

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**RICHARD L. WETHERBY** : DECISION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 816667  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 1989. :

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Petitioner Richard L. Wetherby, P. O. Box 755, Flagler Beach, Florida 32136-0755, filed an exception to the order of the Administrative Law Judge issued on December 10, 1998.

Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter in opposition to petitioner's exception. Oral argument was not requested.

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

***ISSUE***

Whether petitioner timely filed his petition following the issuance of a conciliation order.

***FINDINGS OF FACT***

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

Petitioner, Richard L. Wetherby, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking review of a Notice of Disallowance of a claim for refund of personal income tax, dated March 27, 1995.

Following the conference held on March 19, 1998, the conciliation conferee issued a Conciliation Order (CMS No. 160289), dated May 15, 1998, which denied petitioner’s request and sustained the Notice of Disallowance.

On August 17, 1998, the Division of Tax Appeals received the petition in this matter. The petition was sent by certified mail on August 14, 1998.

On September 4, 1998, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The notice stated:

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

Pursuant to § 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 15, 1998 but the petition was not filed until August 14, 1998 or ninety-one days later.

Pursuant to § 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 on the proposed dismissal.

In response to the Notice of Intent to Dismiss, the Division of Taxation (hereinafter the “Division”) submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division’s mailing procedures with respect to conciliation orders; a copy

of a certified mail record; and a copy of the conciliation order which denied petitioner's request for a refund of tax and sustained the statutory notice.

The affidavit of Thomas J. English, Assistant Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the certified mail record ("CMR") which is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. A BCMS clerk verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer or representative and then records on the CMR, under the heading "Certified No.," the certified control number from each envelope next to the appropriate name. Certified number Z257569588 was used for the conciliation order mailed to petitioner. The conciliation orders and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center.

According to Mr. English, each page of a CMR is a separate and individual 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 CMR for the receiving postal employee to affix his or her signature.

Mr. English states that the CMR for conciliation orders mailed on May 15, 1998 consisted of four individual pages; the conciliation order mailed to petitioner was listed on page one of the

four-page CMR. He indicates that the copy of the CMR attached to his affidavit is a true and accurate copy of the original. The certified control numbers on the CMR run consecutively throughout the four pages, from Z257569583 through Z257569631. All of the names and addresses listed on the CMR have been redacted except the entry for petitioner. Petitioner's name and address appear on page one of the CMR with the certified mail number Z257569588 appearing next to his name. There are 14 entries and 14 certified mail numbers on page one of the CMR; there were no deletions.

Each of the four pages of the CMR is date stamped May 15, 1998 by the Colonie Center branch of the U.S. Postal Service 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 entered as the "Total Number of Pieces Listed by Sender" and the number "14" has also been entered as the "Total Number of Pieces Received at Post Office."

Mr. English states that the Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record. Mr. English also indicates that these procedures were the normal and regular procedures of BCMS on May 15, 1998.

The affidavit of James Baisley, Chief Processing Clerk in the Division's Mail Processing Center, sets forth the procedures followed by the Mail Processing Center in delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). 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. A

clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR.

A member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. The postal employee affixes a postmark or his or her signature to the CMR to indicate receipt by the USPS. In this case, the postal employee affixed a postmark to the CMR, wrote in the total number of pieces received ("14") and initialed the CMR to indicate that 14 pieces were the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee wrote in the "Total Number of Pieces Received at Post Office" to indicate that 14 pieces were received is based upon the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the CMR.

Mr. Baisley states that, in the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and is delivered to the originating office by a member of his staff. He further indicates that the regular procedures of the Mail Processing Center, concerning the mailing of certified mail, were followed in the mailing to petitioner on May 15, 1998.

In response to the Notice of Intent to Dismiss Petition, petitioner submitted a letter on October 2, 1998. He states that, based upon the Rules of Practice and Procedure sent to him by the Division of Tax Appeals, he thought that his mailing of the petition on August 14, 1998 was timely. He maintains that there were several national legal holidays which fell within the 90-day period. In addition, he states that due to wildfires, Florida was in a state of emergency for much of May, June and July and that Flagler County, the county of his residence, was under mandatory

evacuation during part of July. Petitioner attached a copy of an Administrative Order of the Supreme Court of Florida, dated July 8, 1998, which, because of the wild fires, tolled all statutes of limitation for five days, *nunc pro tunc*, to July 2, 1998 for all proceedings in Flagler and Volusia Counties, Florida.

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

In his order, the Administrative Law Judge noted that pursuant to Tax Law § 170(3-a)(e), a conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the order. A conciliation order is “issued” at the time of its mailing to the taxpayer and the filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals.

Where the timeliness of a petition is at issue, the Administrative Law Judge noted that the Division has the burden of proving proper mailing of the conciliation order. After reviewing the evidence submitted by the Division, the Administrative Law Judge concluded that the Division had provided adequate proof of its standard procedure for the mailing of conciliation orders by certified mail. Further, the Administrative Law Judge concluded that the Division had established that its standard mailing procedures were followed with respect to the conciliation order issued to petitioner and that the conciliation order was mailed to petitioner by certified mail on May 15, 1998.

The Administrative Law Judge rejected petitioner’s contentions that the filing period should have been extended because several legal holidays fell within the 90-day period and that due to wildfires, petitioner’s home state of Florida was in a state of emergency for much of May, June and July of 1998. The Administrative Law Judge noted that the 90-day period for filing the

petition is absolute and there is no provision in the Tax Law for the waiver or extension of such period. Thus, the Administrative Law Judge determined that the petition filed with the Division of Tax Appeals on August 14, 1998 was filed one day beyond the 90-day period of limitation provided by Tax Law § 170(3-a)(e). As a result, the Administrative Law Judge dismissed the petition with prejudice.

### ***ARGUMENTS ON EXCEPTION***

In support of his exception, petitioner argues that without having the benefit of Tax Law § 691 to explain how the period within which he had to file his petition was calculated, he was under the impression that his petition was filed early rather than late. Petitioner argues that his untimely filing was invited by the “deficiencies in instructional materials furnished by the tax tribunal” (Petitioner’s exception). Further, due to the state of emergency existing in Florida during the period of time between the issuance of the conciliation order and the filing of his petition, petitioner could not have been expected to travel to another city to consult the New York State Tax Law.

The Division initially supported the order of the Administrative Law Judge in this matter. However, on February 2, 1999, the Division, by its representative Christina L. Seifert, submitted a letter to the Secretary to the Tribunal which enclosed a copy of an Executive Order from the Governor of Florida that sets forth that President Clinton issued a major disaster declaration for all Florida counties. Ms. Seifert stated that, based on this letter and the provisions of Tax Law § 171-twenty-eighth(a), Mr. Wetherby should be entitled to a hearing on the merits.

***OPINION***

As the Administrative Law Judge noted in his order, the filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals and there is no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order.

We have long held that the submission of evidentiary material by any party to a proceeding before us subsequent to the closing of the record is inappropriate. "If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record" (*Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). Thus, we reject the evidence submitted by the Division's representative in her February 2, 1999 letter.

With respect to the arguments set forth by petitioner in his exception, we conclude that they are without merit. In this proceeding, the Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioner and we affirm his order for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard L. Wetherby is denied;
2. The order of the Administrative Law Judge is affirmed; and



3. The petition of Richard L. Wetherby is dismissed.

DATED: Troy, New York  
March 4, 1999

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner