

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SALVATORE FRESINA, OFFICER OF SAL MASONRY CONTRACTORS, INC.	:	DECISION DTA No. 814776
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Periods June 23, 1990 through June 30, 1990 and June 23, 1991 through June 30, 1991.	:	

Petitioner Salvatore Fresina, Officer of Sal Masonry Contractors, Inc., 2821 Gardner Road, Pompey, New York 13138, filed an exception to the order of the Administrative Law Judge issued on May 9, 1996. Petitioner appeared pro se. 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 submitted a letter stating it would not be filing a brief in opposition. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

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 September 15, 1995 and by Conciliation Order (CMS No. 131107), dated November 3, 1995, petitioner's request was denied and the statutory notices were sustained.

On February 9, 1996, the Division of Tax Appeals received a petition seeking redetermination of deficiencies or refund of personal income tax asserted to be due pursuant to notice numbers L007107700 and L007107701.¹ The envelope containing the petition bore a metered mail stamp of February 2, 1996 and a United States Postal Service postmark of February 7, 1996.

On March 13, 1996, 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 the petition must be filed within 90 days from the date of the conciliation order. The Notice of Intent to Dismiss Petition indicated that the Conciliation Order in this case was issued on November 3, 1996, but that the petition was not filed until February 7, 1996, or 96 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 March 18, 1996 and received by the Division of Tax Appeals on March 20, 1996. The letter stated, in pertinent part, that petitioner placed a call to the Division of Tax Appeals in Troy, New York on Friday, January 26, 1996 and "was told by one of the clerks that there could be no verbal extension and I must file by February 2, 1996." The letter further stated that it was petitioner's understanding that "as long as an item is post-marked and received by the addressee within a reasonable proximity to that post-mark, it is considered timely." Petitioner's letter also indicated that it was his understanding that it is possible to give a petitioner an additional 30 days to file a corrected petition if not in proper form.

On April 3, 1996, the Division of Taxation ("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

¹The notices of deficiency issued to petitioner were not made a part of the record; accordingly, the dates of issuance and the amounts asserted to be due by the Division of Taxation are unknown.

on November 3, 1995, including one addressed to petitioner (Exhibit "A") and a copy of the Conciliation Order (CMS No. 131107) dated November 3, 1995 (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 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 conciliation orders are being sent by certified mail on a given day. A clerk in BCMS, as part of her regular duties, verifies the names and addresses of the taxpayers listed on the certified mail record. A certified control number is assigned to each conciliation order listed on the certified mail record. The clerk then records on the certified mail record, the certified control number from each envelope. The conciliation orders and the certified mail record are picked up, in BCMS, by an employee of the Division's mail room. 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 three-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 November 3, 1995, including, on page 2, an order addressed to petitioner, Salvatore Fresina, Officer of Sal Masonry Contractors, Inc., 7495 Bluegrass Blvd., Pompey, NY 13138-9999. The certified control numbers run consecutively throughout the three pages and Mr. Chyrywaty states that there were no deletions from the mail record. Each of the three pages of the certified mail record submitted is date stamped

November 3, 1995 by the Colonie Center branch of the U.S. Postal Service in Albany, New York and each contains a postal employee's initials verifying receipt as well. At the bottom of page 2, the page on which petitioner's certified number is 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. 131107), dated November 3, 1995, regarding notice numbers L007107700 and L007107701, which denied petitioner's request and sustained the statutory notices.

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. More specifically, after a notice is placed in the "Outgoing Certified Mail" basket in the mail room, a member of his staff weighs and seals each envelope and places postage and fee amounts on the letters. A mail processing clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. Thereafter, a member of his staff delivers the stamped envelopes to the Colonie Center branch of the United States Post Office in Albany, New York. In this particular instance, the postal service employee affixed a postmark to each individual page of the certified mail record, filled in the line for "Total Number of Pieces Received at Post Office" and initialed the certified mail record to indicate that this was the total number of pieces received by the Postal Service.

Mr. LaFar states that the certified mail record is the Division's record of receipt, by the Postal Service, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the certified mail record is picked up from the Postal Service by a member of Mr. LaFar's staff on 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 November 3, 1995.

On April 12, 1996, petitioner submitted a letter which stated that, after reviewing the Division's evidence, he conceded that "the letter" (referring to what was presumably the conciliation order) had been placed at the U.S. Post Office sometime before midnight on November 3, 1995. Petitioner contends, however, that the letter dated November 3, 1995 (containing the conciliation order) "was received on Tuesday, November 7, 1995, and not on Friday, November 3, 1995."

OPINION

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.

The Administrative Law Judge dismissed petitioner's petition as it was not filed within 90 days from the issuance of the conciliation order on November 3, 1995. The Administrative Law Judge found that the envelope containing the petition bore a United States Postal Service postmark of February 7, 1996 and a metered mail stamp of February 2, 1996. The Administrative Law Judge stated that when an envelope has a United States Postal Service postmark in addition to a postmark not made by the United States Postal Service, the latter postmark is disregarded (20 NYCRR 3000.22[b][3]) and the United States Postal Service postmark is deemed to be the date of filing (20 NYCRR 3000.22[a]). The Administrative Law Judge, therefore, found that the petition was untimely because it was filed on February 7, 1996, 96 days after the issuance of the conciliation order.

The Administrative Law Judge then stated 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 record which showed that the procedure was followed in this matter.

With regard to petitioner's argument that "as long as an item is post-marked and received by the addressee within a reasonable proximity to that post-mark, it is considered timely," the

Administrative Law Judge determined that petitioner has not cited any authority for this argument and, in addition, it is contradicted by the Tax Appeals Tribunal's Rules of Practice and Procedure. The Administrative Law Judge next determined that in regard to petitioner's statement "that it is possible to give a petitioner an additional 30 days to file a corrected petition if not in proper form, such provision (20 NYCRR 3000.3[d][1]) does not extend the time limitation for the filing of a petition (see, 20 NYCRR 3000.3[c])" (Determination, conclusion of law "I").

On exception, petitioner has submitted a copy of his petition dated February 2, 1996. In addition, petitioner submitted copies of various letters in an attempt to show that nonpayment was due to reasonable cause.

We affirm the order of the Administrative Law Judge. The conciliation order was issued to petitioner on November 3, 1995. The petition in this matter was not filed until February 7, 1996, or 96 days later. Therefore, the petition was not filed within the 90-day period.

In his exception, petitioner has attempted to address the merits of this case. We cannot address the merits of petitioner's case because, without a timely petition having been filed, we lack jurisdiction to review the matter.

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, he may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 170[3-a][a]; see, Matter of Rosen, Tax Appeals Tribunal, July 19, 1990).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Salvatore Fresina, Officer of Sal Masonry Contractors, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Salvatore Fresina, Officer of Sal Masonry

Contractors, Inc. is dismissed.

DATED: Troy, New York
January 30, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner