

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 New York State 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 Supervising 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. The six-month period for issuance of this decision commenced on November 25, 2015, the due date for petitioners' reply brief.

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

ISSUE

Whether the petition should be dismissed because it was not timely filed following the issuance of a conciliation order.

FINDINGS OF FACT

We find the following facts.

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 August 6, 2015, the Supervising Administrative Law Judge issued to petitioners a notice of intent to dismiss petition (notice of intent) that states, in relevant part:

“Pursuant to § 170 (3-a) (h) (iii) of the Tax Law, the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of thirty (30) days following the issuance of a BCMS [Bureau of Conciliation and Mediation Services] conciliation order.

In this case, the conciliation order, CMS No. 261398, was issued to petitioners on November 21, 2014. However, the petition in this matter was not filed with the Division of Tax Appeals until February 12, 2015, or eighty three (83) days later.”

3. The notice of intent allowed the parties 30 days to submit written comments on the proposed dismissal. The Division of Taxation (Division) responded by submitting proof of mailing of the relevant conciliation order. Petitioners did not respond to the notice of intent.

4. On August 6, 2015, the Supervising Administrative Law Judge issued a determination dismissing the petition filed in this matter. The determination repeated the language in the notice of intent quoted above (*see* finding of fact 2).

OPINION

The Supervising Administrative Law Judge's determination was issued following the

Division of Tax Appeals' issuance to petitioner of a notice of intent 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). 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]).

Under certain circumstances, including the assertion of a fraud penalty, there is a 30-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170 [3-a] [e], [h]; 20 NYCRR 4000.5 [c] [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 30-day time limit (*see e.g. Matter of Dean*, Tax Appeals Tribunal, April 16, 2013).

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 issuance of the relevant conciliation order (*see Matter of Castillo*, Tax Appeals Tribunal, November 12, 2015). 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).

In this case, the determination contains no findings of fact or conclusions of law to indicate that the Division met its burden to prove mailing. The determination thus fails to address this issue. Accordingly, we remand this matter to the Supervising Administrative Law Judge for a supplemental determination (*see Matter of CMC Food, Inc.*, Tax Appeals Tribunal,

December 11, 2015).

The supplemental determination shall be rendered as expeditiously as possible and shall be based upon the factual record already made.

We will retain jurisdiction over this matter based on the exception that was timely filed by petitioners. After the Supervising Administrative Law Judge issues his supplemental determination, petitioners will be allowed to add to their existing exception and to file a brief, provided they do so within 30 days of the issuance of the supplemental determination or request an extension of time within the 30-day period. The Division will be given an opportunity to respond to any additional submission by petitioners. If the Division wishes to except to any portion of the Supervising Administrative Law Judge's supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Supervising Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision.

DATED: Albany, New York
May 19, 2016

/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