

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN F. CASESSA	:	DECISION
for Redetermination of a Deficiency/Revision	:	DTA No. 815291
of a Determination or for Refund of New York	:	
State and New York City Personal Income Tax	:	
under Articles 22 and 30 of the Tax Law for	:	
the Year 1986.	:	

Petitioner John F. Casessa, 87 4th Place, Apt. 2, Brooklyn, New York 11231-4021, filed an exception to the order of the Administrative Law Judge issued on November 14, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief on exception. 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 following facts.

A conciliation conference was held in the above matter on December 7, 1995 and by Conciliation Order (CMS No. 144855), dated March 8, 1996, petitioner's request was denied and the statutory notice sustained.

Petitioner filed a petition for redetermination of a deficiency of personal income tax for the year 1986. The petition was received by the Division of Tax Appeals on September 3, 1996. The envelope containing the petition bears a United States Postal Service postmark of August 30, 1996.

On September 26, 1996, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss Petition to petitioner for failure to file a timely petition. The Notice stated that the petition was not filed until August 30, 1996 or 175 days after the issuance of the Conciliation Order dated March 8, 1996. Following the issuance of the Notice of Intent to Dismiss Petition, the parties were given 30 days to respond. No response was received from petitioner to this Notice.

A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation (hereinafter the "Division"). In response, the Division submitted affidavits and documentary evidence establishing that the Conciliation Order was sent by certified mail to petitioner on March 8, 1996 at petitioner's last known address at 87 Fourth Place - Apt. 2, Brooklyn, New York 11231-4021. The affidavits submitted by the Division described the customary office practice in preparing and mailing conciliation orders. The documentary evidence consisted of a certified mailing record which lists on page two John F. & Lucille (dec'd) Casessa as addressee and bears a postmark of March 8, 1996. At the bottom of page two, the page listing petitioner as the addressee, the number "13" has been filled in as the "Total Number of Pieces Listed by Sender," and the number "13" has also been filled in as the "Total Number of Pieces Received at Post Office." The page also contains a postal employee's signature further verifying receipt at the post office.

On November 14, 1996, the Administrative Law Judge, sua sponte, ordered that the petition be dismissed with prejudice on the ground that it was not timely filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petition was not filed until August 30, 1996 or 175 days after the Conciliation Order was issued on March 8, 1996.

Petitioner filed an exception with the Tax Appeals Tribunal to the order of the Administrative Law Judge dismissing his petition.

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.

When the timeliness of the petition is at issue, the Division must establish proper mailing of the Conciliation Order. We find that the Division has met its burden to establish proper mailing of the Conciliation Order to petitioner on March 8, 1996 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this matter.

On exception, petitioner has not made any arguments relative to the timeliness of his petition. Instead, petitioner renews his argument made at the conciliation conference that he made timely inquiries regarding refunds of taxes paid on his Federal pension.

We affirm the order of the Administrative Law Judge. The Conciliation Order was issued to petitioner on March 8, 1996. The petition in this matter was not filed until August 30, 1996, or 175 days later. Therefore, petitioner's petition was not timely filed within the 90-day period and the Division of Tax Appeals lacks jurisdiction to review it (Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John F. Casessa is denied;

2. The order of the Administrative Law Judge is affirmed; and
3. The petition of John F. Casessa is dismissed with prejudice.

DATED: Troy, New York
May 29, 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