

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KEVIN RYAN AND PAULINA SIMONS	:	DETERMINATION
	:	DTA NO. 824835
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax Under Article 22 of the Tax Law for	:	
the Years 2002 through 2007.	:	

Petitioners, Kevin Ryan and Paulina Simons, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2002 through 2007.

The Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion on August 14, 2012, seeking an order dismissing the above-referenced matter or, in the alternative, summary determination in its favor pursuant to section 3000.5 and section 3000.9(a)(1)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing pro se, did not respond to the motion. Therefore, the 90-day period for the issuance of this order commenced on September 13, 2012.

After due consideration of the documents submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely request for a conciliation conference following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. On January 20, 2012, petitioners, Kevin Ryan and Paulina Simons, filed a petition with the Division of Tax Appeals in protest of a Conciliation Order Dismissing Request, CMS No. 249028, dated December 23, 2011. The Conciliation Order explains the basis for the dismissal as follows:

The Tax Law requires that a request be filed within thirty days from the mailing date of the statutory notice. Since the notice(s) was issued on October 19, 2011, but the request was not mailed until November 22, 2011, or in excess of thirty days, the request is late filed.

The request filed for a Conciliation Conference is denied.

2. Attached to the petition filed in this matter is a letter addressed to the Division of Tax Appeals and "To Whom It May Concern," dated January 15, 2012 and signed by petitioners. Therein, petitioners state, in part:

We were confused about the time-frame for our response because your letter of 6/29/11 (attached with relevant portions highlighted) clearly stated that the deadline for filing our request was 90 days from our receipt of the statutory notice of deficiency and our response fell well within that time-frame. In addition, we had already disputed and appealed the assessment in writing on two previous occasions, which your records will indicate.

Also attached to the petition are (1) copies of a letter, dated June 29, 2011, from the Income/Franchise Tax Field Audit Bureau of the Division of Taxation (Division) addressed to petitioners and (2) a copy of the protested Conciliation Order and the cover sheet thereto.

The Division's letter to petitioners of June 29, 2011 states, in pertinent part, as follows:

An audit of your New York State tax returns for [the years 2002 through 2007] has resulted in an increase to the tax liability in the amount of \$102,799, less \$65,251 paid to Suffolk County District Attorney's Office on May 27, 2011, for a net amount due of \$37,548. The enclosed schedules reflect the details of the proposed audit adjustments.

* * *

Not responding to this letter will result in the issuance of a statutory notice of deficiency. This deficiency will become a statutory assessment unless a request for a conciliation conference or a petition for a Tax Appeals hearing is filed within 90 days.

The cover letter to the Conciliation Order states, in pertinent part, as follows:

Your Request for Conciliation Conference (or protest) has been dismissed because it was not filed within the time allowed by the Tax Law. If you wish to contest the timeliness of your filing, you may file a petition within thirty (30) days from the date of this order with the Division of Tax Appeals.

3. On August 14, 2012, the Division moved to dismiss the petition or, in the alternative, for summary determination in its favor. Attached to the motion is, among other documents, the affidavit of John E. Matthews. Therein Mr. Matthews states, in sum, that petitioners' protest was untimely because the Notice of Deficiency issued on October 19, 2011 "was a fraud assessment issued under Tax Law Section 170(3)" and therefore "a timely protest would have had to have been filed within 30 days" (Matthews affidavit ¶ 4).

In support of its motion, the Division also submitted, among other documents, the following: (i) a copy of the petition filed in this matter; (ii) a copy of the Division's answer filed in response thereto; (iii) a copy of the Notice of Deficiency sent to petitioners and their representative, Jack Stuart; (iv) a copy of petitioners' request for a conciliation conference; (v) a copy of the envelope that contained the request for a conciliation conference; (vi) a copy of the protested Conciliation Order; (vii) affidavits of Division employees Daniel A. Maney and Bruce Peltier, dated May 1, 2012 and May 3, 2012, respectively; and (viii) a copy of the certified mail record (CMR) relevant to this matter.

4. The affidavit of Daniel A. Maney, manager of the Division's Refunds, Deposits and Control Units, which includes the Case and Resource Tracking System Control Unit (CARTS), sets forth the Division's general practice and procedure for preparing and mailing statutory

notices to taxpayers. Mr. Maney receives the computer-generated CMR and a batch of corresponding notices from CARTS. CARTS prepares “batches” of statutory notices and the accompanying one-page mailing cover sheet, predated with the intended date of mailing. The front of each cover sheet bears a certified control number, a bar code, the taxpayer’s mailing address and the departmental return address, and taxpayer assistance information is listed on the back. CARTS also generates any enclosures referenced within the body of the notices in the batch.

The CMR, which is printed approximately 10 days prior to the batch’s anticipated mailing date, lists the notices in the batch, in the order that they are generated. In accordance with the Division’s general practice, this date was manually changed on the first page of the CMR to reflect the actual date of mailing. In this case, the date was changed to “10/19/11.” The purpose of printing the CMR prior to the anticipated mailing date is to provide sufficient lead time for the notices to be manually reviewed and processed for postage by employees of the Division’s Mail Processing Center (the Center). It is also the Division’s general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and for the CMR to be maintained in this same manner when returned to CARTS, unless otherwise ordered by Mr. Maney.

5. The 12-page CMR relevant to this matter lists 125 certified control numbers with corresponding assessment numbers, names and addresses. Mr. Maney states that portions of the CMR have been redacted to preserve the confidentiality of information relating to others taxpayers who are not parties to this proceeding. Each page of the CMR bears an October 19, 2011 postmark from the Colonie Center branch of the USPS, and the initials of a USPS employee. In addition, on page 12 of the CMR, the number 125 has been circled. Mr. Maney

affirms that these markings indicate that the 125 notices listed on this CMR were mailed on October 19, 2011.

6. The certified control numbers, assessment numbers, and the name and address of the addressee are listed on the CMR under the headings “CERTIFIED NO,” “REFERENCE NO” and “NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS,” respectively. Each CMR, together with the associated batch of notices, is then forwarded by CARTS to the Center for delivery to the USPS for mailing.

Page 8 of the CMR contains two nonredacted listings. The first listing indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0853 4220 and assessment number L-036747668, was mailed to petitioners at the Northport, New York, address listed thereon. The corresponding mailing cover sheet, submitted with the Division’s motion papers, bears the same certified control number and petitioners’ names and address as noted. The second listing indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0853 4268 and assessment number L-036747668, was mailed to “JAKC [*sic*] STUART” at the Hauppauge, New York, address listed thereon. The corresponding mailing cover sheet, submitted with the Division’s motion papers, bears the same certified control number and Mr. Stuart’s name and address as noted.

7. The affidavit of Bruce Peltier, a mail and supply supervisor in the Center, describes the Center’s general operations and procedures. Notices that are ready for mailing to taxpayers are received by the Center in an area designated for “Outgoing Certified Mail.” A mailing cover sheet precedes each notice and is accompanied by any required enclosures. Additionally, the Center receives a CMR with each batch of notices, as described in the Maney affidavit.

A member of Mr. Peltier's staff operates a machine that places each notice, cover sheet and any enclosures into a windowed envelope such that the address and certified number listed on the cover sheet is visible through the window. The same staff member then weighs and seals each envelope and places postage thereon. Next, a mail processing clerk verifies the first and last envelope in the batch against the information listed on the CMR and also performs a random review of up to 30 envelopes by checking the envelopes against the information listed on the CMR. After completing the review as described, the CMR and the associated sealed and stamped envelopes are delivered by a member of the Center's staff to a USPS branch located in the Albany, New York, area. An employee of the USPS affixes a postmark and places his or her initials or signature on the CMR. In addition, the Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing this number on the CMR to indicate receipt by the USPS. Here, as noted, each page of the CMR bears both a postmark and handwritten initials. Also as noted, consistent with the Center's request, the number 125 has been circled on page 12 of the CMR. Mr. Peltier also attested to the truth and accuracy of the copy of the 12-page CMR relevant to this matter, which contains a list of the notices issued by the Division on October 19, 2011. In sum, according to the Maney and Peltier affidavits, copies of the subject Notice of Deficiency were mailed to petitioners and to petitioners' former representative on October 19, 2011.

8. In support of its motion and as further proof of proper mailing, the Division submitted a copy of a one-page report of audit and a copy of petitioners' Request for Conciliation Conference. In his affidavit, Mr. Matthews explains that the audit report is part of the Division's record of the audit that was conducted prior by the Division and ultimately resulted in issuance of the subject notice to petitioners. The audit report lists addresses for petitioners and their former

representative, Mr. Stuart, that are consistent with the addresses listed on the assessments sent to each (*see* Finding of Fact 6). Similarly, petitioners' Request for Conciliation Conference, dated November 11, 2011, also bears the same Northport, New York, address for petitioners; however, petitioners instead listed their representative as "Jack Stuart Beige" with a Smithtown, New York, address.

9. Each document in the record, including those submitted by petitioners as well as those submitted by the Division, that lists an address for petitioners lists the same Northport, New York, address. This includes the petition and various correspondence sent between petitioners and the Division.

10. Petitioners did not respond to the Division's motion.

11. Beginning on its first page, the Notice of Deficiency issued to petitioners on October 19, 2011 and submitted by the Division in support of its motion, contains the following instructions, in pertinent part:

IF YOU DISAGREE with the amount due, refer to the enclosed Notice of Taxpayer Rights to determine your options.

- To request a Conciliation Conference, complete the enclosed Request for Conciliation Conference (items 1 through 8) and return it in the envelope provided.
- To request a Petition for a Tax Appeals Hearing, form TA-10, follow the instructions on the enclosed Notice of Taxpayer Rights.
- Attach a photocopy of all pages of this notice to the Request for Conciliation Conference.

NOTE: You must file the request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 11/18/11.

* * *

If we do not receive a response to this notice by 11/18/11:

This notice will become an assessment subject to collection action.

12. Petitioners' request for a conciliation conference was mailed on November 22, 2011.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) authorizes the Division to issue a Notice of Deficiency for additional tax or penalties due under Article 22. Penalties asserted may include a fraud penalty pursuant to Tax Law § 685(e). A taxpayer may file a petition with the Division of Tax Appeals seeking a revision of such deficiency, or alternatively, a request for conciliation conference with BCMS, within 30 days of the receipt of the notice of deficiency (*see* Tax Law § 2008[2][a]; § 170[3-a][h]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 30-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. A party may move to dismiss a petition for lack of jurisdiction (*see* 20 NYCRR 3000.9[a][1][ii]) and such a motion may be treated as a motion for summary determination (*see* 20 NYCRR 3000.9[a][2][i]). A motion for summary determination is subject to the same provisions as a motion for summary judgement pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9[c]).

A motion for summary determination 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

C. Where the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). "To meet its burden of

proof, the Division is required to show proof of a standard procedure used by it, and must further show proof that the standard procedure was followed in this instance” (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011, citing *id.*; *see also Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011).

D. In this case, the CMR, along with the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency, establish the Division’s standard mailing procedure. Additionally, the CMR has been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus met its burden of proof and established that the protested Notice of Deficiency was mailed, as addressed, to petitioners on October 19, 2011.

E. When a notice is found to have been properly mailed by the Division, a presumption arises that it was delivered to the intended recipient (*see Matter of Chung*, Tax Appeals Tribunal, September 22, 2011). That is, “[o]nce the Division has introduced adequate proof to establish a presumption of receipt by the taxpayer, the burden is on petitioner to rebut that presumption by introducing evidence of non-receipt” (*Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011, *rearg denied* April 19, 2012). In this case, however, petitioners did not introduce evidence of nonreceipt. Rather, petitioners conceded that they received the protested Notice of Deficiency and further filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). However, in response to the Conciliation Order dismissing their request as being filed beyond the 30-day time limit, petitioners assert they were confused as to the statutory time frame for filing their request as the Division’s letter of June 29, 2011 indicated a 90-day time limit. In essence, petitioners seeks to circumvent the 30-day period

prescribed by Tax Law § 170(3-a)(h) by arguing detrimental reliance on erroneous advice from a Division employee.

F. In matters contemplating the propriety of a petitioner's reliance on misleading or erroneous instructions received from Division employees, it must first be determined whether such reliance was reasonable (*see Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). Although the contents of the June 29, 2011 letter were inaccurate, the explicit language of the instructions contained in the statutory notice, i.e., the Notice of Deficiency that petitioners received, correctly provided, in two instances, that it would be binding unless petitioners filed a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals by November 18, 2011, or within 30 days of the issuance of the statutory notice (*see* Finding of Fact 11). In addition, the content of the June 29, 2011 letter is "contradicted [by] the explicit language" (*id.*) of Tax Law § 170(3-a)(h) insofar as the protest period set forth in this statute following the issuance of a notice of deficiency is "clear and unequivocal" (*Matter of Glover Bottled Gas Corp.*). Therefore, it was unreasonable for petitioners to rely on the June 29, 2011 letter (*Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003; *see also Matter of Glover Bottled Gas Corp.*), and petitioners' request for equitable relief on this basis is without merit.

G. Moreover, relying on the advice of an employee of the Division that is contrary to the Tax Law is not a defense to the failure to timely file a petition (*see Matter of Winners Garage*, Tax Appeals Tribunal, March 18, 2010; *Matter of Glover Bottled Gas Corp.*). As the U.S. Supreme Court stated in *Heckler v. Community Health Servs.*, "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law" (467 US 51, 63 [1984]; *see also Broz v. Commr*, 137 TC 46 [2011]).

Therefore, the erroneous instructions contained in the June 29, 2011 letter are insufficient to overcome the requirement of Tax Law § 170(3-a)(h) that requests for conciliation conferences or petitions filed in protest of notices of deficiency be filed with BCMS or the Division of Tax Appeals within 30 days of being issued.

H. The request for a conciliation conference in this matter was filed on November 22, 2011, in excess of the 30-day limitations period. It is firmly established that the deadlines for filing requests or petitions are strictly enforced (*see e.g. Matter of Lamanna; Matter of Standard Notions*, Tax Appeals Tribunal, February 23, 2006). Furthermore, the Division of Tax Appeals has no authority to waive the filing period in particular cases (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). Accordingly, as the request for a conciliation conference was untimely filed, the Division of Tax Appeals is without jurisdiction to consider the merits of petitioners' protest.

I. The petition of Kevin Ryan and Paulina Simons is dismissed.

DATED: Albany, New York
December 6, 2012

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE