

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ALBERT C. AND NANCY P. STRICKLAND, JR. : DECISION
for Redetermination of a Deficiency/Revision of a : DTA No. 812222
Determination or for Refund of New York State Personal :
Income Tax under Article 22 of the Tax Law for the :
Year 1988. :
:

Petitioners Albert C. and Nancy P. Strickland, Jr., 10205 Oak Pond Circle, Charlotte, North Carolina 28277, filed an exception to the order of the Administrative Law Judge issued on December 30, 1993. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioners did not file a brief. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on March 8, 1994 which began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioners timely filed a petition for redetermination of a deficiency.

FINDINGS OF FACT

We find the following facts.

A Notice of Deficiency (#L-004872151-2) dated December 30, 1991 in the amount of \$1,824.69 was issued to petitioners.

On January 22, 1992, petitioners notified the Department of Taxation and Finance that they disagreed with the amount due and requested Conciliation Conference Forms which forms, dated

March 26, 1992, were subsequently filed with the Bureau of Conciliation and Mediation Services (hereinafter the "BCMS") of the Department of Taxation and Finance.

The BCMS, by Conferee Mr. Thomas Dwyer of the Department of Taxation and Finance, issued a Conciliation Default Order (CMS #120936), dated March 12, 1993, to petitioners sustaining the statutory notice (Notice #L-004872151-2).

On June 28, 1993, the Division of Tax Appeals received a letter and other documentation from petitioners by certified mail #P075603286. The letter, dated June 22, 1993, stated: "[a]ttached please find correspondence together with other supporting documentation which was forwarded to Mr. Thomas Dwyer via certified mail on June 9, 1993. Per Mr. Dwyer's letter dated June 16, 1993, I am forwarding this information to the above address, accordingly." The other documentation enclosed with the June 22, 1993 letter included a copy of a June 9, 1993 letter and revised worksheet addressed to the New York State Department of Taxation and Finance, Bureau of Conciliation and Mediation Services, W.A. Harriman Campus, Albany, New York 12227, Attn: Mr. Thomas Dwyer, and a copy of a June 16, 1993 letter from Mr. Thomas Dwyer to petitioners. Mr. Dwyer's letter stated:

"[t]his is in regard to your letter of June 9, 1993.

"As stated in the Conciliation Default Order dated March 12, 1993, you had thirty (30) days from that date to have the matter reopened at the conciliation conference level. In the alternative you had ninety (90) days to file a petition with the Division of Tax Appeals. Since the thirty (30) day period has lapsed, I no longer have jurisdiction in this matter.

"If you did file the petition with the Division of Tax Appeals, you will have the (sic) pursue the matter at that level."

On August 26, 1993, the Division of Tax Appeals received by regular mail a letter and other documentation including a petition requesting a redetermination of a deficiency for Notice/Assessment #L-004872151-2.

On October 21, 1993, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit, issued a Notice of Intent to Dismiss the Petition in this matter as untimely. This Notice was sent by certified mail and advised petitioners that pursuant to section

170(3-a)(e) of the Tax Law, a petition must be filed within 90 days from the date a Conciliation Order is issued and that the petition in this matter was not mailed until August 23, 1993, or 164 days later. The parties were given 30 days within which to submit their written comments in response to this Notice. This certified mail was returned to the Division of Tax Appeals on November 22, 1993.

The Division of Taxation (hereinafter the "Division") responded by letter dated November 12, 1993 and submitted the following documents in response to the Notice of Intent to Dismiss.

An affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences in the BCMS of the Department of Taxation and Finance (hereinafter "the Chyrywaty affidavit"). This affidavit sets forth the routine procedures followed in the ordinary course of business of the BCMS in the preparation and mailing of conciliation orders. Attached to this affidavit are two exhibits denominated "A" and "B." Exhibit "A" consists of a one-page certified mail record of the BCMS, bearing the date of March 12, 1993. Exhibit "B" is a one-page Conciliation Default Order dated March 12, 1993 in the Matter of Albert C. and Nancy P. Strickland, Jr.

The Chyrywaty affidavit states that all conciliation orders are mailed by certified mail. BCMS prepares and maintains Certified Mail Records ("CMRs") which are a listing of taxpayers to which conciliation orders are sent by certified mail on a particular day.

As part of the regular procedure of preparing conciliation orders for mailing, a clerk in BCMS verifies the names and addresses of taxpayers who are listed on the CMR. A certified mail control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer. The clerk records on the CMR the certified control number from each envelope next to the appropriate taxpayer's name.

Each page of the CMR is a separate and individual CMR for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office." There is also a space on each

individual CMR for the receiving postal employee to sign in acknowledging receipt. After being signed by the postal employee and having the postmark for the particular date affixed to the CMR, it is returned to BCMS and maintained in the regular course of business as a permanent record.

An affidavit of Daniel B. Lafar, Principal Mail and Supply Clerk with the Department of Taxation and Finance (hereinafter "the Lafar affidavit"). Mr. Lafar is fully familiar with the operation and procedures of the Mail and Supply Room ("the Mail Room"). Mr. Lafar's duties include the supervision of Mail Room staff in delivering outgoing Department mail to branch offices of the United States Postal Service. Mr. Lafar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the Mail Room in the regular course of business, and which were followed in particular, on March 12, 1993.

As part of these procedures, when conciliation orders are placed in the "Outgoing Certified Mail" basket in the Mail Room, each envelope is weighed, sealed and postage and fees are affixed. Postage and fee amounts are then recorded on the CMR. A Mail Room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the Mail Room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. A postal employee then affixes his or her signature and/or a postmark to the certified mail record acknowledging receipt by the post office of the items of certified mail recited therein. After the CMR has been signed and/or stamped by the United States Postal Service it is returned to the originating office of the Department of Taxation and Finance.

The one-page CMR attached as Exhibit "A" of the Chyrywaty affidavit shows the addressees of conciliation orders mailed on March 12, 1993. The certified control numbers on

the CMR run consecutively.¹ The CMR shows that an envelope bearing certified control number P229447730 was addressed to Albert C. and Nancy P. Strickland, Jr., 10205 Oak Pond Circle, Charlotte, NC 28277, and that 9 items of mail containing conciliation orders were delivered and accepted for certified mailing by the United States Postal Service. The CMR bears a March 12, 1993 postmark affixed by the Roesseville Branch of the United States Postal Service and contains the signature of the postal employee acknowledging the receipt and acceptance of the items of certified mail recited therein.

The Lafar affidavit affirms that on March 12, 1993, an employee of the Mail Room delivered 9 sealed postpaid envelopes for delivery by certified mail to the Roesseville Branch of the United States Postal Service, in Albany, New York. These envelopes included one piece of certified mail (bearing Certified No. P229447730) addressed to petitioners at 10205 Oak Pond Circle, Charlotte, NC 28277.

After receiving a copy of the Division's answer to the Notice of Intent to Dismiss the Petition, petitioners responded by a letter received by the Division of Tax Appeals on November 22, 1993 and submitted correspondence which was part of their original petition along with a copy of the Division's answer to the Notice of Intent to Dismiss the Petition. Petitioners' reply, in reference to documents included in the Division's answer, in part, states: "[t]he certified mail record which indicates that the Conciliation Default Order was mailed on March 12, 1993 is correct." Petitioners' reply further states, in paragraph 3: "[p]lease let me reiterate that I never received ANY correspondence from the State of New York Department of Taxation and Finance upon forwarding a Request for Conciliation Conference until I received a certified letter from Mr. Thomas Dwyer on March 12, 1993 (350 days without any correspondence whatsoever). This lack of communication is not only inconsiderate . . . it is unprofessional."

¹Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

OPINION

Pursuant to section 170(3-a)(e) of the Tax Law, a petition must be filed with the Division of Tax Appeals within 90 days from the date a Conciliation Order is issued.

Petitioners acknowledge receipt of the Conciliation Default Order dated March 12, 1993 and argue that they filed a petition by mailing it via certified mail to Mr. Thomas Dwyer, Conciliation Conferee, on June 9, 1993, within 90 days of the March 12, 1993 date, as prescribed by Sections 170(3-a)(e) of the Tax Law. Petitioners, while admitting they mistakenly forwarded the required information to the wrong party, namely, Mr. Dwyer, argue that based on the documented facts, it was clearly their intent to forward an appropriate response in a timely manner.

Petitioners' exception also includes attachments and other information pertaining to the assessment for the year 1988.

The Rules of Practice and Procedure of the Tax Appeals Tribunal for the Division of Tax Appeals provide, in pertinent part, that the date of the United States Postal Service postmark will be deemed to be the date of filing of any mailed document required to be filed under any provision of Article 40 of the Tax Law (20 NYCRR 3000.16[a][1]).

Although petitioners argue that the June 9, 1993 letter mistakenly sent to the Conferee should serve as their petition to the Division of Tax Appeals, the record before us lacks any evidence as to the actual mailing date of said letter or even the date of receipt by the Conferee.

The petition to the Division of Tax Appeals which was signed by petitioner on August 15, 1993, and mailed by regular mail, bears a United States Postal Service postmark of August 23, 1993. As noted earlier, under the Tax Appeals Tribunal's rules of practice, the date of the United States Postal Service postmark stamped on the envelope is deemed the date of filing. Accordingly, this petition was filed on August 23, 1993.

The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). June 10, 1993 was the last day petitioners

could timely file a petition with the Division of Tax Appeals. Since the petition was filed on August 23, 1993, the petition was not timely filed. Further, since the petition was not timely filed we will not address the merits of the case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Albert C. and Nancy P. Strickland, Jr. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Albert C. and Nancy P. Strickland, Jr. is dismissed.

DATED: Troy, New York
August 25, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner