

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). In response to a request for additional time, the parties were granted until May 22, 2014 to respond to the proposed dismissal. 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. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced May 22, 2014. After due consideration of the documents submitted, 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 March 7, 2014, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners. The Notice of Intent indicates that the relevant Conciliation Order was issued on September 23, 2011, but that the petition was not filed until January 13, 2014, or 843 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 in the Office of Counsel of the Division, dated May 16, 2014; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated May 6, 2014; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked September 23, 2011; (iv) an affidavit, dated May 16, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (v) petitioners’ Request for Conciliation Conference, received by BCMS on August 30, 2011, showing petitioners’ address in Williston Park, New York, and listing petitioners’ representative as Ana E. Rios, Marti and Associates, Inc., at 1500 Jerusalem Ave., Merrick, New York 11566.

4. 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.

5. 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. 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.

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

8. 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.

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 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.

11. The CMR, along with 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. Petitioners responded to the Notice of Intent to Dismiss by affidavit of their representative, Michael Buxbaum, CPA, dated May 22, 2014. Petitioners argue that the underlying notice of deficiency, dated April 11, 2011, was mailed to an incorrect address. Petitioners did not address the issue of the timeliness of their petition in protest of the conciliation order.

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. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period.

Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. 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).

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 this case, the CMR, along with the 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. Additionally, 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

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. Petitioners do not dispute that the conciliation order was mailed to the proper address. Rather, they argue that the underlying notice of deficiency, which they protested by filing their request for conciliation conference, was mailed to the wrong address.

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 noted previously, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest. As it has been determined that petitioners' petition protesting the conciliation order was filed beyond the applicable statute of limitations, petitioners' argument that the underlying notice of deficiency was mailed to the incorrect address may not be considered herein.

H. The petition of Casimiro and Maria Alvarenga is dismissed.

DATED: Albany, New York
July 31, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE