

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GIUSEPPE BRIGUGLIO</b>	:	<b>ORDER</b>
	:	<b>DTA NO. 826787</b>
for Redetermination of a Deficiency or for Refund	:	
of Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 2009.	:	

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Petitioner, Giuseppe Briguglio, 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 2009.

On June 4, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Bryan Bergeron), brought a motion seeking an order dismissing the petition or, in the alternative, summary determination of the proceeding pursuant to sections 3000.5, 3000.9(a)(1)(i), and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Bryan Bergeron, dated June 2, 2015, and annexed exhibits supporting the motion. Petitioner did not respond to the motion. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on July 5, 2015. After due consideration of the documents submitted, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services.

***FINDINGS OF FACT***

1. On February 7, 2015, petitioner, Giuseppe Briguglio, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Conciliation Order Dismissing Request (CMS Number 264712), issued by the Bureau of Conciliation and Mediation Services (BCMS)

on January 30, 2015.

2. On March 21, 2012, the Division of Taxation (Division) issued a Notice of Disallowance to petitioner. The Notice of Disallowance states any disagreement with the notice must be filed “within two years from the date of this notice.” The Conciliation Order indicates the relevant notice was issued on March 21, 2012, but the request for conference was not mailed until January 8, 2015, or 293 days later.

3. The Division submitted, among other documents, (i) the affidavit of Bryan Bergeron, a law clerk employed by the Office of Counsel of the Division, dated June 2, 2015; (ii) a copy of the petition, filed on February 7, 2015; (iii) the Division’s answer to the petition, dated April 22, 2015; (iv) the Notice of Disallowance, addressed to petitioner and dated March 21, 2012; and (v) petitioner’s Request for Conciliation Conference, received by BCMS on January 16, 2015.

4. The Division has submitted no documents to support proof of mailing of the Notice of Disallowance.

5. Petitioner filed no response to the Division’s motion.

#### ***SUMMARY OF THE PARTIES’ POSITIONS***

6. Petitioner states he did not find the necessary documents to be included in his petition on time and he then misplaced them a second time. Upon finding the necessary documents, he sent everything he had received to the Division of Tax Appeals.

7. The Division states that since the Request for Conciliation Conference was filed more than two years from the date petitioner acknowledged receipt of the Notice of Disallowance, it was untimely filed and the Division of Tax Appeals lacks jurisdiction to review the notice.

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

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). This deadline is strictly enforced and protests filed even one day late are considered untimely (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). 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). Accordingly, a conciliation order is binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed within the 90-day period.

B. Where, as here, the timeliness of a request for a conciliation conference is at issue, the initial inquiry is whether or not the Division has carried its burden of demonstrating the fact and date of mailing of the Notice of Disallowance (*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 either direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. 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 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).

D. In this case, there exists neither proof of mailing of the Notice of Disallowance nor proof of a standard procedure for mailing. Thus, the Division has not met its burden of demonstrating the fact and date of mailing of the Notice of Disallowance.

E. The 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing of the conciliation order, January 30, 2015. The petition in this matter having been filed on February 7, 2015, or 30 days after the issuance of the order, was therefore timely.

F. The Division's motion for summary determination is denied and the matter will proceed to hearing in due course.

DATED: Albany, New York  
July 23, 2015

/s/ Daniel J. Ranalli  
SUPERVISING ADMINISTRATIVE LAW JUDGE