

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEFFREY ALLEN AND SUSAN TISCH ALLEN : ORDER
for Redetermination of a Deficiency or for Refund of New : DTA NO. 828760
York State Personal Income Tax under Article 22 of the :
Tax Law for the Year 2012. :

Petitioners, Jeffrey Allen and Susan Tisch Allen, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2012.

On February 15, 2019, 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 given until May 2, 2019 to respond to said notice. On April 15, 2019, the Division of Taxation, appearing by Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by May 2, 2019, which date triggered the 90-day deadline for issuance of this order. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On December 30, 2016, petitioners, through their then-representative, Sheldon A. Berger, filed a request for conciliation conference with the Division of Taxation's (Division's)

Bureau of Conciliation and Mediation Services (BCMS) in protest of an audit letter bearing case identification number X471016273 pertaining to the year 2012.¹

2. On March 2, 2018, BCMS issued a conciliation order, CMS number 000273090, pertaining to assessment number L-045494270, to petitioners and their then-representative sustaining the statutory notice.

3. Petitioners filed a petition that was received by the Division of Tax Appeals on June 14, 2018. The envelope containing the petition bears a United States Postal Service (USPS) label, indicating the petition was mailed on June 2, 2018.

4. On February 15, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioners a notice of intent to dismiss petition (notice of intent). The notice of intent stated, in sum, that as the petition was filed in excess of 90 days after issuance of the conciliation order, the petition appeared that it was not timely filed.

5. To show proof of proper mailing of the conciliation order dated March 2, 2018, the Division submitted, among other documents: (i) the affirmation, dated April 15, 2019, of Stephanie M. Lane, an attorney employed in the Office of Counsel of the Division; (ii) a request for conciliation conference signed by Sheldon Berger on December 29, 2016; (iii) an affidavit, dated March 11, 2019, of Robert Farrelly, Supervisor of Tax Conferences of BCMS; (iv) a “Certified Record for Manual Mail - CMS-37 - BCMS Order” (CMR) postmarked March 2, 2018; (v) a copy of the conciliation order, cover letter and cover sheet, dated March 2, 2018; (vi) an affidavit, dated March 13, 2019, of Fred Ramundo, a supervisor in the Division’s mail room;

¹ While Mr. Berger represented petitioners, Jeffrey Allen and Susan Tisch Allen, at BCMS, Mr. Berger does not represent petitioners at the Division of Tax Appeals. Michael Freel of Citrin Cooperman and Company LLC has submitted documentation on behalf of petitioners; however, despite numerous requests, Mr. Freel has not furnished the Division of Tax Appeals with a power of attorney form. Petitioners were informed via letter that until a power of attorney form is received, the Division of Tax Appeals cannot discuss this matter with Mr. Freel.

(vii) an affidavit, dated March 12, 2019, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel involved in making requests to the USPS for delivery information; and (viii) two postal service forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) pertaining to petitioners and their then-representative and the USPS response to such requests dated March 4, 2019.

6. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the conciliation orders by 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 (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, 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 Manual Mail." The CMR is a listing of taxpayers 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 (000). 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.

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. The "Total Pieces and Amounts" is indicated on the last page of the CMR. 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 CMR.

12. 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, "3-2-18" 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 from 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 three-page CMR, which contains a list of the conciliation orders issued by the Division on March 2, 2018. The CMR lists 22 certified control numbers. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number, and the name and address of the addressee, and postage and fee amounts.

15. Information regarding the conciliation order issued to petitioners is contained on page one of the CMR. Specifically, the CMR indicates that a conciliation order with a certified control number 7104 1002 9735 4125 1288 and reference or CMS number 000273090, was mailed to petitioners at the Southampton, New York, address listed on the conciliation order cover letter. The corresponding mailing cover sheet, attached to the Farrelly affidavit as exhibit “D,” bears this certified control number and petitioners’ names and address as noted.

16. Page two of the CMR indicates that a conciliation order with a certified control number 7104 1002 9735 4125 1417 and reference or CMS number 000273090 was mailed to petitioners’ then-representative, Sheldon Berger at the Hoboken, New Jersey, address listed on the conciliation order cover letter. The corresponding mailing cover sheet, attached to the Farrelly affidavit as exhibit “D,” bears this certified control number and petitioners’ then-representative’s name and address as noted.

17. 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 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.

18. In this particular instance, the postal employee affixed a postmark dated March 2, 2018, to page three of the CMR. The postal employee circled the typed number “22” corresponding to the hearing “Total Pieces and Amounts” to indicate the total pieces of mail received at the post office and initialed page three of the CMR. There are no postmarks on the remaining pages of the CMR.

19. 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.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on March 2, 2018, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioners at their Southampton, New York, address, and their then-representative at his Hoboken, New Jersey, 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 post office on March 2, 2018, for the records of BCMS. 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 March 2, 2018.

21. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information. Specifically, using two separate PS forms 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9735 4125 1288 and 7104 1002 9735 4125 1417. Attached to the Corina affidavit as exhibit "A" are the Division's "Requests for Delivery Information" for article numbers 7104 1002 9735 4125 1288 and 7104 1002 9735 4125 1417. Exhibit "B" to the Corina affidavit are the USPS responses to each of the Division's requests. The USPS response to the first request indicates that the article bearing the certified control number 7104 1002 9735 4125 1288 that was addressed to petitioners was delivered at 10:31 a.m. on March 3, 2018, in Southampton, New York 11968. The USPS response to the second request indicates that the article bearing the certified control number 7104 1002 9735 4125 1417 that was addressed to petitioners' then-representative was delivered at 2:14 p.m. on March 16, 2018, in Fort Lee, New Jersey 07024. The scanned image of the recipient's signature as shown on the USPS response is "SA Berger." The scanned address of the recipient indicates "1565 Center Ave., 5F."

22. The record also includes a copy of an internet Whitepages search, which identifies Mr. Berger's current address as "1565 Center Ave., Apt 5, Fort Lee, NJ 07024-4620."

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals 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 (*see Matter of Victory Bagel Time, Inc.*).

D. Where the timeliness of a taxpayer’s petition following the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see 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 (*see 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 (*see 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 (*see 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 in question (*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 introduced adequate proof of its standard mailing procedures through 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.

G. However, the Division failed to present sufficient documentary proof, i.e., the CMR, to establish that the conciliation order was mailed as addressed to petitioners and petitioners' then-representative on March 2, 2018. Specifically, this document does not contain legible USPS postmarks on each page, indicating the mailing date of March 2, 2018; a legible postmark appears only on the last page of the CMR.²

² USPS Domestic Mail Manual § 503 [5.1.1] provides that each individual form sheet is postmarked (round-dated) at the time of mailing; and the form(s) are then returned to the mailer and become the mailer's receipt i.e. certificate of mailing. A "local" postmark shows the full name of the Post Office, a two-letter state abbreviation, "ZIP CODE, TM" and date of mailing (see USPS Handbook PO-408 [1-1.3]).

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Raskusin*, Tax Appeals Tribunal, July 26, 2001).

H. An inadequacy in the evidence of mailing, as in conclusion of law G, may be overcome by evidence of delivery of the conciliation order to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day period for filing a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn. of the State of N.Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. Notwithstanding the described evidentiary failure with regard to the mailing of the conciliation order, the Division has established, via the Corina affidavit and the accompanying USPS form 3811-A and the USPS response thereto, that the conciliation order was mailed by certified mail and was, in fact, received by petitioner on March 3, 2018 (*see* finding of fact 21).

J. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of*

Multi Trucking, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]).

K. The Corina affidavit and the accompanying USPS form 3811-A and the USPS response thereto, establishes that the conciliation order was mailed by certified mail and was, in fact, thereafter received by petitioners' then-representative on March 16, 2018 (*see* Finding of Fact 21). As a result, the period within which to challenge the conciliation order commenced to run on the date when both the petitioners and petitioners' then-representative were in receipt of the conciliation order i.e., March 16, 2018. In order to be timely, a petition with the Division of Tax Appeals, had to have been filed within 90 days thereafter (*see Matter of Agosto; Matter of Rosen*). In turn, 90 days after the March 16, 2018 date of actual receipt of the conciliation order by the petitioners' then-representative was June 14, 2018, and in order to be considered timely, petitioners' protest had to have been filed on or before such date. The petition was filed on June 2, 2018 (*see* finding of fact 3), a date that is within the statutory period within which a timely protest had to have been filed.

L. The notice of intent is rescinded and the Division shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
June 27, 2019

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE