

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CASIMIRO AND MARIA ALVARENGA	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 826051
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2007 through 2009.	:	

Petitioners, Casimiro and Maria Alvarenga, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2007 through 2009.

On March 7, 2014, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On May 19, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted documents in support of dismissal. On May 22, 2014, petitioners, appearing by Michael Buxbaum, CPA, submitted documents in opposition to dismissal. On July 31, 2014, the Administrative Law Judge issued a determination finding that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioners' protest and dismissed the petition.

Petitioners filed an exception to the determination of the Administrative Law Judge. On May 28, 2015, the Tax Appeals Tribunal issued a decision finding that the absence of a mail cover sheet raised a material issue of fact of whether the Division of Taxation's standard mailing procedure was followed, reversed the determination of the Administrative Law Judge, withdrew the Notice of Intent to Dismiss Petition without prejudice, and remanded the matter to the

Administrative Law Judge for further proceedings on the issue of timeliness and ultimately, if determined to be appropriate, a determination on the merits.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion dated September 14, 2015 seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners responded to the Division of Taxation's motion on October 9, 2015. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On January 13, 2014, petitioners, Casimiro and Maria Alvarenga, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Conciliation Order Dismissing Request (CMS number 247906), issued by the Bureau of Conciliation and Mediation Services (BCMS) on September 23, 2011.

2. On September 14, 2015, the Division of Taxation (Division) brought a motion seeking an order dismissing the petition or, in the alternative, summary determination on the basis that the petition was not filed within 90 days of the issuance of the conciliation order. To show proof of proper mailing of the conciliation order dated September 23, 2011, the Division submitted, among other documents, (i) the affidavit of Peter B. Ostwald, Esq., an attorney employed in the

Office of Counsel of the Division, dated September 14, 2015; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated September 14, 2015; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked September 23, 2011; (iv) a copy of the conciliation order, cover letter and cover sheet, dated September 23, 2011, and copy of the three-windowed mailing envelope; (v) an affidavit, dated September 14, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (vi) petitioners’ Request for Conciliation Conference, received by BCMS on August 30, 2011, showing petitioners’ address as 116 Custer Ave., Williston Park, New York, and listing petitioners’ representative as Ana E. Rios, Marti and Associates, Inc., at 1500 Jerusalem Ave., Merrick, New York 11566. The addresses as listed for petitioners and petitioners’ representative on the request are the same addresses indicated on the conciliation order cover letter and cover sheet for petitioners and petitioners’ representative, respectively.

3. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS’s receipt of a postmarked copy of the CMR.

4. 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.

5. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation’s Advanced Function Printing Unit (AFP). 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.

6. 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 these documents are delivered to the BCMS clerk assigned to process conciliation orders.

7. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers and taxpayers' representatives 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 where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

8. 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."

9. 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 case "9/23/11" is written in the upper right corner of pages 1 through 4 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of September 23, 2011.

10. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are 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 the USPS.

11. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on September 23, 2011. This CMR lists 47 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a reference/CMS number, and the name and address of the addressees. There are no deletions from the list.

12. Information regarding the conciliation order issued to petitioners is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0812 7002 is reference/CMS number 000247906, along with petitioners' names and a Williston Park, New York, address that is identical to the address on petitioners' request for conciliation conference. Additionally, corresponding to certified control number 7104 1002 9730 0812 6975 is reference/CMS number 000247906, along with the name of petitioners' representative, Ana E. Rios, and a Merrick, New York, address that is identical to the representative's address as indicated on the request for conciliation conference.

13. The cover sheet bearing petitioners' names and a Williston Park, New York, address that is identical to the address on petitioners' request for conciliation conference and on the CMR shows the same certified control number, 7104 1002 9730 0812 7002, as that listed on the CMR for petitioners' entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

14. The cover sheet bearing petitioners' representative's name, Ana E. Rios, and a Merrick, New York, address that is identical to the representative's address as indicated on the request for conciliation conference and on the CMR shows the same certified control number, 7104 1002 9730 0812 6975, as that listed on the CMR for petitioners' representative's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

15. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center. This affidavit 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 envelopes. A clerk then counts the envelopes and verifies the names and certified control 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.

16. In this particular instance, the postal employee affixed a postmark dated September 23, 2011 to, and also wrote his or her signature or initials on, each page of the five-page CMR. The postal employee also circled the preprinted number "47" corresponding to the heading "Total Pieces and Amounts." The circling of the Total Pieces and Amounts number was done at the Division's specific request and is intended to indicate that all 47 pieces of mail listed in the CMR were received at the post office.

17. 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.

18. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on September 23, 2011, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioners at their Williston Park, New York, address and an item of certified mail addressed to Ana E. Rios at her Merrick, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelopes 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 September 23, 2011 for the records of BCMS. Mr. Peltier 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 and petitioners' representative on September 23, 2011.

CONCLUSIONS OF LAW

A. 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]; 20 NYCRR 4000.5[c][4]). This deadline is strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). 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).

Accordingly, a conciliation order is binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals.

B. The Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b) on the basis that petitioners failed to file a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order Dismissing Request. The proper motion in this case is for summary determination. Where the timeliness of a taxpayer's protest against a 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 conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993; *Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

C. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices 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.*, Tax Appeals Tribunal, May 23, 1991).

D. In the Tribunal's decision remanding this matter for further proceedings, the Tribunal noted that:

“[w]hile we have held that a properly completed CMR and affidavits from individuals with requisite knowledge of mailing procedures may be sufficient to prove mailing . . . we are unable to discover in our research any case wherein the absence of the mail cover sheet was directly confronted [footnote omitted]. We are thus uncertain of the significance of its absence. It may be that the absence of

this document may be overcome by other evidence in the record that proves mailing. . . . Nevertheless, we observe that the cover sheet is an important component of the mailing process as it provides the address to which the order is mailed through the windowed envelope. It thus gives the finder of fact an opportunity to view how the subject conciliation order was mailed. It also lists the certified control number. Hence, both the address and the certified control number as listed on the cover sheet can be verified against the CMR. We note further that the conciliation order itself lists neither the taxpayer's address nor the certified control number" (*Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015 [citations omitted]).

In its motion on remand, the Division has presented the mail cover sheet and cover letter, along with the CMR, and the affidavits of Mr. Farrelly and Mr. Peltier. Together, the mail cover sheet, cover letter, CMR and affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establish the Division's standard mailing procedure and show that the procedure was followed in the instance. The CMR has been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The mail cover sheet bears petitioners' names and a Williston Park, New York, address that is identical to the address on petitioners' request for conciliation conference and on the CMR and shows the same certified control number, 7104 1002 9730 0812 7002, as that listed on the CMR for petitioners' entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order. Regarding petitioners' representative, the cover sheet bears the representative's name, Ana E. Rios, and a Merrick, New York, address that is identical to the representative's address as indicated on the request for conciliation conference and on the CMR and shows the same certified control number, 7104 1002 9730 0812 6975, as that listed on the CMR for petitioners' representative's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the

conciliation order. The Division has sufficiently established that the addresses as indicated for petitioners and petitioner's representative, as appear on the mail cover sheets, were the addresses appearing through the windowed envelope and are the addresses to which the order was mailed.

The Division has thus established that the conciliation order at issue was mailed as addressed to petitioners on September 23, 2011. The Division has further established that a copy of the conciliation order was mailed to petitioners' representative.

E. The address to which the conciliation order was mailed is the address designated by petitioners on their request for conciliation conference. At no time did petitioners provide BCMS with notice of any new or alternative address. The order was thus properly addressed.

F. The 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing of the conciliation order, September 23, 2011. The petition in this matter, having been filed on January 13, 2014, or 843 days after the date of issuance of the order, was therefore untimely.

G. As it has been determined that petitioners' petition protesting the conciliation order was filed beyond the applicable statute of limitations, the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition.

H. The Division's motion for summary determination is granted, and the petition of Casimiro and Maria Alvarenga is denied.

DATED: Albany, New York
December 17, 2015

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE