

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BERT NELSON, JED NELSON AND BARRY NELSON :** DECISION  
for Revision of a Determination or for Refund : DTA No. 805448  
of Tax on Gains Derived from Certain Real :  
Property Transfers under Article 31-B of the :  
Tax Law. :

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 20, 1990 with respect to the petition of Bert Nelson, Jed Nelson and Barry Nelson, 955 Front Street, Uniondale, New York 11553 for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law. Petitioners appeared by D'Amato, Forchelli, Libert, Schwartz, Mineo & Joseph F. Carlino (Peter Alpert, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Both parties filed briefs on exception. The Division of Taxation's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioners timely filed a request for a conciliation conference within the meaning and intent of Tax Law § 1445(2).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner Bert Nelson and his two sons, petitioners Jed and Barry Nelson, operate a real estate appraisal firm. They also made an excellent real estate investment on Long Island. On

February 12, 1985, they purchased property in North Merrick, New York for \$1,600,000.00 which they sold less than two years later for \$3,619,000.00. By the time of the sale on December 15, 1986, petitioners had divided the property into two parcels and sold them in separate transactions: one parcel was sold for \$2,669,000.00 to Jerusalem Merrick Development, Inc., and the second parcel was sold for \$950,000.00 to Barclay Construction at Cedarhurst, Ltd.

Petitioners agree that the real property transfer gains tax was due in the amount of \$137,101.51 on the transfer of the parcel sold for \$2,669,000.00. However, they paid the gains tax of \$59,794.89 on the transfer of the second parcel sold for \$950,000.00 under protest. Bert Nelson testified:

"[W]hen we closed on the transaction, we paid a state tax, which state tax, pardon the pun, was called a Cuomo tax. I was under the impression that it did not apply to us. In order to close, we had to pay it, otherwise we could not -- the title company wouldn't accept conveyance of the property."

On June 16, 1987, petitioners filed a claim requesting a refund of \$59,794.89, the real property transfer gains tax paid on the transfer of the second parcel. The claim consisted of a lawyer's brief and 15 exhibits attached to the appropriate Department of Taxation and Finance form. Petitioners argued that the transfers of the two parcels were distinct and should not be aggregated. Therefore, since the consideration paid on the transfer of the second parcel was less than \$1,000,000.00, the real property transfer gains tax should not apply to such transfer.

The refund claim was rejected by the Division of Taxation in a letter to petitioners dated October 26, 1987 from the Central Miscellaneous Tax Section. The Division did not present any evidence of the mailing of this denial letter. However, on cross-examination, petitioner Bert Nelson testified:

"[T]his [the denial of refund letter] came about the 26th or the 27th.... I would say somewhere toward the latter part of October, maybe the first couple of days in November when I spoke to Mr. Alpert about that letter."

Further, the parties by their counsel stipulated that "[t]he Department of Taxation & Finance denied the Nelsons' claim for a refund on October 26, 1987."

During the fall of 1987, Frida Nelson, the mother of Bert Nelson and grandmother of Jed Nelson and Barry Nelson, became seriously ill and was hospitalized. She died on January 15, 1988. It was not until after petitioners observed a mourning period that ended on January 24, 1988 that petitioners could address business concerns. The parties' counsel stipulated that "[o]n January 25, 1988 the Nelsons filed a request for a Conciliation Conference." However, the record shows that the request for a conciliation conference was dated January 25, 1988 but not received by the Bureau of Conciliation and Mediation Services until January 26, 1988. The request was alleged to have been delivered by the courier service known as Federal Express.<sup>1</sup>

Petitioners in their petition alleged as follows:

"In view of the personal tragedy which the Petitioners were subjected to during the ninety day period within which Petitioners had to file their Request for a Conciliation Conference, Petitioners respectfully request that their late submission be deemed an excusable error and the order of the Conciliation Conferee be reversed."

At the formal hearing held herein, counsel for the parties described the issue to be resolved as follows:

"[ALJ:] The issue, Mr. Zalewski, for today's hearing?

Mr. Zalewski: Yes. The issue is a jurisdictional question dealing with the timeliness of a petition of a denial of refund that's dated October 26, 1987. Under Article 31-B, the petitioner had ninety days in which to petition the denial of their claim for refund.

It's the Division of Taxation's position that their petition of the denial was untimely in that it was filed after the ninetieth day from the date of the denial.

[ALJ:] Have you calculated the number of days late it was?

Mr. Zalewski: Yes. It was mailed on January 25th of 1988, which was the ninety-first day from the issuance of the denial letter.

[ALJ:] Mr. Alpert, would you like to restate the issue and/or make a brief opening statement?

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<sup>1</sup>In their petition, petitioners alleged that "[a]s a result of this situation [the illness and death of Frida Nelson] Petitioners did not forward their Request for a Conciliation Conference to the Bureau of Conciliation and Mediation Services until January 25, 1988, which they did by Federal Express delivery service." The Division's answer denied having knowledge and information of this allegation. Petitioners offered no proof or evidence concerning the manner of service of the request for conciliation conference.

Mr. Alpert: Yes, I would.

I guess I'd like to expand the issue to include whether there are reasons which would excuse a non-timely filing of a petition for a conciliation conference, and also whether pursuant to

Section 3000.3(e) of the Tax Appeals Tribunal Rules of Practice, the Judge may suspend action on a petition and refer the matter to the Bureau of Conciliation Services."

On March 20, 1990, prior to the commencement of the hearing herein, the parties by their counsel executed a stipulation of facts. Relevant portions have been incorporated into this determination.

### *OPINION*

The Administrative Law Judge concluded that petitioners' request for a conciliation conference was not untimely and that the Bureau of Conciliation and Mediation Services (hereinafter the "BCMS") erred in denying the request. In a separate order, the Administrative Law Judge denied the Division of Taxation's (hereinafter the "Division") motion to renew.

The Administrative Law Judge determined that Tax Law § 1445(2) and 20 NYCRR 4000.3(c) allow a taxpayer to apply for a hearing within 90 days of the mailing of notice of the Division's determination (here, a denial of refund). Because the Division failed to prove when it mailed the denial, the Administrative Law Judge concluded that petitioners applied for a conciliation conference within 90 days of its mailing.

The Administrative Law Judge denied the Division's motion to renew on the grounds that the Division failed to prove the mailing records it sought to introduce constituted new evidence or that they were unavailable at the time of hearing.

In its exception, the Division asserts that petitioners conceded their request for a conciliation conference was late and that petitioner Bert Nelson admitted at hearing that he received the denial on the 26th or 27th of October. The Division argues that the Administrative Law Judge erred in concluding that the Division was required to prove when the denial was mailed because petitioners conceded their request was late and so an offer of the mailing records at hearing would have merely confirmed the already conceded untimeliness of the petition. The

Division also argues that the issue at hearing was "whether there are reasons which would excuse a nontimely filing of a petition" and not whether the request itself was timely (Division's brief in support, p. 4).

The Division argues that its motion to renew should have been granted because courts can question jurisdictional issues at any time and the timeliness of a petition is a jurisdictional issue. The Division also contends that petitioners raised the timeliness argument for the first time at closing argument and thereby failed to give the Division an opportunity to make an adequate presentation of its case. For these reasons, the Division asserts that the Tribunal should exercise its ability to reopen the hearing in order to fully resolve the issue.

Petitioners assert that the Division failed its burden of proving that petitioners' request for a conciliation conference was filed late and it did not obtain new evidence sufficient to grant its motion to renew. Petitioners argue that the Administrative Law Judge's determination should be upheld.

We affirm the determination of the Administrative Law Judge based on the following rationale.

Under 20 NYCRR 4000.3(c), the regulation regarding requests for conciliation conferences, petitioners had to file their request within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals. Under Tax Law § 1445(2), the statute governing gains tax refunds, that time limitation is 90 days: "[s]uch determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing." The question of whether petitioners' request for a conciliation conference was timely depends on when the denial was mailed.

The parties here stipulated that the Division "denied" the refund on October 26, 1987 (Exhibit N). According to 20 NYCRR 3000.7(e), stipulations for hearing are binding on the parties and a party to a stipulation cannot qualify, change or contradict a stipulation unless justice requires. In Matter of J & L Home Improvement Corp. (Tax Appeals Tribunal, August 1, 1991),

this Tribunal adopted the view that words in a writing are to be given the meaning which those to whom they are addressed would reasonably be expected to perceive them to have, and in the case of a stipulation in the Division of Tax Appeals the addressee is ultimately this Tribunal. The Administrative Law Judge concluded that the stipulation here failed to establish when the denial was mailed, but the conclusion that the word "denied" means anything but "mailed" in this context fails to construe the word according to its reasonable legal effect (see, Matter of J & L Home Improvement Corp., supra). Here, "denied" must mean "mailed" because the only relevant date under Tax Law § 1445(2) is the date of mailing of the denial. To give "denied" any other meaning in this context renders the word unnecessary and irrelevant to the only issue being addressed by the parties, the timeliness of the conciliation request.

The parties also stipulated: "[o]n January 25, 1988 the Nelsons filed a request for a Conciliation Conference" (Exhibit N, ¶ 8). As noted above, the regulations of the BCMS provide that a taxpayer may request a conference by "filing" a timely request with the BCMS (20 NYCRR 4000.3; see also, 20 NYCRR 4000.7). Thus, the only interpretation of this stipulated fact is that the parties agreed petitioners made a request for a conference by filing such request with the BCMS on January 25, 1988.

When summarizing the Division's position, the Administrative Law Judge stated that petitioners sent their request for conference by the courier service known as Federal Express and that the BCMS received it January 26, 1988. If these were the facts, the request would not have been filed until January 26, 1988. However, this information was derived from the petition (Exhibit K), i.e., assertions made by petitioners prior to the stipulation. Further, the Division responded to the assertion that the request was sent by Federal Express as follows: "DENIES KNOWLEDGE AND INFORMATION sufficient to form a belief as to the allegation . . . ." (Exhibit L, ¶ 4). We find no evidence of the form of delivery in the record, i.e., there is no envelope nor testimony on this point. Therefore, because the only evidence in the record as to how petitioners sent their request for conference to the BCMS is a disputed assertion in the pleadings and because the pleadings preceded the stipulation, there is no reason for a finding of

fact contrary to the one stipulated by the parties (cf., Jasionowski v. Commissioner, 66 TC 312 [where the Tax Court decided not to be bound by a stipulation because the testimony presented by the petitioner at trial was clearly contrary to the facts previously stipulated to by the parties]).

The Division denied the refund on October 26, 1987. Ninety days from that date (starting from October 27th, see General Construction Law § 20) would have been January 24, 1988, which was a Sunday. According to General Construction Law § 25-a(1), if the period of time ends on a Sunday, the act may be done on the next business day. Therefore, if petitioners filed a request for a conciliation conference on January 25, 1988, their request would have been timely.<sup>2</sup> According to the stipulation, petitioners filed their request on January 25, 1988, therefore, their request was timely and should not have been denied by the BCMS.

The Division's remaining arguments that: the issue at hearing was not the timeliness of the request because the timeliness issue was not raised until closing argument; the Administrative Law Judge erred in placing the burden of proof of mailing; and the Administrative Law Judge should have granted the Division's motion to renew, are all rendered moot by our disposition of this matter. Since we have found, based on the stipulation, that the refund was mailed on the date claimed by the Division, we see nothing more for the Division to argue on this point.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The order of the Administrative Law Judge is affirmed; and

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<sup>2</sup>The Division argues that petitioners conceded in their petition that the conciliation request was late based on the portion of the petition set forth in the facts which discusses the personal tragedy to which petitioners were subjected during the 90 day period (Exhibit L). We conclude that these statements are inconclusive since the 90 day period in this case ended on a Sunday and the statutory period was in fact 91 days. In any event, the weight of these statements as a concession would seem to be negated by the fact that the Division denied them in its answer (Exhibit L, ¶ 1).

4. The petition of Bert, Jed and Barry Nelson is granted to the extent that the case is remanded to the Bureau of Conciliation and Mediation Services for further proceedings not inconsistent herewith.

DATED: Troy, New York  
September 12, 1991

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner