

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**SEYMOUR EPSTEIN ENTERPRISES, INC.** : DECISION  
**SEYMOUR EPSTEIN, AS OFFICER** : DTA No. 808661  
: :  
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 :  
September 1, 1985 through August 31, 1987. :

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Petitioners Seymour Epstein Enterprises, Inc. and Seymour Epstein, as Officer, 787 Bonnie Drive, Baldwin, New York 11510 filed an exception to the order of the Administrative Law Judge issued on January 17, 1991 dismissing their 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 September 1, 1985 through August 31, 1987. Petitioners appeared by George E. Milhim, 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. Petitioners' request for oral argument was denied.

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

***ISSUE***

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

***FINDINGS OF FACT***

We find the following facts.

On December 4, 1989, the Bureau of Conciliation and Mediation Services (hereinafter the "BCMS") held a conciliation conference upon the request of petitioners.

As a result of this conference, the BCMS issued a conciliation order to petitioners dated May 4, 1990 sustaining the notices of determination issued, with certain recomputations of tax due pursuant to such notices.

Petitioners filed a petition for revision of a determination of sales and use tax with the Division of Tax Appeals which was received on August 6, 1990. The petition was mailed by United States Express Mail and the envelope containing the petition did not bear a United States postmark. The mailing label affixed to the envelope bore a handwritten "date in" of August 3.

By letter dated August 15, 1990, Frank A. Landers of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals informed petitioners that unless evidence was submitted that a timely petition was filed, the petition would be dismissed.

By letter dated September 24, 1990, petitioners submitted an affidavit by Victoria Milhim, an employee of petitioners' representative, stating that on Thursday, August 2, 1990, prior to 5:00 p.m., she deposited the petition in a United States Express mailbox in Hempstead, New York. Also submitted was a letter from Robert J. Brown, Manager of Customer Services of the Hempstead New York United States Postal Service, indicating that the petition was accepted on August 3, 1990, not on August 2, 1990, the day Ms. Milhim states she deposited the petition in the mailbox. Mr. Brown further states that there is a possibility that the carrier collected the mail from that box early thus causing a one day delay in acceptance of the petition.

On October 18, 1990, Frank A. Landers issued a Notice of Intent to Dismiss Petition to petitioners for failure to file a timely petition. The Notice states that the petition was not mailed until August 3, 1990, or 91 days after May 4, 1990, the date the conciliation order was issued.

In response to such Notice, the Division of Taxation (hereinafter the "Division") submitted an affidavit and documentary evidence establishing that the conciliation order was mailed to petitioners on May 4, 1990. Petitioners in response to the Notice again submitted the affidavit of Victoria Milhim and the letter from Mr. Brown of the Hempstead Postal Service.

On January 17, 1991, the Administrative Law Judge, sua sponte, ordered that the petition be dismissed with prejudice on the grounds that it was not timely filed within 90 days after May 4, 1990 as prescribed by section 170(3-a)(e) of the Tax Law. The Administrative Law Judge found that the petition was not mailed until August 3, 1990 or 91 days after the conciliation order was issued to petitioners.

On February 15, 1991, petitioners filed with the Tax Appeals Tribunal an exception to the order of the Administrative Law Judge dismissing their petition.

### ***OPINION***

The Administrative Law Judge determined that since the petition was due on August 2, 1990, and was not mailed until August 3, 1990 (the Administrative Law Judge is using the handwritten August 3 date as the date of mailing of the petition), it was untimely and dismissed the petition.

On exception, petitioners argue that their petition was timely deposited in a United States Express Mail Box in Hempstead, New York on August 2, 1990, and that the petition would have been timely filed by them if the mail had not been collected from that box early on that date.

The Division argues that the dismissal of the petition was proper since petitioners failed to prove timely filing of the petition.

We affirm the order of the Administrative Law Judge.

The statute and regulations do not provide that a petition is timely filed upon deposit in a United States Postal Service facility. The general rule is one of physical delivery to the Division of Tax Appeals, i.e., the petition must be filed with the Division of Tax Appeals within the 90 day period required by section 170(3-a)(e) of the Tax Law (see, Matter of Transworld Corp., Tax Appeals Tribunal, October 11, 1990).

Further, the Tribunal's Rules of Practice and Procedure provide in part as follows:

"Date of filing. If any document required to be filed under this Part within a prescribed period or on or before a prescribed date . . . is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals . . . the date of the United States

postmark stamped on the envelope . . . will be deemed to be the date of filing" (20 NYCRR 3000.16[a][1]).

In this case, the envelope containing the exception does not bear any postmark, but the mailing label affixed to it has a handwritten "date in" of "8-3" presumably made by the United States Postal Service. If this handwritten date could be considered to be a postmark, then petitioners' petition would still be untimely as it was received after the prescribed period for filing and the handwritten date falls outside of the prescribed period for filing a petition.

Petitioners, by using United States Express Mail Service as opposed to registered or certified mail, bore the risk that the document would not be timely postmarked and, thus, not timely filed.

The Tribunal's Rules of Practice and Procedure further provide, in part, as follows:

"The envelope or other wrapper containing the document must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for filing . . . If the postmark stamped by the United States Postal Service on the envelope or wrapper containing the document does not bear a date which falls within the prescribed period or on or before the prescribed date for filing such document . . . the document will be considered not to be timely filed, regardless of when the envelope or wrapper containing such document is deposited in the mail. Accordingly, the sender assumes the risk that the envelope containing the document will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing . . . but see subdivision (c) of this section with respect to the use of registered mail or certified mail to avoid this risk" (20 NYCRR 3000.16[a][2][iii]).

We, therefore, find that petitioners have not met their burden to prove timely filing of the petition.

ACCORDINGLY, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Seymour Epstein Enterprises, Inc. and Seymour Epstein, as Officer is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Seymour Epstein Enterprises, Inc. and Seymour Epstein, as Officer is dismissed.

DATED: Troy, New York  
September 12, 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