

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEFFREY L. BURKE	:	ORDER
for Revision of Determinations or for Refund of Sales	:	DTA NO. 819848
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2000 through February 28, 2001.	:	

Petitioner, Jeffrey L. Burke, 28 Bishops Court, Pittsford, New York 14534-2882, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2000 through February 28, 2001.

On March 3, 2004, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On March 26, 2004, petitioner, appearing by Wolford & Leclair LLP (Michael R. Wolford, Esq., of counsel), sent a letter and documents to the Division of Tax Appeals in opposition to the Notice of Intent to Dismiss Petition. On March 31, 2004, the Division of Tax Appeals received a letter and documents from Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) on behalf of the Division of Taxation in support of the Notice of Intent to Dismiss Petition. After due consideration of the pleadings, the letters and documents received from the parties, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, Jeffrey L. Burke, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking review of six notices of determination for the period March 1, 2000 through February 28, 2001 pursuant to Articles 28 and 29 of the Tax Law. Both the request for a conciliation conference and the accompanying letter set forth petitioner’s address as 28 Bishops Court, Pittsford, New York 14534-2882.

2. Following a conference, BCMS issued a Conciliation Order, dated November 7, 2003, denying petitioner’s request and sustaining the statutory notices (Assessment ID numbers: L-021919826, L-021919827, L-021919828, L-021919829, L-021919830, L-021919831).

3. On February 9, 2004, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by United States Postal Service (“USPS”) First Class Certified Mail. The USPS postage-paid stamp is dated February 6, 2004.

4. On March 3, 2004, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner with a copy to the Division of Taxation (the “Division”). The Notice of Intent to Dismiss Petition indicates that the Conciliation Order in this matter was issued on November 7, 2003, but that the petition was not filed until February 6, 2004, or 91 days later. In the letter transmitting the Notice of Intent to Dismiss Petition, petitioner was advised that “[t]he last date on which you could have filed a timely petition was February 5, 2004.”

5. In response to the Notice of Intent to Dismiss Petition, the Division submitted affidavits from two Division employees, Carl DeCesare and Bruce Peltier. The affidavit of Carl DeCesare, Assistant Director of BCMS, sets forth the Division’s general procedures for preparing and mailing out conciliation orders. The affidavit of Bruce Peltier, Mail and Supply Supervisor in

the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center for delivering outgoing certified mail to branches of the U.S. Postal Service. Findings of Fact "6" through "13" are taken from their affidavits.

6. All conciliation orders mailed within the United States are sent by certified mail. The Division's BCMS Data Management Services Unit prepares each conciliation order and an accompanying cover letter. The computer-generated conciliation order and cover letter are predated with the anticipated date of mailing. The name, mailing address, anticipated date of mailing and a control number assigned by BCMS (the "CMS No.") for each Conciliation Order to be issued are electronically sent to the Division's Advanced Function Printing Unit ("AFP"). From electronically pulled data, the AFP Unit assigns a certified control number to each order and produces a cover sheet that contains the following information: the BCMS return address, the anticipated date of mailing, the taxpayer's name and mailing address, the CMS No., a certified mail control number and a certified number bar code. The AFP Unit produces a computer-generated document entitled "Certified Record for Presort Mail - BCMS Cert Letter" ("CMR"). The CMR is a listing of taxpayers to whom conciliation orders are to be sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The CMS No. is recorded on the CMR under the heading "Reference No." and is preceded by three zeroes. On the last page of the CMR there are spaces to record the "TOTAL PIECES AND AMOUNTS" and the "TOTAL PIECES RECEIVED AT POST OFFICE."

7. The Data Management Unit forwards the conciliation orders and cover letters to the appropriate BCMS conciliation conferee who reviews and signs them. The conferee then

forwards the signed Conciliation Order and the cover letter to a clerk assigned to process conciliation orders.

8. The BCMS clerk associates each cover sheet provided by the AFP Unit with the appropriate conciliation order and cover letter. The clerk verifies that the information on the cover sheet, the respective conciliation order and the cover letter are the same. All three documents are then folded and placed in a three-windowed envelope which allows the Division's return address, the certified mail control number, the bar code and the name and address of the taxpayer to show. The clerk also writes, in the upper right-hand corner of each page of the CMR, the date the conciliation orders were mailed which in this case is November 7, 2003.

9. The CMR, along with the envelopes, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. After a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a staff member 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 on the CMR. Once the envelopes are stamped, a member of the mail processing center staff delivers them to a branch of the USPS in Albany. The postal employee affixes a postmark and his initials or signature to the certified mail record, indicating receipt by the Postal Service. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and is delivered to the originating office, in this case BCMS, by a Mail Processing Center staff member. The Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed showing the date of mailing. The CMR is kept in BCMS as a permanent record.

10. Portions of the CMR have been redacted to protect the confidentiality of the taxpayers listed on the CMR. It contains a list of the conciliation orders allegedly issued by the Division on November 7, 2003. There are 39 certified mail control numbers on this document. They do not run consecutively. Petitioner's name and address, Jeffrey L. Burke, 28 Bishops Court, Pittsford, NY 14534-2882, appear on page 3 with the certified control number 7104 1002 9730 0294 0591 and the reference number 000196393 appearing next to his name.

11. Each of the four pages of the CMR is date stamped November 7, 2003 by the Stuyvesant Plaza branch of the USPS in Albany, New York. On page four, the number "39" has been entered as the "TOTAL PIECES AND AMOUNTS."

12. The following stamp appears at the bottom right-hand corner of the last page of the CMR:

POST OFFICE
Hand write total # of pieces and initial.
Do Not stamp over written areas.

13. The stamp is placed on the CMR by the BCMS clerk. The number "39," the word "received" and the illegible signature of the Postal Service employee appear above the USPS postmark which is to the left of the lower right-hand corner stamp on page four of the CMR. The fact that a Postal Service employee wrote the number of pieces listed on the CMR to indicate the number of pieces received was established through the affidavit of Mr. Peltier based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

14. Attached to Mr. DeCesare's affidavit is a copy of the Conciliation Order, CMS No. 196393, dated November 7, 2003, which denied petitioner's request and sustained the statutory notices.

SUMMARY OF PETITIONER'S POSITION

15. In response to the Notice of Intent to Dismiss Petition, petitioner submitted the affidavit of Michael R. Wolford, the attorney representing him in this matter. In his affidavit, Mr. Wolford states that he was retained by petitioner in January 2004 to file an appeal with the Division of Tax Appeals. After reviewing the file, including the Conciliation Order, dated November 7, 2003, Mr. Wolford concluded that petitioner had 90 days in which to file an appeal. Therefore, on February 5, 2004 at approximately 3:00 P.M., he telephoned the Division of Tax Appeals to ascertain what forms were necessary and was referred to Ms. Janet Danahy. During the course of that conversation, Mr. Wolford claims that he discussed with her the fact that it appeared that he was running short on time to file the petition because the Conciliation Order had been issued on November 7, 2003. He asserts that Ms. Danahy advised him that he could obtain the forms from the Division of Tax Appeals website. He further asserts that she also advised him that the petition would still be timely if it was mailed the next day, February 6, 2004. Mr. Wolford avers that he immediately contacted petitioner and arranged for him to come to the office the next day to review and sign the petition and to file it. He also claims that he obtained the form off of the Internet and prepared it that evening. According to Mr. Wolford, on February 6, 2004, petitioner came into the office, where he reviewed and signed the petition, which was mailed by certified mail on the same date. Mr. Wolford contends that had Ms. Danahy advised him that the last day to file the petition was February 5, 2004, he would have arranged to have petitioner "come to the office that evening and [they] would have mailed it

before midnight.” Therefore, petitioner claims that the Division of Tax Appeals should be estopped from dismissing his petition as untimely.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1138(a)(1), petitioner had 90 days from the mailing of the notices of determination to file a petition with the Division of Tax Appeals. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*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 from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]). 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 DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame 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 DeWeese, supra*).

B. Where the taxpayer files a petition, but the timeliness of the 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, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the 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 affidavits of two Division employees, Carl DeCesare and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and Peltier affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name, address and the CMS No. appear on page three of the certified mail record which bears a USPS date stamp of November 7, 2003. There are 39 certified control numbers listed on the CMR, and the USPS employee indicated that he received 39 items for mailing. The Division has, therefore, established that it mailed the Conciliation Order to petitioner by certified mail on November 7, 2003 (*Matter of DeWeese, supra*).

C. Petitioner's petition was mailed by certified mail to the Division of Tax Appeals on February 6, 2004 and is, therefore, deemed filed on the same date (*see*, 20 NYCRR 3000.22[c][2]), a date which is 91 days after the mailing of the conciliation order. Petitioner claims that the Division of Tax Appeals should be estopped from dismissing the petition as late filed. The premise of petitioner's estoppel claim is that he signed and filed his petition on February 6, 2004 in reliance on the oral advice (that the mailing of the petition on February 6, 2004 would be timely) that he alleges his attorney received on February 5, 2004 from Ms. Danahy, the individual responsible for petition intake in the Division of Tax Appeals. He argues that had his attorney been informed that the last day for timely filing the petition was February 5, 2004, the petition would have been downloaded from the Internet, and then it would have been prepared, reviewed, signed and mailed prior to midnight on February 5, 2004.

Equitable estoppel, usually referred to simply as estoppel, is not, as a general proposition, available as a defense to governmental acts absent a showing of exceptional facts which require its application to avoid manifest injustice (*see, Matter of Sheppard-Pollack, Inc. v. Tully*, 64 AD2d 296, 409 NYS2d 847). This rule applies particularly to a taxing authority because sound public policy favors full enforcement of the Tax Law (*Matter of Turner Constr. Co. v. State Tax Commn.*, 57 AD2d 201, 394 NYS2d 78).

The Tax Appeals Tribunal has adopted a three-part test to determine the applicability of equitable estoppel to specific cases. Briefly, the test asks whether petitioner had the right to rely on the Division's representation; if, in fact, there was such reliance and whether the reliance was to the detriment of petitioner (*Matter of AGL Welding Supply Co.*, Tax Appeals Tribunal, May 11, 1995, *confirmed Matter of AGL Welding Supply Co. v. Commissioner of Taxation & Fin.*, 238 AD2d 734, 656 NYS2d 502, *lv denied* 90 NY2d 808, 664 NYS2d 270; *Matter of Harry's Exxon Serv. Sta.*, Tax Appeals Tribunal, December 6, 1988).

Based on the facts of this case, application of the doctrine of estoppel is not warranted. Although petitioner retained his attorney in January 2004, Mr. Wolford waited until February 5, 2004 to contact the Division of Tax Appeals to ascertain what type of form needed to be filed. Mr. Wolford claims that, during the course of his conversation with Ms. Danahy, he drew her attention to the fact that the Conciliation Order was dated November 7, 2003 and, therefore, time was running short for filing a petition with the Division of Tax Appeals. He further claims that, after directing him to the Division of Tax Appeals website, she orally stated that the petition would be timely if it was mailed on February 6, 2004. If Ms. Danahy informed petitioner's representative that the petition would be timely if it was mailed on February 6, 2004, this was contrary to the Tax Appeals Tribunal's Rules and Regulations. Specifically, the Rules of

Practice and Procedure of the Tax Appeals Tribunal provide that “[t]he petition must be filed within the time limitations prescribed by the applicable statutory sections and there can be no extension of those time limitations” (20 NYCRR 3000.3[c]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]). Since Mr. Wolford did not obtain a written confirmation of what he claims he was told by Ms. Danahy, there is no independent evidence to support his assertion that she in fact made the oral statement regarding the February 6, 2004 mailing date. Without adequate proof that the Division of Tax Appeals explicitly advised petitioner’s representative that the petition would still be timely if it was mailed on February 6, 2004, I cannot find that there was any conduct by the Division of Tax Appeals on which petitioner relied. In addition, despite the fact that he had the Conciliation Order, dated November 7, 2003, and he knew that there was a 90-day period for filing a petition with the Division of Tax Appeals, there is no evidence that Mr. Wolford asked Ms. Danahy for any statutory or regulatory authority in support of her alleged statement that the petition would be timely if it was mailed on February 6, 2004. As an attorney, it was incumbent upon Mr. Wolford to consult the statutes and regulations to ascertain the filing deadlines, not merely rely on alleged oral statements. It is also noted that the 90-day period for filing the petition is absolute and there is no provision in the Tax Law for the waiver or extension of such period (*see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, 661-662, *lv denied and dismissed* 72 NY2d 938, 532 NYS2d 845; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

For all of the above-stated reasons, it is held that the Division of Tax Appeals is not estopped from dismissing the petition as late filed.

D. 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 authority to hear petitioner's challenge to the Conciliation Order.

E. Finally, it is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 1139[c]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 1138[a][1]; § 170[3-a][a]; *cf. Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

F. The petition of Jeffrey L. Burke is dismissed with prejudice.

DATED: Troy, New York
June 17, 2004

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE