

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DIANE QUINN : DETERMINATION
for Redetermination of a Deficiency or for Refund : 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 a petition for redetermination of a deficiency or for refund of 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.

On October 13, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. In response to a request for additional time, the parties were granted until December 29, 2016 to respond to the proposed dismissal. Petitioner, appearing pro se, did not submit a response to the proposed dismissal. On November 29, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on December 29, 2016. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

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 is 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 Conciliation Order (CMS No. 267996), dated June 3, 2016, recomputing Notice of Deficiency L-042639936 to tax due of \$1,218.35, plus interest.

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, Assistant 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, Assistant 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, along with the envelopes containing the cover sheets, cover letters, and conciliation orders is 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, store 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.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). This deadline is strictly enforced and protests filed even one day late are 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). 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. Thus, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4).

B. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2012) the Tribunal held that the standard to employ for reviewing a Notice of Intent To Dismiss Petition is the same as that used for reviewing a motion for summary determination.

A motion for summary determination 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

C. Where the timeliness of a taxpayer’s petition following a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly mailed. (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*). When an order is found to have been properly mailed by the Division to the taxpayer’s last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

D. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*Matter of United Water New York*,

Inc., Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. 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, reviewing and issuing (mailing) 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 was mailed as addressed to petitioner on June 3, 2016. Further, the address to which the Conciliation Order was mailed is the address designated by petitioner in her May 16, 2016 letter to the BCMS Conciliation Conferee. This same address appears on the petition filed by petitioner in this matter. As such, the address used satisfies the "last known address" requirement.

It is concluded that the Division properly mailed the Conciliation Order on June 3, 2016, and 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]).

F. The documents show that the Conciliation Order was mailed on June 3, 2016, but petitioner's petition was mailed by FedEx Express shipping on September 2, 2016 (*see* 26 USC § 7502[a][1]; Tax Law § 691[a][2][A]), which is one day beyond the 90-day period. Even one day late precludes petitioner from having her petition heard since deadlines for filing petitions are strictly enforced (*see Matter of American Woodcraft* [a petition was dismissed because it was filed one day late]). As such, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

G. The Notice of Intent to Dismiss Petition is sustained and the petition of Diane Quinn is dismissed.

DATED: Albany, New York
March 16, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE