

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
WSD UNITED TRANSPORTATION, INC. : DECISION
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 September 1, 1977 :
through May 31, 1980. :

Petitioner, WSD United Transportation, Inc., 1898 Buffalo Avenue, Niagara Falls, New York 14303, filed an exception to the determination of the Administrative Law Judge issued on January 12, 1989 with respect to its 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 September 1, 1977 through May 31, 1980 (File No. 804466). Petitioner appeared by Edward P. Perlman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

Petitioner filed a notice on exception. The Division filed a letter in opposition. Oral argument was not heard.

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

ISSUE

Whether the petitioner failed to timely file a petition for a hearing with the State Tax Commission pursuant to Tax Law section 1138(a)(1).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On May 27, 1981, following an audit, the Division of Taxation issued to petitioner, WSD United Transportation, Inc., a Notice of Determination and Demand for Payment of

Sales and Use Taxes Due for the period September 1, 1977 through May 31, 1980 which assessed \$11,803.19 in tax due plus minimum interest.

On November 4, 1980 petitioner, by its then president, William Santiago, executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1977 through May 31, 1980 to June 20, 1981.

On April 3, 1987, a petition dated March 27, 1987 was received by the Tax Appeals Bureau in respect of the May 27, 1981 notice of determination.

The filing of the petition in 1987 was triggered by the issuance of a warrant on December 22, 1986 in respect of the assessment herein.

At some point during 1981, petitioner's then-accountant, Robert W. Baker, contacted the office of State Assemblyman Matthew J. Murphy regarding petitioner's dispute with the Division arising from the audit. Following Mr. Baker's contact, a letter dated September 25, 1981, written for Mr. Murphy's signature, was generated and addressed to Ralph J. Vecchio, Counsel, Department of Taxation and Finance. An unsigned copy of said letter was introduced into evidence at the hearing. The letter provided, in part:

"I have been in contact with the accountant for the United Cab Company in regard to a problem which they are experiencing with your Department.

* * *

The Company is most anxious to have this matter resolved since they have heard nothing from the Department since December 1980 when they attended a pre-assessment hearing.

* * *

I would greatly appreciate your investigation into this matter so as to resolve the matter once and for all."

At hearing, petitioner introduced into the record an affidavit of Robert W. Baker dated March 16, 1987. As stated previously, Mr. Baker was petitioner's accountant at the time of the audit and the issuance of the notice. The affidavit stated, in part, the following:

"3. In January, 1981 your deponent, along with Attorney John Papsidero, represented WSD United Transportation, Inc. at a special assessment conference in Buffalo, New York.

4. Subsequent to said conference, a consent to fixing of tax (Form AU-3) was issued on March 3, 1981 for the tax period November 30, 1977-May 31, 1980 indicating an assessment in the amount of \$11,803.19 plus interest.

5. Within 90 days from the issuance of such determination your deponent caused to be filed a petition with the Tax Appeals Bureau, contesting the determination and assessment, by depositing the appeal with the U.S. Postal Service by 1st class mail.

6. Your deponent never received a response from the State Tax Commission to the aforesaid petition nor, to the best of your deponent's knowledge was any other representative of the Corporation notified of the status of the petition."

No evidence was presented at hearing to show that a petition in respect of the May 27, 1981 notice was received prior to April 3, 1987.

OPINION

The Administrative Law Judge determined that the petition was not timely filed pursuant to Tax Law section 1138(a)(1).

The petitioner on exception claims that an affidavit sworn to on March 16, 1987, established that the petitioner applied for a hearing within 90 days after a notice of tax deficiency was issued on May 27, 1981. The petitioner also asserts that it is presumptive that the September 28, 1981 letter from Assemblyman Matthew J. Murphy to Tax Counsel Ralph J. Vecchio was received by the State Tax Commission.

We affirm the determination of the Administrative Law Judge.

Tax Law section 1138(a)(1), reads in pertinent part:

" . . . notice of such determination shall be given to the person liable for collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing. . . ."

The rule with regard to section 1138(a)(1) is that the petition must be filed with the Division of Tax Appeals (formerly the State Tax Commission) within this ninety day period.

This is a general rule of physical delivery, in that the petition must actually be delivered within the prescribed time period (see, Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988). In the present case, petitioner presented an affidavit, sworn to by petitioner's accountant, Mr. Robert W. Baker, as evidence that a petition was mailed by Mr. Baker within ninety days of the issuance of the notice of determination. This affidavit was sworn to some six years after the petition was allegedly mailed. No evidence of actual delivery of the 1981 petition was offered.

Section 1147(a)(2) of the Tax Law has been interpreted to hold that proof of ordinary mailing is insufficient to prove timely filing of a petition where there is no actual delivery of the petition (Matter of Sipam Corporation, *supra*). Tax Law section 1147(a)(2) is modeled after Internal Revenue Code section 7502. Both sections provide that when a taxpayer effects delivery of a petition for hearing through the United States Postal Service and such delivery occurs after the prescribed period, the postmark appearing on the face of the envelope will be deemed the date of delivery. In addition, both sections provide that use of registered mail is prima facie evidence that the document was delivered and that regulations may allow for the use of certified mail instead of registered mail (see, Matter of Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988).

In that section 1147(a)(2) is patterned after section 7502 of the Internal Revenue Code, it is helpful to look to the Federal courts' interpretation of section 7502 for guidance. These courts have consistently held that where there is no actual delivery of the petition, proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing (Miller v. United States, 784 F2d 728 [6th Cir 1986]; Deutsch v. Commr., 599 F2d 44, 46 [2d Cir 1979]). For example, in Deutsch the Circuit Court stated that section 7502 of the Internal Revenue Code:

" . . . 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 v. United States, *supra*, at 46.)

The court furthered noted that, "courts have consistently rejected testimony or other evidence as proof of the actual date of mailing." (Deutsch v. Commr., supra, at 46.)

In the present case, even if petitioner's submission of the affidavit in question had served to prove mailing, we conclude that such proof is insufficient, as a matter of law, to prove timely filing of the petition pursuant to Tax Law section 1138(a)(1) and 1147(a)(2). This Tribunal has followed Federal precedent in interpreting section 1147(a)(2) and the regulations thereunder adopted (Sipam Corporation, supra). Therefore, we affirm the determination of the Administrative Law Judge in finding that in the present case, proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing, where there is no actual delivery of the petition (cf., Donald Siegel v. State Tax Commn., Appellate Division, 3rd Dept, February 25, 1988, Harvey, J., the particular proof offered by the petitioner to prove timely filing was held insufficient).

In regard to petitioner's claim that the letter of Assemblyman Murphy is presumed to have been received by the Division as petitioner's timely petition, we find nothing in the record to indicate proof of such receipt. In any event, it must be noted that the September 25, 1981 date of the letter falls considerably beyond the ninety day period imposed by Tax Law section 1138(a)(1). The letter in question, even if delivered, would fail to meet the requirements of filing imposed upon petitioner by Tax Law sections 1138(a)(1) and 1147(a)(2).

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of petitioner, WSD United Transportation, Inc., is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of WSD United Transportation, Inc. is dismissed; and

4. The Notice of Determination and Demand issued on May 27, 1981 is sustained.

DATED: Troy, New York
July 27, 1989

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner