

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DIANE QUINN : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827823
New York State and City Personal Income Taxes :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 2013. :

Petitioner, Diane Quinn, filed an exception to the determination of the Administrative Law Judge issued on March 16, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on June 20, 2017, the date that petitioner's reply brief was due.

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

ISSUE

Whether petitioner 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 Administrative Law Judge, except that we have modified finding of fact 4 to more fully reflect the record. As so modified, the Administrative Law Judge findings of fact appear below.

1. The Division of Taxation (Division) issued a notice of deficiency (Assessment ID L-042639936-4), dated August 26, 2015, assessing personal income tax in the amount of \$2,685.00, plus interest for the year 2013. The notice of deficiency was addressed to petitioner at a Bronx River Road, Yonkers, New York, address.

2. In protest of the foregoing notice of deficiency, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated September 25, 2015, that was received by BCMS on September 29, 2015. The request lists petitioner's address as Bronx River Road, Yonkers, New York.

3. A conciliation conference was conducted by Thomas F. O'Donnell, Conciliation Conferee, on February 23, 2016. By letter dated May 16, 2016, petitioner requested that BCMS Conciliation Conferee O'Donnell mail detailed information to her at the following address: "7900 E. Princess Drive, Unit 2289, Scottsdale, AZ 85255."

4. Subsequently, BCMS issued a conciliation order (CMS No. 267996), dated June 3, 2016, recomputing notice of deficiency L-042639936 to tax due of \$1,218.35, plus interest. The cover letter issued together with the conciliation order stated that the conciliation order was binding unless petitioner filed a petition with the Division of Tax Appeals within 90 days from the date of the conciliation order.

5. On September 2, 2016, petitioner mailed a petition by FedEx Express shipping to the Division of Tax Appeals. It was received on September 6, 2016. The petition lists petitioner's

address as 7900 E. Princess Drive, Apt. 2289, Scottsdale, AZ 85255. The petition challenges the audit adjustments and the recomputation of tax by BCMS.

6. On October 13, 2016, Daniel J. Ranalli, then Supervising Administrative Law Judge of the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner. The notice of intent to dismiss petition indicates that the relevant conciliation order was issued on June 3, 2016, but that the petition was not filed until September 2, 2016, or 91 days later.

7. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents: (i) the affidavit of Mary Hurteau, Esq., the Division's representative, dated November 28, 2016; (ii) the affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated November 14, 2016; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) dated June 3, 2016; (iv) an affidavit, dated November 18, 2016, of Bruce Peltier, Stores and Mail Operations Supervisor in the Division's Mail Processing Center; (v) a copy of the petition filed with the Division of Tax Appeals on September 2, 2016; (vi) a copy of petitioner's request for conciliation conference, received by BCMS on September 29, 2015; (vii) a copy of the Conciliation Order and cover sheet, dated June 3, 2016, and a copy of the three-windowed mailing envelope; and (viii) a copy of petitioner's letter, dated May 16, 2016, to BCMS Conciliation Conferee Thomas F. O'Donnell.

8. The affidavit of Robert Farrelly, Supervisor of Tax Conference 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 United States Postal Service (USPS) via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

9. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

10. 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, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

11. 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 zeroes. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

12. The clerk, as part of her regular duties, associates each cover sheet, conciliation order and cover letter. The clerk verifies the name and address of the taxpayer with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear.

13. Pursuant to the general office practice, the BCMS clerk stamped “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas” on the last page of the CMR and also stamped “MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on each page of the CMR.

14. 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, “6-3-16” is written in the upper right corner of each page of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of June 3, 2016.

15. The CMR and the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the 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 the USPS.

16. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR, which contains a list of conciliation orders issued by the Division on June 3, 2016. The CMR lists 35 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 was a reference/CMS number, the name and address of the addressee, and postage and fee amounts. There are no deletions from the list. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

17. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0848 3924 is reference/CMS number 000267996, along with petitioner’s name and a Scottsdale,

Arizona, address that is identical to petitioner's address contained in her May 16, 2016 letter to BCMS Conciliation Conferee O'Donnell. The cover sheet bears petitioner's name and the same Scottsdale, Arizona, address that appears on the CMR and shows the same certified control number, 7104 1002 9730 0848 3924, as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

18. The affidavit of Bruce Peltier, Stores and Mail Operations Supervisor 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. He stated that 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 affixes postage and fee amounts. 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.

19. In this case, the postal employee affixed a postmark dated June 3, 2016 to, and also wrote his or her initials on, pages one through four of the CMR. The postal employee also circled the preprinted number "35" corresponding to the heading "TOTAL PIECES AND AMOUNTS," contained on the fourth and last page of the CMR. The postal employee circled the "TOTAL PIECES AND AMOUNTS" number at the Division's specific request, and this was intended to indicate that all of the 35 pieces of mail listed on the CMR were received at the post office.

20. Mr. Peltier's affidavit 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. Peltier'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.

21. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on June 3, 2016, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at her Scottsdale, Arizona, address, 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 U.S. Postal Service on June 3, 2016 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit were 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 petitioner on June 3, 2016.

22. Petitioner did not respond to the notice of intent to dismiss petition.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the statutory notice by mailing the document to the taxpayer'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 its procedure was followed in this specific case.

The Administrative Law Judge determined that the Division met its burden here through the affidavits of Mr. Farrelly and Mr. Peltier, along with the CMR, which the Administrative Law Judge found was properly completed. The Administrative Law Judge thus found that the conciliation order was properly mailed on June 3, 2016, as claimed. The Administrative Law Judge also found that since the date of mailing (and deemed filing date) of the petition was September 2, 2016, petitioner's protest was filed one day beyond the statutory 90-day limitations period for the filing of petitions in the Division of Tax Appeals. The Administrative Law Judge noted that this limitations period is strictly enforced and that petitions filed even one day late are properly considered untimely. Accordingly, the Administrative Law Judge dismissed the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that she miscalculated the number of days in each month in determining the 90-day deadline. Petitioner also contends that she was confused by the appeals process. In addition, petitioner makes substantive claims regarding the asserted liability.

The Division contends that the Administrative Law Judge properly determined that the petition was untimely filed.

OPINION

The Supervising 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 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, Inc.*, 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]).

With certain exceptions not relevant here, there is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law §§ 170 [3-a] [e]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

Where, as here, the timeliness of a taxpayer’s protest against a notice of deficiency 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 such notice or conciliation order, by certified or registered mail, to the taxpayer’s last known address (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). 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 (*Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

We agree with the Administrative Law Judge that the Division has established the existence of a standard mailing procedure during the relevant period 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 period at issue (*id.*). We also

agree with the Administrative Law Judge that the CMR has been properly completed. We observe that this document lists certified control numbers and assessment numbers with corresponding names and addresses. Such listing includes petitioner's name and address, and corresponding certified control and assessment numbers. Additionally, the CMR bears a USPS postmark dated June 3, 2016 and the initials of a USPS employee on each page thereof. The same USPS employee circled the preprinted total pieces listed number on page 4 of the CMR to indicate receipt by the post office of all pieces of mail listed thereon in accordance with the Division's standard mailing procedure. As so completed, the CMR is highly probative evidence of the fact and date of mailing (*Matter of Modica*).

We also note, as did the Administrative Law Judge, that the address to which the conciliation order was mailed is the address specifically designated by petitioner in her May 16, 2016 letter to the BCMS conciliation conferee. The use of this address clearly satisfies the "last known address" requirement (*Matter of Campos-Liz*, Tax Appeals Tribunal, January 12, 2017).

We thus agree with the Administrative Law Judge's conclusion that the Division properly mailed the conciliation order on June 3, 2016, and that the statutory 90-day time limit to file a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170 [3-a] [e]).

Petitioner's petition was delivered to FedEx Express on September 2, 2016. As that company is a designated delivery service pursuant to Internal Revenue Code (26 USCA) § 7502 and Tax Law § 691, the date of such delivery is deemed to be the date the petition was filed (*see also* Department of Taxation and Finance Publication 55 ["Designated Private Delivery Services"] [4/17]). September 2, 2016, however, is 91 days after the June 3, 2016 mailing date. As the Administrative Law Judge noted, the 90-day statutory deadline is strictly enforced and petitions filed just one day late are properly considered untimely (*see e.g. Matter of American*

Woodcraft, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

Petitioner's asserted failure to correctly compute a day count from the date of mailing is not a basis for relief in the present matter. With respect to petitioner's contention that she was confused by the administrative appeals process, we observe that petitioner was aware of the 90-day limitations period, which is the only aspect of that process that is relevant here (*see* finding of fact 4). As to petitioner's substantive claims regarding her underlying tax liability, we note, again, that we lack jurisdiction to consider the merits of an untimely petition (*Matter of Modica*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Diane Quinn is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Diane Quinn is dismissed.

DATED: Albany, New York
November 22, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner