

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
EDWARD J. LYNCH : DECISION  
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, 1977 :  
through August 31, 1979.

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Petitioner, Edward J. Lynch, 30-13 42nd Street, Astoria, New York, 11103, 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, 1977 through August 31, 1979 (File No. 49291).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 2, 1984 at 2:45 P.M. Petitioner appeared by James A. Fuery, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether a petition for a hearing was timely filed.

FINDINGS OF FACT

1. On September 7, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, numbered S820907402Q, against petitioner, Edward J. Lynch, assessing a tax due of \$3,320.40 plus penalty and interest for the period December 1, 1977 through August 31, 1979.

2. By letter of November 1, 1983, the Tax Appeals Bureau notified petitioner that his September 1, 1983 protest letter was late, having been filed beyond 90 days from the date of the Notice of Determination and Demand for

Payment of Sales and Use Taxes Due. The Tax Appeals Bureau's letter actually referred to the date of mailing of the September 1 letter which was September 2, 1983.

3. Petitioner's September 1, 1983 letter was prepared by James A. Fuery, Esq., petitioner's duly appointed representative, and provided, in part:

"I have attached herewith a copy of a letter I sent your office in November of 1982 relative to Edward Lynch, identification number 112352505 in response to a Notice #S820907402Q.

We have no further communication respecting Mr. Lynch's appeal.

\* \* \*

Please advise what our situation is relative to the appeal."

4. At the hearing, Mr. Fuery testified that he prepared and mailed an original letter of protest on November 16, 1982 after petitioner consulted with him on that date about the Notice of Determination and Demand for Payment of Sales and Use Taxes Due. The duplicate copy of the letter introduced into evidence and the follow-up letter of September 1, 1983 were addressed as follows:

"New York State Tax Commission  
Tax Appeals Bureau  
Room 107, Bldg. 9  
State Campus  
Albany, New York 12227"

5. The Tax Appeals Bureau has no record of receipt of the letter dated November 16, 1982.

#### CONCLUSIONS OF LAW

A. That pursuant to section 1138(a)(1) of the Tax Law a notice of determination of tax due "(s)hall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix

the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing...".

B. That petitioner, Edward J. Lynch, first petitioned for a hearing on or about September 1, 1983. This Commission has no record of receipt of an earlier petition and petitioner failed to prove that such a petition was in fact mailed. The petition received, dated September 1, 1983, was filed outside the 90 day time limitation prescribed by section 1138(a)(1).

C. That the petition of Edward J. Lynch is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 7, 1982 is sustained.

DATED: Albany, New York

FEB 15 1985

STATE TAX COMMISSION

Roderick A. Cline  
PRESIDENT

Francis P. Koenig  
COMMISSIONER

[Signature]  
COMMISSIONER