

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAPHAEL RODRIGUEZ : DETERMINATION
DTA NO. 828249
for Redetermination of a Deficiency or for Refund of New :
York State Personal Income Tax Under Article 22 of the :
Tax Law and the New York City Administrative Code :
for the Year 2015.

Petitioner, Raphael Rodriguez, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2015.

On August 28, 2017, 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 be timely filed. By request of the Division of Taxation, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to November 13, 2017. On November 13, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Ellen K. Roach, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, did not respond to the notice of intent to dismiss petition. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on November 13, 2017. After due consideration of the documents and arguments submitted, Dennis M. Galliher, 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. On August 11, 2016, petitioner, Raphael Rodriguez, electronically filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was filed in response to a notice of deficiency (assessment ID L-044969024) issued to petitioner by the Division of Taxation (Division) asserting additional income tax due, for the tax year 2015.

2. BCMS issued to petitioner a conciliation order, CMS No. 271418, dated February 17, 2017, sustaining the notice of deficiency.

3. On June 22, 2017, petitioner filed a petition with the Division of Tax Appeals protesting the conciliation order.

4. On August 28, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition, on the basis that the petition did not appear to have been timely filed. The notice of intent indicated that the conciliation order was issued on February 17, 2017, but that the petition was not filed until June 22, 2017, or 125 days later.

5. In response to the issuance of the notice of intent, the Division submitted the affidavits of Robert Farrelly, dated November 6, 2017, and Fred Ramundo, dated November 7, 2017, both employees of the Division. The Division also submitted a copy of the notice of deficiency issued to petitioner, a copy of the request for conciliation conference filed by petitioner, a copy of the

conciliation order issued to petitioner, and a copy of the certified mail record (CMR) containing a list of conciliation orders issued by the Division on February 17, 2017.

6. The affidavit of Robert Farrelly, Supervisor of Tax Conferences for BCMS, sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of conciliation 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.

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

8. 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.

9. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail." 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 AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk's regular duties include associating each cover sheet, conciliation order and cover letter. The clerk verifies the names and addresses of taxpayers 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 control number, bar code, and name and address of the taxpayer appear.

11. It is the general office practice that the BCMS clerk stamps "Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the last page of the CMR.

12. 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 "2-17-17" was written in the upper right corner of each page of the CMR.

13. 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.

14. Mr. Farrelly attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the conciliation orders issued by BCMS on February 17, 2017. The CMR lists 49 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 number and the name and address of the addressee, and postage and fee amounts.

15. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Corresponding to certified control number 7104 1002 9730 0096 3134 is reference number 000271418, along with the name and then-last known address of petitioner,

Raphael Rodriguez. Specifically, the Sheridan Avenue, Bronx, New York, address listed on the CMR is the same address to which the notice of deficiency was issued, and this address was, in turn, marked as correct by petitioner on his request for a conciliation conference, as filed with BCMS. Mr. Farrelly's affidavit states that the BCMS clerk noted on page two on the CMR, next to Raphael Rodriguez's name, "Order ret./unclaim. New Addr. Rемаiled (reg.): 4/12/17." On April 12, 2017, BCMS mailed a copy of the conciliation order to Raphael Rodriguez by regular mail. Mr. Farrelly avers that it is the policy of BCMS to remail, by regular mail, any orders returned by the Post Office.

16. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested 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 signature to the CMR indicating receipt by the post office.

17. In this particular instance, the postal employee affixed a postmark dated February 17, 2017, to each page of the five-page CMR. The postal employee also wrote and circled the number "49" and initialed page five to indicate the total pieces of mail received at the post office.

18. Mr. Ramundo stated 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. Ramundo'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.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo states that on February 17, 2017, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Raphael Rodriguez to a branch of the USPS in Albany, New York, in a sealed 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 post office on February 17, 2017, for the records of the Division. Mr. Ramundo 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 piece of certified mail to petitioner on February 17, 2017.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (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.

B. A motion for summary determination may 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. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Victory Bagel Time, Inc.*).

D. 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 issued. (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*; *Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, 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 bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. 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 the particular instance (*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 its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address (*see Matter of Wilson*). As indicated by the CMR, and by the affidavits of Robert Farrelly and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by certified mail on February 17, 2017, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copy of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo affidavits were followed with respect to the conciliation order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of February 17, 2017. There are 49 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "49," that the post office received 49 items for mailing. In short, the Division

established that it mailed the order to petitioner by certified mail on February 17, 2017 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. In this case, the order was properly mailed when it was delivered into the custody of the USPS on February 17, 2017, properly addressed to petitioner at his last known address, and with the requisite amount of postage affixed, and it is this date which commenced the 90-day period within which protests had to have been filed. In fact, the cover letter that accompanied the conciliation order here apprised petitioner of the 90-day time frame for filing a petition following issuance of the conciliation order. Where a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order by the taxpayer. Specifically, that section provides that a conciliation order affirming a written notice described in section 170 (3-a) is binding unless a petition is filed “within ninety days after the conciliation order is issued.” As noted previously, issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*). Hence, notwithstanding that the conciliation order issued to petitioner was returned to the Division as unclaimed (*see* Finding of Fact 17), the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, i.e., on February 17, 2017 (*Matter of Dean*). Petitioner makes no claim that he did not receive the order, but even if he had, nonreceipt of the order does not act to toll the statute (*Matter of Dean*), nor does BCMS’s practice of re-mailing unclaimed orders via regular mail act to restart the 90-day period within which to petition a properly issued order.

H. In sum, the Division has established that conciliation order CMS number 271418, relating to assessment ID number L-044969024, was properly mailed as addressed to petitioner at his last known address on February 17, 2017. As noted, petitioner did not respond to the notice

of intent to dismiss petition in any manner, including specifically submitting any challenge or evidence to counter the Division's proof of mailing of the conciliation order, as described above. Since the petition was filed on June 22, 2017, or more than 90 days after the February 17, 2017 date of issuance of the conciliation order, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

G. The petition Raphael Rodriguez is dismissed.

DATED: Albany, New York
February 8, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE