

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AMERICAN WOODCRAFT, INC.	:	DECISION DTA NO. 819201
for Redetermination of Deficiencies or for Refund	:	
of New York State Personal Income Tax under Article 22	:	
of the Tax Law, Yonkers Personal Income Tax under	:	
Article 30-A of the Tax Law and New York City Personal	:	
Income Tax under the New York City Administrative Code :	:	
for the Period January 3, 1997 through December 30, 1999.	:	

Petitioner American Woodcraft, Inc., c/o Foreht, Last, Landau, Miller & Katz, LLP, 228 East 45th Street, 17th Floor, New York, New York 10017, filed an exception to the order of the Administrative Law Judge issued on February 6, 2003. Petitioner appeared by Stephen R. Foreht, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief on exception and 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 filed a petition dated November 1, 2002 which was received by the Division of Tax Appeals on November 4, 2002 in an envelope with a postmark of November 1, 2002. Its petition contested a Conciliation Order Dismissing Request dated August 2, 2002 which denied petitioner's request as late filed. This conciliation order noted that the request for conciliation conference was late filed because the 18 notices of deficiency challenged by petitioner in its request "were issued on January 28, 2002, but the request was not mailed until July 12, 2002, or in excess of 90 days."

The Petition Intake, Review and Exception Unit of the Division of Tax Appeals in reviewing the petition dated November 1, 2002 determined that the petition seemed, on its face, to be late filed, albeit only by one day. The petition was filed on November 1, 2002, which appeared to be 91 days after the issuance of the Conciliation Order Dismissing Request dated August 2, 2002. In the Notice of Intent to Dismiss Petition dated November 22, 2002, petitioner was advised that "The last date on which you could have file[d] a timely petition was October 31, 2002."

The Division of Taxation ("Division") included in its response dated December 11, 2002, in support of the proposed dismissal, proof of mailing on August 2, 2002 of the Conciliation Order Dismissing Request dated August 2, 2002. The Division's proof of mailing consisted of (i) an affidavit dated December 10, 2002 of Daniel LaFar, the principal mail and supply clerk of the Division's mail processing center, and (ii) an affidavit dated December 9, 2002 of Carl

DeCesare, the Assistant Director of the Bureau of Conciliation and Mediation Services (“BCMS”).

The affidavit of Carl DeCesare sets forth the Division’s general practice and procedure for processing conciliation orders. Further, an attached copy of the certified mail record for conciliation orders issued on August 2, 2002 shows that a Conciliation Order dated August 2, 2002, with reference to the 18 assessment numbers running consecutively from L020529389 to L020529406, was sent to petitioner at “415 Madison Avenuel [sic], New York, New York 10017” by certified mail using certified control number 7104 1002 9739 0110 7828 on August 2, 2002, as indicated by an affixed United States postmark.

The affidavit of Daniel LaFar, the principal mail and supply clerk of the Division’s mail processing center, 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 each page of the certified mail record, wrote in the “Total pieces received at post office” and initialed or signed the certified mail record near the area “Total pieces received at post office” to indicate that “51” pieces, including the one addressed to petitioner, were the total number of pieces received at the post office on August 2, 2002.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge noted that a conciliation order is binding on a taxpayer unless the taxpayer petitions for a hearing with the Division of Tax Appeals within 90 days after the conciliation order is “issued,” which occurs on the date on which it is mailed to the taxpayer. The Administrative Law Judge found that the Division met its burden to establish proper mailing of the Conciliation Order Dismissing Request to petitioner on August 2, 2002. Consequently, the Administrative Law Judge concluded that the petition dated November 1, 2002 was untimely since it was filed 91 days after the issuance of the Conciliation Order Dismissing Request on August 2, 2002. The Administrative Law Judge noted that if a petition is even one day late, it precludes petitioner from having its petition heard because the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition. The Administrative Law Judge rejected petitioner’s assertion that the one day delay in filing the petition was due to law office failure. The Administrative Law Judge stated that neither tragedy, ill health nor extenuating circumstances can remedy a jurisdictional defect.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that while the Division has provided ample evidence that the Conciliation Order Dismissing Request was mailed to petitioner in the ordinary course of business, it has failed to prove that the order was actually mailed on August 2, 2002 or that it was received by the USPS for mailing on that date. Petitioner notes that the Division has introduced neither a mailing receipt nor a delivery record regarding the Conciliation Order Dismissing Request. Petitioner maintains that the Division has merely shown that 51 pieces of

mail left the Division on August 2, 2002 and that petitioner's order was likely one of those pieces of mail.

The Division, in opposition, argues that the Administrative Law Judge's order was correct for the reason set forth therein.

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 (*see*, 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 Dismissing Request to petitioner on August 2, 2002 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). There is no requirement to produce employees with personal knowledge of the mailing of each individual conciliation order (*see, Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997).

Petitioner's petition was not filed until November 1, 2002 or 91 days after the Conciliation Order Dismissing Request was issued. Despite the fact that the petition was filed only one day late, 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 (*see, Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Therefore, we affirm the conclusion of the Administrative Law Judge that since petitioner failed to file its petition protesting the Conciliation Order Dismissing Request 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 American Woodcraft, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of American Woodcraft, Inc. is dismissed.

DATED: Troy, New York
May 15, 2003

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

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