

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SEBASTIAN GIORDANO, OFFICER OF IPCO CORPORATION	:	DECISION DTA No. 812198
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 June 1, 1988 through November 30, 1991.	:	

Petitioner Sebastian Giordano, Officer of IPCO Corporation, 149 Schweitzer Lane, Bardonia, New York 10954-2031, filed an exception to the order of the Administrative Law Judge issued on November 4, 1993. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation submitted a letter stating it would not be filing a brief which was received on February 3, 1994 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioner timely filed a petition for redetermination of a deficiency.

FINDINGS OF FACT

We find the following facts.

The Bureau of Conciliation and Mediation Services (hereinafter "BCMS") of the Department of Taxation and Finance issued a Conciliation Order (CMS # 127047), dated May 14, 1993, to petitioner sustaining the statutory notice (Notice No. L006156895). Petitioner filed the petition in which he challenged the order of the conciliation conferee by Express Mail

and said envelope bears a United States Postal Service postmark of August 14, 1993. This petition was indate stamped as received by the Division of Tax Appeals on August 16, 1993.

On September 23, 1993, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss the Petition in this matter as untimely. This Notice advised that, pursuant to section 170(3-a)(e) of the Tax Law, a petition must be filed within 90 days from the date a Conciliation Order is issued and that the petition in this matter was not mailed until August 14, 1993, or 92 days later. The parties were given 30 days within which to submit their written comments in response to this Notice. Petitioner did not respond. The Division responded by letter dated October 12, 1993 and submitted the following documents in response to the Notice of Intent to Dismiss.

1. An affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences in the BCMS of the Department of Taxation and Finance. This affidavit sets forth the routine procedures followed in the ordinary course of business of the BCMS in the preparation and mailing of conciliation orders (hereinafter "the Chyrywaty affidavit"). Attached to this affidavit are two exhibits denominated "A" and "B." Exhibit "A" consists of a one-page certified mail record of the BCMS, bearing the date of May 14, 1993. Exhibit "B" is a one-page Conciliation Order dated May 14, 1993 in the Matter of Sebastian Giordano, Officer of IPCO Corporation.

The Chyrywaty affidavit states that all conciliation orders are mailed by certified mail. BCMS prepares and maintains Certified Mail Records ("CMR's") which are a listing of taxpayers to which conciliation orders are sent by certified mail on a particular day.

As part of the regular procedure of preparing conciliation orders for mailing, a clerk in BCMS verifies the names and addresses of taxpayers who are listed on the CMR. A certified mail control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer. The clerk records on the CMR the certified control number from each envelope next to the appropriate taxpayer's name.

Each page of the CMR is a separate and individual CMR for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender," and the "Total Number of Pieces Received at Post Office." There is also a space on each individual CMR for the receiving postal employee to sign in acknowledging receipt. After being signed by the postal employee and having the postmark for the particular date affixed to the CMR, it is returned to BCMS and maintained in the regular course of business as a permanent record.

2. An affidavit of Daniel B. Lafar, Principal Mail and Supply Clerk with the Department of Taxation and Finance (hereinafter "the Lafar affidavit"). Mr. Lafar is fully familiar with the operation and procedures of the Mail and Supply Room ("the Mail Room"). Mr. Lafar's duties include the supervision of Mail Room staff in delivering outgoing Department mail to branch offices of the United States Postal Service. Mr. Lafar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the Mail Room in the regular course of business, and which were followed in particular, on May 14, 1993.

As part of these procedures, when conciliation orders are placed in the "Outgoing Certified Mail" basket in the Mail Room, each envelope is weighed, sealed and postage and fees are affixed. Postage and fee amounts are then recorded on the CMR. A Mail Room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the Mail Room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. A postal employee then affixes his or her signature and/or a postmark to the certified mail record acknowledging receipt by the post office of the items of certified mail recited therein. After the CMR has been signed and/or stamped by the United States Postal Service it is returned to the originating office of the Department of Taxation and Finance.

The one-page CMR attached as Exhibit "A" of the Chyrywaty affidavit shows the addressees of conciliation orders mailed on May 14, 1993. The certified control numbers on the

CMR run consecutively.¹ This CMR shows that an envelope bearing certified control number P229446220 was addressed to Sabastian Giordano Officer of IPCO Corporation, 149 Schweitzer Lane, Bardonia, NY 10954-2031. This CMR also shows that 15 items of mail containing conciliation orders were delivered to the United States Postal Service for certified mailing. The CMR bears a May 14, 1993 postmark affixed by the Roesseville Branch of the United States Postal Service and contains the signature of the postal employee acknowledging the receipt and acceptance of the items of certified mail recited therein.

The Lafar affidavit affirms that on May 14, 1993, an employee of the Mail Room delivered 15 sealed postpaid envelopes for delivery by certified mail to the Roesseville Branch of the United States Postal Service, in Albany, New York. These envelopes included certified mail (bearing Certified No. P229446220) addressed to petitioner at 149 Schweitzer Lane, Bardonia, NY 10954-2031.

OPINION

Pursuant to section 170(3-a)(e) of the Tax Law, a petition must be filed with the Division of Tax Appeals within 90 days from the date a Conciliation Order is issued.

The Rules of Practice and Procedure of the Tax Appeals Tribunal for the Division of Tax Appeals provide, in pertinent part, that the date of the United States Postal Service 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. The petition, which was mailed by Express Mail, bears a United States Postal Service postmark of August 14, 1993. As noted earlier, under the Tax Appeals Tribunal's rules of practice, the date of the United States Postal Service postmark stamped on the envelope is deemed the date of filing. Accordingly, this petition was filed on August 14, 1993.

Petitioner argues that "a personal family illness -- OUT OF STATE -- prevented response by 2 days past deadline indicated by State" and, further, the "[r]esponse was filed within 90 days

¹Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

of receipt of letter" (Petitioner's exception, p. 1).

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]). August 12, 1993 was the last day petitioner could timely file a petition with the Division of Tax Appeals. Since the petition was filed August 14, 1993, the petition was not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sebastian Giordano, Officer of IPCO Corporation is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Sebastian Giordano, Officer of IPCO Corporation is dismissed.

DATED: Troy, New York
June 16, 1994

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

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