

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : ORDER
MICHAEL VAN SLOOTEN : DTA NO. 824037

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 :
Administrative Code of the City of New York for the :
Year 2008.

Petitioner, Michael Van Slooten, filed a petition 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 Administrative Code of the City of New York for the year 2008.

On January 4, 2011, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. Petitioner, appearing pro se, filed his response to the notice on February 18, 2011. The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted its response to the notice on March 2, 2011, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). After due consideration of the documents and arguments submitted by the parties and the pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the petition.

FINDINGS OF FACT

1. Petitioner filed a request for a conference with the Bureau of Conciliation and Mediation Services (BCMS) on February 16, 2010. A Conciliation Order Dismissing Request, dated March 5, 2010, was issued denying the request as untimely filed. Petitioner filed a petition with the Division of Tax Appeals on December 7, 2010.

2. On January 4, 2011, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated as follows:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

It appears the Conciliation Order was issued on March 5, 2010, and it appears the petition was not filed until December 7, 2010 or two hundred seventy seven days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted a letter on February 18, 2011, urging this agency to contact his tax return preparer who would be able to explain the errors made on his 2008 income tax return. However, petitioner did not argue that his petition was timely filed.

4. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the following: affidavits of three Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel, Bruce Peltier, the Principal Mail and Supply Supervisor in the Division's Registry Unit, and Robert Farrelly, the Assistant Supervisor of Tax Conferences of the

BCMS of the New York State Department of Taxation and Finance; a copy of the petition filed with the Division of Tax Appeals on December 7, 2010; a copy of the conciliation order dismissing request issued on March 5, 2010; and a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on March 5, 2010.

5. 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 culminated 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.

6. The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predicated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

7. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

8. The AFP Unit also produced a computer-generated CMR entitled "CERTIFIED RECORD FOR PRESORT MAIL." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The BCMS numbers were recorded on the CMR under the heading "Reference No." and were preceded by three zeros.

The AFP Unit printed the CMR and cover sheets via a printer located in BCMS and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

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

10. Pursuant to the general office practice, the BCMS clerk stamped "POST OFFICE" Hand write total # of pieces and initial. Do Not stamp over written areas," and also stamped "Mail Room: Return Listing To: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR.

11. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "03/05/10" was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division's Mail Processing Center.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the 6-page CMR, which contained a list of the 56 conciliation orders issued by the Division on March 5, 2010. The CMR listed 56 certified control numbers. Each such certified control number was assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number and the name and address of the addressee.

14. Information regarding the conciliation order issued to petitioner was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 1787 4669 was reference number 000237362, along with petitioner's name and address, which was 42 Bowdoin Street, Apt. 2C, Clifton, NJ 07013-2064. This was the same address listed by petitioner on his request for a conciliation conference, i.e., his last known address.

15. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

16. Here the postal employee affixed a postmark dated March 5, 2010 to each page of the six-page CMR. The postal employee also wrote his or her initials and the number "56" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page six of the CMR, 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, indicating that 56 pieces of mail were actually received.

17. Mr. Peltier stated 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 was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case, BCMS. The CMR was maintained by BCMS in the regular course of business.

18. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on March 5, 2010, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Michael Van Slooten, 42 Bowdoin Street, Apt. 2C, Clifton, NJ 07013-2064 to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on March 5, 2010 for the records of BCMS. Mr. Peltier asserted that the procedures described in his affidavit were 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 5, 2010.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation order in this case and the underlying assessment would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to the taxpayer's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the Conciliation Order Dismissing Request to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Bruce Peltier and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by

certified mail on March 5, 2010, the date appearing on the CMR, to his last known address. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order, and the CMR was submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the Conciliation Order Dismissing Request issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of March 5, 2010. There were 56 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "56" near his or her initials, that 56 items were received for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on March 5, 2010 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on March 5, 2010, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the March 5, 2010 date of mailing was June 3, 2010, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Petitioner's protest was not filed until December 7, 2010. As a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

E. This order, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of a determination in favor of the

Division on a motion for summary determination for failure to have filed a timely petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1) addressing motions for summary determination, such a motion "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented."

Petitioner submitted no evidence that he filed his petition within the time required, i.e., by June 3, 2010. In addition, petitioner has failed to directly challenge the Division's proof of mailing of the Conciliation Order Dismissing Request with any evidence or arguments. Therefore, it must be concluded that petitioner has failed to meet his burden of proof.

F. The petition of Michael Van Slooten is dismissed.

DATED: Troy, New York
April 28, 2011

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE