

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AMERICAN WOODCRAFT, INC. : ORDER
 : 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 a petition 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.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition dated November 22, 2002 on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was untimely filed. The Division of Taxation, by its representative, Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), submitted a response dated December 11, 2002 in support of the proposed dismissal. Petitioner, by Stephen R. Foreht, Esq., submitted a response dated December 20, 2002 in opposition to the proposed dismissal. Based upon the pleadings in this matter, the

affidavits and documents included in the Division's response, and petitioner's response, Frank W. Barrie, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. 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."

2. 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."

3. 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”).

4. 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.

5. 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.

6. Petitioner asserts that “the petition was post-marked one day beyond the 90 day filing period merely as a result of law-office failure, and by no action of of [sic] petitioner.”

CONCLUSIONS OF LAW

A. Tax Law § 681(a) provides, in part, as follows:

If upon examination of a taxpayer’s return . . . the [Division of Taxation] determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last know address in or out of this state.

B. Pursuant to Tax Law § 681(b):

After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment . . . except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition

C. In lieu of petitioning for a hearing, a taxpayer may request a conference at the Division’s Bureau of Conciliation and Mediation Services (Tax Law § 170[3-a][a]). The time for filing such request is determined by the time period set out in the statutory provision authorizing the assessment which in this case was 90 days (Tax Law § 170[3-a][a]). As noted in Finding of Fact “1”, petitioner elected, in the first instance, to request a conference. However, as noted above, its request for a conference was denied by a Conciliation Order Dismissing Request dated August 2, 2002 on the basis that it was made untimely, approximately 75 days late.

D. As noted in Finding of Fact “1”, petitioner then sought to challenge the dismissal of its request for a conference by filing a petition with the Division of Tax Appeals. Pursuant to Tax Law § 170(3-a)(e), 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 Deweese*, Tax Appeals Tribunal, June 20, 2002). Here the record establishes

that the Conciliation Order Dismissing Request dated August 2, 2002 was, in fact, issued on this same date because the Division has met its burden to establish proper mailing of the conciliation order to petitioner on August 2, 2002. The affidavits submitted by the Division, which describe the Division's general mailing procedure as well as the relevant mailing record, establish that the general mailing procedure was followed in this case (*see, Matter of Deweese, supra*).

Consequently, the petition dated November 1, 2002 was untimely since it was filed 91 days after the issuance of the conciliation order on August 2, 2002. Even one day late precludes petitioner from having its petition heard since deadlines for filing petitions are strictly enforced (*see, Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). The forthright assertion by petitioner's representative of "law office failure" to explain the late filing of one day does not remedy a jurisdictional defect. The Division of Tax Appeals simply lacks subject matter jurisdiction over a late-filed petition. Personal tragedy, ill health or extenuating circumstances do not provide a basis to excuse the late filing of a petition (*see, Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990; *Matter of Rathgaber*, Tax Appeals Tribunal, April 5, 1990).

E. The petition dated November 1, 2002 of American Woodcraft, Inc. is dismissed.

DATED: Troy, New York
February 6, 2003

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE