

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BUR-SUL, LTD.	:	DECISION
	:	DTA No. 808460
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, 1978	:	
through November 30, 1978.	:	

Petitioner, Bur-Sul, Ltd., Attn: Edward D. Burke, President, Noyac Road, P.O. Box 400, Sag Harbor, New York 11963 filed an exception to the determination of the Administrative Law Judge issued on August 8, 1991 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 September 1, 1978 through November 30, 1978. Petitioner appeared by Edward D. Burke, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in response to the 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 filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2" and "3" and the footnote to finding of fact "4" which have been modified. We have also

made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Bur-Sul, Ltd. ("petitioner") did not timely file its sales and use tax return for the period September 1, 1978 through November 30, 1978. The due date for the filing of the return was December 20, 1978; the return was filed on March 1, 1979 without payment of the tax due as set forth on the return.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

It is not possible to determine from the record before us when the Notice and Demand was issued by the Division of Taxation. According to the conciliation order issued by the Division of Taxation and its answer to petitioner's petition, the notice was issued on January 29, 1988. The document, entitled "Accounts Receivable System," introduced by the Division of Taxation at the hearing without any testimony to explain it, has a line in it that reads: "DATE OF ASMT 1-29-80." A memorandum introduced at the hearing by the Division of Taxation from Theodore Eckler, Tax Compliance Agent II, dated October 19, 1990, states in pertinent part: "[p]er Nick Ramundo of Sales Tax Processing the date the assessment was issued is May 9, 1979" The Division of Taxation offered no mailing evidence with respect to the notice.¹

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

By a check dated July 24, 1980 drawn on the account of Bur-Sul, Ltd. d/b/a The Salty Dog (the check contained deposit serial no. 0188780 and was deposited on August 7, 1980), petitioner paid the

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The Administrative Law Judge's finding of fact "2" read as follows:

"2. According to the Division of Taxation's computerized accounts receivable system, a Notice and Demand for Payment of Sales and Use Taxes Due for the tax due (\$1,384.04), plus penalty and interest, was issued to petitioner on January 29, 1988. Due to the fact that nearly 11 years had elapsed from the date of issuance of the notice and demand until the date of this hearing and, furthermore, since the issuance of a notice and demand did not require mailing by certified or registered mail, the Division of Taxation did not offer, at the hearing held herein, a copy of the notice and demand or proof of the date of its issuance to petitioner."

We modified this fact to more accurately reflect the record.

sum of \$1,636.66 to the New York State Sales Tax Bureau. This payment satisfied the sales tax liability for the period at issue herein.²

In March 1988, petitioner received notification from the Division of Taxation, dated March 1, 1988, that its sales tax liability for the quarter ended November 30, 1978 remained unpaid and that the amount of \$4,001.51 was then due.³ In its petition, petitioner states that "notice was not received until March 10, 1988". By letter dated March 14, 1988 from petitioner's president and representative, Edward D. Burke, to the tax compliance representative, additional time (at least four weeks) was requested to retrieve records which petitioner contended would prove that payment had been made.

By a notice from the Suffolk District Office dated August 30, 1988, petitioner was advised that the total due was now \$4,296.51. Mr. Burke sent a letter to the district office dated September 8, 1988 in which he enclosed a copy of the check which he contended was for payment for the period at issue.

Petitioner was then advised, by a memorandum dated February 2, 1990, that unless payment of \$4,990.84 was made by February 13, 1990, warrant proceedings would be instituted. On February 27, 1990, Mr. Burke sent a letter to the Tax Compliance Section of the Suffolk District Office which, among other things, requested a "hearing" before the Bureau of

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The Administrative Law Judge's finding of fact "3" read as follows:

"3. By a check dated July 24, 1980 drawn on the account of Bur-Sul, Ltd. d/b/a The Salty Dog (the check contained deposit serial no. 0188780 and was deposited on August 7, 1980), petitioner paid the sum of \$1,636.66 to the New York State Sales Tax Bureau. Apparently, petitioner assumed that the payment was to satisfy its outstanding sales tax liability for the period at issue herein.

We modified this fact because we conclude, as more fully described in our opinion, that the record requires a finding that the instant liability has been satisfied.

³The March 1988 notification referred to herein was from a tax compliance representative in the Suffolk District Office. A copy of this notification was attached to the petition. (We have modified this footnote by deleting the first three sentences. These sentences, which referred to the Administrative Law Judge's finding of fact "2," were deleted because of our modification of finding of fact "2.")

Conciliation and Mediation Services.⁴ Subsequent letters requesting a conciliation conference were sent to the Suffolk District Office and the Bureau of Conciliation and Mediation Services on March 29, 1990 and April 23, 1990, respectively.

On June 8, 1990, a Conciliation Order was issued which provided as follows:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on January 29, 1988, but the request was not mailed until April 23, 1990, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied."

In addition to the facts found by the Administrative Law Judge, we find as follows:

In response to the Division of Taxation's collection letters to petitioner, petitioner paid an additional amount of \$5,246.48 on the liability for the quarter ending November 30, 1978. This amount was paid in two installments, the first by check dated July 18, 1990 in the amount of \$2,500.00 and the second by check dated August 27, 1990 in the amount of \$2,746.48. The Division of Taxation does not dispute that these amounts were paid and applied to this liability.

The envelope containing petitioner's exception bore a United States postal service postmark of September 9, 1991. The determination of the Administrative Law Judge in this matter was issued on August 8, 1991.

OPINION

The Administrative Law Judge stated that there was no statutory provision to contest a Notice and Demand in the instant circumstances. In any event, the Administrative Law Judge held that while there was some confusion regarding the actual date of issuance of the Notice and Demand, petitioner's request for a hearing would not be timely whether the notice was issued on January 29, 1980 or on January 29, 1988. On this basis, the Administrative Law Judge sustained the conciliation order which had denied petitioner's request for a conciliation conference because the request was not timely filed.

⁴Sometime during February 1990, Mr. Burke, in a letter to the tax compliance agent, requested "a hearing to properly resolve this matter." The undated letter included, as an enclosure, a copy of the notice dated February 2, 1990.

On exception, petitioner states that "[i]nsofar as the Division of Taxation did not offer, at the hearing herein, a copy of the notice and demand or proof of the date of issuance to Petitioner, the respondent is unable to sustain its rebuttable presumption and the petition of Bur-Sul, Ltd. should be granted" (petitioner's exception). Petitioner also asserts that the doctrine of laches precludes the Division of Taxation (hereinafter the "Division") from claiming that petitioner did not timely request a conciliation conference.

In response, the Division asserts that petitioner, by its own admission, acknowledged that it received the Notice and Demand on March 10, 1988, and that since petitioner did not request a conciliation conference until April 23, 1990, petitioner's request was properly denied. The Division also asserts that petitioner's exception was not timely because the Administrative Law Judge's determination was issued on August 8, 1991, but the envelope mailing the exception was not postmarked until September 9, 1991, which the Division notes is 32 days later.

First, we address the Division's claim that petitioner's exception was not timely. Since the Administrative Law Judge's determination in this matter was issued on August 8, 1991, the 30 day period in which petitioner was required to file an exception began to run on August 9, 1991 (Tax Law § 2006[7]; General Construction Law § 20; Matter of American Express Co., Tax Appeals Tribunal, July 3, 1991). Thirty days from August 9, 1991 was September 7, 1991. September 7, 1991 was a Saturday and, thus, the next business day was September 9, 1991. When any period of time, computed from a certain day, within which an act is required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day (General Construction Law § 25-a; Matter of American Express Co., supra). Therefore, the postmark of September 9, 1991 on the envelope bearing petitioner's exception indicates that the exception was timely filed (20 NYCRR 3000.16[a][1]).

We turn now to the merits of the controversy. By filing a timely petition and attaching a copy of the conciliation order to it, petitioner established its right to a hearing to challenge the conciliation order (Tax Law §§ 170[3-a][e] and 2006[4]; Matter of Novar TV & Air

Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). Thus, we conclude that we have jurisdiction to determine whether the Division of Taxation properly denied petitioner's request for a conciliation conference.

The only ground stated by the Division in the conciliation order for denying petitioner a conference was that petitioner did not make a timely request for the conference. The timeliness of the request is also the only point made by the Division (other than to question the timeliness of the exception) in response to petitioner's exception. Where the Division has denied a taxpayer a conciliation conference on the grounds that it is not timely, the Division is required to establish when the time period in which to request the conference began to run (see, Matter of Novar TV & Air Conditioner Sales & Service, supra). If the Division is not able to establish this date, the proper remedy is to deem the petition timely (Matter of Novar TV & Air Conditioner Sales & Serv., supra). In the instant case, the Division has offered no proof with respect to the mailing of the Notice and Demand. Further, the four statements made by the Division (in the conciliation order, the answer, the accounts receivable statement and the internal memorandum) with respect to when the Notice was issued, state three different dates. With this record, we conclude that it is not possible to determine when the Notice and Demand was issued. Therefore, we deem petitioner's petition for a hearing to be timely.

Attached to petitioner's petition was a copy of its July 24, 1980 check for \$1,636.66, payable to the N.Y. State Sales Tax Bureau. Petitioner claimed that this check was payment for the quarter ending November 30, 1978. In spite of this claim made in the attachments to the petition, the Division did not introduce any evidence at the hearing as to the application of this payment.⁵ In response to the Administrative Law Judge's specific direction at the hearing to submit proof after the hearing as to the application of this payment, the only evidence submitted

⁵Other attachments to petitioner's petition indicate that petitioner, beginning on September 8, 1988, repeatedly submitted a copy of this check to the Division's Tax Compliance Bureau, claiming that it was payment of the liability for the quarter ending November 30, 1978. The petition states that petitioner did not receive any response to these repeated claims.

by the Division was contained in a memorandum from John Rappleyea of the Audit Evaluation Bureau. With respect to this payment, Mr. Rappleyea stated in his letter: "[t]he payment of \$1,636.68 [sic] appears to be part of purged Assessment #S8004070066." No explanation is given of what Mr. Rappleyea means by "appears," nor is any definition offered of a "purged" assessment. We find this information a wholly inadequate response to petitioner's proof that it paid the tax liability for the quarter ending November 30, 1978 by the check in the amount of \$1,636.66. Therefore, we conclude that petitioner proved that it satisfied the liability for this quarter through the check deposited by the Division on August 7, 1980. Since petitioner satisfied this liability on or before August 7, 1980, the subsequent amounts totalling \$5,246.48 paid by petitioner were overpayments and must be returned to petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bur-Sul, Ltd. is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Bur-Sul, Ltd. is granted; and

4. The Division of Taxation shall refund petitioner's payments of \$5,246.48.

DATED: Troy, New York
February 13, 1992

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

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

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