

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CHARLES LUKACS : DECISION
 : DTA NO. 821248
for Redetermination of a Deficiency or for Refund of :
New York State and New York City Personal Income :
Taxes under Article 22 of the Tax Law and the New :
York City Administrative Code for the Year 2001. :

Petitioner, Charles Lukacs, filed an exception to the order of the Administrative Law Judge issued on January 25, 2007. Petitioner appeared by Terrence P. Buckley, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed briefs in this matter. 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 filed a timely 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.

Petitioner, Charles Lukacs, filed a request for a conciliation conference, dated January 31, 2005, with the Bureau of Conciliation and Mediation Services ("BCMS") in protest of Notice of

Deficiency L-024693823-1 and pertaining to the year 2001. The request was received by BCMS on February 1, 2005.

Petitioner's request for conciliation conference, listed the following as his address: "LUKACS-CHARLES, 147 05 SANFORD AVE., FLUSHING, NY 11355-1259." The request further indicated that petitioner's representative was Terrence P. Buckley, Esq., whose address was 1 Suffolk Sq., Islandia, New York 11749.

By a Conciliation Order (CMS No. 207619) dated April 21, 2006, BCMS denied petitioner's request and sustained the statutory notice.

Petitioner, by his representative, Terrence P. Buckley, Esq., filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the aforementioned Conciliation Order. The petition, dated July 20, 2006, was received by the Division of Tax Appeals on July 24, 2006. The envelope in which the petition was sent indicates that it was sent by UPS Next Day Air and the envelope further indicates that the date of shipment was "7/21/06."

On September 14, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the Conciliation Order in this matter was issued on April 21, 2006, but that the petition was not filed until July 21, 2006, or 91 days later.

In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation ("Division") submitted the affidavits of its representative, John E. Matthews, Esq., along with the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's petition filed with the Division of Tax Appeals and the envelope in which it was mailed, petitioner's Request for Conciliation Conference and the envelope in which it was mailed, a copy of the certified mail record ("CMR") containing a list

of the conciliation orders allegedly issued by the Division on April 21, 2006, and a copy of the subject April 21, 2006 Conciliation Order.

The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the United States Postal Service ("USPS"), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

The name, mailing address, order date and BCMS number for each Conciliation Order to be issued are electronically sent to the Division's Advanced Function Printing Unit ("AFP Unit"). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

The AFP Unit also produces a computer-generated CMR entitled "CERTIFIED RECORD FOR PRESORT MAIL - BCMS CERT LETTER." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

The "Total Pieces and Amounts" is indicated on the last page of the CMR. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas," and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "04/21/06" is written in the upper right corner of each page of the CMR.

The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center which is responsible for delivering the CMR along with the envelopes containing the cover sheets, covering letters and conciliation orders to the USPS.

A piece may be "pulled" for a number of reasons including, but not limited to, a discrepancy in the name or address. A piece of mail so "pulled" will be segregated from the remaining group of orders for correction or issuance at another time. In this case, a review of the CMR indicates that one piece of mail was "pulled." This piece is listed on page two of the CMR and a line was placed through the entry for this taxpayer by the clerk after the order was "pulled."

Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR attached to his affidavit which contains a list of the conciliation orders issued by the Division on April 21,

2006. This CMR lists 41 certified control numbers and as noted there is one deletion, on page 2 thereof, from the list for a total of 40 pieces. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

Information regarding the Conciliation Order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1177 1827 is reference/CMS number 000207619, along with the following address:

Charles Lukacs
147-05 Sanford Avenue
Flushing, NY 11355-1259

Information regarding the copy of the Conciliation Order issued to petitioner's representative is also contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1177 1872 is reference/CMS number 000207619, along with following address:

Terrence Buckley
One Suffolk Square - Suite 520
Islandia, NY 11747

The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order 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 CMR. Thereafter, a member of

the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

In this particular instance, the postal employee affixed a postmark dated April 21, 2006 to each page of the four-page CMR. The postal employee also wrote his or her initials and wrote the number "40" next to the printed listing of the "number of pieces" of mail, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record.

Mr. Peltier states that the CMR is the Division's record of receipt, by the USPS, 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 CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on April 21, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Charles Lukacs, 147-05 Sanford Avenue, Flushing, NY 11355-1259 and a piece of certified mail to Terrence Buckley, One Suffolk Square- Suite 520, Islandia, NY 11747 to a branch of the USPS in Albany, New York in sealed postpaid envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on April 21, 2006 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary

course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioner and his representative on April 21, 2006.

Petitioner raises no dispute as to the Division's mailing date of April 21, 2006. The letter from his representative, in response to the Notice of Intent to Dismiss Petition, alleges that "the petition was faxed and overnighted within the 90 day period and therefore that any dismissal would not only be improper, but unjust."

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge found that a conciliation order is "issued" at the time of its mailing to the taxpayer and that such order is binding on both the Division and the taxpayer unless the taxpayer petitions the Division of Tax Appeals for a hearing within 90 days from the date of the issuance of the order. The Division of Tax Appeals has no jurisdiction to consider the merits of a petition not filed within this 90-day period.

The Administrative Law Judge noted that where the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order. The Division must prove a standard procedure used by it for the issuance of conciliation orders by one with knowledge of the relevant procedures; and must also prove that the standard procedure was followed in the particular instance in question. Based on the affidavits of two of its employees submitted in support of its motion, the Administrative Law Judge concluded that the Division had established that it mailed the conciliation order to petitioner by certified mail on April 21, 2006 at his last known address. Thus, the Administrative Law Judge concluded that a conciliation order was issued to petitioner on April 21, 2006 sustaining the Notice of Deficiency at issue. Since the petition was filed with the Division of Tax Appeals on July 21, 2006, the

Administrative Law Judge observed that this date was past the statutory 90-day period within which a petition may be filed. As a result, the Administrative Law Judge concluded that the petition was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of petitioner's case.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the petition was faxed and/or mailed within the 90-day statutory period and, therefore, any dismissal would not only be improper, but unjust.

The Division requests that the order by the Administrative Law Judge to dismiss the petition be sustained.

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.

A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see, 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]). When the timeliness of the petition is at issue, the Division must establish proper mailing of the conciliation order (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has met its burden to establish proper mailing of the conciliation order to petitioner and to petitioner's representative on April 21, 2006 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this case

(*see, generally, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner's petition was not filed until July 21, 2006, or 91 days after the conciliation order was issued. Despite the fact that the petition was filed only one day late, the law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see, Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Therefore, we affirm the conclusion of the Administrative Law Judge that since petitioner failed to file its petition protesting the conciliation order within 90 days of its issuance, such petition was untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Charles Lukacs is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Charles Lukacs is dismissed.

DATED:Troy, New York
November 8, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

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