

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

PHILIP W. WARNER :

DECISION
DTA NO. 816015

for Revision of a Deficiency or for Refund of New York :
City Personal Income Tax under Article 30 of the Tax Law
for the Years 1992 and 1993. :

Petitioner Philip W. Warner, 755 Park Avenue, Apt. #2B, New York, New York 10021,
filed an exception to the order of the Administrative Law Judge issued on October 27, 1997.
Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq.
(Christina L. Seifert, Esq., of counsel).

Neither party filed a brief on exception. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the
following decision.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the
issuance of the conciliation order.

FINDINGS OF FACT

We find the following facts.

A conciliation conference was held in the above matter on February 21, 1997 and by Conciliation Order (CMS No. 157603), dated April 18, 1997, petitioner's request was denied and the statutory notice was sustained.

On July 28, 1997, the Division of Tax Appeals received a petition seeking redetermination of a deficiency of tax under Article 30 of the Tax Law for the years 1992 and 1993. The envelope containing the petition bore a metered mail postmark of July 24, 1997.

On August 29, 1997, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss Petition to petitioner for failure to file a timely petition. The Notice stated that the petition was not filed until July 24, 1997 or 97 days after the issuance of the Conciliation Order dated April 18, 1997. Following the issuance of the Notice of Intent to Dismiss Petition, the parties were given 30 days to respond. No response was received from petitioner to this Notice.

A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation (hereafter the "Division"). In response the Division submitted affidavits and documentary evidence establishing that the Conciliation Order was sent by certified mail to petitioner on April 18, 1997 at petitioner's last known address at 755 Park Avenue, Apt. #2B, New York, New York 10021. The affidavits submitted by the Division described the customary office practice in preparing and mailing conciliation orders. The documentary evidence consisted of a certified mailing record which lists on page one Philip W. Warner, as addressee and bears a postmark of April 18, 1997. At the bottom of page one, the page listing petitioner as the addressee, the number "14" has been filled in as the "Total Number of Pieces Listed by Sender," and the

number “14” has also been filled in as the “Total Number of Pieces Received at Post Office.”

The page also contains a postal employee’s initials further verifying receipt at the post office.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge, *sua sponte*, ordered that the petition be dismissed with prejudice on the ground that it was not timely filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petition was not filed until July 24, 1997 or 97 days after the Conciliation Order was issued on April 18, 1997.

ARGUMENTS ON EXCEPTION

In his exception, petitioner does not dispute the fact that he filed his petition seven days late. However, petitioner argues that because of business travel and surgery he was unable to timely file his petition. Petitioner further argues that although his petition was late, he did try to comply with the requirements of the law.

OPINION

Tax Law § 170(3-a)(e) provides, in pertinent part, that 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.

When the timeliness of the petition is at issue, the Division must establish proper mailing of the Conciliation Order. We find that the Division has met its burden to establish proper mailing of the Conciliation Order to petitioner on April 18, 1997 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this matter.

Petitioner's reasons for filing his petition late do not empower us to waive the 90-day period for filing a petition. The remaining arguments in petitioner's exception are not relevant to the issue of timeliness of the petition. 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]).

We affirm the order of the Administrative Law Judge. The Conciliation Order was issued to petitioner on April 18, 1997. The petition in this matter was not filed until July 24, 1997, or 97 days later. Therefore, petitioner's petition was not timely filed within the 90-day period and the Division of Tax Appeals lacks jurisdiction to review it (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Philip W. Warner is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Philip W. Warner is dismissed with prejudice.

DATED: Troy, New York
May 7, 1998

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner