

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH MARTIN	:	DECISION DTA NO. 817955
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1996.	:	

Petitioner Joseph Martin, P.O. Box 544, Browns Mills, New Jersey 08015, filed an exception to the order of the Administrative Law Judge issued on November 10, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition.

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

ISSUE

Whether petitioner timely filed his 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 April 28, 2000. However, neither petitioner nor a duly authorized representative of petitioner appeared at the conciliation

conference. Therefore, by Conciliation Default Order (CMS No. 177579) dated May 12, 2000, the statutory notice was sustained.

On August 15, 2000, 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 12, 2000.

On September 15, 2000, 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 Default Order is issued.

The Conciliation Default Order was issued on May 12, 2000 but the petition was not filed until August 12, 2000 or ninety-two 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, Carl Decesare and James Baisley, explaining the Division’s mailing procedures with respect to conciliation default orders; copies of the certified mail records for conciliation default orders mailed on May 12, 2000; a copy of the conciliation default order which dismissed petitioner’s request and sustained the statutory notice; and a copy of the request for conciliation conference.

The affidavit of Carl Decesare, Assistant Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services¹ ("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 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 P811141500 was used for the conciliation default order mailed to petitioner. 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. Decesare, 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. Decesare indicates that the copy of the CMR attached to his affidavit is a true and accurate copy of the original. All of the names and addresses listed on the CMR have been

¹Mr. Decesare became the Assistant Supervisor of Tax Conferences in May 2000 and had been the acting Assistant Supervisor of Tax Conferences since April 3, 2000.

redacted except the entry for petitioner. Petitioner's name and address appears on the CMR with the certified mail number P811141500 appearing next to his name. There are 7 entries and 7 certified mail numbers on the CMR; there were no deletions.

The CMR is date stamped May 12, 2000 by the Colonie Center branch of the USPS and contains a postal employee's initials verifying receipt. At the bottom of the CMR, there is a number entered in the space for "Total Number of Pieces Listed by Sender" which corresponds to the number entered in the space for "Total Number of Pieces Received at Post Office" on that same page. At the bottom of the CMR, the number "7" has been entered as the "Total Number of Pieces Listed by Sender" and the number "7" has also been entered as the "Total Number of Pieces Received at Post Office."

Mr. Decesare 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. Decesare also indicates that these procedures were the normal and regular procedures of BCMS on May 12, 2000.

The affidavit of James Baisley, Chief Mail 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 on the CMR.

A member of the staff delivers the sealed, 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 ("7") and initialed the CMR to indicate that "7" 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 "7" 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 petitioner on May 12, 2000.

Petitioner did not respond to the Notice of Intent to Dismiss Petition.

THE DETERMINATION 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 12, 2000 or 92 days after the Conciliation Default Order was issued on May 12, 2000.

ARGUMENTS ON EXCEPTION

Petitioner has presented arguments concerning his liability for the additional tax which are not relevant to the issue of timeliness of his petition. He also stated that he assumed the 90-day period for filing a petition with the Division of Tax Appeals was actually three months from the date of the Conciliation Default Order.

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.

A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). 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]). 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 petitioner on May 12, 2000 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 August 12, 2000 or 92 days after the Conciliation Default Order was issued. Therefore, we agree with the conclusion of the Administrative Law

Judge that since petitioner failed to file his 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 Joseph Martin is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Joseph Martin is dismissed.

DATED: Troy, New York
May 17, 2001

/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