

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPH SIKULA : ORDER
for Redetermination of a Deficiency or for Refund : DTA NO. 822033
of New York State and New York City Personal
Income Taxes and Yonkers Income Tax Surcharge :
under Articles 22 and 30A of the Tax Law and
the New York City Administrative Code for the :
Year 1999. :
:

Petitioner, Joseph Sikula, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes and Yonkers income tax surcharge under Articles 22 and 30A of the Tax Law and the New York City Administrative Code for the Year 1999.

On January 10, 2008, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.0(a)(4) upon the basis that the petition had not been filed with the Division of Tax Appeals within the applicable period of time prescribed by statute. On January 28, 2008, petitioner, appearing pro se, challenged the proposed dismissal of the petition by filing a letter in explanation together with documentary evidence in support thereof. On January 31, 2008, the Division of Taxation by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted the affidavit of John E. Matthews, Esq., together with exhibits attached in support of the proposed dismissal of the petition. The parties had 30 days from the January 10, 2008 date of the Notice of Intent to Dismiss Petition to respond thereto, and

thus the 90-day period for issuance of this order commenced on February 11, 2008, i.e., the date on which the parties' time to respond to the motion expired.¹ After due consideration of the documents and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. On October 11, 2006, the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) received from petitioner, Joseph P. Sikula, a Request for Conciliation Conference (Request). Petitioner's Request challenged the Division's assertion, per Assessment No. L-027432126 dated September 14, 2006, of an income tax deficiency under Tax Law Articles 22, 30A and 30B for the year 1999 in the amount of \$1,723.00, plus penalty and interest.

2. A conciliation conference was conducted on July 11, 2007 and, by a Conciliation Order (CMS No. 215993) dated September 28, 2007, BCMS advised petitioner that his Request was denied and the statutory notice was sustained.

3. By a facsimile transmission cover sheet dated January 3, 2008, received by the Division of Tax Appeals on the same date, and captioned "Re: Petition of Joseph P. Sikula," the Division's Office of Counsel advised the Division of Tax Appeals that "BCMS (Manhattan) received this petition and sent it to our office. I will also mail it to you today." The balance of the facsimile transmission included a copy of the petition pertaining to Mr. Sikula (described

¹ The Notice of Intent to Dismiss was issued on January 10, 2008. The 30th day thereafter, February 9, 2008, fell on a Saturday, thus leaving Monday, February 11, 2008 as the date on which the parties' time to respond to the Notice expired.

hereinafter), together with copies of various attachments thereto including Mr. Sikula's New York State Resident Income Tax Return (Form IT-201) for 1999, the Conciliation Order and related correspondence, and the postmark section of the envelope (also described hereinafter) in which the petition and attachments were mailed. The petition, and each of the attachment pages, bear the receipt stamp of the BCMS Manhattan office dated December 31, 2007. The petition also bears the receipt stamp of the Division's Office of Counsel, Litigation Section, dated January 3, 2008. The facsimile transmission cover page bears the receipt stamp of the Division of Tax Appeals dated January 3, 2008.

4. On January 4, 2008, consistent with the foregoing facsimile transmission, the originals of the items described above, including the envelope in which the petition and attachments were mailed by petitioner, were received at the offices of the Division of Tax Appeals by mail from the Division's Office of Counsel. Consistent with the foregoing, the originals bear the receipt stamp of the BCMS Manhattan office dated December 31, 2008, the petition bears the receipt stamp of the Division's Office of Counsel, Litigation Section, dated January 3, 2008, and all of the documents, including the envelope in which the originals were mailed to the Division of Tax Appeals, bear the receipt stamp of the Division of Tax Appeals dated January 4, 2008.

5. The petition, signed by petitioner and hand-dated December 14, 2007, challenges the tax, penalty and interest asserted as due pursuant to Assessment No. L-027432126 and sustained by the Conciliation Order. The envelope in which the petition was mailed is addressed as follows:

State of New York
Department of Taxation & Finance
Bureau of Conciliation & Mediation Services
1740 Broadway, New York, N.Y. 10019-4357

The envelope bears the December 22, 2007 postmark of the College Point, New York (zip code 11356) branch of the United States Postal Service (USPS), and bears the receipt stamp of the BCMS Manhattan Office dated December 31, 2007.

6. On January 10, 2008, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. This notice advised that although the petition appeared to have been mailed on December 22, 2007, the envelope in which the petition was mailed was not properly addressed, as a consequence was not received by the Division of Tax Appeals until January 4, 2008, and therefore was not timely filed leaving the Division of Tax Appeals without jurisdiction to address the merits of the petition. The notice further advised that the parties had 30 days from the date of the notice within which to submit written comments on the proposed dismissal of the petition.

7. By a letter dated January 23, 2008, petitioner challenged the proposed dismissal of his petition. Petitioner noted that after receiving the conciliation order, he contacted the conciliation conferee by telephone and, in turn, the conferee mailed petition forms to petitioner's home for completion and submission. After several additional telephone conversations, the conferee contacted another individual employed by the Division as a further contact to "resolve this matter."² This individual provided petitioner, through the conferee, with the following address:

NYS Dept. of Taxation & Finance
Audit Group
Building #9--Room 452
State Campus
Albany, New York 12227.

² The phrase "resolve this matter," in the context of the circumstances, presumably refers to resolving the general issue of the case with its asserted tax deficiency, as sustained at conference, as opposed to resolving the very specific question of the address to which a petition was to be mailed.

8. Included among the documents accompanying petitioner's challenge to the proposed dismissal was the cover letter, dated September 28, 2007, which accompanied the Conciliation Order issued to petitioner. This cover letter provides as follows:

Please take notice of the enclosed Conciliation Order.

Please take further notice that this order will be binding unless you file a petition within ninety (90) days from the date of this order with the Division of Tax Appeals. Petition forms and the Rules of Practice and Procedure may be obtained from the Division of Tax Appeals website (<http://www.nysdta.org>) or by contacting:

Division of Tax Appeals
Riverfront Professional Tower
500 Federal Street - 4th Floor
Troy, NY 12180 - 2894
Phone: (518) 266 - 3000

A request for petition forms and the rules is not considered the filing of a petition for hearing and does not extend the time limits for filing a petition.

9. By a letter dated February 5, 2008, the Division also responded to the proposed dismissal of the petition. The Division takes the position that since the Conciliation Order was mailed on September 28, 2007 but the petition was not filed until January 4, 2008, the petition was therefore not filed within the requisite 90 days from the date of issuance of the Conciliation Order and must be dismissed as not timely filed. In support of its position, the Division submitted the certified mailing record (CMR), relevant documents and supporting affidavits detailing the standard procedure pursuant to which conciliation orders are mailed. These documents also identified the subject Conciliation Order and provided evidence to establish that such Order, together with its covering letter enclosed within an envelope, was in fact mailed to petitioner at his last known address by certified mail when it was delivered into the custody of

the USPS with the appropriate amount of postage and fees affixed on September 28, 2007, in accordance with the standard procedure as detailed in the documents submitted.

10. Petitioner has raised no challenge to the Division's claim that the subject Conciliation Order was properly issued to him on September 28, 2007, nor has petitioner denied receipt of the Order thereafter. Careful review of the CMR, attendant documents and supporting affidavits bears out that the Order was, in fact, properly mailed by certified mail to petitioner at his last known address on September 28, 2007.

11. Notice is hereby taken, pursuant to State Administrative Procedure Act § 306(4), of Division of Tax Appeals Form TA-10, Petition, which provides on its final page (page four) as follows:

File the petition and 2 identical copies within the time limitations indicated on the notice/assessment with:

Supervising Administrative Law Judge
NYS Division of Tax Appeals
Riverfront Professional Tower
500 Federal Street
Troy, NY 12180-2894

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation order in this case and the underlying tax deficiency would be binding upon petitioner unless he 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 90-day time limit (*see*

Matter of DeWeese, Tax Appeals Tribunal, June 20, 2002; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed 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; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). Here, the Division's response in support of the proposed dismissal on the basis that the petition was not timely filed included documentary evidence which established that the Conciliation Order in this case was properly mailed to petitioner on September 28, 2007 (*see* Findings of Fact 8 and 9; *see also Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Petitioner has not challenged the propriety of the issuance of the Conciliation Order, or of its receipt, but rather maintains that his petition was properly mailed within the 90-day jurisdictional limit for filing a petition. As noted, petitioner bears the burden of proving timely and proper mailing (*Matter of Malpica*).

C. 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), and it is properly mailed when it is delivered into the custody of the USPS, as detailed above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the conciliation order was properly mailed to petitioner when it was delivered into the

custody of the USPS on September 28, 2007, as described, and it is this date which commenced the 90-day period within which a protest had to have been filed in order to be considered timely. The 90th day after September 28, 2007 was Friday, December 28, 2007. It is undisputed that the petition was mailed on December 22, 2007 and thus was mailed within such 90-day period. However, the envelope in which the petition was mailed was not addressed to the Division of Tax Appeals, and the petition was not in fact delivered to the Division of Tax Appeals until January 4, 2008, a date falling beyond the requisite 90-day period. Hence, the essential question is whether a petition, timely mailed but improperly addressed, which eventually arrives at the Division of Tax Appeals but does so beyond the 90-day time period, constitutes a proper mailing and hence a timely filed challenge to a conciliation order.

D. The Tax Appeals Tribunal's Rules of Practice and Procedure provide that "[a]ll proceedings in the Division of Tax Appeals must be commenced by the filing of a petition." (20 NYCRR 3000.3[a].) Such regulations go on to provide, at 20 NYCRR 3000.3(c), as follows:

(c) Filing of Petition. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of those time limitations. The petition should be filed, along with the two conformed copies, with the supervising administrative law judge either in person at the offices in Troy or by mail addressed to:

Supervising Administrative Law Judge
State of New York
Division of Tax Appeals
Riverfront Professional Tower
500 federal Street
Troy, NY 12180-2890

E. The Tribunal's Rules of Practice and Procedure set forth additional requirements with respect to the service and filing of documents. With regard to documents which are mailed, as

opposed to hand delivered, to the Division of Tax Appeals, 20 NYCRR 3000.22 provides, in pertinent part, as follows:

(a) General rule. (1) *date of filing.* If any document required to be filed under this Part within a prescribed period or on or before a prescribed date under authority of any provision of article 40 of the Tax Law is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals or Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180, the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed the date of filing. . . .

(2) *Mailing requirements.* Any document required to be filed under this Part *will not* be considered to be timely mailed or timely filed unless the document is mailed in accordance with the following requirements:

(i) The document must be contained in an envelope or other appropriate wrapper *and properly addressed to: State of New York, Division of Tax Appeals or Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180.*

* * *

(d) Document defined. The term document, as used in this section, means any exception to Administrative Law Judge's determination, *Petition* or other document required to be filed under the authority of any provision of Article 40 of the Tax Law.

(e) Filing and service. (1) *Filing.* Filing of all pleadings, motions, exceptions and other papers with the Division of Tax Appeals or the tribunal pursuant to this Part shall be made by either delivery during business hours to its Troy offices or by mail *properly addressed to New York State Division of Tax Appeals or Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180.* (Emphasis added as non-bold italics)

F. Pursuant to the foregoing provisions, where a petition challenging a conciliation order is filed by mail, such petition will be considered timely filed if it is properly mailed (20 NYCRR 3000.22[a][2][i]) and if the date of such mailing, as determined by the USPS postmark affixed to the envelope or other appropriate wrapper in which the petition is mailed, falls within 90 days

after the issuance of the conciliation order (20 NYCRR 3000.22[a][1]). Failure to meet either of these requirements will mandate a determination that the petition was not timely filed (20 NYCRR 3000.22[a][2][i]). In this case, the petition meets the latter requirement of having been mailed within 90 days after issuance of the conciliation order. Unfortunately, however, the petition was not properly addressed as required (20 NYCRR 3000.22[a][2][ii]), and thus can not be found to have been properly mailed as required. Under these circumstances, the benefit of the “timely mailing equals timely filing” rule of 20 NYCRR 3000.22 (a)(1) is specifically negated by 20 NYCRR 3000.22(a)(2)(i) and does not apply, and thus the date on which the petition is delivered to the Division of Tax Appeals shall be considered the date of filing. In this instance, the petition was not delivered to the Division of Tax Appeals until January 4, 2008, which is some 7 days beyond the 90-day time limit for filing, and the petition was therefore not timely filed and is subject to dismissal.

G. No explanation was furnished as to why petitioner did not properly address the petition. This is perplexing, given that numerous sources setting forth the correct address for the filing of a petition were consistently available and provided to petitioner, including the Tribunal’s regulations as set forth above, the cover letter accompanying the conciliation order issued to petitioner (*see* Finding of Fact 8), and the petition form itself (*see* Finding of Fact 10). In fact, no explanation was provided as to why petitioner did not utilize the address (albeit also incorrect) furnished to him in connection with his inquiries regarding “resolving” the matter (*see* Finding of Fact 7). In any event, this is not an instance where the address to which a document is mailed is lacking only an inconsequential part of an otherwise complete and correct address (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994), but rather involves the use of an entirely incorrect address.

H. While the result reached herein may seem harsh, given that the petition did eventually arrive at the Division of Tax Appeals, there remains absolute consistency in the application and result of the mailing rules regardless of the party to which such rules are applied. That is, improper mailing resulting from the use of an incorrect address, and its accompanying risk of untimely delivery leading to dismissal, falls without bias upon the party who fails to properly address and hence properly mail a document subject to a jurisdictional time limit. Here, petitioner's failure to properly mail his petition due to the use of an incorrect address left the benefit of the "timely mailing equals timely filing" rule unavailable to petitioner and subjected petitioner to the risk (and result) of dismissal for untimely filing. In the same manner, if the Division timely mails an assessment against a taxpayer to an incorrect address, then the benefit of establishing the date of issuance of the assessment based upon the date of proper mailing, and hence establishing the time period within which a protest may be filed, is not available to the Division. As a consequence, the taxpayer's time to protest (i.e., the 90-day period) is tolled and does not commence to run until the taxpayer's actual receipt of the notice, from which point the time period within which to file a protest is measured. If such actual receipt occurs within sufficient time for the taxpayer to file a protest (i.e., prior to expiration of the period of limitations on assessment), then the assessment will remain valid (subject to protest by the taxpayer). However, the Division runs the risk that actual receipt by the taxpayer will occur beyond the period within which a protest may be filed (i.e., after expiration of the period of limitations on assessment), the result of which is that the Division's assessment must be cancelled (*see Matter of Combemale, supra.*).

I. This determination, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the

Division on a motion for summary determination for failure to have timely filed a petition, and precludes petitioner from having a hearing on the substantive issues of the asserted deficiency. As provided in 20 NYCRR 3000.9(b)(1) addressing motions for summary determination, such a motion “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented.” Petitioner has offered no arguments or evidence to counter the Division’s motion regarding the issue of the timeliness of petitioner’s protest, and petitioner is therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Accordingly, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor. Since a protest was not timely filed as required by statute, there is no jurisdiction to proceed with this matter (Tax Law § 170 [3-a][e]; § 689[b]; 20 NYCRR 4000.5[c][4]).

J. The petition of Joseph Sikula is hereby dismissed.³

DATED: Troy, New York
May 8, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

³ Petitioner is not entirely without recourse in this matter. That is, petitioner may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing to contest the refund denial (*see Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).