

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHEILA DEWEESE	:	DECISION
	:	DTA NO. 818659
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1994 and 1995.	:	

Petitioner Sheila DeWeese, 1143 Blake Avenue, 2nd Floor, Brooklyn, New York 11208, filed an exception to the determination of the Administrative Law Judge issued on November 29, 2001. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kathleen D. O'Connell, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals 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, Sheila DeWeese, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) dated October 2, 2000, seeking a review of notices of disallowance issued to petitioner dated September 29, 2000. The notices of disallowance concerned claims for refund in the total amount of \$1,488.00, which petitioner claimed on her 1994 and 1995 income tax returns.

Petitioner’s conciliation conference was held on February 22, 2001. Petitioner appeared *pro se* at the conciliation conference.

BCMS subsequently issued a conciliation order to petitioner (CMS No. 183061) dated April 6, 2001, which denied petitioner’s request and sustained the statutory notices concerning both 1994 and 1995 dated September 29, 2000.

On July 31, 2001, a petition seeking an administrative hearing to review the conciliation order dated April 6, 2001, was sent by petitioner to the Division of Tax Appeals by United States Postal Service Express Mail. The address listed by petitioner on her petition is 1143 Blake Avenue, 2nd Floor, Brooklyn, New York 11208. The envelope in which the petition was delivered contains a United States Postal Service (“USPS”) postmark of July 31, 2001.

On August 30, 2001, 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 of Intent to Dismiss Petition indicates that the conciliation order in this matter was issued on April 6, 2001, but that the petition was not filed until July 31, 2001, or 116 days later.

In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (“Division”) submitted the affidavits of Carl DeCesare and James Baisley, employees of the Division. The Division also submitted a copy of the certified mail record (“CMR”)

containing a list of the conciliation orders allegedly issued by the Division on April 6, 2001, including one issued to petitioner, and a copy of the conciliation order.

The affidavit of Carl DeCesare, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS' receipt of a postmarked copy of the CMR.

The Data Management Services Unit in BCMS prepares the conciliation orders and the CMR which are then forwarded to a BCMS clerk assigned to process the conciliation orders. The clerk, as part of her regular duties, verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned by an internal computer application which stores a block of certified control numbers and assigns such numbers. The certified control number is printed at the top of the conciliation order cover letter and on the CMR. A clerk verifies that the certified control number on the CMR is the same as that on the cover letters and the actual orders. The conciliation orders and the CMR are picked up at BCMS by an employee of the Division's Mail Processing Center. Each page of a CMR is a separate CMR 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 initial.

A one-page CMR contains a list of the conciliation orders allegedly issued by the Division on April 6, 2001, including an order addressed to petitioner, Sheila DeWeese, 1143 Blake Avenue-2nd Floor, Brooklyn, NY 11208. The certified control numbers on the CMR do not run

sequentially. The certified control number corresponding to the entry listing petitioner's name and address is P 811 144 790. The single page of the CMR is date stamped April 6, 2001 by the Colonie Center branch of the USPS in Albany, New York. The CMR contains a space for the signature of a postal service employee verifying receipt of the articles listed on the CMR, and it bears initials in the space provided. At the bottom of the CMR, on the page on which petitioner's name and certified control number are listed, the number "6" has been filled in as the "Total Number of Pieces listed by Sender." There are six articles of mail listed on that page. There is also a space for "Total Number of Pieces Received at Post Office," which also bears the number "6."

The affidavit of James Baisley, Chief Mail Processing Clerk in 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 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 on the mail record. 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. In this particular instance, the postal employee affixed a postmark dated April 6, 2001 to the CMR, wrote in the "Total Number of Pieces Received at Post Office" as "6," and initialed the CMR to indicate that six pieces were received. In addition, the U.S. postmark on the CMR is the official acknowledgment by the USPS for the pieces of mail recorded on that

mail record. According to Mr. Baisley's affidavit, his knowledge that the postal employee wrote in the "Total Number of Pieces Received at Post Office" for the purpose of indicating that six pieces were received is based on the fact that the Department's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number received by writing in the number of pieces on the mail record.

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. Baisley's staff on the following day after its initial delivery and is then delivered to the originating office. On April 6, 2001, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Sheila DeWeese, 1143 Blake Avenue, 2nd Floor, Brooklyn, NY 11208 to the Colonie Center branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by certified mail. A member of Mr. Baisley's staff obtained a copy of the CMR delivered to and accepted by the post office on April 6, 2001 for the records of BCMS. The procedures described in Mr. Baisley's 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 these procedures were followed in mailing the piece of certified mail to petitioner on April 6, 2001.

In response to the Division of Tax Appeals' Notice of Intent to Dismiss Petition, petitioner submitted a letter on September 4, 2001. The letter indicates that petitioner's conciliation conference was in April 2001 after which time she mailed a petition to the Division of Tax Appeals, on April 21, 2001, by regular mail. When petitioner became aware that the Division of

Tax Appeals had not received her petition, she sent it again by Express Mail on July 31, 2001. Petitioner contends that her petition was timely filed when she submitted it by regular mail in April 2001.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that, pursuant to applicable provisions of the Tax Law, a conciliation order is binding on the taxpayer unless the taxpayer petitions for a hearing with the Division of Tax Appeals within 90 days after the conciliation order was issued.

The Administrative Law Judge also noted that where the timeliness of a petition is at issue, the Division has the burden of proving proper mailing of the conciliation order. This is accomplished by demonstrating the standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures and by proving that the standard procedure was followed in the particular instance in question. After reviewing the affidavits of the two Division employees submitted as proof of the proper mailing of the conciliation order, the Administrative Law Judge concluded that the Division had adequately established that it mailed the conciliation order to petitioner by certified mail on April 6, 2001. Since petitioner's petition was not filed with the Division of Tax Appeals until July 31, 2001, which was 116 days after the mailing of the conciliation order, the Administrative Law Judge concluded that petitioner's request for a hearing was time barred. As a result, the Administrative Law Judge dismissed the petition of Sheila DeWeese.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that she filed her petition for a hearing with the Division of Tax Appeals in a timely manner, having mailed it by regular mail. Petitioner asserts that she is entitled to a refund of tax paid for 1994 and 1995.

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 Wilson***, Tax Appeals Tribunal, July 13, 1989). The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). When the timeliness of the petition is at issue, the Division must establish proper mailing of the conciliation order (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). We agree with the Administrative Law Judge that the Division has met its burden to establish proper mailing of the conciliation order to petitioner on April 6, 2001 by submitting affidavits describing its general mailing procedure and the mailing record which showed that this procedure was followed in this case (***see, generally, Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992).

Petitioner's petition was not filed until July 31, 2001 or 116 days after the conciliation order was issued. While we are sympathetic to petitioner's personal circumstances, the law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition. Therefore, we affirm the conclusion of the

Administrative Law Judge that since petitioner failed to file her petition protesting the conciliation order within 90 days of its issuance, such petition was untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sheila DeWeese is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Sheila DeWeese is dismissed.

DATED: Troy, New York
June 20, 2002

/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