

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHARISSE & CHRISTINE ENTERPRISES LTD.	:	DECISION
for Redetermination of a Deficiency/Revision	:	DTA No. 809010
of a Determination or for Refund of Sales	:	
and Use Taxes under Article(s) 28 and 29 of	:	
the Tax Law for the Period June 1, 1986	:	
through November 20, 1988.	:	

Petitioner Charisse & Christine Enterprises Ltd., 1750 University Avenue, Bronx, New York 10450 filed an exception to the order of the Administrative Law Judge issued on April 11, 1991 with respect to its 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 June 1, 1986 through November 20, 1988. Petitioner appeared by Sanford B. Goldberg, 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.

ISSUE

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

FINDINGS OF FACT

We find the facts as follows.

On October 12, 1989, the Bureau of Conciliation and Mediation Services (hereinafter "BCMS") held a conciliation conference upon the request of petitioner.

As a result of this conference, the BCMS issued a conciliation order to petitioner dated January 19, 1990.

On October 26, 1990, petitioner mailed a petition for redetermination of a deficiency/revision of a determination or for refund of sales and use taxes which was received by the Division of Tax Appeals on November 1, 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, Sanford B. Goldberg, for failure to file a timely petition. The Notice stated that the petition was not filed until October 26, 1990, or 280 days after January 19, 1990.

A response to the Notice of Intent to Dismiss Petition was received from petitioner on February 8, 1991 stating that it was petitioner's position that a timely petition had been filed. A copy of the Notice was also sent to the Division of Taxation (hereinafter the "Division"). In response, the Division submitted an affidavit and documentary evidence, a certified mailing record bearing a postmark of January 19, 1990, establishing that the conciliation order was mailed to petitioner on January 19, 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 section 170(3-a)(e) of the Tax Law. The Administrative Law Judge found that the petition was not mailed by petitioner until October 26, 1990, or 280 days after the conciliation order was issued to petitioner on January 19, 1990.

On May 13, 1991, 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 January 19, 1990. Petitioner has not challenged that finding. Further, the affidavit and the copy of the certified mailing record 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 January 19, 1990.

On exception, petitioner argues that a timely petition was mailed on February 21, 1990 and has enclosed a copy of this petition. However, the Division of Tax Appeals has no record of this petition being filed on behalf of petitioner. The petition filed by petitioner on October 26, 1990 is the first petition received by the Division of Tax Appeals for this taxpayer. Furthermore, petitioner has not submitted any evidence (e.g., a receipt of timely mailing by certified or registered mail) that the petition it alleges was timely filed was, in fact, filed within 90 days after January 19, 1990 (see, Matter of Messinger, Tax Appeals Tribunal, March 16, 1989).

As stated above, the petition filed by petitioner on October 26, 1990 was the first petition received by the Division of Tax Appeals from petitioner. This petition was not filed within 90 days of the issuance of the conciliation order and is, therefore, untimely. Without a timely petition having been filed, this Tribunal has no jurisdiction over the petition and cannot act on it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Charisse & Christine Enterprises Ltd. is denied;

2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Charisse & Christine Enterprises Ltd. is dismissed with prejudice.

DATED: Troy, New York
December 5, 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