

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MATTHEW PRAINITO	:	DECISION
D/B/A VILLAGE PIZZA	:	
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 June 1, 1981	:	
through February 29, 1984.	:	

Petitioner, Matthew Prainito d/b/a Village Pizza, 5 Broadway, Massapequa, New York 11758, 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 June 1, 1981 through February 29, 1984 (File No. 57896).

A formal hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 9, 1985 at 9:15 A.M. Petitioner appeared by Pappas & Marshall, Esqs. (Stewart Weinreb, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael Glannon, Esq., of counsel).

ISSUE

Whether the petition of Matthew Prainito d/b/a Village Pizza was filed with the State Tax Commission within ninety days of the giving of a notice of determination of sales and use taxes due as required by section 1138(a)(1) of the Tax Law.

FINDINGS OF FACT

1. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated September 20, 1984, was issued against petitioner, Matthew

Prainito d/b/a Village Pizza, asserting taxes in the amount of \$19,993.47 plus penalty and interest for the period June 1, 1981 through February 29, 1984.

2. Although the notice was dated September 20, 1984, the Audit Division alleges that it was mailed on September 14, 1984 and that petitioner's petition would be timely only if it had been filed within ninety days of mailing, or December 13, 1984. The auditor testified that she prepared the notice on September 11, 1984 dating it as of September 20, 1984 to reflect the date used by the Audit Division as a basis for the computation of penalty and interest. After review by a supervisor and typing, the notice was forwarded to the mailroom. In accordance with routine office procedures, the mail clerk confirmed mailing of the notice by sending the auditor a photocopy of a receipt for certified mailing addressed to petitioner. The receipt bears the handwritten notation "9-14-84" and the initials "EBS" in the space reserved for postmark or date.

3. Petitioner admits receipt of the notice.

4. The notice sent to petitioner states:

"NOTE: This determination shall be final unless an application for hearing is filed with the State Tax Commission within 90 days from the date of this notice or unless the Tax Commission shall redetermine the tax" (emphasis added).

5. The petition was received by the Tax Appeals Bureau and date stamped on December 21, 1984.

6. The petition in question was accompanied by a cover letter prepared by petitioner's representative dated December 14, 1984; the envelope in which the petition was enclosed bears a private meter stamp also dated December 14, 1984. It is the regular custom and practice within the law office of petitioner's representative to mail letters on the day on which they are metered.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that a notice of determination of sales and use taxes due shall finally and irrevocably fix the tax unless the person against whom it is assessed shall apply to the Tax Commission for a hearing within ninety days of the giving of notice of such determination. The statute further provides that the giving of notice shall commence to run from the date of mailing of such notice [Tax Law section 1147(a)(1)]. However, the notice sent to petitioner unequivocally states that the petitioner had ninety days to challenge the petition beginning on the date of the notice. In light of this statement, the ninety day statutory period must be counted from September 20, 1984 regardless of the fact that mailing may actually have occurred on September 14, 1984 [Cf. Douglas Donohue v. Commission, 36 T.C.M. 1112 (1977)].

B. That pursuant to section 1147, subd. (a)(2) of the Tax Law, a document bearing a United States postmark is deemed delivered on the date of the postmark stamped on the envelope. However, the statute further provides that "[T]his subdivision shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulation of the tax commission." The Tax Commission has provided that where an envelope bears a private postmark, a petition will be deemed filed upon receipt by the Tax Commission (20 NYCRR 601.3).


C. That the petition of Matthew Prainito was mailed on December 14, 1984 in an envelope bearing a private postmark. To be timely, such a petition must be received by the Tax Commission within ninety days from the date of the notice of determination. It was not received until December 21, 1984, ninety-two days from the date of notice. Thus, the petition was not timely filed.

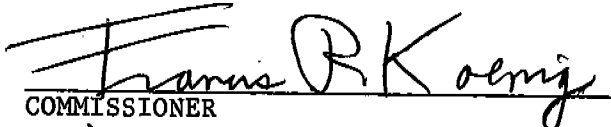
D. That the petition of Matthew Prainito d/b/a Village Pizza is in all respects denied.

DATED: Albany, New York

JAN 28 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER