

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JENNIFER MOSCHETTA A/K/A	:	DECISION
JENNIFER PERROTTA¹	:	DTA NO. 821227
	:	
for Redetermination of Deficiencies or for Refund of New	:	
York State Personal Income Tax Under Article 22 of the	:	
Tax Law for the Years 2001 and 2002.	:	

Petitioner, Jennifer Moschetta, filed an exception to the order of the Administrative Law Judge issued on February 1, 2007. Petitioner appeared by Allen Lokensky, Enrolled Agent. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

¹Although the record established that petitioner has used the name "Jennifer Perrotta" since 2005, she continued to use the name "Jennifer Moschetta" consistently for this proceeding, listing it as her name on the request for conciliation conference, filed May 18, 2005, and on her petition, filed July 10, 2006. The name "Jennifer Perrotta" was first used on her power of attorney, dated December 7, 2006, submitted to the Division of Tax Appeals without any explanation. For clarity and consistency, petitioner will be referred to as "Jennifer Moschetta" throughout this decision.

FINDINGS OF FACT

Two notices and demands for payment of tax due, notice numbers L-024968769-6 and L-024971491-1, dated July 3, 2006, were issued to petitioner, Jennifer Moschetta, by the Division of Taxation (“Division”) which assessed additional personal income tax for the years 2001 and 2002 in the amounts of \$438.00 and \$593.00, respectively, plus interest.

Petitioner filed a request for conference in the Bureau of Conciliation and Mediation Services (“BCMS”) on May 18, 2005. A Conciliation Order was issued on January 27, 2006, which denied the request and sustained the statutory notice. Petitioner filed a petition with the Division of Tax Appeals on July 10, 2006.

On September 20, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated as follows:

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 Order was issued on January 27, 2006, but the petition was not filed until July 10, 2006, or one hundred and sixty-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 issuance of the notice of intent to dismiss petition, the Division submitted the following: affidavits of three Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel, Bruce Peltier, the Mail and Supply Supervisor in the Division’s

Registry Unit, and Robert Farrelly, the Assistant Supervisor of Tax Conferences of BCMS of the New York State Department of Taxation and Finance; a copy of the petition filed with the Division of Tax Appeals on July 10, 2006; a copy of the conciliation order issued on January 27, 2006; and a copy of the certified mail record (“CMR”) containing a list of the conciliation orders issued by the Division on January 27, 2006.

In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner’s representative, Allen Lokensky, submitted a letter, dated November 9, 2006, which stated that petitioner had been selected for audit in retaliation for Mr. Lokensky’s representation of another taxpayer and filing a complaint with the tax commissioner. Mr. Lokensky argued that he waited for all the cases he had pending before BCMS to be completed before filing his petition on behalf of petitioner, since he considered the cases a “group” and did not want to separate them for purposes of filing petitions, regardless of the statutory time limits. However, petitioner did not argue that the petition was filed timely.

The Division submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (“USPS”), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the order and cover 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 were electronically sent to the Division's Advanced Function Printing Unit ("AFP Unit"). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

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

The clerk, as part of her regular duties, associated each cover sheet, conciliation order, and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear.

Pursuant to the general office practice, the BCMS clerk stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas," and also stamped "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit" on the last page of the CMR.

The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “1/27/06” was written in the upper right corner of each page of the CMR.

The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were 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 7-page CMR which contained a list of the 69 conciliation orders issued by the Division on January 27, 2006. The CMR listed 70 certified control numbers with one deletion from the list. Each such certified control number was assigned to an item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

Information regarding the Conciliation Order issued to petitioner was contained on page seven of the CMR. Corresponding to certified control number 7104 1002 9730 1140 6309 was reference number 000209515, along with petitioner’s name and address, which, at that time, was 359 East Frances Lane, Gilbert, AZ 85296. This address was listed as petitioner’s address on the power of attorney she filed on August 31, 2004 and appeared as her address in the Division of Taxation’s computer tracking system as of September 2005, where it was used on the 2004 New York personal income tax return and constituted her last known address.² A copy of the Conciliation Order was also mailed to petitioner’s representative, Allen Lokensky, by certified

²Petitioner has also used the address “211 Brittany Ct., Valley Cottage, NY 10989.” She listed it as her address on her request for conference, filed May 18, 2005, and again on her petition herein, filed July 10, 2006. But she reverted to the “359 East Frances Lane, Gilbert, AZ 85296” on her most recent power of attorney, dated December 7, 2006.

mail, which was referenced on the same CMR on page three as certified number 7104 1002 9730 1140 5951 and reference number 000209515.

The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

Here the postal employee affixed a postmark dated January 27, 2006 to each page of the seven-page CMR. The postal employee also wrote his or her initials and the number "69" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page seven of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record, indicating that 69 pieces of mail were actually received.

Mr. Peltier stated 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 was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the

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

Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on January 27, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Jennifer Moschetta, 359 East Frances Lane, Gilbert, AZ 85296, and a piece of certified mail addressed to Allen Lokensky, 209 Brittany Court, Valley Cottage, NY 10989, to a branch of the USPS in Albany, New York in sealed postpaid envelopes for delivery by certified mail. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the Postal Service on January 27, 2006 for the records of BCMS. Mr. Peltier asserted that the procedures described in his affidavit were 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 petitioner and his representative on January 27, 2006.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge found that a conciliation order is “issued” at the time of its mailing to the taxpayer and that such order is binding on both the Division and the taxpayer unless the taxpayer petitions the Division of Tax Appeals for a hearing within 90 days from the date of the issuance of the order. The Division of Tax Appeals has no jurisdiction to consider the merits of a petition not filed within this 90-day period.

The Administrative Law Judge noted that where the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order. The Division must prove a standard procedure used by it for the issuance of conciliation orders by one with

knowledge of the relevant procedures. It must also prove that the standard procedure was followed in the particular instance in question. Based on the affidavits of two of its employees submitted in support of the Notice of Intent to Dismiss Petition, the Administrative Law Judge concluded that the Division had established that it mailed the conciliation order to petitioner and her representative by certified mail on January 27, 2006 at their last known addresses. Since the petition was filed with the Division of Tax Appeals on July 10, 2006, the Administrative Law Judge observed that this date was well past the statutory 90-day period, within which a petition must be filed. As a result, the Administrative Law Judge concluded that the petition was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of petitioner's case.

The Administrative Law Judge noted that the unsworn letter of Mr. Lokensky does not raise a valid defense to the untimely filing of the petition. The Administrative Law Judge concluded that petitioner failed to directly challenge the Division's proof of mailing of the Conciliation Order with any credible evidence. Therefore, the Administrative Law Judge concluded that petitioner failed to meet her burden of proof.

ARGUMENTS ON EXCEPTION

On exception, petitioner argued that the Division of Tax Appeals has viewed the cases submitted as cases submitted by individual entities and then claimed the filings of the petitions in the case were submitted late. Petitioner also argued that the facts of all the cases show that they are part of twenty-one cases contested as a class action and responding to each individual case goes against the very nature of the case.

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.

A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see, 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 order (*see, 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 order to petitioner and to petitioner’s representative on January 27, 2006 by submitting affidavits describing its general mailing record, which showed that the procedure was followed in this case (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner’s petition was not filed until July 10, 2006, which is 74 days late. The law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see, Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Therefore, we affirm the conclusion of the Administrative Law Judge, that because petitioner failed to file her petition protesting the conciliation 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 Jennifer Moschetta is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The petition of Jennifer Moschetta is dismissed.

DATED: Troy, New York
June 19, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner