

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>LINDEN F. MEERTINS</b>	:	DECISION
	:	DTA NO. 822123
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
the Period April 9, 2006.	:	

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Petitioner, Linden F. Meertins, filed an exception to the order of the Administrative Law Judge issued on August 14, 2008. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation did not file a brief in opposition. 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 filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation default 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 February 11, 2008, which was received by the Division of Tax Appeals on February 14, 2008. The envelope in which it was mailed shows a date of

mailing of February 12, 2008. His petition contested a Conciliation Default Order dated June 22, 2007, which dismissed petitioner's request due to his failure to appear at the conciliation conference, where his default was duly noted.

In reviewing the petition dated February 11, 2008, the Petition Intake Unit of the Division of Tax Appeals determined that the petition seemed, on its face, to be filed late. The petition was filed on February 12, 2008, its date of mailing, which appeared to be 237 days after the issuance of the Conciliation Default Order dated June 22, 2007. In the Notice of Intent to Dismiss Petition dated February 29, 2008, petitioner was advised that, "The last date on which you could have filed a timely petition was September 20, 2007."

The Division of Taxation ("Division") included in its response, dated March 21, 2008, in support of the proposed dismissal, proof of mailing on June 22, 2007 of the Conciliation Default Order. The Division's proof of mailing consisted of (i) an affidavit dated March 20, 2008 of James Steven VanDerzee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit dated March 19, 2008 of Robert Farrelly, the Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services ("BCMS") and (iii) an amended affidavit of Mr. Farrelly dated May 1, 2008, which is the same as his earlier affidavit, except for a correction in its paragraph 14 where there were typographical errors in certain dates.

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 June 22, 2007 shows that a Conciliation Order dated June 22, 2007, with reference to assessment number L-027983357, was sent to petitioner at 124-02 97<sup>th</sup> Avenue,

Richmond Hill, NY 11419, by certified mail using certified control number 7104 1002 9730 0074 4610 on June 22, 2007, as indicated by an affixed United States postmark.

The affidavit of James Steven VanDerzee, 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. VanDerzee'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 there were 64 total pieces, including the one addressed to petitioner, received at the post office on June 22, 2007.

Petitioner asserts that, since June of 2006, he has lived in three different locations, and the Richmond Hill address he used on his request for a conciliation conference, as well as on his petition, was his sister's address, which he utilized as his mailing address. He candidly noted that he "drifted for awhile" before he picked up his mail at his sister's address.

In the amended affidavit of Robert Farrelly dated May 1, 2008, Mr. Farrelly observed that page 3 of the certified mail record has a notation next to petitioner's name made by the BCMS clerk that the Conciliation Default Order dated June 22, 2007 was remailed on July 27, 2007 because 124-02 97<sup>th</sup> Avenue, Richmond Hill, NY 11419 was an insufficient address. On the

re-mailing, the conciliation order was sent to petitioner at 124-02 97<sup>th</sup> Avenue, *South* Richmond Hill, NY 11419.

***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 the Tax Law § 170(3-a)(e). Since the petition was filed with the Division of Tax Appeals on February 14, 2008, the Administrative Law Judge observed that this date was well past the statutory 90-day period, within which a petition must be filed. As a result, the Administrative Law Judge concluded that the petition was not timely filed and the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition. The Administrative Law Judge noted that the re-mailing of the conciliation default order to a revised address is irrelevant in this proceeding, in that the Division was only required to mail it to petitioner's last known address.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argued, as he did below, that he did not appear at the conciliation conference because his mailing address (the same one he used for his conciliation conference request) was not the same as his residence and he only picked up his mail there.

The Division argued that the Administrative Law Judge correctly decided the relevant issues and, therefore, the order should be affirmed.

***OPINION***

Tax Law § 170(3-a)(e) provides, in pertinent part, that a conciliation default order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation default 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 on June 22, 2007 by submitting affidavits describing its general mailing record, which showed that the procedure was followed in this case, i.e., mailing the conciliation order to petitioner at his last known address (*see, generally, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner’s petition was not filed until February 12, 2008 or 237 days after the Conciliation Default Order was issued. Therefore, we agree with the conclusion of the Administrative Law Judge that since petitioner failed to file a petition protesting the Conciliation Default 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 Linden F. Meertins is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The petition of Linden F. Meertins is dismissed.

DATED: Troy, New York  
March 5, 2009

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

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