

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
THOMAS STICKEL : DECISION
 : DTA NO. 823326
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Years 2003 and 2004. :

Petitioner, Thomas Stickel, filed an exception to the order of the Administrative Law Judge issued on June 10, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Petitioner did not file a reply 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 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, Thomas Stickel, filed a request for a conciliation conference, dated April 29, 2008, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Assessment ID L-029875907 pertaining to the years 2003 and 2004. The conciliation conference request form, which is preprinted by the Division of Taxation (Division) and is included with its issuance of notices of tax deficiency to taxpayers, lists petitioner's address as follows:

Stickel-Thomas A. Jr
2520 Vestal Pky E.
Vestal, NY 13850-2075

Petitioner's request for a conciliation conference was received by BCMS on April 30, 2008.

The United Parcel Service (UPS) label on the envelope in which petitioner's conciliation conference request was filed sets forth petitioner's address as follows:

Thomas Stickel
[telephone number]
Suite 304
2520 Vestal Parkway East
Vestal, NY 13850

A conciliation conference was held on September 17, 2008, and by a Conciliation Order (CMS No. 223722) dated March 13, 2009, BCMS set forth the amount of tax due per Assessment ID L-029875907 as \$275,700.00 for the years 2003 and 2004, plus interest. The Conciliation Order reflects a reduction of the amount of penalty to zero (i.e., penalty cancellation).

Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the aforementioned Conciliation Order and the underlying amount of tax plus interest. The petition, dated October 2, 2009, was received by the Division of Tax Appeals on October 26, 2009. The petition lists petitioner's address as follows:

2520 Vestal Pkwy E.
304
Vestal, NY 13850

The envelope in which the petition was mailed indicates that it was sent by United States Postal Service (USPS) Certified Mail, reflects the date of mailing as October 23, 2009, and includes a return address label listing petitioner's address as follows:

2520 Vestal Pkwy East
Suite 304
Vestal, NY 13850

Documents issued by the Division of Taxation to petitioner prior to (and presumably culminating in the filing of) his request for a conciliation conference, included a Notice and Demand for Payment, Statement of Consolidated Tax Liabilities, Collection Notice, and Payment Document. These documents were printed and issued by the Division, and in each instance included "Suite 304" or "# 304" as part of petitioner's Vestal, New York, address.

On January 29, 2010, 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 March 13, 2009, but that the petition was not filed until October 23, 2009, or 224 days later. The cover letter accompanying this Notice of Intent, as well as all additional correspondence issued by the Division of Tax Appeals to petitioner included "#304" as part of petitioner's Vestal, New York, address.

In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation submitted the affidavit of its representative, John E. Matthews, Esq., along with the affidavits of Heidi Corina, James Steven VanDerZee and Robert Farrelly, employees of the Division. The Division also submitted a copy of the petition filed with the Division of Tax

Appeals, petitioner's Request for Conciliation Conference, a copy of the certified mail record (CMR) containing a list of the conciliation orders allegedly issued by the Division on March 13, 2009, and a copy of the subject Conciliation Order dated March 13, 2009.

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 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 each 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 cover 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, cover 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 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 “3/13/09” is written in the upper right corner of each page of the CMR.

The CMR, along with the envelopes containing the cover sheets, cover 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, cover letters and conciliation orders to the USPS.

Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR attached to his affidavit, which contains a list of the conciliation orders issued by the Division on March 13, 2009. This CMR lists 44 certified control numbers and each such certified control number is assigned to an item of mail listed on the first four pages of the five-page 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.¹

Information regarding the Conciliation Order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1268 1811 is reference/CMS number 000223722, along with petitioner's address, set forth as follows:

Thomas A. Stickel, Jr.
2520 Vestal Parkway E.
Vestal, NY 13850-2075

The affidavit of James Steven VanDerZee, 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 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 March 13, 2009 of the Stuyvesant Plaza branch of the USPS to each of the first four pages of the CMR. The postal employee also wrote his or her initials and wrote the number "11" at the bottom of each of the four pages, 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.

¹ The fifth page of the CMR includes no information with respect to particular individual conciliation orders, but rather simply sums the total number of such items (44) as listed on the preceding four pages, and sets forth the total of postage and fee amounts pertaining to such items.

Mr. VanDerZee 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. VanDerZee'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. VanDerZee states that on March 13, 2009, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner at his Vestal, New York, address to a branch of the USPS in Albany, New York, in a sealed postpaid envelope 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 March 13, 2009 for the records of BCMS. Mr. VanDerZee 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 on March 13, 2009.

The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing return receipt delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, the form 3811-A sought such information for an item mailed by the Division under certified number 7104 1002

9730 1268 1811 on March 13, 2009 from the Stuyvesant Plaza branch office of the USPS to petitioner at the following address:

Thomas A. Stickel, Jr.
2520 Vestal Parkway E.
Vestal, NY 13850-2075

In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 1268 1811 on March 16, 2009 at 11:47 AM as follows:

Signature of Recipient: Dave Hoppagh

Address of Recipient: 2520 V.P.E.

All of petitioner's correspondence with the Division in connection with the filing of his request for a conciliation conference, and thereafter with the Division of Tax Appeals in connection with the filing of his petition and including his correspondence regarding the subject Notice of Intent to Dismiss, has included either "Suite 304" or "#304" as a part of his Vestal, New York, address. This portion of his address has been included in handwritten correspondence from petitioner, as part of a stamped presentation of petitioner's address (or return address), and as part of the address listed on petitioner's letterhead in instances where such correspondence has been on letterhead paper. In contrast, none of the correspondence from BCMS to petitioner has included either "Suite 304" or "#304."

Correspondence in this matter includes a letter, dated May 5, 2009, from petitioner to the BCMS conciliation conferee who conducted the September 18, 2008 conference and signed the Conciliation Order and its accompanying cover letter issued to petitioner. The first paragraph of petitioner's May 5, 2009 letter states:

Reference is made to your letters to me dated January 29, 2009 and March 13, 2009. As you know, I was requesting that you explain the reasoning and actions

on the “conciliation” so that a proper adjustment or an appeal can be processed. Thank you so much for agreeing with [the auditor] to waive all penalties.

The balance of the letter primarily addresses petitioner’s position as to the outcome of the “reconciliation” (conciliation conference) and the merits of the underlying tax deficiency asserted by the Division. After noting that he was attempting to obtain additional records to support his position, petitioner states, in the fourth paragraph of the second page of his letter, the following:

An appeal should not be required. * * * I am formally herein considering filing for a hearing. * * * An option would be an extension of limits to file a petition.

The foregoing May 5, 2009 letter was mailed by petitioner to the Division of Tax Appeals, where it was received on May 8, 2009. In turn, by a letter dated May 8, 2009, petitioner was advised that his letter had been forwarded to BCMS. Enclosed with this letter from the Division of Tax Appeals to petitioner were materials needed to appeal the Conciliation Order (petition form, Rules of Practice and Procedure Handbook). This letter also contained a paragraph advising petitioner as follows:

IMPORTANT NOTE: You have **90 days** from the date the Conciliation Order was mailed to file a petition with the Division of Tax Appeals.

Petitioner’s May 5, 2009 letter was received by BCMS (as forwarded). By a letter dated May 11, 2009, the conciliation conferee’s supervisor responded to petitioner by providing schedules showing how the amount of tax liability was computed for each of the years in issue.

The second paragraph of this letter set forth the following:

Please note I cannot extend the time for filing a petition to the Division of Tax Appeals. * * * The conciliation conference proceedings were concluded and a Conciliation Order was issued on March 13, 2009. As was indicated in the letter that accompanied the order, you have ninety (90) days from the date of the order to file a petition with the Division of Tax Appeals if you wish to continue your appeal of this matter.

Also included in the correspondence in this matter is a letter, dated August 18, 2009, from petitioner to the Division of Tax Appeals. This letter references in its caption “CMS No.: 223772” (i.e., the Conciliation Order number), and states its purpose is to “explain a number of factors which has [*sic*] caused some delay from my end.” After noting certain matters pertaining to his medical circumstances, and to his efforts and outcomes regarding obtaining additional records concerning the underlying merits of the asserted tax deficiency at issue, petitioner states:

After I received the “CMS no. 223772 ”. I then faxed my handwritten letter to [the conciliation conferee], dated January 24, 2009.² Further, I wrote another letter dated May 5, 2009. In that letter I explain, again, these issues and how something has to be appealed or dealt with somehow under justice.

Petitioner’s August 18, 2009 letter goes on to conclude as follows:

I look forward to hearing from both of you [BCMS and the Division of Tax Appeals] so that we can determine whether the “Division of Tax Appeals” or the “Bureau of Conciliation and Mediation Services” will decide this matter. It may be that it is irrelevant under the circumstances, but **NO MATTER WHAT**, justice has not been done in the mediation and reconciliation process. These two letters [presumably the May 8, 2009 and May 11, 2009 letters], must themselves be reconciled. I am once again formally requesting an appeal, or conciliation, or mediation by the Department of Finance in New York State.

Petitioner has raised no specific challenge to the evidence of mailing as provided by the Division in support of the claimed mailing date of March 13, 2009 for the Conciliation Order, nor does petitioner dispute that he mailed his petition in response thereto to the Division of Tax Appeals at any time prior to October 23, 2009. Rather, petitioner has raised a question as to his receipt of the order, noting specifically in his April 10, 2010 response to the Notice of Intent to Dismiss that the address used for the mailing of the order (and other correspondence from BCMS

² The date January 24, 2009 precedes the March 13, 2009 date of issuance of the Conciliation Order. Apparently, petitioner wrote a letter to the conciliation conferee on January 24, 2009 (i.e., prior to conclusion of the conciliation process, which occurred on March 13, 2009 with issuance of the Conciliation Order), and at some point after receiving “CMS no. 223722,” submitted or resubmitted this letter to the conciliation conferee.

to petitioner) did not include “Suite 304” or “#304” as a part of petitioner’s address. Petitioner noted and provided certain documents to support his position that, during the period surrounding the date of issuance of the order, he was in the Midwest attending to matters concerning his parents’ illnesses while at the same time attending to his own serious medical issues. In this regard, petitioner stated that, “no order was sent or read to me on March 13, 2009. As I know you will recall I was personally in Illinois for the entire month of March.” Petitioner states that the “Conciliation Order was not in proper formal order,” and argues that the alleged failure to forward the Conciliation Order to him while he was out of New York State constituted “oversight . . . which prevented the timeliness of this appeal.” Petitioner states, in summary, that “[o]bviously, the question turns on whether I observed and/or read the [Conciliation Order] dated March 13, 2009. I say I did not see it, but [the Division] must think that I did receive it. I simply [do] not definitively know for certain but, either way, justice should be utilized from a substantive, not [sic] procedurally, point of view.”

Ultimately, petitioner does not specify the date on which he received the Conciliation Order, or actual notice thereof, but apparently maintains that he either filed his petition within 90 days thereafter, as required, or that his appeal should be considered, in the interest of justice, to have been timely filed in any event.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge determined that the statutory 90-day time period to file a petition with the Division of Tax Appeals had been tolled because the Division’s mailing of the conciliation order lacked the suite number in petitioner’s address and was considered a consequential error. The Administrative Law Judge held that the 90-day time period to file a petition with the Division of Tax Appeals began to run from the date that

petitioner acknowledged receipt of the conciliation order, which was May 5, 2009. The Administrative Law Judge concluded that even if petitioner's letter to the Division of Tax Appeals, dated August 18, 2009 constituted a petition, it was still untimely and thus, the Division of Tax Appeals lacked jurisdiction to entertain the merits of petitioner's claims.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues as he did below that "suite 304" was not included in the mailing of the conciliation order and that the Division did not meet its burden of proof. Petitioner states that this case is clearly a case of form over substance.

It is the Division's contention that the Administrative Law Judge correctly decided the relevant issues and that the order should be affirmed for the reasons stated therein.

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]). Where the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Where an order is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*Matter of Katz, supra*). However, the presumption of delivery does not arise unless or until sufficient evidence of

mailing has been proffered by the Division (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

In the instant matter, the Division submitted the affidavits of its employees, including a copy of the CMR containing a list of the conciliation orders issued by the Division on March 13, 2009 and USPS Form 3811-A, Domestic Return Receipt (After Mailing) to prove the fact and date of mailing.

However, the Division is also required to show that the order was mailed to petitioner at his last known address (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). We agree with the Administrative Law Judge that, although the conciliation order was mailed to petitioner on March 13, 2009, the failure to include the suite number in the address resulted in a “consequential error.” As such, the 90-day period within which a petition could be timely filed was properly tolled until petitioner’s actual receipt of the order or actual notice thereof (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).

It is clear from petitioner’s letter addressed to the conciliation conferee and sent to the Division of Tax Appeals that he did in fact receive the conciliation order by, at the latest, May 5, 2009. Petitioner referenced the March 13, 2009 conciliation order in that letter. On May 8, 2009, the Division of Tax Appeals sent to petitioner the materials needed to appeal the conciliation order. Specifically, the Division of Tax Appeals sent to petitioner the petition form, Rules of Practice and Procedure Handbook and a letter containing the following paragraph:

IMPORTANT NOTE: You have ***90 days*** from the date the Conciliation Order was mailed to file a petition with the Division of Tax Appeals.

Accordingly, the 90-day period for filing a petition was correctly tolled until May 5, 2009 (*see Matter of Combemale, supra; see also Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d

970 [1992], *lv denied* 79 NY2d 759 [1992]). We agree with the Administrative Law Judge that since petitioner received the conciliation order by May 5, 2009 the toll period was properly ended on that date and the 90-day period for filing a petition with the Division of Tax Appeals commenced. Accordingly, petitioner's petition was due to be filed on or before August 3, 2009. Petitioner filed a petition with the Division of Tax Appeals on October 29, 2009. Moreover, even if petitioner's letter dated August 18, 2009 constituted a petition, it too is untimely and the Division of Tax Appeals lacks jurisdiction to entertain the merits of petitioner's claims.

Therefore, we find that the Administrative Law Judge fully and correctly addressed the issue before him. Petitioner has offered no arguments on exception that would justify our modifying the order of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that;

1. The exception of Thomas Stickel is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Thomas Stickel is dismissed, with prejudice.

DATED:Troy, New York
April 7, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner