

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT G. WILSON & GSA	:	DECISION
CORPORATION d/b/a GSA PARTNERS	:	
for Redetermination of a Deficiency/Revision	:	
of a Determination or for Refund of Sales	:	
and Use Tax under Articles 28 and 29 of the	:	
Tax Law for the Period September 1, 1983	:	
through August 31, 1984.	:	

Petitioners Robert G. Wilson and GSA Corporation d/b/a GSA Partners, filed an exception to the order of the Administrative Law Judge issued on December 15, 1988 dismissing their 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, 1983 through August 31, 1984 (File No. 806293).

Petitioners appeared by Coudert Brothers (Charles H. Purcell, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq. of counsel).

Both parties filed a brief on exception. Oral argument was not requested by either party.

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

ISSUE

Whether petitioners timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the following facts.

A conciliation order dated August 12, 1988, which sustained the Division of Taxation's Notice of Determination and Demand against petitioners was signed by conciliation conferee John M. Jones.

A petition was mailed by the petitioner to the Division of Tax Appeals on November 14, 1988, or 94 days later.

OPINION

The Administrative Law Judge, sua sponte, ordered that the petition herein be dismissed with prejudice. The order was based upon petitioners' alleged failure to timely mail the petition to the Division of Tax Appeals following the issuance of a conciliation order by the Bureau of Conciliation and Mediation Services.

We reverse the Administrative Law Judge and remand this case for a full hearing on the issue of whether a timely petition was filed.

The Bureau of Conciliation and Mediation Services ("Bureau") is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170[3-a], 20 NYCRR 4000.1[c]). Conciliation orders are binding upon "the department (of Taxation) and the person who requested the (conciliation) conference," unless such person petitions the Division of Tax Appeals for a hearing "within 90 days after the conciliation order is issued" (Tax Law § 170[3-a][e], 20 NYCRR 4000.6[b]).

The record reveals that one such order dated August 12, 1988, which sustained the Division of Taxation's Notice of Determination against petitioners, was signed by a conciliation conferee. However, this signature alone does not by itself constitute the issuance of the order as required by Tax Law § 170(3-a)(e). A conciliation order can only be "issued" as that term is used in Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer. Concluding otherwise, i.e. that the order is "issued" on the date the conciliation conferee simply signs the order, would be incorrect. Such an interpretation would establish differing rules regarding when conciliation orders are "issued" (Tax Law § 170[3-a][e]) from when notices of determination are "given" (Tax Law § 1138[a][1], see also, Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, 946, aff'd, 64 NY2d 688, 485 NYS2d 517). Such a distinction is untenable.

Thus, any decision concerning the timeliness of petitions to the Division of Tax Appeals must necessarily begin with a review of the evidence related to the date and manner of mailing of either the Bureau's conciliation order or the Division of Taxation's statutory notice determining tax due. The record in the instant case is absent of any evidence as to when and how the conciliation order was mailed.¹ We do not find the date of the conferee's signature any substitute therefore. Further, petitioners have asserted in their brief on exception that the conciliation order was mailed to a prior residence of the taxpayer. Petitioners have not asserted, nor introduced any documentation to establish, that they informed the Division of this change of address. Without proof on this matter, we have no basis to determine whether the conciliation order was mailed to petitioners' last known address as required by Tax Law § 1147(a)(1). For these reasons, we are unable to decide whether petitioners timely mailed their petition.

Finally, the representative for the Division alleged that petitioners failed to serve a copy of their exception on "The Division of Taxation or (emphasis added) the Law Bureau as required by section 3000.11" (Division's brief, p. 3). We note first that Tax Law section 2006(7) entitles either party to except to the determination of the Administrative Law Judge. In the case where taxpayers have appealed to the Tax Appeals Tribunal, 20 NYCRR 3000.11(a)(1) requires them to serve the Director of the Law Bureau, on behalf of the Division of Taxation, with a copy of the exception (see also, Matter of Marshall Farms USA, Inc., Tax Appeals Tribunal, August 4, 1988). As the Division submitted no evidence in support of its claim, for example, an affidavit, we are without any basis to conclude whether petitioners committed such an error.

Since we lack a factual basis to resolve any of the issues raised by the parties, we remand this matter for a hearing on the service and timeliness issues. We note that the rebuttable presumption of petitioners' receipt of the conciliation order would seem to arise only

¹Tax Law § 1147(a)(1) was amended in 1981 to require that service be made by registered or certified mail rather than ordinary mail. This change was intended to improve the likelihood that the taxpayer would receive his notice (Assembly Memorandum in Support, L 1981, ch 760, § 2). The Division of Taxation's regulations (20 NYCRR 4000.7[a]) provide that conciliation orders will be served by registered or certified mail.

upon adequate presentation of proof of mailing by the Division (see, Matter of Mareno v. State Tax Commn., 144 AD2d 114, 534 NYS2d 453; Matter of T.J. Gulf, Inc. v. State Tax Commn., 124 AD2d 314, 508 NYS2d 97, 98). Petitioners' burden to rebut the same would seem to extend beyond a mere denial of receipt (see, Ruggerite Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517; Matter of American Cars 'R' Us, Inc. v. Chu, slip op., App. Div. Third Dept., February 9, 1989, 537 NYS2d 672).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The order of the Administrative Law Judge is reversed; and
2. The case is remanded to the Administrative Law Judge for a new hearing to be scheduled on the timeliness and service issues.

DATED: Troy, New York
July 13, 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