

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
FRED L. SAVAGE : DECISION
DTA NO. 816239
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 1992. :

Petitioner Fred L. Savage, 158 Independence Avenue, Freeport, New York 11520, filed an exception to the order of the Administrative Law Judge issued on February 13, 1998.

Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a letter in support of his exception. The Division of Taxation did not file a brief. Petitioner'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 petitioner timely filed a petition for a hearing in the Division of Tax Appeals.

FINDINGS OF FACT

We make the following findings of fact.

Petitioner filed a request for a conciliation conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS") challenging the denial of a refund of personal income tax. BCMS mailed a Conciliation Default Order (CMS No.

157996) to petitioner on July 11, 1997 at petitioner's last known address at 158 Independence Avenue, Freeport, New York 11520.

Petitioner filed a petition for a hearing with the Division of Tax Appeals seeking review of the Conciliation Default Order issued to him. The envelope containing the petition bore a United States Postal Service postmark dated December 16, 1997.

On January 9, 1998, 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 the petition must be filed within 90 days from the date of the conciliation order. The Notice of Intent to Dismiss Petition indicated that the Conciliation Default Order in this matter was issued on July 11, 1997, but that the petition was not filed until December 16, 1997 or 158 days later.

Pursuant to 20 NYCRR 3000.9(a)(4), following the issuance of the Notice of Intent to Dismiss Petition, the parties were afforded 30 days within which to submit comments on the proposed dismissal. On February 9, 1998, the Division submitted the affidavits of Thomas J. English and James Baisley, employees of the Division, as well as a copy of the certified mail record containing a list of the conciliation default orders allegedly issued by the Division on July 11, 1997, including one issued to petitioner, Fred L. Savage, and a copy of the Conciliation Default Order (CMS No. 157996) dated July 11, 1997.

The affidavit of Thomas J. English, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedure for preparing and mailing out conciliation default orders, which culminates in the orders being sent by certified mail by the United States Postal Service and BCMS receiving confirmation of the mailing via receipt of a postmarked copy of the certified mail record.

Mr. English's affidavit describes the computerized preparation of conciliation default orders and the preparation of a certified mail record, the record listing those taxpayers to whom conciliation default orders are being sent by certified mail on a given day. A clerk in BCMS, as part of her regular duties, verifies the names and addresses of the taxpayers listed on the certified mail record. A certified control number is assigned to each conciliation default order listed on the certified mail record. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer and records, on the certified mail record, the certified control number from each envelope. The conciliation default orders and the certified mail record are picked up, in BCMS, by an employee of the Division's mail room. According to Mr. English, each page of a certified mail record is a separate certified mail record for the conciliation default 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 default 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. English attested to the truth and accuracy of the copy of the one-page certified mail record attached to his affidavit, which contains a list of the conciliation default orders allegedly issued by the Division on July 11, 1997, including an order issued to Fred L. Savage. The certified control numbers run consecutively and there are no deletions from the certified mail record. The certified mail record submitted is date stamped July 11, 1997 by the Colonie Center branch of the United States Postal Service in Albany, New York and it contains a postal employee's initials verifying receipt as well. At the bottom of the certified mail record, the number "7" has been filled in as the "Number of Pieces Listed by Sender," and the number "7"

has also been filled in as the "Total Number of Pieces Received at Post Office," indicating no deletions from the record.

Attached to Mr. English's affidavit as Exhibit "B" is a copy of the Conciliation Default Order (CMS No. 157996), dated July 11, 1997, regarding the refund denial. The order stated that the notice of said conciliation conference was mailed on May 12, 1997 and that the requester failed to appear personally, or by representative, at the conciliation conference. Therefore, a Default was duly noted. Thus, the statutory notice was sustained and the request was dismissed.

The affidavit of James Baisley, Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by its staff in the ordinary course of its business of delivering outgoing mail to branch offices of the United States Postal Service. More specifically, after a notice is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the United States Postal Service in Albany, New York. In this particular instance, the postal employee affixed a postmark to the certified mail record, wrote the total number of pieces received, and initialed the certified mail record to indicate that "7" pieces were the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee wrote the total number of pieces for the purpose of indicating that "7" pieces were received was based on the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces

received or indicate the total number of pieces received by writing the number of pieces received on the mail record.

Mr. Baisley states that the certified mail record is the Division's record of receipt, by the Postal Service, 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 certified mail record is picked up from the Postal Service by a member of Mr. Baisley's staff on the day after it is delivered there. He asserts that the staff's regular procedures were followed in mailing the piece of certified mail in question to petitioner on July 11, 1997.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that, based upon the evidence submitted by the Division, the Conciliation Default Order was mailed to petitioner by certified mail on July 11, 1997. The Administrative Law Judge noted that the petition was not filed until December 16, 1997 or 158 days later. Therefore, on February 13, 1998, the Administrative Law Judge issued an Order Dismissing the Petition on the grounds that it was not filed with the Division of Tax Appeals within 90 days after July 11, 1997 as prescribed by Tax Law § 170(3-a)(e).

ARGUMENTS ON EXCEPTION

Petitioner states that he did not file tax returns for a three-year period and, as a result, penalties were assessed against him.¹ Petitioner states that he requested, and was granted, two "hearings" (presumably with BCMS). Unfortunately, petitioner did not attend either conference.

¹Petitioner makes no reference to the refund claim which was the subject of the BCMS conference request.

OPINION

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. Petitioner does not claim that his petition was timely, and, in any event, the evidence of proper mailing of the Conciliation Default Order submitted by the Division is sufficient to establish that the Conciliation Default Order was mailed to petitioner on July 11, 1997. 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 Wilson*, Tax Appeals Tribunal, July 13, 1989).

The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). Since the petition was filed on December 16, 1997 (158 days after the Conciliation Default Order was issued), the petition was not timely filed and the Division of Tax Appeals is without jurisdiction to consider the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Fred L. Savage is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Fred L. Savage is dismissed.

DATED: Troy, New York
November 12, 1998

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner