

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
RONALD AND BARBARA DISCENZA : DECISION
for Redetermination of a Deficiency or for Refund : DTA NO. 826808
of Personal Income Tax under Article 22 of the :
Tax Law for the Year 2008. :

Petitioners, Ronald and Barbara DiScenza, filed an exception to the determination of the Administrative Law Judge issued on August 6, 2015. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian J. McCann, Esq. of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners did not file a reply brief. Oral argument was not requested. By decision dated May 19, 2016, this matter was remanded to the Supervising Administrative Law Judge for the issuance of a supplemental determination, based on the existing factual record, with relevant findings of fact and conclusions of law addressing the issue of whether the Division of Taxation met its burden to prove mailing of the statutory notice at issue. The Tax Appeals Tribunal retained jurisdiction over petitioners' original exception during this process.

A supplemental determination was issued on July 14, 2016. The parties were granted until August 29, 2016 to make additional filings in response to the supplemental determination, but neither did so.

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

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge, except that we have modified findings of fact 1, 2 and 3 and we have added additional findings of fact, numbered 18 through 21 herein. We make these changes to more fully and accurately reflect the record. The Supervising Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. On February 12, 2015, petitioners, Ronald and Barbara DiScenza, filed a petition with the Division of Tax Appeals in protest of notice number L-040805750. In connection with their petition, petitioners provided a copy of a conciliation order dated November 21, 2014 (CMS number 261398) that denied petitioners' conciliation request and sustained the statutory notice. Petitioners also provided a copy of the cover letter that accompanied the conciliation order. The cover letter advised petitioners that the conciliation order would be binding unless petitioners filed a petition within thirty days from the date of the order.

2. On April 24, 2015, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition to petitioners. This notice indicates that the conciliation order in this matter was issued to petitioners on November 21, 2014, but that the petition was not filed until February 12, 2015, or 83 days later.

3. In response to the issuance of the notice of intent to dismiss petition, the Division of Taxation (Division) submitted, among other documents: (i) the affidavit of Leo Gabovich, a law clerk employed by the Office of Counsel of the Division, dated June 30, 2015; (ii) a copy of the

petition in this matter, filed on February 12, 2015, and showing petitioners' address as 59 Halley Drive, Pomona, New York 10970; (iii) a copy of the conciliation order, cover letter and cover sheet dated November 21, 2014; (iv) a consolidated statement of tax liabilities, dated March 6, 2014; (v) a copy of the notice of intent to dismiss petition, dated April 24, 2015; (vi) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated June 15, 2015; (vii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked November 21, 2014; and (viii) the affidavit of Bruce Peltier, a supervisor since 1999 and currently the Principal Mail and Supply Clerk in the Division's mail room, dated June 16, 2015.

4. The affidavit of Robert Farrelly sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of orders by United States Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the CMR.

5. In order to commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

6. Next, 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 indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

7. The AFP Unit also produces a computer-generated CMR. 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 using a printer located in BCMS, and then these documents are delivered to the BCMS clerk assigned to process conciliation orders.

8. The clerk, as part of his or her regular duties, associates and combines each individual and matching conciliation order, cover sheet, and cover letter. The clerk then verifies the names and addresses of the relevant taxpayers and representatives using the information listed on the CMR and the appropriate cover sheet. Next, the clerk folds and places the cover sheet, cover letter, and conciliation order, in that order, into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

9. The “Total Pieces and Amounts” is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps “Mailroom: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT.”

10. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this particular case, “11-21-14” is written in the upper right corner of pages one through four of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of November 21, 2014.

11. The CMR, along with the cover sheets, cover letters, and conciliation orders, is picked up in BCMS by an employee of the Division’s Mail Processing Center. The Division’s Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters, and conciliation orders to USPS.

12. Mr. Farrelly attested to the truth and accuracy of the four-page CMR relevant to this

matter, which contains a list of the conciliation orders issued by the Division on November 21, 2014. This particular CMR lists 36 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number as well as the names and addresses of the addressees. There are no deletions from this list.

13. Information regarding the conciliation order relevant to this case is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0329 4457 is reference or CMS number 000261398, along with petitioners' names and a Pomona, New York, address that is identical to petitioners' address contained on their request for BCMS conference.

14. The Division also submitted the affidavit of Bruce Peltier, a supervisor since 1999 and the current Principal Mail and Supply Clerk in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by Mr. Peltier's staff in the ordinary course of business of delivering outgoing mail to branch offices of USPS. Further, after a conciliation order is placed in the specifically designated "Outgoing Certified Mail" basket in the Mail Processing Center, a staff member weighs, seals, and places postage and fee amounts on each envelope. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a staff member delivers the stamped envelopes to a branch of USPS in Albany, New York. A postal employee then affixes a postmark and either his or her initials or signature to the CMR, thereby indicating receipt by USPS.

15. In this case, the postal employee affixed a postmark dated November 21, 2014 to, and also wrote his or her initials on, pages one through four of the CMR. The postal employee

also wrote the number “36” corresponding to the heading “Total Pieces and Amounts” as well as the preprinted number 36, contained on the fourth and last page of the CMR. The postal employee rewrites the “Total Pieces and Amounts” number at the Division’s specific request, and this is intended to indicate that all pieces of mail listed on the CMR were received at USPS, which, in this case, was 36.

16. Mr. Peltier’s affidavit states that the CMR is the Division’s record of receipt, by 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 relevant branch of the USPS by a member of Mr. Peltier’s staff on the day following its initial delivery and is then delivered to the originating office, which, in this case, is BCMS. Additionally, the CMR is maintained by BCMS in the regular course of its business.

17. Based upon his review of Mr. Farrelly’s affidavit, the exhibits attached thereto, and the CMR, Mr. Peltier avers that on November 21, 2014, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioners at their Pomona, New York, address to a branch of USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He also states that a member of his staff obtained a copy of the CMR delivered to and accepted by USPS on November 21, 2014 for the records of BCMS. Mr. Peltier lastly 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 pieces of certified mail to petitioners on November 21, 2014.

18. The petition and the subject conciliation order indicate a protest of notice number L-040805750. The consolidated statement of tax liabilities, dated March 6, 2014, includes that

number among the assessments listed thereon. Specifically, the consolidated statement indicates that assessment number L-040805750 assesses penalty and interest against petitioners for the tax year 2008.

19. In his affidavit submitted in response to the notice of intent to dismiss, Mr. Gabovich asserts “knowledge of the facts involved in this matter herein based on a review of the Division’s files.”

20. Mr. Gabovich also asserts in his affidavit that fraud penalty was imposed in the assessment at issue. Petitioners have made no claims to the contrary.

21. Petitioners did not respond to the notice of intent to dismiss.

THE SUPPLEMENTAL DETERMINATION

The Supervising Administrative Law Judge found that the documents submitted by the Division established that the subject conciliation order was properly mailed to petitioners at their last known address using certified USPS mail on November 21, 2014, as claimed. He also found sufficient evidence to establish that the assessment that was the subject of the conciliation order asserted fraud penalty pursuant to Tax Law § 685 (e). The Supervising Administrative Law Judge thus concluded that petitioners had 30 days from the date of mailing of the conciliation order to file a petition with the Division of Tax Appeals. As petitioners’ petition was filed 83 days after the mailing of the order, the Supervising Administrative Law Judge determined that it was late-filed and must be dismissed.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioners assert, for the first time on exception, that they spoke with the conciliation conferee who, they assert, informed them that they had 90 days to protest the conciliation order.

They contend that they relied on this advice in filing their petition within 90 days.

The Division asserts that the Administrative Law Judge properly dismissed the petition as untimely. The Division contends that there is no evidence in the record to support petitioners' claim that they were misled by the conferee.

OPINION

The jurisdictional question presented in this matter emanates from the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to 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). That is, 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" (20 NYCRR 3000.9 [b] [1]).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (citations omitted)" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In contrast, the opponent of such a motion "must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where, as here, the timeliness of a taxpayer's petition is in question, the initial inquiry is

whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by “producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)” (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

We agree with the Supervising Administrative Law Judge's finding that the Division has established the existence of a standard mailing procedure through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders during the relevant period. We also agree with the Supervising Administrative Law Judge's finding that the CMR in the present matter has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). We thus conclude, as did the Supervising Administrative Law Judge, that the Division has met its burden to show that the conciliation order at issue was mailed as addressed to petitioners on November 21, 2014.

Additionally, we agree with the Supervising Administrative Law Judge's conclusion that the address to which the conciliation order was mailed was petitioners' last known address (*see* finding of fact 13).

The petition in this matter was filed on February 12, 2015, or 83 days after the conciliation

order was mailed. Generally, where a conciliation conference has been requested and held, a taxpayer has 90 days from the date of issuance of the conciliation order to further contest the notice by filing a petition with the Division of Tax Appeals (*see* Tax Law § 170 [3-a] [e]).

Where the Division asserts fraud penalty in the underlying deficiency, however, the limitations period for filing such a petition is reduced to 30 days (*see* Tax Law § 170 [3-a] [e], [h]).

As noted, in order to prevail in the present matter, the Division must make a “prima facie showing of entitlement to judgment as a matter of law” (*Winegrad v New York Univ. Med. Ctr.* at 853). In this particular case, this means that, in addition to a showing of proper mailing, the Division must establish that the petition was subject to a 30-day time limitation.¹

Mr. Gabovich’s affidavit provides that, based on his review of the Division’s files, fraud penalty was imposed in the underlying deficiency. Petitioners have not contested nor controverted this claim in any way. Under such circumstances, we agree with the Supervising Administrative Law Judge’s conclusion that the Gabovich affidavit is sufficient to establish that fraud penalty was imposed herein, notwithstanding that the relevant notice of deficiency has not been submitted into the record (*see Whelan v GTE Sylvania* [uncontested affidavit provides sufficient evidence for summary judgment]).

By establishing that fraud penalty was imposed in the underlying deficiency, the Division has also established that the 30-day time period for filing a petition under Tax Law § 170 (3-a) (e) is properly applicable herein. Petitioners’ petition, filed 83 days after the conciliation order was mailed, was therefore late-filed. The Division of Tax Appeals thus lacks jurisdiction to

¹ Obviously, this issue does not arise where the 90-day period is applicable. Nor would this issue have arisen here if the underlying notice had been submitted in evidence.

consider the merits of petitioners' protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

Petitioners' claim on exception that their late-filed petition should be permitted because they were misled by the conciliation conferee regarding the deadline is unsubstantiated by any evidence in the record. This claim is thus insufficient to defeat the notice of intent to dismiss (*see Whelan v GTE Sylvania*).

We thus conclude that the Supervising Administrative Law Judge properly dismissed the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ronald and Barbara Discenza is denied;
2. The supplemental determination of the Administrative Law Judge, dated July 14, 2016, is affirmed; and
3. The petition of Ronald and Barbara Discenza is dismissed.

DATED: Albany, New York
February 16, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner