

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MAHMOUD FARRAJ	:	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, 1976	:	
through August 31, 1980.	:	

Petitioner, Mahmoud Farraj, 624 5th Avenue, Brooklyn, New York 11215, 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, 1976 through August 31, 1980 (File No. 53319).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 31, 1986 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Glannon, Esq., of counsel).

ISSUES

- I. Whether petitioner timely applied for a hearing.
- II. Whether the Audit Division properly denied petitioner's claim for refund.

FINDINGS OF FACT

1. Petitioner, Mahmoud Farraj, operated a grocery store in Brooklyn, New York during the period at issue.
2. On January 20, 1981, the Audit Division issued notices of determination and demand for payment of sales and use taxes due covering the periods December 1, 1976 through May 31, 1980 and June 1, 1980 through August 31, 1980 for taxes

due of \$22,293.24 and \$1,410.23, respectively, plus applicable penalties and interest. The Audit Division followed normal office mailing procedures for such notices and they were sent to the correct address.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes due for the period December 1, 1976 through November 30, 1979 to March 20, 1981.

4. The aforesaid notices were issued as a result of an audit of petitioner's books and records. The audit disclosed unreported taxable sales of \$297,318.00 with tax due thereon of \$23,703.47.

5. On May 15, 1981, the Audit Division received a letter from Marvin Smith Associates, petitioner's authorized representative, which protested the notice issued for the period December 1, 1976 through May 31, 1980. The envelope in which the letter was mailed was postmarked May 11, 1981.

6. On June 3, 1981, the Audit Division advised petitioner's representative that the letter of May 11, 1981 was not received within ninety days after the issuance of the notices referred to in Finding of Fact "2" and, therefore, the taxes were finally and irrevocably fixed.

7. On July 30, 1982, petitioner filed a petition with the Tax Appeals Bureau with respect to the two notices. Petitioner was again advised that the letter of May 11, 1981 was not a timely protest.

8. On December 22, 1982, petitioner filed an application for a refund of \$10,300.00. The amount of the refund claim was based on the payments petitioner made towards the assessments. Petitioner was seeking to have a hearing on the merits of the audit that was conducted.

9. By letter dated March 6, 1984, the Audit Division denied petitioner's refund claim on the grounds that he was given proper notice of the taxes determined due and failed to timely protest such notices.

10. Petitioner applied for a hearing on June 1, 1984 to review the refund denial.

11. Petitioner argued that his representative, Mr. Marvin Smith, had suffered a heart attack and was hospitalized during the period in which to file a timely protest.

12. During the course of the audit, petitioner was represented by Marvin Smith and Michael Smith. Michael Smith was the son of Marvin Smith and was an active member of the firm.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that a notice of determination of tax due shall be given to the person liable for the collection or payment of the tax and 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, or unless the Tax Commission of its own motion shall redetermine the same.

B. That section 1147(a)(1) of the Tax Law provides that a notice of determination shall be mailed promptly by registered or certified mail and 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. Subsection (2) provides that if any return, claim, statement, application, or other document required to be filed within a prescribed period under

Article 28 is delivered after such period, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.

C. That the Audit Division gave petitioner notice of the additional taxes due on January 20, 1981. Petitioner's protest to the notice or application for a hearing with respect thereto was postmarked May 11, 1981, which is one hundred and twelve days from the date the Audit Division gave notice of the taxes due. Accordingly, petitioner's liability was finally and irrevocably fixed.

D. That section 1139(c) of the Tax Law provides that a person shall not be entitled to a refund or credit of tax which had been determined to be due pursuant to section 1138 where he has had a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided. Since petitioner failed to timely apply for a hearing, he is not entitled to a refund of the taxes paid against the liability that was irrevocably fixed.

E. That the petition of Mahmoud Farraj is denied and the notices of determination and demand for payment of sales and use taxes due issued January 20, 1981 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

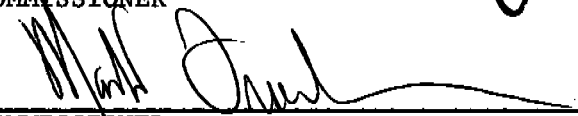
JUN 12 1986



PRESIDENT



COMMISSIONER



COMMISSIONER