

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSE A. COLON AND CINDY A. RIVERA	:	DECISION
	:	DTA NO. 817267
for Revision of a Deficiency or for Refund of New York	:	
State Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 1994.	:	

Petitioners Jose A. and Cindy A. Colon, 144 Verona Parkway, Lindenhurst, New York 11757, filed an exception to the order of the Administrative Law Judge issued on November 8, 1999. Petitioners appeared by William S. Dempsey. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mark Volk, Esq., of counsel).

Petitioners filed a brief in support of their exception. 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 petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the following facts.

A conciliation conference was scheduled in the above matter on July 22, 1998. However, neither petitioners nor a duly authorized representative of petitioners appeared at the conciliation

conference. Therefore, by Conciliation Default Order (CMS No. 163073) dated August 14, 1998, the statutory notice was sustained.

On August 5, 1999, the Division of Tax Appeals received the petition in this matter. The envelope containing the petition bore a United States Postal Service (“USPS”) postmark of August 3, 1999.

On August 27, 1999, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners. 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 Default Order is issued.

The Conciliation Default Order was issued on August 14, 1998 but the petition was not filed until August 3, 1999 or three hundred and fifty-four 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 (“Division”) submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division’s mailing procedures with respect to conciliation default orders; a copy of a certified mail record; and a copy of the conciliation default order 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 default orders. All conciliation default orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation default orders and the certified mail record (“CMR”) which is a listing of taxpayers to whom conciliation default 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 default 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 Z257570267 was used for the conciliation default order mailed to petitioners. The conciliation default 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 default 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 default 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 default orders mailed on August 14, 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 Z257570264 through Z257570273. All of the names and addresses listed on the CMR have been redacted except the entry for petitioners. Petitioners’ name and address

appear on the CMR with the certified mail number Z257570267 appearing next to their names.

There are 10 entries and 10 certified mail numbers on the CMR; there were no deletions.

The CMR is date stamped August 14, 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 "10" has been entered as the "Total Number of Pieces Listed by Sender" and the number "10" 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 August 14, 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 ("10") and initialed the CMR to indicate that 10 pieces was 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 10 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 August 14, 1998.

In response to the Notice of Intent to Dismiss Petition, petitioners submitted a letter dated October 6, 1999 which enclosed material already in the record.

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 August 3, 1999 or 354 days after the Conciliation Default Order was issued on August 14, 1998.

ARGUMENTS ON EXCEPTION

Petitioner has resubmitted the same documents submitted in response to the Notice of Intent to Dismiss Petition which 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 Default Order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the Conciliation Default Order is issued.

When the timeliness of the petition is at issue, the Division must establish proper mailing of the Conciliation Default Order (*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 Default Order to petitioners on August 14, 1998 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).

Petitioners' petition was not filed until August 3, 1999 or 354 days after the Conciliation Default Order was issued. Therefore, we agree with the conclusion of the Administrative Law Judge that since petitioners failed to file their petition protesting the Conciliation Default Order within 90 days of its issuance, such petition was untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jose A. Colon and Cindy A. Rivera is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The petition of Jose A. Colon and Cindy A. Rivera is dismissed.

DATED: Troy, New York
August 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