

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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

Petitioners, Kevin Ryan and Paullina Simons, filed an exception to the determination of the Administrative Law Judge issued on December 6, 2012. Petitioners appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (John E. Matthews Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation did not file a brief in opposition. Petitioners' request for oral agreement was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact "2" and "11," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On January 20, 2012, petitioners, Kevin Ryan and Paullina 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, issued by the Bureau of Conciliation and Mediation Services (BCMS), 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.”

We modify finding of fact “2” of the Administrative Law Judge’s determination to read as follows:

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) a copy of a letter, addressed to petitioners, on official Division of Taxation (Division) letterhead, dated June 29, 2011 and signed by Lawrence Wolff, Income/Franchise Tax Auditor II of the Field Audit Bureau of the Division; 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, dated December 23, 2011, 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.”¹

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 (the “Notice”) “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 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.

¹ We modify this fact to more accurately reflect the record.

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 the 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.

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 other 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.

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.

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 were mailed to petitioners and to petitioners' former representative on October 19, 2011.

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 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. 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.

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

Petitioners did not respond to the Division's motion.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

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" (Emphasis in original).

On the second page of the two-page Notice, the deadline for filing a response is again noted, with the following instruction:

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

This notice will become an assessment subject to collection action” (Emphasis in original).²

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

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division has the authority to issue notices of deficiency for additional taxes and penalties, and that such penalties may include a fraud penalty pursuant to Tax Law § 685 (e). The Administrative Law Judge recognized that if fraud penalties are asserted, as in the instant case, a taxpayer must file a petition with the Division of Tax Appeals seeking a revision of the deficiency, or alternatively, request a conciliation conference with BCMS, within 30 days of the mailing of the relevant notice of deficiency. The Administrative Law Judge found that petitioners filed their request for a BCMS conference or hearing with the Division of Tax Appeals outside of the prescribed 30-day time frame.

The Administrative Law Judge recognized that the Division had sent earlier correspondence to petitioners incorrectly informing them that they had 90 days from a notice of deficiency in which to seek redress with BCMS or the Division of Tax Appeals. However, given the totality of the circumstances, the Administrative Law Judge determined that petitioners’ reliance upon the erroneous information provided by the Division was not reasonable, noting that taxpayers who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law. Accordingly, the Administrative Law Judge held

² We modify this fact to more accurately reflect the record.

that petitioners' request for a BCMS Conciliation Conference was late filed and dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the confusion regarding the date by which an appeal was to be filed with BCMS or the Division of Tax Appeals was the result of the erroneous information provided to them by the Division in the June 29, 2011 letter. Petitioners assert that because of this fact, the petition should be deemed timely filed.

The Division asserts that the Administrative Law Judge correctly decided the relevant issues and that the determination should be affirmed.

OPINION

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). When such fraud penalties are asserted, a taxpayer may file either a petition with the Division of Tax Appeals seeking a revision of such deficiency, or alternatively, request a conciliation conference with BCMS, within 30 days of the mailing of the notice of deficiency by the Division (*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).

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 date of the 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; *see also Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011).

The Division has sufficiently established proper mailing of the relevant Notice, and petitioners do not challenge the date of the mailing or their receipt of the Notice. Rather, petitioners, on exception, continue to assert that they were entitled to rely upon the Division's June 29, 2011 letter, which specifically stated that petitioners would have 90 days from a statutory notice of deficiency to file either a request for a conciliation conference or petition for a hearing with the Division of Tax Appeals. Petitioners are, in effect, arguing that they relied to their detriment upon written advice of the Division as to when their appeal was required to be filed and that the State should be estopped from denying them a hearing based upon that incorrect advice.

“Estoppel is an equitable doctrine invoked to avoid injustice in particular cases.” (*Heckler v Community Health Servs.*, 467 US 51, 59 [1984]). It is well established that where a party seeks to impose estoppel against the government, especially in tax cases, estoppel will not be imposed absent unusual circumstances that would result in a manifest injustice to the private party (*see Id.* at 60; *Matter of Salh v Tax Appeals Trib. of the State of N.Y.*, 99 AD3d 1124 [2012], *lv denied* 20 NY3d 863 [2013]; *Matter of Winners Garage, Inc. v Tax Appeals Trib. of the State of N.Y.*, 89 AD3d 1166 [2011], *lv denied* 18 NY3d 807 [2012]).³ However, in applying

³ In noting the need for parties (and in particular, those who seek funds from the government) to familiarize themselves with and abide by the law, the Supreme Court recognized the “*general rule* that 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” (emphasis added) (*Heckler v Community Health Servs.*, 467 US 51, 63 [1984], *supra*). This does not appear to be a separate test, departing from the enumerated rules of estoppel, but rather a strong statement limiting parties' ability to assert the reasonableness of their reliance upon government misrepresentations.

such precedent to the current case, we must consider that what is at issue is petitioners' fundamental right to "protest a deficiency" (*Matter of Eastern Tier*, Tax Appeals Tribunal, December 6, 1990; *but cf. Heckler v Community Health Servs.*, 467 US 51, 63 [1984], *supra* [where "protection of the public fisc" was at issue]).

In examining the circumstances of a particular case, the U.S. Supreme Court noted that the doctrine offers some flexibility, but certain elements must be established (*Heckler v Community Health Servs.*, 467 US 51, 63 [1984], *supra*). In particular, it must be established that: (1) there was a misrepresentation made by the government to a party and the government had reason to believe that the party would rely upon the misrepresentation; (2) the party's reliance on the government's misrepresentation was reasonable; and (3) prior to the party discovering the truth, the party acted to its detriment based upon the misrepresentation (*id.*). New York State courts and the Tribunal have previously articulated and applied these same elements, and in some instances, have broken the main elements into separate sub-components (*see Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68 [1980]; *Matter of Winners Garage, Inc. v Tax Appeals Trib. of the State of N.Y.*, 89 AD3d 1166 [2011], *lv denied* 18 NY3d 807 [2012]), *supra*; *Matter of Rashbaum v Tax Appeals Trib. of State of N.Y.*, 229 AD2d 723 [1996]; *Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990; *Matter of Charles H. Geiger*, Tax Appeals Tribunal, March 8, 2001).

Accordingly, we must first determine if the Division made a misrepresentation to petitioners and had reason to believe that petitioners would rely on that misrepresentation. The U.S. Tax Court has reviewed the proper application of the elements of the estoppel doctrine articulated by the Supreme Court in *Heckler*, and has indicated that courts must determine

whether the government officials in question acted with a certain requisite intent (*see Broz v C.I.R.*, 137 TC 46 [2011], *affd* WL 4483517 [6th Cir. Aug 23, 2013]). In this regard, the Tax Court held that the government officials had to act “either intentionally or recklessly” in providing the misinformation (*Id.* at 57).⁴

In the case at hand, the June 29, 2011 letter from the Division, written on official Division letterhead and signed by its employee, was inaccurate and misleading when it clearly articulated that petitioners would have 90 days from a notice of deficiency to request a conference with BCMS or file a petition with the Division of Tax Appeals. We note that the relevant section of the Tax Law, which changed the time frame for filing a request for a BCMS conciliation conference to within 30 days of the mailing of a notice of deficiency when fraud penalties are asserted, was enacted in 2009. The similar law changing the filing date for a petition with the Division of Tax Appeals in such cases was enacted in 2010. Clearly, the Division’s June 29, 2011 letter was incorrect when written and the Division knew, or should have known, this fact. The June 29, 2011 letter misstated the law even though the relevant laws had actually been changed a considerable amount of time prior to the issuance of the letter. As such, we find that the issuance of the June 29, 2011 letter was arguably sufficiently “reckless” behavior on the part of the Division to give rise to the conclusion that the State should be estopped from enforcing the 30-day filing deadline.

The next question to be determined is whether it was reasonable for petitioners to rely upon the Division’s June 29, 2011 letter in determining the due date for the filing of their request for a conciliation conference. We find that it was not reasonable for petitioners to rely upon the

⁴ The Tax Court clarified that the action in question must be “. . . affirmative misconduct on the Government's part as a threshold to proving estoppel. See *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992). Affirmative misconduct is more than mere negligence. *Id.* It requires an affirmative act by the Government to either intentionally or recklessly mislead the taxpayer. *Mich. Express, Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004)” (*Broz v C.I.R.*, 137 TC 46, 56 [2011], *affd* WL 4483517 [6th Cir. Aug 23, 2013], *supra*).

June 29, 2011 misrepresentations when, almost four months later, they received the statutory Notice, which conspicuously emphasized the correct specific deadline for filing a response.

Petitioners contend that they were confused by the different time limitations set forth in the June 29, 2011 letter (90 days) and the Notice (30 days). However, the Notice was issued almost four months after the letter and conspicuously stated that any protest was required to be filed by November 18, 2011. In a case that also involved pre-notice confusion regarding filing dates, the Appellate Division found that “no confusion could have existed when petitioner received the notices of determination that clearly and unambiguously stated [the correct time limitations for filing a protest]” (*Matter of Winners Garage, Inc. v Tax Appeals Trib. of the State of N.Y.*, 89 AD3d 1166, 1169 [2011], *lv denied* 18 NY3d 807 [2012]), *supra*).

Our conclusion is further buttressed by the fact that the content of the June 29, 2011 letter is “contradicted [by] the explicit language” of Tax Law § 2008 [2] [a] and § 170 [3-a] [h], insofar as the protest periods set forth in these statutes following the issuance of a notice of deficiency is “clear and unequivocal” (*Matter of Glover Bottled Gas Corp.* Tax Appeals Tribunal, September 27, 1990, *supra*).

We agree with the Administrative Law Judge’s conclusion that petitioners’ request for a conciliation conference was late filed. Therefore, the Division of Tax Appeals cannot consider the merits of petitioners’ case. However, we note that the Administrative Law Judge made a certain procedural error in his resolution of this matter, which has no bearing on the ultimate outcome, and which we hereby correct. The Division made a motion for the dismissal of the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). While it appears that the Administrative Law Judge treated the Division’s motion for dismissal as a motion for summary determination and granted such

motion, the Division's motion for dismissal should have been denied, as the Division of Tax Appeals has subject matter jurisdiction over the issue of whether petitioners timely filed their request for a conciliation conference (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). The Division's motion in the alternative for summary determination should have been granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kevin Ryan and Paullina Simons is denied;
2. The determination of the Administrative Law Judge is modified to the extent that the Division's motion to dismiss the petition is denied and its motion for summary determination is granted, but the determination is otherwise affirmed; and
3. The petition of Kevin Ryan and Paullina Simons is dismissed with prejudice.

DATED: Albany, New York
September 12, 2013

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

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

/s/ Roberta Moseley Nero
Roberta Moseley Nero
Commissioner