

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DANIEL J. GARCIA	:	DECISION DTA NO. 826489
for Review of a Notice of Suspension, Refusal to Register or Other Disciplinary Action Dated May 23, 2014 Pursuant to Article 1 of the Tax Law.	:	

Petitioner, Daniel J. Garcia, filed an exception to the determination of the Administrative Law Judge issued on February 26, 2015. Petitioner appeared by Steven J. Homayoon, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Neither party requested oral argument. The six-month period for the issuance of this decision commenced on June 8, 2015, the due date for petitioner's reply brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact 10, which we have modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. Petitioner, Daniel J. Garcia, filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). On the request for conciliation conference, petitioner listed his address in Ronkonkoma, New York.

2. The request was in response to a notice of suspension, refusal to register, or other disciplinary action dated May 23, 2014, which suspended petitioner's registration as a New York State tax preparer.

3. BCMS issued to petitioner a conciliation default order (CMS No 262510) dated August 8, 2014 denying petitioner's request based upon his failure to appear at the scheduled conference. The conciliation default order indicates that notice of the conference was mailed to petitioner on July 1, 2014.

4. Petitioner filed a petition with the Division of Tax Appeals dated September 6, 2014 by U.S. Postal Service (USPS) first class mail. The envelope in which the petition was mailed bears a USPS postage-paid stamp dated September 10, 2014. The petition was received by the Division of Tax Appeals on September 15, 2014.

5. On October 3, 2014, Supervising Administrative Law Judge Daniel Ranalli issued to petitioner a notice of intent to dismiss petition on the basis that the petition had not been timely filed.

6. In support of dismissal and to show proof of proper mailing of the conciliation default order on August 8, 2014, the Division provided the following: (i) an affidavit, dated December 12,

2014, of Leo Gabovich; (ii) an affidavit, dated November 26, 2014, of Robert Farrelly, the Assistant Supervisor of the BCMS; (iii) an affidavit, dated November 26, 2014, of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room; (iv) the "Certified Record for Presort Manual Mail - BCMS Cert. Letter" (CMR); and (v) a copy of petitioner's request for conciliation conference, the notice of suspension, refusal to register, or other disciplinary action being challenged by the request for conciliation conference, and the conciliation default order and cover letter issued in response thereto.

7. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS Data Management Services Unit prepared and forwarded the conciliation orders, together with their accompanying cover letters, to the particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward the order and cover letter to the BCMS clerk assigned to process conciliation orders.

8. 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), which in turn assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code for each order. The AFP Unit generates a CMR listing those taxpayers and representatives to whom conciliation orders are being sent on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO," and the BCMS numbers are recorded under the heading "Reference No." Each Reference No. is preceded by three zeroes. The AFP Unit assigns the CMR and cover sheet data to a printer located in BCMS and these documents are printed there and delivered to the BCMS clerk assigned to process conciliation orders.

9. The BCMS clerk's regular duties included associating each cover sheet, conciliation order and covering letter, and verifying the names and addresses of taxpayers and their representatives, per BCMS records, 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 such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear. The run of orders to be mailed, denominated "Total Pieces and Amounts," is indicated on the last page of the CMR, along with the preprinted heading "Total Pieces Received at Post Office." The BCMS clerk stamps the bottom left corner of the last page of the CMR "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" and stamps the bottom right corner of the last page "POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas." The clerk then inserts on the top of each page of the CMR the date that the conciliation orders were mailed.

10. In this instance, certified control number 7104 1002 9730 0272 7215 and reference number 000262510 were assigned to the conciliation default order to be mailed to petitioner at his Ronkonkoma, New York, address. The foregoing information appears on page six of the seven-page CMR pertaining to this mailing. The same information appears on the cover sheet relevant to this matter. The date "8/8/14" is handwritten in the upper right corner of each of the seven pages of the CMR, signifying the date on which the conciliation orders set forth on the CMR were mailed.

11. A piece of mail may be "pulled" from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of conciliation orders being mailed, so as to allow for

correction and issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

12. The CMR in this case reflects that two pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for total pieces received at the post office. The specific pulled items appear on pages one and three, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listing pertaining to petitioner. The preprinted number “73,” as appearing next to the heading “Total Pieces and Amounts,” on the last page of the CMR was crossed out and replaced with the handwritten number “71” to reflect the two pieces pulled from the run.

13. The affidavit of Bruce Peltier, Principal Mail and Supply Clerk in the Division’s Mail Processing Center (mail room), describes the mail room’s general operations and procedures. The mail room receives the items to be mailed in an area designated for “Outgoing Certified Mail.” A staff member retrieves the windowed envelopes, containing the cover sheet, covering letter and conciliation orders to be mailed, and then weighs, seals and affixes postage and fee amounts on each envelope. A clerk counts the envelopes and verifies the names and certified mail numbers on those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. In this case, the USPS employee affixed a postmark dated August 8, 2014 and initialed each page of the CMR. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of

pieces received by writing the number on the last page of the CMR. Here, the USPS employee complied with this request by circling the handwritten “71” on the last page next to the heading “Total Pieces Received at Post Office.”

14. 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 Center, each CMR would be picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

15. Petitioner responded to the notice of intent to dismiss with a letter and attachments in opposition to the proposed dismissal including the affidavit of petitioner’s office manager, Lisa Hendrickson. Ms. Hendrickson avers that she mailed the petition in this matter on September 6, 2014 at the United States Post Office in Ronkonkoma, New York.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of a petition filed with the Division of Tax Appeals following the issuance of a conciliation order sustaining the suspension of a tax preparer’s registration. The Administrative Law Judge noted that there is a 30-day statutory period to file a petition in such matters. The Administrative Law Judge further noted that the Division bears the burden of establishing that it properly issued the notice of suspension by mailing the document to the tax preparer’s last known address using certified or registered mail. The Administrative Law Judge found that, to meet this burden, the Division must establish its standard mailing procedure and that such procedure was followed in this specific case.

Upon review of the documents submitted, the Administrative Law Judge concluded that the Division had established its standard mailing procedure through the affidavits of Mr. Farrelly and Mr. Peltier. The Administrative Law Judge also concluded that such affidavits, along with the properly completed CMR, established that the Division followed its standard mailing procedure in this instance. The Administrative Law Judge further noted that the conciliation order was addressed to petitioner at his last known address. The Administrative Law Judge thus determined that the subject conciliation order was properly issued to petitioner on August 8, 2014, as claimed, and that petitioner's petition, deemed filed on September 10, 2013, was untimely. Accordingly, the Administrative Law Judge dismissed the petition. In reaching this conclusion, the Administrative Law Judge rejected petitioner's contention, supported by an affidavit made by his office manager, that the petition herein was actually timely filed by USPS mail on September 6, 2014.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the affidavit submitted by his office manager should be sufficient to establish that his petition was mailed by USPS, and thus timely filed, on September 6, 2014. Petitioner also takes issue with the Division's assertion that the conciliation order was mailed on August 8, 2014, reasoning that, while the evidence indicates that the order was delivered to the post office on that date, such evidence does not establish that the document was actually "mailed" on that date.

The Division asserts that the determination of the Administrative Law Judge correctly addressed the issue presented and properly dismissed the petition.

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

Our rules provide that a summary determination 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" (20 NYCRR 3000.9 [b] [1]).

As we previously noted in *Matter of United Water New York* (Tax Appeals Tribunal, April 1, 2004):

"Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is 'arguable' (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (*Daliendo v. Johnson*, 147 AD2d 312 [1989])."

Section 2600-6.2 (a) of the Division's regulations (20 NYCRR 2600-6.2 [a]) authorizes the Division to issue a notice of suspension to a tax return preparer registered under Tax Law § 32. There is a 30-day period of limitations in which a tax return preparer may file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals in protest of such a notice (Tax Law §§ 170 [3-a] [h]; 2008 [2] [a]). Where, as here, such tax return preparer files a request for conciliation conference, he or she has 30 days from the date of issuance of the

conciliation order in which to file a petition with the Division of Tax Appeals to further pursue the protest (Tax Law § 170 [3-a] [e], [h]).

A petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

It is well established that where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet its burden "by establishing the use of a standard mailing procedure for conciliation orders by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

We agree with the Administrative Law Judge's conclusion that the Division met its burden of establishing proper mailing of the conciliation order in the present matter. Specifically, we find that the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, establish the Division's standard mailing procedure. Additionally, we find that those affidavits, along with the properly completed CMR, the conciliation order itself, and the mail cover sheet, establish that the Division followed its standard procedure with respect to the mailing of the conciliation order at issue (*see Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011; *cf. Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015). We thus conclude, as did the

Administrative Law Judge, that the Division has shown that it mailed the conciliation order at issue to petitioner at his last known address by certified mail on August 8, 2014, as claimed.

Petitioner's argument that proof of delivery of an article of mail to the post office does not constitute proof of mailing is without merit. A notice or conciliation order is properly mailed when it is delivered into the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Here, the evidence submitted clearly shows delivery of the articles of mail listed on the CMR to the USPS on August 8, 2014.

As noted, the Tax Law provides for a 30-day limitations period for the filing of a petition following the issuance of a conciliation order affirming a notice of suspension to a tax return preparer registered under Tax Law § 32 (*see* Tax Law § 170 [3-a] [e], [h]). Issuance in this context means mailing (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014). The 30-day limitations period thus began on August 8, 2014 and ended on September 8, 2014.¹ The petition in this matter was received by the Division of Tax Appeals in an envelope bearing a USPS postmark dated September 10, 2014. Pursuant to our Rules of Practice and Procedure, the date of such USPS postmark is deemed to be the date of filing (20 NYCRR 3000.22 [a] [1]).

Unfortunately for petitioner, September 10, 2014 fell 32 days after the date of issuance of the conciliation order. The petition was therefore late-filed. We note that the deadlines for filing petitions are strictly enforced and petitions even one day late are properly dismissed (*see Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Lukacs*).

¹ The 30th day from August 8, 2014 was Sunday, September 7, 2014. Pursuant to General Construction Law § 25-a, petitioner had until Monday, September 8, 2014, to timely file his petition.

Regarding petitioner's claim, made via the affidavit of his office manager, that the petition was deposited in the mail on September 6, 2014, "the rules of the Tribunal specifically state that if the postmark stamped by the United States Postal Service does not bear a date within the prescribed filing period, the document will not be considered timely filed regardless of when the envelope was deposited in the mail (20 NYCRR 3000.22 [a] [2] [iii])" (*Matter of Price*, Tax Appeals Tribunal, June 17, 1999). The postmark thus controls and the affidavit may not be considered (*see Matter of Western New York Flying Club*, Tax Appeals Tribunal, January 25, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Daniel J. Garcia is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Daniel J. Garcia is dismissed.

DATED: Albany, New York
December 3, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner