

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| AUGUSTO CUARTAS | : | DECISION |
| D/B/A GCA RESTAURANT, INC. | : | DTA No. 814170 |
| | : | |
| for Review of a Cancellation, Revocation or | : | |
| Denial of a License or Registration under | : | |
| Articles 28 and 29 of the Tax Law. | : | |

Petitioner Augusto Cuartas, d/b/a GCA Restaurant, Inc., 2751 Broadway, New York, New York 10025, filed an exception to the order of the Administrative Law Judge issued on October 12, 1995. Petitioner appeared by John Keenan, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a letter stating no brief in opposition would be filed which was received on December 29, 1995. This date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed his petition following the issuance of the conciliation order.

FINDINGS OF FACT

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

A conciliation conference was held in the above matter on February 8, 1995 and by Conciliation Order (CMS No. 141846), dated May 12, 1995, petitioner's request was denied and the statutory notice sustained.

On August 11, 1995, petitioner, Augusto Cuartas, d/b/a GCA Restaurant, Inc., filed a petition with the Division of Tax Appeals, seeking a review of a cancellation, revocation or denial of a license or registration dated September 13, 1994 and protesting certain assessments made by the Division in two consolidated statements of tax liabilities issued to petitioner dated October 3, 1994 and February 23, 1994. In addition to his requests for relief from the assessments contained in the two consolidated statements, petitioner's petition seeks relief in the form of a revocation of the cancellation of his license or registration.

On August 24, 1995, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition, pursuant to Tax Law § 170(3-a)(e), on the basis that a petition must be filed within 90 days from the date a conciliation order is issued. The Notice of Intent to Dismiss indicates that the Conciliation Order in this case was issued on May 12, 1995, but that the petition was not filed until August 11, 1995, or 91 days later.

Pursuant to 20 NYCRR 3000.5(b)(5), following the issuance of the Notice of Intent to Dismiss Petition, the parties are afforded 30 days within which to submit documents and comments with regard to said notice. Petitioner responded in a timely fashion by submitting a letter, dated and postmarked August 26, 1995, from petitioner's representative, along with attachments. In this letter, petitioner claims that the law in New York is that notice is given upon receipt of a document, not upon the issuance of it, and that, in this case, the Conciliation Order was received on or after May 16, 1995, not May 12, 1995. Petitioner's representative asserts: "[petitioner] could have picked the certified letter up later [than May 16, 1995]. The letter was redelivered and signed for on May 16, 1995." Petitioner's representative then argues that 90 days from May 16, 1995 is August 14, 1995, and since petitioner filed his petition on August 11, 1995, he filed it three days before the statute of limitations had run, or 87 days after

the Conciliation Order was received. In closing, petitioner's representative asks that if the Division has proof that either he or petitioner received notice of the Conciliation Order on May 12, 1995, the Division should "KINDLY INFORM [HIM]" (original in all capitals).

Along with this letter, petitioner enclosed: (1) a copy of the cover letter accompanying the Notice of Intent to Dismiss from Frank A. Landers of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals, dated August 24, 1995 which includes the statement, "[i]f you have proof that a petition was filed on or before August 10, 1995, please submit such proof to my attention"; (2) a copy of the face page of the envelope containing the Conciliation Order addressed to petitioner's representative, sent certified mail, postmarked May 12, 1995 by the United States Postal Service, which has handwritten on the envelope "Re-deliver 5/16 - Tuesday M C-12" and then "5/16 Recd" handwritten and circled; and (3) a copy of the cover letter accompanying the Conciliation Order issued to petitioner from the Conciliation Conferee, dated May 12, 1995, which has, handwritten at the top of the page next to this printed date, the handwritten notation "Rec'd 5/16/95", and which letter contains the phrase, "pursuant to section 170.3-a of the Tax Law, this order will be binding unless you file a petition within 90 days from the date of this order with the Division of Tax Appeals" (emphasis added).

As proof of mailing of the Conciliation Order to petitioner, the Division submitted the affidavits of Joseph Chyrywaty and Daniel B. LaFar, employees of the Division, as well as a copy of the certified mail record containing a list of the conciliation orders allegedly issued by the Division on May 12, 1995, including one addressed to petitioner and one addressed to petitioner's representative (Exhibit "A" attached to Chyrywaty affidavit), and a copy of the Conciliation Order (CMS No. 141846) dated May 12, 1995 (Exhibit "B" attached to Chyrywaty affidavit).

The affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services ("BCMS") of the Division, sets forth the Division's general procedure for preparing and mailing out conciliation orders, which culminates in the orders

being sent by certified mail by the United States Postal Service ("USPS") and BCMS receiving confirmation of the mailing via receipt of a postmarked copy of the certified mail record.

Mr. Chyrywat's affidavit describes the computerized preparation of conciliation orders and the preparation of a certified mail record, the record listing those taxpayers to whom conciliation orders are being sent by certified mail on a given day. A certified control number is assigned to each conciliation order listed on the certified mail record. Mr. Chyrywat notes that the certified control number assigned to the copy of the Conciliation Order sent to petitioner was Z116101384 and the one assigned to the copy sent to petitioner's representative was Z116101385. According to Mr. Chyrywat, each page of a certified mail record is a separate certified mail record for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to sign.

Mr. Chyrywat attests to the truth and accuracy of the copy of the three-page certified mail record attached to his affidavit (see, Exhibit "A"), which contains a list of the conciliation orders allegedly issued by the Division on May 12, 1995, including, on page three, an order addressed to petitioner, Augusto Cuartas, d/b/a GCA Restaurant, Inc., at 2751 Broadway, New York, NY 10025-2803 and an order addressed to John Keenan, as legal representative of Augusto Cuartas, at 57 Unquowa Road, Fairfield, CT 06430. The certified control numbers run consecutively throughout the three pages and Mr. Chyrywat states that there were no deletions from the mail record. Each of the three pages of the certified mail record submitted is date stamped May 12, 1995 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York and each contains a postal employee's signature verifying receipt as well. At the bottom of page three, the page on which petitioner's and petitioner's representative's certified numbers are listed, the number "3" has been filled in as the "Number of Pieces Listed by Sender," and the number "3" has also been filled in and circled as the "Total Number of Pieces Received at Post Office," indicating no deletions from the record.

Attached to Mr. Chyrywat's affidavit as Exhibit "B" is a copy of the Conciliation Order (CMS No. 141846), dated May 12, 1995, which denied petitioner's request and sustained the statutory notice.¹

The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the Postal Service. Mr. LaFar states that the certified mail record is the Department of Taxation and Finance's record of receipt by the Colonie Branch of the Postal Service for pieces of certified mail, in that the mail record contains a Postal Service postmark and/or the signature of the postal employee who received the mail record and the pieces of certified mail from the Division. The certified mail record is retrieved from the Postal Service by a member of Mr. LaFar's staff the day after it is delivered there.

Mr. LaFar asserts that the staff's regular procedures were followed in mailing the pieces of certified mail in question to petitioner and his representative on May 12, 1995.

OPINION

The Administrative Law Judge dismissed petitioner's petition as the petition was not filed within 90 days from the issuance of the Conciliation Order. The Administrative Law Judge found that the petition was sent by certified mail to the Division of Tax Appeals on August 11, 1995 and was deemed filed on that date which is one day beyond the 90-day period for filing the petition.

The Administrative Law Judge went on to state that when the timeliness of a petition is at issue, the Division must establish proper mailing of the Conciliation Order. In this regard, the Administrative Law Judge found that the Division established proper mailing of the Conciliation Order by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter.

¹The notice referred to here is presumably the Division's cancellation of petitioner's license or registration, which was not itself submitted into evidence, though it is referred to in petitioner's petition.

The Administrative Law Judge found that if the Division establishes proper mailing of the order, "there is a presumption of receipt by the person to whom it was addressed (Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643, affd 62 NY2d 943, 479 NYS2d 188)" (Determination, conclusion of law "F"). The Administrative Law Judge, citing Matter of Ruggerite, Inc. v. State Tax Commn. (64 NY2d 688, 485 NYS2d 517, 518), also found that petitioner has the right to rebut this presumption of receipt.

The Administrative Law Judge rejected petitioner's argument that the 90-day period commences from the date of receipt of the order. The Administrative Law Judge stated that Tax Law § 170(3-a)(e) provides that a petition must be filed within 90 days after the Conciliation Order is issued and the cover letter sent with the Conciliation Order clearly indicates that a petition had to be filed within 90 days from the date of the order.

On exception, petitioner continues to argue that he replied to the Conciliation Order within 86 days of his receipt of the order and that the State has not produced proof of service, i.e., a signed return receipt.

Petitioner's arguments are the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, we affirm the order of the Administrative Law Judge for the reasons stated in said order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Augusto Cuartas d/b/a GCA Restaurant, Inc. is denied;

2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Augusto Cuartas d/b/a GCA Restaurant, Inc. is dismissed with prejudice.

DATED: Troy, New York
May 9, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner