

In the Matter of the Petition

of

KEVIN COLENA

ORDER
DTA NO. 820312

for Redetermination of a Deficiency 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 Year 1999.

Petitioner, Kevin Colena, 1383 Dutch Broadway, North Valley Stream, New York 11580, filed a petition for redetermination of a deficiency 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 year 1999.

On February 11, 2005, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On March 10, 2005, petitioner submitted a letter and attached documents in opposition to dismissal. On March 30, 2004, the Division of Taxation, by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other 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 March 30, 2005. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Kevin Colena, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") in protest of Notice of Deficiency L-023103527 dated February 2, 2004 and pertaining to the year 1999.

2. Petitioner's request for conference, mailed September 1, 2004, lists the following as his address:

Kevin Colena
1383 Dutch Broadway
Valley Stream, NY 11580

3. BCMS subsequently issued to petitioner a Conciliation Order Dismissing Request (CMS No. 205150) dated September 24, 2004, which denied petitioner's request with respect to Notice of Deficiency L-023103527 as having been filed late.

4. On December 24, 2004, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated September 24, 2004.

5. On February 11, 2005, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued

to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the Conciliation Order in this matter was issued on September 24, 2004, but that the petition was not filed until December 24, 2004, or 91 days later.

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation ("Division") submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on September 24, 2004, and a copy of the subject September 24, 2004 Conciliation Order.

7. 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 the orders 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 CMR.

8. 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 order and covering letter to a BCMS clerk assigned to process the conciliation orders.

9. 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, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR entitled "Assessments Receivable, Certified Record for Presort Mail." 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 via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, Conciliation Order, and covering 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, covering 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.

12. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas," and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

13. 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 "9/24/04" is written in the upper right corner of each page of the CMR

14. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on September 24, 2004. This CMR lists 38 certified control numbers and there are no deletions from the list. 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 notice number, the name and address of the addressee, and postage and fee amounts.

16. Information regarding the Conciliation Order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0289 6775 is reference/CMS number 000205150, along with the following address:

Kevin Colena
1383 Dutch Broadway
Valley Stream, NY 11580-1552

17. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of 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. More specifically, 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 places postage and fee amounts on the letters. 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/or his or her initials or signature to the CMR indicating receipt by the post office.

18. In this particular instance, the postal employee affixed a postmark dated September 24, 2004 to each page of the four-page CMR. The postal employee also wrote his or her initials and circled the number "38" next to the printed listing of the "number of pieces" of mail, 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 mail record.

19. Mr. Peltier states 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.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on September 24, 2004, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Kevin Colena, 1383 Dutch Broadway, Valley Stream, NY 11580-1552 to a branch of the USPS in Albany, New York in a sealed envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on September 24, 2004 for the records of BCMS. Mr. Peltier 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 piece of certified mail to petitioners on September 24, 2004.

21. Petitioner raises no dispute as to the Division's mailing date of September 24, 2004, or that his petition was filed on December 24, 2004. In fact, petitioner included, in his response to the Notice of Intent to Dismiss, a February 15, 2005 letter from the USPS confirming that the item bearing certified number 7104 1002 9730 0289 6775 (the certified number for the Conciliation Order in question) was delivered to him as addressed on September 28, 2004. Petitioner argues he was advised that "if a letter is certified then the 90 days would start at the receipt of certified document," and that his petition was therefore timely as filed within 90 days after his receipt of the conciliation order.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time 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][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b) the conciliation order in this case and the underlying Notice of Deficiency would be binding upon petitioner unless he filed a timely 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, as here, the timeliness of a taxpayer's protest against a conciliation order is in question, the initial inquiry is on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id; Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id; see also, Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517).

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, supra; Matter of Novar TV & Air Conditioning Sales & Serv., supra*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the subject Conciliation Order to petitioner at his last known address (*see, e.g., Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Bruce Peltier and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner, by certified mail, on September 24, 2004, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing orders and, in addition, attest to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR which bears a USPS date stamp of September 24, 2004. There are 38 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "38" near his initials, that he received 38 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on September 24, 2004 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on September 24, 2004, and it is this date which triggered the 90-day period within which a protest had to have been filed (*Id*). In turn, 90 days after the September 24, 2004 date of mailing of the order was December 23, 2004, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Petitioner's protest was not filed until it was mailed on December 24, 2004, or one day beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a resulting matter of law there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop, supra*).

E. Petitioner has argued that his protest, mailed within 90 days after his receipt of the order, should be considered timely filed. Where the Division fails to establish proper mailing of an order, the 90-day period within which to protest is not triggered until the taxpayer's actual receipt of the order (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994; *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).⁽¹⁾ Here, however, the Division established proper mailing and the 90-day period is measured from the date of such mailing and not from the date of receipt (*Matter of Air Flex Custom Furniture, supra*).

E. The petition of Kevin Colena is hereby dismissed.⁽²⁾

DATED: Troy, New York
June 30, 2005

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

1. Petitioner's submission of the USPS delivery confirmation establishes receipt of the Conciliation Order on September 28, 2004, and itself provides additional support for the conclusion that the order was mailed by the Division on September 24, 2004.
2. Petitioner may not be entirely without recourse in this matter. That is, petitioner may pay the disputed tax sought by the Division via the underlying Notice of Deficiency and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.

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