

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
REIDY'S CAFE, INC.	:	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,	:	
1980 through November 30, 1983.	:	

Petitioner, Reidy's Cafe, Inc., 22 East 54th Street, New York, New York 10022, 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, 1980 through November 30, 1983 (File No. 59422).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 19, 1985 at 9:15 A.M., with all briefs to be submitted by February 5, 1986. Petitioner appeared by Maloney & Porcelli, Esqs. (William P. Maloney, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioner filed a petition for a hearing with the State Tax Commission within 90 days of the issuance of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

FINDINGS OF FACT

1. On September 20, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due ("Notice") against petitioner, Reidy's Cafe, Inc. Said Notice, which encompassed the period

December 1, 1980 through November 30, 1983, determined additional sales and use tax due of \$49,488.00, plus penalty of \$10,999.57 and interest of \$14,132.37, for a total amount due of \$74,619.94.

2. In its Answer to petitioner's Perfected Petition the Audit Division "[a]ffirmatively alleges on information and belief that the petitioner failed to timely file an application for a hearing." There is nothing in the record to indicate the date on which the Audit Division asserts petitioner's late filed petition was received.

3. The petition submitted in evidence by the Audit Division was signed by petitioner's president on November 27, 1984. The mailing envelope was not attached to said petition nor was it submitted in evidence. The petition submitted in evidence contained no indate stamps or any other evidence to indicate the date of its receipt.

4. The petition filed by Reidy's Cafe, Inc. was prepared prior to November 27, 1984 and said petition was placed, on November 27, 1984, in an official depository of the United States Postal Service. The petition was addressed to the Tax Appeals Bureau of the State Tax Commission and was enclosed in a postpaid envelope.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, as follows:

"...Notice of such determination shall 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 the evidence in the instant matter demonstrates that the petition for redetermination was filed on or about November 27, 1984. There is nothing in the record to show that the petition was mailed on a date other than November 27, 1984 nor is there any evidence to show that the petition was received beyond the statutory 90 day period for the filing of a petition. Since the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was dated September 20, 1984, the petition filing date of November 27, 1984 falls within the 90 day period. See Matter of the Petition of Carolyn Compton, State Tax Comm., February 18, 1986.


C. That the petition of Reidy's Cafe, Inc. is found to have been timely filed and the matter is to be returned to the Tax Appeals Bureau for further proceedings not inconsistent herewith.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER