

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RONALD & BARBARA DISCENZA : DETERMINATION
for Redetermination of a Deficiency or for : DTA NO. 826808
Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Year 2008.:

Petitioners, Ronald and Barbara DiScenza, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2008.

On April 24, 2015, the Petition Intake Unit of Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were granted until July 10, 2015 to respond to the proposed dismissal. On July 1, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted documents in support of dismissal. Petitioners, appearing pro se, did not respond to the Notice of Intent to Dismiss Petition. On August 6, 2015, Daniel J. Ranalli, Supervising Administrative Law Judge, issued a determination dismissing the petition filed in this matter. The determination repeated the language set forth in the Notice of Intent to Dismiss Petition.

Petitioners filed an exception to the determination of the Supervising Administrative Law Judge. On May 19, 2016, the Tax Appeals Tribunal issued a decision finding that the determination failed to address the issue of whether the Division of Taxation has met its burden of demonstrating the date and fact of issuance of the relevant conciliation order, and remanded

the matter back to the Supervising Administrative Law Judge for a supplemental determination based upon the factual record already in existence. After due consideration of the documents in the record, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. On February 12, 2015, petitioners, Ronald and Barbara DiScenza, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Conciliation Order (CMS No. 261398), issued by the Bureau of Conciliation and Mediation Services (BCMS), and dated November 21, 2014.

2. On April 24, 2015, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners. This notice indicates that the Conciliation Order in this matter was issued to petitioners on November 21, 2014, but that the petition was not filed until February 12, 2015, or 83 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 by the Office of Counsel of the Division, dated June 30, 2015; (ii) a copy of the petition in this matter, filed on February 12, 2015, and showing petitioners' address as 59 Halley Drive, Pomona, New York 10970; (iii) a copy of the Conciliation Order, cover letter and cover sheet dated November 21, 2014; (iv) a Consolidated Statement of Tax Liabilities, dated March 6,

2014, and asserting fraud penalties pursuant to Tax Law § 685(e); (v) a copy of the Notice of Intent to Dismiss Petition, dated April 24, 2015; (vi) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated June 15, 2015; (vii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked November 21, 2014; and (viii) the affidavit of Bruce Peltier, a supervisor since 1999 and currently the Principal Mail and Supply Clerk in the Division’s mail room, dated June 16, 2015.

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

5. In order 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. Next, 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 indicating 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 then these documents are delivered to the BCMS clerk assigned to process conciliation orders.

8. The clerk, as part of his or her regular duties, associates and combines each individual and matching conciliation, cover sheet, and cover letter. The clerk then verifies the names and addresses of the relevant taxpayers and representatives using the information listed on the CMR and the appropriate cover sheet. Next, the clerk folds and places the cover sheet, cover letter, and conciliation order, in that 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 particular case, “11-21-14” is written in the upper right corner of pages one through four of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of November 21, 2014.

11. The CMR, along with the cover sheets, cover letters, and conciliation orders, is 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 USPS.

12. Mr. Farrelly attested to the truth and accuracy of the four-page CMR relevant to this

matter, which contains a list of the conciliation orders issued by the Division on November 21, 2014. This particular CMR lists 36 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number as well as the names and addresses of the addressees. There are no deletions from this list.

13. Information regarding the Conciliation Order relevant to this case is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0329 4457 is reference or CMS number 000261398, along with petitioners' names and a Pomona, New York, address that is identical to petitioners' address contained on their request for BCMS conference.

14. The Division also submitted the affidavit of Bruce Peltier, a supervisor since 1999 and the current Principal Mail and Supply Clerk in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by Mr. Peltier's staff in the ordinary course of business of delivering outgoing mail to branch offices of USPS. Further, after a conciliation order is placed in the specifically designated "Outgoing Certified Mail" basket in the Mail Processing Center, a staff member weighs, seals, and places postage and fee amounts on each envelope. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a staff member delivers the stamped envelopes to a branch of USPS in Albany, New York. A postal employee then affixes a postmark and either his or her initials or signature to the CMR, thereby indicating receipt by USPS.

15. In this case, the postal employee affixed a postmark dated November 21, 2014 to,

and also wrote his or her initials on, pages one through four of the CMR. The postal employee also wrote the number “36” corresponding to the heading “Total Pieces and Amounts” as well as the preprinted number 36, contained on the fourth and last page of the CMR. The postal employee rewrites the “Total Pieces and Amounts” number at the Division’s specific request, and this is intended to indicate that all pieces of mail listed on the CMR were received at USPS, which, in this case, was 36.

16. Mr. Peltier’s affidavit states that the CMR is the Division’s record of receipt, by 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 relevant branch of the USPS by a member of Mr. Peltier’s staff on the day following its initial delivery and is then delivered to the originating office, which, in this case, is BCMS. Additionally, the CMR is maintained by BCMS in the regular course of its business.

17. Based upon his review of Mr. Farrelly’s affidavit, the exhibits attached thereto, and the CMR, Mr. Peltier avers that on November 21, 2014, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioners at their Pomona, New York, address to a branch of USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He also states that a member of his staff obtained a copy of the CMR delivered to and accepted by USPS on November 21, 2014 for the records of BCMS. Mr. Peltier lastly 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 on November 21, 2014.

CONCLUSIONS OF LAW

A. Typically, there is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). However, if a fraud penalty is asserted, the statutory time limit for filing a petition following the issuance of a conciliation order is reduced to 30 days, and the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond this 30-day statutory time limit (Tax Law § 170[3-a][e], [h]; 20 NYCRR 4000.5[c][4]; *Matter of Dean*, Tax Appeals Tribunal, April 16, 2013). Here, the affidavit of Leo Gabovich asserts that fraud penalties pursuant to Tax Law § 685(e) were assessed. This assertion has not been contradicted or refuted by petitioners, and therefore will be accepted as true. This deadline is strictly enforced and petitions filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). Accordingly, a conciliation order is binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 30-day period. Thus, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

B. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether or not the Division has carried its burden of demonstrating the fact and date of mailing of the conciliation order to the petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet this burden by evidence of its

standard mailing procedure, corroborated by either direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in the particular instance at hand (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

D. In this case, the CMR, along with the affidavits of both Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establishes the Division's standard mailing procedure. Additionally, the CMR has been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus established that the Conciliation Order at issue was mailed as addressed to petitioners on November 21, 2014.

E. The address to which the conciliation order was mailed is the address designated by petitioners on their request for conference. At no time did petitioners provide notice of any new or alternative address. The order was thus properly addressed to petitioners' last known address and petitioners do not dispute that the conciliation order was mailed to the proper address.

F. Even though petitioners asserted that the reason for their late-filed petition was that they were misled by the Division into thinking that they had 90 days to file a petition with the Division of Tax Appeals after the issuance of a conciliation order, instead of the 30-day period when a fraud penalty is asserted, the record contains no such allegation or proof in support

thereof. Therefore, the Division has established proper mailing of the Conciliation Order at issue here.

G. The 30-day period for the filing of a petition in this matter commenced as of the date of mailing of the conciliation order, November 21, 2014. The petition at hand, having been filed on February 12, 2015, or 83 days after the issuance of the Conciliation Order, was therefore untimely. As such, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

H. The petition of Ronald and Barbara DiScenza is hereby dismissed.

DATED: Albany, New York
July 14, 2016

/s/ Daniel J. Ranalli
Supervising Administrative Law Judge