

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN J. PETITO, CPA, PLLC	:	ORDER
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 2012.	:	DTA NO. 827055

Petitioner, John J. Petito, CPA, PLLC, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 2012.

On August 7, 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 did not appear to have been filed in a timely manner. In response to two requests for additional time, the parties were granted until November 9, 2015 to respond to the proposed dismissal. On November 6, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), submitted affidavits and other documents in support of dismissal. On August 28, 2015, petitioner, appearing by John J. Petito, submitted documents in opposition to 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 9, 2015. After due consideration of the documents 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 order dismissing request.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice and Demand for Payment of Tax Due (Assessment ID: L-040800216-4), dated March 3, 2014, (Notice and Demand) assessing corporation franchise tax penalty in the amount of \$1,900.00 for the year 2012. The notice and demand is addressed to petitioner, John J. Petito, C.P.A., PLCC, One Sanford Court, Valley Stream, NY 11581-2504.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated March 6, 2015, that was received by BCMS on March 11, 2015. John J. Petito signed this request, which protested, among other assessments, notice number L-040800216-4. The request lists petitioner's address as One Sanford Court, North Woodmere, NY 11581.

3. By a Conciliation Order Dismissing Request (CMS No. 265414) dated March 27, 2015, BCMS dismissed petitioner's request as late filed.

4. On June 26, 2015, petitioner mailed a petition via United States Postal Service (USPS) Priority Mail to the Division of Tax Appeals. It was received on June 30, 2015. The petition lists petitioner's address as One Sanford Court, North Woodmere, New York 11581.

5. On August 7, 2015, Daniel J. Ranalli, Supervising Administrative Law Judge 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 March 27, 2015, but that the petition was not filed until June 26, 2015, or 91 days later.

6. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents, (i) the affidavit of Mary Hurteau, Esq., the Division's representative, dated November 6, 2015; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated October 13, 2015; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) dated March 27, 2015; (iv) an affidavit, dated October 15, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (v) an affidavit, dated October 28, 2015, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel involved in making requests to the USPS for delivery information; (vi) Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated October 27, 2015; (vii) a copy of the petition filed with the Division of Tax Appeals on June 26, 2015; (viii) a copy of petitioner's request for conciliation conference, received by BCMS on March 11, 2015; (ix) a copy of the Conciliation Order Dismissing Request, cover letter and cover sheet, dated March 27, 2015, and a copy of the three-windowed mailing envelope; and (x) a printout from the United States Zip Codes website for ZIP code 11581.

7. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conference for BCMS, 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, and forwards both 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, the 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. 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 using a printer located in BCMS 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 through which the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear.

12. 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.

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 “3-27-15” is written in the upper right corner of each page of the CMR.

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

15. Mr. Farrelly attested to the truth and accuracy of the copy of the 5-page CMR, which contains a list of 46 conciliation orders issued by the Division on March 27, 2015. The CMR lists 46 computer-printed certified control numbers. 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 was a reference/CMS number, the name and address of the addressee, and postage and fee amounts. There are no deletions from the list. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

16. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0439 9403 is reference/CMS number 000265414, along with petitioner’s name and a Valley Stream, New York, address. The cover sheet bears petitioner’s name and the same Valley Stream, New York, address that appears on the CMR and shows the same certified control number, 7104 1002 9730 0439 9403, as that listed on the CMR for petitioner’s entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

17. The affidavit of Bruce Peltier, Principal Mail and Supply Clerk and mail room supervisor of the Division’s Mail Processing Center, attests 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 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 postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

18. Here, the barely legible date “Mar 27 2015” is stamped on all five pages of the CMR. No legible postmarks appear on any pages of the CMR. The barely legible date “Mar 27 2015” is stamped on the last page of the CMR, page five, which contained a statement of the total number of pieces received by the Postal Service for mailing. On the last page of the CMR next to “TOTAL PIECES AND AMOUNTS” appears the printed number 46, which was circled. In addition, the handwritten number “46” and illegible initials appear below the heading “TOTAL PIECES RECEIVED AT POST OFFICE.” The circling and writing of the number of pieces of mail received on the mail record was done at the Division’s specific request and was intended to indicate that all 46 pieces of mail listed on the CMR were received at the post office.

19. Mr. Peltier’s affidavit 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 Division’s Mail Processing 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.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on March 27, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to John J. Petito, CPA, PLLC, One Sanford Court, Valley Stream, NY 11581-2504, 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 U.S. Postal Service on March 27, 2015 for the records of BCMS. Mr. Peltier asserts 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 March 27, 2015.

21. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0439 9403 on March 27, 2015 from the Albany, New York, branch office of the USPS to petitioner at One Sanford Court, Valley Stream, NY 11581-2504. In response, the USPS confirmed delivery of this certified mail item at the noted address, specifically petitioner's 1 Sanford Court, Valley Stream, New York, address, on March 30, 2015 at 10:37 A.M.

22. Attachment 6 to Ms. Hurteau's affidavit is a printout for USPS ZIP code 11581 from the United States zip codes website (www.unitedstateszipcodes.org) that lists Valley Stream, New York, as the primary or acceptable city to use when mailing a letter or package to that ZIP

code. The unacceptable cities for purposes of mailing something to ZIP code 11581 are N Woodmere and North Woodmere.

23. Petitioner's response to the Notice of Intent to Dismiss petition addresses the merits of the petition, but not the timeliness of the petition filed in this matter.

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 § 1081(b), the conciliation order in this case and the underlying deficiency would be binding upon petitioner unless it 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 whether the conciliation order was properly mailed. (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). 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 Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*). 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 in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

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 (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders.

E. The Division failed to present sufficient documentary proof, i.e., the CMR, to establish that the conciliation order dismissing request was mailed as addressed to petitioner on March 27, 2015. Specifically, this document did not contain legible USPS postmarks on each page, indicating the mailing date of March 27, 2015, despite the fact that both the Peltier and Farrelly affidavits assert that a postmark was affixed to each page.¹ Rather, on all of the pages, the barely legible date “Mar 27 2015” was stamped. It is noted that no legible USPS postmarks appeared on any page of the CMR, including the last page, page five, which set forth and verified vital information: the total number of pieces being mailed on the date contained in the USPS postmark.

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

¹ USPS Domestic Mail Manual § 503[5.1.1] provides that each individual firm sheet (form 3877) is postmarked (round-dated) at the time of mailing; and the form(s) are then returned to the mailer and become the mailer’s receipt, i.e., certificate of mailing. A “local” postmark shows the full name of the Post Office, a two-letter state abbreviation, “ZIP CODE,™” and date of mailing (*see* USPS Handbook PO-408[1-1.3]).

F. Where proper mailing cannot be proved, demonstration of receipt of the conciliation order dismissing request by the taxpayer allows for the statutory period to be measured from the date of receipt (*Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). The affidavit of Heidi Corina, the Request for Delivery Information/Return Receipt After Mailing form (USPS form 3811-A) and the response of the USPS indicate that the conciliation order dismissing request was received by petitioner on March 30, 2015. Therefore, running the statute of limitations from the receipt of the conciliation order dismissing request, the 90-day period ends on June 28, 2015.

G. The subject petition was mailed on June 26, 2015. The 90-day period to file the petition expired on June 28, 2015. Accordingly, it is found that the petition was timely filed.

H. The Notice of Intent to Dismiss Petition, dated August 7, 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
January 14, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE