

RECEIVED
IRRC

3091.

2016 MAR -9 AM 11: 57

Commonwealth of Pennsylvania



BOARD OF FINANCE AND REVENUE
1101 South Front Street, Suite 400
Harrisburg, Pennsylvania 17104
FAX (717) 783-4499
PHONE (717) 787-2974

March 9, 2016

Delivered Via Electronic Mail

John F. Mizner, Esq.
Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

RE: Board of Finance and Revenue Response to the Department of Revenue's Comment on Final Regulation #64-5, IRRC # 3091

Dear Chairman Mizner:

Please allow this letter to serve as the Board of Finance and Revenue's (Board) response to the comments by Jeffery S. Snavelly, Chief Counsel, Department of Revenue ("Department") received on March 7, 2016, regarding the above-referenced Final Regulations submitted

Initially, I would like to note that in an effort to continue the collaborative nature of our relationship with the Department and the greater tax community in developing the Final Form Regulations, yesterday, Mr. Snavelly and I discussed his comments and he expressed his intention to provide a statement at the IRRC Public Hearing regarding these regulations which would, in essence, constitute a withdrawal of his first five comments (Comment #2, Comment #3, Comment #5, Comment #6 and Comment #9). Mr. Snavelly communicated to me that he also reached out to Mr. Schalles at the Commission regarding his intention. We have been working with the Department to develop mutually agreeable regulations since July 2014 and will continue to do so in the best interest of the taxpayers and the Commonwealth. Accordingly, relying on Mr. Snavelly's good faith and stated intentions, no further response will be submitted regarding those comments at this time.

John F. Mizner, Esq.
March 9, 2016
Page Two

Additional Comments concerning *Quest Diagnostics* and Section 702.11 Date of Filing

The Department's assertion that Section 702.11. of our Final Form Regulations needs to be reviewed in light of the recent Commonwealth Court decision in *Quest Diagnostics v Commonwealth*, 119 A.3d 406 (2015), is untimely and without merit. The decision in *Quest* was issued by the Commonwealth Court on June 9, 2015. The Department submitted its initial comments on the Board's proposed regulations six days later, on June 15, 2015, and never mentioned the *Quest* decision. As a matter of fact, the Department actually reviewed and commented on Section 702.11 by striking out the parenthetical in (a)(2) and striking out the superseded subsection (b), as shown below.

§ 702.11. Date of filing.

(a) Whenever a party's submission is required or permitted to be filed, it will be deemed to be filed on the earliest of the following dates:

- (1) On the date actually received by the Board.**
- (2) On the date deposited with an IRS-designated private delivery service (as set forth in an IRS notice) as shown on the delivery receipt attached to or included within the envelope containing the document.**
- (3) On the date deposited in the United States mail as shown by the United States Postal Service stamp on the envelope or noted on a United States Postal Service Form 3817, Certificate of Mailing. A mailing envelope stamped by an in-house postage meter is insufficient proof of the date of mailing.**
- (4) When a document is submitted by means of electronic delivery on a day other than a business day, the document will be deemed to be filed on the next business day.**

~~(b) Subsection (a) superseded 1 Pa. Code § 31.11 (relating to timely filing required).~~

The Department did not raise this additional concern regarding Section 702.11(a)(2) until three days prior to the public hearing on the Final Regulations. Exceptions in *Quest* were overruled in December 2015, ordering the June 15, 2015 Order final, which still would have provided the Department ample time to voice its concern. Moreover, *Quest Diagnostics*, 1 MAP 2016, is currently on appeal to the Supreme Court of Pennsylvania.

John F. Mizner, Esq.
March 9, 2016
Page Three

Timing of the Department's new comment aside, Section 702.11(a)(2) is not in conflict with current statutory law. 72 P.S. § 1103.1. Timely mailing treated as timely filing reads as follows:

Notwithstanding the provisions of any state tax law to the contrary, whenever a petition pertaining to a state tax is required by law to be received by the Board of Finance and Revenue on or before a day certain, the taxpayer shall be deemed to have complied with such law if the letter transmitting the petition which has been received by the board is postmarked by the United States Postal Service on the final day on which the petition is to be received.

For purposes of this article, presentation of a receipt indicating that the petition was mailed by registered or certified mail on or before the due date shall be evidence of timely filing.

The statute is silent as to methods of mailing other than the United States Postal Service (USPS) and understandably so as it was enacted in 1929 and last amended in 1979. A strict interpretation of the Board's timely mailing statute as argued by the Department, would be construed to mean that the only time a taxpayer complies with the timely mailing law is when its transmittal letter is postmarked by the USPS. That is certainly not what the Legislature intended. In order to effectuate the meaning of the statute, the Board has interpreted it to mean that at a minimum, we must consider an appeal timely if it contains a timely USPS postmark. But in addition, there is nothing in the Board's statute that prohibits or conflicts with the Board's interpretation in Section 702.11(a)(2) where the Board also accepts timely mailing by private delivery methods that are proven to be timely mailed. The Board mirrored the requirements of timely USPS mailing for timely private delivery mailing, which are more reliable methods employed by most businesses today and accepted by the Internal Revenue Service. The regulation is consistent with the statute to achieve the purpose of the law. The need for this interpretation became abundantly clear when the Commonwealth instituted the Commonwealth Mail Center where all mail is scanned for security purposed prior to delivery to the agency, thereby causing a delay in receipt by the Board through no fault of the taxpayer. Further, it is unjust and contrary to the purpose of the appeals system to dismiss as late a petition that was mailed via a private delivery method when the taxpayer could prove timely mailing through delivery tracking or a receipt for overnight mail.

John F. Mizner, Esq.
March 9, 2016
Page Four

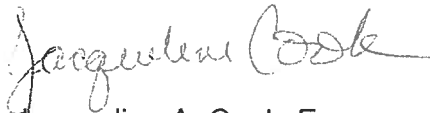
Further, the Department is wrong when it concludes, "Its adoption would result in virtually identical statutory provisions governing each administrative appeal level being interpreted in opposite ways. This varied application of virtually identical statutory provisions will create confusion and uncertainty with regard to filing of petitions and it is not in the public interest." First, the provisions are not identical. The timely mailing provision for the Department (72 P.S. § 10003.6) which was enacted in 1971 and most recently amended in 2006 reads, in part:

A taxpayer shall be deemed to have timely filed a petition...if the letter transmitting the petition is received by the Department of Revenue or is postmarked by the United States Postal Service....(emphasis added)

The Department's statute, unlike the Board's statute, contains the disjunctive term "or" which could be interpreted to mean that there are only two ways for timely submission to the Department: (1) it must be received by the Department timely, or (2) it must timely postmarked by the USPS. The Board's statute does not contain the disjunctive term. Second, it is preposterous to argue that accepting a taxpayer's appeal sent via private delivery as timely when the taxpayer produces concrete proof of timely mailing is not in the public interest. Additionally, if the Department is concerned with inconsistent interpretations among the Board, it should adopt the more reasonable method incorporated into these Final Regulations.

Accordingly, the Department's comments are without merit and the Final Regulations should be approved as submitted.

Respectfully,



Jacqueline A. Cook, Esq.
Chairman
Board of Finance and Revenue

cc: Jeffery S. Snively (via email)