

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TRANS COUNTY CONSTRUCTION, INC.	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 813295
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1988.	:	

Petitioner Trans County Construction, Inc., c/o John W. Nill, President, P.O. Box 596, Southampton, New York 11969, filed an exception to the order of the Administrative Law Judge issued on February 2, 1995. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation submitted a letter stating it would not be filing a brief which was received on April 6, 1995 and 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. Commissioners Dugan and DeWitt concur.

ISSUE

Whether petitioner timely filed its 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.

A conciliation conference was held in the above matter on November 19, 1993 and by Conciliation Order (CMS No. 125106) dated August 12, 1994, petitioner's request was denied and the statutory notice sustained.

On November 14, 1994, petitioner, c/o John W. Nill, president, filed a petition with the Division of Tax Appeals, contesting \$83,927.32, the amount deemed due by the Division of Taxation ("Division") for withholding taxes.¹

On November 18, 1994, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition, pursuant to Tax Law § 170.3-a(e), on the basis that a petition must be filed within 90 days from the date a conciliation order is issued. The Notice of Intent to Dismiss indicates that the Conciliation Order in this case was issued on August 12, 1994, but that the petition was not filed until November 14, 1994, or 94 days later.

Pursuant to 20 NYCRR 3000.5(b)(5), following the issuance of the Notice of Intent to Dismiss Petition, the parties are afforded 30 days within which to submit documents and comments with regard to said notice. Petitioner responded in a timely fashion, by submitting a letter, dated and postmarked December 15, 1994, from its president, along with attachments.

As proof of mailing of the Conciliation Order to petitioner, the Division submitted the affidavits of Joseph Chyrywaty and Daniel B. LaFar, employees of the Division, as well as a copy of the certified mail record containing a list of the conciliation orders allegedly issued by the Division on August 12, 1994, including one addressed to petitioner (Exhibit "A") and a copy of the Conciliation Order (CMS No. 125106) dated August 12, 1994 (Exhibit "B").

The affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services ("BCMS") of the Division, sets forth the Division's general procedure for preparing and mailing out conciliation orders, which culminates in the orders being sent by certified mail by the United States Postal Service ("USPS") and BCMS receiving confirmation of the mailing via receipt of a postmarked copy of the certified mail record.

Mr. Chyrywaty's affidavit describes the computerized preparation of conciliation orders and the preparation of a certified mail record, the record listing those taxpayers to whom

¹This amount was gleaned from petitioner's petition, as no copy of the actual statutory notice is in the record.

conciliation orders are being sent by certified mail on a given day. A certified control number is assigned to each conciliation order listed on the certified mail record. According to Mr. Chyrywaty, each page of a certified mail record is a separate certified mail record 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" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to sign.

Mr. Chyrywaty attests to the truth and accuracy of the copy of the two-page certified mail record attached to his affidavit (see, Exhibit "A"), which contains a list of the conciliation orders allegedly issued by the Division on August 12, 1994, including, on page one, an order addressed to petitioner, Trans County Construction, Inc., at 78 Mariners Drive, Southampton, NY 11968. The certified control numbers run consecutively throughout the two pages and Mr. Chyrywaty states that there were no deletions from the mail record. Each of the two pages of the certified mail record submitted is date stamped August 12, 1994 by the Roessleville branch of the USPS in Albany, New York and each contains a postal employee's signature verifying receipt as well. At the bottom of page one, the page on which petitioner's certified number is listed, the number "12" has been filled in, presumably by the postal employee who signed the mail record, as the "Number of Pieces Listed by Sender," and the number "12" has also been filled in as the "Total Number of Pieces Received at Post Office," indicating no deletions from the record.

Attached to Mr. Chyrywaty's affidavit as Exhibit "B" is a copy of the Conciliation Order (CMS No. 125106), dated August 12, 1994, regarding notice number L005396864, which denied petitioner's request and sustained the Notice of Deficiency.

The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the USPS. Mr. LaFar states that the certified mail record is the Department of Taxation and

Finance's record of receipt by the Roessleville Branch of the USPS for pieces of certified mail, in that the mail record contains a USPS postmark and/or the signature of the postal employee who received the mail record and the pieces of certified mail from the Division. The certified mail record is retrieved from the USPS by a member of Mr. LaFar's staff the day after it is delivered there.

Mr. LaFar asserts that the staff's regular procedures were followed in mailing the piece of certified mail in question to petitioner on August 12, 1994.

In response to the foregoing, petitioner, by its president, Mr. Nill, submitted a letter, dated December 15, 1994, wherein he requests that his petition be reconsidered. Mr. Nill bases his request on the fact that he has had an acute flare up of a psoriasis skin disease since January of 1994 which has debilitated him and which has required his taking medication which leaves him drowsy and dizzy, "affect[ing] [his] judgment." Mr. Nill also mentions suffering side effects from a stroke in 1983 and notes that he is "limited in some aspects of performance."

In regard to the fact that, although the 90-day period for filing a petition expired on November 10, 1994, his petition was sent by UPS overnight mail on Friday, November 11, 1994 (for Saturday delivery), Mr. Nill explains that when he saw on the Conciliation Order that a petition had to be filed within 90 days of the date of the order, in his "confused state due to medication" he was taking for his skin disorder, he "thought the 90 days would expire in three months, or on November 12, 1994."

Finally, Mr. Nill urges that the records necessary to prove his case are unavailable to him as they are tied up in his bankruptcy case, claiming:

"[t]hese records are available to NYS through the bankruptcy trustee and NYS was properly notified of my filing, but did not avail themselves of the opportunity, and due to their deadlines, denied the conciliation request."

Attached to his letter are copies of (1) a Physician's Statement for Insurance Forms which reveals that petitioner was treated by his doctor on October 13, 1994 for psoriasis; and (2) a 1 1/3-page statement from Corwith Pharmacy, Inc. regarding, inter alia, the uses and side effects of and the precautions for taking this particular psoriasis medication. It is noted that, consistent

with Mr. Nill's assertion, among the possible side effects listed for the drug are drowsiness, dizziness, headache, vision changes, and irritability.

OPINION

In the order issued below, the Assistant Chief Administrative Law Judge held that:

"[p]etitioner's petition was sent by UPS overnight mail to the Division of Tax Appeals on November 11, 1994 but was not received, and thus, not deemed filed until November 14, 1994 (see, 20 NYCRR 3000.16[a][1]), or 4 days beyond the 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170.3-a[e]; 20 NYCRR 4000.5[c][4])" (Order, conclusion of law "A").

The Assistant Chief Administrative Law Judge reviewed various sections of the Tax Law and New York Codes, Rules and Regulations (NYCRR) relating to proceedings before the Division of Tax Appeals, petition filing requirements and the requesting of a conciliation conference and held that in the matter at hand:

"petitioner requested a conciliation conference, the conference was held, and petitioner's notice was sustained by a Conciliation Order dated August 12, 1994. According to Tax Law § 170.3-a(e), that order would be binding upon petitioner unless, within 90 days from the date of issuance of the order, he filed a petition with the Division of Tax Appeals challenging the notice" (Order, conclusion of law "C").

The Assistant Chief Administrative Law Judge also reviewed case law relating to: 1) jurisdiction of the Division of Tax Appeals; 2) the issue of timeliness of the petition and the Division's burden of proving proper mailing of the order in question; 3) a "properly mailed" order, presumption of receipt by the person to whom it was addressed and a right to rebut said presumption; and 4) mailing evidence required of the Division.

The Assistant Chief Administrative Law Judge, after such case law review, then held that "[t]he Division has introduced adequate proof of its standard mailing procedure of conciliation orders [and has also] established that the general issuance procedure was followed on August 12, 1994, in the generation and mailing of the Conciliation Order in question" (Order, conclusion of law "H").

Finally, the Assistant Chief Administrative Law Judge, while being sympathetic to and addressing a December 15, 1994 letter relating to petitioner's personal situation, held that "[t]he law does not endow the Division of Tax Appeals with the power to grant such extensions" (Order, conclusion of law "I"), but noted that petitioner could pay the disputed tax and within two years from the date of payment, apply for a refund.

On exception petitioner argues that while it did not receive the conciliation order until August 15, 1994, the Division used the order's issuance date of August 12, 1994, but then used the receipt date of its petition, November 14, 1994, not acknowledging the actual mailing date of November 11, 1994.

Petitioner's president, Mr. Nill, further argues that he was given a 32-page complicated and vague booklet to interpret what "within" 90 days means and that while previous notices which he complied with timely carried a "must respond by ____date," Mr. Nill, though ill, to the best of his ability thought he was timely responding to the 90-day statutory time limit.

Petitioner also argues that since the United States Post Office was closed on November 11, 1994, he paid additional money for guaranteed overnight delivery (Saturday) by United Parcel Service (UPS), but since the tax office was closed on Saturday, his petition was not received until Monday, November 14, 1994.

Petitioner's exception also contained copies of correspondence, the Consent Form from the Bureau of Conciliation and Mediation Services and the Conciliation Order, as well as: 1) an argument that the conciliation conference was not properly completed since corporate records held by the bankruptcy trustee were not reviewed by the auditor; 2) petitioner's request was, therefore, improperly denied and the statutory notice should be invalid as tax and penalties were improperly assessed; 3) the conciliation conferee accepted hearsay evidence from the State agent; and 4) New York State arbitrarily decided that all of petitioner's sub-contractors were employees.

The Division of Taxation concurred with the order issued by the Assistant Chief Administrative Law Judge and did not file a brief in opposition.

We affirm the Order of the Assistant Chief Administrative Law Judge.

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. While petitioner argues that it did not receive the conciliation order until August 15, 1994 and thought it was timely responding to the 90-day statutory time limit, 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 Wilson, Tax Appeals Tribunal, July 13, 1989).

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 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, and where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed the date of filing (20 NYCRR 3000.16[a][1]). In the matter at hand, since the United States Post Office was closed on November 11, 1994, petitioner sent its petition by UPS overnight mail to the Division of Tax Appeals. Under these rules, the date of delivery of a document sent by UPS is deemed the date of filing (see, Matter of Burks, Tax Appeals Tribunal, July 11, 1991).

The remaining arguments in petitioner's exception are not relevant to the issue of timeliness of the petition. 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]). November 10, 1994 was the last date petitioner could timely file a petition with the Division of Tax Appeals, and since the petition was filed on November 14, 1994, the petition was not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Trans County Construction, Inc. is denied;
2. The order of the Assistant Chief Administrative Law Judge is affirmed; and

3. The petition of Trans County Construction, Inc. is dismissed.

DATED: Troy, New York
August 24, 1995

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Donald C. DeWitt

Donald C. DeWitt
Commissioner