

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAYMOND A. AND JOANNE T. : **ORDER**
DEVEREAUX : DTA NO. 816162
: :
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Years 1985 through 1988. :
:

Petitioners, Raymond A. and Joanne T. Devereaux, 48 Ondaora Park, Highland Falls, New York 10928, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1985 through 1988.

On November 13, 1997, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On December 4, 1997, the Division of Taxation, by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), submitted documents in support of dismissal. On December 13, 1997, petitioner Raymond A. Devereaux, appearing *pro se*, submitted a letter in response. After due consideration of the documents submitted, Jean Corigliano, Administrative Law Judge, issues the following order.

ISSUE

Whether petitioners timely filed their petition following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioners, Raymond A. and Joanne T. Devereaux, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking review of a Notice of Disallowance of a claim for refund of personal income taxes, dated January 30, 1995.

2. Following a conference, BCMS issued a Conciliation Order, dated July 18, 1997, denying petitioners’ request and sustaining the Notice of Disallowance.

3. On October 20, 1997, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and was postmarked October 18, 1997.

4. On November 13, 1997, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners with a copy to the Division of Taxation (“Division”). The notice states:

"You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

"Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

"The Conciliation Order was issued on July 18, 1997 but the petition was not filed until October 18, 1997 or ninety-two days later.

"Pursuant to section 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 regarding the proposed dismissal."

5. In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division’s mailing procedures for conciliation orders; a copy of a certified mail record; and a copy of the

conciliation order which denied petitioners' request for a refund of tax and sustained the statutory notice.

6. The affidavit of Thomas English, Assistant Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services of the Division, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the mailing documents including a document which lists the taxpayers to whom conciliation orders are being sent by certified mail on a given day. This document is referred to as a certified mail record. A certified control number is assigned to each conciliation order listed on the certified mail record. According to Mr. English, each page of a certified mail record is a separate certified mail record for the conciliation 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 orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to affix his or her signature.

7. Mr. English states that the copy of the two-page certified mail record attached to his affidavit is a true and accurate copy of the original. It contains a list of the conciliation orders allegedly issued by the Division on July 18, 1997. The certified control numbers on this document run consecutively throughout the two pages, from P482630106 through P482630120. All the names and addresses listed on the certified mail record have been redacted except the entry for petitioners. Petitioners' names and address appear on page 1 of the certified mail record with the certified mail number P482630117 appearing next to their names. Mr. English states that two envelopes were pulled from the mail record after the taxpayers' names were listed on the

certified mail record. The certified mail record reflects this fact, showing that postage and handling fees on two entries were crossed out. Certified mail numbers were not assigned to these entries.

8. Each of the two pages of the certified mail record submitted is date stamped July 18, 1997 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York and each contains a postal employee's initials verifying receipt. At the bottom of page one, the page on which petitioner's certified number is listed, the number "13" has been entered as the "Total Number of Pieces Listed by Sender," and the number "13" has also been entered as the "Total Number of Pieces Received at Post Office". There are 13 certified mail numbers listed on page one of the certified mail record.

9. Mr. English states that after the certified mail records and the conciliation orders are prepared for mailing, they are picked up in the offices of BCMS by an employee of the Division's Mail Processing Center.

10. Attached to Mr. English's affidavit as Exhibit "B" is a copy of the Conciliation Order, CMS No. 159329, dated July 18, 1997, which denied petitioners' request and sustained the statutory notice.

11. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service. 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. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in

the mail record. Once the envelopes are stamped, a member of the mail processing center staff delivers them to the Colonie Center branch of the United States Postal Service (“USPS”) in Albany. The postal employee affixes either a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In this case, the postal employee wrote the total number of pieces, initialed the certified mail record, and affixed a postmark which indicates that this was the total number received at the post office. Mr. Baisley's knowledge that the postal employee wrote the total number of pieces to indicate that 13 pieces were received at the post office is based on the fact that the Division's Mail Processing Center requested that postal employees either circle the number of pieces received or indicate the number of pieces received by writing that number on the mail record. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

12. In response to the Notice of Intent to Dismiss Petition, petitioner Raymond A. Devereaux submitted a letter which was received on December 15, 1997. Apparently referring to the Conciliation Order, he states that he received a letter dated July 18, 1997 which he responded to on October 18, 1997. He mentions that he was taking medication during this period and underwent an operation in November 1997. He also asserts that the Division failed in a duty to inform Mr. Devereaux that he erroneously paid tax on his military pension for the years 1985 through 1988. In a postscript, Mr. Devereaux states that the “envelope carrying the Petition was post-marked Jul 24, 1997”. The files of the Division of Tax Appeals contain a letter from Mr. Devereaux , dated July 22, 1997, in which he requests petition forms and a copy of the rules of

practice and procedure. Attached to his letter is an envelope bearing a USPS date stamp of July 22, 1997. This letter was received by the Division of Tax Appeals on July 24, 1997, and, as Mr. Devereaux indicates, the forms he requested were mailed to him on the same day.

CONCLUSIONS OF LAW

A. A petition contesting a notice of disallowance of a refund claim may be filed within two years after the date of mailing of the notice (Tax Law § 689[c]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also two years (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order was issued (Tax Law § 170[3-a][e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where 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 (*see*, *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see*, *Matter of Katz*, *supra*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, *supra*).

The affidavits of two Division employees, Thomas J. English and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders

by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the English and Baisley affidavits were followed with respect to the Conciliation Order issued to petitioners. Petitioners' names and address appear on page one of the certified mail record which bears a USPS date stamp of July 18, 1997 and the initials of a postal service employee. There are 13 certified mail control numbers listed on page one, and the USPS employee who initialed the certified mail record indicated that he received 13 items for mailing. In short, the Division established that it mailed the Conciliation Order to petitioners by certified mail on July 18, 1997.

Petitioners' petition was mailed to the Division of Tax Appeals on October 18, 1997 and deemed filed on the same date (*see*, 20 NYCRR 3000.22[a][1]), which is 92 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioners' challenge to the Conciliation Order.

C. The petition of Raymond A. Devereaux and Joanne T. Devereaux is dismissed with prejudice.

DATED: Troy, New York
February 12, 1998

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE