

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHRISTINE LAMANNA	:	DECISION
	:	DTA NO. 818850
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period July 14, 2000.	:	

Petitioner Christine Lamanna, 232 East Main Street, Frankfort, New York 13340-1112, filed an exception to the determination of the Administrative Law Judge issued on June 20, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel).

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

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

ISSUE

Whether the Division of Taxation was entitled to summary determination in its favor on the ground that petitioner failed to timely file her petition for hearing 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.

The Division of Taxation (“Division”) issued a Notice of Determination dated November 17, 2000 with an Assessment ID of L-018809313 against petitioner, Christine Lamanna, asserting that on July 14, 2000 she was “found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.” As a consequence, this notice imposed a penalty of \$1,800.00 under Article 20 of the Tax Law.

Petitioner requested a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services, and on May 18, 2001, a conference was held at the Division’s offices in Utica before a conciliation conferee. The conferee issued a Conciliation Order dated July 13, 2001, which sustained the Notice of Determination dated November 17, 2000 and denied petitioner’s request.

Petitioner filed a petition dated December 10, 2001, which was stamped received by the Division of Tax Appeals on December 18, 2001. The petition was mailed in an envelope which bears a United States Postal Service postmark of December 11, 2001.

The Division of Taxation’s Proof of Mailing of Conciliation Order

To establish proof of mailing of the Conciliation Order dated July 13, 2001 with reference to the Assessment ID of L018809313, the Division submitted (i) an affidavit dated February 15, 2002 of Carl DeCesare, the assistant supervisor of Tax Conferences whose duties entail familiarity “with the operations and procedures of the Bureau of Conciliation and Mediation Services” and an attached photocopy of a four-page certified mail record, and (ii) an affidavit

dated February 19, 2002 of Daniel LaFar, the chief processing clerk of the Division's mail processing center.

The affidavit of Carl DeCesare sets forth the Division's general practice and procedure for processing conciliation orders. The certified mail record for conciliation orders issued on July 13, 2001 indicates that the Conciliation Order dated July 13, 2001 with reference to the Assessment ID of L018809313 was sent to petitioner at 232 E. Main Street, Frankfort, New York 13340-1112 by certified mail using certified control number 7000 1530 0005 5513 4955 on July 13, 2001, as indicated by an affixed United States postmark. Another number "assigned by an internal computer application" of P 811 145 799 was also printed on the top of the cover letter transmitting the Conciliation Order as well as on the certified mail record for conciliation orders issued on July 13, 2001.

The affidavit of Daniel LaFar describes the operations and procedures followed by the mail processing center. After the conciliation orders are placed in an "Outgoing Certified Mail" basket, a member of Mr. LaFar's staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service in Albany, New York. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here the postal employee affixed a postmark to the certified mail record, wrote in the "Total Number of Pieces Received at Post Office" and initialed the certified mail record near the area "Total Number of Pieces Received at Post Office" to indicate that "6" pieces, including the one

addressed to petitioner, were the total number of pieces received at the post office on July 13, 2001.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 170(3-a)(b) and (e), petitioner had 90 days from the issuance of the Conciliation Order by the Bureau of Conciliation and Mediation Services (“BCMS”) to file a petition for a hearing with the Division of Tax Appeals. The Conciliation Order was issued on July 13, 2001 and, accordingly, petitioner had until October 11, 2001 to file her petition. The petition was deemed filed on December 11, 2001 as the envelope containing the petition bore a United States Postal Service postmark of that date. This date was two months past the due date of October 11, 2001.

The Administrative Law Judge considered and rejected petitioner’s argument that her petition was timely because her filing deadline had been postponed by notice N-01-14 due to the terrorist attacks of September 11, 2001.

The Administrative Law Judge concluded that Governor Pataki recognized the hardship inflicted on all New Yorkers as a result of the terrorist attacks on the World Trade Center and he directed the Division to extend various tax related deadlines. However, the Administrative Law Judge noted that pursuant to notice N-01-14, such deadlines were extended to December 10, 2001. As petitioner’s petition was not filed until December 11, 2001, it was beyond the extension period and, thus, petitioner was precluded from having her petition heard on the merits. The Administrative Law Judge concluded that the provision in notice N-01-14 that “Abatements of penalties on all other late filings of returns or late payments not made by the

date required by law and not covered by this announcement will be handled on a case-by-case basis” did not provide a remedy to petitioner.

The Administrative Law Judge also rejected petitioner’s argument that she relied on the advice of a member of the staff of the Division of Tax Appeals that her filing deadline had been extended until December 11, 2001.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that based on notice N-01-14 issued by the Commissioner of the Department of Taxation and Finance and on Governor Pataki’s Executive Order 113.7 dated September 12, 2001 (and subsequent Executive Orders), the deadline for filing her petition was extended through January 7, 2002. Alternatively, petitioner argues that even if the filing deadline was only suspended until December 10, 2001, petitioner had at least 30 days beyond that date to file her petition. Additionally, petitioner argues that the Division of Tax Appeals accepted her petition as being “in proper form” and, therefore, accepted the December 11, 2001 filing date as proper.

The Division, in opposition, argues that as petitioner does not contest the date of issuance of the BCMS conciliation order nor the date on which her petition was filed, her petition was not timely filed. The Division asserts that despite petitioner’s argument concerning notice N-01-14, the notice extended filing dates only until December 10, 2001 and it was not further extended by the Governor’s Executive Orders. Additionally, the Division argues that petitioner has not demonstrated that she was entitled to any extension of the time to file her petition as she has not demonstrated that she was afflicted by the events of September 11, 2001 resulting in her

inability to meet her filing deadline. Such impact, the Division maintains, was a prerequisite to the applicability of notice N-01-14.

In reply, petitioner argues that the Governor's Executive Orders extended her filing deadline until January 7, 2002. Additionally, petitioner maintains that petitioner's entitlement to an extended filing limit was first brought to her attention by a member of the staff of the Division of Tax Appeals and she relied on that representation in filing her petition.

OPINION

Initially, we note that petitioner does not dispute that her petition for a hearing was filed with the Division of Tax Appeals on December 11, 2001, a date which is more than 90 days after the issuance of the BCMS Conciliation Order on July 13, 2001. Thus, absent a valid extension of the 90-day time limit provided by Tax Law § 170(3-a)(e) for filing a petition with the Division of Tax Appeals, the petition is untimely and the Division of Tax Appeals lacks jurisdiction to review the merits of that petition.

Petitioner urges that her petition was timely because her filing period was extended by notice N-01-14 issued by the Commissioner of the Department of Taxation and Finance and by Governor Pataki's Executive Order 113.7 dated September 12, 2001 (and subsequent Executive Orders). For the following reasons, we disagree with petitioner.

The Commissioner of Taxation and Finance, relying on the authority granted to him pursuant to Tax Law § 171(28), issued notice N-01-14 in September 2001. That notice clearly provided that:

The Commissioner of Taxation and Finance has postponed deadlines from September 11, 2001, through December 10, 2001, for:

. . . filing a petition for credit or refund, or for redetermination of a deficiency, or application for review of a decision;
. . . any other act required or permitted under the Tax Law or specified in the New York State Regulations.

Any deadlines for performance of the above required acts from September 11, 2001, through December 10, 2001, **have been extended to December 10, 2001**” (emphasis in original).

For petitioner’s petition to be timely, it must have been filed on or before December 10, 2001.

As the Administrative Law Judge noted, although it is but one day late, “[E]ven one day late precludes petitioner from having her petition heard on the merits since deadlines for filing petitions are strictly enforced (*see, Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996)” (Determination, conclusion of law “B”).

Equally unavailing is petitioner’s argument that Governor’s Executive Order 113.7, issued on September 12, 2001, extended her time to file a petition until January 7, 2002. In the applicable part of that Order, Governor Pataki temporarily suspended

“any other statute, local law, ordinance, order, rule or regulation or part thereof, establishing limitations of time for the filing or service of any legal action, notice or other process or proceeding that the courts lack authority to extend through the exercise of discretion, where any limitation of time concludes during the period commencing from the date that the disaster emergency was declared pursuant to Executive Order Number 113, issued on September 11, 2001, until further notice.”

Thus, the time within which petitioner had to file a petition for a hearing with the Division of Tax Appeals was extended by Executive Order 113.7.

On October 4, 2001, Governor Pataki issued Executive Order 113.28, which provided as follows: “upon reconsideration of the relevant facts, the provisions added by Executive Order Number 113.7, dated September 12, 2001, . . . shall be extended until October 12, 2001, at 11:59

p.m. and shall then terminate.” While Executive Order 113.28 also provided that certain enumerated provisions of specific laws (Civil Practice Law and Rules, Criminal Procedure Law, Family Court Act and Court of Claims Act) would be temporarily suspended until November 8, 2001, none of those laws are relevant for purposes of extending the time limits for filing a petition with the Division of Tax Appeals. Therefore, petitioner’s time limit for filing a petition was suspended until October 12, 2001 by Executive Orders 113.7 and 113.28. This suspension, from September 11, 2001 until October 12, 2001, gave petitioner an additional 31 days beyond October 12, 2001, within which to file her petition, or until November 12, 2001. Therefore, petitioner’s reliance on the provisions of Executive Order 113.7 is misplaced.

Finally, petitioner maintains that she relied on the advice of an employee of the Division of Tax Appeals, who allegedly told her in a telephone conversation on or about October 5, 2001 that the time within which she had to file her petition was extended until December 11, 2001. She asserts that the December 21, 2001 letter of this same employee, who forwarded her petition to the Division after he found it “to be in proper form,” is proof of the fact that he believed that her petition was timely. We reject petitioner’s argument.

By petitioner's own admission, the alleged advice concerning a filing date of December 11, 2001 was communicated over the telephone. However, the alleged content of this telephone conversation contradicted the explicit language of notice N-01-14, which provided that any deadline for filing a petition from September 11, 2001, through December 10, 2001 had been extended until December 10, 2001. Therefore, it was unreasonable for petitioner to rely on the purported advice that she could file her petition at any time on or before December 11, 2001.

The December 21, 2001 letter finding the petition “to be in proper form” does not vary our decision. There is no reference in that letter to the timeliness of the petition.

As a result, we find that the petition filed with the Division of Tax Appeals on December 11, 2001 by petitioner was untimely and the Division of Tax Appeals is without jurisdiction to consider the merits of such petition (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED: Troy, New York
March 13, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner