

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEREMY WIESEN : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827455
Personal Income Tax under Article 22 of the Tax Law and :
the New York City Administrative Code for the Years :
2009 and 2011. :
:

Petitioner, Jeremy Wiesen, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2009 and 2011.

On February 26, 2016, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were granted until May 12, 2016 to respond to the proposed dismissal. On April 6, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of dismissal. On May 11, 2016, petitioner, appearing pro se, submitted a brief in opposition to dismissal. On July 14, 2016, Donna M. Gardiner, Administrative Law Judge, issued a determination dismissing the petition filed in this matter and granting summary determination in favor of the Division of Taxation.

Petitioner timely filed an exception to the determination of the administrative law judge. On April 10, 2017, the Tax Appeals Tribunal issued a decision finding that the determination failed to address whether the Division of Taxation has met its burden of demonstrating proper

mailing of the conciliation order sufficient to demonstrate entitlement to an accelerated determination as a matter of law, and remanded the matter back to the administrative law judge for a supplemental determination based upon the factual record already in existence. After due consideration of the documents in the record, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition in this matter is properly subject to dismissal.

FINDINGS OF FACT

1. Petitioner, Jeremy Wiesen, filed a petition with the Division of Tax Appeals on January 26, 2016. Attached to the petition were a conciliation order (CMS No. 265328) dated October 2, 2015, a one-page letter from petitioner dated January 25, 2016, and a one-page letter from Jack B. Goldhaber, CPA, dated January 25, 2016.

2. The conciliation order sustained a Notice of Deficiency, No. L-042253882, dated December 5, 2014, that was issued to petitioner for the tax years 2009 and 2011.¹

3. In his letter attached to his petition, petitioner acknowledged that he missed the deadline for the timely filing of his petition. Petitioner asserts that he has relied on his accountant for over 30 years and his accountant was out of the country during the months leading up to the deadline for petitioning the conciliation order issued to him. Additionally, there is a one-page letter from his accountant which sets forth the weeks he was out of the country.

¹ The record does not contain a complete copy of the notice of deficiency (Assessment ID L-042253882). Both petitioner and the Division of Taxation have offered an incomplete copy of the notice of deficiency in their filings with the Division of Tax Appeals. Both such incomplete copies show a deficiency for 2009. The conciliation order, however, indicated that petitioner's request involves assessment L-042253882 and tax years 2009 and 2011.

4. The notice of intent to dismiss petition advised that the petition was subject to dismissal on the basis that:

“Pursuant to § 170(3-a)(e), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a BCMS conciliation order.

In this case, the conciliation order, CMS No. 265328, was issued to petitioner on October 2, 2015. However, the petition in this matter was not filed with the Division of Tax Appeals until January 26, 2016, or one hundred and sixteen (116) days later.”

5. In petitioner’s response to the notice of intent to dismiss petition, he argues that the Division of Tax Appeals should exercise its jurisdiction to review the notice of intent to dismiss if it believes there is a justifiable excuse. Petitioner requests that the two letters attached to his petition be considered in “waiving [his] failure to meet the petition deadline.” Additionally, petitioner argues the substantive issues underlying the issuance of the notice of deficiency.

6. The Division of Taxation (Division) submitted an affidavit of the Division’s attorney, which referenced the attached affidavits of two Division employees, Robert Farrelly, Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services (BCMS) and Bruce Peltier, a supervisor since 1999 and currently the Principal Mail and Supply Clerk in the Division’s mail room, along with their respective attached supporting exhibits in response to the notice of intent to dismiss.

7. The affidavit of Robert Farrelly, dated March 29, 2016, 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 “Certified Record for Presort

Mail - BCMS Cert Letter” (CMR).

8. In order to commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and 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.

9. 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, certified control number, and certified control number bar code.

10. 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.

11. 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.

12. 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.”

13. 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, “10-2-15” is written in the upper right corner of pages one through five of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of October 2, 2015.

14. 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.

15. Mr. Farrelly attested to the truth and accuracy of the five-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on October 2, 2015. This particular CMR lists computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the 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.

16. Information regarding the conciliation order relevant to this case is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0593 1558 is reference or CMS number 000265328, along with petitioner’s name and a West Palm Beach, Florida, address that is identical to petitioner’s address contained on his request for

BCMS conference.

17. The Division also submitted the affidavit of Bruce Peltier, dated March 31, 2016. 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 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.

18. In this case, the postal employee affixed a postmark dated October 2, 2015 to, and also wrote his or her initials on, pages one through five of the CMR. The postal employee also wrote and circled the number "46" corresponding to the heading "Total Pieces and Amounts" as well as the preprinted number 46, contained on the fifth and last page of the CMR. The postal employee writes and circles 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 46.

19. 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 a 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.

20. Based upon his review of Mr. Farrelly's affidavit, the exhibits attached thereto, and the CMR, Mr. Peltier avers that on October 2, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his West Palm Beach, Florida, 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 October 2, 2015 for the records of BCMS. Mr. Peltier lastly asserts that the procedures described in this 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 piece of certified mail to petitioner on October 2, 2015.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326 [1991]). In the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

B. Section 2006(4) of the Tax Law requires the Tax Appeals Tribunal:

“[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically*

provided for, modified or denied by another provision of this chapter (emphasis added)."

C. Tax Law § 2008(1), in turn, provides:

“All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency . . . , or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.”

D. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether or not the Division has carried its burden of demonstrating the fact and date of mailing of the conciliation order to the petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by either direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. 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 the particular instance at hand (*Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*).

F. In this case, the CMR, along with the affidavits of both Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establishes 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 petitioner on October 2, 2015.

G. The address to which the conciliation order was mailed is the address designated by petitioner on his request for conference. At no time did petitioner provide notice of any new or alternative address. The order was thus properly addressed to petitioner's last known address and petitioner does not dispute that the conciliation order was mailed to his proper address.

H. As set forth above in Finding of Fact 3, petitioner acknowledges that his petition was not timely filed and he argues that he had an excuse for the late filing that he would like considered herein. However, Article 22 of the Tax Law, which imposes the state personal income tax, contains provisions that provide for, modify or deny the right to a hearing with respect to personal income tax (*see Matter of Dreisinger*, Tax Appeals Tribunal, July 20, 1989). Accordingly, it is necessary to look to the provisions of Article 22 of the Tax Law to determine petitioner's right to a hearing.

Under Article 22 of the Tax Law, there is a strict 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals (*see* Tax Law §§ 689(b); 170[3-a][e]; 20 NYCRR 4000.5[c][4]), and the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond such 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). In this case, the conciliation order was issued to petitioner on October 2, 2015. Since the petition was not filed with the Division of Tax Appeals until January 26, 2016, or 116 days later, such petition was not timely filed and the Division of Tax Appeals lacks jurisdiction to consider it.

I. The petition of Jeremy Wiesen is hereby dismissed.

DATED: Albany, New York
August 24, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE