

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN P. MCALEESE	:	DECISION DTA NO. 826435
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes Under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2006 through 2008.	:	

Petitioner, John P. McAleese, filed an exception to the determination of the Administrative Law Judge issued on February 26, 2015. Petitioner appeared by Leatha J. Sturges, Esq. and Sheila Franks, EA. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian McCann, Esq., of counsel).

Petitioner did not file a brief in support of his 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 January 8, 2016, the date that the reply brief was due.

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

ISSUE

Whether petitioner timely filed his 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. Petitioner, John P. McAleese, filed a request for a conciliation conference (request) with the Division of Taxation's (Division) Bureau of Conciliation and Mediation Services (BCMS). The request, dated October 25, 2013, was filed in response to three notices of deficiency issued by the Division against petitioner. The notices are dated August 1, 2012, November 2, 2012 and November 7, 2012, bear assessment numbers L-038075825, L-0380075826 and L-038075827, and assert additional personal income tax due for the years 2006, 2007 and 2008 in the amounts of \$1,250.00, \$1,335.00 and \$6,946.00, respectively, plus penalty and interest.

2. BCMS issued to petitioner a conciliation order dismissing request (CMS No. 259964), dated December 20, 2013 (dismissal order), dismissing petitioner's request as untimely filed.

3. On August 1, 2014, petitioner filed a petition with the Division of Tax Appeals challenging the dismissal order.

4. On September 12, 2014, Supervising Administrative Law Judge Daniel J. Ranalli issued to petitioner a notice of intent to dismiss petition with respect to the aforementioned petition, on the basis that the petition had not been timely filed.

5. The Division submitted the affidavits of Robert Farrelly and Bruce Peltier, employees of the Division, sworn to on November 17 and 19, 2014, respectively. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of such orders, including the dismissal order at issue, by the United States Postal Service

(USPS), via certified mail, with confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

6. The process for issuance of conciliation orders begins when 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 orders and cover letters to a BCMS clerk assigned to process 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, the 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." The CMR is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

9. The clerk's regular duties include associating 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 folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

10. It is (and was) the general office practice that the BCMS clerk stamps on the bottom left corner “Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the last page of the CMR. The BCMS clerk also stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas” on the bottom right corner of the last page of the CMR.

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 “12-20-13” was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division’s Mail Processing Center.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the 6-page CMR, which sets forth a list of the 55 conciliation orders issued by the Division on December 20, 2013. The CMR also lists 55 certified control numbers. Each such certified control number is assigned to an item of mail listed on the first five pages of the CMR. Specifically, corresponding to each lists certified control number is a reference number, the name and address of the addressee, and postage and fee amounts.¹

14. Information regarding the dismissal order issued to petitioner is contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0107 8738 is reference number 000259964, along with the petitioner’s name and address at 762 10th Ave., Apt. 4N, NY,

¹ There are 11 separate items of mail listed and identified on each of the first five pages of the CMR. The sixth, and final, page of the CMR contains no such individual items of mail, but rather presents (sums) the total number of items of mail set forth on the preceding pages, the postage and fee amounts for such items, and sets forth additional information specific to establishing the mailing of such items.

NY, 10019. This is the address set forth by petitioner in his request and in the petition filed herein, and petitioner does not argue that this is an incorrect address.

15. Information regarding the dismissal order issued to petitioner's representative is also contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0107 8752 is the same reference number 000259964, along with the petitioner's representative's name and address at 1501 Broadway, Suite 12019, New York, New York, 10036. This is the address set forth for petitioner's representative in the request, and there was no argument raised before the Administrative Law Judge that this was an incorrect address.

16. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center, 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. He states that 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 affixes postage and fee amounts. 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 postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

17. Here, the postal employee affixed a postmark date of December 20, 2013 to each page of the six-page CMR. The postal employee also wrote his or her initials each page of the CMR and circled the number "55" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page six of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR, indicating that 55 pieces of mail were actually received.

18. Mr. Peltier stated 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.

19. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier states that on December 20, 2014, an employee of the Mail Processing Center delivered a piece of certified mail addressed, as indicated above, to petitioner and to petitioner's representative, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Peltier states that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on December 20, 2013 for the records of BCMS. He asserts that the procedures described in his affidavit were 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 December 20, 2013.

20. A BCMS clerk's handwritten notation next to petitioner's name on page one of the CMR indicates that the subject dismissal order was returned to BCMS as unclaimed; that petitioner's address was re-verified; and that the dismissal order was subsequently remailed. There is no such notation appearing next to petitioner's representative's name on page one of the CMR. Mr. Farrelly's affidavit indicates that the dismissal order was remailed to petitioner by regular USPS mail on May 13, 2014, in accordance with BCMS policy.

21. In response to the notice of intent to dismiss petition, petitioner maintained that he did not receive the dismissal order allegedly mailed on December 20, 2013. Petitioner admitted actual receipt of the dismissal order on May 19, 2014, and asserted that the petition filed in response thereto on August 1, 2014 was timely. Petitioner submitted with the petition a copy of the three-windowed envelope within which BCMS originally mailed the dismissal order, postage metered with the date of December 20, 2013 and bearing a certified mail label. The envelope is dated stamped as received (back) by BCMS on May 12, 2014. A postal service sticker affixed to the envelope states “return to sender, unclaimed, unable to forward.” The May 12, 2014 date is consistent with the representation of Mr. Farrelly concerning remailing as detailed in finding of fact 20.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of petitions following the issuance of a conciliation order. 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 this procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division had met its burden of establishing the date and fact of mailing of the subject conciliation order to petitioner’s last known address and his representative’s address on December 20, 2013. Specifically, the Administrative Law Judge found that the CMR in this matter was properly completed and constituted probative evidence of the date and fact of mailing. Accordingly, the Administrative

Law Judge concluded that the CMR, along with the Farrelly and Peltier affidavits, established that the Division had a general mailing procedure and that such procedure was followed in this instance. As petitioner's petition was filed on August 1, 2014, which was beyond the 90-day period in which to file a petition, the Administrative Law Judge held that the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioner raises the new argument that the copy of the dismissal order mailed to his representative was mailed to an incorrect address. Petitioner also argues that the practice of BCMS remailing, by regular mail, unclaimed orders sent by certified mail, should provide for the restarting of the time to file a petition. Petitioner argues that the time to file a petition should start from the date the orders are remailed by regular mail.

The Division asserts that it has proven proper mailing of the dismissal order and that petitioner's argument is nothing more than a claim of non-receipt. Further, the Division contends that, as petitioner has not rebutted the presumption of receipt that arises upon proper mailing of the dismissal order, the determination should be affirmed and the exception should be denied.

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).

As the Administrative Law Judge correctly noted, it is well established that, where, as here, 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 and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

We agree with the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders.

We also find that the CMR has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). Specifically, this document lists certified control numbers and reference numbers with corresponding names and addresses and bears USPS postmarks dated December 20, 2013, on each page. As noted, the name, address, reference and the certified control number of petitioner and his representative appear, respectively, on page 1 of the CMR. There are 55 pieces of mail listed on the CMR and a postal employee circled the preprinted 55 total pieces listed number and initialed the CMR to indicate receipt by the post office of all 55 pieces of mail listed thereon in accordance with the Division's standard mailing procedure. We thus conclude that the Division has presented sufficient documentary proof to establish that a copy of the subject dismissal order was mailed as addressed to both petitioner and his representative on December 20, 2013.

We reject petitioner's arguments on exception.

Petitioner's argument that the copy of the dismissal order mailed to petitioner's representative was mailed to an incorrect address is inconsistent with the record and is therefore rejected (*see* finding of fact 15). Furthermore, petitioner's claim that his representative notified the Division of a change of address is irrelevant considering that such claimed notice purportedly was given in August 2014, approximately eight months after the dismissal order was mailed.

With respect to petitioner's claim of non-receipt of the dismissal order, we note that where, as here, a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order (*Matter of Dean*, Tax Appeals Tribunal, April 16, 2013).

Furthermore, where, as here, a properly mailed conciliation order is returned to the Division as unclaimed and is subsequently remailed, the period of limitations in which to file a petition remains the date of the original mailing (*id.*). Thus, petitioner's argument that the date of the re-mailing starts the time period for filing a petition must fail.

A petition 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). As petitioner's petition was not filed until August 1, 2014, which was beyond the 90-day period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John P. McAleese is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of John P. McAleese is dismissed, with prejudice.

DATED: Albany, New York
June 30, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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