

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>BERTRAM AND ELEANOR KURTZ</b>	:	DECISION
	:	DTA No. 812221
for Redetermination of a Deficiency/Revision of a	:	
Determination or for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years 1987 and 1988.	:	

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Petitioners Bertram and Eleanor Kurtz, 7863 Dundee Lane, Delray Beach, Florida 33446, filed an exception to the order of the Administrative Law Judge issued on November 24, 1993. Petitioners appeared by Nussbaum, Yates & Wolpow, P.C. (Alan Yates, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Neither petitioners nor the Division of Taxation filed a brief. The Division of Taxation was given until January 24, 1994 to file a brief, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

***ISSUE***

Whether petitioners timely filed a petition for redetermination of a deficiency.

***FINDINGS OF FACT***

We find the following facts.

The Bureau of Conciliation and Mediation Services (hereinafter "BCMS") of the Department of Taxation and Finance issued a Conciliation Order (CMS # 117218), dated May 28, 1993, to petitioners sustaining the statutory notice (Notice No. L002496590). Petitioners filed the petition in which they challenged the order of the conciliation conferee by certified mail, #P371 914 507, and said envelope bears a United States Postal Service postmark of

August 28, 1993. This petition was indated stamped as received by the Division of Tax Appeals on August 30, 1993.

On October 21, 1993, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss the Petition in this matter as untimely. This notice advised that, pursuant to section 170(3-a)(e) of the Tax Law, a petition must be filed within 90 days from the date a Conciliation Order is issued and that the petition in this matter was not mailed until August 28, 1993, or 92 days later. The parties were given 30 days within which to submit their written comments in response to this Notice. Petitioner did not respond. The Division of Taxation (hereinafter the "Division") responded by letter dated November 12, 1993 and submitted the following documents in response to the Notice of Intent to Dismiss.

An affidavit of Joseph Chyrywat, Supervisor of Tax Conferences in the BCMS of the Department of Taxation and Finance. This affidavit sets forth the routine procedures followed in the ordinary course of business of the BCMS in the preparation and mailing of conciliation orders (hereinafter "the Chyrywat affidavit"). Attached to this affidavit are two exhibits denominated "A" and "B." Exhibit "A" consists of a three-page certified mail record of the BCMS, bearing the date of May 28, 1993. Exhibit "B" is a one-page Conciliation Order dated May 28, 1993 in the Matter of Bertram & Eleanor Kurtz.

The Chyrywat affidavit states that all conciliation orders are mailed by certified mail. BCMS prepares and maintains Certified Mail Records ("CMR's") which are a listing of taxpayers to which conciliation orders are sent by certified mail on a particular day.

As part of the regular procedure of preparing conciliation orders for mailing, a clerk in BCMS verifies the names and addresses of taxpayers who are listed on the CMR. A certified mail control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer. The clerk records on the CMR the certified control number from each envelope next to the

appropriate taxpayer's name.

Each page of the CMR is a separate and individual CMR for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender," and the "Total Number of Pieces Received at Post Office." There is also a space on each individual CMR for the receiving postal employee to sign in acknowledging receipt. After being signed by the postal employee and having the postmark for the particular date affixed to the CMR, it is returned to BCMS and maintained in the regular course of business as a permanent record.

An affidavit of Daniel B. Lafar, Principal Mail and Supply Clerk with the Department of Taxation and Finance (hereinafter "the Lafar affidavit"). Mr. Lafar is fully familiar with the operation and procedures of the Mail and Supply Room ("the Mail Room"). Mr. Lafar's duties include the supervision of Mail Room staff in delivering outgoing Department mail to branch offices of the United States Postal Service. Mr. Lafar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the Mail Room in the regular course of business, and which were followed in particular, on May 28, 1993.

As part of these procedures, when conciliation orders are placed in the "Outgoing Certified Mail" basket in the Mail Room, each envelope is weighed, sealed and postage and fees are affixed. Postage and fee amounts are then recorded on the CMR. A Mail Room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the Mail Room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. A postal employee then affixes his or her signature and/or a postmark to the certified mail record acknowledging receipt by the post office of the items of certified mail recited therein. After the CMR has been signed and/or stamped by the United States Postal Service it is returned to the originating office of the Department of Taxation and Finance.

The three-page CMR attached as Exhibit "A" of the Chyrywaty affidavit shows the addressees of conciliation orders mailed on May 28, 1993. The certified control numbers on the

CMR run consecutively.<sup>1</sup> On page one of this CMR, it shows that an envelope bearing certified control number P229446297 was addressed to Bertram & Eleanor Kurtz, 7863 Dundee Lane, Delray Beach, FL 33446. This CMR also shows that a second envelope bearing certified mail control number P229446298 was addressed to petitioner's representative, James B. Liebman, at 106 7th Street, Garden City, NY 11530. Page one of this CMR shows that 15 items of mail containing conciliation orders were delivered to the United States Postal Service for certified mailing. Page two of this CMR shows that 14 additional pieces of certified mail containing conciliation orders were delivered and accepted for mailing by the United States Postal Service. Page three of this CMR shows that 6 additional pieces of certified mail containing conciliation orders were delivered and accepted for mailing by the United States Postal Service. All three pages of this CMR bear a May 28, 1993 postmark affixed by the Roessleville Branch of the United States Postal Service and all three pages contain the signature of the postal employee acknowledging the receipt and acceptance of the items of certified mail recited therein.

The Lafar affidavit affirms that on May 28, 1993, an employee of the Mail Room delivered 15 sealed postpaid envelopes for delivery by certified mail to the Roessleville Branch of the United States Postal Service, in Albany, New York. These envelopes included two pieces of certified mail (bearing Certified Nos. P229446297 and P229446298) addressed to petitioner at 7863 Dundee Lane, Delray Beach, FL. 33446 and to its representative, James B. Liebman, 106 7th Street, Garden City, NY 11530, respectively.

### ***OPINION***

Pursuant to section 170(3-a)(e) of the Tax Law, a petition must be filed with the Division of Tax Appeals within 90 days from the date a Conciliation Order is issued.

The Rules of Practice and Procedure of the Tax Appeals Tribunal for the Division of Tax Appeals provide, in pertinent part, that the date of the United States Postal Service postmark will be deemed to be the date of filing of any mailed document required to be filed under any provision of Article 40 of the Tax Law. The petition, which was mailed by certified mail, bears

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<sup>1</sup>Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

a United States Postal Service postmark of August 28, 1993. As noted earlier, under the Tax Appeals Tribunal's rules of practice, the date of the United States Postal Service postmark stamped on the envelope is deemed the date of filing. Accordingly, this petition was filed on August 28, 1993.

Petitioners, while agreeing the petition was mailed on August 28, 1993, take exception to the date of mailing by New York State and the beginning of the 90-day period. Petitioners argue that, based on the prior representative's affidavit, the Conciliation Order was not received until June 10, 1993, many days after the State claimed date of mailing, further noting that the Administrative Law Judge's order which indicates a mailing date of November 24, 1993 was not received until December 8, 1993. Petitioners also argue for a finding of a timely filing of the petition, which would allow a hearing of their case, based on reasonable cause due to the actions of the prior accountant who believed he had properly complied with all of the required filings and had instructed personnel from his office to properly mail the petition timely to comply with all the tax laws.

The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). August 26, 1993 was the last day petitioners could timely file a petition with the Division of Tax Appeals. Since the petition was filed on August 28, 1993, the petition was not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bertram and Eleanor Kurtz is denied.
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Bertram and Eleanor Kurtz is dismissed.

DATED: Troy, New York  
June 23, 1994

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner