

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARO LUNCHEONETTE, INC.	:	DECISION
for Redetermination of a Deficiency/Revision	:	DTA No. 813605
of a Determination or for Refund of Sales and	:	
Use Taxes under Article(s) 28 and 29 of the	:	
Tax Law for the Period March 1, 1991 through	:	
November 30, 1991.	:	

Petitioner Maro Luncheonette, Inc., 46 West Old Country Road, Hicksville, New York 11801, filed an exception to the order of the Administrative Law Judge issued on May 11, 1995. Petitioner appeared by John P. Bagattine, EA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter stating it would not be filing a brief on August 4, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

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

FINDINGS OF FACT

We find the facts as follows.

On November 4, 1994, the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request to petitioner and its representative.

Petitioner filed a petition for revision of a determination of sales and use tax for the period March 1, 1991 through November 30, 1991. The petition was delivered to the Division of Tax Appeals by UPS on February 3, 1995.

On March 9, 1995, 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 John P. Bagattine for failure to file a timely petition. The Notice stated that the petition was not filed until February 3, 1995 or 91 days after the issuance of the Conciliation Order Dismissing Request on November 4, 1994.

No response was received from petitioner to this Notice.

A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation (hereinafter the "Division"). In response, the Division submitted affidavits and documentary evidence establishing that the Conciliation Order Dismissing Request was sent by certified mail to petitioner on November 4, 1994 at petitioner's last known address at Old Lighthouse Road, 46 West Old Country Road, Hicksville, New York 11801-4002 and to petitioner's representative John P. Bagattine, EA at 1650 Sycamore Avenue, Suite 41, Bohemia, New York 11716. The affidavits submitted by the Division described the customary office practice in preparing and mailing conciliation orders. The documentary evidence consisted of a certified mailing record which lists on page one Maro Luncheonette, Inc. and John P. Bagattine, EA as addressees and bears a postmark of November 4, 1994. At the bottom of page one, the page listing petitioner and its representative as the addressees, the number "14" has been filled in as the "Number of Pieces Listed by Sender," and the number "14" has also been filled in as the "Total Number of Pieces Received at Post Office." The page also contains a postal employee's signature further verifying receipt at the post office.

On May 11, 1995, 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 filed until February 3, 1995 or 91 days after the Conciliation Order Dismissing Request was issued on November 4, 1994.

Petitioner filed an exception to the order of the Administrative Law Judge dismissing its petition with the Tax Appeals Tribunal.

OPINION

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.

When the timeliness of the petition is at issue, the Division must establish proper mailing of the Conciliation Order. We find that the Division has met its burden to establish proper mailing of the Conciliation Order Dismissing Request to petitioner on November 4, 1994 by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter.

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 Article 40 of the Tax Law. Where the delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed the date of filing (20 NYCRR 3000.22[a]). Therefore, the date of delivery of a document sent by UPS is deemed the date of filing (see, Matter of Trans County Constr., Tax Appeals Tribunal, August 24, 1995; Matter of Madison Business Forms, Tax Appeals Tribunal, October 29, 1992; Matter of Troster, Tax Appeals Tribunal, January 16, 1992; Matter of Burks, Tax Appeals Tribunal, July 11, 1991).

On exception, petitioner argues that reasonable cause existed for the one day miscalculation in filing the petition. Petitioner's representative states that due to an office move, "many of my files and scheduled communications were difficult to attend to and consequently forgotten" (Exception, p. 2).

We affirm the order of the Administrative Law Judge. The Conciliation Order Dismissing Request was issued to petitioner on November 4, 1994. The petition in this matter was not filed until February 3, 1995, or 91 days later. Therefore, the petition was not timely filed within the 90-day period. Petitioner's reason for filing his petition late does not empower us to waive the 90-day time period for filing a petition. With respect to the copies of cancelled checks petitioner

submitted with its petition, if these checks do, in fact, apply to this assessment, petitioner may present them to the Division's Tax Compliance Bureau for verification of payment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Maro Luncheonette, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Maro Luncheonette, Inc. is dismissed with prejudice.

DATED: Troy, New York
February 1, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner