

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STEVEN LEWIS KISSEL	:	DECISION DTA NO. 818763
for Redetermination of a Deficiency or for Refund of	:	
New York State, New York City and Yonkers Personal	:	
Income Taxes under Articles 22, 30 and 30-A of the Tax	:	
Law for the Year 1990.	:	

Petitioner Steven Lewis Kissel, c/o Turnkey Property Management, 316 Main Mall, Poughkeepsie, New York 12601-3123, filed an exception to the order of the Administrative Law Judge issued on December 5, 2001. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kathleen D. O'Connell, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. 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.

FINDINGS OF FACT

We find the following facts.

A conciliation order dismissing request (hereinafter “CODR”) (CMS No. 186602) dated June 1, 2001 was issued to petitioner denying his request for a conciliation conference as his request was filed in excess of 90 days from the date of the statutory notice.

On October 11, 2001, the Division of Tax Appeals received the petition in this matter. The envelope containing the petition bore a United States Postal Service (“USPS”) postmark of October 6, 2001.

On October 30, 2001, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The notice stated:

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

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

The Conciliation Order Dismissing Request was issued on June 1, 2001 but the petition was not filed until October 6, 2001 or one hundred and twenty-seven days later.

Pursuant to § 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 on the proposed dismissal.

In response to the Notice of Intent to Dismiss, the Division of Taxation (“Division”) submitted affidavits from two Division employees, Carl DeCesare and James Baisley, explaining the Division’s mailing procedures with respect to CODRs; copies of the certified mail records

for CODRs mailed on June 1, 2001; a copy of the CODR which denied petitioner's request for a conciliation conference; and a copy of a request for conciliation conference.¹

The affidavit of Carl DeCesare, Assistant Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services ("BCMS"), sets forth the Division's general procedure for preparing and mailing out conciliation default orders. All conciliation default orders mailed within the United States are sent by certified mail. The Data Management Services Unit prepares the CODRs and the certified mail record ("CMR") which is a listing of taxpayers to whom CODRs are sent by certified mail on a particular day. These CODRs are forwarded to the conciliation conferee for signature and that conferee, in turn, forwards the signed CODRs to a BCMS clerk assigned to process CODRs. The Data Management Services Unit forwards the CMR to this same clerk. That BCMS clerk verifies the names and addresses of taxpayers and representatives who are listed on the CMR. For each listed taxpayer and representative, the clerk manually attaches the sticker from the USPS PS Form 3800 (May 2000) to the envelope containing the CODR and cuts the 20 digit bar code certified mail number from the certified mail receipt and attaches it to the center of the CMR. Certified mail number 7000 1530 0005 5513 6928 was used for the CODR mailed to petitioner. The CODRs and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center.

According to Mr. DeCesare, each page of a CMR is a separate and individual certified mail record for the CODRs listed on that page only and each page contains spaces to record the

¹The request for conciliation conference submitted by the Division was received by BCMS on September 14, 2001, which date is more than three months subsequent to the date of the BCMS CODR at issue herein. Based on documents submitted by petitioner, it is apparent that this conference request was a second attempt by petitioner to obtain a conference regarding the same tax liability that was the subject of the June 1, 2001 order. This second request for conciliation conference has no bearing on the timeliness of petitioner's initial request for a conference.

“Total Number of Pieces Listed by Sender” and the “Total Number of Pieces Received at Post Office” for CODRs listed on that page only. There is also a space on each individual CMR for the receiving postal employee to initial.

Mr. DeCesare indicates that the copy of the CMR attached to his affidavit is a true and accurate copy of the original. All of the names and addresses listed on the CMR have been redacted except the entry for petitioner. Petitioner’s name and address appears on the CMR with the certified mail number 7000 1530 0005 5513 6928 appearing next to his name. There are seven entries and seven certified mail numbers on the CMR; there were no deletions.

The CMR is date stamped June 1, 2001 by the Colonie Center branch of the USPS and contains a postal employee’s initials verifying receipt. At the bottom of the CMR, there is a number entered in the space for “Total Number of Pieces Listed by Sender” which corresponds to the number entered in the space for “Total Number of Pieces Received at Post Office” on that same page. At the bottom of the CMR, the number “7” has been entered as the “Total Number of Pieces Listed by Sender” and the number “7” has also been entered as the “Total Number of Pieces Received at Post Office.”

Mr. DeCesare states that the Division’s Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record. Mr. DeCesare also indicates that these procedures were the normal and regular procedures of BCMS on June 1, 2001.

The affidavit of James Baisley, Chief Mail Processing Clerk in the Division’s Mail Processing Center, sets forth the procedures followed by the Mail Processing Center in delivering outgoing certified mail to branches of the USPS. Mr. Baisley states that after

envelopes containing CODRs are 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. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR.

A member of the staff delivers the sealed, stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. The postal employee affixes a postmark or his or her signature to the CMR to indicate receipt by the USPS. In this case, the postal employee affixed a postmark to the CMR, wrote in the total number of pieces received (“7”) and initialed the CMR to indicate that “7” pieces was the total number of pieces received at the post office.

Mr. Baisley’s knowledge that the postal employee wrote in the “Total Number of Pieces Received at Post Office” to indicate that “7” pieces were received is based upon the fact that the Division’s Mail Processing Center specifically requests that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the CMR.

Mr. Baisley states that, in the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and is delivered to the originating office by a member of his staff. He further indicates that the regular procedures of the Mail Processing Center, concerning the mailing of certified mail, were followed in the mailing to petitioner on June 1, 2001.

Although petitioner responded to the Notice of Intent to Dismiss Petition, he did not provide any explanation for his failure to file his petition within 90 days of June 1, 2001.

THE DETERMINATION 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 October 6, 2001 or 127 days after the CODR was issued on June 1, 2001.

ARGUMENTS ON EXCEPTION

Petitioner has presented arguments concerning his health problems and his inability to pay his tax liability. The Division argues that petitioner has shown no reason why the petition should not be dismissed as untimely filed.

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.

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 Wilson***, Tax Appeals Tribunal, July 13, 1989). 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]). When the timeliness of the petition is at issue, the Division must establish proper mailing of the CODR (*see, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has met its burden to establish proper mailing of the CODR to petitioner on June 1, 2001 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure

was followed in this case (*see, generally, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner's petition was not filed until October 6, 2001 or 127 days after the CODR was issued. Therefore, we agree with the conclusion of the Administrative Law Judge that since petitioner failed to file his petition protesting the CODR within 90 days of its issuance, such petition was untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Steven Lewis Kissel is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Steven Lewis Kissel is dismissed.

DATED: Troy, New York
August 29, 2002

/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