

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LINDEN F. MEERTINS	:	ORDER
	:	DTA NO. 822123
for Revision of a Determination of for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
the Period April 9, 2006.	:	

Petitioner, Linden F. Meertins, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period April 9, 2006.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition, dated February 29, 2008, 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, Daniel Smirlock, Esq., (John E. Matthews, Esq., of counsel) submitted papers dated March 21, 2008 and May 1, 2008¹ in support of the proposed dismissal. Petitioner, appearing pro se, submitted a response dated May 29, 2008 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.

¹ The Division of Taxation submitted an affidavit dated May 1, 2008 which amended an earlier affidavit dated March 21, 2008. Petitioner was then provided with a due date of June 1, 2008 to file a response, which date commenced the 90-day period for the issuance of this order.

FINDINGS OF FACT

1. Petitioner filed a petition dated February 11, 2008 which was received by the Division of Tax Appeals on February 14, 2008. The envelope in which it was mailed shows a date of mailing of February 12, 2008. His petition contested a Conciliation Default Order dated June 22, 2007, which dismissed petitioner's request due to his failure to appear at the conciliation conference, where his default was duly noted.

2. In reviewing the petition dated February 11, 2008, the Petition Intake Unit of the Division of Tax Appeals determined that the petition seemed, on its face, to be filed late. The petition was filed on February 12, 2008, its date of mailing, which appeared to be 237 days after the issuance of the Conciliation Default Order dated June 22, 2007. In the Notice of Intent to Dismiss Petition dated February 29, 2008, petitioner was advised that, "The last date on which you could have filed a timely petition was September 20, 2007."

3. The Division of Taxation (Division) included in its response, dated March 21, 2008, in support of the proposed dismissal, proof of mailing on June 22, 2007 of the Conciliation Default Order. The Division's proof of mailing consisted of (i) an affidavit dated March 20, 2008 of James Steven VanDerzee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit dated March 19, 2008 of Robert Farrelly, the Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services (BCMS) and (iii) an amended affidavit of Mr. Farrelly dated May 1, 2008, which is the same as his earlier affidavit, except for a correction in its paragraph 14 where there were typographical errors in certain dates.

4. The affidavit of Robert Farrelly 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 June 22, 2007 shows that a Conciliation Order dated June 22, 2007, with reference to assessment number L-027983357, was sent to petitioner at 124-02 97th Avenue, Richmond Hill, NY 11419, by certified mail using certified control number 7104 1002 9730 0074 4610 on June 22, 2007, as indicated by an affixed United States postmark.

5. The affidavit of James Steven VanDerzee, the mail and supply supervisor, 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. VanDerzee'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 there were 64 total pieces, including the one addressed to petitioner, received at the post office on June 22, 2007.

6. Petitioner asserts that, since June of 2006, he has lived in three different locations, and the Richmond Hill address he used on his request for a conciliation conference as well as on his petition, was his sister's address, which he utilized as his mailing address. He candidly noted that he "drifted for awhile" before he picked up his mail at his sister's address.

7. In the amended affidavit of Robert Farrelly dated May 1, 2008, Mr. Farrelly observed that page 3 of the certified mail record has a notation next to petitioner's name made by the

BCMS clerk that the Conciliation Default Order dated June 22, 2007 was remailed on July 27, 2007 because 124-02 97th Avenue, Richmond Hill, NY 11419 was an insufficient address. On the remailing, the conciliation order was sent to petitioner at 124-02 97th Avenue, *South* Richmond Hill, NY 11419.

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]). 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 § 478). Petitioner elected, in the first instance, to request such a conference. As noted above, his request for a conference was denied by a Conciliation Default Order dated June 22, 2007.

B. 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 Default Order dated June 22, 2007 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 June 22, 2007. 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 id.*). Consequently, the petition dated February 11, 2008 was untimely since it was filed on February 14, 2008, or 237 days after the issuance of the conciliation order on June 22, 2007.

C. Even one day late would preclude a petitioner from having his petition heard since deadlines for filing petitions are strictly enforced (*Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). The Division of Tax Appeals simply lacks subject matter jurisdiction over a late-filed petition. In addition, not even personal tragedy, ill health or extenuating circumstances provides a basis to excuse the late filing of a petition (*Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003; *Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990; *Matter of Rathgaber*, Tax Appeals Tribunal, April 5, 1990).

D. Furthermore, the remailing of the conciliation order to a revised address of South Richmond Hill instead of merely Richmond Hill is irrelevant for purposes of this order. The Division was required to mail the conciliation order to petitioner's last known address (*see Matter of Wading River Deli*, Tax Appeals Tribunal, November 27, 1991; *see also Follum v. Commr. of Internal Revenue Service*, 128 F3d 118 [2d Cir 1997]). The Division utilized petitioner's last known address of 124-02 97th Avenue, Richmond Hill, NY 11419, the address he used on his request for a conciliation conference, as noted in Finding of Fact 6.

E. The petition of Linden F. Meertins is dismissed.

DATED:Troy, New York
August 14, 2008

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE