

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SANTA CASTILLO : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826373
Personal Income Tax under Article 22 of the Tax Law :
for the Year 2007. :

Petitioner, Santa Castillo, filed an exception to the determination of the Administrative Law Judge issued on February 19, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on May 19, 2015, the due date for petitioner's reply brief.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 1 and 2, which we have modified to more accurately reflect the record. We have also added additional findings of fact numbered 18 and 19 herein. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. Petitioner, Santa Castillo, filed a petition with the Division of Tax Appeals, which was received on June 16, 2014 and deemed filed on June 11, 2014 (pursuant to 20 NYCRR 3000.22 [a] [3]). The petition was filed in protest of a conciliation order (CMS number 258228), issued by the Bureau of Conciliation and Mediation Services (BCMS) and dated January 17, 2014.

2. On September 12, 2014, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition to petitioner. The notice of intent indicates that the relevant conciliation order was issued on January 17, 2014, but that the petition was not filed until June 11, 2014, or 145 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 November 25, 2014; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated November 17, 2014; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked January 17, 2014; (iv) an affidavit, dated November 19, 2014, of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room; and (v) petitioner's request for conciliation conference, received by BCMS on June 10, 2013, showing petitioner's address as 1428 Webster Avenue, Apartment 17K, Bronx, New York 10456.

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 "1-17-14" is written in the upper right corner of pages 1 through 3 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of January 17, 2014.

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 three-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on January 17, 2014. This CMR lists 32 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the three 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 petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0146 5033 is reference/CMS number 000258228, along with petitioner's name and a Bronx, New York, address that is identical to the address on petitioner's request for conciliation conference.

14. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Clerk 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 January 17, 2014 to, and also wrote his or her signature or initials on, page three of CMR. The postal employee also circled the preprinted number "32" 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 32 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 January 17, 2014, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at petitioner's Bronx, New York, address to a branch of the USPS in Albany, New York, in a sealed postpaid envelope 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 January 17, 2014 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 piece of certified mail to petitioner on January 17, 2014.

18. In opposition to the notice of intent to dismiss, petitioner submitted documentation purportedly related to the merits of her petition. Petitioner offered no evidence on the issue of the timeliness of the petition.

19. Petitioner also sought to submit evidence related to the merits of the petition with her exception. By letter dated May 22, 2015, the Secretary to the Tax Appeals Tribunal advised petitioner that such evidence would not be considered by the Tribunal.

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 the subject conciliation order was properly mailed to petitioner on January 17, 2014. The Administrative Law Judge thus 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 filed with the Division of Tax Appeals on June 11, 2014, or 145 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 petitioner's protest and dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner's exception addresses only the substantive merits of her petition.

The Division relies on the Administrative Law Judge's conclusion that it established proper mailing of the conciliation order on January 17, 2014, and that accordingly, the petition herein was untimely filed.

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner 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 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).

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).

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).

We have recently held that, without other documentary evidence in the record that proves the mailing of a conciliation order, the absence of the mail cover sheet raises a material factual issue of whether the Division’s standard mailing procedure was followed in a particular case (*Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015). We explained our rationale in *Alvarenga* as follows:

“[W]e 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.”

Here, the Division did not submit the mail cover sheet among the documents submitted to prove mailing. Additionally, upon review, we find that the other evidence in the record is insufficient to overcome this evidentiary flaw and thereby establish the fact of mailing (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). We conclude, therefore, that the absence of the mail cover sheet in the present matter raises the material issue of fact of whether the Division followed its standard mailing procedure in this case. We therefore withdraw the September 12, 2014 notice of intent to dismiss petition without prejudice to any subsequent motion to dismiss under section 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 Santa Castillo is granted to the extent indicated in paragraph 3 below;
2. The determination of the Administrative Law Judge is reversed;
3. The September 12, 2014 notice of intent to dismiss petition is withdrawn; and

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
November 12, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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