STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DARIUS AND IRINA KASPARAITIS	:	DECISION DTA NO. 819395
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1997, 1998 and 1999.	:	

Petitioners Darius and Irina Kasparaitis, c/o Bingham McCutchen LLP, 399 Park Avenue, New York, New York 10022, filed an exception to the determination of the Administrative Law Judge issued on July 1, 2004. Petitioners appeared by Bingham McCutchen LLP (Anthony J. Carbone, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners' request for oral argument was denied.

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

ISSUES

I. Whether the Division of Taxation's motion for summary determination should be denied because it constitutes an improper attempt to reopen this proceeding in contravention of the July 17, 2003 order issued by the Administrative Law Judge.

II. If not, whether the Division of Taxation is entitled to summary determination on the ground that the petition for a hearing before the Division of Tax Appeals was untimely filed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "6" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

On November 23, 2001, the Division issued to petitioners a notice of deficiency imposing New York State and New York City personal income taxes plus interest for the years 1997, 1998 and 1999.

Petitioners filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") in protest of the notice of deficiency.

A conciliation conference was held on July 11, 2002, and a conciliation order was issued to petitioners on November 22, 2002 denying the request and sustaining the statutory notice.

A petition was filed in protest of the conciliation order by petitioners' representatives on February 21, 2003.

On March 17, 2003, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioners and the Division, which notice explained that a petition must be filed within 90 days from the date of issue of the conciliation order, and that the notice was issued because it appeared that the petition was filed 91 days after the conciliation order was issued.

We make the following additional finding of fact.

> In response, petitioners argued that they were not timely served with the conciliation order.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> In the order of July 17, 2003, the Administrative Law Judge withdrew the notice of intent to dismiss petition and accepted the petition for a hearing on the merits because the mailing records submitted by the Division, although demonstrating that the conciliation order was properly issued to petitioners, did not establish that petitioners' previous representative, Joel Brill, CPA, had been served with a copy of the conciliation order, which service is required before a statute of limitations will begin to run.[1]

Attached to the affidavit of Mr. DeCesare is a five-page assessments receivable certified record for non-presort mail, commonly known as a certified mail record ("CMR"), along with other documents relating to the mailing of the conciliation order. In his affidavit, Mr. DeCesare states that he is the Assistant Director of BCMS. He then proceeds to describe the Division's general procedure for preparing and mailing conciliation orders.

Mr. Peltier, in his affidavit, states that he has been a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance since March of 1999, and as such is familiar with the operations and procedures of the Mail Processing Center. The findings of fact that follow are derived from the affidavits of Mr. DeCesare and Mr. Peltier.

All conciliation orders mailed within the United States are sent by certified mail. The Data Management Services Unit of BCMS prepares the final copy of each conciliation order and its accompanying cover letter. The computer-generated conciliation order and cover letter are

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[1]This fact was modified to more fully reflect the record.

predated with the anticipated date of mailing. Using electronically stored data, the Advanced Function Printing Unit ("AFP") assigns a certified mail control number to each order and produces a cover sheet that contains the following information: the BCMS return address, the anticipated date of mailing, the taxpayer's name and mailing address, the control number assigned by BCMS (the "CMS" number), the certified mail control number and a corresponding certified mail control number bar code. The AFP Unit produces the computer-generated CMR which is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day. The certified mail control numbers are recorded on the CMR under the heading "CERTIFIED NO."

The Data Management Services Unit forwards the conciliation order and cover letter to BCMS where they are reviewed and signed by the appropriate conciliation conferee. The conferee then forwards the signed conciliation order and cover letter to a clerk assigned to process conciliation orders. The AFP Unit forwards the CMR and cover sheet to a printer located in BCMS where these documents are delivered to the BCMS clerk assigned to process conciliation orders.

The BCMS clerk associates each cover sheet provided by the AFP Unit with the appropriate conciliation order and cover letter. The clerk verifies that the information on the cover sheet, the conciliation order and the cover letter are the same. All three documents are then folded and placed in a three-windowed envelope which allows the BCMS return address, the certified mail control number, the bar code and the name and address of the taxpayer to show.

The CMR, along with the envelopes to be mailed that day, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. A staff member weighs and seals each envelope and places postage and fee amounts on the envelopes. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the Mail Processing Center staff delivers them to a branch of the USPS in the Albany area. A postal employee affixes a postmark and his or her initials to the CMR as evidence of receipt by the USPS. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the CMR is picked up at the post office the next business day and delivered to the originating office by a Mail Processing Center staff member.

In his affidavit Mr. DeCesare states that the copy of the five-page CMR attached to his affidavit is a true and accurate copy of the original. Portions of the CMR have been redacted to protect the confidentially of the taxpayers listed thereon. The CMR originally contained a list of 47 conciliation orders to be issued by the Division on November 22, 2002. Of these 47 pieces of mail, 3 were segregated from the 47 due to some form of defect and held for issuance at a future date. References to these 3 conciliation orders were redacted from the CMR leaving a total of 44 pieces of mail listed and received at the USPS on November 22, 2002. The 44 certified mail control numbers on the CMR do not run consecutively. Petitioners' names and address appear on page 1 of the CMR with the certified mail control number 7104 1002 9739 0142 1542 appearing next to their names. Mr. Brill's name and address appear on page 4 of the CMR with certified mail control number 7104 1002 9739 0142 1856.

Each of the five pages of the CMR is postmarked with the date, November 22, 2002, by the Stuyvesant Plaza branch of the USPS in the Albany, New York area. At the bottom right of page 5 of the CMR, the number "44" is hand written and circled next to the initials of the USPS employee and below the area marked "total pieces received at post office." The fact that a Postal Service employee wrote the number of pieces listed on the CMR to indicate the total number of pieces of mail received at the post office was established through the affidavit of Mr. Peltier based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the total number of pieces of mail received or indicate the total number of pieces received by writing the total number of such pieces on the CMR.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by explaining the procedural history of this case. The Administrative Law Judge recounted the facts by stating that the Supervising Administrative Law Judge, on his own motion, issued a Notice of Intent to Dismiss Petition based upon the fact that the conciliation order in this case was issued on November 22, 2002 and petitioners did not file a petition for a hearing until February 21, 2003 which, on its face, appeared untimely.

The Administrative Law Judge assigned to this matter stated that, upon his review of the record, it appeared that petitioners' previous representative was not served with the conciliation order in this case and, thus, issued an order setting down the case for a hearing on the merits.

After issue had been joined, the Division made a motion for summary determination on the grounds that the request for a petition indeed was untimely filed. Accompanying its motion, the Division submitted proof of mailing which included alleged proof of mailing to petitioners' previous representative.

After reviewing the evidence submitted in support of the Division's motion, the Administrative Law Judge determined that, in fact, the request for a petition was untimely and, as such, the petition was dismissed for lack of jurisdiction.

ARGUMENTS ON EXCEPTION

In their exception, petitioners maintain that the Division's motion for summary determination is an attempt to overcome a failure to meet its burden of proof regarding proper issuance of the conciliation order which issue was decided by the Administrative Law Judge's order of July 17, 2003. Accordingly, petitioners argue that the Division should be precluded from filing its motion for summary determination since it relates to the issue of timeliness. Petitioners state that general principles of fairness dictate the need for finality and certainty with respect to an order by the Administrative Law Judge and since the Division did not file an exception to the issue of improper mailing as determined by the Administrative Law Judge's order, petitioners' petition for a hearing on the merits should be entertained.

In opposition, the Division emphasizes that the July 17, 2003 order issued by the Administrative Law Judge was a non-binding, non-final order. As such, the Division contends that it could not have appealed the order and that its motion for summary determination was properly entertained.

With respect to the underlying timeliness issue, the Division states that at no point in the proceedings did petitioners argue that their previous representative failed to receive notice. The Division argues that since petitioners changed their representative, petitioners merely asserted that they were unclear whether the previous representative was, in fact, properly served with the conciliation order in this case. The Division respectfully requests that based upon the evidence

submitted in support of its motion for summary determination, it has been shown that petitioners' former representative, Joel Brill, CPA, was served with the conciliation order and, thus, the determination of the Administrative Law Judge should in all respects be sustained.

OPINION

The July 17, 2003 order is at the heart of the instant proceeding. This order withdrew the Notice of Intent to Dismiss Petition that was issued by the Supervising Administrative Law Judge. Petitioners argue that the order necessarily decided the timeliness issue in their favor by determining that the Division failed to establish that their previous representative was served with the conciliation order. We disagree with this contention.

Pursuant to 20 NYCRR 3000.9(a)(4), the Supervising Administrative Law Judge may issue a determination dismissing the petition for lack of jurisdiction. The notice of intent to dismiss a petition provides the parties with the facts and reasons underlying the intended dismissal. In this case, the petition, on its face, appeared to be untimely filed since the petition was not filed with the Division of Tax Appeals within 90 days of the issuance of the conciliation order (***see***, Tax Law § 170[3-a][e]). However, each party was given 30 days to respond to the Notice of Intent to Dismiss Petition. Within this time frame, each party presented their arguments. The resolution of this matter was distilled in the July 17, 2003 order wherein the Administrative Law Judge stated:

> The record includes a copy of petitioners' request for a conciliation conference signed by Joel Brill, CPA, which was indated by BCMS on February 5, 2002, along with a copy of a power of attorney signed by petitioners on January 19, 2002 appointing Mr. Brill as their representative. There is nothing in the record to indicate that Mr. Brill's status as petitioners' representative was terminated at any time prior to the execution of a new power of attorney on February 21, 2003, when Mr. Kasparaitis alone signed the new power of attorney appointing his present representatives (Order, conclusion of law "C").

Thus, the Administrative Law Judge determined that the responses to the Notice of Intent to Dismiss Petition raised a factual issue and, as such, withdrew the Notice of Intent to Dismiss Petition and set down the case for a hearing.[2]

This conclusion as determined by the Administrative Law Judge was in error. As pointed out by the Division, the issue of proper mailing of the conciliation order to petitioners' previous representative was never raised in response to the Notice of Intent. As such, it was improper for the Administrative Law Judge to raise this issue and then make a determination without giving either party an opportunity to respond (***see***, ***New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal***, 151 Misc 2d 326, 573 NYS2d 140 [holding that the Tribunal was in error for dismissing a tax proceeding upon a ground which clearly had not been raised or litigated]).

We reject petitioners' argument that, since it could not be determined on the papers submitted in response to the Notice of Intent to Dismiss Petition whether their previous representative was served, the issue of timeliness was previously decided and that the Division at this juncture should be precluded from introducing evidence that establishes that the Division properly mailed to petitioners' previous representative a copy of the conciliation order. Petitioners argue that the doctrine of "law of the case" should be applied herein to deny the Division its opportunity to move for summary determination. As pointed out by petitioners, the doctrine of "law of the case" states that once an issue has been decided by a judge in a proceeding, it cannot be litigated again at the trial level. However, the July 17, 2003 order involved whether there existed a petition before the Division of Tax Appeals. Therefore, in

[2]The language used by the Administrative Law Judge was "[o]n the Division of Tax Appeals' own motion the Notice of Intent to Dismiss Petition is withdrawn and the petition of Darius and Irina Kasparaitis for a hearing on the merits is accepted" (Order, conclusion of law "E").

effect, the order merely determined whether or not there existed a valid petition such that a proceeding would necessarily follow. The sole issue raised by the Notice of Intent was whether petitioners had been properly served with the conciliation order to determine if the Division of Tax Appeals had jurisdiction over the matter. Once issue was joined, the Division was certainly within its rights to file a motion for summary determination on the issue of timeliness (***see***, 20 NYCRR 3000.9[b][1]; ***see also***, Tax Law § 2006[6]).

Any party may bring a motion for summary determination, however, it must be shown that there is no material issue of fact in dispute (***see***, 20 NYCRR 3000.9[b][1]; ***see also***, Tax Law § 2006[6]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595).

The evidence in this record demonstrates that the Division followed the general mailing procedures with respect to mailing the conciliation order at issue to both petitioners and their representative by certified mail on November 22, 2002. Tax Law § 170(3-a)(e) provides that a conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the date of issuance of such order. There is no authority for the Division of Tax Appeals to waive this statute of limitations (***see***, ***Matter of DeWeese***, Tax Appeals Tribunal, June 20, 2002; ***see also***, ***Matter of Central Ave. Automotive Servs.***, Tax Appeals Tribunal, August 22, 1991 [wherein the Tribunal held that it did not have the discretion to provide a hearing where the request for a conciliation conference was made 94 days after issuance of the notices of determination]). Since the petition was not filed until February 21,

2003, or 91 days after the issuance of the conciliation order, such petition was not timely filed and we lack the jurisdiction to review it (***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Darius and Irina Kasparaitis is denied;

2. The determination of the Administrative Law Judge is sustained consistent with the decision herein; and

3. The petition of Darius and Irina Kasparaitis is dismissed.

DATED: Troy, New York
July 21, 2005

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner