

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VERONICA WILLIAMS AND IAN LAWRENCE : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 826443
New York State Personal Income Tax under Article 22 :
of the Tax Law and the Administrative Code of the :
City of New York for the Years 2009 and 2010. :
:

Petitioners, Veronica Williams and Ian Lawrence, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2009 and 2010.

On December 17, 2014, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Kent J. Gebert, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Petitioners, appearing pro se, filed no response to the Division of Taxation's motion by its due date on January 16, 2015, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits and documents presented, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed a timely petition following the issuance of a conciliation order by the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued notices of deficiency (L-038994712-5 and L-038993876-9) to Veronica Williams and Ian Lawrence, petitioners, dated April 1, 2013, concerning additional income tax due for tax years 2009 and 2010.¹

2. Petitioners filed a Request for Conciliation Conference (Request) dated April 8, 2013, which was date-stamped as received by BCMS on April 10, 2013. Petitioners' address on the Request was an Eastern Parkway, Brooklyn, New York, address.

3. The conciliation conference was held on November 5, 2013, and the conciliation conferee issued an order dated May 16, 2014 sustaining the statutory notices (CMS No. 257016).

4. A petition was filed protesting the conciliation order on August 15, 2014, and the petition was date-stamped as received by the Division of Tax Appeals on August 19, 2014.

5. The Division brought this motion to dismiss, or alternatively, for summary determination, to challenge the timeliness of the filing of the petition after the issuance of the conciliation order.

6. In support of its motion, the Division submitted the following: (i) an affidavit, dated December 2, 2014, of Robert Farrelly, the assistant supervisor of tax conferences of BCMS since 2002, who is familiar with the operations and procedures of BCMS, including the preparation and mailing of conciliation orders; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 16, 2014; (iii) an affidavit, dated December 3, 2014, of Bruce Peltier, a mail room supervisor of the Division; and (iv) a copy of petitioner Ian Lawrence's 2011 New York State Resident Income Tax Return, dated October 25, 2012.

¹ The notices of deficiency were not included with the motion. The identifying information was located on and extracted from the Request for Conciliation Conference.

7. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for processing and mailing conciliation orders, and included the identification of a conciliation order having been mailed on May 16, 2014, to petitioners at an Ocean Avenue, Brooklyn, New York, address. Mr. Farrelly's affidavit also noted the following:

"The clerk noted on page 3 of the CMR next to Veronica Williams and Ian Lawrence's name, 'order ret. (unclaim. new addr. remailed [reg.]: 6-17-14.' On June, 17, 2014, BCMS mailed a copy of the Conciliation Order to Veronica Williams and Ian Lawrence by regular mail. It is BCMS policy to remail by regular mail any Orders returned by the Post Office."

8. The affidavit of Bruce Peltier, a mail room supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. Once a staff member delivers the envelopes and the CMR to one of the various United States Postal Service (USPS) branches located in the Albany, New York, area, a USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. Here, all pages of the CMR contain legible postmarks and initials. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS circled the number "43" and handwrote the number as well.

9. According to the Farrelly and Peltier affidavits, the subject conciliation order was mailed to petitioners on May 16, 2014, as claimed, to their Ocean Avenue, Brooklyn, New York address.

CONCLUSIONS OF LAW

A. BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). Conciliation orders are binding upon the Division and the person who requested the conference, unless such person petitions the Division

of Tax Appeals for a hearing within 90 days after the conciliation order is issued (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.6 [b]). When the timeliness of the petition is at issue, the Division must establish proper mailing of the statutory notice, which in this case is the Conciliation Order, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Tax Law § 691 (b) provides that a taxpayer's "last known address" shall be the address given in the last return filed by him, unless subsequent to the filing of such return, the taxpayer shall have notified the Division of a change of address. A rebuttable presumption of petitioner's receipt of the Conciliation Order would arise only upon adequate presentation of proof of mailing by the Division (*see Matter of Mareno v State of N.Y. Tax Commn.*, 144 AD2d 114 [1988]; *Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314 [1986]). In the present matter, however, the Division does not meet its burden of establishing that it utilized petitioners' last known address.

B. Petitioners' Request for Conciliation Conference, dated April 8, 2013 and received by the Division on April 10, 2013, bore their Eastern Parkway, Brooklyn, New York, address. A conciliation conference was held and the Division established through its mailing procedures and processes that it mailed the Conciliation Order to an Ocean Avenue, Brooklyn, New York, address on May 16, 2014. The Division's own mailing records, the CMR, bear a distinct notation that is described in the affidavit of Robert Farrelly (Finding of Fact 7), indicating the original mailing was unclaimed and the Order had to be remailed to a new address. According to the notation, this was done on June 17, 2014, though no additional mailing documentation was provided.

The Division claims that the last return filed that apprised it of petitioners' last known address was Ian Lawrence's 2011 personal income tax return dated October 25, 2012. However,

the Division is ignoring the notification it received of a changed address when it received the Request on April 10, 2013. Although the Division mentions that the envelope in which the Request was sent bore the Ocean Avenue, Brooklyn, New York, address, it is the document filed, the Request in this case, from which the Division was notified of a change of address. Since the Division did not show proper mailing of the Order, the 90-day period in which petitioners had to file a petition did not commence on May 16, 2014. Whether the 90-day period is measured from the Division's own records indicating the order was mailed by regular mail on June 17, 2014, or some later date, the petition filed on August 15, 2014, also bearing petitioners' Eastern Parkway, Brooklyn, New York, address, was thereafter timely. Accordingly, the Division's motion to dismiss is denied.

C. The Division's motion to dismiss is denied, and petitioners are granted a hearing on the merits of the case, which will be scheduled by the Division of Tax Appeals in due course.

DATED: Albany, New York
April 2, 2015

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE