

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GEORGE WRIGHT : ORDER
 : DTA NO. 826397
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Year 2011. :

Petitioner, George Wright, 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 2011.

On September 12, 2014, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Petitioner, appearing pro se, filed a letter and documents on September 27, 2014 in opposition to the notice of intent to dismiss the petition. On November 26, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), having been granted an extension of time to do so, submitted an affidavit and documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on November 26, 2014. After due consideration of the documents and arguments submitted, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, George Wright, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). On the request for conciliation conference, petitioner listed his address as follows:

George Wright
223-27 Cypress Ave #6H
Bronx, New York 10454

2. The request was in response to a notice of disallowance dated August 17, 2012 that denied petitioner's refund of personal income tax claimed for the year 2011. The notice of disallowance was addressed to petitioner as follows:

George Wright
223 27 Cypress Ave 6H
Bronx, New York 10454

3. BCMS issued to petitioner a Conciliation Order (CMS#254446) denying petitioner's request and sustaining the notice of disallowance. The mailing cover sheet to the conciliation order is addressed as follows:

George Wright
22327 Cypress Avenue Apt 6H
Bronx, NY 10454

4. On July 10, 2014, petitioner filed a petition with the Division of Tax Appeals in this matter in which petitioner lists his address as follows:

George Wright
223-27 Cypress Ave
Bronx, New York 10454
#6H

5. On September 12, 2014, Supervising Administrative Law Judge Daniel 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.

6. In support of dismissal, the Division of Taxation (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, set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the conciliation order by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

7. The BCMS Data Management Services Unit prepared and forwarded the conciliation order and the accompanying cover letter, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation order.

8. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

9. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and

cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed 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.

11. It 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.

12. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "4-5-13" was written in the upper right corner of each page of the CMR.

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

14. Mr. Farrelly attested to the truth and accuracy of the copy of the 6-page CMR, which contained a list of the 60 conciliation orders issued by the Division on April 5, 2013. The CMR also listed 60 certified control numbers. Each such certified control number was assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

15. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Corresponding to certified control number 7104 1002 9730 1530 7633 was reference number 000254446, along with the name and address of petitioner as follows:

GEORGE WRIGHT
22327 CYPRESS AVENUE APT 6H
BRONX, NY 10454

16. The affidavit of Bruce Peltier, Principal Mail and Supply Clerk in the Division's Mail Processing Center, attested 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 stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed 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 April 5, 2013 to each page of the six-page CMR. The postal employee also wrote his or her initials on each page of the CMR and circled the number "60" 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 60 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 was picked up at the post office

by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was 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 stated that on April 5, 2013, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner with the address specified on the CMR to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Peltier stated 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 April 5, 2013 for the records of BCMS. He asserted 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 April 5, 2013.

20. Petitioner responded to the notice of intent to dismiss with a letter and attachments disagreeing with the refund denial.

CONCLUSIONS OF LAW

A. There is a 90-day statutory limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c]). Pursuant to Tax Law § 170(3-a)(e), the conciliation order and the notice of disallowance would be binding upon petitioner unless he timely filed a petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. 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. (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 1, 2014; *Matter of Cato*; *Matter of DeWeese*).

C. The evidence required of the Division in order to establish proper mailing is two-fold: 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 this particular instance (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Here, the Division failed to meet this burden as it has failed to establish that BCMS mailed the subject Conciliation Order to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavit of Bruce Peltier, the address on the conciliation order mailed to petitioner by BCMS contained an incorrect street number. The conciliation order was mailed to petitioner at 22327 Cypress Avenue, Apt 6H, rather than 223-27 Cypress Avenue, Apt, 6H. Based upon the record herein, such an error of an essential element of an address is not harmless error (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Because of this error, proper mailing has not been established. The record is devoid of evidence of actual delivery or actual receipt of the conciliation order or of petitioner's actual notice of such order (*cf. Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579

NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447; *Matter of Karolight, Ltd.*, Tax Appeals Tribunal, July 30, 1992). Accordingly, there is insufficient evidence in the record to support a dismissal of the petition as untimely pursuant to 20 NYCRR 3000.9(a)(4).

D. The notice of intent to dismiss petition is hereby rescinded and the Division is hereby directed to serve its answer to the petition within 75 days of the date of this order.

DATED: Albany, New York
February 12, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE