each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear. In this case, the Division did not submit a copy of the cover sheet which was sent to petitioner in this matter. Instead, it inexplicably attached a generic, redacted copy of a cover sheet, the origins of which were not divulged, which only revealed the return address of BCMS, an unidentifiable bar code, handwritten numbers and the words "BCMS Number." There is no mention of anything related to petitioner.

11. Pursuant to the general office practice, the BCMS clerk stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" on the last page of the CMR, and also stamped "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit" on each page of the CMR.

12. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “8-8-14” was written on the top of each page of the CMR.

13. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Mail Processing Center.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the 7-page CMR which originally contained 73 pieces of mail, but was changed to 71 after 2 pieces were pulled. A certified control number was assigned to each item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

15. Information regarding the Conciliation Order issued to Winston Thaw was contained on page five of the CMR. Corresponding to certified control number 7104 1002 9730 0272 7086 was reference number 000262846, along with petitioner’s name and address, which, at that time, was 17 Craft Avenue, Glen Cove, NY 11542-3508. This was the same address listed by petitioner on his request for a conciliation conference, the notice and demand protested by petitioner, petitioner’s 2008 New York personal income tax return and the petition herein, i.e., his last known address.

16. Mr. Farrelly noted that next to petitioner’s name on the CMR, the clerk wrote, “Order Ret./unclaim.addr.ok remailed (reg.) 9/23/14.” On September 23, 2014, BCMS mailed a copy of the conciliation order to petitioner by regular mail because the certified mailing had been returned by the U.S. Postal Service, consistent with its policy when certified mailings are returned.

17. The affidavit of Bruce Peltier, Principal Mail and Supply Clerk and mail room supervisor of the Division's Mail Processing Center, 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 was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

18. Here the postal employee affixed a postmark with the date to each page of the seven-page CMR. The postal employee also wrote his or her initials and the number "71" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page seven of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record, indicating that 71 pieces of mail were actually received.

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

20. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on August 8, 2014, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner, 17 Craft Ave, Glen Cove, NY 11542-3508, to a branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by certified mail. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the U.S. Postal Service on August 8, 2014 for the records of BCMS. Mr. Peltier asserted that the procedures described in his affidavit were 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 August 8, 2014.

#### ***CONCLUSIONS OF LAW***

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation order in this case and the underlying deficiency 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).

B. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has

been produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

C. The evidence required of the Division in order to establish proper mailing is two-fold: 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 this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). In this case, the Division has not met its burden of establishing that the standard procedure for mailing was followed in this case.

In *Matter of Alvarenga* (Tax Appeals Tribunal, May 28, 2015), the Tribunal stated:

“While we have held that a properly completed CMR and affidavits from individuals with the requisite knowledge of mailing procedures may be sufficient to prove mailing (*see e.g., Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011), we are unable to discover in our research any case wherein the absence of the mail cover sheet was directly confronted. We are thus uncertain of the significance of its absence. It may be that the absence of this document may be overcome by other evidence in the record that proves mailing (*cf., Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001 [flaws in a CMR need not be fatal if the evidence presented is otherwise sufficient to prove mailing]). Nevertheless, we observe that the cover sheet is an important component of the mailing process as it provides the address to which the order is mailed through the windowed envelope. It thus gives the finder of fact an opportunity to view how the subject conciliation order was mailed. It also lists the certified control number. Hence, both the address and the certified control number as listed on the cover sheet can be verified against the CMR. We note

further that the conciliation order itself lists neither the taxpayer's address nor the certified control number.

Accordingly, we find that, under the instant circumstances, the absence of the mail cover sheet raises the material factual issue of whether the Division's standard mailing procedure for conciliation orders was followed in this case."

The facts in the instant matter cannot be distinguished from those in *Alvarenga*.

Although the Farrelly affidavit states that the BCMS clerk assigned to process conciliation orders as part of her regular duties 1) associated each cover sheet, conciliation order and cover letter, 2) verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet, and then 3) folded and placed the cover sheet, cover letter, and conciliation order into a three-windowed envelope so that the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer plainly appeared, a material issue of fact is raised by the Division's failure to submit a copy of the cover sheet which was sent to petitioner in this matter. In addition, this conclusion is not influenced by Mr. Peltier's sworn statement that one of his mailroom staff compared the names and certified mail numbers on the envelopes against those on the CMR.

D. The Notice of Intent to Dismiss Petition, dated February 26, 2015, is withdrawn and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York  
August 6, 2016

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE