

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>WARD SALES COMPANY, INC.</b>	:	DECISION
for Redetermination of a Deficiency/Revision	:	DTA No. 815271
of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period September 1, 1991 through	:	
November 30, 1994.	:	

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Petitioner Ward Sales Company, Inc., 1117 West Fayette Street, Syracuse, New York 13204-2701, filed an exception to the order of the Administrative Law Judge issued on November 14, 1996. Petitioner appeared pro se by its president, Richard Hayko. 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 that it would not be filing a brief in opposition. 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 following facts.

A conciliation conference was held in the above matter on April 4, 1996 and by Conciliation Order (CMS No. 151212), dated May 24, 1996, petitioner's request was denied and the statutory notice sustained.

Petitioner filed a petition for revision of a determination of sales and use tax for the period September 1, 1991 through November 30, 1994. The petition was received by the

Division of Tax Appeals on August 29, 1996. The envelope containing the petition bears a United States Postal Service postmark of August 27, 1996.

On September 12, 1996, 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 27, 1996 or 95 days after the issuance of the Conciliation Order dated May 24, 1996. Following the issuance of the Notice of Intent to Dismiss Petition, the parties were given 30 days to respond. Petitioner's president responded by a letter dated October 11, 1996. In this letter, he stated that he has no proof that the petition was filed on or before August 22, 1996. In addition, he stated that he believed the petition was due 90 days after he received the TA-10 forms.

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 was sent by certified mail to petitioner on May 24, 1996 at petitioner's last known address at 1117 West Fayette Street, Syracuse, New York 13204-2701. 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 two Ward Sales Company, Inc. as addressee and bears a postmark of May 24, 1996. At the bottom of page two, the page listing petitioner as the addressee, the number "12" has been filled in as the "Total Number of Pieces Listed by Sender," and the number "12" 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 November 14, 1996, 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 27, 1996 or 95 days after the Conciliation Order was issued on May 24, 1996.

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

***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 to petitioner on May 24, 1996 by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this matter.

On exception, petitioner repeats his argument below that he misinterpreted the filing date for a hearing. Petitioner's remaining arguments on exception are not relevant to the issue of timeliness of the petition.

We affirm the order of the Administrative Law Judge. The Conciliation Order was issued to petitioner on May 24, 1996. The petition in this matter was not filed until August 27, 1996, or 95 days later. Therefore, petitioner's petition was not timely filed within the 90-day period and the Division of Tax Appeals lacks jurisdiction to review it (Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ward Sales Company, Inc. is denied;

2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Ward Sales Company, Inc. is dismissed with prejudice.

DATED: Troy, New York  
May 15, 1997

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner