

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PMG SERVICES, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 819195
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 1997 through May 31, 1997. :

Petitioner, PMG Services, Inc., 150 Varick Street, 6th Floor, New York, New York 10013, 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 March 1, 1997 through May 31, 1997.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on August 21, 2003 at 10:45 A.M. Petitioner appeared by Perlson, Touhy & Co., LLP (Mark Perlson, CPA). The Division of Taxation appeared by Mark F. Volk, Esq. (Frank Grillo).

Since neither party elected to reserve time to file a brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether the Division of Taxation properly denied petitioner's application for credit or refund on the basis that the application was not filed within the statute of limitations for refund as provided for in Tax Law § 1139.

FINDINGS OF FACT

1. Petitioner herein, PMG Services, Inc. ("PMG"), is a small direct mail printing broker employing two to three people at its sole office located at 150 Varick Street, New York, N.Y. PMG is a registered vendor for purposes of collecting and remitting New York State and local sales and use taxes imposed under Articles 28 and 29 of the Tax Law.

2. Petitioner is required to file its New York State and local sales and use tax returns on a quarterly basis, and for the one period at issue in this proceeding, March 1, 1997 through May 31, 1997, petitioner filed its sales tax return on or before the June 20, 1997 prescribed due date. PMG's sales tax return for the quarter in dispute reported gross sales of \$456,700.00, taxable sales of \$127,235.00 and a tax due of \$10,420.57. Petitioner paid the tax due of \$10,420.57 at the time the return was filed.

3. On July 9, 1997, PMG received a letter from one of its customers, AT&T, which stated the following:

Pursuant to a change in the tax law effective on March 1, 1997 New York State no longer taxes promotional materials and related activities. Accordingly, the printing, storage and delivery of letters, flyers, envelopes and other types of promotional materials into New York State from another state is no longer subject to tax.

The letter requested that petitioner refund the sales tax it had collected from AT&T as reflected on two invoices, PMG 0543 in the sum of \$5,218.13 and PMG 0565 in the amount of \$3,221.29. On August 25, 1997, AT&T forwarded to PMG a blanket exempt use certificate which reported that 100% of promotional materials would be distributed to customers or prospective customers located outside New York State for use outside the State. On August 29, 1997, petitioner issued a check to AT&T in the sum of \$8,439.42 for the sales tax it had collected from AT&T on invoices PMG 0543 and PMG 0565. Petitioner also issued refunds to

its other customers for the sales tax that it had erroneously collected from them for the quarter ending May 31, 1997.

4. On or before September 11, 1997, petitioner's accountant prepared an amended return for the quarter ending May 31, 1997 indicating that PMG had no taxable sales for this quarter. The amended return requested a refund of the \$10,420.57 that PMG had paid to the Division of Taxation ("Division") for the period at issue since it had already refunded such amount to its customers. The amended return was faxed by the accountant to petitioner on September 11, 1997, and petitioner's president promptly signed and dated the amended return on September 11, 1997.

5. The record contains a copy of a letter dated September 11, 1997 from petitioner's accountant which states that enclosed therein was the amended return requesting a refund of \$10,420.57 for the quarter ending May 31, 1997. The September 11, 1997 letter was addressed to "New York State Department of Taxation & Finance, JAF Building, P.O. Box 1205, New York, NY 10116-1205," which is the same address to which petitioner mailed its sales and use tax returns. The letter and amended return were purportedly mailed by first class mail on or about September 11, 1997.

6. Approximately one year later petitioner's accountant, on September 16, 1998, drafted a follow-up letter addressed to "NYS Sales Tax Processing, P.O. Box 1205, New York, NY 10116" indicating that "we filed an amended return for the period ended May 31, 1997 a copy of which is attached. The reason for the amended return was that my client charged taxes during this period to its clients and subsequently returned the tax to its clients." The follow-up letter, like the first letter and amended return, was mailed by first class mail. A third letter dated June 19, 2000, which contained the same statements as the September 16, 1998 letter, was again sent

by first class mail and addressed to “NYS Sales Tax Processing, P.O. Box 1205, New York, NY 10116.”

7. In the summer of 2000, petitioner’s accountant, while representing another client in a field audit matter, met Ms. Laura Liberio, a sales tax auditor from the Division’s Syracuse District Office. During the course of this audit, petitioner’s accountant asked for Ms. Liberio’s assistance in resolving PMG’s refund request for the period at issue. A fourth letter, dated September 18, 2000 and again addressed to “New York State Department of Taxation & Finance, JAF Building, P.O. Box 1205, New York, NY 10116-1205,” was sent wherein petitioner’s accountant indicated that “we have filed an amended sales tax return for the quarter ended May 31, 1997 twice,¹ the first in 1997 and the second time in early 2000. My client has never received a refund or any correspondence from your office regarding the return.” Petitioner’s accountant sent copies of the September 18, 2000 correspondence to Ms. Liberio along with a handwritten note asking for her help. On March 28, 2001, Ms. Liberio sent a handwritten note to petitioner’s accountant indicating that she could not “find any movement towards a refund for your client, PMG Services, on our system. I would send the same info to the address below. . . .”

8. On July 6, 2001, petitioner mailed an Application for Credit or Refund of Sales or Use Tax to “NYS Tax Department, Sales Tax Audit Bureau, W A Harriman Campus, Albany, NY 12227” requesting a refund of \$10,420.57. The application, which was received on July 9, 2001 and included copies of all prior correspondence, indicated that “we’ve been trying for 4 years to have this resolved.”

¹ This letter is apparently in error since there were three letters, September 11, 1997, September 16, 1998 and June 19, 2000, sent regarding this matter.

9. On November 13, 2001, the Division denied petitioner's claim for refund in full for the following reasons:

Upon search of your records, we can not find any indication that an amended return was filed three years ago as you state in your letter.

The Sales and Use Tax Law requires that a refund be made within three years from the date the taxes are payable to the Tax Department. Sales tax is deemed to be payable on the 20th day of the month following the quarter in which the sale/purchase was made. Your claim was filed on 07/09/01. Based on the three year statute of limitations, your claim can include periods beginning on 06/01/98. Tax payable prior to that date can not be refunded.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner maintains that its actions support a finding that the amended return for the quarter ending May 31, 1997 was filed within the applicable statute of limitations for refund on at least three separate occasions. Petitioner points to the fact that there is no dispute concerning its entitlement to the refund; that the amount of refund represents a significant sum of money and that at all times its president and accountant were keenly aware of and followed up on the status of the amended return; that there is no logical reason why it would not have mailed the amended return on the three occasions when cover letters were drafted indicating that the amended return was enclosed; that the documentary evidence it adduced at hearing is sufficient to establish that the amended return was in fact timely filed; and that given the circumstances herein it would be unfair and inequitable not to grant the refund as requested.

11. The Division asserts that it has no record of ever receiving the amended return purportedly mailed on September 11, 1997, September 16, 1998 and June 19, 2000. The Division argues that a claim for refund was first received on July 9, 2001 when PMG filed the Application for Credit or Refund of Sales or Use Tax and that this date is clearly beyond the statute of limitations for refund.

CONCLUSIONS OF LAW

A. Tax Law § 1139 provides that a claim for credit or refund of sales tax must be filed within three years of the date the tax was payable (Tax Law § 1139[a]) or within three years of the date the return was filed or two years from the time the tax was paid, whichever of such periods expires the later (Tax Law § 1139[c]). There is no dispute in the instant matter that a claim for credit or refund of the \$10,420.57 paid for the quarter ended May 31, 1997 was required to be filed on or before June 20, 2000. Petitioner does not dispute that the Application for Credit or Refund of Sales or Use Tax received by the Division on July 9, 2001 was filed after the statute of limitations for refund expired; however, it contends that it filed an amended return claiming the \$10,420.57 refund in a timely manner on at least three separate occasions. Thus, the issue to be resolved herein is whether PMG filed the amended return on or before the June 20, 2000 deadline.

B. Tax Law § 1139(a) requires that an application for credit or refund “shall be in such form as the tax commission[er] shall prescribe.” Regulation 20 NYCRR 534.2(a)(2)(ii) requires that “all applications for refunds or credits of sales and use taxes are to be filed with the Central Office Audit Bureau, Sales Tax Section, Building 9, W.A. Harriman Campus, Albany, NY 12227.”

As relevant to this proceeding, Tax Law § 1147(a)(2) states that when an application which is required to be filed on or before a prescribed date is “delivered by United States mail to the . . . bureau . . . with which or with whom such document is required to be filed . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.” Tax Law § 1147(a)(2) further provides that “if any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the . . .

bureau . . . to which or to whom addressed.” Regulation 20 NYCRR 2399.2(b)(2) also permits the use of United States certified mail and treats the date of the postmark on the sender’s receipt for certified mail as the date of filing.

C. Although there is no reason to doubt that petitioner’s accountant mailed the amended return as alleged on September 11, 1997, September 16, 1998 and June 19, 2000, the fact that the Division failed to receive said amended return leads to the conclusion that petitioner did not timely file an application for credit or refund within the time period specified in Tax Law § 1139. In reaching this conclusion, it is noted that it was petitioner who erroneously collected sales tax from its customers in the first place when none was due; that all three amended returns were mailed to the wrong address and thus PMG failed to comply with 20 NYCRR 534.2(a)(2)(ii); that petitioner chose to mail the amended returns by first class mail and thus it has no proof of delivery; and, finally, that petitioner, while aware that the statute of limitations for refund was running, did not follow up on the status of the amended return with even so much as a telephone call but instead merely continued to mail copies of the amended return to the wrong address. While I sympathize with petitioner, it must be noted that PMG was the one who failed to comply with the requirements of the Tax Law and regulations in filing the claim for refund and therefore I do not believe that the principles of fairness and equity mandate a determination in petitioner’s favor.

D. The petition of PMG Services, Inc. is denied and the Division’s letter dated November 13, 2001 denying petitioner’s claim for refund in full is sustained.

DATED: Troy, New York
November 20, 2003

/s/ James Hoefler
PRESIDING OFFICER