

STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|----------------|
| In the Matter of the Petition | : | |
| of | : | |
| CHRISTINE LAMANNA | : | DETERMINATION |
| for Revision of a Determination or for Refund of | : | DTA NO. 818850 |
| 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, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period July 14, 2000.

The Division of Taxation by its representative, Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated March 15, 2002, requesting the Division of Tax Appeals to grant summary determination in favor of the Division of Taxation as a matter of law on the grounds that petitioner failed to file a timely petition contesting the statutory notice at issue. Petitioner, appearing *pro se*, filed reply papers dated April 3, 2002 to the motion. Based upon the motion papers, the affidavits and documents filed therewith, and the pleadings in this matter, Frank W. Barrie, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. 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.

2. 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.

3. 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

4. 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.

5. 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.

6. The affidavit of Daniel LaFar, the chief processing clerk in 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 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.

CONCLUSIONS OF LAW

A. Tax Law § 478 provides, in relevant part, as follows:

Any determination [of tax due on cigarettes and tobacco products] made pursuant to this section shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing.

Pursuant to Tax Law § 170(3-a)(a), petitioner also had the option to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”).

Petitioner chose this option, and a Conciliation Order dated July 13, 2001 dismissing her request was issued. Pursuant to Tax Law § 170(3-a)(b) and (e), petitioner then had 90 days to file a petition with the Division of Tax Appeals. Accordingly, counting 90 days from July 13, 2001, petitioner had until October 11, 2001 to file her petition. The petition was received on December 18, 2001 and the envelope containing the petition bore a United States Postal Service postmark of December 11, 2001. A petition delivered after the due date is deemed to be filed on the date of the postmark (20 NYCRR 3000.22[a]). Therefore, the petition filed in this matter is deemed filed on December 11, 2001, which is two months past the due date of October 11, 2001.

Nonetheless, petitioner implores that her petition should be permitted to go forward on the merits. She relies upon Governor George E. Pataki's notice N-01-14, Announcement Regarding the Terrorist Attacks of September 11, 2001, which "postponed deadlines from September 11, 2001, through December 10, 2001" for filing a petition for revision of a determination.

B. Petitioner is correct that Governor Pataki recognized the hardship inflicted on all New Yorkers as a result of the terrorist attacks on the World Trade Center and that he directed the Division to extend various tax related deadlines. The Governor's notice N-01-14 specifically stated that the deadline for filing petitions with the Division of Tax Appeals was extended to December 10, 2001: "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]." Unfortunately, petitioner's petition was filed on December 11, 2001 or one day late. Even 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, Inc.*, Tax Appeals Tribunal, February 1, 1996).

C. Petitioner's mere allegation, without more, that "[t]he Office of Tax Appeals gave me the new deadline of December 11, 2001" cannot serve to alter the severe result here. Finally, the provision in the Governor's notice that "Abatements of penalties on all other 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" does not provide a remedy to petitioner since the Governor's notice, as noted above, specifically covered the situation at hand: the due date for filing a petition with the Division of Tax Appeals.

D. The Division of Taxation's motion is granted, and the petition of Christine Lamanna is dismissed.

DATED: Troy, New York
June 20, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE