

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DAVID C. SLOANE : DECISION
for Redetermination of a Deficiency/Revision of a : DTA No. 814241
Determination or for Refund of Sales and Use Taxes :
under Articles 28 and 29 of the Tax Law for the Period :
August 31, 1983 through November 30, 1984. :

Petitioner David C. Sloane, 203 East Maple Avenue, Newark, New York 14513, filed an exception to the order of the Administrative Law Judge issued on October 30, 1995. Petitioner appeared pro se. 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 submitted a letter stating no brief in opposition would be filed which was received on December 29, 1995. This date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

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 May 12, 1995, the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request to petitioner.

Petitioner filed a petition for revision of a determination of sales and use tax for the period August 31, 1983 through November 30, 1984. The petition was received by the Division of Tax

Appeals on August 16, 1995. The envelope containing the petition bears a United States Postal Service postmark of August 14, 1995.

On September 21, 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 for failure to file a timely petition. The Notice stated that the petition was not filed until August 14, 1995 or 94 days after the issuance of the Conciliation Order Dismissing Request on May 12, 1995.

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 May 12, 1995 at petitioner's last known address at 203 East Maple Avenue, Newark, New York 14513. 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 three David C. Sloane as addressee and bears a postmark of May 12, 1995. At the bottom of page three, the page listing petitioner as the addressee, the number "15" has been filled in as the "Number of Pieces Listed by Sender," and the number "15" 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 October 30, 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 August 14, 1995 or 94 days after the Conciliation Order Dismissing Request was issued on May 12, 1995.

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 May 12, 1995 by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter.

On exception, petitioner admits that he filed his petition late as he mistakenly used the date he received the forms to start the filing period. Petitioner also states that his intent in filing this exception is to reach a payment agreement he can live with.

We affirm the order of the Administrative Law Judge. The Conciliation Order Dismissing Request was issued to petitioner on May 12, 1995. The petition in this matter was not filed until August 14, 1995, or 94 days later. Therefore, petitioner's petition was not timely filed within the 90-day period.

With respect to petitioner's wish to reach a payment agreement, we have no authority to address this issue. Petitioner may contact the Division's Tax Compliance Bureau in an attempt to reach an agreement.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of David C. Sloane is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of David C. Sloane is dismissed with prejudice.

DATED: Troy, New York
April 25, 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