

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ADVENTURE SKI & SPORTING GOODS, 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 June 1, 1981
through August 31, 1984.

Petitioner, Adventure Ski & Sporting Goods, Inc., 1106 Cortelyou Road, Brooklyn, New York 11218, 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 August 31, 1984 (File No. 62516).

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 April 29, 1986 at 10:30 A.M., with all briefs to be submitted by June 29, 1986. Petitioner appeared by David H. Singer, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the petition of Adventure Ski & Sporting Goods, Inc. was filed with the State Tax Commission within ninety days of the issuance of a notice of determination as required by section 1138(a)(1) of the Tax Law.

FINDINGS OF FACT

1. On March 20, 1985, the Audit Division, as the result of a field examination, issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Said notice, which encompassed the period June 1, 1981 through August 31, 1984, assessed a tax due of \$19,816.14, plus

penalty of \$4,363.73 and interest of \$6,178.19, for a total amount due of \$30,358.06.

2. The notice was sent by certified mail on March 16, 1985 and was properly addressed to petitioner at 1106 Cortelyou Road, Brooklyn, New York 11218. Petitioner does not deny prompt receipt of the notice mailed March 16, 1985.

3. On June 24, 1985, the Tax Appeals Bureau received a petition from Adventure Ski & Sporting Goods, Inc. protesting the notice mailed March 16, 1985 and dated March 20, 1985. The envelope in which the petition was mailed was postmarked June 20, 1985.

4. On June 18, 1985, the last day¹ that a petition could be timely filed, Wayne Northup, petitioner's president, visited his representative's office and executed the power of attorney which was filed with the petition in question. Mr. Singer, petitioner's representative, testified that on June 18, 1985, either he personally or his secretary placed the petition and power of attorney "in the mail slot at 225 Broadway (New York, New York)". No explanation was offered as to the discrepancy between the date the petition was allegedly mailed (June 18, 1985) and the date the envelope containing said petition was postmarked by the United States Postal Service (June 20, 1985). It is petitioner's position that the petition was deposited with the United States Postal Service in a timely fashion and that, regardless of the June 20, 1985 postmark, the petition should be considered timely filed.

1 The notice was mailed March 16, 1985, but was dated by the Audit Division on March 20, 1985. For the purpose of determining the last day for the filing of a petition, the March 20, 1985 date is used herein.

5. Petitioner's representative also argued that he did not receive the Audit Division's Answer to the Perfected Petition nor does the record contain an affidavit of service of said Answer. It is petitioner's position that the jurisdictional issue of timeliness of the petition can only be raised in the Answer and, since said Answer was not properly filed, the issue of timeliness can not be raised. Petitioner's representative, pursuant to a letter from the Tax Appeals Bureau dated July 2, 1985, was advised that the petition in question was not timely filed.

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, at the very latest, gave petitioner notice of the additional taxes due on March 20, 1985. Petitioner's petition to the

notice was postmarked June 20, 1985, which is 92 days from the date the Audit Division gave notice of the taxes due. Accordingly, the petition was not filed in a timely manner and petitioner's liability is therefore finally and irrevocably fixed.

D. That the issue of timeliness of the petition was properly raised in the letter dated July 2, 1985 and also in the Answer.


E. That the petition of Adventure Ski & Sporting Goods, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1985 is sustained.

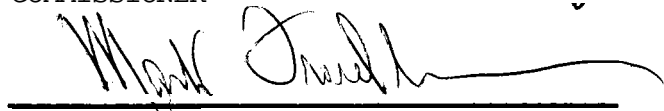
DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1987


PRESIDENT


COMMISSIONER


COMMISSIONER