

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CAROL DUNSEITH : ORDER
: DTA NO. 820609
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 Administrative :
Code of the City of New York for the Year 2000. :
:

Petitioner, Carol Dunseith, 75 Bolingbroke Grove, SW11 6HD, London, United Kingdom, filed a petition 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 Administrative Code of the City of New York for the year 2000.

On February 24, 2006, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel), filed a motion for an order granting summary determination to the Division of Taxation pursuant to Tax Law § 689(b) on the ground that petitioner failed to file a petition with the Division of Tax Appeals for an administrative hearing within the prescribed time. The Division of Taxation submitted the undated affirmation of Peter B. Ostwald, Esq., two affidavits of Robert Farrelly, sworn to February 15, 2006, with annexed exhibits, and two affidavits of Bruce Peltier, sworn to February 16, 2006, in support of its motion. Petitioner had 30 days, or until March 27, 2006, to respond to the motion. On March 24, 2006, petitioner submitted the affirmation of David Bunning, Esq., with annexed exhibits, in opposition to the Division of Taxation's motion. Pursuant to 20 NYCRR 3000.5(d), the 90-day period for issuance of this order commenced March 27, 2006. Based upon the motion papers

and all the pleadings and proceedings had herein, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Carol Dunseith, filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Deficiency L-023874583-6. Petitioner’s request for a conciliation conference listed her address as:

41 Bramfield Road
London, SW11 6RA
UK

2. Petitioner’s request also listed the name and address of her representative as follows:

Kathleen McDermott
PricewaterhouseCoopers LLP
300 Atlantic St.
Stamford, CT 06901

The request was signed by petitioner’s representative and dated June 10, 2004.

3. Petitioner’s conciliation conference was scheduled for November 16, 2004. However, her representative received the notice of the conference the day after the conference, November 17, 2004, and consequently failed to appear. Petitioner’s representative immediately contacted the conferee by telephone leaving voice mails in order to apprise him of the situation.

4. BCMS issued a Conciliation Default Order to petitioner, dated November 26, 2004, which denied petitioner’s request and sustained the Notice of Deficiency.

5. On December 13, 2004, petitioner’s representative wrote a letter to the conciliation conferee which stated, in pertinent part:

We are writing on behalf of the above named [sic] taxpayer in response to your notice dated November 26, 2004 (copy enclosed).

Please note that we were unable to attend to the Conciliation Conference as we did not receive the Notice of the Conciliation Conference until after November 16, 2004. We ask that [a] new date be scheduled, at which time we will have an opportunity to appear and present the case on behalf of the above named [sic] taxpayer.

6. On May 17, 2005, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Default Order dated November 26, 2005.

7. On July 20, 2005, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The notice indicated that the Conciliation Default Order was issued on November 26, 2004 but that the petition was not filed until May 17, 2005, which is beyond the time permitted.

Mailing to Petitioner

8. In support of its motion, the Division submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted, among other things, a copy of petitioner's Request for Conciliation Conference, a copy of the Registered Record for Non-Presort Foreign Address Mail ("RMR") showing the conciliation order allegedly issued by the Division on November 26, 2004 and a copy of the subject November 26, 2004 Conciliation Default Order.

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

10. The BCMS Data Management Services Unit prepares and forwards 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 orders and covering letters 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").

11. For each mailing, the AFP Unit also produces a computer-generated RMR entitled "REGISTERED RECORD FOR NON-PRESORT FOREIGN ADDRESS MAIL." The RMR is a listing of taxpayers and representatives to whom conciliation orders are sent by registered mail on a particular day. The registered control numbers are recorded on the RMR under the heading "REGISTERED NO." The AFP Unit prints the RMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

12. The clerk, as part of her regular duties associates each conciliation order and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the RMR. The clerk then types the name and address of the taxpayer onto the envelope and stamps "Foreign Air Mail" in red on the bottom left corner of the envelope. A red foreign air mail registered sticker is attached to the top mid-section of the envelope. Thereafter, the clerk folds and places the cover letter and conciliation order into the envelope.

13. The "Registered No." from the sticker on the envelope is handwritten on the RMR and the "Total" is written on the last page of the RMR. On the last page of the RMR 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.”

14. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the RMR at the top of each page of the RMR. In this case “11/26/04” is written at the top of the single page of the RMR.

15. The RMR, along with the envelopes containing the covering letters and conciliation orders are picked up in BCMS by an employee of the Division’s Mail Processing Center.

16. The RMR attached to Mr. Farrelly’s affidavit is a true and accurate copy of the RMR for the conciliation order issued by BCMS on November 26, 2004 to Carol Dunseith. The procedures followed on November 26, 2004 were the normal and regular procedures of BCMS on November 26, 2004.

17. After a conciliation order was placed in an area designated by the Division’s Mail Processing Center for “Outgoing Registered Mail,” a staffer weighed and sealed each envelope, affixed postage and placed fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified the names and registered mail numbers against information contained on the mail record. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated RMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Stuyvesant Plaza branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark and his initials to the RMR.

18. In the ordinary course of business a Mail Processing Center employee picks up the RMR from the post office on the following day and returns it to the originating office. The RMR is maintained by BCMS in the regular course of business.

19. In the instant case, the RMR was a one-page computer-generated document entitled “REGISTERED RECORD FOR NON-PRESORT FOREIGN ADDRESS MAIL.” This RMR lists one registered number. Specifically, corresponding to registered number RR355264668US, the following address appears:

Carol Dunseith
41 Bramfield Road
London SW116-RA

20. The one-page RMR contains a printed entry of “1” corresponding to the word “Total.” The number “1” is also handwritten at the bottom of the page next to the initials of a Postal Service employee and directly above a stamp asking the post office to initial and indicate the total number of pieces received at the post office. The postmark of the Stuyvesant Plaza Branch of the USPS also appears at the bottom of the page.

21. The affixation of the Postal Service postmark, the initials of the Postal Service employee, and the handwritten “1” indicates that the piece of mail listed on the RMR was received at the post office.

22. A search of the USPS website for purposes of tracking the status of the delivery relating to the parcel mailed under Registered No. RR355264668US (the number used by the BCMS to mail the conciliation default notice to petitioner) indicates that “[t]here is no record of this item.”

Mailing to Petitioner’s Representative

23. In support of its motion, the Division also submitted affidavits of Bruce Peltier and Robert Farrelly regarding the mailing of the conciliation default order to petitioner’s representative, Kathleen McDermott, Esq. The Division also submitted, among other things, a

copy of the certified mailing record showing the mailing to petitioner's representative of the conciliation default order allegedly issued by the Division on November 26, 2004.

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

25. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature, who in turn, forwards the orders and covering letters 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's AFP.

26. For each mailing, the AFP Unit also produces a computer-generated CMR entitled "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 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.

27. The clerk, as part of her regular duties associates each Conciliation Order and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR. The cover sheet, cover letter and conciliation order are folded and placed into an

envelope with three windows where the return address, certified mail control number, bar code and name and address of the taxpayer appear.

28. 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.”

29. 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 “11/26/04” is written in the upper right corner of each page of the CMR

30. 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.

31. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on November 26, 2004. This CMR lists 63 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 six pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number and the name and address of the addressee.

32. Information regarding the Conciliation Order issued to petitioner’s representative is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0492 8115 is reference number 000203723, along with the following address:

Kathleen McDermott
300 Atlantic Street - 6th Floo [sic]
Stamford CT 06901

33. 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/or his or her initials or signature to the CMR indicating receipt by the post office.

34. In this particular instance, the postal employee affixed a postmark dated November 26, 2004 to each page of the six-page CMR. The postal employee also wrote the number "63" on page 6 to show the "Total pieces received at post office" and wrote his or her initials 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.

35. 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.

36. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on November 26, 2004, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Kathleen McDermott, 300 Atlantic Street - 6th Floor, Stamford, CT 06901, to a branch of the USPS in Albany, New York in a sealed

envelope 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 November 26, 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 piece of certified mail to petitioner's representative on November 26, 2004.

Procedural History

37. On July 20, 2005, the Division of Tax Appeals issued a Notice of Intent to Dismiss. On August 19, 2005, petitioner's representative submitted correspondence with attachments in response and on September 14, 2005 the Division of Taxation submitted a response. On November 17, 2005, the Division of Tax Appeals issued an Order which withdrew the Notice of Intent to Dismiss because the evidence presented was insufficient to warrant dismissal of the petition.

SUMMARY OF THE PARTIES' POSITIONS

38. In support of its motion for summary determination, the Division argues that the Notice of Deficiency was issued on May 24, 2004 and petitioner protested this notice by filing a request for a conciliation conference. The Division then states that the conciliation default order was issued to petitioner on November 26, 2004 by registered mail. The Division further contends that a copy of the conciliation order was issued to petitioner's representative, Kathleen McDermott, by certified mail, on November 26, 2004. According to the Division, the date of the petition, May 17, 2005, and the date of receipt of the petition by the Division of Tax Appeals, May 19, 2005, do not fall within the 90 days of the date of the issuance of the order. The

Division concludes that since petitioner did not file a petition with the Division of Tax Appeals within the time period prescribed by Tax Law § 689(b), the late filed petition should be denied.

39. In response to the forgoing, petitioner submits that BCMS did not follow its procedure for mailing notices outside of the United States. Therefore, petitioner posits that the requirements of Tax Law § 681(a) were not satisfied and the risk that the notice is not received has not been shifted to her. In furtherance of this argument, petitioner points out that her address on the Request for Conciliation Conference was listed as:

Carol R. Dunseith
41 Bramfield Road
London, SW11 6RA
UK

However, the Conciliation Default Order was mailed to:

Carol R. Dunseith
41 Bramfield Road
London, SW116-RA

40. Petitioner submits that the address to which the Conciliation Default Order was purportedly mailed was incorrect because it omitted the country of destination and used an incorrect zip code, which is known as a “post code” in the United Kingdom. It is further maintained that the issuance of the Conciliation Default Order did not satisfy BCMS’s general mailing procedure because the BCMS clerk did not verify the correctness of the last mailing address provided by petitioner’s representative. According to petitioner, the risk of nondelivery was not shifted to petitioner. In this regard, petitioner stresses that, according to the Universal Postal Union, the post code is an essential element of an address.

41. Petitioner also argues that BCMS did not provide a copy of the envelope which allegedly has a sticker attached to it indicating the registered number utilized to send the Conciliation Default Order to her. It is submitted that without a copy of this envelope it is

impossible to know whether the registration number affixed to the actual envelope sent to petitioner was the same registered number that was handwritten on the left side of the RMR. According to petitioner, given the large number of notices issued each day, it would be reasonable to anticipate a mistake when the registration number is handwritten by a clerk on the RMR. In this regard, petitioner contends that the USPS website says that the USPS does not have any record of the registration number used for the conciliation order sent to petitioner.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b) the conciliation order in this case and the underlying Notice of Deficiency would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the requisite time limit (*see, e.g., Matter of Casessa*, Tax Appeals Tribunal, May 29, 1997). Here, petitioner had 90 days after the mailing of the conciliation default order to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). In order to establish the date of mailing, the evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of notices 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 and Service*, Tax Appeals Tribunal, May 23, 1991).

C. Here, the Division presented evidence of its procedure for the mailing of conciliation orders. In response, petitioner has not raised any issue regarding the adequacy of the prescribed procedure. However, on the basis of the errors appearing in the address on the envelope, petitioner asserts that the Division's procedures were not followed in this case. Clearly, there are significant errors in the mailing address of the conciliation order sent to petitioner. The address on petitioner's Request for Conciliation Conference included the abbreviation for the United Kingdom. However, the country of destination was omitted from the envelope bearing petitioner's conciliation default order. Further, the foregoing error may have been compounded by the error in the post code on the envelope which bore the conciliation default order intended for petitioner.¹ Under the circumstances, petitioner's claim that the Division did not follow its procedures has credence to the extent that the clerk was required to verify the taxpayer's name and address with the information listed on the RMR. Adding greater weight to this proposition is the assertion by petitioner's representative that the USPS has no record regarding the delivery of the envelope containing the conciliation default order which was sent to petitioner.

D. By themselves, the errors in the mailing address are not determinative of the outcome of this motion. In *Matter of Riehm v. Tax Appeals Tribunal* (179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447) the taxpayer maintained that the mailing of an incorrectly addressed notice of deficiency did not toll the period of limitations on assessment.

¹ It is noteworthy that the Tribunal has held that an error in the zip code did not result in a failure to comply with Tax Law § 1147. Nevertheless, that case did not involve international mail or the omission of the country of destination (*Matter of Karolight, Ltd.*, Tax Appeals Tribunal, February 8, 1990).

Therefore, if the notice was received after the period of limitations had expired, the notice would be untimely. The Court declined to accept this theory and held that “[a]s long as a notice of deficiency is actually received by the taxpayer in sufficient time to file a petition for redetermination, the notice is valid despite an error in the taxpayer’s mailing address” (*Matter of Riehm v. Tax Appeals Tribunal, supra*, 579 NYS2d 228, 229). Based on the foregoing principle, the Tribunal has concluded that a notice is invalid if an incorrectly addressed notice is not actually received by the petitioner (*see, Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994; *Matter of Karolight, supra*). When the notice is not actually received and errors appear in the mailing address, it must be decided whether the errors in the notice were consequential (*Matter of Combemale, supra*).

E. It follows from the foregoing that there is a threshold factual question regarding whether petitioner received the notice and, if so, when it was received. Unfortunately, neither party presented any evidence on this issue other than the somewhat cryptic point by petitioner that the USPS has no record regarding the status of the delivery to petitioner of the letter bearing the conciliation default order. Therefore, there is a material issue of fact and this matter should be remanded to the Calendar Clerk of the Division of Tax Appeals for a hearing on the timeliness of the petition. (20 NYCRR 3000.9[b][1].)

F. The motion for summary determination is denied and the matter is remanded to the Calendar Clerk for a hearing on the timeliness of the petition.

DATED: Troy, New York
June 22, 2006

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE