

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CRYSTAL A. NICHOLSON	:	DECISION
	:	DTA NO. 818695
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1997 and 1998.	:	

Petitioner Crystal A. Nicholson, c/o 411 East 71st Street, Apt. 12, New York, New York 10022, filed an exception to the order of the Administrative Law Judge issued on October 17, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

On December 31, 2002, the Tax Appeals Tribunal (hereinafter the "Tribunal") issued a Notice of Intent to Dismiss Exception on the ground that petitioner's exception was not timely filed. The parties were given until February 4, 2003 to respond. The Division of Taxation filed a response to the Notice on January 10, 2003.

On its own motion, after reviewing the order of the Administrative Law Judge, petitioner's exception, the mailing records of the Division of Tax Appeals in this matter and the response of the Division of Taxation, the Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed her exception to the order of the Administrative Law Judge.

FINDINGS OF FACT

We find the facts as determined by the Chief Administrative Law Judge and make additional findings of fact. The Chief Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On June 15, 2001, the Division of Tax Appeals received a petition from Ms. Crystal Nicholson protesting an income execution which had been served on petitioner's employer. Petitioner complained that she had never been told the factual basis of the assessment, had not been granted a conciliation conference and had been denied due process of law because the Commissioner of Taxation and Finance had never instituted a court proceeding, never obtained a court judgment, never advised her of her administrative rights, never advised her of her right to a prompt hearing and never advised her of the facts the Department of Taxation and Finance relied upon in issuing the warrant.

In its answer, the Division of Taxation asserted that notices of deficiency (Notice Nos. L-016987210 and L-016987211, dated December 2, 1999) were issued to petitioner because she claimed the foreign earned income exclusion although domiciled in New York. The answer asserts that petitioner's Request for Conciliation Conference was not mailed until February 8, 2001 and that the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request (CMS# 185088) to petitioner on March 2, 2001.

On November 2, 2001, the Bureau of Conciliation and Mediation Services "(BCMS)" advised the Division of Tax Appeals that it had rescinded the Conciliation Order Dismissing Request. On November 13, 2001, the Division of Tax Appeals advised petitioner that she would be scheduled for a conciliation conference in BCMS and requested that she sign a Stipulation for

Discontinuance of Proceeding form withdrawing her petition at the Division of Tax Appeals with the condition that if this matter was not resolved at conference, petitioner would be allowed to file a new petition. Petitioner was advised that if she did not sign the petition, a timeliness hearing would be scheduled for her in the Division of Tax Appeals and if she did not appear for her hearing, she could be defaulted. Petitioner never signed the stipulation. On February 15, 2002, the Division of Taxation sent petitioner a second Stipulation for Discontinuance of Proceeding form. Again, petitioner failed to sign and return the form. On February 19, 2002, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Division of Taxation advising them that a hearing had been scheduled for them on March 28, 2002.

On March 28, 2002 at 9:15 A.M., Presiding Officer Thomas C. Sacca called the ***Matter of Crystal A. Nicholson***, involving the petition here at issue. Present was the representative for the Division of Taxation. Petitioner did not appear and no representative appeared on her behalf. The representative for the Division of Taxation moved that petitioner be held in default. On May 2, 2002, Presiding Officer Sacca issued a determination finding petitioner in default.

On June 20, 2002 the Division of Tax Appeals received a petition from Crystal A. Nicholson protesting the same assessments protested in her first petition as well as the March 15, 2002 Conciliation Order sustaining said assessments. On June 26, 2002, Frank Landers of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals returned the petition to petitioner explaining that she had already received a default determination in this matter. He went on to explain the process whereby petitioner could seek to have the default determination

vacated. By letter dated July 5, 2002, petitioner requested that the default determination of May 2, 2002 be vacated. In this request, petitioner stated:

I originally filed for and was granted an Appeal Hearing in April or May of 2001. Upon being notified of this, The Department of Taxation and Finance decided to grant me a Conciliation and Mediation Hearing, in lieu of the Appeal, which was subsequently scheduled for February 05, 2002.

Apparently they never informed the Division of Tax Appeals of this fact because I received a letter informing me of the date of the Appeal Hearing anyway. When I received it I knew that it was in error because I still had not yet to receive the Conciliation Order.

On February 15, 2002 The Department of Taxation and Finance sent me a Stipulation for Discontinuance of Proceeding form but I failed to return it to them. I guess this is what caused the confusion with your division.

In her letter of July 5, 2002, petitioner did not address the merits of her case. However, petitioner did reference her purported representative in this matter - Garry:Webb:Bey.

By letter dated July 29, 2002, the Division of Taxation opposed petitioner's request. The Division of Taxation asserted that petitioner has not established reasonable cause for her failure to appear at the hearing and has not presented evidence of a meritorious case. The Division of Taxation stated that:

In fact, petitioner concedes that she was sent a Stipulation of Discontinuance of Proceeding which she failed to sign and return. Such failure to sign and return caused the Small Claims Hearing to continue as scheduled. This outcome was explained to the petitioner in the cover letter accompanying the Stipulation (Exh. A). Petitioner knew that if the stipulation was not signed the hearing would occur, no reasonable cause exists.

As for a meritorious case, the petitioner claimed a Foreign Earned Income Exclusion for income earned at the Society of the New York Hospital (1997) and New York Presbyterian Hospital (1998) which are both located in New York City. Petitioner has

shown no evidence that the wages were earned in a foreign country. Petitioner appears to live and work in New York City. The Division has grounds to ask for a frivolous petition penalty.

We find the following additional findings of fact.

On September 6, 2002, the Division of Tax Appeals received a power of attorney form which purported to authorize Mr. Garry:Webb:Bey to represent petitioner in this proceeding and a Notice of Appearance signed by Mr. Bey.

In the Notice of Appearance, Mr. Bey stated that he was a “trusted friend” of petitioner but he was “not an attorney-at-law, certified public accountant, a former employee of the NYS Department of Taxation and Finance, nor the taxpayer’s spouse, child or parent.”

On October 17, 2002, Chief Administrative Law Judge Andrew F. Marchese issued an order denying petitioner’s motion to vacate a default determination which had been issued on May 2, 2002. In his order, the Chief Administrative Law Judge excused petitioner’s failure to appear at the hearing but found that she had failed to establish a meritorious case. The Chief Administrative Law Judge also concluded that Mr. Garry:Webb:Bey was not authorized to represent petitioner in a small claims proceeding. The Division of Tax Appeals mailed the order of the Chief Administrative Law Judge by certified mail (certified control number 7002 0860 0008 3339 1284) in Troy, New York to petitioner Crystal Nicholson on October 17, 2002 at petitioner’s last known address of 411 East 71st Street, New York, New York 10021-4838. A copy of the order was not mailed to Garry:Webb:Bey

Petitioner’s exception to the order of the Chief Administrative Law Judge was received by the Office of the Secretary to the Tribunal on December 27, 2002. The envelope containing the exception bears a United States Postal Service postmark of December 23, 2002.

OPINION

Section 2006 of the Tax Law provides that the Tribunal shall have certain functions, powers and duties. Tax Law § 2006(7) provides, in pertinent part, as follows:

To provide for a review of the determination of an administrative [sic] law judge if any party to a proceeding conducted before such administrative law judge, within thirty days after the giving of notice of such determination, takes exception to the determination.

The Tribunal's regulation at 20 NYCRR 3000.17(a)(1) provides as follows:

Within 30 days after the giving of notice of the determination of an administrative law judge, any party may take exception to such determination and seek review thereof by the tribunal by filing an exception with the secretary. The exception should be filed with the secretary either in person at the offices in Troy or by mail addressed to:

Secretary to the Tax Appeals Tribunal
State of New York
Division of Tax Appeals
Riverfront Professional Tower
500 Federal Street
Troy, NY 12180-2893

A copy of the exception shall be served at the same time on the other party. When the Division of Taxation is the other party, service shall be made on the office of counsel.

The Tribunal's regulation at 20 NYCRR 3000.23(a) provides that service of determinations and orders shall be made by registered or certified mail and shall be complete upon enclosing the document in a post-paid properly addressed wrapper and depositing it in a post office under the exclusive care and custody of the United States Postal Service. Following this procedure constitutes the giving of notice under section 2006(7) of the Tax Law.

Exceptions must be filed within 30 days after the giving of notice of the determination of an administrative law judge or within the time granted by the Tribunal for an extension of time to file an exception (Tax Law § 2006[7]; 20 NYCRR 3000.17[a][1], [2]). An exception received

by this Tribunal after the date it was due is deemed to be filed on the date of the United States Postal Service postmark stamped on the envelope (20 NYCRR 3000.22[a][1]).

The Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative. However, in *Matter of Bianca v. Frank* (43 NY2d 168, 401 NYS2d 29), the Court of Appeals held that once a representative appears in a matter, a statute of limitations cannot begin to run unless that representative is served with the determination or notice sought to be reviewed (*see, Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988).

Pursuant to section 3000.2(b) of the Rules of Practice and Procedure of the Tribunal (20 NYCRR 3000.2[b]), in small claims proceedings a petitioner may be represented before a presiding officer by anyone authorized to appear before an Administrative Law Judge or the Tribunal, by a petitioner's child or by a petitioner's parent. Further, another individual may appear and represent a petitioner by special permission of the Tribunal (*see also*, Tax Law § 2014[2]). Neither the Tribunal's Rules nor Tax Law § 2014(2) provide criteria for determining whether "another individual" may or may not represent a petitioner in a small claims proceeding.

In this matter, petitioner's designated representative attempted to appear on her behalf by filing a power of attorney authorizing him to appear as her representative and a notice of appearance. The Chief Administrative Law Judge found that Garry:Webb:Bey was not authorized to represent petitioner in a small claims proceeding because he had not requested or received special permission to represent petitioner as required by section 3000.2(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.2[b]) nor did it appear to the Chief Administrative Law Judge that Mr. Garry:Webb:Bey was otherwise qualified to

appear on petitioner's behalf. However, there was no communication of this fact to petitioner or to petitioner's purported representative prior to the issuance of the order. Absent this, petitioner's designated representative did not receive notice that he had been found not authorized to act as petitioner's representative before the Division of Tax Appeals and, thus, was not mailed a copy of the order.

Therefore, we conclude that the time for filing an exception did not begin to run on October 17, 2002 and, as a result, petitioner's exception to the order of the Chief Administrative Law Judge, filed on December 23, 2002, was timely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

The Notice of Intent to Dismiss Exception issued by this Tribunal is withdrawn. The Secretary to the Tax Appeals Tribunal is directed to establish a briefing schedule and proceed with petitioner's exception.

DATED: Troy, New York
June 12, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner