

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:
of	:
SIPAM CORPORATION	:
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 December 1, 1980	:
through May 31, 1984.	:

DECISION
DTA NO. 802481

The Division of Taxation filed an exception to the determination of the Administrative Law Judge, issued on September 17, 1987, which held that petitioner's petition for a hearing before the Tax Commission was timely filed (File No. 802481). The Division of Taxation, appeared by William Collins, Esq. (Paul Lefebvre, Esq. of Counsel). Petitioner, Sipam Corporation appeared by Steven M. Sano, Public Accountant.

The Division filed a brief, the taxpayer did not. Neither party requested oral argument.

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

ISSUE

The issue is whether petitioner is limited to the provisions of Tax Law section 1147(a)(2) and the regulations adopted pursuant thereto (i.e., 20 NYCRR 535.1) in proving timely mailing of the petition.

Resolution of the issue is critical, since timely filing of the petition is a jurisdictional necessity in order for the Division of Tax Appeals to hold a hearing on the validity of the Division's assessment of taxes (Tax Law § 1138[a][1]).

FINDINGS OF FACT

The relevant facts are that on March 13, 1985, the Division mailed¹ to Sipam Corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$70,312.58, plus interest and penalty, for a total amount of \$99,754.89 for the period December 1, 1980 through May 31, 1984. Pursuant to Tax Law section 1138(a)(1), the Notice of Determination and Demand irrevocably fixes the tax, unless the taxpayer within ninety days from the mailing of the Notice applies for a hearing to challenge the Notice. Here that date is June 13, 1985. Petitioner mailed the petition and a covering letter on May 16, 1985 using an envelope provided by the Division with the Notice. Petitioner used ordinary mail, not registered or certified mail.

Approximately two months later the Division filed a warrant against Sipam. There then took place several conversations between the accountant and personnel in the Tax Compliance Bureau of the Division concerning the reason for the filing of the warrant. The accountant was informed that the Tax Appeals Bureau had not received the petition. The accountant then submitted a copy of the petition and letter of May 16, 1985 to the Tax Appeals Bureau. This material was received by the Tax Appeals Bureau on August 21, 1985. Petitioner's original petition was never received by the Tax Appeals Bureau.

¹ The Division introduced into evidence a certificate of mailing, indicating that the Notice was mailed by certified mail on March 13, 1985.

At hearing, the Division's sole position was that the petition was not timely filed since it was not received within the 90 day period.

OPINION

The Administrative Law Judge, based on the accountant's testimony, determined that the petition was timely filed.

The Division argues on exception that since there is no evidence of actual receipt of the petition by the Tax Commission, and since the petitioner used ordinary mail, not registered or certified mail, the testimony of the accountant, no matter how credible, is insufficient as a matter of law to prove timely mailing and thus timely filing of the petition.

The general rule is one of physical delivery, i.e., the petition must be filed with the Tax Commission within the ninety day period required by section 1138(a)(1). Certainly this can be accomplished by any means, including mailing of the document to the Commission. However, when mail is used Tax Law section 1147(a)(2) concerning the mailing of sales tax documents is specific as to the method of proof of timely mailing.

Tax Law section 1147(a)(2) is patterned after Internal Revenue Code section 7502 (see, In the Matter of Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988).

The framework of both sections is similar. Both provide that when a taxpayer utilizes the United States Postal Service to effect delivery of a petition for hearing and delivery takes place after the prescribed period, the date of the United States postmark stamped on the envelope is deemed the date of delivery. Of course, the postmark must be made within the prescribed period and the document must be deposited in the mail, postage paid and properly addressed.

Use of registered mail is prima facie evidence that the document was delivered. Where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service or that the document may not be delivered at all.

Both sections authorized the adoption of regulations allowing use of certified mail in place of registered mail and discretion as to the treatment of postmarks not made by the United States Postal Service. Regulations have been promulgated under each section (20 NYCRR 535.1; Treas. Reg. 9301.7502-1) and these regulations are similar.

The interpretation of section 7502 has been clearly enunciated by the federal courts. In Deutsch v. Commissioner of Internal Revenue (599 F2d 44, [2nd Cir 1979]), the Internal Revenue Service issued a notice of deficiency to the taxpayer on June 29, 1977. On October 12, 1977, 105 days after the issuance of the notice, the Tax Court received and filed as a petition a copy of a letter dated August 4, 1977 and postmarked "Oct. (illegible) 1977". This letter was signed by the taxpayer's accountant, and although addressed to the Internal Revenue Service office in Los Angeles, the letter stated that a copy was being sent to the United States Tax Court.

The copy addressed to the Tax Court was never found or presented. The Internal Revenue Service moved to dismiss the petition for lack of jurisdiction. In response, the taxpayer offered the affidavit of his accountant who claimed he had mailed the copy of the letter to the Tax Court on August 4, 1977, within the ninety day period prescribed by Internal Revenue Code section 6213.

After a hearing at which the taxpayer's accountant testified regarding the issue of mailing, the Tax Court dismissed the petition on the ground that it was not timely filed.

On appeal, the taxpayer argued that section 7502 of the Internal Revenue Code creates a presumption in favor of the taxpayer and that, if such section does not apply, the taxpayer can prove timely mailing by other evidence without benefit of the presumption.

The Circuit Court disagreed. Section 7502 of the Internal Revenue Code, said the court, "...provides guidance for determining when a petition is mailed. In certain cases, the date of the postmark or the date of registration will be deemed the date of delivery to the Tax Court. However, in the present case, there is no postmark or registration receipt that indicates timely mailing. Further, the legislative history indicates that section 7502 is only applicable if the petition is actually delivered. Delivery for these purposes is synonymous with receipt of the item." (Deutsch, supra, at 46.)

The court went on to state that "The exception embodied in section 7502 and the cases construing it demonstrate a penchant for an easily applied, objective standard. (See, Fishman v. Commissioner, 420 F2d 491 [2d Cir 1970].) Where, as here, the exception of section 7502 is not literally applicable, courts have consistently rejected testimony or other evidence as proof of the actual date of mailing." (Deutsch, supra, at 46.)

In Miller v. United States (784 F2 728 (6th Cir 1986]), similar facts were before the court. The taxpayer alleged that he executed a proper form for a refund. His attorney stated by affidavit that he mailed the claims to the Internal Revenue Service Cincinnati office in an envelope properly addressed, postage prepaid, by regular mail. The taxpayer claimed that he did not learn that the claims for refund had not been received by the Internal Revenue Service until over a year later when he filed suit. The Internal Revenue Service, in its answer, stated that plaintiff had failed to file claims for refund and offered Certificates of Lack of Record

signed by the custodian of federal tax forms and related documents for the Cincinnati Service Center of the Internal Revenue Service. The District Court held that taxpayer's claim for refund was not timely filed.

The Court of Appeals affirmed stating that "Because plaintiff's claim was never received by the IRS and because it was not sent by registered mail, the exceptions in section 7502 do not apply to the filing of his refund claim." (Miller, supra, at 730 [emphasis in original].)

The court, relying on Deutsch rejected taxpayer's contention that section 7502 was intended to be a "safe harbor" creating two exceptions to the physical delivery rule, i.e., "deemed delivery" and registered mail, and was not intended to bar him from proving proof of timely mailing by other evidence.

The Tax Commission has followed federal precedent in interpreting section 1147(a)(2) and the regulations adopted thereunder (see, In the Matter of Micro-Carburetor Corporation, State Tax Commission, June 30, 1986; In the Matter of Edward J. Lynch, State Tax Commission, June 21, 1985). This Tribunal affirms that interpretation and finds that proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing, where there is no actual delivery of the petition. Accordingly, we reverse the opinion of the Administrative Law Judge and find the petition not timely filed.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exceptions of the Division of Taxation to conclusions of law B and C of the Administrative Law Judge determination are granted;

2. The exceptions of the Division of Taxation to findings of fact 2 and 4 of the Administrative Law Judge determination are denied;
3. The determination of the Administrative Law Judge is reversed;
4. The petition of Sipam Corporation is denied and the Notice of Determination and Demand issued on March 13, 1985 is sustained.

DATED: Albany, New York
March 10, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner