

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOHN V. AND DAWN M. LITTLEFIELD** : ORDER  
for Redetermination of a Deficiency or for Refund of : DTA NO. 831236  
New York State and City Personal Income Taxes under :  
Article 22 of the Tax Law and the Administrative Code :  
of the City of New York for the Year 2018. :  
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Petitioners, John V. and Dawn M. Littlefield, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2018.

On June 23, 2023, the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), submitted documents in support of dismissal. Petitioners, appearing pro se, did not submit a response by September 7, 2023, the date which began the 90-day period for the issuance of this order. After due consideration of the documents submitted, Jessica DiFiore, 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 by the Bureau of Conciliation and Mediation Services.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioners, John V. and Dawn M. Littlefield, a notice of deficiency dated February 12, 2021, bearing assessment number L-

051518631, for the year 2018 (notice). The notice was issued to petitioners at an address in Buffalo, New York.

2. In protest of the notice, petitioners filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was conducted on March 29, 2022, and by conciliation order number 000327426, dated May 13, 2022, BCMS sustained the statutory notice.

3. On August 16, 2022, petitioners mailed a petition by first-class mail to the Division of Tax Appeals. The petition was hand-dated as signed on August 14, 2022, by Mr. Littlefield. Petitioners list their address as the same Buffalo, New York address that was listed on the notice. In their petition, petitioners challenge the notice and contend that they do not have access to the records evidencing the mileage deduction they claimed on their return.

4. On June 23, 2023, Donna M. Gardiner, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioners a notice of intent to dismiss petition. The notice of intent to dismiss petition stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that it did not appear to be timely filed as the relevant conciliation order was issued on May 13, 2022, but the petition was not filed until August 16, 2022, or 95 days later.

5. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, in relevant part, the following documents: (i) an affirmation of Maria Matos, dated August 10, 2021; (ii) an affidavit of Joseph DiGaudio, sworn to on August 2, 2023; (iii) a "Certified Record for Manual Mail – CMS 37 – BCMS Order" (CMR) postmarked May 11, 2022; (iv) an affidavit of Susan Ramundo, sworn to on August 9, 2023; (v) a copy of the

conciliation order and cover sheet, both dated May 13, 2022; (vi) a copy of the petition filed with the Division of Tax Appeals; and (vii) a copy of the notice.

6. Maria Matos, an attorney in the Office of Counsel of the Division, asserts that the conciliation order was issued and mailed to petitioners on May 11, 2022, at their last known address, and that this address was the same address that was reflected on the notice. She states that while the conciliation order is dated May 13, 2022, it was issued on May 11, 2022. Ms. Matos states that the petition was untimely because it was filed more than 90 days from the date the conciliation order was issued and requests that the notice of intent to dismiss be sustained.

7. Joseph DiGaudio is the assistant director of BCMS. He has served in that title since July of 2021. Prior to holding that position, he was the supervisor of tax conferences and an assistant supervisor of tax conferences. As part of his duties as assistant director, he is familiar with the operations and procedures of BCMS, including the preparation and mailing of conciliation orders. This procedure culminates 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.

8. Mr. DiGaudio avers that conciliation orders mailed within the United States are sent by certified mail with the number assigned to that conciliation order by BCMS written in the caption. The BCMS Data Management Services Unit prepares the computer-generated 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 them.

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, where applicable, 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." The AFP Unit prints the CMR, cover sheets, and cover letters using a printer located in BCMS. These documents are then 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 name and address 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 can be seen.

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 "Mail Room: 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, "5-13-22" is written in the upper right corner of each page of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of May 11, 2022.

14. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are retrieved from BCMS by an employee of the Mail Processing Center. The Division's Mail Processing Center delivers the CMR along with the envelopes containing the cover sheets, cover letters, and conciliation orders to the USPS.

15. Mr. DiGaudio attested to the truth and accuracy of the copy of the five-page CMR, which contains a list of conciliation orders issued by the Division on May 11, 2022. He explains that the CMR was for conciliation orders that were originally scheduled to be mailed on May 13, 2022, but were instead part of a batch of conciliation orders that were mailed on May 11, 2022. Mr. DiGaudio did not explain this change or why the hand-written date of 5-13-22 was written in the upper right corner of each page of the CMR instead of 5-11-22.

16. The CMR lists 59 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, and the name and address of the addressee. There are no deletions from the list. Portions of the copy of the CMR were redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

17. Information regarding the conciliation order issued to petitioners is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 1745 1070 is reference/CMS number 000327426, along with petitioners' names and a Buffalo, New York, address. A cover sheet dated May 13, 2022, bears petitioners' names and the same Buffalo, New York, address that appears on the CMR, shows the same certified control number, 7104 1002 9735 1745 1070, as that listed on the CMR for petitioners' entry, and bears the same CMS number as that listed on the CMR and the conciliation order.

18. Susan Ramundo has been a manager of the mail room of the Division since 2017. As manager, she is fully knowledgeable of both present and past office procedures as they relate to BCMS orders. She attests to the regular procedures followed by her staff in the mail room in the ordinary course of business when delivering outgoing mail to branch offices of the USPS. She 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 sealed, 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.

19. In this case, the postal employee affixed a postmark dated May 11, 2022, to each page of the CMR. The postal employee also handwrote the number 59 next to the “TOTAL PIECES RECEIVED AT POST OFFICE” and initialed the last page of the CMR. The postmark on the mail record is the official acknowledgement by the United States Post Office for the pieces of mail recorded on that mail record. The Department’s Mail Processing Center specifically requested that the postal employees either circle the number of pieces received or indicate the number received by writing in the number of pieces received on the mail record.

20. Ms. Ramundo avers that the CMR is the Division’s record of receipt by the USPS of 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 Ms. Ramundo’s staff the 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.

21. Based on her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto, and the CMR, Ms. Ramundo avers that on May 11, 2022, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioners at their Buffalo, New York address, in a sealed postpaid envelope for delivery by certified mail. She states it was mailed on May 11, 2022, even though it was originally dated for mailing on May 13, 2022. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to and accepted by the USPS on May 11, 2022, for the records of BCMS. Ms. Ramundo asserts that the procedures described in her 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 petitioners on May 11, 2022.

#### ***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]). It is well established that the 90-day statutory time limit is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Thus, the Division of Tax Appeals issued a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4).

B. 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.

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. 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 Cato*; *Matter of DeWeese*). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*id.*).

D. 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 Cato*). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The Division may meet its burden of establishing proper mailing by providing proof of a standard mailing procedure and that such procedure was followed by “producing affidavits from individuals with the requisite knowledge



of mailing procedures and a properly completed CMR” (*Matter of Balan*, Tax Appeals Tribunal, October 26, 2016; *see also Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

E. In this case, the Division has not met its burden. The affidavits of Mr. DiGaudio and Ms. Ramando establish the Division’s mailing procedure. However, the CMR indicates that this procedure was not followed. Mr. DiGaudio averred in his affidavit that the BCMS clerk inserts the date the conciliation orders were mailed on the top of each page, and that in this case, the hand-written date was “5-13-22.” Mr. DiGaudio is correct to note that the CMR does reflect a hand-written note that the conciliation orders were mailed on May 13, 2022. However, an issue of fact exists because the affidavits and affirmation submitted in support of the motion allege that the conciliation orders were in fact alleged to be mailed on May 11, 2022. Mr. DiGaudio simply states that the CMR for the conciliation orders was originally scheduled to be mailed on May 13, 2022, but was instead part of a batch that was mailed on May 11, 2022. It is not clear when or who decided the conciliation orders would be sent out on May 11, 2022, or why the CMR reflects the hand-written notations “5-13-22.” Additionally, both the cover letter and the conciliation order are dated May 13, 2022. To make a finding that the CMR was properly completed on these facts would be to make assumptions of facts that are not part of the record. Because the Division has failed to establish that the standard procedures for issuing conciliation orders were followed, it has not established that the conciliation order dated May 13, 2022, was mailed to petitioners at their last known address on May 11, 2022.

F. The Division may overcome an inadequacy in evidence of mailing by providing evidence of actual receipt by the taxpayer (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017). In such a case, the 90-day period to protest the conciliation order commences with receipt of the same (*see id.*). Here, the Division has failed to establish actual receipt of the

conciliation order by the taxpayers. Accordingly, the Division has failed to show that petitioners' protest of the conciliation order was more than 90 days after the issuance of the conciliation order making it untimely.

G. It should also be noted that Ms. Matos' affirmation is dated August 10, 2021. Despite being dated in such year, Ms. Matos attests to the last known address of the petitioners on May 11, 2022, a date almost a year in the future. Accordingly, the Division would fail to establish proof of mailing on this fact alone.

H. The notice of intent to dismiss petition, dated June 23, 2023, is rescinded. The Division of Taxation shall have 75 days from the date of this order to file an answer to the petition of John V. and Dawn M. Littlefield.

DATED: Albany, New York  
November 30, 2023

/s/ Jessica DiFiore  
ADMINISTRATIVE LAW JUDGE