

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JOHN A. TROSTER, OFFICER OF COMPU DOC, INC.</b>	:	DECISION DTA No. 808795
for Redetermination of a Deficiency/Revision of a Determination or for Refund of Sales and Use Taxes under Article(s) 28 and 29 of the Tax Law for the Period December 1, 1986 through August 31, 1988.	:	

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Petitioner John A. Troster, Officer of Compu Doc, Inc., 22 Claridge Drive, Middletown, New Jersey 07748 filed an exception to the order of the Administrative Law Judge issued on April 11, 1991 with respect to his petition for redetermination of a deficiency/revision of a determination or for refund of sales and use taxes under Article(s) 28 and 29 of the Tax Law for the Period December 1, 1986 through August 31, 1988. Petitioner appeared by Raymond B. Benzinger, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Neither party filed a brief on exception. Petitioner's request for oral argument was denied.

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

***ISSUES***

I. Whether petitioner filed a petition for hearing within ninety days after the issuance of the conciliation order, as prescribed by Tax Law § 170.3-a(e).

II. Whether the Administrative Law Judge must consider that petitioner's representative failed to receive permission to appear on behalf of petitioner until 11 days after the relied upon filing deadline.

***FINDINGS OF FACT***

We find the facts as follows.

On April 2, 1990, 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 July 13, 1990.

By a letter, dated October 2, 1990, petitioner's representative wrote a letter to the Secretary to the Tax Appeals Tribunal requesting permission to appear as petitioner's representative pursuant to the Tax Appeals Tribunal Rules of Practice and Procedure § 3000.2(a)(4). By a letter dated October 22, 1990, the Secretary granted petitioner's representative permission to appear.

Petitioner filed five separate envelopes containing copies of his petition for redetermination of a deficiency/revision of a determination of sales and compensating use taxes for the period December 1, 1986 to August 31, 1988. The petitions were signed by petitioner's representative and dated October 12, 1990. One package sent by Federal Express was received by the Division of Tax Appeals on October 15, 1990. The two envelopes sent by certified mail were postmarked October 12 and October 13, 1990. The two envelopes sent by regular mail were postmarked October 12 and October 13, 1990.

On January 10, 1991, 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 Raymond B. Benzinger for failure to file a timely petition. The Notice stated that the petition was not mailed until October 12, 1990 or 91 days after July 13, 1990, the date the conciliation order was issued.

In response to the Notice of Intent, petitioner's representative submitted a letter to the Division of Tax Appeals challenging the Division of Taxation's jurisdiction over petitioner, and he submitted two affidavits as proof that the petitions were mailed on October 11, 1990 and not October 12, 1990. One affidavit made by petitioner's representative states that the

representative personally observed the placing of one regular mail package and one certified mail package in the United States Postal Service mail box at approximately 4:20 p.m. on October 11, 1990.

A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation. In response, the Division submitted an affidavit and documentary evidence establishing that the conciliation order was sent by certified mail to petitioner on July 13, 1990 at petitioner's last known address at 22 Claridge Drive, Middletown, New Jersey 07748. The affidavit submitted by the Division described the customary office practice in mailing conciliation orders. The documentary evidence consisted of a certified mailing record, listing John A. Troster as an addressee, bearing a postmark of July 13, 1990.

On April 11, 1991, 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 Tax Law § 170.3-a(e). The Administrative Law Judge found that the petition was not mailed until October 12, 1990 or 91 days after the conciliation order was issued on July 13, 1990.

Petitioner filed an exception to the order of the Administrative Law Judge dismissing his petition with the Tax Appeals Tribunal. The exception was postmarked May 10, 1991.

### ***OPINION***

On exception, petitioner asserts that he was never a corporate officer of Compu Doc, Inc., that no proof was offered to show the conciliation order was mailed on July 13, 1990 and that, in fact, petitioner mailed the petition on October 12, 1990. Petitioner also argues that it is inequitable to apply the filing deadlines strictly, given that this Tribunal failed to promptly authorize petitioner's representative to appear on petitioner's behalf.

In response, the Division of Taxation (hereinafter the "Division") argues that it submitted a mailing record and affidavit as proof that the conciliation order was mailed on July 13, 1990. The Division argues that because the petition was postmarked October 12, 1990, it was not

timely filed within the 90 days prescribed by Tax Law § 170.3-a(e), thus, the order dismissing the petition should be affirmed.

We affirm the order of the Administrative Law Judge.

Tax Law § 170.3-a(e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless 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). Petitioner contests the finding of the Administrative Law Judge that the conciliation order was mailed on July 13, 1990, but the record shows that the Division submitted an affidavit which set forth the standard procedure for the issuance of such orders and documentary evidence, the certified mail record, establishing that the procedure was followed in this instance (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; see also, Cataldo v. Commissioner, 60 TC 522, 524). Petitioner failed to submit evidence that the conciliation order was not mailed on July 13, 1990, and we see no reason to disturb the finding of the Administrative Law Judge. Thus, unless petitioner timely filed a petition for hearing within 90 days after July 13, 1990 (i.e., on or before October 11, 1990), petitioner is bound by the conciliation order.

The Tax Appeals Tribunal Rules of Practice and Procedure provide, in pertinent part, that the date of the United States postmark will be deemed to be the date of filing of any mailed document required to be filed under any provision of Article 40 of the Tax Law, and where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed the date of filing (20 NYCRR 3000.16[a][1]). Under these rules, the date of delivery of a document sent by Federal Express is deemed the date of filing (see, Matter of Burks, Tax Appeals Tribunal, July 11, 1991).

Petitioner sent the original petition and two copies to the Division of Tax Appeals in a package via Federal Express and it arrived on October 15, 1990. Because the date of delivery is deemed the date of filing in that situation, that petition arrived four days after the 90 day

deadline. Petitioner also mailed copies of the petition via ordinary United States mail: one envelope was postmarked October 12, 1990 and the other was postmarked October 13, 1990. Under the regulation, these petitions were one and two days late, respectively. Petitioner also used certified mail to send copies of the petition: one envelope was postmarked October 12, 1990, and the other was postmarked October 13, 1990. Respectively, these postmarks indicate that the packages were also one and two days late. Petitioner has not offered a postmarked sender's receipt to establish that these certified mailings were made at any earlier time (see, 20 NYCRR 3000.16[c][2]). Thus, despite his efforts, petitioner failed to meet his October 11, 1990 filing deadline.

Petitioner argues that his two affidavits prove that he mailed the petition on October 11, 1990. Petitioner's argument ignores 20 NYCRR 3000.16(a)(2)(iii) which provides, in pertinent part, that if the date of the postmark stamped by the United States Post Office falls outside of the prescribed period, then the document will not be considered timely filed, regardless of when the document was deposited in the mail. Although petitioner might have placed the envelopes in a mailbox on October 11, 1990, petitioner bore the risk that they would not be postmarked on that day (see, 20 NYCRR 3000.16[a][2][iii]; Matter of Sipam, Tax Appeals Tribunal, March 10, 1988). Neither the statute nor the regulation provides for an extension of the 90 day period when the postmark falls outside the prescribed period (Matter of McNeil, Tax Appeals Tribunal, May 24, 1990). Thus, because petitioner failed to timely file his petition, he is bound by the conciliation order.

Petitioner also asserts that the Division of Tax Appeals received his petition within the time that ordinary mail would normally be received if mailed within the time required, and, therefore, he timely filed his request for hearing. Petitioner's argument confuses two separate provisions under 20 NYCRR 3000.16. Documents postmarked by the United States Postal Service are governed by 20 NYCRR 3000.16(a) and documents not postmarked by the United States Postal Service (i.e., office metered mail) are governed by 20 NYCRR 3000.16(b). Under 20 NYCRR 3000.16(b)(1), a document sent by office metered mail must bear a postmark date

which falls within the prescribed period and must be received not later than the time it would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Office within the prescribed period. However, none of the petitions were sent by office metered mail, and so none of the provisions under 20 NYCRR 3000.16(b) apply. Furthermore, 20 NYCRR 3000.16(a) and (b) both require that the document bear a postmark date that falls within the prescribed period. As outlined above, all of the petitions were postmarked on or after October 12, 1990, i.e., after the prescribed 90 day period.

Finally, petitioner argues that his petition should be deemed timely due to this Tribunal's delay in granting his representative's request for permission to appear as petitioner's representative at the hearing pursuant to 20 NYCRR 3000.2(c). The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170.3-a[e]). Failure to timely file a petition is a jurisdictional defect which cannot be corrected by a continuance or an extension of time (cf., Tax Law § 2006[7] which specifically provides for an extension of the period for filing an exception). Further, there is no reason on record as to why petitioner's representative did not ask for permission to appear as soon as the order was issued, thereby reducing the possibility that the permission might be received after the period to file a petition had elapsed. Finally, petitioner could have signed the petition himself, which would have avoided this problem entirely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John A. Troster, Officer of Compu Doc, Inc., is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of John A. Troster, Officer of Compu Doc, Inc., is denied.

DATED: Troy, New York  
January 16, 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