

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALAN BRENNER, OFFICER OF	:	DECISION
SCRUPLES PARLOR, INC.	:	
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 June 1, 1983 through	:	
November 30, 1984	:	

Petitioner, Alan Brenner, Officer of Scruples Parlor, Inc., 135 Post Avenue, Westbury, New York 11590 filed an exception to the order of the Administrative Law Judge issued on December 7, 1989 dismissing his 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 June 1, 1983 through November 30, 1984 (File No. 807432). Petitioner appeared by Marvin Weinstein, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Neither party filed a brief on exception.

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 May 2, 1989, the Bureau of Conciliation and Mediation Services (hereinafter the Bureau) held a conciliation conference upon the request of petitioner.

As a result of this conference, the Bureau issued a conciliation order to petitioner dated June 16, 1989.

Petitioner filed a petition for revision of a determination of sales and use tax for the period June 1, 1983 through November 30, 1984. The envelope containing the petition bears a machine metered postmark date of August 30, 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 petitioner's representative Marvin Weinstein for failure to file a timely petition. The Notice stated that the petition was not filed until October 2, 1989 or 108 days after June 16, 1989.

In response to the Notice of Intent, petitioner's representative submitted a letter stating that the petition was filed and mailed on August 30, 1989 and requested a copy of the postmarked envelope. A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation. In response, the Division submitted affidavits and documentary evidence establishing that the conciliation order was mailed to petitioner on June 16, 1989 at petitioner's last known address at 135 Post Avenue, Westbury, New York 11590 and also to petitioner's representative, Marvin Weinstein, C.P.A. at his last known address of 1585 Front Street, East Meadow, New York 11554-2398.

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 the 90 day period prescribed by § 170.3-a(e) of the Tax Law. The Administrative Law Judge found that the petition was not received by the Division of Tax Appeals until October 2, 1989, or 108 days after the conciliation order was issued to petitioner on June 16, 1989.

On December 15, 1989, the petitioner filed with the Tax Appeals Tribunal an exception to the order of the Administrative Law Judge dismissing his petition. On January 16, 1990 petitioner submitted a notarized affidavit pertaining to the date of preparation and mailing of his petition.

OPINION

We affirm the order of the Administrative Law Judge.

Tax Law § 170.3-a(e) provides that a conciliation order shall not be binding on the taxpayer if the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is "issued" within the meaning of Tax Law § 170.3-a(e) at the time of its mailing to the taxpayer (Robert G. Wilson & GSA Corp., Tax Appeals Tribunal, July 13, 1989). In the order below, the Administrative Law Judge found that the conciliation order had been mailed to petitioner on June 16, 1989. Petitioner has not challenged that finding. Further, the affidavits submitted by the Division to the Administrative Law Judge, which are not disputed by petitioner, confirm that the conciliation order was in fact mailed to petitioner on June 16, 1989.

On exception petitioner argues that his petition was timely filed because the envelope containing the petition was postmarked August 30, 1989 which is within 90 days from the issuance of the conciliation order. However, this postmark was a machine metered postmark and the petition was not received by the Division of Tax Appeals until October 2, 1989 or 108 days after the conciliation order was issued.

The Tax Appeals Tribunal Rules of Practice and Procedure provide that in the case of a document bearing a machine metered postmark falling within the prescribed period for filing, but which document is not received within such prescribed period or within the time a document so mailed and so postmarked by the United States Postal Service would ordinarily be received, the petitioner bears the burden of proving the document was timely mailed. The petition was received by the Division of Tax Appeals on October 2, 1989, 18 days after the prescribed period for filing expired. We conclude that 18 days is not within the time that a document mailed and postmarked by the United States Postal Service would ordinarily be received (cf., Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988).

Therefore, petitioner must establish the following in order to satisfy the Tax Appeals Tribunal Rules of Practice and Procedure:

"(i) that it [the document] was actually deposited in the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the

prescribed period or on or before the prescribed date for filing the document;

"(ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and

"(iii) the cause of such delay." (20 NYCRR 3000.16[b][2][i], [ii], [iii].)

The affidavit prepared by petitioner's representative does not satisfy the above requirements. It only states that the petition was prepared and mailed on August 30, 1989. We, therefore, find that petitioner has not met his burden to prove timely filing of the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alan Brenner, Officer of Scruples Parlor, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Alan Brenner, Officer of Scruples Parlor, Inc. is dismissed with prejudice.

DATED: Troy, New York
March 1, 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