

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRAN AND EDMONDA VATAJ : DETERMINATION
for Redetermination of a Deficiency or for : DTA NO. 830109
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law the Year 2018.:

Petitioners, Fran and Edmonda Vataj, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2018.

On June 7, 2021, the 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 given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension until August 23, 2021 to respond to said notice. On July 27, 2021, the Division of Taxation, appearing by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), submitted documents in support of dismissal. Petitioners, appearing pro se, did not submit a response by August 23, 2021, which triggered the 90-day deadline for the issuance of this determination. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On June 26, 2020, the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 319831, to petitioners, Fran and Edmonda Vitaj, dismissing their request for a conciliation conference for notice number L-049614503 for the year 2018.

2. Petitioners filed a petition that was received by the Division of Tax Appeals on October 26, 2020 challenging the June 26, 2020 conciliation order. The envelope containing the petition bears a United States Postal Service (USPS) postmark indicating the petition was mailed on October 21, 2020.

3. On June 7, 2021, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioners a notice of intent to dismiss petition with respect to the aforementioned petition. The notice of intent to dismiss petition provided that the petition was filed more than 90 days after the issuance of the conciliation order and, therefore, was not timely filed.

4. In response to the issuance of the notice of intent to dismiss, to show proof of proper mailing of the conciliation order dated June 26, 2020, the Division submitted, among other documents: (i) an affidavit of Maria Matos, an attorney employed in the Office of Counsel of the Division, dated July 27, 2021; (ii) an affidavit, dated July 22, 2021 of Heidi Corina, the Division's Legal Assistant 2 in the Office of Counsel; (iii) a U.S. Postal Service Request for Delivery Information/Return Receipt bearing petitioner's signature; (iv) an affidavit of Joseph DiGaudio, Assistant Supervisor of Tax Conferences of BCMS, dated July 19, 2021; (v) a

“Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked June 25, 2020; (vi) a copy of the request for conciliation conference that was faxed on April 7, 2020; (vii) a copy of the conciliation order, cover letter and cover sheet, dated June 26, 2020, as well as a copy of the three-windowed mailing envelope used to mail the order; and (viii) an affidavit of Susan Saccocio, Manager of the Mail Room of the Department of Taxation and Finance, dated July 22, 2021.

5. The affidavit of Joseph DiGaudio sets forth the Division’s general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of the conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

6. 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 the 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, taxpayers 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 - BCMS Cert Letter.” The CMR is a listing of taxpayers 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 (000). 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.

9. The clerk's regular duties including associating each cover sheet, cover letter, and conciliation order. 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. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner 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 the pages of the CMR. In this case, "6-26-20" was written in the upper right corner of each page of the CMR.

12. Mr. DiGaudio attests that a postmark of June 25, 2020 was erroneously applied to the pages of the certified mail record. He adds that conciliation orders are mailed on Fridays. Therefore, the date of June 26, 2020, which was a Friday, is correct.

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

14. Mr. DiGaudio attests to the truth and accuracy of the copy of the six-page CMR, which he asserts contains a list of the conciliation orders issued by the Division on June 26, 2020. The CMR lists 65 certified control numbers. Each such certified control number is

assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number, and the name and address of the addressee, and postage and fee amounts.

15. Information regarding the conciliation order issued to petitioners is contained on page on two of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 0025 1984 is reference or CMS number 000319831, along with the name and last known address of petitioners. Specifically, the Rye, New York, address listed on the CMR is the same address listed on the request for conciliation conference.

16. The affidavit of Susan Saccocio, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the regular procedures followed by her staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. She stated 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 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.

17. In this particular instance, the postal employee affixed a postmark dated June 25, 2020, to each page of the six-page CMR. The postal employee wrote the number "65" and initialed page six to indicate the total pieces of mail received at the post office. The postal

employee also circled the typed number “65” corresponding to the heading “Total Pieces and Amounts” to indicate the number received.

18. Ms. Saccocio 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 Ms. Saccocio 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 her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto and the CMR, Ms. Saccocio avers that on June 26, 2020, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioners at their Rye, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to and accepted by the post office on June 26, 2020, for the records of BCMS. Ms. Saccocio asserts that the procedures described in her 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 petitioners on June 26, 2020.

20. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms.

Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9735 0025 1984. The response to the Request for Information she received from the U.S. Postal Service shows that certified mail number 7104 1002 9735 0025 1984 was delivered on June 29, 2021 at 12:32 PM to a location in Rye, NY 10580.

21. Petitioners did not submit a response to the notice of intent to dismiss petition.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

C. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*).

D. Where the timeliness of a taxpayer’s petition following a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). BCMS is responsible for providing conciliation conferences and

issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 7200.1 [c]). As noted above, a conciliation order is issued within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*; *Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, when an order is found to have been properly mailed by the Division to the taxpayer's last known address by certified or registered mail, the petitioner bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. The evidence required of the Division in order to establish proper mailing is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*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 its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. DiGuadio and Ms. Saccocio, both of whom are Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal,

September 13, 2012). However, the Division has not provided adequate proof that it followed its standard procedure in mailing the conciliation order at issue. According to Mr. DiGuadio, the clerk in BCMS hand-writes the date of mailing on the top of each page of the CMS – in this case, June 26, 2020. However, according to Ms. Saccocio, a postal employee places a postmark on each page of the CMS when received at the post office – here, June 25, 2020. Mr. DiGuadio’s explanation for the discrepancy, that conciliation orders are mailed on Fridays, is too general to completely clarify the issue in this particular case. Consequently, the Division fails to meet its burden under a summary determination motion to demonstrate a mailing date of June 26, 2020.

G. When the Division’s evidence that it followed its standard mailing procedure is insufficient, the Division can still prevail by providing evidence of actual receipt of the notice in question by the taxpayer. In such a case, the 90-day period within which to protest the statutory notice commences with such the taxpayers’ actual receipt of the same (*see Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib. of State of N.Y.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *rearg denied* 80 NY2d 893 [1992]). Here, the Division has submitted the affidavit of Ms. Corina, together with its attached USPS delivery information, as provided by the USPS in response to the Ms. Corina’s request for proof of actual delivery of the notice at issue. Specifically, the USPS’s response to Ms. Corina’s inquiry shows that an item with certified number 7104 1002 9735 0025 1984 was received by petitioners on June 29, 2020. That certified number corresponds to the conciliation order at issue. Thus, the Division has established that petitioners actually received the conciliation order on June 29, 2020.

H. By having established that petitioners actually received the conciliation order on June 29, 2020, the statutory 90-day time limit to file a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law §§ 170 [3-a] [a]; 689 [b]). Petitioners' request for a conciliation conference, filed on October 21, 2020, was thus untimely, and the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Lukacs.*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Fran and Edmonda Vataj is dismissed.

DATED: Albany, New York
November 18, 2021

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE