

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LAWRENCE H. HUGGINS	:	DECISION
	:	DTA NO. 816547
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period Ended April 5, 1992.	:	

Petitioner Lawrence H. Huggins, 80 East 93rd Street, Apt. B-915, Brooklyn, New York 11212-2354, filed an exception to the order of the Administrative Law Judge issued on October 1, 1998. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

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

The Division of Taxation (“Division”) issued a Notice of Determination to petitioner dated November 7, 1994. The notice was for sales and use taxes due for the period ended April 5, 1992. As of the date of the issuance of the notice, the total balance due, including tax, penalty and interest, was \$4,098.09. The explanation set forth in the notice indicates that petitioner failed to file a “Report of Casual Sale” for the purchase of a race horse, and since petitioner did not respond to the Division’s inquiry regarding the transaction, the taxes due were estimated.

Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) and a conference was held on September 6, 1995. BCMS, by conciliation order dated December 15, 1995, denied petitioner’s request and sustained the statutory notice issued to petitioner.

On June 8, 1998, the Division of Tax Appeals received the petition of Lawrence H. Huggins seeking a revision of the determination that was sustained by the conciliation order. The envelope containing the petition bore a United States Postal Service postmark of June 4, 1998.

On July 17, 1998, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition which explained that petitioner had 90 days from the date the conciliation order was issued to file a petition, and it appeared the petition was filed on June 4, 1998, or 902 days after the conciliation order was issued.

The Division submitted affidavits from the following employees, with attachments, in response to the Notice of Intent to Dismiss Petition: Thomas J. English, Assistant Supervisor of Tax Conferences in BCMS since October of 1987, whose duties include being familiar with the procedures and operations of BCMS including the preparation and mailing of conciliation orders, and James Baisley, Chief Processing Clerk, Mail Processing Center of the Division since 1994,

who is familiar with the operations and procedures of the Mail Processing Center and whose duties include supervising the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of conciliation orders and how such procedures were followed in this case.

Mr. English, in his affidavit, explains that conciliation orders are sent by certified mail. Conciliation orders issued on a given day, together with a certified mail record (“CMR”), are prepared by the word processing unit of BCMS. A CMR lists all taxpayers to whom an order is to be mailed on a given day. Completed CMRs are kept by BCMS. The CMR has columns for the certified number, name and address of the addressee, postage and fee amounts, and remarks. At the bottom of each page of a CMR are blank spaces for the total number of pieces of mail the sender has listed, the total number of pieces of mail received at the post office and a space for the name of the receiving employee at the post office. The word processing unit forwards the conciliation orders for the day, together with the CMR, to a clerk within BCMS who processes these papers. The clerk:

verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each Conciliation Order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer or representative. The clerk then records on the CMR, under the heading ‘Certified No.’, the certified control number from each envelope next to the appropriate name. (English affidavit, ¶ 6.)

An employee of the Mail Processing Center of the Division then picks up the orders and the CMR. Mr. Baisley’s affidavit explains what happens after the orders and the CMR are placed in the “Outgoing Certified Mail” basket in the Mail Processing Center. First, “a

member of the staff weighs and seals each envelope and places ‘postage’ and ‘fee’ amounts to the letters.” (Baisley affidavit, ¶ 4.) Then a clerk counts the envelopes and checks the names and certified mail numbers to ensure that they are the same on the envelopes and the CMR. An employee of the Mail Processing Center then delivers the envelopes and the CMR to the Colonie Center Branch of the United States Postal Service in Albany. The CMR is the Division’s receipt for the certified mail delivered. The CMR is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to BCMS.

In support of its position that the procedures outlined above were followed in this case, the Division has submitted a copy of the CMR for December 15, 1995. The CMR consists of three pages. On each page of the CMR the caption lists BCMS as the sender, and indicates that it is a record of mailing and fees for conciliation orders mailed on December 15, 1995. On page two of the CMR petitioner’s name and address are listed next to the certified number Z181287333. At the bottom of page two of the CMR, 14 pieces of mail are indicated as both being listed by the sender and received at the post office.¹ Fourteen certified control numbers are listed on page two of the CMR sequentially from Z181287329 to Z181287342. There is a signature in the space for the name of the receiving postal employee. There is a United States Postal Service postmark of December 15, 1995 on the bottom of the page.

¹The names and addresses of the other taxpayers have been redacted to protect their confidentiality.

Petitioner's address is listed on the CMR as "80 East 93rd Street, Apt. #B915, Brooklyn, NY 11212-2354." This matches the address set forth on the notice of determination issued by the Division and the address set forth by petitioner in his petition.²

In his letter submitted in response to the Notice of Intent to Dismiss Petition, petitioner asserts that he had never received written notice of the conciliation order and therefore was unaware of the 90-day time period to file his petition. Petitioner requests that the Notice of Intent to Dismiss Petition be revoked and that the petition be considered valid.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the envelope containing the petition in this matter bore a United States Postal Service postmark of June 4, 1998. Therefore, the petition was deemed filed with the Division of Tax Appeals on June 4, 1998. Relying on prior decisions by this Tribunal, the Administrative Law Judge noted that where the timeliness of a petition filed with the Division of Tax Appeals is at issue, the Division bears the burden of submitting sufficient evidence to prove its general mailing procedures and that those procedures were followed in the mailing of the document at issue. The Administrative Law Judge found that the Division had submitted sufficient evidence to establish its general procedures for mailing conciliation orders and had provided a properly completed CMR showing that the conciliation order in this matter had been mailed by certified mail to petitioner on December 15, 1995. As a result, the Administrative Law Judge concluded that

²However, the address listed by petitioner on his petition did not include the final four digits of the zip code.

the conciliation order in this matter was issued and mailed to petitioner on December 15, 1995.

The Administrative Law Judge also noted that if the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of receipt by the taxpayer arises. The Administrative Law Judge concluded that, based on the evidence provided, the Division was entitled to rely on a presumption that the conciliation order had been received by petitioner.

Although petitioner asserted that he never received the conciliation order, the Administrative Law Judge found that petitioner could not merely assert non-receipt but must rebut the presumption of receipt with evidence. Since petitioner did not submit any evidence on this issue, the Administrative Law Judge concluded that he failed to rebut the presumption of receipt.

The Administrative Law Judge noted that pursuant to Tax Law § 170(3-a), petitioner had 90 days from the issuance of the conciliation order in which to file a petition with the Division of Tax Appeals. As the conciliation order was issued on December 15, 1995 and the petition in this matter was not filed with the Division of Tax Appeals until June 4, 1998, the petition was not timely filed. Thus, the Administrative Law Judge concluded that the Division of Tax Appeals was without jurisdiction to review the substantive arguments presented in the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner continues to deny actual receipt of the conciliation order. Petitioner argues that the Division has failed to prove that the conciliation order was received

by him as there was no signed “return receipt” offered into evidence. Petitioner argues that it was unfair for the Administrative Law Judge to base her determination on a presumption of receipt.

The Division, in opposition, argues that the Administrative Law Judge’s order was correct in all respects.

OPINION

After carefully reviewing the record in this matter, we find that the Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioner herein.

Petitioner has presented no basis for modifying the Administrative Law Judge’s order in any respect. As the Administrative Law Judge has correctly pointed out, once the Division has introduced adequate proof to enable it to obtain a presumption of receipt by the taxpayer, the burden is on petitioner to rebut that presumption by introducing evidence of non-receipt.

Petitioner did not meet his burden in this regard. As the Administrative Law Judge correctly concluded, the Division of Tax Appeals has no jurisdiction to entertain the substance of the petition in this matter. As a result, we affirm the Administrative Law Judge’s order for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lawrence H. Huggins is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Lawrence H. Huggins is dismissed.

DATED: Troy, New York
April 8, 1999

/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