

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
TWELFTH STREET APARTMENTS : DECISION
for Redetermination of a Deficiency/Revision :
of a Determination or for Refund of Real :
Property Transfer Gains Tax under Article 31-B :
of the Tax Law for the Year 1987. :
:

Petitioner Twelfth Street Apartments, 475 Park Avenue South, 6th Floor, New York, New York 10016 filed an exception to the order of the Administrative Law Judge issued on April 26, 1990 dismissing its petition for redetermination of a deficiency/revision of a determination or for refund of real property transfer gains tax under Article 31-B of the Tax Law for the year 1987 (File No. 807852). Petitioner appeared by John C. Tobin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief and a reply brief. The Division submitted a letter in lieu of a brief.

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 October 11, 1988, 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 November 24, 1989.

Petitioner filed a petition for redetermination of a deficiency/revision of a determination or for refund of real property transfer gains tax. The petition was hand delivered to the Division of Tax Appeals on February 23, 1990.

On March 22, 1990, 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 John C. Tobin for failure to file a timely petition. The Notice stated that the petition was not filed until February 23, 1990 or 91 days after November 24, 1989.

There was no response to the Notice of Intent to Dismiss Petition from petitioner. A copy of the Notice of Intent was also sent to the Division of Taxation. In response, the Division submitted an affidavit and documentary evidence establishing that the conciliation order was mailed to petitioner on November 24, 1989.

On April 26, 1990, 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 February 23, 1990 or 91 days after the conciliation order was issued to petitioner on November 24, 1989.

On May 18, 1990, petitioner filed with the Tax Appeals Tribunal an exception to the order of the Administrative Law Judge dismissing its 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 (Matter of Wilson, 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 November 24, 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 November 24, 1989.

On exception petitioner, relying on 20 NYCRR 3000.3(c), argues that the Division should be barred from dismissing its petition because notice was not given to petitioner by the Supervising Administrative Law Judge that its petition was not in proper form within 20 days after filing of its petition. Petitioner is mistaken in its interpretation of the regulations. The regulations of the Tax Appeals Tribunal (20 NYCRR 3000.3[b]) set forth the requirements that a petition must comply with to be in proper form and any failure to satisfy these requirements provides the basis for notification to a petitioner. These requirements pertain solely to the form and content of the petition such as the name and address of the petitioner, the petitioner's representative, the taxable years or periods involved and the amount of tax in controversy. Timeliness is not one of the requirements enumerated in this section because timeliness is not a requirement of form, but rather one of jurisdiction. This section presupposes that a timely petition has been filed. Without a timely petition having been filed, this Tribunal has no jurisdiction over the petition and cannot act on it. We, therefore, find that petitioner has not met its burden to prove timely filing of the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Twelfth Street Apartments is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Twelfth Street Apartments is dismissed with prejudice.

DATED: Troy, New York
November 15, 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