

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

CLIFFORD AND ROBIN CATO :

DECISION
DTA NO. 820070

for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1997, 1998 and 1999. :

Petitioners Clifford and Robin Cato, 93 Nicholas Avenue, Staten Island, New York 10302, filed an exception to the order of the Administrative Law Judge issued on November 4, 2004. Petitioners appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation submitted a letter stating it would not be filing a brief in opposition. 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 filed a timely 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. These facts are set forth below.

Petitioners, Clifford and Robin Cato, filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Deficiency L-022780759.

Petitioners' request for conference lists the following as their address:

Clifford and Robin Cato
93 Nicholas Avenue
Staten Island, New York 10302-1105

Petitioners' request for conference also lists the following as their representative's name and address:

Angelo Coscia
1678 Hylan Boulevard
Staten Island, New York 10305

Petitioners' representative appeared at the conciliation conference held on January 7, 2004 on behalf of petitioners.

BCMS subsequently issued a Conciliation Order to petitioners (CMS No. 198321) dated March 12, 2004, which denied petitioners' request and sustained Notice of Deficiency L-022780759.

On June 16, 2004, petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated March 12, 2004.

On July 16, 2004, 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 of Intent to

Dismiss Petition indicates that the Conciliation Order in this matter was issued on March 12, 2004, but that the petition was not filed until June 16, 2004, or 96 days later.

In response to the issuance of the Notice of Intent to Dismiss Petition, petitioners submitted a letter and supporting documentation which claimed that there were mitigating circumstances which explained the late filing of the petition. Initially, petitioners admitted that the petition had been filed late. They went on to explain and substantiate the difficulty they had obtaining copies of bank statements, mortgage statements, canceled checks and deposit slips from JP Morgan Chase, Citimortgage, Inc., Citicorp Trust Bank and Chase Bank. Once petitioners received these documents they required time to review them in order to present a cogent argument in their petition. Finally, petitioners note that despite repeated efforts, they were unable to obtain a copy of the conciliation order from their representative.

In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioners' Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on March 12, 2004, and a copy of the subject March 12, 2004 Conciliation Order.

The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service ("USPS") certified mail and confirmation of the mailing through BCMS' receipt of a postmarked copy of the CMR.

The BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, to the conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

The AFP Unit also produces a computer-generated CMR entitled "Assessments Receivable, Certified Record for Presort Mail." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "3/12/04" is written in the upper right corner of each page of the CMR.

The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up, in BCMS, by an employee of the Division's Mail Processing Center.

Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on March 12, 2004. This CMR lists 47 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

Information regarding the conciliation order issued to petitioners is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0004 4796 is reference/CMS number 000198321, along with the following address:

Clifford and Robin Cato
93 Nicholas Avenue
Staten Island, New York 10302-1105

Page two of the CMR also contains information regarding a conciliation order issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002

9730 0004 4802 is reference/CMS number 000198321 along with the name and address of petitioners' representative as follows:

Angelo Coscia
1678 Hylan Boulevard
Staten Island, New York 10305

The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order 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. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

In this particular instance, the postal employee affixed a postmark dated March 12, 2004 to each page of the five-page CMR. The postal employee also wrote his or her initials and circled the number "47" contained on page 5 of the CMR where it states "total pieces received at post office."

Mr. Peltier states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the

originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on March 12, 2004, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Clifford and Robin Cato, 93 Nicholas Avenue, Staten Island, NY 10302-1105 and a piece of certified mail addressed to Angelo Coscia, 1678 Hylan Boulevard, Staten Island, NY 10305, to a branch of the USPS in Albany, New York in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on March 12, 2004 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioners and their representative on March 12, 2004.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge noted that a conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days of the date the conciliation order is mailed to the taxpayer. The Administrative Law Judge pointed out that the filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals.

The Administrative Law Judge stated that when the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the

conciliation order. The Division must demonstrate the standard procedure used by the Division for the issuance of conciliation orders by one with knowledge of the relevant procedures and also provide proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge found that the affidavits of two Division employees, Robert Farrelly and Bruce Peltier, provided adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail and that this standard mailing procedure was followed with respect to the conciliation order issued to petitioners and their representative. The Administrative Law Judge held that the Division had established that it mailed the conciliation order to petitioners and their representative by certified mail on March 12, 2004.

The Administrative Law Judge concluded that as the petition was filed on June 16, 2004, a date more than 90 days after the mailing of the conciliation order, the Division of Tax Appeals had no authority to hear petitioners' challenge to the conciliation order. The Administrative Law Judge advised, however, that petitioners were not without recourse here, for they may pay the disputed tax and, within two years from the date of payment, apply for a refund. If their request for a refund is denied, petitioners may then proceed with another petition requesting a hearing or conciliation conference.

ARGUMENTS ON EXCEPTION

In support of their exception, petitioners merely state that they have not been accorded justice in this proceeding and that they object to the availability of information concerning them on the internet.

OPINION

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case.

Petitioners have offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Clifford and Robin Cato is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Clifford and Robin Cato is dismissed.

DATED: Troy, New York
October 27, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner