

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT POINDEXTER	:	SMALL CLAIMS DETERMINATION DTA NO. 821092
for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2000.	:	

Petitioner, Robert Poindexter, 153-27 120 Avenue, Jamaica, New York 11434, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2000.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 10, 2007 at 2:45 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Mac Wyszomirski).

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order by the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

1. On May 23, 2005, the Division of Taxation (“Division”) issued to petitioner, Robert Poindexter, a Notice of Deficiency asserting New York State and City personal income taxes of \$1,172.00, plus penalty and interest.

2. Petitioner filed a timely Request for a Conciliation Conference which was held on October 6, 2005 in Kew Gardens, New York. Petitioner appeared at the conciliation conference. Thereafter, the Division mailed a Conciliation Order (CMS No. 209838), dated December 2, 2005, to petitioner.

3. On April 17, 2006, petitioner filed with the Division of Tax Appeals a petition challenging the Conciliation Order. The petition lists petitioner’s address as 153-27 120 Avenue, Jamaica, New York 11434. The envelope containing the petition bears a United States Postal Service (“USPS”) stamp of April 17, 2006, and indicates that the envelope was mailed from Jamaica, New York.

4. To establish the date and method of mailing of the Conciliation Order, the Division offered into evidence: its certified mailing record (“CMR”) for conciliation orders mailed on December 2, 2005, a copy of the Conciliation Order issued to petitioner and affidavits of two employees, James Steven VanDerzee and Robert Farrelly, familiar with the creation, processing and mailing of conciliation orders. Taken together, these documents are sufficient to establish that the order was properly addressed and sent by certified mail to petitioner’s last known address on December 2, 2005. Petitioner did not present any evidence to show that the order was not properly mailed or timely received or that he filed a timely protest within 90 days of the issuance of the Conciliation Order. In fact, although not conceded, there appears to be no

dispute on petitioner's part that he received the order in a timely manner or that his petition was mailed on April 17, 2006.

CONCLUSIONS OF LAW

A. A petition contesting a notice of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]). In the alternative, a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]). 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 Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Cato, supra; Matter of DeWeese, supra*).

B. In the present matter, the Division has presented sufficient evidence to prove that the Conciliation Order was properly mailed to petitioner at his last known address on December 2, 2005. Accordingly, in order to timely protest the order, petitioner was required to file the petition within 90 days of December 2, 2005, i.e., on or before March 2, 2006.

C. The petition was mailed on April 17, 2006. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

D. The petition of Robert Poindexter is hereby dismissed.

DATED: Troy, New York
May 31, 2007

/s/ Thomas C. Sacca
PRESIDING OFFICER