

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**RAYMOND A. AND JOANNE T.** :  
**DEVEREAUX** :

DECISION  
DTA NO. 816162

for Redetermination of a Deficiency or for Refund of :  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1985 through 1988. :

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Petitioners Raymond A. and Joanne T. Devereaux, 48 Ondaora Park, Highland Falls, New York 10928, filed an exception to the order of the Administrative Law Judge issued on February 12, 1998. Petitioners 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. Petitioners' request for oral argument was denied.

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

***ISSUE***

Whether petitioners timely filed their petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Raymond A. and Joanne T. Devereaux, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking review of a Notice of Disallowance of a claim for refund of personal income taxes, dated January 30, 1995.

Following a conference, BCMS issued a Conciliation Order, dated July 18, 1997, denying petitioners’ request and sustaining the Notice of Disallowance.

On October 20, 1997, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and was postmarked October 18, 1997.

On November 13, 1997, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners with a copy to the Division of Taxation (“Division”). The notice states:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on July 18, 1997 but the petition was not filed until October 18, 1997 or ninety-two days later.

Pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments regarding the proposed dismissal.

In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division’s mailing procedures for conciliation orders; a copy of a certified mail record; and a copy of the

conciliation order which denied petitioners' request for a refund of tax and sustained the statutory notice.

The affidavit of Thomas English, Assistant Supervisor of Tax Conferences in the BCMS of the Division, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the mailing documents including a document which lists the taxpayers to whom conciliation orders are being sent by certified mail on a given day. This document is referred to as a certified mail record. A certified control number is assigned to each conciliation order listed on the certified mail record. According to Mr. English, each page of a certified mail record is a separate certified mail record 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" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to affix his or her signature.

Mr. English states that the copy of the two-page certified mail record attached to his affidavit is a true and accurate copy of the original. It contains a list of the conciliation orders allegedly issued by the Division on July 18, 1997. The certified control numbers on this document run consecutively throughout the two pages, from P482630106 through P482630120. All the names and addresses listed on the certified mail record have been redacted except the entry for petitioners. Petitioners' names and address appear on page 1 of the certified mail record with the certified mail number P482630117 appearing next to their names. Mr. English states that two envelopes were pulled from the mail record after the taxpayers' names were listed on the

certified mail record. The certified mail record reflects this fact, showing that postage and handling fees on two entries were crossed out. Certified mail numbers were not assigned to these entries.

Each of the two pages of the certified mail record submitted is date stamped July 18, 1997 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York and each contains a postal employee's initials verifying receipt. At the bottom of page one, the page on which petitioner's certified number is listed, the number "13" has been entered as the "Total Number of Pieces Listed by Sender," and the number "13" has also been entered as the "Total Number of Pieces Received at Post Office". There are 13 certified mail numbers listed on page one of the certified mail record.

Mr. English states that after the certified mail records and the conciliation orders are prepared for mailing, they are picked up in the offices of BCMS by an employee of the Division's Mail Processing Center.

Attached to Mr. English's affidavit as Exhibit "B" is a copy of the Conciliation Order, CMS No. 159329, dated July 18, 1997, which denied petitioners' request and sustained the statutory notice.

The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service. Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the

envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, a member of the mail processing center staff delivers them to the Colonie Center branch of the United States Postal Service (“USPS”) in Albany. The postal employee affixes either a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In this case, the postal employee wrote the total number of pieces, initialed the certified mail record, and affixed a postmark which indicates that this was the total number received at the post office. Mr. Baisley's knowledge that the postal employee wrote the total number of pieces to indicate that 13 pieces were received at the post office is based on the fact that the Division's Mail Processing Center requested that postal employees either circle the number of pieces received or indicate the number of pieces received by writing that number on the mail record. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

In response to the Notice of Intent to Dismiss Petition, petitioner Raymond A. Devereaux submitted a letter which was received on December 15, 1997. Apparently referring to the Conciliation Order, he states that he received a letter dated July 18, 1997 which he responded to on October 18, 1997. He mentions that he was taking medication during this period and underwent an operation in November 1997. He also asserts that the Division failed in a duty to inform Mr. Devereaux that he erroneously paid tax on his military pension for the years 1985 through 1988. In a postscript, Mr. Devereaux states that the “envelope carrying the Petition was

post-marked Jul 24, 1997". The files of the Division of Tax Appeals contain a letter from Mr. Devereaux, dated July 22, 1997, in which he requests petition forms and a copy of the rules of practice and procedure. Attached to his letter is an envelope bearing a USPS date stamp of July 22, 1997. This letter was received by the Division of Tax Appeals on July 24, 1997, and, as Mr. Devereaux indicates, the forms he requested were mailed to him on the same day.

***THE ORDER OF THE ADMINISTRATIVE LAW JUDGE***

At the outset, the Administrative Law Judge pointed out that a petition contesting a Notice of Disallowance of a refund claim may be filed within two years after the date of mailing of the notice (*see*, Tax Law § 689[c]). As an alternative, within the same time period a taxpayer may request a conciliation conference in BCMS (*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 after the Conciliation Order was issued (*see*, Tax Law § 170[3-a][e]). The filing of a petition within this time frame, the Administrative Law Judge noted, 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 Roland*, Tax Appeals Tribunal, February 22, 1996).

However, the Administrative Law Judge stated, where the timeliness of a petition is at issue, the Division has the burden of proving proper mailing of the Conciliation Order (*see*, *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, the Division must prove that it has a standard procedure for the issuance of orders; and, second, it must prove that that standard procedure was

followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The Administrative Law Judge then reviewed the Division's proof and concluded that the affidavits of two Division employees, Thomas J. English and James Baisley, provided adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. The Administrative Law Judge also concluded that the two affidavits and supporting documents establish that the general mailing procedures described in the English and Baisley affidavits were followed with respect to the Conciliation Order issued to petitioners. In short, the Administrative Law Judge concluded that the Division established that it mailed the Conciliation Order to petitioners by certified mail on July 18, 1997.

The Administrative Law Judge found that the petition was mailed to the Division of Tax Appeals on October 18, 1997 and was deemed filed on the same date (*see, 20 NYCRR 3000.22[a][1]*), which was 92 days after the mailing of the Conciliation Order. Therefore, the Administrative Law Judge concluded that 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 jurisdiction to hear the petition, and the petition was dismissed.

#### ***ARGUMENTS ON EXCEPTION***

Petitioners argue that the Conciliation Order was not issued on July 18, 1997 because they did not receive it until on or about July 24, 1997. In any event, petitioners urge, there is no specific proof that the Conciliation Order was sent by certified mail. "We received one (1) certified letter on Jul 21, 1997, NOT from New York State Tax Appeals Tribulal [sic]" (Notice of Exception, p. 1).

***OPINION***

We affirm the order of the Administrative Law Judge for the reasons stated therein.

Contrary to petitioners' arguments, there is sufficient proof in the record to establish that BCMS mailed a Conciliation Order (CMS No. 159329) to petitioners by certified mail on July 18, 1997. Petitioners admit in their exception to receiving certified mail on July 21, 1997, but contend, apparently, that it was not the Conciliation Order because they received no certified mail from the Tax Appeals Tribunal on that date. It is probably true that petitioners received no certified mail from this Tribunal on July 21, 1997, but, as noted above, we do not issue conciliation orders.

We find that the Administrative Law Judge fully and completely addressed all of the issues raised in this matter. Petitioners have offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Raymond A. and Joanne T. Devereaux is denied;
2. The order of the Administrative Law Judge is affirmed; and



3. The petition of Raymond A. and Joanne T. Devereaux is dismissed.

DATED: Troy, New York  
November 12, 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