

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
JOSEPH AND ROSA CINARDI
for Redetermination of Deficiencies or for Refund
of New York State and City Personal Income Tax
under Article 22 of the Tax Law and the New York
City Administrative Code for the Years 2000, 2001
and 2002.

DECISION
DTA NO. 821267

Petitioners Joseph and Rosa Cinardi, 1349 81st Street, Brooklyn, New York 11228, filed an exception to the order of the Administrative Law Judge issued on February 22, 2007. Petitioners appeared by Sandro S. Paterno & Associates, PC (Sandro S. Paterno, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel). 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 timely filed their 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, Joseph and Rosa Cinardi, filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of notices of deficiency L-023627845, L-023627847 and L-023627849.

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

1349 81st Street
Brooklyn, New York 11228

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

Pio Andreotti
c/o M & P Tax Consultants
7204 20th Avenue
Brooklyn, New York 11204

Pio Andreotti appeared at the conciliation conference held on December 21, 2004 on behalf of petitioners.

BCMS subsequently issued a Conciliation Order to petitioners (CMS No. 203999) dated March 17, 2006, which denied petitioners’ request and sustained notices of deficiency L-023627845, L-023627847 and L-023627849.

On August 4, 2006, petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated March 17, 2006.

On August 18, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals advised Mr. Andreotti that petitioners’ petition filed on August 4, 2006 lacked the statutory document being protested. In response, on September 5, 2006, petitioners resubmitted their petition with a copy of a BCMS Consent Form attached.

In a letter dated October 3, 2006, the Division of Tax Appeals advised petitioners that the BCMS Consent Form was not a statutory notice providing the right to a hearing and, therefore, the Division of Tax Appeals did not have jurisdiction over the matter. On the same date, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition.

After advising the Division of Tax Appeals that petitioners had never received a statutory notice, petitioners' representative obtained a copy of the BCMS Conciliation Order and submitted it to the Division of Tax Appeals on October 24, 2006.

On November 3, 2006, 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 17, 2006, but that the petition was not filed until August 4, 2006, or 140 days later.

In response to the issuance of the Notice of Intent to Dismiss Petition, petitioners' representative submitted a letter explaining the circumstances surrounding the filing of the petition, the failure of petitioners to receive the BCMS Conciliation Order and their efforts to comply with the Rules of Practice and Procedure of the Tax Appeals Tribunal.

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 17, 2006, and a copy of the subject March 17, 2006 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's 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, and forwards them to the conciliation conferee for signature. The conferee 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 document entitled "Certified Record for Presort Mail - BCMS Cert Letter." 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 “3/17/06” 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 four-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on March 17, 2006. This CMR lists 38 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 four 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 1161 9181 is reference/CMS number 000203999, along with the following address:

Joseph and Rose Cinardi
1349 81st Street
Brooklyn, New York 11228-3005

Page two of the CMR also contains information regarding a conciliation order issued to petitioners' representative. Specifically, corresponding to certified control number 7104 1002 9730 1161 9136 is reference/CMS number 000203999 along with the name and address of petitioners' representative as follows:

Pio Andreotti
7204 20th Avenue
Brooklyn, New York 11204

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 envelopes. 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 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 17, 2006 and his or her initials or signature to each page of the four-page CMR. The postal employee also circled the number "38" contained on page 4 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 17, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Joseph and Rose Cinardi, 1349 81st Street, Brooklyn, New York 11228-3005 and a piece of certified mail addressed to Pio Andreotti, 7204 20th Avenue, Brooklyn, New York 11204, 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 17, 2006 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 17, 2006.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge found 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; and 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 petitioners and their representative by certified mail on March 17, 2006 at their last known addresses. Since the petition was filed with the Division of Tax Appeals on August 4, 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 petitioners' case.

The Administrative Law Judge did note, however, that if petitioners paid the disputed tax, they could apply for a refund within two years from the date of payment. If their request for a refund was denied, they could then proceed with another petition requesting a hearing or a conciliation conference.

ARGUMENTS ON EXCEPTION

On exception, petitioners concede that the petition was filed well in excess of the 90-day requirement set forth in the statute for filing a timely petition. Petitioners state that numerous attempts were made to secure the statutory notice required to be filed with the petition and, thus, their late filed petition should be excused.

The Division respectfully requests that the order by the Administrative Law Judge to dismiss the petition be sustained.

OPINION

We affirm the determination of the Administrative Law Judge. Petitioners have presented the same arguments herein as were considered by the Administrative Law Judge. We find that the Administrative Law Judge completely and correctly addressed the issues presented to him and correctly applied the Tax Law and relevant case law to the facts of this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph and Rosa Cinardi is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Joseph and Rosa Cinardi is dismissed.

DATED: Troy, New York
September 27, 2007

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

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

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