

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
HOWARD AND NANCY POWERS : DETERMINATION  
D/B/A VILLAGE PINE SHOP :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1979 :  
through February 28, 1987. :

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Petitioners, Howard and Nancy Powers, d/b/a Village Pine Shop, R.D. #5, Montrose, Pennsylvania 18801, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through February 28, 1987 (File No. 804958).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 164 Hawley Street, Binghamton, New York, on June 12, 1990 at 1:15 P.M., with additional evidence submitted by September 13, 1990. Petitioner appeared by Joel A. Scelsi, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether a petition protesting certain notices of determination and demands for payment of sales and use taxes due was timely filed.

FINDINGS OF FACT

On May 14, 1987, the Division of Taxation mailed to petitioners, Howard and Nancy Powers d/b/a Village Pine Shop, four notices of determination and demands for payment of sales and use taxes due which, together, assessed \$69,919.08 in tax due, plus penalty and interest, for the period December 1, 1979 through February 28, 1987. One of the notices in issue assessed penalties only, so-called omnibus penalties, for the period June 1, 1985 through

February 28, 1987.

The four notices in question were mailed by the Division on May 14, 1987 by U.S. Postal Service certified mail, return receipt requested, to petitioners at the following address:

"Howard & Nancy Powers T/A  
Village Pine Shop  
R.D. #5  
Montrose, PA 18801"

The return receipt card associated with the envelope containing the four notices of determination mailed to petitioners indicates receipt of said envelope at the address listed above by a Renee Powers on May 15, 1987.

Although the four notices of determination herein were mailed on May 14, 1987, each indicated "05 20 87" as the "Date of Notice".

A petition protesting the four notices of determination herein was received by the former Tax Appeals Bureau on August 25, 1987. The envelope in which the petition was mailed bore a machine metered postmark of August 19, 1987. Said envelope also indicated that the petition was mailed via certified mail. The envelope contained no U.S. Postal Service postmark. The petition itself was dated August 15, 1987 and was signed by petitioner's then-representative, Joseph Garbarino.

The certified mail receipt associated with the petition contained the following handwritten marking:

"8/18/87  
Petition to NYS  
Howard & Nancy Powers"

The certified mail receipt contained no U.S. Postal Service stamp of any kind.

CONCLUSIONS OF LAW

A. During the period at issue, Tax Law § 1138(a)(1) provided that a properly issued notice of determination finally and irrevocably fixed the tax assessed unless, within 90 days of the giving of notice of such determination, the person against whom such notice was assessed applied to the former State Tax Commission for a hearing.

B. The general rule with respect to the filing of petitions is one of physical delivery; the petition must be actually filed within 90 days as required by Tax Law § 1138(a)(1). Where mail is used to accomplish this filing specific rules apply. In the instant matter the envelope in which the petition was mailed bore only a machine metered postmark. It bore no U.S. Postal Service postmark. Where, as here, the envelope containing a petition bears only a machine metered postmark, such postmark must bear a date which falls within the 90-day period in order for the petition to be considered timely (Matter of Harron's Electric Service, Inc., Tax Appeals Tribunal, February 19, 1988; 20 NYCRR 535.1 former [b][2]; see also 20 NYCRR 3000.16[b]).

C. Pursuant to the foregoing mailing rules it must be concluded that the petition herein was untimely. Tax Law § 1147(a)(1) provides that "any period of time which is determined according to the provisions of [Article 28] by the giving of notice shall commence to run from the date of mailing of such notice." In the instant matter the parties dispute the date from which the 90-day period should have commenced to run. The Division contends that the date of mailing should be the starting point. Petitioner contends that the starting point should be the date set forth on the notices. Since using either date leads to the same result it is unnecessary to choose between these two dates. The notices herein were mailed on May 14, 1987. Using this date as the starting point the last day for filing of a petition would have been August 12, 1987. The date set forth on the notices is May 20, 1987. Using May 20 as the date of "the giving of notice", the last day for the filing of a petition would be August 18, 1987. The machine metered

postmark herein is dated August 19, 1987. Thus, using either May 14 or May 20 as a starting point results in a finding that the machine metered stamp on the envelope falls outside the 90-day period for the filing of petitions. The petition herein must, therefore, be dismissed.

D. Petitioner contended that the envelope containing the petition was actually mailed on August 18, 1987. Petitioners' former representative, who signed the petition, testified as to the mailing practices in his office. He testified that, pursuant to such mailing practices, documents to be mailed via certified mail would be taken to the post office for mailing. No testimony was presented as to the mailing of the specific document in question. Petitioners also introduced a statement of a postal employee to the effect that he (the employee) often signed certified mail receipts for petitioners' former representative "when there was certified mail left in the outgoing mail". This apparently contradictory evidence, i.e. certified mail taken to the post office per the former representative's testimony and picked up at the office per the postal employee's statement, is clearly insufficient to prove that the petition was mailed on August 18, 1987. Moreover, the statement that the postal employee signed certified mail receipts is woefully inadequate to show that a postal employee dated the certified mail receipt introduced herein. In the absence of a U.S. Postal Service postmark on the certified mail receipt, the mailing rules for certified mail do not apply (see 20 NYCRR 535.1 former [b][3]).

E. The petition of Howard and Nancy Powers d/b/a Village Pine Shop is dismissed.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE