

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SERVICE MERCHANDISE CO. OF FISHKILL, NY : DECISION

for Redetermination of a Deficiency/Revision :
of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period March 1, 1986 through :
May 31, 1986. :

Petitioner, Service Merchandise Co. of Fishkill, NY, P.O. Box 24600, Nashville, Tennessee 37202, filed an exception to the order of the Administrative Law Judge issued on December 7, 1989 dismissing its petition for redetermination of a deficiency/revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1986 through May 31, 1986 (File No. 807431). Petitioner appeared by Bond, Schoeneck & King, Esqs. (Gary R. Germain, Esq. and Richard L. Smith, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

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

ISSUE

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

FINDINGS OF FACT

We find the facts as follows.

On June 20, 1989, following an audit, the Division of Taxation issued to petitioner, Service Merchandise Co. of Fishkill, NY, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1986 through May 31, 1986.

Petitioner filed a petition for revision of a determination of sales and use tax for the period March 1, 1986 through May 31, 1986. The envelope containing the petition bears a machine metered postmark date of September 19, 1989.

On October 19, 1989, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss Petition to Jeanne Linker, Tax Compliance Manager of Service Merchandise Co. of Fishkill, NY for failure to file a timely petition. The Notice of Intent stated that the Notice of Determination was issued on June 20, 1989 but the petition was not mailed until "June 19, 1989" or 91 days later. The date of June 19, 1989 in the Notice of Intent was an error; it should have read September 19, 1989.

A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation. In response, the Division submitted a certified mail record and return receipt of notice of determination establishing that the Notice of Determination was mailed to petitioner on June 20, 1989.

On December 7, 1989, the Administrative Law Judge, sua sponte, ordered that the petition be dismissed with prejudice on the ground that it was not timely filed within 90 days after June 20, 1989 as prescribed by section 1138(a)(1) of the Tax Law. The Administrative Law Judge found that the petition was not mailed until September 19, 1989, or 91 days after the issuance of the Notice of Determination on June 20, 1989.

On January 5, 1990, the petitioner filed with the Tax Appeals Tribunal an exception to the order of the Administrative Law Judge dismissing its petition.

On March 20, 1989, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S890320007A) for the period December 1, 1985 through February 28, 1986 was issued to petitioner. A petition was filed with the Division of Tax Appeals by petitioner on April 11, 1989 protesting this notice of determination.

On September 14, 1989, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S890915015A) for the period June 1, 1986 through November 30,

1988 was issued to petitioner. A petition was filed with the Division of Tax Appeals by petitioner on December 7, 1989 protesting this notice of determination.

OPINION

We affirm the order 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 within this 90 day period. Petitioner's petition was not mailed until September 19, 1989, 91 days after the issuance of the Notice of Determination.

The Tax Appeals Tribunal Rules of Practice and Procedure provide the following, in pertinent part, with respect to postmarks not made by the United States Postal Service (i.e., office metered mail):

"(i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extensions of time granted for filing the document); and" (20 NYCRR 3000.16[b][i].)

On exception, petitioner argues that it considered a 90 day filing period for a petition to be three months. We find this argument unpersuasive. Section 1138(a)(1) clearly states that the filing period for protesting a Notice of Determination is 90 days.

On exception, petitioner also argues that its petition for a hearing to protest Notice No. S890620015A presently before us should be reviewed as part of a single administrative proceeding along with two other notices issued against petitioner. We do not agree with this argument. Each notice was issued independently of the others and covered a different audit period. The first notice (Notice No. S890320007A) issued on March 20, 1989 was for the period December 1, 1985 through February 28, 1986 and a timely petition was filed by petitioner protesting this notice. Such petition only covered the audit period December 1, 1985 through

February 28, 1986 and refers only to Notice No. S890320007A. This notice and petition were issued and filed before the second notice, currently before us, was even issued; therefore, we cannot find petitioner's first petition to be a timely filed petition for the second notice (Matter of West Mountain v. Department of Tax & Fin., 105 AD2d 989, 482 NYS2d 140, affd. 64 NY2d 991, 489 NYS2d 62; Matter of Hagop Yegnukian, Tax Appeals Tribunal, March 22, 1990). The last notice (Notice No. S890915015A) issued on September 14, 1989 was for the period June 1, 1986 through November 30, 1988 and a timely petition was filed by petitioner protesting this notice. Such petition covered the period June 1, 1986 through November 30, 1988 and refers to Notice No. S890915015A. In a schedule attached to the last petition, mention is made of the notice before us along with a request to treat the results of the audit as a single case. However, this petition was not filed with the Division of Tax Appeals until December 7, 1989 which is not within the prescribed period for filing a petition to protest the notice before us.

ACCORDINGLY, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Service Merchandise Co. of Fishkill, NY is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Service Merchandise Co. of Fishkill, NY is dismissed with prejudice.

DATED: Troy, New York
April 12, 1990

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

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

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