

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION
LAWRENCE ZIGERELLI	:	DTA NO. 824237
for Revision of Determinations or for Refund of	:	
Personal Income Taxes under Article 22 of the Tax	:	
Law for the Years 2006 through 2008.	:	

Petitioner, Lawrence Zigerelli, filed an exception to the Order Dismissing Petition issued by the Administrative Law Judge on October 25, 2011. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. 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 a petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the following facts.

On November 12, 2010, the Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Default Order for petitioner's non-appearance at the conciliation conference. Petitioner's request for Conciliation Conference listed his address as 2700 Brittany

Ter, Apt. 12, Manhattan, KS, 66502-0403. The CERTIFIED RECORD FOR PERSORT MAIL - BCMS CERT LETTER (CMR) showed that the Conciliation Default Order was mailed to petitioner at 1060 Borghese Lane, Unit 1703, Naples, FL 34101.

On March 4, 2011, petitioner mailed a petition for Redetermination of a Deficiency/Revision of a Determination or for Refund of personal income tax under Article 22 of the Tax Law, which was received by the Division of Tax Appeals on March 7, 2011.

On April, 12, 2011, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition, for failure to file a timely petition. The Notice states that the petition was not filed until March 4, 2011, or 112 days after November 12, 2010, the date when the Conciliation Default Order was issued.

There was no response from petitioner to the Notice of Intent to Dismiss Petition. A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation (Division). In response, the Division submitted an affidavit and documentary evidence establishing that the Conciliation Default Order was mailed to petitioner on November 12, 2010. The Division also submitted a printout from the BCMS tracking system, dated June 2, 2011. This printout indicated petitioner's address in Naples, Florida and listed zero amount of tax due.

On October 25, 2011, the Administrative Law Judge, *sua sponte*, ordered that the petition be dismissed with prejudice on the grounds that it was not timely filed within 90 days after November 12, 2010, as prescribed by section 170 (3-a) (e) of the Tax Law. The Administrative Law Judge found that the petition was not mailed until March 4, 2011 or 112 days after the Conciliation Default Order was issued to petitioner.

On November 16, 2011, petitioner filed with the Tax Appeals Tribunal an exception to

the Order of the Administrative Law Judge dismissing his petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he was late filing the petition because the Conciliation Default Order was mailed to the incorrect address. Petitioner asserts that once the error was discovered, he filed the petition with the Division of Tax Appeals.

The Division argues that the dismissal should be sustained.

OPINION

The Administrative Law Judge dismissed the petition herein based upon his finding that a Conciliation Default Order was mailed to petitioner on November 12, 2010. The petition was not received until March 4, 2011, which was not within 90 days after the mailing of the Conciliation Default Order as required by Tax Law § 170 (3-a) (e).

BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). Conciliation orders are binding upon the Division and the person who requested the conference, unless such person petitions the Division of Tax Appeals for a hearing within 90 days after the conciliation order is issued (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.6 [b]).

On exception, petitioner argues that the Administrative Law Judge erred in dismissing the petition as untimely because the Division failed to mail the Conciliation Default Order to the proper address. As a result, petitioner contends that the Division's mailing error was the reason for the delay in the filing of his petition with the Division of Tax Appeals.

When the timeliness of the petition is at issue, the Division must establish proper mailing of the notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Tax Law

§ 691 (b) provides that a taxpayer's "last known address" shall be the address given in the last return filed by him, unless subsequent to the filing of such return, the taxpayer shall have notified the Division of a change of address. We note that the rebuttable presumption of petitioner's receipt of the Conciliation Default Order would arise only upon adequate presentation of proof of mailing by the Division (*see Matter of Mareno v State of N.Y. Tax Commn.*, 144 AD2d 114 [1988]; *Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314 [1986]).

The Division contends that the Order Dismissing Petition was correct since the Conciliation Default Order was properly mailed to petitioner. In support of this claim, the Division has submitted an affidavit of mailing from BCMS, as well as a copy of the CMR. The Division's affidavit states that the Conciliation Default Order was mailed to the Florida address. The Request for Conciliation Conference lists the Kansas address as petitioner's address. The June 2, 2011 printout from the BCMS tracking system lists the Florida address as petitioner's address. The BCMS printout lacks probative value because it was dated after the filing of the petition and lists the incorrect amount of tax due. Absent this proof, it is unclear whether the Kansas address or the Florida address was the proper mailing address. As the Division has failed to produce sufficient evidence to raise the presumption of proper mailing, dismissal is inappropriate (*see Matter of Lantz*, Tax Appeals Tribunal, December 28, 1989; *see also Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989).

We remand this matter to the Division of Tax Appeals for further proceedings because factual issues with regard to the mailing of the Conciliation Default Order remain unresolved. In particular, further evidence is required to determine whether the proper mailing address was the Kansas address or Florida address.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The order of the Administrative Law Judge is reversed; and
2. The case is remanded to the Administrative Law Judge for further proceedings

consistent with the decision herein.

DATED: Albany, New York
September 20, 2012

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

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