

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CASIMIRO AND MARIA ALVARENGA : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826051
Personal Income Tax under Article 22 of the Tax Law :
for the Years 2007 through 2009. :

Petitioners, Casimiro and Maria Alvarenga, filed an exception to the determination of the Administrative Law Judge issued on July 31, 2014. Petitioners appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioners filed a letter brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply on December 1, 2014. Neither party requested oral argument. The six-month period for issuance of this decision began on December 1, 2014.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order dismissing request.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. On January 13, 2014, petitioners, Casimiro and Maria Alvarenga, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a conciliation order dismissing request (CMS number 247906), issued by the Bureau of Conciliation and Mediation Services (BCMS) on September 23, 2011.

2. On March 7, 2014, the Petition Intake Unit of the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition. The notice of intent indicates that the relevant conciliation order was issued on September 23, 2011, but that the petition was not filed until January 13, 2014, or 843 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, (i) the affidavit of Leo Gabovich, a law clerk employed in the Office of Counsel of the Division, dated May 16, 2014; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated May 6, 2014; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked September 23, 2011; (iv) an affidavit, dated May 16, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (v) petitioners’ request for conciliation conference, received by BCMS on August 30, 2011, showing petitioners’ address in Williston Park, New York, and listing petitioners’ representative as Ana E. Rios, Marti and Associates, Inc., at 1500 Jerusalem Ave., Merrick, New York 11566.

4. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS’s receipt of a postmarked copy of the CMR.

5. To commence this procedure, the BCMS Data Management Services Unit prepares the

conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

6. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP). 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.

7. The AFP Unit also produces a computer-generated 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." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. 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.

8. 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 and taxpayers' representatives with the information listed on the CMR and on the cover sheet. The clerk then 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 name and address of the taxpayer appear.

9. The "Total Pieces and Amounts" is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm

180 Att: Conference Unit.”

10. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case “9/23/11” is written in the upper right corner of pages 1 through 4 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of September 23, 2011.

11. 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. The Division’s Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

12. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on September 23, 2011. This CMR lists 47 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a reference/CMS number, and the name and address of the addressees. There are no deletions from the list.

13. Information regarding the conciliation order issued to petitioners is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0812 7002 is reference/CMS number 000247906, along with petitioners’ names and a Williston Park, New York, address that is identical to the address on petitioners’ request for conciliation conference. Additionally, corresponding to certified control number 7104 1002 9730 0812 6975 is reference/CMS number 000247906, along with the name of petitioners’ representative, Ana E. Rios, and a Merrick, New York, address that is identical to the representative’s address as indicated on the request for conciliation conference.

14. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, 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 control 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 postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

15. In this particular instance, the postal employee affixed a postmark dated September 23, 2011 to and also wrote his or her signature or initials on each page of the five-page CMR. The postal employee also circled the preprinted number "47" corresponding to the heading "Total Pieces and Amounts." The circling of the Total Pieces and Amounts number was done at the Division's specific request and is intended to indicate that all 47 pieces of mail listed in the CMR were received at the post office.

16. Mr. Peltier's affidavit states 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 is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery 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 affidavit of Robert Farrelly, the exhibits attached thereto

and the CMR, Mr. Peltier avers that on September 23, 2011, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioners at their Williston Park, New York, address and an item of certified mail addressed to Ana E. Rios at her Merrick, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on September 23, 2011 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are 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 pieces of certified mail to petitioners and petitioners' representative on September 23, 2011.

18. Petitioners responded to the notice of intent to dismiss by affidavit of their representative, Michael Buxbaum, CPA, dated May 22, 2014. Petitioners argue that the underlying notice of deficiency, dated April 11, 2011, was mailed to an incorrect address. Petitioners did not address the issue of the timeliness of their petition in protest of the conciliation order.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of petitions. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the conciliation order by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing standards

and established that copies of the subject conciliation order were properly mailed to petitioners and petitioners' representative on September 23, 2011. As a result, the Administrative Law Judge further concluded that the period for the filing of a petition with the Division of Tax Appeals to protest the conciliation order expired 90 days from the date of such mailing. As the subject petition was undisputedly filed with the Division of Tax Appeals on January 13, 2014, or 843 days after the date of the issuance of the conciliation order, the Administrative Law Judge found that such petition was untimely filed. Consequently, the Administrative Law Judge determined that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioners' protest and dismissed the petition. The Administrative Law Judge noted that this lack of jurisdiction precluded any consideration of issues regarding the issuance of the April 11, 2011 notice of deficiency that led, ultimately, to the filing of the petition herein.

ARGUMENTS ON EXCEPTION

Petitioners continue to argue that the underlying notice of deficiency in this matter was incorrectly addressed and never received by them.

Petitioners also raise two new arguments regarding the issuance of the subject September 23, 2011 conciliation order.

First, petitioners contend that the conciliation order was incorrectly issued because BCMS did not mail a copy of the order to each of petitioners' two representatives. Petitioners assert that there were "multiple" powers of attorney on file and that the Division should have included such powers of attorney in the documents submitted to the Administrative Law Judge. Petitioners also assert that the mailing of the conciliation order was defective because it included the incorrect addresses of each of the representatives.

Second, petitioners argue that the Division's proof of mailing of the subject conciliation

order is defective because the Division failed to include a copy of the mail cover sheet that is, according to the Division's standard procedures, placed in an envelope and mailed along with the conciliation order and covering letter.¹ Petitioners contend that this failure is significant because the cover sheet lists the certified control number assigned to that particular article of mail and also lists the address to which the article is mailed. The conciliation order itself contains no such information. Petitioners assert that, without the cover sheet, the conciliation order cannot be associated with the CMR and the assertions that the order was mailed as claimed in the Farrelly and Peltier affidavits are "invalid."

On exception, the Division relies on the Administrative Law Judge's conclusion that the Division established proper mailing of the conciliation order on September 23, 2011. The Division also asserts that petitioners' continuing arguments regarding the underlying notice of deficiency are irrelevant given the untimeliness of their petition. In response to petitioners' contention that the Division failed to mail a copy of the conciliation order to each of petitioners' two representatives, the Division contends that a copy of the order was properly mailed to petitioners' sole representative of record at the time of mailing. The Division offers no response to petitioners' contentions regarding the absence of the mail cover sheet from the record.

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioners of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of*

¹ Petitioners refer to the cover sheet as a "covering letter" in their exception and briefs. It is clear from their description of the document, i.e., that it contains the certified control number and petitioners' address, that they intend to refer to the cover sheet. We note that the covering letter is also not in the record.

Victory Bagel Time, Tax Appeals Tribunal, September 13, 2012).

Our rules provide that a summary determination 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” (20 NYCRR 3000.9 [b] [1]).

As we previously noted in *Matter of United Water New York*:

“Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is ‘arguable’ (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v. Johnson*, 147 AD2d 312 [1989]) (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).”

Preliminarily, we note our agreement with the Administrative Law Judge’s conclusion that questions regarding the proper issuance of the April 11, 2011 notice of deficiency may not be considered by the Division of Tax Appeals or this Tribunal unless and until the issue of jurisdiction, i.e., the timeliness of the subject petition, is resolved in petitioners’ favor. This is because a petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Next, we reject petitioners’ claim that the issuance of the conciliation order was defective because no notice was given to another representative. There are two grounds upon which to reject this contention. First, the record contains no evidence to show that petitioners, in fact, had any representatives other than Ms. Rios as of the date of issuance of the conciliation order.

Petitioners' request for conciliation conference identifies only Ms. Rios as petitioners' representative. Although petitioners contend that there were multiple powers of attorney on file, they produced no copies of any such powers. Accordingly, even considering the record in a light most favorable to petitioners, we find that Ms. Rios was petitioners' sole representative as of the date of issuance of the conciliation order.

Second, even if petitioners had multiple representatives, the Division's obligation to mail a copy of a statutory notice to a taxpayer's representative may be met where the Division mails such a notice to one such representative (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). We note that this rule is consistent with the plain language on the Division's power of attorney form (*see* form POA-1 ["statutory notices . . . will be sent to the first representative named . . ."]).

Turning now to the issue of the absence of the mail cover sheet, it is well established that where the timeliness of a taxpayer's protest against a notice or conciliation order 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 or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet its burden "by establishing the use of a standard mailing procedure for conciliation orders [or notices] by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order [or notice] in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

While we have held that a properly completed CMR and affidavits from individuals with the requisite knowledge of mailing procedures may be sufficient to prove mailing (*see e.g., Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011), we are unable to

discover in our research any case wherein the absence of the mail cover sheet was directly confronted.² We are thus uncertain of the significance of its absence. It may be that the absence of this document may be overcome by other evidence in the record that proves mailing (*cf.*, *Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001 [flaws in a CMR need not be fatal if the evidence presented is otherwise sufficient to prove mailing]). Nevertheless, we observe that the cover sheet is an important component of the mailing process as it provides the address to which the order is mailed through the windowed envelope. It thus gives the finder of fact an opportunity to view how the subject conciliation order was mailed. It also lists the certified control number. Hence, both the address and the certified control number as listed on the cover sheet can be verified against the CMR. We note further that the conciliation order itself lists neither the taxpayer's address nor the certified control number.

Accordingly, we find that, under the instant circumstances, the absence of the mail cover sheet raises the material factual issue of whether the Division's standard mailing procedure for conciliation orders was followed in this case. We therefore withdraw the March 7, 2014 notice of intent to dismiss petition without prejudice to any subsequent motion to dismiss under 3000.9 (a) of our Rules (20 NYCRR 3000.9 [a]) or any subsequent hearing on the issue of timeliness. We thus remand this matter to the Administrative Law Judge for further proceedings on the issue of timeliness consistent with this decision and ultimately, if determined to be appropriate, a determination on the merits.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Casimiro and Maria Alvarenga is granted to the extent indicated

² We note that this issue was not raised below and therefore not addressed by the Administrative Law Judge.

in paragraph 3 below;

2. The determination of the Administrative Law Judge is reversed;
3. The March 7, 2014 notice of intent to dismiss petition is withdrawn without prejudice;
4. This matter is remanded to the Administrative Law Judge for further proceedings on the issue of the timeliness of the petition consistent with this decision and, if determined to be appropriate, a determination on the merits.

DATED: Albany, New York
May 28, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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