

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSE M. ENGRACIA	:	ORDER
	:	DTA NO. 818630
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Period July 6, 1995 through	:	
December 27, 1995.	:	

Petitioner, Jose M. Engracia, 11 Alice Court, Lynbrook, New York, 11563-2105, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period July 6, 1995 through December 27, 1995.

On August 3, 2001 the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4), allowing the parties until September 4, 2001¹ to respond to the proposed dismissal of the matter, which date began the 90-day period for the issuance of this order. The Division of Taxation, appearing by Barbara G. Billet, Esq. (Kathleen D. O’Connell, Esq., of counsel), submitted the affidavits of Carl DeCesare and James Baisley with attachments, in response to the motion. Petitioner, appearing by Hodgson Russ, LLP (Alvan L. Bobrow, Esq., of counsel) submitted a letter in response.

Upon review of the pleadings, the Notice of Intent to Dismiss Petition, the affidavits and other documents submitted in response to the notice, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ The 30 days allowed for the parties’ responses to the notice expired on Sunday September 2, 2001. Since Monday, September 3, 2001 was a legal holiday, the parties’ responses were due by September 4, 2001.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, Jose M. Engracia, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking a review of notices of deficiency numbered L-012192172 and L-012192173.² The request was sent by United States Postal Service (“USPS”) First Class Certified Mail. The USPS postage-paid stamp is dated July 2, 1997. BCMS received the request on July 7, 1997.

2. BCMS issued a Conciliation Order Dismissing Request (CMS No. 162361) dated August 1, 1997 which stated:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on June 11, 1996, but the request was not received until July 7, 1997, or in excess of 90 days, the request is late filed.

Accordingly, the Order denied petitioner’s request for a conciliation conference.

3. On July 20, 2001, the Division of Tax Appeals received the petition of Jose M. Engracia seeking a redetermination of the deficiencies which were effectively sustained by the conciliation order dismissing request. Petitioner’s representative sent the petition by Federal Express “Priority Overnight” service on July 19, 2001. Petitioner’s address on the petition is listed as 11 Alice Court, Lynbrook, New York 11563-2105.

² The notices are not in evidence. However, the only issue in the present matter is the timeliness of the petition filed with the Division of Tax Appeals, making the Conciliation Order Dismissing Request issued by BCMS the relevant statutory document.

4. On August 3, 2001, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner for failure to file a timely petition. The notice stated that the petition was not filed until July 19, 2001 or 1,448 days after the issuance of the Conciliation Order Dismissing Request dated August 1, 1997. Following the issuance of the Notice of Intent to Dismiss Petition, the parties were given 30 days to respond.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Carl DeCesare and James Baisley, employees of the Division. The Division also submitted a copy of the certified mail record ("CMR") containing a list of the conciliation orders dismissing requests allegedly issued by the Division on August 1, 1997 (including one issued to petitioner) and a copy of the Conciliation Order Dismissing Request.

6. The affidavit of Carl DeCesare, Assistant Supervisor in the Division's BCMS, sets forth the Division's general procedure for preparing and mailing out conciliation orders dismissing requests. All conciliation orders dismissing requests are sent by certified mail. The word processing unit in BCMS prepares the conciliation orders dismissing requests and the CMR which are then forwarded to a BCMS clerk assigned to process the conciliation orders dismissing requests. The clerk, as part of her regular duties, verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order dismissing request listed on the CMR. The clerk then affixes sequential certified control number stickers to envelopes for each listed taxpayer or representative and records, on the CMR, the certified control number from each envelope next to the appropriate name. Certified number P 482 630 276 was used for the Conciliation Order Dismissing Request mailed to petitioner. The conciliation orders dismissing requests and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center.

7. The CMR is comprised of columns for the certified number, name and address of the addressee, postage and fee amounts, and remarks. Each page of a CMR is a separate and individual certified mail record for the conciliation orders dismissing requests 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 dismissing requests listed on that page only. There is also a space on each individual CMR for the receiving postal employee to affix his or her initials.

8. The four-page CMR contains a list of the conciliation orders dismissing requests allegedly issued by the Division on August 1, 1997 including, on page three, an order addressed to petitioner, Jose M. Engracia, 11 Alice Court, Lynbrook, NY 11563-2105. The certified control numbers run consecutively on each page of the CMR from P482630233 through P482630247 for a total of 15 items on CMR page one, P482630248 through P482630262 for a total of 15 items on CMR page two, P482630263 through P482630276 for a total of 14 items on CMR page three (the conciliation order dismissing request issued to petitioner bore certified control number P482630276) and P482630277 through P482630282 for a total of 6 items on CMR page four.³ Each page of the CMR is date stamped August 1, 1997 by the Colonie Center branch of the USPS in Albany, New York and each page contains a postal service employee’s initials verifying receipt as well. At the bottom of page three, the page on which petitioner’s name and certified control number are listed, the number “14” has been filled in as the “Total Number of Pieces Listed by Sender” and the number “14” has also been filled in as the “Total Number of Pieces Received at Post Office,” indicating no deletions from the CMR.

³ The names and addresses of other taxpayers to whom conciliation orders dismissing requests were issued, as reflected on the CMR in question, have been redacted to preserve the confidentiality of information relating to such other taxpayers.

Attached to Mr. DeCesare's affidavit as Exhibit "B", is a copy of the Conciliation Order Dismissing Request, CMS No. 1623610, dated August 1, 1997, which denied petitioner's request for a conciliation conference and effectively sustained the notices of deficiency.

9. 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. These procedures were the normal and regular procedures of BCMS on August 1, 1997.

10. The affidavit of James Baisley, Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the mailroom staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. 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 counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record.

An employee of the mailroom then delivers the envelopes and the CMR to the Colonie Center branch of the USPS in Albany. A postal employee affixes a postmark and his initials or signature to the certified mail record, indicating receipt by the Postal Service. In this case, the postal employee affixed a postmark to the certified mail record, wrote the number of pieces, and signed his initials on the CMR to indicate that this was the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee wrote the "total number of pieces" for the purpose of indicating that 14 pieces were received at the post office is based on 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 the number received on the mail record.

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, in this case BCMS, by a member of Mr. Baisley's staff. The regular procedures of the Mail Processing Center concerning the mailing of certified mail were followed in the mailing to petitioner on August 1, 1997.

SUMMARY OF PETITIONER'S POSITION

11. In response to the Notice of Intent to Dismiss Petition, petitioner's representative, Mr. Bobrow, submitted a letter. In his letter, Mr. Bobrow states that Mr. Engracia filed the petition in part because he has no record of receiving the notices of deficiency. Mr. Bobrow claims that this procedural argument would have been raised with BCMS but for the fact a conciliation conference was never held. Rather, petitioner's request for a conciliation conference was dismissed. Therefore the taxpayer did not have the opportunity to raise this jurisdictional issue. Mr. Bobrow further states that it is the taxpayer's position "that no assessment exists since a Notice of Determination/Deficiency was never issued." He requests that the petition not be dismissed and petitioner be afforded the opportunity to set forth his arguments concerning whether the notices of deficiency were properly mailed.

12. Mr. Bobrow submitted a supplemental letter on October 5, 2001 which reiterated petitioner's position with respect to the validity of the notices of deficiency. Since the 30-day comment period expired on September 4, 2001, the supplemental letter was not taken into consideration in this matter.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689(b), petitioner had 90 days from the mailing of the notices of deficiency to file a petition with the Division of Tax Appeals. Petitioner also had the option, pursuant to Tax Law § 170(3-a)(a), to file a request for a conciliation conference with BCMS. Petitioner chose the latter option in this case, and a conciliation order dismissing the request dated August 1, 1997 was issued. Pursuant to Tax Law § 170(3-a)(e), the conciliation order dismissing request is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the order. A conciliation order dismissing request 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; *Matter of Trans County Construction*, Tax Appeals Tribunal, August 24, 1995). The filing of a petition within the 90-day period 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 dismissing request (*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 dismissing request (*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, Carl DeCesare and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders dismissing requests by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders dismissing requests, and, in addition, attest to the authenticity and accuracy of the copies of the Conciliation Order Dismissing Request and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and Baisley affidavits were followed with respect to the Conciliation Order Dismissing Request issued to petitioner. Petitioner's name and address appears on page three of the certified mail record which bears a USPS postmark of August 1, 1997 along with the initials of a postal service employee. There are 14 certified control numbers listed on page three and the USPS employee who initialed the certified mail record indicated that he received 14 items for mailing. The Division has, therefore, established that it mailed the Conciliation Order Dismissing Request to petitioner by certified mail on August 1, 1997.

C. Petitioner's petition was delivered to the Division of Tax Appeals by Federal Express on July 20, 2001 and deemed filed on July 19, 2001 (*see, Tax Law § 691[a][2][A]; 20 NYCRR 3000.22[a][1]*), or 1,448 days after the mailing of the Conciliation Order Dismissing Request on August 1, 1997. 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 petitioner's challenge to the Conciliation Order Dismissing Request.

D. Finally, it is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

E. The petition of Jose M. Engracia is dismissed with prejudice.

DATED: Troy, New York
November 29, 2001

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE