

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SAMUEL P. SPORN : DECISION
 : DTA No. 813408
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Years 1975 through 1977. :

Petitioner Samuel P. Sporn, 593 Third Street, Brooklyn, New York 11215-3002, filed an exception to the order of the Administrative Law Judge issued on March 2, 1995. Petitioner appeared by Howard A. Tanz, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter stating no brief in opposition would be filed on May 4, 1995, 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. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUE

Whether petitioner timely filed his petition following the issuance of the conciliation order.

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 June 13, 1994 and by Conciliation Order (CMS No. 129003), dated August 19, 1994, petitioner's request was denied and the statutory notice sustained (although the interest owed was recomputed based on the fact that the tax assessed had been paid in full).

On November 21, 1994, petitioner, Samuel P. Sporn, filed a petition with the Division of Tax Appeals, seeking a redetermination of the deficiency or a refund of \$45,697.71 (\$14,055.00 in tax; \$31,642.71 in interest) owed to the Division of Taxation ("Division") pursuant to the Notice of Deficiency and Conciliation Order (which, as noted, recomputed the interest owed). It is clear from an August 10, 1994 letter to petitioner's representative from the conciliation conferee that petitioner has paid \$14,055.00 of the amount owed. It is unclear if any of the interest owed has been paid.

On December 29, 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 19, 1994, but that the petition was not filed until November 21, 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 January 7 and postmarked January 9, 1994, from petitioner's representative, along with attachments. In this letter, petitioner acknowledges that the petition was not sent until November 19, 1994;¹ however, petitioner argues that by the "calendar method" of counting days - - a method petitioner refers to as the "common practice for filing of tax forms" and a "general practice" -- November 19, 1994 is 90 calendar days from the August 19, 1994 date of issuance of the Conciliation Order ("i.e. September 19, 1994, 30 days, October 19, 1994, 60 days and November 19, 1994, 90 days"). Petitioner asserts that the Conciliation Order should have been more specific about the due date of the petition, indicating outright the November 17, 1994 date rather than stating that the petition must be filed "within 90 days from the date of this order."

¹The actual mailing date as indicated by a United States Postal Service stamp was, as noted, November 21, 1994. The November 19, 1994 date to which petitioner refers represents the date stamped on the envelope by an office postal meter, not the Postal Service.

Petitioner further contends that the letter received from the Petition Intake, Review and Exception Unit following his request for the Rules of Practice should have stated outright the "unusual filing due date of November 17, 1994." Claiming that the only time the November 17, 1994 date was specifically indicated was after the petition was filed, petitioner maintains that "[i]n view of the ambiguity created it is reasonable to withdraw the Motion To Dismiss." Finally, petitioner avers that the method of calculating 90 days is not clearly stated in Tax Law § 170.3(a)-(e), and that a good faith effort was made to mail the petition on November 19, 1994, the date petitioner calculated as 90 days from the date of issuance of the Conciliation Order.

As proof of mailing of the petition, petitioner encloses a copy of the face page of the envelope containing the petition which has an office postal meter stamp on it dated November 19, 1994. Petitioner encloses, as well, copies of the August 19, 1994 cover letter from the conciliation conferee and the August 31, 1994 letter from the Petition Intake, Review and Exception Unit regarding his request for petition forms and the Rules of Practice and Procedure.

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 19, 1994, including one addressed to petitioner and one addressed to petitioner's representative (Exhibit "A"), and a copy of the Conciliation Order (CMS No. 129003) dated August 19, 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. Chyrywat's affidavit describes the computerized preparation of conciliation orders and the preparation of a certified mail record, the record listing those taxpayers to whom 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. Chyrywat, 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. Chyrywat attests to the truth and accuracy of the copy of the five-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 19, 1994, including, on page one, an order addressed to petitioner, Samuel P. Sporn, at 593 3 Street, Brooklyn, NY 11215-3002 and an order addressed to Howard Tanz as legal representative of Samuel Sporn, at 350 Northern Blvd., Great Neck, NY 11021. The certified control numbers run consecutively throughout the five pages and Mr. Chyrywat states that there were no deletions from the mail record. Each of the five pages of the certified mail record submitted is date stamped August 19, 1994 by the Roessleville branch of the U.S. Postal Service 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 and petitioner's representative's certified numbers are listed, the number "14" has been filled in as the "Number of Pieces Listed by Sender," and the number "14" has also been filled in as the "Total Number of Pieces Received at Post Office," indicating no deletions from the record.

Attached to Mr. Chyrywat's affidavit as Exhibit "B" is a copy of the Conciliation Order (CMS No. 129003), dated August 19, 1994, regarding notice number L006187698, 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 Postal Service. Mr. LaFar states that the certified mail record is the Department of Taxation and Finance's record of receipt by the Roesseville Branch of the Postal Service for pieces of certified mail, in that the mail record contains a Postal Service 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 Postal Service 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 pieces of certified mail in question to petitioner and his representative on August 19, 1994.

OPINION

The Administrative Law Judge dismissed petitioner's petition as the petition was not filed within 90 days from the issuance of the Conciliation Order. The Administrative Law Judge found that the envelope containing the petition bore a United States Postal Service Postmark of November 21, 1994, which is 4 days beyond the 90-day period for filing the petition.

The Administrative Law Judge went on to state that when the timeliness of a petition is at issue, the Division must establish proper mailing of the Conciliation Order. In this regard, the Administrative Law Judge found that the Division established proper mailing of the Conciliation Order 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 noted that the certified mail record lists the following certified numbers, Z181282757 and Z181282758, for the conciliation orders addressed to Samuel P. Sporn and Howard Tanz, C.P.A.; however, those certified numbers do not appear on the conciliation order itself nor are they referred to in the affidavits. The Administrative Law Judge found, however, that:

"(1) the Conciliation Order is dated August 19, 1994 and the certified mail record contains 'Conciliation Orders Issued August 19, 1994'; (2) petitioner does not dispute the claimed date of issuance of the Conciliation Order; (3) the 'presumption of official regularity' is at work here; [footnote omitted] and (4) petitioner has not challenged the presumption of official regularity by the introduction of any meaningful evidence to the contrary, together, offer sufficient corroboration to tie the Conciliation Order in question to the certified mail record, and thus, to the August 19, 1994 issuance date" (Determination, conclusion of law "H").

Next, the Administrative Law Judge rejected petitioner's argument that the Division's mailing rules are ambiguous. The Administrative Law Judge stated that "[h]ad petitioner researched the pertinent case law, he would have discovered that 90 days means exactly 90 days, not approximately 90 days (see, e.g., Matter of Bove, Tax Appeals Tribunal, February 22, 1991; Matter of Western New York Flying Club, Tax Appeals Tribunal, January 25, 1991; Matter of Perillo, Tax Appeals Tribunal, August 2, 1990; Matter of Transworld Corp., Tax Appeals Tribunal, October 11, 1990)" (Determination, conclusion of law "I").

The Administrative Law Judge also rejected petitioner's proof of mailing because it was insufficient. The Administrative Law Judge found that the United States Postal Service postmark on the envelope containing the petition is controlling and any other postmark is overridden by the United States postmark (20 NYCRR 3000.16[b][3]). Thus, the petition was mailed on November 21, 1994 as indicated by the United States postmark and the office metered postmark of November 19, 1994 is disregarded.

On exception, petitioner argues that he has been denied due process of law because of the Administrative Law Judge's strict adherence to the ambiguous and complex rules for filing petitions and that these rules do not clearly specify the method of calculating the 90-day period for filing a petition.

The Administrative Law Judge correctly and adequately addressed all of the issues raised before him and we find no basis in the record before us for modifying the Administrative Law

Judge's order on these issues in any respect. Therefore, we affirm the order of the Administrative Law Judge on these issues for the reasons stated in said order.

As noted by the Administrative Law Judge, petitioner is not without a remedy here. He may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If petitioner's request for a refund is denied, or six months has expired since the refund claim was filed and the Division has taken no action on it, he may then proceed with another petition requesting a hearing (Tax Law § 689[c]; see, Matter of Rosen, Tax Appeals Tribunal, July 19, 1990).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Samuel P. Sporn is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Samuel P. Sporn is dismissed.

DATED: Troy, New York
October 26, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner