

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

DONALD DAVIDSON
OFFICER OF TRI-ARTS PRESS, INC.

DECISION
DTA NO. 802807

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 March 1, 1984 through May 31, 1984.

Petitioner, Donald Davidson, officer of Tri-Arts Press, Inc., 22 Stonewall Lane, Mamaroneck, New York 10543, filed an exception to the determination of the Administrative Law Judge issued on April 14, 1988 with respect to his petition 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 March 1, 1984 through May 31, 1984 (File No. 802807). Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

Both petitioner and the Division filed briefs on exception. Oral argument was held, at the request of the petitioner, on October 11, 1988.

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

ISSUES

I. Whether the Division of Taxation properly issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner.

II. Whether petitioner timely filed an application for an administrative hearing relative to the aforesaid notice of determination.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. We also find an additional fact as noted below. Such facts

are as follows.

On June 20, 1985, the Division of Taxation issued to Donald Davidson (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended November 30, 1983 and May 31, 1984 in the amount of \$150,259.97 (\$67,415.61 for the period ended November 30, 1983 and \$82,844.36 for the period ended May 31, 1984), plus penalty and interest, for a total amount due of \$175,718.66. The notice of determination contained the following explanation:

"THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW. SEE ADDITIONAL INFORMATION ON BACK OF THIS NOTICE.

You are liable individually and as officer of (Tri Arts Press, Inc.) under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

The aforesaid notice of determination was mailed, by certified mail, on June 20, 1985 to petitioner at 22 Stone Wall Lane, Mamaroneck, New York 10543.

In response to this notice, petitioner's representative at the time, Edward C. Kramer, Esq., signed Form TA-11, Petition, dated the Petition August 17, 1985, attached a two-page letter on the stationery of Olanoff & Kramer, Attorneys at Law, signed by Mr. Kramer and dated August 19, 1985, and on September 18, 1985, applied a machine-metered stamp to the envelope using the postage meter in his office. He then deposited the envelope in the mail depository in the Graybar Building at 420 Lexington Avenue in New York City, the location of the law offices of Olanoff & Kramer. The Petition and attached letter were received by the Tax Appeals Bureau of the former State Tax Commission on September 24, 1985. The envelope containing the aforesaid documents bore a machine-metered stamp with a date of September 18, 1985 and also bore a United States Postal Service postmark of September 19, 1985.

On the sales tax return of Tri-Arts Press, Inc. for the sales tax quarter ended November 30, 1983, gross sales were erroneously listed in the taxable sales column of the return which resulted in an assessment being issued for said period in the amount of \$67,415.61. An amended return was

filed July 24, 1986 which correctly stated tax due. Full payment of tax due accompanied the amended return. As a result thereof, the Division conceded that no additional sales or use taxes were due for this period, thereby leaving only taxes due for the quarter ended May 31, 1984 remaining at issue. Subsequent to the issuance of the assessment on June 20, 1985 in the amount of \$82,844.36 for the period ended May 31, 1984, Tri-Arts Press, Inc. filed a sales tax return for this period indicating total tax due of \$20,033.01. Payment was not remitted with the return. The original assessment was estimated in accordance with Tax Law section 1138(a)(1). No audit of the corporation took place.

On or about July 24, 1986, the State Tax Commission filed a claim against Tri-Arts Press, Inc. in the amount of \$153,900.45 in the United States District Court, Southern District of New York relating to a bankruptcy proceeding commenced by the corporation in this Court. On December 16, 1986, the State Tax Commission filed an amended claim which indicated that, based on sales tax returns filed for the two sales tax quarters originally at issue, the amended claim was only for the period March 1, 1984 through May 28, 1984 and was amended to reflect tax due of \$20,033.01, plus interest. The \$20,033.01 was the identical amount contained in the corporation's sales tax return filed subsequent to the issuance of the original assessment.

We also find as an additional fact that:

Petitioner raised the issue of the method by which the Division of Taxation issued the Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the first time at the hearing on December 9, 1987.

OPINION

In the decision below the Administrative Law Judge determined that the Division of Taxation had properly issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner on June 20, 1985 by certified mail. The Administrative Law Judge also concluded that under the Tribunal decision in Matter of Harron's Electric Service, Inc. (Tax Appeals Tribunal, February 19, 1988) the filing date of this petition was to be determined under the regulations at 20 NYCRR 535.1. Applying these regulations, the Administrative Law Judge determined that the United States Postal Service postmark bearing the date September 19, 1985

determined the timeliness of the petition and not the machine metered stamp of September 18, 1985. Based on these findings it was concluded that petitioner had not timely filed a petition with regard to the notice issued. As a result, petitioner's application for a hearing was denied. The Administrative Law Judge did, however, modify the amount due to \$20,033.01, to reflect the amount determined to be due from the corporation.

On exception petitioner contests the finding that the Division issued the Notice of Determination and Demand for Payment of Sales and Use Taxes Due by certified mail. Instead, petitioner claims that the Division of Taxation failed to establish certified mailing and that such failure entitles him to a hearing if requested within 90 days of receipt of the notice. Additionally, petitioner contends that there was no authority for the Division to estimate the amount of tax due since a complete set of financial books and records had been maintained, but had not been requested.

In response, the Division argues that it established that notice was properly given by certified mail and that the petition was not timely filed so the Administrative Law Judge's decision should be sustained.

We affirm the determination of the Administrative Law Judge.

Tax Law section 1138(a)(1) requires that a petition challenging a notice of determination issued under Article 28 of the Tax Law be filed within 90 days after the giving of such notice of determination. Further, Tax Law section 1147(a)(1) provides in part that "The notice of determination shall be mailed promptly by registered or certified mail". We agree with the Administrative Law Judge that the record indicates that the notice was sent by certified mail. The Division provided documentary evidence in support of its position.

Among the documents offered as proof by the Division was a United States Post Office log indicating acceptance of registered, insured, C.O.D. and certified mail containing petitioner's name and address under the June 20, 1985 entry. Additionally, the Division presented a departmental certified mailing record indicating that petitioner had been issued a notice of determination by way of certified mail on June 20, 1985. Accompanying the departmental certified mailing record were

signed statements of employees describing the delivery, sealing, stamping, addressing and depositing of the notice of determination to petitioner by certified mail. These statements were witnessed by another employee who also signed the documents. We find such proof to be adequate as opposed to that offered by the Division in Matter of MacLean v. Procaccino (53 AD2d 965). In MacLean the Division's only proof of certified mailing of a notice of determination was a copy of the mailing log. Consequently, the Court in MacLean concluded that the mailing log alone, without additional proof such as affidavits or testimony, was not sufficient to prove certified mailing. In the present case, however, there are signed and witnessed statements supporting the mailing log. In addition, the United States Post Office acceptance log has been presented. Such additional evidence clearly distinguishes the present situation from that in MacLean.

Petitioner's reliance on Matter of Ruggerite v. State Tax Commn. (97 AD2d 634) must also be distinguished. In Ruggerite the reason that the taxpayer was afforded a hearing more than 90 days after the notice of assessment was mailed was the fact that the taxpayer never received the notice. Not only did the taxpayer in Ruggerite prove that he never received the notice, but he also proved that the Postal Service failed to comply with one of its own requirements of certified mail. Such facts are clearly distinguishable from those now before us. Thus, we find petitioner's reliance upon Ruggerite to be misplaced.

Additionally, petitioner's attempt to rebut the proof offered by the Division by way of offering new facts into the matter on exception must be rejected. Petitioner failed to introduce such facts into the record (20 NYCRR 3000.3[a]) and we cannot now consider them in our decision (20 NYCRR 3000.11[e][1]; Matter of Modern Refractories Service Corp., Tax Appeals Tribunal, December 15, 1988).

The general rule for filing a petition requires physical delivery, i.e., the petition must be filed with the Tax Commission within the 90 day period required by Tax Law section 1138(a)(1) (Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988). When the United States Postal Service is used to effect delivery and the envelope containing the document has a postmark made by the United States Postal Service in addition to the postmark not made by the Postal Service, here

the machine metered postmark, Tax Law section 1147(a)(2) and 20 NYCRR 535.1(b)(1)(iii) provide that the date of the postmark as made by the United States Post Office shall be deemed the date of delivery. In the case at hand delivery was made by way of the United States mail. The date of the United States Postal Service postmark on the envelope containing the petition was September 19, 1985. Since the 90-day period for application for an administrative hearing expired on September 18, 1985, the petition was untimely. As a result, we will not address the remaining issues as we are without jurisdiction to address them since the petition was not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Donald Davidson, is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Donald Davidson is denied and the Notice of Determination issued on June 20, 1985 is sustained except for the modifications made by finding of fact "5" and conclusions of law "D" and "F" of the determination of the Administrative Law Judge.

Dated: Albany, New York
March 23, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

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