

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DEBORAH AND ANDREW EPIFANE : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 823255
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2004. :

Petitioners, Deborah and Andrew Epifane, 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 year 2004.

On September 25, 2009, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On October 23, 2009, petitioners, appearing pro se, submitted a letter in opposition to dismissal, and the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) submitted affidavits and other documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced October 25, 2009. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. Petitioners, Deborah and Andrew Epifane, filed a request for a conciliation conference, dated May 13, 2009, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice of Deficiency L-031300765, dated February 12, 2009 and pertaining to the year 2004. The request was received by BCMS on June 1, 2009.

2. Petitioners' request for conciliation conference listed their preprinted address as West Babylon, New York. At item 1 of their request, petitioners entered information showing their corrected address as North Babylon, New York.

3. By a Conciliation Order Dismissing Request (CMS No. 233182) dated June 19, 2009, BCMS denied petitioners' request as not timely filed.

4. Petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the aforementioned Conciliation Order. The petition, dated September 19, 2009, was received by the Division of Tax Appeals on September 21, 2009. The envelope in which the petition was mailed indicates that it was sent by United States Postal Service (USPS) Priority Mail and reflects the date of mailing as "Sep. 18, 09."

5. On September 25, 2009, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the Conciliation Order in this matter was issued on June 19, 2009, but that the petition was not filed until September 18, 2009, or 91 days later.

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavit of its representative, John E. Matthews, Esq., along with the affidavits of James Steven VanDerZee and Robert Farrelly, both employees of the Division. The Division also submitted a copy of the petition filed with the Division of Tax

Appeals, petitioner's 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 June 19, 2009, and a copy of the subject June 19, 2009 Conciliation Order.

7. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. 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. The conciliation conferee, in turn, signs and forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each Conciliation Order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). 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.

10. The AFP Unit also produces a computer-generated CMR 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.

11. 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.

12. The “Total Pieces and Amounts” is indicated on the last page of the CMR. 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.”

13. 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 “06/19/09” is written in the upper right corner of each page of the CMR

14. 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 which is responsible for delivering the CMR along with the envelopes containing the cover sheets, covering letters and conciliation orders to the USPS.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the seven-page CMR attached to his affidavit which contains a list of the conciliation orders issued by the Division on June 19, 2009. This CMR lists 72 certified control numbers and each such certified control number is assigned to an item of mail listed on the seven 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.

16. Information regarding the Conciliation Order issued to petitioners is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 10002 9730 1354 5754 is reference/CMS number 000233182, along with the corrected address in North Babylon, New York.

17. The affidavit of James Steven VanDerZee, 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 letters. 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.

18. In this particular instance, the postal employee affixed a postmark dated June 19, 2009 of the Stuyvesant Plaza branch of the USPS to each page of the seven-page CMR. The postal employee also wrote his or her initials and wrote the number "72" next to the printed listing of the "number of pieces" of mail, 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.

19. Mr. VanDerZee 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. VanDerZee'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.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on June 19, 2009, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Deborah & Andrew Epifane in North Babylon, New York to a branch of the USPS in Albany, New York, in a sealed postpaid 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 June 19, 2009 for the records of BCMS. Mr. VanDerZee 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 petitioners on June 19, 2009.

21. Petitioners raise no challenge to the Division's claimed mailing date of June 19, 2009, or dispute that they mailed their petition in response thereto on September 18, 2009. Rather, petitioners state they calculated the latest date for the filing of a timely petition based on the Conciliation Order date of June 19, 2009, thus believing that they had until September 19, 2009 to mail their petition. Petitioners claim they overlooked the fact that July and August are each 31-day months, thus leaving the latest date for the filing of a timely petition to be September 17, 2009. In turn, petitioners request reconsideration of the dismissal of their petition in light of their unfortunate error in calculation.

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 Notice of Deficiency would be binding upon petitioners unless they 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 Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer's protest against a conciliation order is in question, the initial inquiry is 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). 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*; *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, i.e., sent to the taxpayer (and his representative, if any) at his 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). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]).

C. The evidence required of the Division in order to establish proper mailing 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 this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the subject Conciliation Order to petitioners at their last known address (*see e.g. Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of James Steven VanDerZee and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioners by certified mail on June 19, 2009, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing orders and, in addition, attest to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the VanDerZee and Farrelly affidavits were followed with respect to the order issued to petitioners. Petitioners' names and address, as well as the numerical information on the face of the order, appear on the CMR which bears a USPS date stamp of June 19, 2009. There are 72 certified mail control numbers listed on the CMR for June 19, 2009, and the USPS employee who initialed the CMR indicated, by writing the number "72" near such initials, that 72 items were received for mailing. In short, the Division established that it mailed the order to petitioners, by certified mail, on June 19, 2009 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on June 19, 2009, and it is this date which triggered the 90-day period within which a protest had to have been filed (*id*). In turn, 90 days after the June 19, 2009 date of mailing of the order was September 17, 2009, and in order to be considered timely, petitioners' protest had to have been filed on or before such date. Petitioners' protest was not filed until it was sent by UPS Priority Mail on September 18, 2009, or one day beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, there is no jurisdiction to address the merits of petitioner's protest, including reconsideration based upon the stated reason for the admitted late filing of the petition (*Matter of Sak Smoke Shop*).

E. The petition of Deborah and Andrew Epifane is hereby dismissed.

DATED:Troy, New York
January 7, 2010

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE