

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
BIG M TRUCK STOP, INC.	:	DECISION
AND MORRIS KAMINSKY,	:	
as an Officer of Big M Truck Stop, Inc.	:	
	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1981	:	
through November 30, 1983.	:	

Petitioners, Big M Truck Stop, Inc. and Morris Kaminsky, as an officer of Big M Truck Stop, Inc., Corning Hill & 9W, Glenmont, New York 12077 filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through November 30, 1983 (File No. 59522 and 59523).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman Campus, Albany, New York, on January 22, 1986 at 9:15 A.M. Petitioners appeared by Robert D. Schneider, Esq. (Robert L. Harder, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

Whether the petitions of Big M Truck Stop, Inc. and Morris Kaminsky, as an officer of Big M Truck Stop, Inc., were filed with the State Tax Commission within ninety days of the giving of a notice of determination as required by section 1138(a)(1) of the Tax Law.

FINDINGS OF FACT

1. On December 20, 1984, the Audit Division, as the result of a field audit, issued to petitioner Big M Truck Stop, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax due of \$22,538.83, plus interest of \$5,088.60, for a total amount due of \$27,627.43 for the period June 1, 1981 through November 30, 1983. On the same date, the Audit Division also issued to petitioner Morris Kaminsky, as an officer of Big M Truck Stop, Inc., a notice of determination identical as to amounts and as to period as the notice issued to the corporate petitioner.

2. On September 5, 1984, Mr. Kaminsky, as president, executed on behalf of Big M Truck Stop, Inc. a consent extending the period of limitations for issuing an assessment for sales and use taxes for the period June 1, 1981 through August 31, 1981 to December 20, 1984.

3. The notices were sent by certified mail on December 20, 1984. The return receipts indicate that the notice issued to the corporate petitioner was delivered on December 27, 1984 and the notice issued to Mr. Kaminsky was delivered on December 21, 1984.

4. On March 25, 1985, Mr. Kaminsky hand delivered to the Tax Appeals Bureau at its Albany, New York office, an application for a hearing to review the notices.

5. Petitioners contend that the ninety-day period for applying for a hearing as specified in section 1138(a)(1) of the Tax Law starts with the date a notice is received by a petitioner and not the date when a notice is mailed.

CONCLUSIONS OF LAW

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

"[n]otice 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, or unless the tax commission of its own motion shall redetermine the same."

B. That section 1147(a)(1) of the Tax Law provides, in pertinent part, as follows:

"[a] notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

C. That the application for a hearing was hand delivered on March 25, 1985 or in excess of ninety days of December 20, 1984, the date the notices were mailed. It should be noted that even if the date of receipt of a notice were controlling, the application would still be untimely with respect to Morris Kaminsky (see Findings of Fact "3" and "4").


D. That the petitions of Big M Truck Stop, Inc. and Morris Kaminsky, as an officer of Big M Truck Stop, Inc., are denied, and the notices of determination and demands for payment of sales and use taxes due, issued December 20, 1984, are sustained.

DATED: Albany, New York

JUN 19 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER