

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ATTILIO RENNY	:	DECISION
	:	DTA NO. 816918
for Revision of a Deficiency or for Refund of New York	:	
State and New York City Personal Income Tax under	:	
Articles 22 and 30 of the Tax Law and the City Income	:	
Tax Surcharge under Article 30-A of the Tax Law for the	:	
Period August 1, 1989 through December 31, 1990.	:	

Petitioner Attilio Renny, 6 Brussel Drive, New Hyde Park, New York 11040-3703, filed an exception to the order of the Administrative Law Judge issued on April 23, 1999. Petitioner appeared by Milton Shaiman, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a letter in lieu of a brief in support. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether petitioner timely filed his petition following the issuance of Conciliation Orders Dismissing Requests.

FINDINGS OF FACT

We find the following facts.

Petitioner requested conciliation conferences with the Bureau of Conciliation and Mediation Services (“BCMS”). However, petitioner’s requests were not timely filed and the requests for conciliation conferences were denied by Conciliation Orders Dismissing Requests Nos. 159100 and 159113, dated February 28, 1997.

On November 23, 1998, the Division of Tax Appeals received the petition in this matter. The petition was sent by certified mail on November 18, 1998.

On February 19, 1999, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The notice stated:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order Dismissing Request is issued.

The Conciliation Orders Dismissing Request were issued on February 28, 1997 but the petition was not filed until November 18, 1998 or six hundred and twenty-eight days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this notice to submit written comments on the proposed dismissal.

In response to the Notice of Intent to Dismiss, the Division of Taxation (hereinafter 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 Dismissing Requests; enclosing a copy of a certified mail record and enclosing copies of the Conciliation Orders Dismissing Requests.

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 Dismissing Requests. All Conciliation Orders Dismissing Requests mailed within the United States are sent by certified mail. BCMS prepares the Conciliation Orders Dismissing Requests and the certified mail record ("CMR") which is a listing of taxpayers to whom Conciliation Orders Dismissing Requests 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 Dismissing Request 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 numbers P482629025 and P482629058 were used for the Conciliation Orders Dismissing Requests mailed to petitioner. Certified numbers P482629026 and P482629059 were used for the Conciliation Orders Dismissing Requests mailed to petitioner's representative, Milton Shaiman, Esq. The Conciliation Orders Dismissing Requests and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center.

According to Mr. English, each page of a CMR is a separate and individual certified mail record for the Conciliation Orders Dismissing Requests 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 Dismissing Requests 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 Dismissing Requests mailed on February 28, 1997 consisted of five individual pages; the Conciliation Orders Dismissing Requests mailed to petitioner and his representative were listed on pages two and four of the five-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 throughout the five pages, from P482629001 through P482629071. All of the names and addresses listed on the CMR have been redacted except the entries for petitioner and his representative. Petitioner's name and address appear on pages two and four of the CMR with the certified mail numbers P482629025 and P482629058 appearing next to his name. Petitioner's representative's name and address appear on pages two and four of the CMR with the certified mail numbers P482629026 and P482629059.

Each of the five pages of the CMR is date stamped February 28, 1997 by the Colonie Center branch of the United States Postal Service ("USPS") and each contains a postal employee's initials verifying receipt. At the bottom of page two, one of the pages on which petitioner's and his representative's certified numbers are listed, the number "15" has been crossed out and the number "14" inserted 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." At the bottom of page four, the other page on which petitioner's and his 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.”

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 permanent record. Mr. English also indicates that these procedures were the normal and regular procedures of BCMS on February 28, 1997.

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 which includes, but is not limited to Conciliation Orders Dismissing Requests 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. The 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 signed each page of the CMR, affixed a postmark to each page of the CMR and noted the total number of pieces received by the USPS. With respect to page two of the CMR, it is indicated that “15” pieces of mail were listed by the sender. However, this number was crossed out and the number “14” was inserted to reflect that one piece of certified mail had been pulled from the CMR for that day. Mr. Baisley states that a piece of mail may be “pulled” for a number of reasons and will be segregated from the remaining group of notices and would be corrected and mailed at another

time. Mr. Baisley stated that no such deletion mark was made with respect to the listing for petitioner and his representative. With respect to page four of the CMR, it is indicated that "14" pieces of mail were delivered and received by the USPS.

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 mailings to petitioner and his representative on February 28, 1997.

In response to the Notice of Intent to Dismiss Petition, petitioner submitted a letter on March 29, 1999 stating that initially the protest was timely.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

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 November 18, 1998 or 628 days after the Conciliation Orders Dismissing Requests were issued on February 28, 1997.

ARGUMENTS ON EXCEPTION

Petitioner's arguments on exception are not relevant to the issue of timeliness of the petition.

OPINION

Tax Law § 170(3-a)(e) provides, in pertinent part, that a Conciliation Order Dismissing Request shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the Conciliation Order Dismissing Request is issued.

When the timeliness of the petition is at issue, the Division must establish proper mailing of the Conciliation Order Dismissing Request (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has met its burden to establish proper mailing of the Conciliation Orders Dismissing Requests to petitioner on February 28, 1997 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this case (*see, generally, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner's petition was not filed until November 18, 1998 or 628 days after the Conciliation Orders Dismissing Requests were issued. Therefore, we agree with the conclusion of the Administrative Law Judge that since petitioner failed to file his petition protesting the Conciliation Orders Dismissing Requests within 90 days, such petition was untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Attilio Renny is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The petition of Attilio Renny is dismissed.

DATED: Troy, New York
March 23, 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