

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
OTU A. AND CAROL O. OBOT	:	DECISION
for Revision of a Deficiency or for Refund of New York	:	DTA Nos. 817015
State Personal Income Tax under Article 22 of the Tax	:	And 817016
Law for the Years 1994 and 1995.	:	

Petitioners Otu A. and Carol O. Obot, 502 Windermere Boulevard, Amherst, New York 14226-2863, filed exceptions to the orders of the Administrative Law Judge issued on July 15, 1999. Petitioners appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioners filed a brief in support of their exceptions. 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 petitioners timely filed their petitions with the Division of Tax Appeals.

FINDINGS OF FACT

We find the following facts.

A conciliation conference was scheduled in the above matter on October 9, 1998.

However, neither petitioners nor a duly authorized representative of petitioners appeared at the

conciliation conference. Therefore, by conciliation default orders (CMS Nos. 166230 and 170419), the statutory notices were sustained.

On January 28, 1999, the Division of Tax Appeals received correspondence from petitioners protesting the conciliation default orders in this matter. The envelope containing the correspondence bore a United States Postal Service (“USPS”) postmark of January 26, 1999.

By letter dated February 17, 1999, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals advised petitioners that, in order to continue with their appeal in this matter, it would be necessary for them to complete and return the enclosed petition forms. Petitioners were given 30 days from the date of this letter to submit the completed petitions.

On March 22, 1999, petitions were received from petitioners in the proper form. The envelope containing the petitions bore a USPS postmark of March 18, 1999.

On May 11, 1999, the Petition Intake, Review and Exception Unit issued two Notices of Intent to Dismiss Petition to petitioners. The notices 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 Default Order is issued.

The Conciliation Default Order was issued on October 23, 1998 but the petition was not filed until January 26, 1999 or ninety-five 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 Notices 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; a copy of a certified mail record; and a copy of the conciliation default orders which dismissed petitioners’ request and sustained the statutory notices.

The affidavit of Thomas J. English, Assistant Supervisor of Tax Conferences in the Division’s Bureau of Conciliation and Mediation Services (“BCMS”), 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 numbers Z257570709 and Z257570714 were used for the conciliation default orders mailed to petitioners. The conciliation orders 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 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 October 23, 1998 consisted of one individual page. 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 from Z257570708 through Z257570718. All of the names and addresses listed on the CMR have been redacted except the entries for petitioners. Petitioners’ name and address appear on the CMR with the certified mail numbers Z257570709 and Z257570714 appearing next to their names. There are 11 entries and 11 certified mail numbers on the CMR; there were no deletions.

The CMR is date stamped October 23, 1998 by the Colonie Center branch of the USPS and contains a postal employee’s initials verifying receipt. At the bottom of the CMR, the number “11” has been entered as the “Total Number of Pieces Listed by Sender” and the number “11” 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 October 23, 1998.

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. 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 affixed a postmark to the CMR, wrote in the total number of pieces received ("11") and initialed the CMR to indicate that 11 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 11 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 October 23, 1998.

Petitioners did not respond to the Notices of Intent to Dismiss Petition.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge, *sua sponte*, ordered that the petitions be dismissed with prejudice on the ground that they were not timely filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petitions were not filed

until January 26, 1999 or 95 days after the conciliation default orders were issued on October 23, 1998.

ARGUMENTS ON EXCEPTION

In their exceptions, petitioners argue that the Petition Intake, Review and Exception Unit's letter of February 17, 1999 extended the time for them to file their petitions until March 17, 1999. Therefore, petitioners state that the petitions filed on January 26, 1999 were timely filed.

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 orders to petitioner on October 23, 1998 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this matter.

While the Petition Intake, Review and Exception Unit's letter could have been clearer, it certainly does not provide what petitioners allege in their exceptions. This letter was sent to petitioners because their original correspondence, purporting to be petitions, was not in the proper form, i.e., they lacked a signature of petitioners or their representative "beneath a statement that the petition is made with knowledge that a willfully false representation is a misdemeanor punishable under section 210.45 of the Penal Law" (20 NYCRR 3000.3[b]). If petitioners' correspondence that was filed on January 26, 1999 had been timely filed, then

petitioners would have been allowed 30 days to submit the completed petitions in proper form. However, this was not the case, and we are not empowered nor do we have the discretion to waive the 90-day period prescribed by statute to file a petition. The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]).

We affirm the orders of the Administrative Law Judge. The conciliation default orders were issued to petitioners on October 23, 1998. The petitions in this matter were not filed until January 26, 1999, or 95 days later. Therefore, petitioners' petitions were not timely filed within the 90-day period and the Division of Tax Appeals lacks jurisdiction to review them (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Otu A. and Carol O. Obot are denied;
2. The orders of the Administrative Law Judge are affirmed; and

3. The petitions of Otu A. and Carol O. Obot are dismissed with prejudice.

DATED: Troy, New York
February 24, 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