

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NAJWA KASEM : DETERMINATION
DTA NO. 828274
for Redetermination of a Deficiency or for Refund of New :
York State Personal Income Tax under Article 22 of the :
Tax Law for the Year 2015. :

Petitioner, Najwa Kasem, 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 for the year 2015.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated August 28, 2017, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because 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 November 13, 2017 to respond to the proposed dismissal. Petitioner, appearing pro se, did not submit a response to the proposed dismissal. On November 9, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, 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 November 13, 2017. 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. As a result of its review of correspondence submitted by petitioner, Najwa Kasem, the Division of Taxation (Division) issued an Account Adjustment Notice - Personal Income Tax, dated June 30, 2016 (refund denial), that denied petitioner's claimed refund of the earned income credit for the year 2015. The refund denial is addressed to petitioner at a Brooklyn, New York, address.

2. In protest of the foregoing refund denial, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). The request was signed and dated by Yehad (Jay) Abdelaziz, who is listed as petitioner's representative, on September 26, 2016, and was received by BCMS on September 30, 2016. The request lists petitioner's address as a Brooklyn, New York, address, and Mr. Abdelaziz's address as a Brooklyn, New York, address. No power of attorney appointing Mr. Abdelaziz as petitioner's representative was included with the request.

3. By letter dated November 2, 2016, Yehad Abdelaziz, The Five Pillars Tax Services, requested special permission to appear before BCMS and represent petitioner because he was "the tax preparer" and had been given "intimate knowledge of the taxpayers [sic] finances and household composition." Subsequently, by letter dated January 20, 2017, the BCMS Office of the Director granted Mr. Abdelaziz special permission to appear and represent petitioner at a BCMS conciliation conference. The January 20, 2017 letter is addressed to Mr. Abdelaziz, The

Five Pillars Tax Services, 508 72nd Street, Brooklyn, NY 11209.

4. A conciliation conference was conducted by Jeet Jaikissoon, Conciliation Conferee, on January 25, 2017. Subsequently, BCMS issued a conciliation order, CMS No. 271972, dated April 7, 2017, denying the request and sustaining the statutory notice, i.e., the notice of refund denial.

5. On July 22, 2017, a petition protesting the conciliation order was filed by petitioner.¹ The United States Postal Service (USPS) Priority Mailing Envelope in which the petition was mailed bears a USPS Priority Mail 2-day postage label dated July 22, 2017. The petition lists petitioner's address as the same Brooklyn, New York, address as that listed on petitioner's request for conciliation conference.

6. On August 28, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner, on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the conciliation order was issued on April 7, 2017, but that the petition was not filed until July 22, 2017, or 106 days later.

7. In response to the issuance of the notice of intent to dismiss, the Division submitted, among other documents: (i) the affidavit, dated November 7, 2017, of Christopher O'Brien, Esq.;² (ii) an affidavit, dated September 25, 2017, of Robert Farrelly, Supervisor of Tax

¹ Although Mr. Abdelaziz was listed as petitioner's representative on the petition, he does not have special permission to represent petitioner before the Division of Tax Appeals (*see* Tax Law § 2014 [1]).

² In paragraph five of Mr. O'Brien's affidavit, he asserts that attachment five to his affidavit "is the Division's proof that the conciliation order was mailed to petitioner on September 23, 2016. . . ." Inasmuch as attachment five to Mr. O'Brien's affidavit includes, among other documents, the Certified Record for Presort Mail - BCMS CERT LETTER, dated April 7, 2017, it is clear that the date of September 23, 2016 in paragraph five of Mr. O'Brien's affidavit is merely a typographical error.

Conferences of BCMS; (iii) a “Certified Record for Presort Mail – BCMS Cert Letter” (CMR) postmarked April 7, 2017; (iv) an affidavit, dated September 29, 2017, of Fred Ramundo, 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 July 22, 2017; (vi) a copy of petitioner’s request for conciliation conference, received by BCMS on September 30, 2016; (vii) a copy of the conciliation order and cover sheet, dated April 7, 2017, and a copy of the three-windowed mailing envelope; and (viii) a copy of the refund denial issued to petitioner, the Division’s form DTF-160, dated June 30, 2016.

8. 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 culminated in the mailing of the conciliation order by the 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 prepared and forwarded 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, signed and forwarded 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 were electronically sent to the Division’s Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated 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 produced a computer-generated CMR entitled “Certified Record for Presort Mail.” The CMR was a listing of taxpayers and representatives to whom conciliation

orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

12. The clerk, as part of her regular duties, associated each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed 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.

13. Pursuant to 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 wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "4-7-17" was written in the upper right corner of each page of the CMR. Each page of the CMR also contained a USPS postmark indicating the date of April 7, 2017.

15. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division's Mail Processing Center.

16. A piece of mail may be "pulled" from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is

segregated from the remaining group of items being mailed, so as to allow for correction or issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

17. The CMR in this case reflects that two pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for total pieces received at the post office. The specific pulled items appear on page five, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There is no such line drawn on or near the CMR listing pertaining to petitioner. The preprinted number “48,” as appearing next to the heading “TOTAL PIECES AND AMOUNTS,” on the last page of the CMR was crossed out and replaced with the handwritten number “46” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” to reflect the two pieces pulled from the run.

18. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR, which contained a list of the 46 conciliation orders issued by the Division on April 7, 2017. The CMR listed 46 certified control numbers. Each such certified control number was assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference/CMS number and the name and address of the addressee, and postage and fee amounts. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

19. Information regarding the conciliation order issued to petitioner was contained on page four of the CMR. Corresponding to certified control number 7104 1002 9730 0106 9125 was reference/CMS number 000271972, along with the name and address of petitioner, Najwa

Kasem, at her Brooklyn, New York, address. This was the same address listed by petitioner on her request for a conciliation conference filed with BCMS and on her petition filed with the Division of Tax Appeals. The cover sheet bears petitioner's name and the same Brooklyn, New York, address that appears on the CMR and shows the same certified control number, 7104 1002 9730 0106 9125, 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.

20. Information regarding the copy of the conciliation order issued to petitioner's then-representative was contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0106 9057 was reference/CMS number 000271972, along with Mr. Abdelaziz's name and The Five Pillars Tax Services, Brooklyn, New York, address that is identical to Mr. Abdelaziz's address listed on correspondence to BCMS. The cover sheet bears Mr. Abdelaziz's name and the same Brooklyn, New York, address and shows the same certified control number, 7104 1002 9730 0106 9057, entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

21. 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 was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her signature to the CMR

indicating receipt by the post office.

22. In this particular instance, the postal employee affixed a postmark dated April 7, 2017, to each page of the five-page CMR. The postal employee also wrote and circled the number “46” and initialed page five to indicate the total pieces of mail received at the post office.

23. 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.

24. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on April 7, 2017, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner at her Brooklyn, New York, address, and a piece of certified mail addressed to Yehad Abdelaziz, The Five Pillars Tax Services, Brooklyn, New York 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 USPS on April 7, 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 April 7, 2017.

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. Ramundo, 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 April 7, 2017. Further, the address to which the conciliation order was mailed is the address designated by petitioner in her request for conciliation conference. This same address appears on the petition filed by petitioner in this matter. As such,

the address used satisfies the “last known address” requirement.

F. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer’s representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer’s representative is not served with the statutory notice (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168 [1977]). Here the evidence demonstrated that the conciliation order was mailed by certified mail to Mr. Abdelaziz, petitioner’s then-representative, at his last known address on April 7, 2017, thus fulfilling the case law requirement for doing so.

G. It is concluded that the Division properly mailed the conciliation order on April 7, 2017, 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]). Ninety days after the April 7, 2017 date of mailing was July 6, 2017, and in order to be considered timely, petitioner’s protest had to have been filed on or before such date. Petitioner’s petition was filed on July 22, 2017, a date that falls beyond the 90-day period of limitations for filing a petition following the issuance of the conciliation order and was, therefore, untimely (*see Matter of Liaquat Ali, Inc.*, May 15, 2003). As such, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest (*Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

H. The Notice of Intent to Dismiss Petition is sustained and the petition of Najwa Kasem is dismissed.

DATED: Albany, New York
February 8, 2018

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE