

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>TODD L. AND ANDREA M. McLAUGHLIN</b>	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 816024
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1992.	:	

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Petitioners Todd L. and Andrea M. McLaughlin, 133 North 15<sup>th</sup> Street, Olean, New York 14760-2022, filed an exception to the order of the Administrative Law Judge issued on November 6, 1997. Petitioners appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioners timely filed their petition following the issuance of the conciliation order.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Todd L. and Andrea M. McLaughlin, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”). The request was

in response to a determination by the Division of Taxation ("Division") that petitioners had additional income subject to New York State personal income tax.

BCMS scheduled a conciliation conference for April 3, 1997 in Buffalo, New York. Petitioner Todd L. McLaughlin appeared at the conference. In a Conciliation Order, dated May 9, 1997, BCMS denied petitioners' request and sustained the statutory notice.

On August 15, 1997, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and was postmarked August 13, 1997. Petitioner Todd L. McLaughlin's signature on the petition was dated August 9, 1997.

On August 29, 1997, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition. The notice stated:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on May 9, 1997 but the petition was not filed until August 13, 1997 or ninety-six days later.

Pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments regarding the proposed dismissal.

In response to the foregoing notice, the Division mailed a letter, dated September 16, 1997, which included affidavits from Thomas J. English and James Baisley explaining the mailing procedures for conciliation orders. The Division also included a copy of the certified mail record

and the conciliation order which denied petitioners' request and sustained the statutory notice. The affidavit of Thomas English, Assistant Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services of the Division, sets forth the Division's general procedure for preparing and mailing out conciliation orders, which culminates in the orders being sent by certified mail by the United States Postal Service ("USPS"). Mr. English's affidavit describes the preparation of conciliation orders and the preparation of a certified mail record, the record listing those taxpayers to whom conciliation orders are being sent by certified mail on a given day. A certified control number is assigned to each conciliation order listed on the certified mail record. Mr. English notes that the certified control number assigned to the copy of the Conciliation Order sent to petitioners was P482629582. According to Mr. English, each page of a certified mail record is a separate certified mail record for the conciliation orders listed on that page only, and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to sign.

Mr. English attests to the truth and accuracy of the copy of the two-page certified mail record attached to his affidavit, which contains a list of the conciliation orders allegedly issued by the Division on May 9, 1997, including, on page one, an order addressed to petitioners, Todd L. and Andrea M. McLaughlin, 133 North 15<sup>th</sup> Street, Olean, NY 14760-2022. The certified control numbers run consecutively throughout the two pages and Mr. English states that there were no deletions from the mail record.

Each of the two pages of the certified mail record submitted is date stamped May 9, 1997 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York and each contains a postal employee's initials verifying receipt. At the bottom of page one, the page on which petitioner's certified number is listed, the number "14" has been filled in as the "Total Number of Pieces Listed by Sender," and the number "14" has also been filled in as the "Total Number of Pieces Received at Post Office," indicating no deletions from the record.

Attached to Mr. English's affidavit as Exhibit "B" is a copy of the Conciliation Order, CMS No. 155241, dated May 9, 1997, which denied petitioners' request and sustained the statutory notice.

The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service. Mr. Baisley states that after a notice 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. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. Baisley maintains that a member of the mail processing center staff delivers them to the Colonie Center branch of the USPS in Albany. The postal employee affixes a postmark and/or his or her signature to the certified mail record as an indication of receipt by the USPS. He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In this case, the postal employee wrote the total number of pieces, initialed the certified mail record, and affixed a

postmark which indicates that this was the total number received at the post office. Mr. Baisley's knowledge that the postal employee wrote the total number of pieces to indicate that 14 pieces were received at the post office is based on the fact that the Division's Mail Processing Center requested that postal employees either circle the number of pieces received or indicate the number of pieces received by writing that number on the mail record. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

On the basis of the procedures enumerated and the information contained in Mr. English's affidavit, Mr. Baisley concluded that on May 9, 1997 an employee of the mail and processing center delivered a piece of certified mail addressed to Todd L. and Andrea M. McLaughlin, 133 North 15<sup>th</sup> Street, Olean, N.Y. 14760-2022, to the Colonie Center Branch of the United States Postal Service in Albany, New York in a sealed postpaid envelope for delivery by certified mail. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the certified mail record, with the postmark indicating the mail was delivered to and accepted by the Postal Service on May 9, 1977, for the records maintained by BCMS. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the items of certified mail at issue herein.

There are 14 entries on the first page of the certified mail record with certified numbers running consecutively from P482629579 to P482629592. Thirteen orders on the page were redacted to protect the privacy of the persons involved.

In response to the Notice of Intent to Dismiss Petition, petitioner Todd L. McLaughlin mailed a letter which stated that while the petition may have been received late, one must take into account delays by the Postal Service. According to Mr. McLaughlin, while the Notice of Intent to Dismiss Petition letter was dated August 29, 1997, it was not received by him until September 5, 1997. Mr. McLaughlin surmises that, if his petition was received late, the delay was due to the Postal Service and that he should not be penalized for the Postal Service's delay.

***THE ORDER OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first noted that pursuant to Tax Law § 170(3-a)(e), a conciliation order would be binding on petitioners unless, within 90 days of its issuance, they filed a petition with the Division of Tax Appeals challenging the order.

The Administrative Law Judge then determined that when the timeliness of a petition is at issue, the Division must establish proper mailing of the conciliation order. In this regard, the Administrative Law Judge found that the Division established proper mailing of the conciliation order by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this matter.

The Administrative Law Judge then dismissed petitioners' petition as it was not filed within 90 days from the issuance of the conciliation order on May 9, 1997.

***ARGUMENTS ON EXCEPTION***

On exception, petitioners argue that the 90-day period for filing a petition should have commenced from the date they received the conciliation order, i.e., May 17, 1997, not May 9, 1997, the date of issuance of the conciliation order. Petitioners contend that their petition is timely based on the May 17, 1997 date for commencing the 90-day period.

**OPINION**

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 (*Matter of Trans County Constr.*, Tax Appeals Tribunal, August 24, 1995; *Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). Therefore, the 90-day period commenced from the date the conciliation order was issued, May 9, 1997.

We affirm the order of the Administrative Law Judge. The conciliation order was issued to petitioner on May 9, 1997. The petition in this matter was not filed until August 13, 1997, or 96 days later. Therefore, petitioners’ petition was not timely filed and the Division of Tax Appeals lacks jurisdiction to review it (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Todd L. and Andrea M. McLaughlin is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Todd L. and Andrea M. McLaughlin is dismissed.

DATED: Troy, New York  
June 18, 1998

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/s/Donald C. DeWitt

Donald C. DeWitt  
President

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/s/Carroll R. Jenkins

Carroll R. Jenkins

Commissioner

/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner