

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HOWARD FOSTER	:	ORDER
AND MAURA WALSH-FOSTER	:	DTA NO. 825308
	:	
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 2007 and 2008.	:	

Petitioners, Howard Foster and Maura Walsh-Foster, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax for the years 2007 and 2008.

On November 29, 2012, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On December 21, 2012, petitioners, appearing pro se, submitted a letter in opposition to dismissal. On December 27, 2012, the Division of Taxation filed a letter requesting an extension of time within which to file its response. The Division of Tax Appeals granted an extension until February 14, 2013 for the Division of Taxation to respond to the Notice of Intent to Dismiss Petition. On February 6, 2013, the Division of Taxation, by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel) submitted affidavits and other 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 February 6, 2013.

After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners timely filed their petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. Petitioners, Howard Foster and Maura Walsh-Foster, filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice of Deficiency L-036550723. On their request for conciliation conference, petitioners' preprinted address was listed as a Farmingville, New York, address.
2. After a conciliation conference held on March 27, 2012, BCMS issued Conciliation Order (CMS No. 249015), dated June 8, 2012, recomputing Notice of Deficiency L-036550723 to tax due of \$9,541.00 plus interest and penalty. Petitioners filed a petition with the Division of Tax Appeals on October 9, 2012. Attached to their petition is a copy of the Conciliation Order that was faxed from "518-485-1431 NYS Tax & Finance" on "10/09/2012."
3. On November 29, 2012, the Petition Intake Unit of the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the Conciliation Order appeared to have been issued on June 8, 2012 and the petition appeared to have been filed on October 9, 2012, or 123 days later.
4. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavit of its representative, John E. Matthews, Esq., along with the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted copies of petitioners' petition and the envelope in which it was sent to the Division of Tax Appeals, a copy of petitioners' Request for Conciliation Conference sent to BCMS, a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on June 8, 2012, and a copy of the subject June 8, 2012 conciliation order.

5. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS since 2002, sets forth the Division's general procedure for preparing conciliation orders for mailing.

6. 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 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 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.

8. 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 zeroes. The AFP Unit prints the CMR and cover sheets and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

9. 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 places the cover sheet, cover letter and conciliation order into a three-windowed envelope.

10. On each page of the CMR the BCMS clerk stamps “**MAILROOM: RETURN LISTING TO: BCMS BLDG 9 (RM 180) ATT: CONFERENCE UNIT.**” On the last page of the CMR the BCMS clerk also stamps “**POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.**”

11. 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, “6-8-12” is written in the upper right corner of each page of the CMR.

12. The CMR, along with 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.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR that contains a list of the conciliation orders issued by the Division on June 8, 2012. This CMR lists 64 computer-printed certified control numbers. There are no deletions from the list. Each certified control number is assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number and the name and address of the addressee.

14. 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 1137 0877 is reference/CMS number 000249015, along with the names and address of petitioners, Howard Foster and Maura Walsh-Foster, Farmingville, NY 11738-2829. This was the address listed on petitioners’ Request for Conciliation Conference, i.e., petitioners’ last known address.

15. The affidavit of Bruce Peltier, a supervisor in the Registry Unit since 1999 and currently a mail and supply supervisor in the Division's Mail Processing Center (Center) describes the Center's general practices and procedures. 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 envelopes. 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 USPS employee affixes a postmark and his or her initials or signature to the CMR, indicating receipt by the post office. The Center further requested that the USPS either circle the number of pieces received or indicate the number of pieces received by writing the number on the last page of the CMR.

16. In this particular instance, the postal employee affixed a postmark dated June 8, 2012 of the Colonie Center branch of the USPS to each page of the six-page CMR. On page six, the postal employee also circled and wrote the number "64" and wrote his or her initials near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

17. According to both the Farrelly and Peltier affidavits, a copy of the subject Conciliation Order was mailed to petitioners on June 8, 2012, as claimed.

18. In comments filed in response to the Notice of Intent to Dismiss Petition, petitioners asserted that they have been subjected to prolonged life threatening illnesses that resulted in delays in filing their appeal. They further asserted that they were told that there was a 30-day grace period to file the appeal, and the appeal was postmarked on the 30th day.

CONCLUSIONS OF LAW

A. There is a 90-day statutory 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]). A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation order and underlying assessment in this case would be binding upon petitioners unless they 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). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under 20 NYCRR 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss Petition. Accordingly, the instant matter shall be treated as a motion for summary determination, and “shall be granted if, upon all 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” (20 NYCRR 3000.9[b][1]).

B. Where, as here, the timeliness of a taxpayer’s protest against 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).

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 conciliation 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 (*Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

D. In this case, the Division has not fulfilled the requirement to introduce adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier. Specifically, the affidavit of Bruce Peltier indicated that he had been a supervisor in the Registry Unit of the New York State Department of Taxation and Finance (Tax Department) since March 1999. However, there is no explanation of what the unit does, where it exists within the Tax Department and whether Mr. Peltier’s duties in the Registry Unit since 1999 involved mailing procedures. While his affidavit separately states that he is currently a Principal Mail and Supply Supervisor, Mr. Peltier does not aver that he held that position in June 2012 when the subject conciliation order was allegedly issued. The ambiguity in his affidavit makes it impossible to conclude that Mr. Peltier was familiar with mailing operations and procedures in effect when the Conciliation Order in this matter was allegedly mailed, or issued. A similar ambiguity was recently considered by the Tribunal to be fatal to the presumption of delivery (*see Matter of Madoff*, Tax Appeals Tribunal, April 19, 2012).

E. Based upon the record presented, there appears to be a triable issue of fact and the Notice of Intent to Dismiss Petition, dated November 29, 2012, is withdrawn and the Division of Taxation shall have 75 days from the date of this Order to file an answer to petitioners' petition.

DATED: Albany, New York
May 2, 2013

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE