

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CAP EQUIPMENT RENTAL CORP.	:	
AND VINCENT CAPORASO, AS OFFICER	:	DECISION
for Redetermination of a Deficiency/Revision of	:	DTA NO. 805919
a Determination or for Refund of Sales and	:	
Compensating Use Tax under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1982	:	
through August 31, 1985.	:	

Petitioners, Cap Equipment Rental Corp. and Vincent Caporaso, as officer, 34-02 127th Street, Corona, New York 11368 filed an exception to an order of the Administrative Law Judge issued on September 22, 1988 dismissing their petition for redetermination of a deficiency/revision of a determination or for refund of sales and compensating use tax under Articles 28 and 29 of the Tax Law for the period June 1, 1982 through August 31, 1985 (File No. 805919). Petitioners appeared by Max Felberbaum, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq. of counsel).

Neither petitioners nor the Division submitted a brief. Petitioners' request for oral argument was denied.

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

ISSUE

Whether a petition filed on November 26, 1986 requesting a hearing was timely filed.

FINDINGS OF FACT

On September 19, 1986, the Division of Taxation issued to petitioners, Cap Equipment Rental Corp. and Vincent Caporaso, as officer, a Notice of Determination and Demand for Sales and Use Taxes Due for the period June 1, 1982 through August 31, 1985.

Petitioners timely filed a petition for a hearing on November 26, 1986. Subsequent to filing the petition, a Conciliation Conference was scheduled for April 28, 1988. Petitioners did not appear personally or by representative. Petitioners' default was duly noted by the Bureau of Conciliation and Mediation and a Conciliation and Default Order was issued on May 27, 1988. The letter accompanying the order provided in pertinent part as follows:

"Please take notice of the Conciliation Default Order enclosed herewith.

"If there is a reasonable excuse for your non-appearance, you have 30 days from the date of this order to request the order be vacated. Please address the request to the undersigned.

"In the alternative to requesting the order be vacated, you may file a petition within 90 days from the date of this order. . . .

"If you fail to either request the order be vacated or file a petition within the above time limits, the enclosed order will be final."

Petitioners did not request that the order be vacated but filed a second petition for hearing dated August 22, 1988, mailed August 29, 1988 and received by the Division of Tax Appeals on August 31, 1988, 94 days after the Conciliation Order was issued. Petitioners enclosed a copy of the petition filed November 26, 1986, indicated that they were unable to attend the Conciliation Conference and requested a hearing be scheduled.

The Administrative Law Judge dismissed the petition as untimely since it was not filed within 90 days after May 27, 1988 as required by section 170.3-a(e) of the Tax Law.

OPINION

On exception, petitioners assert that the petition dated November 26, 1986 was timely filed and entitles them to a hearing.

The crux of the matter in this case is the transition from the conference/hearing system that existed prior to September 1, 1987 to the new two-part system under the Bureau of Conciliation and Mediation Services and the Division of Tax Appeals. The relevant language is contained in section 32 of Chapter 282 of the Laws of 1986 which provides in pertinent part that:

"This act . . . shall take effect September first, nineteen hundred eighty-seven and shall apply to all proceedings commenced in the division of tax appeals on or after such date and shall apply to all proceedings commenced prior to such date which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent this act can be made applicable . . ." (emphasis added).

We reverse the order of the Administrative Law Judge. Here, petitioners timely filed a petition for a hearing on November 26, 1986. That petition was acknowledged as being received by the Tax Appeals Bureau on December 12, 1986 meaning that petitioners were entitled to a hearing.¹

We do not view the transition language in section 32 as requiring the application of the procedural requirements of section 170.3-a(e) so as to abrogate the rights of the petitioners to the hearing to which they were entitled by virtue of the timely filing of the November 26, 1986 petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Cap Equipment Rental Corp. and Vincent Caporaso, as Officer, is granted;
2. The order of the Administrative Law Judge is reversed; and

¹Under prior law and the regulations of the State Tax Commission, a prehearing conference could be scheduled by the Commission, in its discretion, to afford the parties an opportunity to resolve the issues. Under the new procedures, the taxpayer has the right to either petition for a hearing or to apply for a conciliation and mediation conference. In the latter case, the language in section 170.3-a(e) has particular application since a taxpayer would not have already filed a petition for hearing.

3. The matter is remanded to the Chief Administrative Law Judge to schedule a hearing on the petitions of Cap Equipment Rental Corp. and Vincent Caporaso, as Officer.

Dated: Albany, New York
March 2, 1989

/s/ John P. Dugan

John P. Dugan
President

/s/ Francis R. Koenig

Francis R. Koenig
Commissioner