

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
POM PHOMMACHANH : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 824969
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2007 through February 28, 2010. :

Petitioner, Pom Phommachanh, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2007 through February 28, 2010.

On May 16, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On June 13, 2012, petitioner, appearing pro se, submitted a letter in opposition to dismissal. On July 12, 2012, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), having been granted an extension of time to do so, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on July 12, 2012.

After due consideration of the documents submitted, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. On April 23, 2012, petitioner, Pom Phommachanh, filed a petition with the Division of Tax Appeals in protest of a Conciliation Order, CMS No. 244024, dated October 28, 2011.

2. On May 16, 2012, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant Conciliation Order was issued on October 28, 2011, but that the petition was not filed until April 23, 2012, or 178 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of conciliation orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record (CMR).

4. To commence this procedure, the BCMS Data Management Services Unit prepares conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards them to the BCMS conferee for signature, who, in turn, forwards the orders and cover letters to the BCMS clerk assigned to process them.

5. 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 (AFP) Unit. For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer's name and mailing address, BCMS number, certified control number, and certified control number bar code.

6. The AFP Unit also produces a computer-generated certified mail record (CMR). 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" and the BCMS numbers, which are preceded by three zeros, are recorded on the CMR under the heading "REFERENCE NO." The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

7. The clerk, as part of his or her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk also verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. Then, the clerk folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code and the taxpayer's name and address appear.

8. On each page of the CMR, the BCMS clerk stamps "**MAILROOM: RETURN LISTING TO BCMS BLDG 9 ROOM 180 ATT: CONFERENCE UNIT.**" The last page of the CMR also indicates the "TOTAL PIECES AND AMOUNTS" listed therein.

9. Next, the BCMS clerk 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, "10/28/11" is written on the top of each page.

10. The CMR, cover sheets, cover letters, and conciliation orders are then picked up in BCMS by an employee of the Division's Mail Processing Center who is charged with delivering these items to the USPS.

11. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on

October 28, 2011. This CMR lists 40 computer-printed certified control numbers, each of which is assigned to an item of mail listed on one of the CMR's four pages. Specifically, corresponding to each listed certified control number is a reference number and the name and address of the addressee.

12. Information regarding the conciliation order issued to petitioner is contained on the fourth page of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0862 1944 is reference number 000244024,¹ along with petitioner's name and address in Allen, Texas.

13. Attached to Mr. Farrelly's affidavit are the following exhibits: (A) a copy of the CMR discussed herein; (B) a copy of the protested Conciliation Order; (C) a copy of petitioner's Request for Conciliation Conference, dated February 14, 2011, as well as a copy of the envelope in which the request was mailed by petitioner to BCMS; (D) a copy of a redacted cover sheet; (E) a copy of a three-windowed envelope; (F) a copy of a notarized letter mailed by petitioner to BCMS, dated July 6, 2011, listing petitioner's address as the Allen, Texas, address listed on the CMR (*see* Finding of Fact 12).

14. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Registry Unit of the Mail Processing Center (the Center). This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Center, a member of the staff weighs, seals and places postage on each envelope. A clerk then counts the envelopes and verifies the names and

¹ Mr. Farrelly's affidavit references CMS number 244024, rather than reference number 000244024 (*see* Farrelly affidavit ¶ 10).

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 USPS employee affixes a postmark and his or her initials or signature to the CMR to indicate receipt by the USPS. In addition, the Center specifically requests that the USPS employee either circle the number of pieces received or write such number on the CMR.

15. In this particular instance, the USPS employee affixed a postmark dated October 28, 2011 to each of the CMR's four pages, circled the number "40" on page 4 to indicate the number of pieces received by the USPS, and initialed or signed his or her name on each page.

16. Mr. Peltier states that the CMR is the Division's record of receipt from the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Center, the CMR is picked up at the USPS office by a member of Mr. Peltier's staff on the following day and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

17. Based upon his review of the Farrelly affidavit and the exhibits attached thereto (including the CMR), Mr. Peltier states that on October 28, 2011, an employee of the Center delivered an item of mail addressed to petitioner at an Allen, Texas, address to a branch of the USPS in Albany, New York, in a sealed and stamped envelope for delivery by certified mail. He further states that he can determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on October 28, 2011 for the records of BCMS. Mr. Peltier states that the procedures described in his affidavit are the regular procedures followed by the 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 item of certified mail to petitioner on October 28, 2011.

18. Petitioner responded to the Notice of Intent to Dismiss Petition by letter dated June 13, 2012, stating that his petition “was submitted late due to misleading instructions” from an auditor. Petitioner asserts that following his receipt of the protested Conciliation Order, he was misled insofar as the auditor, via telephone, told him “the process repeats” and instructed him to wait for a notice of determination “which would allow [him] to request for a petition hearing [sic] at which point [he] would be allowed to submit new documents to [the auditor] for review” but that instead, he received a “Notice and Demand for Payment Tax Due” [sic]. Petitioner further states that the auditor’s “misleading instructions [were] the reason [the petition] was filed past the 90 days grace period” and that if he had not followed her advice, he “would have taken actions much sooner” [sic]. In concluding, petitioner requests that the Division of Tax Appeals “[p]lease grant an exception, I have in good faith cooperated with the audit process and with all parties from the NYS Tax and Finance division [sic] in a timely manner.” Along with the letter, petitioner enclosed, among other items, documentation in support of the merits of his protest.

19. Attached to the petition filed in this matter were (1) a copy of a Notice and Demand for Payment of Tax Due (Assessment No. L-035078899), dated April 18, 2012, issued to petitioner by the Division; and (2) a copy of the protested Conciliation Order, along with the cover letter that had accompanied it. The cover letter states, in pertinent part, that “this order will be binding unless you file a petition within ninety (90) days from the date of this order with the Division of Tax Appeals.”

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a conciliation order (*see* Tax Law § 170[3-a][e]). “The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax

Appeals” (*Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011, *citing id.*). Accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011, *rearg denied* April 19, 2012). Therefore, a conciliation order is binding upon a taxpayer unless a timely petition is filed with the Division of Tax Appeals (*see* Tax Law § 170[3-a][e]; *Matter of Chuck Realty Corp.*, Tax Appeals Tribunal, March 22, 2012).

B. The supervising administrative law judge may, on his own motion and on notice to the parties, issue a determination dismissing a petition for lack of jurisdiction (*see* 20 NYCRR 3000.9[a][4]). Similarly, 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]). Furthermore, it is proper to apply “the same standard of review to the Notice of Intent to Dismiss Petition as that applied to a motion for summary determination” (*Matter of Tufariello*, Tax Appeals Tribunal, July 7, 2011).

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]).

D. 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).

E. In this case, the CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, 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). “A conciliation order is mailed when it is delivered into the custody of the USPS for mailing” (*Matter of Western Aries Construction* [citations omitted]). The Division has thus met its burden of proof and established that the protested Conciliation Order was mailed, as addressed, to petitioner on October 28, 2011.

F. When an order 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*). In this case, however, petitioner did not introduce evidence of non-receipt. Rather, petitioner conceded that he received the protested Conciliation Order and further conceded that his protest was untimely (*see* Finding of Fact 18). Contrarily, petitioner asserts that his protest would have been timely but for his reliance on an auditor’s “misleading instructions.” In essence, petitioner seeks to circumvent the 90-day period prescribed by Tax Law § 170(3-a)(e) by arguing detrimental reliance on erroneous advice from a Division employee.

G. Petitioner has not submitted sufficient proof indicating the content of the telephone call that he alleges misled him. Even if he had provided sufficient proof, by petitioner's own admission, the alleged advice concerning the procedure for protesting the Conciliation Order was communicated over the telephone (*see* Finding of Fact 18). However, the alleged content of this telephone conversation contradicted the explicit language of the cover letter that petitioner received with the Order, and that petitioner subsequently attached to his untimely-filed petition, which provided that it would be binding unless petitioner filed a petition with the Division of Tax Appeals within 90 days (*see* Finding of Fact 19). "Therefore, it was unreasonable for petitioner to rely on the purported advice" (*Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003; *see also Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990).

In matters contemplating the propriety of a petitioner's reliance on misleading or erroneous instructions purportedly received from Division employees, it must first be determined whether such reliance was reasonable (*see Matter of Glover Bottled Gas*). In this case even assuming, *arguendo*, that petitioner had received erroneous advice from the auditor, as alleged, the content of such advice is "contradicted [by] the explicit language" of Tax Law § 170(3-a)(e) insofar as the protest period set forth in this statute following the issuance of a conciliation order is "clear and unequivocal" (*Matter of Glover Bottled Gas*). Thus, petitioner's request for equitable relief on this basis is without merit.

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 file a timely petition (*see Matter of Winners Garage*, Tax Appeals Tribunal, June 10, 2010; *Matter of Glover Bottled Gas Corp.*). As the U.S. Supreme Court stated in *Heckler v. Community Health Servs.*, "those who deal with Government are

expected to know the law and may not rely on the conduct of Government agents contrary to the law” (467 US 51, 63 [1984]; *see also Broz v. Comm’r*, 137 TC 46 [2011]). Therefore, even if petitioner had submitted proof sufficient to corroborate the “misleading instructions” he alleges, this would be insufficient to overcome the requirement of Tax Law § 170(3-a)(e) that petitions filed in protest of conciliation orders be filed with the Division of Tax Appeals within 90 days of being issued. As such, it is not so much petitioner’s failure to corroborate the alleged “misleading instructions” as it is his failure to introduce evidence of non-receipt, or, in the alternative, evidence of actually having made a timely protest, which establishes that “no material and triable issue of fact is presented” (*see* 20 NYCRR 3000.9[b][1]).

H. The petition in this matter was filed on April 23, 2012, well beyond the 90-day limitations period. It is firmly established that the deadlines for filing 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 petition was untimely filed, the Division of Tax Appeals is without jurisdiction to consider the merits of petitioner’s protest.

I. The petition of Pom Phommachanh is dismissed.

DATED: Albany, New York
August 23, 2012

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE