

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CONSOLIDATED BEVERAGE CORP.</b>	:	DECISION
for Revision of a Notice of Increase in Amount of Bond	:	DTA No. 815459
or Other Security Required to be Filed under Article 18	:	
of the Tax Law for the Period October 31, 1996.	:	

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Petitioner Consolidated Beverage Corp., 235 West 154th Street, New York, New York 10039, filed an exception to the Order Dismissing Petition issued by the Administrative Law Judge on January 9, 1997.<sup>1</sup> Petitioner appeared by Albert N. Thompson, President of Consolidated Beverage Corp. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, 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 the Tax Appeals Tribunal has jurisdiction to address the merits of a petition that was not filed with the Division of Tax Appeals within seven days of the date of the Notice of Increase in Amount of Bond or Other Security Required to be Filed.

***FINDINGS OF FACT***

We find the following facts.

The Notice of Increase in Amount of Bond or Other Security Required to be Filed was mailed to petitioner on October 31, 1996 at petitioner's last known address at 235 West 154th

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<sup>1</sup>While the Order Dismissing Petition is date stamped "JAN 09 1996," this was apparently a clerical error. The affidavit of mailing and the cover letter to the petition each bear the correct date of "January 9, 1997."

Street, New York, New York 10039.

The petition protesting the notice was not filed with the Division of Tax Appeals until November 14, 1996.

In the Notice of Increase in Amount of Bond or Other Security Required to be Filed, the Division of Taxation informed petitioner that failure to file the increase in its security from \$20,000.00 to \$160,000.00 within 30 days of the date of the notice may result in cancellation of its registration as a New York State Alcoholic Beverage Distributor under Tax Law § 422. The Division of Taxation further stated in bold type that petitioner had the right to protest this increase within seven days of the date of the notice and that such timely protest is the only opportunity it would have to protest the increase in the security.

The Division of Tax Appeals informed petitioner by Notice of Intent to Dismiss Petition, dated November 20, 1996, that it intended to dismiss the petition filed on November 14, 1996 because it was not filed within seven days from the date the Notice of Increase in Amount or Other Security Required to be Filed was issued, as required by Tax Law § 283(6)(b)(ii). The Division of Tax Appeals permitted the parties 30 days from the date of the Notice of Intent to Dismiss to submit written comments on the proposed dismissal.

In response to the Notice of Intent to Dismiss, the Division of Taxation submitted a certified mail record, affidavits from Peter J. Spitzer and James Baisley, employees of the Division of Taxation, explaining the mailing procedures in issuing Notices of Increase in Amount of Bond and Other Security Required to be Filed, and a copy of the certified mail record indicating that a Notice was mailed to petitioner on October 31, 1996 and delivered to petitioner on November 4, 1996 at 235 West 154th Street, New York, New York 10039.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge issued an Order Dismissing Petition, dated January 9, 1997, stating that after a review of the file in the proceeding, he concluded that the petition was not filed, as prescribed by section 283(6)(b)(ii) of the Tax Law, within seven days from October 31, 1996, the date that the Notice of Increase in Amount of Bond and Other Security

was mailed to petitioner.

***ARGUMENT ON EXCEPTION***

Petitioner states that it does not disagree with the Administrative Law Judge's finding that the petition was not filed within seven days after October 31, 1996 as prescribed by Tax Law § 283(6)(b)(ii); that it disagrees with the original conclusion of the review which indicated that an increase in security from \$20,000.00 to \$160,000.00 is required for the continued registration of it as a distributor of alcoholic beverages; and that it disagrees with the Administrative Law Judge's action of not reviewing the relevant facts contained in the petition before dismissing the petition on the ground that it was not filed in a timely manner.

***OPINION***

We affirm the determination of the Administrative Law Judge.

Petitioner agrees that it did not file a timely petition with the Division of Tax Appeals as prescribed by Tax Law § 283(6)(b)(ii) but contends that the Administrative Law Judge should have addressed the merits of the increase in security imposed by the Division of Taxation notwithstanding the untimely petition.

Tax Law § 423 provides that all the provisions of subdivisions four through six of section 283 of the Tax Law relating to registration of distributors of motor fuel shall be applicable to the registration of distributors of alcoholic beverages. Tax Law § 283(6)(b)(ii) in turn provides that a registrant, who is protesting an increase in the amount of the bond or other security, must apply to the Division of Tax Appeals for a hearing within seven days of the day that the Division of Taxation gives the registrant notice of the increase. Absent a timely petition filed with the Division of Tax Appeals in the first instance, the Tax Appeals Tribunal has no jurisdiction to address the merits of petitioner's assertions that the Division of Taxation erroneously increased the security to be filed by petitioner (*see, Matter of Batavia Coal & Oil*, Tax Appeals Tribunal, February 2, 1995).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Consolidated Beverage Corp. is denied;

2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Consolidated Beverage Corp. is dismissed.

DATED: Troy, New York  
August 28, 1997

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Donald C. DeWitt  
President

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Carroll R. Jenkins  
Commissioner

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Joseph W. Pinto, Jr.  
Commissioner