

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAJINDER SINGH	:	ORDER
	:	DTA NO. 822560
for Redetermination of a Deficiency or for Refund of	:	
New York State and City Personal Income Tax under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Periods Ending June 30, 2005	:	
through December 31, 2006.	:	

Petitioner, Rajinder Singh, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the periods ending June 30, 2005 through December 31, 2006.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition, dated October 31, 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 November 18, 2008 in support of the proposed dismissal. Petitioner, appearing by Bailey & Sherman, P.C. (Edward G. Bailey, Esq., of counsel), submitted a response dated December 1, 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, Arthur S. Bray, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioner filed a petition for redetermination of a deficiency, dated October 14, 2008, which was received by the Division of Tax Appeals on October 15, 2008. On October 14, 2008, the envelope containing the petition was mailed to the Division of Tax Appeals by United States mail. The petition contested a Conciliation Order, dated July 11, 2008, which dismissed petitioner's request.

2. Upon reviewing the petition dated October 14, 2008, the Petition Intake Unit of the Division of Tax Appeals determined that the petition appeared to be filed late. The petition was filed on October 14, 2008, its date of mailing, which was 95 days after the issuance of the Conciliation Order dated July 11, 2008.

3. The Division of Taxation (Division) included in its response, in support of the proposed dismissal, proof of mailing on July 11, 2008 of the Conciliation Default Order. The Division's proof of mailing consisted of (i) an affidavit dated November 17, 2008 of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; and (ii) an affidavit dated November 13, 2008 of Robert Farrelly, the Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services (BCMS).

4. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for processing conciliation orders. Further, the certified mail record for conciliation orders issued on July 11, 2008, which was attached as an exhibit, shows that a Conciliation Order, with reference number 000222389, was sent to petitioner at 511 Central Boulevard, New Hyde Park, New York, 11040-4235, by certified mail using certified control number 7104 1002 9730 0767 1865 on July 11, 2008. The mailing date is confirmed 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 and circled the “Total pieces received at post office” and signed the certified mail record to indicate that there were 48 total pieces, including the one addressed to petitioner, received at the post office.¹

6. In response to the motion to dismiss, petitioner’s current representative requests that the Division of Tax Appeals consider that the conciliation order was mailed to the taxpayer and the taxpayer’s representative. Petitioner submits that because of the mailing, CPLR 2103 permits five days to be added to the deadline and that, as a result, the petition should be deemed timely.

CONCLUSIONS OF LAW

A. In lieu of petitioning for a hearing before the Division of Tax Appeals, a taxpayer may request a conference at the Division’s Bureau of Conciliation and Mediation Services (Tax Law § 170[3-a][a]). Here, petitioner elected, in the first instance, to request such a conference. As

¹ The first page of the certified mail record also shows that a copy of the conciliation order was also mailed to petitioner’s representative at the time, Sharat R. Magdalia, at 110 West 40th Street, Suite 504, New York, NY 10018.

noted above, his request for a conference was denied by a Conciliation Order dated July 11, 2008.

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 Order dated July 11, 2008 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. 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 was untimely since it was filed on October 14, 2008, or 95 days after the issuance of the conciliation order on July 11, 2008.

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 lacks subject matter jurisdiction over a late-filed petition.

D. Petitioner’s reliance upon CPLR 2103 to establish that the petition was timely is misplaced. Proceedings before an administrative agency, such as the Division of Tax Appeals, are not an action and, therefore, CPLR 2103 does not apply (*Matter of Feldman v. New York State Department of Health*, 58 NY2d 80, 459 NYS2d 420 [1983]; *Matter of Esther Parking*

Corp., Tax Appeals Tribunal, December 18, 1997; *Matter of Designer Realty Corp.*, Tax Appeals Tribunal, November 12, 1992).

E. The petition of Rajinder Singh is dismissed.

DATED: Troy, New York
February 26, 2009

/s/ Arthur S. Bray

ADMINISTRATIVE LAW JUDGE