

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JERRY'S EXPRESSWAY SERVICE

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 March 1, 1981
through August 31, 1982.

Petitioner, Jerry's Expressway Service, Wicks Road and Long Island Expressway, Brentwood, New York 11717, 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 March 1, 1981 through August 31, 1982 (File No. 60924).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 20, 1986 at 9:15 A.M. Petitioner appeared by Shelton & Shelton, Accountants. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether a timely petition for a hearing was filed for the audit period at issue.

FINDINGS OF FACT

1. On June 8, 1984, the Audit Division issued to Jerry's Expressway Service (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting tax due of \$31,858.00, plus penalty of \$7,964.50 and interest of \$10,271.98, for a total amount due of \$50,094.48 for the period March 1, 1981 through August 31, 1982.

2. On October 9, 1984, the Tax Appeals Bureau received a petition prepared and executed by petitioner's representative, Joseph Shelton, a Power of Attorney and a copy of a cover letter from the said Joseph Shelton. Each of the aforesaid documents was dated June 20, 1984. Attached thereto was the original of a cover letter to the Tax Appeals Bureau bearing the date October 5, 1984, which stated, in pertinent part, "As per the request of Mrs. Cobb, enclosed you will find copies of power of attorney, tax appeals notice and letter for Jerry's Expressway Service." All of these documents were mailed in an envelope bearing a United States postmark of October 5, 1984.

3. Petitioner's representative was advised by a letter from the Tax Appeals Bureau, dated October 17, 1984, stating as follows:

"The petition (or protest letter) filed regarding the above matter has been reviewed. The Tax Law requires that a petition must be filed within ninety days from the date of the Notice of Determination and Demand. In this case, the Notice was dated June 8, 1984, but the petition was not mailed until October 5, 1984 or in excess of ninety days. It therefore appears that your petition was not timely filed, and this matter has been referred to the Tax Compliance Bureau for collection.

If you have proof that you protested the above matter within the ninety day period, you must mail substantiating documentation to the undersigned."

4. Petitioner's representative contends that he mailed the petition for petitioner along with petitions for two other clients, Dea Ron Service, Inc. and Bar-Jo Auto Service. No evidence was presented at the hearing held herein as to the dates of mailing or receipt by the Tax Appeals Bureau of the petitions of Dea Ron Service and Bar-Jo Auto Service. On January 22, 1985, Mary M. Cobb of the Central Sales Tax Section sent a letter to petitioner's representative which stated, in pertinent part, as follows:

"I have not had any contact with your office since Mrs. McGarry and I met with Wayne Shelton on October 3, 1984.

Mr. Shelton was sending us additional information to substantiate adjustments in the above assessments issued against your clients.

Please review your files and send us the information needed to resolve the problems. If we do not hear from you, we will request the Tax Appeals Bureau to schedule hearing for Dea Ron Service, Inc. and Bar Jo Auto Service. There is no record of a hearing request filed for Jerry's Expressway within the ninety day limitation, so collection action would be resumed on his assessment."

5. On May 6, 1985, petitioner's representative, Joseph Shelton, sent to the Tax Appeals Bureau copies of the petition, power of attorney and all previous correspondence, along with a cover letter stating, in pertinent part, as follows:

"This is to advise you of my telephone conversation on May 3, 1985 with Mary M. Cobb, representative of New York State Sales Tax Commission. Ms. Cobb states that the tax appeals bureau has no record of receiving our correspondence concerning Jerry's Expressway Service.

Upon Ms. Cobb's advise (sic), enclosed please find copies of previous correspondence, including power of attorney, and Sales Tax Petitions."

The cover letter and the copies of the aforesaid documents were received by the Tax Appeals Bureau on May 9, 1985.

CONCLUSIONS OF LAW

A. That pursuant to section 1138(a)(1) of the Tax Law, a notice of determination of tax due "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 20 NYCRR 601.3(c) provides, in pertinent part, as follows:

"The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be

addressed to the particular operating bureau in Albany, New York. When mailed, the petition will be deemed filed on the date **of** the United States postmark stamped on the envelope."

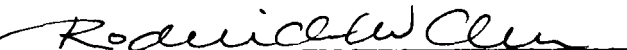
C. That petitioner's initial petition **for a** hearing was mailed on October 5, 1984. The State Tax Commission has no record of receipt of an earlier petition and petitioner has failed to prove that such a petition was, in fact, mailed. The petition, although bearing the date of June 20, 1984, was not filed until October 5, 1984 and was, therefore, not filed within the 90-day period prescribed by section 1138(a)(1) of the Tax Law.

D. That the petition **of** Jerry's Expressway Service is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 8, 1984 is sustained.

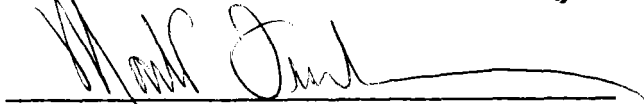
DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987


PRESIDENT


COMMISSIONER


COMMISSIONER