

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JEAN R. DANIEL AND</b>	:	<b>ORDER</b>
<b>NIQUETTE JOSEPH</b>	:	<b>DTA NO. 828776</b>
	:	
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 2013.	:	

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Petitioners, Jean R. Daniel and Niquette Joseph, 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 2013.

On August 3, 2018, the Division of Tax Appeals issued to petitioners 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 be timely filed. The Division of Taxation, appearing by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), submitted documents in support of dismissal. Petitioners, appearing pro se, submitted a letter in opposition to dismissal. The 90-day period for issuance on this order commenced on October 18, 2018. After due consideration of the documents submitted, James Connolly, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

***FINDINGS OF FACT***

1. On March 17, 2017, petitioners, Jean R. Daniel and Niquette Joseph, electronically filed a request for a conciliation conference (request for conference) with the Bureau of Conciliation and Mediation Services (BCMS). The request for conference was filed in response to a notice of deficiency bearing assessment number L-045926382 (subject notice), a copy of which is not included in the record.

2. BCMS issued to petitioners and petitioners' then-representative a conciliation order, CMS No. 274128, dated March 16, 2018, sustaining the subject notice.

3. On June 18, 2018, petitioners filed a petition with the Division of Tax Appeals protesting the conciliation order.<sup>1</sup>

4. On August 3, 2018, the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition (notice of intent), on the basis that the petition did not appear to have been timely filed. The notice of intent indicated that the conciliation order was issued on March 16, 2018, but that the petition was not filed until June 18, 2018, or 94 days later.

5. On August 16, 2018, the Division of Taxation (Division) requested a 45-day extension to respond to the notice of intent. By letter dated August 21, 2018, the Division of Tax Appeals responded to Division's request, and granted both parties an extension until October 18, 2018 to submit a response to the notice of intent.

6. On September 5, 2018, the certified mailing of the notice of intent to petitioners was returned by the United States Postal Service (USPS) to the Division of Tax Appeals, with a

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<sup>1</sup> Mr. George Joseph was listed as petitioners' representative on the petition, but he does not qualify to represent petitioners before the Division of Tax Appeals under 20 NYCRR § 3000.2 (a) (2), or (4).

“Return to Sender, Unclaimed, Unable to Forward, Return to Sender” label attached. USPS did not provide a forwarding address for petitioners.

7. On September 7, 2018, the notice of intent was remailed to petitioners via regular mail.

8. In response to the issuance of the notice of intent, the Division provided the following: (i) an affidavit, dated October 12, 2018, of Colleen M. McMahon, an attorney employed by the Division’s Office of Counsel; (ii) a copy of the petition; (iii) a copy of the notice of intent; (iv) a copy of the request for conference, with a “Transaction date/time” of March 17, 2017; (v) a copy of the conciliation order dated March 16, 2018; (vi) an affidavit, dated October 11, 2018, of Robert Farrelly, Supervisor of Tax Conferences of BCMS; (vii) a certified mail record (CMR) containing a list of the conciliation orders issued by the Division on March 16, 2018; and (viii) an affidavit, dated October 11, 2018, of Fred Ramundo, supervisor of the Division’s mail room.

9. Ms. McMahon’s affidavit asserts that “[a]ttached hereto as Attachment 5 is the Division’s proof that the Conciliation Order was mailed to Petitioners on March 16, 2018, at their last known address of record,” a Mount Sinai, New York, address. According to the McMahon affidavit, the Mount Sinai, New York, address “is the last known address and is the same address as on the [request for conference] which asked the Petitioners if the address was correct on the subject notice and the Petitioners checked ‘yes.’” Her affidavit points out that such address is also the same address as on the petition. Ms. McMahon’s affidavit does not specify the address to which the subject notice was mailed. The request for conference in Attachment 5 consists of three pages, the last page of which shows that it was “submitted” by Jean Daniel. Ms. McMahon asserts that the request for conference was filed electronically. While the document nowhere so indicates, that appears to be the case, judging by the “confirmation number” appearing on each of the pages, the fact that the second page contemplates the attachment of

“[f]iles” and the fact that the last page lists a “transaction date/time.” The first page of the request for conference asks “[i]s the address correct on the bill you received?” and allows the requester to choose a “yes” or a “no” box. Petitioners chose the “yes” box. The second page includes a section entitled “[r]eason for request” and asks the requester to “[p]rovide explanation.” In this section, in addition to describing the general nature of petitioners’ disagreement with the subject notice, Mr. Joseph states “[m]y brother-in-Law [sic] George Joseph . . . is the best person to contact to facilitate this matter. . . . Please mail any and all correspondence directly to him at [a Bellport, New York, address].”<sup>2</sup>

10. In his affidavit Mr. Farrelly asserts that he has been Supervisor of Tax Conferences or Assistant Supervisor of Tax Conferences for BCMS since October 2002 and, that, as a result, he is knowledgeable about BCMS’s procedure for the preparation and mailing of conciliation orders. His affidavit describes that procedure, which culminates in the mailing of conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

11. 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 orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

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<sup>2</sup> The McMahon affidavit also states that a copy of the request for conference is included as attachment 3 to her affidavit. That attachment is identical to the copy of the request for conference in attachment 5 described above, except that it omits the first page of the request for conference. It is determined that the copy included in attachment 5 is the correct copy of the request for conference in this case, and that the Division inadvertently omitted the first page of the request for conference in the version that is included in attachment 3.

12. 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.

13. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR is a listing of taxpayers 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 number is recorded under the heading "Reference No." and is preceded by three zeros (000). The AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

14. The clerk's regular duties include associating 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 control number, bar code, and name and address of the taxpayer appear.

15. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the last page of the CMR.

16. 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 “3-16-18” was written in the upper right corner of each page of the CMR.

17. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up from BCMS by an employee of the Division’s Mail Processing Center.

18. Mr. Farrelly attests to the truth and accuracy of the copy of the four-page CMR, which contains a list of the conciliation orders issued by BCMS on March 16, 2018. The CMR lists 40 certified control numbers. His affidavit asserts that each such certified control number is assigned to an item of mail listed on the four pages of the CMR and that specifically, corresponding to each listed certified control number is the BCMS number and the name and address of the addressee. No postage and fee columns are visible in the copy of the CMR attached to the Farrelly affidavit and there are no totals for postage and fees paid on the last page of that CMR.

19. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Corresponding to certified control number 7104 1002 9735 4143 1246 is reference number 000274128, along with the name and last known address of petitioners, Jean R. Daniel and Niquette Joseph.<sup>3</sup> Mr. Farrelly’s affidavit states that the BCMS clerk noted on page two on the CMR, next to Jean R. Daniel and Niquette Joseph’s name, “Order ret./unclaim. addr. ok. Remained (reg.): 4/17/18.” According to Mr. Farrelly, this means that, on April 17, 2017,

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<sup>3</sup> The CMR contains an error in the name of one of the addressees. The document identifies one addressee as Joseph-Niquette rather than Niquette Joseph. Given the obvious nature of the error in Niquette Joseph’s name and the correctness of petitioner Jean R. Daniel’s name on the CMR, the error appears to be inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

BCMS mailed a copy of the conciliation order to Jean R. Daniel and Niquette Joseph by regular mail, which Mr. Farrelly avers is consistent with the policy of BCMS of remailing, by regular mail, any orders returned by the Post Office.

20. Information regarding the conciliation order issued to petitioners' then-representative is contained on page one of the CMR. Corresponding to certified control number 7104 1002 9735 4143 1208 is reference number 000274128, along with the name and last known address of petitioners' then-representative, George Joseph. Specifically, the Bellport, New York, address listed on the CMR is the same address referenced on petitioners' request for conference for George Joseph. Mr. Farrelly's affidavit states that the BCMS clerk noted on page one on the CMR, next to George Joseph's name, "Reps copy of order ret./unclaim. no updated addr avail. for rep. remailed (reg.): 4/17/18." This means, according to the Farrelly affidavit, that on April 17, 2017, BCMS mailed a copy of the conciliation order to George Joseph by regular mail, pursuant to BCMS's standard policy noted above.

21. The affidavit of Fred Ramundo stated that he has been a supervisor in the Division's mail room since December 2013, and that, as a result of that experience, he is familiar with present and past mail room procedures as relate to BCMS orders. In his affidavit, Mr. Ramundo 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 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 signature to the CMR indicating receipt by the post office.

22. In this particular instance, the postal employee affixed a postmark dated March 16, 2018, to each page of the four-page CMR. The postal employee also wrote and circled the number "40" and initialed page four to indicate the total pieces of mail received at the post office.

23. Mr. Ramundo 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 is picked up at the post office by a member of Mr. Ramundo'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.

24. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto, including the CMR, Mr. Ramundo states that on March 16, 2018, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Jean R. Daniel and Niquette Joseph, and another piece of mail addressed to George Joseph, to a branch of the USPS in Albany, New York, in sealed "postpaid" envelopes 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 March 16, 2018, for the records of the Division. Mr. Ramundo 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.

25. In response to the notice of intent, petitioners do not dispute the Division's mailing proof and acknowledge receiving the conciliation order. They argue, however, that their petition should be considered timely, citing the five-day extension afforded by CPLR 2103 (b) (2) for measuring the period of time prescribed by law for responding to a paper served by mail.

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

A. In *Matter of Victory Bagel Time, Inc.* (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 may 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 petitions 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 at the taxpayer's last known address (*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, Inc.*).

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). 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 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 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. Here, the Division's proof is not sufficient to establish that it mailed the conciliation order to petitioners on March 16, 2018 to their last known address. Specifically, the Division's mailing proof here is not sufficient to show that the Mount Sinai, New York, address to which the conciliation order was mailed was petitioners' last known address (*see Matter of Katz* [proper mailing of a conciliation order includes mailing it to the taxpayer's last known address]). The

phrase “last known address” is defined by Tax Law § 691 (b) as “the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address.” The Tax Law does not specifically set forth what constitutes appropriate notification of a change of address. Where the effect of a statutory notice conferring protest rights is at issue, it is appropriate to refer to federal case law and statutes regarding issuance of analogous statutory notices to clarify the meaning of the term “last known address” and what constitutes an appropriate notification of a change of address (*see* Tax Law § 607 [a]; *Matter of Campos-Liz*, Tax Appeals Tribunal, January 12, 2017). The last known address of a taxpayer has been defined for federal purposes as the taxpayer’s last permanent address or legal residence known by the Internal Revenue Service (IRS) or the last known temporary address of a definite duration to which the taxpayer has directed the IRS to send all communications (*Matter of Campos-Liz*, citing *Alta Sierra Vista, Inc. v Commissioner*, 62 TC 367, 374 [1974]), *affd sub nom Alta Sierra Vista, Inc. v Commissioner*, 538 F2d 334 [9<sup>th</sup> Cir 1976]). Generally, the last known address will be the address listed on the taxpayer’s last tax return filed with the IRS, unless there is “clear and concise notification” by the taxpayer of a change of address (*see id.*; *Looper v Commissioner*, 73 TC 690 [1980] [concluding that the IRS’s designation of a temporary address as the taxpayer’s last known address was unreasonable in light of the circumstances]).

Here, it is clear that the Division’s motion papers rely on the request for conference as proof that the Mount Sinai, New York, address is petitioners’ last known address, but it is not clear how that request for conference proves that point. The request for conference does not have any address for petitioners on it. The Division focuses on the fact that the request for conference

asks whether the address on the subject notice is correct and petitioners checked the “yes” box. However, it is not clear what difference this makes because there is no proof in the record that the Mount Sinai, New York, address was the address used on the subject notice, since that document is not in the record and none of the affidavits in the record makes such an assertion.

Even assuming that the Mount Sinai, New York, address was the mailing address for petitioners used on the subject notice, the request for conference still would not be a proper source for petitioners’ last known address. Since the request for conference is certainly not a return, it would only be considered a source for petitioners’ last known address if it was considered a notification of a change of address. By checking the “yes” box, petitioners did not indicate that the address on the subject notice was ever their *mailing* address or that they wanted future correspondence mailed henceforth to that address. Accordingly, it does not give a “clear and concise notice of an address change,” and thus does not qualify as a notification of a change of address (*see Tadros v Commissioner*, 763 F2d 89 [2d Cir 1985] [letter from taxpayer that did not indicate taxpayer had permanently moved or that address on letterhead was his new place of residence, or mention the older address or indicate that it was no longer to be used was inadequate to notify the Commissioner of a change of address]; *accord Pritchett v Commissioner*, 52 TCM 1056 [1986]). Finally, the fact that the address to which the conciliation order was mailed is the same address petitioners used on their petition in this matter is not relevant because that petition, which protests the conciliation order, was necessarily

received after the issuance of the conciliation order and thus cannot be a proper source of petitioners' last known address herein.<sup>4</sup>

G. In sum, the Division has not established that the conciliation order CMS No. 274128, relating to assessment ID number L-045926382, was properly mailed to petitioners at their last known address on March 16, 2018. Since no evidence was presented to establish proper mailing of the subject conciliation order, the Division has not met its burden to show that the petition was untimely filed with respect thereto. Consequently, the notice of intent to dismiss petition is properly rescinded as to the conciliation order.

H. The notice of intent to dismiss petition is hereby rescinded. 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 10, 2019

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE

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<sup>4</sup> The request for conference asks the Division to send "any and all correspondence directly to Mr. George Joseph," petitioners' representative at BCMS, at a Bellport, New York, address. This language is too ambiguous to constitute a notification of a change of address for petitioners, because it could be read to mean only that petitioners wanted their representative copied on any correspondence sent to them by the Division. Thus, the Division properly did not mail petitioners' copies of the conciliation order to that address.