

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

FREDERICK AND CAROLE ERMEL :

DECISION
DTA NO. 816853

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
Year 1990. :

Petitioners Frederick and Carole Ermel, c/o David Weiss, CPA, Weiss & Allen, Suite 1300, 469 7th Avenue, New York, New York 10018, filed an exception to the determination of the Administrative Law Judge issued on May 27, 1999. Petitioners appeared by David Weiss, CPA. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel).

Neither petitioners nor the Division of Taxation filed briefs on exception. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners timely filed their petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "7" and "8" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioners, Frederick and Carole Ermel, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking review of a Notice of Deficiency of personal income tax dated October 25, 1995.

Following the conference held on June 19, 1996, the conciliation conferee issued a Conciliation Order (CMS No. 151645), dated November 1, 1996, which denied petitioners' request and sustained the Notice of Deficiency.

On November 23, 1998, the Division of Tax Appeals received the petition in this matter. Petitioners' petition was mailed by certified mail to the Division of Tax Appeals on November 20, 1998.

We make the following additional finding of fact:

On March 15, 1999, the Division of Taxation ("Division") by its representative Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter on the ground that petitioners failed to timely file a petition with the Division of Tax Appeals within 90 days of the issuance of a conciliation order. Petitioners did not respond to the motion of the Division.

In support of the Motion for Summary Determination, the Division submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division's

mailing procedures with respect to conciliation orders; a copy of a certified mail record; and a copy of the conciliation order which denied petitioners' request to reduce the amount of tax due and sustained the statutory notice.

The affidavit of Thomas J. English, Assistant Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the certified mail record ("CMR"), which is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. A BCMS clerk verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer or representative and then records on the CMR, under the heading "Certified No.," the certified control number from each envelope next to the appropriate name. Certified number P255265499 was used for the conciliation order mailed to petitioners and certified number P255265500 was used for the copy of the conciliation order mailed to David Weiss, petitioners' representative in this matter. The conciliation orders and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

According to Mr. English, each page of a CMR is a separate and individual 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 CMR for the receiving postal employee to affix his or her signature.

Mr. English states that the CMR for conciliation orders mailed on November 1, 1996 consisted of two individual pages; the conciliation order mailed to petitioners and to their representative was listed on page one of the two-page CMR. He indicates that the copy of the CMR attached to his affidavit is a true and accurate copy of the original. The certified control numbers on the CMR run consecutively on page one, from P255265493 through P255265506. All of the names and addresses listed on the CMR have been redacted except the entries for petitioners and their representative. Petitioners' names and address and their representative's name and address appear on page one of the CMR with the certified mail numbers P255265499 and P255265500, respectively, appearing next to their names. There are 14 entries and 14 certified mail numbers on page one of the CMR; there were no deletions.¹

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

Page one of the CMR is date stamped November 1, 1996 by the Colonie Center branch of the United States Postal Service ("USPS") and contains a postal employee's signature verifying receipt. At the bottom of page one, the page on which petitioners' and their representative's certified numbers are listed, the number "14" has been entered as the "Total Number of Pieces Listed by Sender" and the number "14" has also been entered as the "Total Number of Pieces Received at Post Office."²

Mr. English states that the Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a

¹We have modified finding of fact "7" of the Administrative Law Judge's determination in order to indicate that a copy of the conciliation order was also mailed to petitioners' representative.

²We have modified finding of fact "8" of the Administrative Law Judge's determination in order to indicate that a certified number for petitioners' representative is also listed on the CMR and verified by the postal employee.

permanent record. Mr. English also indicates that these procedures were the normal and regular procedures of BCMS on November 1, 1996.

The affidavit of James Baisley, Chief Processing Clerk in the Division's Mail Processing Center, sets forth the procedures followed by the Mail Processing Center in delivering outgoing certified mail to branches of the USPS. Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR.

A member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark or his or her signature to the CMR to indicate receipt by the USPS. In this case, the postal employee affixed a postmark to the CMR, wrote in the total number of pieces received ("14") and signed the CMR to indicate that 14 pieces were the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee wrote in the "Total Number of Pieces Received at Post Office" to indicate that 14 pieces were received is based upon the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the CMR.

Mr. Baisley states that, in the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and is delivered to the originating office by a member of his staff. He further

indicates that the regular procedures of the Mail Processing Center, concerning the mailing of certified mail, were followed in the mailing to petitioners on November 1, 1996.

Petitioners claim in their petition that they did not receive the Conciliation Order until collection action began on the unpaid Notice of Deficiency by the Department of Taxation and Finance's Tax Compliance Division.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge cited applicable provisions of the Tax Law and the Rules of Practice and Procedure of the Tax Appeals Tribunal allowing a motion for summary determination to be made before the Division of Tax Appeals and for such motion to be granted if, upon all the papers and proof submitted, it is sufficiently established that no material and triable issue of fact exists and, as a matter of law, a determination may be issued in favor of any party. The Administrative Law Judge concluded that since petitioners did not respond to the Division's motion for summary determination, petitioners were deemed to have conceded that the facts as presented in the affidavits submitted by the Division were correct. However, in determining the motion, the Administrative Law Judge noted that evidence must be viewed in a manner most favorable to the party opposing the motion.

The Administrative Law Judge noted that a conciliation order is "issued" at the time of its mailing to the taxpayer and that such order is binding on both the Division and the taxpayer unless the taxpayer petitions the Division of Tax Appeals for a hearing within 90 days from the date of the issuance of the order. The Division of Tax Appeals has no jurisdiction to consider the merits of a petition not filed within this 90-day period.

The Administrative Law Judge found that where the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order. The Division must prove a standard procedure used by it for the issuance of conciliation orders by one with knowledge of the relevant procedures; and must also prove that the standard procedure was followed in the particular instance in question. Based on the affidavits of two of its employees submitted in support of its motion, the Administrative Law Judge concluded that the Division had established that it mailed the conciliation order to petitioners by certified mail on November 1, 1996 at their last known address. Thus, the Administrative Law Judge concluded that a conciliation order was issued to petitioners on November 1, 1996 sustaining the Notice of Deficiency at issue. Since the petition was filed with the Division of Tax Appeals on November 20, 1998, the Administrative Law Judge observed that this date was well past the statutory 90-day period within which a petition may be filed. The Administrative Law Judge rejected petitioners' assertion that because the Division failed to prove their receipt of the order, their petition was timely filed. As a result, the Administrative Law Judge concluded that the petition was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of petitioners' case.

The Administrative Law Judge did note, however, that if petitioners paid the disputed tax, they could apply for a refund within two years from the date of payment. If their request for a refund was denied, they could then proceed with another petition requesting a hearing or a conciliation conference.

ARGUMENTS ON EXCEPTION

On exception, petitioners assert that the motion for summary determination should not have been granted because a triable issue of fact exists, in that neither petitioners nor their representative received the conciliation order sent by the Division by certified mail on November 1, 1996 and the Division failed to prove actual delivery of the copies of such order.

The Division did not present any argument in opposition to petitioners' exception.

OPINION

We affirm the determination of the Administrative Law Judge. Petitioners have presented the same arguments herein as were considered by the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the Tax Law and relevant case law to the facts of this case. We do add to the conclusions of the Administrative Law Judge, however, that the Division has presented sufficient proof to establish not only that the conciliation order was issued to petitioners by certified mail on November 1, 1996 but also to establish that a copy of such order was issued to petitioners' representative, David Weiss, by certified mail on that same date.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frederick and Carole Ermel is denied;
2. The determination of the Administrative Law Judge is sustained; and

3. The petition of Frederick and Carole Ermel is dismissed.

DATED: Troy, New York
February 17, 2000

/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