

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
COFMEG REALTY CORP. : DECISION
for Revision of a Determination or for Refund : DTA No. 812680
of Tax on Gains Derived from Certain Real :
Property Transfers under Article 31-B of the :
Tax Law. :

Petitioner Cofmeg Realty Corp., c/o Maria Coffinas, Esq., 16 Court Street - Suite 3500, Brooklyn, New York 11241, filed an exception to the determination of the Administrative Law Judge issued on July 28, 1994. Petitioner appeared by its president Maria Coffinas, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Any reply brief by petitioner was due on November 15, 1994, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Cofmeg Realty Corp., sold 8315 4th Avenue, Brooklyn, New York.¹ A Notice of Determination (L002470852) was issued on May 9, 1991.

¹The record is silent as to the sale date, purchaser and sales price.

Petitioner timely requested a conciliation conference.

A Bureau of Conciliation and Mediation Services ("BCMS") conference was held on December 10, 1992. Petitioner appeared by its president, Maria Coffinas. A Conciliation Order (CMS No. 116971), dated November 26, 1993, was issued which denied the request and sustained the statutory notice (L002470852-5).

In a letter addressed to the Division of Tax Appeals, dated December 2, 1993, Ms. Coffinas requested a petition form as well as the Rules of Practice and Procedure of the Tax Appeals Tribunal.

By letter dated December 6, 1993, the Division of Tax Appeals advised Ms. Coffinas as follows:

"Your request for forms does not constitute a petition under the Tax Law nor does it extend the time limits for filing."

Enclosed were petition forms and the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Petitioner filed a petition with the Division of Tax Appeals dated March 1, 1994 and signed by Maria Coffinas, president, by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated March 9, 1994. The petition was received by the Division of Tax Appeals on March 14, 1994.

A cover letter from Maria Coffinas, president of Cofmeg Realty Corp., addressed to the Division of Tax Appeals accompanied the petition. In this letter, Ms. Coffinas states that she did not have a copy of the Conciliation Order and was therefore enclosing copies of the proposed consent.

Petitioner is seeking a revision of a determination which assessed real property transfer gains tax. The petition challenges the assessment of \$187,813.00 in tax, plus interest and penalties. The petition states, inter alia, that the Commissioner failed: (1) to consider the fact that no gain was realized "in the transaction involving the sale by petitioner" because the purchaser has failed to pay any part of the sales price except for approximately \$250,000.00,

and has filed Chapter 11 bankruptcy proceedings; and (2) "to properly credit the payments made and still due with regard to the construction financing."

By notice dated April 28, 1994, the Division of Tax Appeals advised petitioner as follows:

"You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

"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.

"The Conciliation Order was issued on November 26, 1993 but the petition was not mailed until March 9, 1994 or one hundred and three days later.

"Pursuant to section 3000.5(b)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, you are hereby given 30 days to submit written comments on the proposed dismissal."

Copies of this notice were sent to the Division of Taxation ("Division") and to Maria Coffinas, Esq.

On May 23, 1994, the Division of Tax Appeals received the Division's written comments concerning the Notice of Intent to Dismiss. Included therein were affidavits of Joseph Chyrywaty and Daniel B. LaFar, a copy of the BCMS certified mail record for November 26, 1993, and a copy of the Conciliation Order dated November 26, 1993.

Joseph Chyrywaty is the Supervisor of Tax Conferences in BCMS. His affidavit sets forth the custom and practice in the preparation and mailing of conciliation orders.

In his affidavit, Mr. Chyrywaty stated that, as part of his regular duties as Supervisor of Tax Conferences, he is fully familiar with the operations and procedures of BCMS. He indicated that the word processing unit of BCMS prepares conciliation orders and "Certified Mail Records" ("CMR"), which are listings of taxpayers to whom conciliation orders are sent by certified mail on a particular day. He also indicated that each page of a CMR is a separate and individual CMR for the conciliation orders listed on that page and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and "Total Number of Pieces Received at Post Office" for conciliation orders listed on just that page. There is also a space on each individual CMR for the receiving postal employee to sign.

Mr. Chyrywaty explained that both the conciliation orders and the CMR(s) are sent to a clerk who verifies the names and addresses on envelopes with the CMR(s). She also assigns a sequential "certified control number" to each envelope and lists it on the CMR next to the appropriate addressee's name. Mr. Chyrywaty further explained that the conciliation orders and the CMR are then picked up by an employee of the Division's mailroom.

Attached to Mr. Chyrywaty's affidavit as Exhibit "A" are the three pages of the CMR containing a list of the conciliation orders allegedly issued by BCMS on November 26, 1993, which he asserts bears the information relating to petitioner's order and is a true and accurate copy of such record.² He identified the Conciliation Order mailed to petitioner as listed on page 2 of the three-page CMR and that the certified control numbers run consecutively, except certified number P8438300081 was not listed or used, for the three pages. He also indicated there were no deletions from the three-page CMR.

The mailing record submitted is as follows: on each page is the caption which lists the name and address of the sender as BCMS, CMR "conciliation orders issued November 26, 1993." It lists in table form for each item sent the certified number, the name and address of the addressee, the postage, the fees and has a space for remarks. The information listed on page 2 of the CMR for petitioner is Certified No. P843830080, Cofmeg Realty Corp., c/o Maria Coffinas, 16 Court Street, Brooklyn, NY 11241. Across the bottom of each page are spaces for: total number of pieces listed, the number of pieces received by the post office and the name of the post office's receiving employee. Review of the bottom of page 2 of the CMR indicates that the numbers written in are "12" and that the postal representative's signature is illegible. Each page of this three-page CMR is date stamped November 26, 1993 by the Albany, New York, Roessleville Branch of the United States Postal Service, although the postmark is somewhat faint and slightly illegible.³

²Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

³On page 2 of the CMR, the date of November 26, 1993 is clear; Albany, NY is somewhat faint; "Roessleville BR" is somewhat illegible; the remainder of the postmark is illegible.

Mr. Chyrywaty further indicated that the Division's mailroom returned a copy of the postmarked CMR to BCMS and that the CMR is kept in BCMS as a permanent record.

Daniel B. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include the supervision of mailroom staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on November 26, 1993.

Mr. LaFar noted that after a notice is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the staff weighs and seals each envelope; postage and fees are affixed and the postage and fee amounts are recorded on the CMR. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the CMR indicating receipt by the U.S. Postal Service and it is returned the following day to the originating office within the Division (here BCMS).

The LaFar affidavit affirms that on November 26, 1993, an employee of the mailroom delivered a sealed, post-paid envelope for delivery by certified mail addressed to Cofmeg Realty Corp., "c/o Maria Corrinas [sic]", 16 Court Street, Brooklyn, NY 11241 to the Roessleville Branch of the U.S. Postal Service in Albany, New York.

On May 31, 1994, the Division of Tax Appeals received from petitioner its written comments, which consisted of a two-page document entitled "Opposition to Intent to Dismiss Petition" signed on its behalf by Maria Coffinas.

Ms. Coffinas asserts in her opposition that "the date of the signed conciliation order does not by itself constitute the date of issuance of the order." She states that she was pregnant when the order was issued, and that she experienced a very difficult pregnancy, which included confinement to bed with a home monitoring machine, prior to the birth of her son on April 26,

1994. She contends that due to her medical difficulties, which kept her out of her office for "a great period of time", she was not aware that the 90 days had lapsed. She maintains that in early March she "suddenly remembered this matter and immediately arranged" for her office to mail the petition.

Lastly, Ms. Coffinas asserts that the petition sets forth a meritorious basis for the request for revision of the determination. Furthermore, she contends that:

"It would be unfair and unjust for the petition to be dismissed on a technicality when the merits have not been addressed.

"The equities mandate that the petitioner be afforded the opportunity to be heard."

OPINION

The Administrative Law Judge found that the Division met its burden to establish proper mailing of the Conciliation Order to petitioner on November 26, 1993 by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter. The Administrative Law Judge also found that the CMR in this case was substantially the same as the Postal Form 3877.

With respect to Maria Coffinas' assertion that she had a reasonable excuse for late filing the petition, the Administrative Law Judge, relying on Matter of Perillo (Tax Appeals Tribunal, August 2, 1990) and Matter of Rathgaber (Tax Appeals Tribunal, April 5, 1990), stated that "[t]he late filing of a petition cannot be excused by illness or extenuating circumstances" (Determination, conclusion of law "E"). The Administrative Law Judge further found that without a timely petition having been filed, the Division of Tax Appeals has no jurisdiction to review the matter (Tax Law § 170[3-a][e]).

In view of the above, the Administrative Law Judge dismissed the petition as untimely because it was not filed until March 9, 1994 which was not within 90 days of the issuance of the Conciliation Order.

On exception, petitioner, citing Matter of Montesanto (Tax Appeals Tribunal, March 31, 1994), argues that a Postal Form 3877 was not used and, therefore, the Administrative Law

Judge erred in relying on the CMR as being probative evidence of mailing of the Conciliation Order. Petitioner also argues that the Chyrywaty and LaFar affidavits are in conflict because the Chyrywaty affidavit states that the conciliation order was mailed to "c/o Maria Coffinas" while the LaFar affidavit states that an envelope addressed to "c/o Maria Corrinas" was delivered to the post office.

In response, the Division argues that section 914(1.4) of Domestic Mail Manual 47, dated April 10, 1994, provides that a privately printed, properly completed, firm mailing book (here, the CMR) may be used in place of Postal Form 3877. The Division also argues that "the use of the name 'Corrinas' rather than 'Coffinas' in the LaFar affidavit is clearly a typographical error" and that a "review of the CMR for November 26, 1993 clearly indicates that the conciliation order was sent to 'c/o Maria Coffinas'" (Division's letter brief, p. 1).

The Administrative Law Judge correctly and adequately addressed all of the issues raised before her, and we find no basis in the record before us for modifying the Administrative Law Judge's determination on these issues in any respect. Therefore, we affirm the determination of the Administrative Law Judge on these issues for the reasons stated in said determination.

However, we will comment on petitioner's statement in its brief in support that "the CMR has not been found by the Tax Appeals Tribunal to be highly probative evidence of mailing. As has Postal Form 8377 [sic]" (Petitioner's brief, p. 2). We find that petitioner has erred in its interpretation of the Montesanto decision. In Matter of Montesanto (supra), while it was stated that "a properly completed Form 3877 is highly probative evidence that the notice was sent to the address specified," that decision held that "the Division's proof that the Conciliation Order was sent by certified mail on . . . is the properly completed CMR which is substantively the same as the Postal Form 3877" (emphasis added). Therefore, a properly completed CMR provides the same probative evidence of mailing as does a properly completed Postal Form 3877.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Cofmeg Realty Corp. is denied;

2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Cofmeg Realty Corp. is dismissed.

DATED: Troy, New York
April 20, 1995

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

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