

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>STANDARD NOTIONS, INC.</b>	:	DECISION
	:	DTA NO. 820612
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1999 through February 28, 2002.	:	

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Petitioner Standard Notions, Inc., 161 Ludlow Street, New York, New York 10002, filed an exception to the order of the Administrative Law Judge issued on September 15, 2005.

Petitioner appeared by Tanya Spokojny, Enrolled Agent. The Division of Taxation appeared by Christopher C. O'Brien, Esq., (John E. Matthews, Esq., of counsel).

Neither party filed a brief on exception and oral argument was not requested.

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

### ***ISSUE***

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

### ***FINDINGS OF FACT***

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

Petitioner filed a petition dated June 22, 2005 which was received by the Division of Tax Appeals on June 27, 2005 upon delivery by DHL Express. Its petition contested a Conciliation Order Dismissing Request dated March 25, 2005 which denied petitioner's request.

The Petition Intake, Review and Exception Unit of the Division of Tax Appeals in reviewing the petition dated June 22, 2005 determined that the petition seemed, on its face, to be late filed, albeit only by four days. The petition was filed on Monday, June 27, 2005,<sup>1</sup> which appeared to be 94 days after the issuance of the Conciliation Order Dismissing Request dated March 25, 2005. In the Notice of Intent to Dismiss Petition dated July 7, 2005, petitioner was advised that "The last date on which you could have filed a timely petition was June 23, 2005."

The Division of Taxation ("Division") included in its response dated August 2, 2005, in support of the proposed dismissal, proof of mailing on March 25, 2005 of the Conciliation Order Dismissing Request dated March 25, 2005. The Division's proof of mailing consisted of (i) an affidavit dated August 2, 2005 of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center, and (ii) an affidavit dated August 1, 2005 of Robert Farrelly, the Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services ("BCMS").

The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for processing conciliation orders. Further, it explains that the certified mail record for conciliation orders issued on March 25, 2005 shows that a Conciliation Order dated March 25, 2005, with reference to assessment number L-023569811, was sent to petitioner c/o Paladar at

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<sup>1</sup>The DHL Express envelope in which the petition was delivered shows the date received by the Division of Tax Appeals of June 27, 2005, which was a Monday. This envelope indicates that the delivery service provided was "Next Day 12:00." Consequently, it is reasonable to presume that DHL Express picked up the envelope for delivery on the previous business day of Friday, June 24, 2005.

161 Ludlow Street, New York, New York 10002-1515 by certified mail using certified control number 7104 1002 9730 0606 7577 on March 25, 2005, as indicated by an affixed United States postmark.

The affidavit of Bruce Peltier, 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. Peltier’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 in the “Total pieces received at post office” and initialed or signed the certified mail record near the area “Total pieces received at post office” to indicate that “76” pieces, including the one addressed to petitioner, were the total number of pieces received at the post office on March 25, 2005.

Petitioner asserts that petitioner’s principal “got delayed in rush-hour traffic and by the time he arrived at the office and everything signed<sup>2</sup> and ready for mailing, it was too late for pick-up and DHL picked up the envelope the following morning.” Further, petitioner asserts that

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<sup>2</sup> However, a close examination of the petition shows that it was signed on petitioner’s behalf by its representative, Tanya Spokojny, who was appointed representative pursuant to a power of attorney executed on June 22, 2005 by petitioner’s treasurer, Haim Norelli.

“we thought that we were still within the 90-day period and did not realize that there were two months of 31 days within this period.”

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

The Administrative Law Judge ordered that the petition be dismissed 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 June 24, 2005 or 91 days after the conciliation order was issued on March 25, 2005.

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

Petitioner has admitted that the petition was not filed on time but requests that its untimeliness be excused.

### ***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 (*see, 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 conciliation order (*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 conciliation order to petitioner and to petitioner's representative on March 25, 2005 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 June 24, 2005 or 91 days after the conciliation order was issued. Despite the fact that the petition was filed only one day late, the law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see, Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Therefore, we affirm the conclusion of the Administrative Law Judge that since petitioner failed to file its petition protesting the conciliation order 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 Standard Notions, Inc. is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Standard Notions, Inc. is dismissed.

DATED: Troy, New York  
February 23, 2006

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/s/Charles H. Nesbitt

Charles H. Nesbitt  
President

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/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

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/s/Robert J. McDermott

Robert J. McDermott  
Commissioner