

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANCISCO AND ISABEL DE LOS SANTOS : DETERMINATION
DTA NO. 850103
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Tax under :
Article 22 of the Tax Law and the Administrative Code of :
the City of New York for the Year 2020. :
:

Petitioners, Francisco and Isabel De Los Santos, filed a petition for a redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for year 2020.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Daniel Schneider, Esq., of counsel), filed a motion on February 2, 2024, seeking an order dismissing the petition pursuant to section 3000.5 of the Rules of Practice and Procedure of the Tax Appeals Tribunal, Tax Law §§ 170 (3-a) and 2010 (4), and 20 NYCRR 4000.3. Petitioners, appearing pro se, did not respond to the motion by March 4, 2024, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers, the affirmation and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals lacks jurisdiction over the petition.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Francisco and Isabel De Los Santos, a notice of deficiency, dated August 4, 2021, bearing assessment identification number L-053613449 (notice).

2. On August 17, 2021, petitioners filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On March 18, 2022, BCMS issued a conciliation default order, CMS No. 000331833, to petitioners. The conciliation default order stated, in part, that a conciliation conference was scheduled for March 4, 2022 and further that:

“Notice of the Conciliation Conference was mailed on January 24, 2022. The requester failed to appear personally, or by representative, via telephone. A Default has been duly noted.”

The conciliation default order sustained the notice and dismissed petitioners' request.

4. Included as an exhibit with the Division's motion papers is a properly completed “Certified Record for Manual Mail - CMS-37 - BCMS Order” postmarked March 18, 2022, showing that the conciliation default order was mailed on that date to petitioners and their then-representative, Pedro Alvarez, at their addresses, respectively, listed on pages two and five of the request.

5. On March 23, 2022, BCMS received a letter from petitioners requesting that the conciliation default order be vacated. By letter to petitioners and Mr. Alvarez, dated March 24, 2022, BCMS granted petitioners' request to vacate the conciliation default order and informed them that they would be advised of the date and location of the conciliation conference.

6. On April 4, 2022, petitioners filed a petition with the Division of Tax Appeals in protest of the notice. Attached to the petition is a copy of the conciliation default order.

7. A conciliation conference was held by BCMS via teleconference on June 3, 2022. On September 9, 2022, BCMS issued a conciliation order, CMS No. 000331833, to petitioners for notice number L-053613449. The conciliation order sustained the notice.

8. Petitioners did not respond to the Division's motion.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (*see* Tax Law § 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a], [b]). The filing of a request for conciliation tolls the statute of limitations for filing a petition (*see* Tax Law § 170 [3-a] [b]). After an order is rendered by the conciliation conferee, the taxpayer then has 90 days (or thirty days in certain situations not relevant here) to file a petition with the Division of Tax Appeals (*see* Tax Law § 170 [3-a] [e]). A request for a conciliation conference may not be filed concurrently with the filing of a petition with Division of Tax Appeals and if a petition is filed for the same matter pending before BCMS prior to the issuance of a conciliation order, such petition is premature (*see Matter of Sawlani*, Tax Appeals Tribunal, September 14, 1995). A taxpayer does, however, have the option to discontinue the conciliation proceeding by making a written request to BCMS, and such taxpayer then has ninety days (or thirty days in certain situations not relevant here) to file a petition with the Division of Tax Appeals (*see* Tax Law § 170 [3-a] [b]).

Where a conciliation default order has been issued due to a taxpayer's failure to appear at a BCMS conference, a taxpayer may file a written application within 30 days after the issuance of the order dismissing the timely request, and "such order may be vacated and a conciliation conference scheduled where the requester shows a reasonable excuse for the nonappearance. *In the alternative*, the requester may file a petition with the Division of Tax Appeals" (20 NYCRR 4000.5 [b] [3] [emphasis added]).

In this case, on August 17, 2021, petitioners filed a request with BCMS in protest of the notice. A conciliation conference was scheduled for March 4, 2022, and petitioners failed to appear. A conciliation default order was then issued on March 18, 2022. On March 23, 2022, BCMS received a letter from petitioners requesting that the conciliation default order be vacated. By letter dated March 24, 2022, to petitioners and their then-representative, Mr. Alvarez, BCMS granted petitioners' request to vacate the conciliation default order and informed them that they would be advised of the date and location of the conciliation conference. On April 4, 2022, petitioners filed a petition with the Division of Tax Appeals in protest of the same notice that was the subject of the pending conciliation proceedings. At the time of the filing of the petition, a conciliation order had not been issued and the proceedings were pending at BCMS. Petitioners have offered no evidence that they discontinued the conciliation proceedings at any time. A conciliation conference was subsequently held by BCMS on June 3, 2022, and an order was issued on September 9, 2022, for the same notice that is the subject of petitioners' petition here.

The regulations of the Department of Taxation and Finance are clear that where a requester fails to appear at a conciliation conference and a conciliation default order is issued, the taxpayer may *either* make a written request to vacate the default order *or* may file a petition with the

Division of Tax Appeals (*see* 20 NYCRR 4000.5 [b] [3]). A taxpayer may not do both concurrently. Because petitioners filed the petition in this matter prior to the issuance of the conciliation order, the petition is premature and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Sawlani; see also* Tax Law § 170 [3-a]).

B. The Division of Taxation's motion to dismiss is granted and the petition of Francisco and Isabel De Los Santos is dismissed.

DATED: Albany, New York
May 02, 2024

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE