

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>NORTHERN FORD-MERCURY, INC.</b>	:	DECISION DTA NO. 819539
for Redetermination of a Deficiency/Revision of a	:	
Determination or for Refund of New York State Corporate	:	
Franchise Tax under Article 9-A of the Tax Law for the	:	
Year 1997.	:	

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Petitioner Northern Ford-Mercury, Inc., c/o Gary P. Thomas, 9225 Dimmick Drive, Sanibel Island, Florida 33957, filed an exception to the order of the Administrative Law Judge issued on November 24, 2003. Petitioner appeared by Carmen Gentile, PA. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

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 following facts.

Petitioner filed a petition dated June 27, 2003 which was received by the Division of Tax Appeals on June 30, 2003 in an envelope with a United States Postal Service postmark of June 27, 2003. The petition contested a conciliation order dated March 28, 2003 which sustained the statutory notice (L019647155) issued to petitioner.

The Petition Intake, Review and Exception Unit of the Division of Tax Appeals, in reviewing the petition dated and filed on June 27, 2003, determined that the petition seemed to have been filed late in that it was filed 91 days after the issuance of the conciliation order dated March 28, 2003. On July 22, 2003, the Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss Petition to petitioner and petitioner's representative. In the July 22, 2003 letter accompanying the Notice of Intent to Dismiss Petition, petitioner was advised that "The last date on which you could have filed a timely petition was June 26, 2003."

The Division of Taxation ("Division") responded to the Notice of Intent to Dismiss Petition on August 20, 2003 and included therewith, in support of the proposed dismissal, proof of mailing on March 28, 2003 of the conciliation order dated March 28, 2003. The Division's proof of mailing consisted of (i) an affidavit dated August 12, 2003 of Carl DeCesare, the Assistant Director of the Bureau of Conciliation and Mediation Services ("BCMS"), and (ii) an affidavit dated August 15, 2003 of Bruce Peltier, the Mail and Supply supervisor of the Division's Registry Unit.

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 March 28, 2003 shows that a Conciliation Order dated March 28, 2003 was sent to petitioner at "4409 State Highway 30, Amsterdam, NY 12010" by certified

mail using certified control number 7104 1002 9739 0167 1244 on March 28, 2003 and to Carmine Gentile, Jr., petitioner's representative, by certified mail using certified control number 7104 1002 9739 0167 1251, as indicated by an affixed United States postmark.

The affidavit further states that:

14. The clerk noted on page 3 of the CMR next to Northern Ford-Mercury, Inc's name, "remailed 3/13/03 to-c/o Gary P. Thomas, 9225 Dimmick Dr., Sanibel, FL 3395[7]-3003." The original Conciliation Order was never returned to BCMS. On March 31, 2003, BCMS mailed a second copy of the Conciliation Order after Gary Thomas, the owner, called BCMS to ask that a second copy be mailed to his residence in Florida.

The affidavit of Bruce Peltier 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. Peltier'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 the number "31" on page "3" to indicate the "Total pieces received at post office" and initialed the certified mail record on page "3" to indicate that "31" pieces, including the ones addressed to petitioner and its representative, were the total number of pieces received at the post office on March 28, 2003.

Petitioner did not respond to the Notice of Intent to Dismiss Petition.

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

The Administrative Law Judge, *sua sponte*, ordered that the petition be dismissed with prejudice on the ground that it was not timely filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petition was not filed until June 27, 2003 or 91 days after the conciliation order was issued on March 28, 2003.

***ARGUMENTS ON EXCEPTION***

Petitioner has presented arguments concerning its tax liability but has not addressed the timeliness of its petition.

***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 (*see, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has met its burden to establish proper mailing of the conciliation order to petitioner and to petitioner's representative on March 28, 2003 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the 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 June 27, 2003 or 91 days after the conciliation order 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 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 Northern Ford-Mercury, Inc. is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Northern Ford-Mercury, Inc. is dismissed.

DATED: Troy, New York  
May 20, 2004

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

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