

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>WESTERN NEW YORK FLYING CLUB, INC.</b>	:	<b>DECISION</b>
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 December 1, 1982 through February 29, 1988.	:	

---

Petitioner Western New York Flying Club, Inc., P.O. Box 9, 56 Doris Avenue, Lancaster, New York 14086, filed an exception to the determination of the Administrative Law Judge issued on August 9, 1990 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 December 1, 1982 through February 29, 1988 (File No. 806926). Petitioner appeared by Bouvier, O'Connor, Esqs. (Salvatore J. Messina, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in response to petitioner's brief. Oral argument was requested, but was denied. A letter dated December 4, 1990 protesting this denial was received from petitioner.

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

***ISSUE***

Whether petitioner's request for a conciliation conference was timely filed.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On October 4, 1988, the Division of Taxation (hereinafter the "Division") issued to petitioner Western New York Flying Club, Inc. three notices of determination and demands for payment of sales and use taxes due which, together, assessed a total of \$14,913.05 in tax due, plus penalty and interest, for the period December 1, 1982 through February 29, 1988.

On January 12, 1989, the Division's Bureau of Conciliation and Mediation Services received a request for a conciliation conference in response to the three notices referred to above. The envelope containing said request bore a United States Postal Service postmark of January 9, 1989. The request was mailed to the Division via first class U.S. mail. The request itself, along with a cover letter enclosed therewith, was dated December 19, 1988. Both the request and cover letter bore the signature of Salvatore J. Messina, petitioner's representative.

On February 24, 1989, the Bureau of Conciliation and Mediation Services issued an order dismissing petitioner's request as untimely.

### ***OPINION***

The Administrative Law Judge determined that the Division properly denied petitioner's request for a conciliation conference as untimely because the envelope containing petitioner's request for a conciliation conference bore a United States postmark of January 9, 1989, a date which fell beyond the 90-day limitation period with respect to the notices of determination herein.

On exception, petitioner argues that its request for a conciliation conference was timely made by depositing said request in a United States Postal Service mail depository on December 19, 1988. Petitioner, citing Stuart v. Palmer (74 NY 183), further argues that due process embraces, at the very least, the right to be heard before the administrative agency and that a hearing or an opportunity to be heard is absolutely essential to due process and this right must exist as a matter of right, not as a matter of chance or favor.

The Division argues that the attorney's testimony concerning the filing of the petition is not proof of mailing and fails as a matter of law. Therefore, the Division argues that the Administrative Law Judge's determination should be sustained.

We affirm the determination of the Administrative Law Judge.

The general rule is one of physical delivery, i.e., the request for a conference must be filed with the Bureau of Conciliation and Mediation Services within the 90-day period required by Tax Law § 1138(a)(1). Certainly this can be accomplished by any means, including mailing of the document. However, when mail is used, Tax Law § 1147(a)(2), concerning the mailing of sales tax documents, is specific as to the method of proof of timely mailing.

Tax Law § 1147(a)(2) provides that if a petition or other document required to be filed within a prescribed period or on or before a prescribed date is, after such period delivered by United States mail, the date of the United States postmark stamped on the envelope shall be deemed the date of delivery. However, this subsection only applies if the postmark date falls within the prescribed period. Furthermore, if the taxpayer uses registered or certified mail, the receipt is prima facie evidence of delivery.

Tax Law § 1147(a)(2) is patterned after Internal Revenue Code § 7502. The scheme of the statutes and implementing regulations is designed to avoid the use of testimony to establish the date of mailing in favor of tangible evidence in the form of an official government notation (see, Shipley v. Commr., 572 F2d 212, 78-1 USTC ¶ 9211). When a legible postmark appears on an envelope, as is the case before us, no evidence that the petition was mailed on some other day will be allowed; the untimely postmark is the controlling factor (see, Shipley v. Commr., *supra*; Drake v. Commr., 554 F2d 736, 77-2 USTC ¶ 9483; Nelson v. Commr., T.C. Memo 1981-360, 42 TCM 372).

In this case, even though petitioner's representative testified that the request for a conciliation conference was mailed on December 19, 1988 and, further, that his client should not be prejudiced by the failure of the postal authorities to deliver the document on time, the tangible

evidence before us, the envelope containing said request, bore a United States Postal Service postmark of January 9, 1989, a date outside the 90-day period which expired on January 3, 1989. Where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service or that the document may not be delivered at all (see, Matter of Transworld Corp., Tax Appeals Tribunal, October 11, 1990; Matter of Sipam, Tax Appeals Tribunal, March 10, 1988).

Lastly, petitioner's representative argues that a hearing or an opportunity to be heard is absolutely essential to due process and this right must exist as a matter of right, not as a matter of chance or favor. Petitioner cites Stuart v. Palmer (supra) for this principle. The Stuart case, however, is distinguishable from the instant matter in that petitioner received proper notices of determination for sales and use taxes due while plaintiff Stuart was assessed expenses for a local improvement without notification, having had no opportunity to object to or complain of the assessment, or to have it reviewed, or to apply for a review thereof, or to examine the same.

Therefore, we find the petition not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Western New York Flying Club, Inc. is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Western New York Flying Club, Inc. is denied; and

4. The three notices of determination and demands for payment of sales and use taxes due dated October 4, 1988 are sustained.

DATED: Troy, New York  
January 25, 1991

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

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

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