

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS M. RYAN	:	
	:	ORDER
	:	DTA NO. 819396
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under	:	
Article 22 of the Tax Law and New York City	:	
Personal Income Tax under the New York City	:	
Administrative Code for the Years 1998 and 1999.	:	
	:	

Petitioner, Thomas M. Ryan, 16 Old Hill Road, Westport, Connecticut 06880, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under the New York City Administrative Code for the Years 1998 and 1999.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition dated March 17, 2003 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 April 15, 2003 in support of the proposed dismissal. Petitioner, by John J. Cerullo, Sr., CPA, submitted a response dated April 10, 2003 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 January 17, 2003 which was received by the Division of Tax Appeals on February 12, 2003 in an Airborne Express “Flight Ready Letter Express” envelope with a date received stamp of the Division of Tax Appeals of February 12, 2003. This envelope also shows a shipment number of 3169 824 9516, a hand written “confirmation #” of 170509, and a handwritten shipment date of February 12, 2003. The petition contested a Conciliation Order Dismissing Request dated November 1, 2002 which denied petitioner’s request as late filed. This conciliation order noted that the request for conciliation conference was filed late because the Notice and Demand for Payment of Tax Due challenged by petitioner in its request “was issued on June 28, 2000, but the request was not received until October 15, 2002, or in excess of 90 days”

2. The Petition Intake, Review and Exception Unit of the Division of Tax Appeals (“Intake and Review Unit”) in reviewing the petition dated January 17, 2003 determined that the petition appeared to be filed late. The petition was filed on February 12, 2003, which appeared to be 103 days after the issuance of the Conciliation Order Dismissing Request dated November 1, 2002. In the letter dated March 17, 2003 of the Intake and Review Unit transmitting the Notice of Intent to Dismiss Petition also dated March 17, 2003, petitioner was advised that “The last date on which you could have file[d] a timely petition was January 30, 2003.”

3. The Division of Taxation (“Division”) included in its response dated April 15, 2003, in support of the proposed dismissal, proof of mailing on November 1, 2002 of the Conciliation Order Dismissing Request dated November 1, 2002. The Division’s proof of mailing consisted of (i) an affidavit dated April 14, 2003 of Daniel LaFar, the principal mail and supply clerk of the Division’s mail processing center, and (ii) an affidavit dated April 11, 2003 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, it explains that the certified mail record for conciliation orders issued on November 1, 2002 shows that a Conciliation Order dated November 1, 2002, with reference to the assessment number L021205815, was sent to petitioner at 433 Fairfield Beach Road, Fairfield, Connecticut by certified mail using certified control number 7104 1002 9739 0133 7119 on November 1, 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 of November 1, 2002 to each page of the certified mail record, initialed the certified mail record on the last page, and wrote the number “76” to indicate the “Total pieces received at post office,” including the one addressed to petitioner, were received at the post office on November 1, 2002.

6. Petitioner contends that the petition should not be denied for late filing because its representative “due to a serious physical injury” was not able to request and obtain necessary materials until early January 2003 and then “the taxpayer in error” forwarded the petition to the Bureau of Conciliation and Mediation Services.

CONCLUSIONS OF LAW

A. 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]). As noted in Finding of Fact “1”, petitioner elected, in the first instance, to request a conference. However, as noted above, his request for a conference was denied by a Conciliation Order Dismissing Request dated November 1, 2002 on the basis that it was made untimely.

B. 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 November 1, 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 November 1, 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 on February 12, 2003, 103 days after the issuance of the conciliation order on

November 1, 2002, or 13 days late. Even one day late precludes petitioner from having his petition heard since deadlines for filing petitions are strictly enforced (*see, Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). The assertion by petitioner's representative of his ill health and then the erroneous mailing to the wrong bureau to explain the late filing¹ 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).

C. The petition dated January 17, 2003 of Thomas M. Ryan is dismissed.

DATED: Troy, New York
May 8, 2003

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE

¹ Petitioner's position is not stated clearly. On the one hand, he appears to be suggesting that a late filed petition should be excused for the reasons noted above, but, on the other hand, he also seems to be suggesting that his petition was filed timely. Nonetheless, petitioner has offered no evidentiary proof to support a conclusion that his petition was, in fact, timely filed. Rather, Finding of Fact "1" details the evidentiary basis for concluding that the petition was filed late. As a result of this failure of proof, petitioner has not met his burden to show that his petition should not be dismissed (*see, Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595, 598 [wherein the Court of Appeals noted that "unsubstantiated allegations or assertions are insufficient" to require a trial of material questions of fact]).