

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
BRYCO SERVICE, INC. : DECISION
for Redetermination of a Deficiency/Revision :
of a Determination or for Refund under Article :
9A of the Tax Law for the Years 1981, 1982 :
and 1983. :

Petitioner, Bryco Service, Inc., 500 Fifth Avenue, Room 840, New York, New York 10036, filed an exception to an order of the Administrative Law Judge issued on December 15, 1988 dismissing its petitions for redetermination of deficiencies or for refunds of corporation franchise tax under Article 9-A of the Tax Law for the Years 1981, 1982 and 1983 (File No. 806194). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel). The petitioner appeared by Shea & Gould, 1251 Avenue of the Americas, New York, New York 10020 (Richard E. Halperin, Esq., of counsel).

The petitioner submitted a brief on exception. Oral argument was requested by the petitioner and denied by the Tribunal.

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

ISSUE

Whether a petition filed on September 5, 1985 requesting a hearing was timely filed.

FINDINGS OF FACT

We find the following facts.

On June 12, 1985 the Division of Taxation issued to petitioner a Notice of Deficiency under Article 9-A of the Tax Law for the period ending December 31, 1981.

Petitioner timely filed a petition for a hearing on September 6, 1985. The petition was acknowledged as received by the Tax Appeals Bureau by letter mailed September 23, 1985.

On March 21, 1986 Notices of Deficiency were sent to the petitioner with respect to deficiencies determined under Article 9-A of the Tax Law for the periods ended December 31, 1982 and December 31, 1983. On May 8, 1986, petitions were filed requesting a redetermination of such deficiencies. On May 22, 1986 a letter acknowledging receipt of such petitions was sent to the petitioner by the Tax Appeals Bureau. On September 23, 1986 a notice of pre-hearing conference was sent to the petitioner by the Tax Appeals Bureau. The pre-hearing conference was held on October 30, 1986. On May 11, 1988 three consent forms were sent to the petitioner. The petitioner did not execute these consent forms.

On June 17, 1988, conciliation orders were issued by the pre-hearing conferee. The letter accompanying the order stated, in essence, that the petitioner had ninety days from the date of the order to file a petition for hearing. The petitioner mailed such a petition on October 26, 1988 or 131 days later.

The Administrative Law Judge dismissed the petition as untimely since it was not filed within 90 days after June 17, 1988, as required by section 170.3-a(e) of the Tax Law.

OPINION

We are guided by our decision in Cap Equipment Rental Corp. and Vincent Caporaso, as Officer (Tax Appeals Tribunal, March 2, 1989) in which we reversed the determination of the Administrative Law Judge on the same issue of timeliness under similar circumstances. The crux of the matter here as in Cap Rental was the interpretation of the transition language 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. . ."

As we stated in Cap Rental, 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 petitioner to the hearing to which it was entitled by virtue of the timely filing of petitions on September 6, 1985 and May 8, 1986.¹

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Bryco Service Inc, is granted;
2. The order of the Administrative Law Judge is reversed; and
3. The matter is remanded to the Chief Administrative Law Judge to schedule a hearing on the petitions of Bryco Service Inc.

DATED: Troy, New York
June 22, 1989

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

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

¹Under prior law and the regulations of the State Tax Commission, a pre-hearing 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.