

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
DANIEL LEACH AND CRAIG FOSTER
D/B/A ADIRONDACK BUILDERS, INC.
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, 1980
through May 31, 1984.

DECISION

Petitioners, Daniel Leach and Craig Foster d/b/a Adirondack Builders, Inc., 4 West State Street, Gloversville, New York, 12078, 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, 1980 through May 31, 1984 (File No. 63847).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman State Office Building Campus, Albany, New York on May 23, 1986 at 9:00 A.M., with all briefs to be submitted by June 12, 1986. Petitioners appeared by Caputo, Aulisi & Skoda, Esqs. (Edward F. Skoda, Esq., of counsel). The Audit Division appeared by John D. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioners 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 March 20, 1985 the Audit Division issued, by certified mail, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioners, Daniel Leach and Craig Foster doing business as Adirondack Builders.

The notice assessed sales and use taxes for the period June 1, 1980 through May 31, 1984 in the amount of \$17,616.53 plus penalty of \$4,404.10 and interest of \$8,807.48 for a total amount due of \$30,828.11.

2. In a petition dated June 19, 1985, the foregoing assessment was challenged. The petition was mailed in an envelope which was postmarked by the United States Postal Service on June 28, 1985. On July 2, 1985, the petition was received by the Tax Appeals Bureau of the New York State Tax Commission.

3. In a letter dated July 23, 1985, the Tax Appeals Bureau notified petitioners' law firm that the petition was late, having been filed beyond 90 days from the date of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

4. During the periods in issue, Daniel Leach and Craig Foster were partners doing business as Adirondack Builders, Inc. The partnership engaged in construction activities.

5. At the hearing, Mr. Leach testified that on April 15, 1985 he prepared a letter of protest and that on April 16, 1985 the letter was mailed from a post office in Gloversville, New York. The purported letter was addressed to the New York State Department of Taxation and Finance.

6. Mr. Leach, within 90 days of the issuance of the notice, orally notified an employee of the Department of Taxation and Finance that petitioners wished to have a hearing on the assessment of sales and use taxes due.

7. Neither the Audit Division nor the Tax Appeals Bureau has a record of receipt of the letter purportedly prepared April 15, 1985.

CONCLUSIONS OF LAW

A. That pursuant to section 1138(a)(1) of the Tax Law, a notice of determination of tax due "[s]hall be given to the person liable for the collec-

tion 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 proceedings before the Commission must be commenced by the filing of a petition (20 NYCRR 601.3[a]). Moreover, a petition "... must be filed within the time limitations prescribed by the applicable statutory sections". (20 NYCRR 603.1[c]).

C. That the burden of proving that a timely application for a hearing was made is upon petitioners (Matter of Tea Auto Clinic, Inc. and Eunice M. Accardi, as Officer, State Tax Commission, January 3, 1986). This Commission has no record of receipt of a petition allegedly mailed in April 1985 and petitioners have failed to prove that such a petition was in fact mailed. The petition received on July 2, 1985 was filed outside the 90 day time limit prescribed by Tax Law §1138(a)(1) and was therefore untimely. Furthermore, oral notification of the desire to have a hearing does not constitute the filing of a petition within the meaning of 20 NYCRR 601.3(a). Accordingly, the petition must be dismissed as untimely.

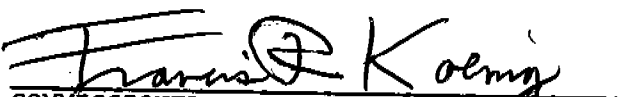
D. That the petition of Daniel Leach and Craig Foster d/b/a Adirondack Builders, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued March 20, 1985, is sustained.

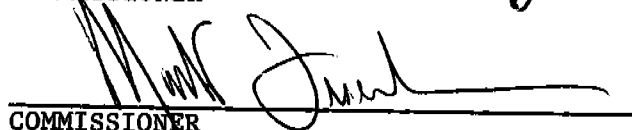
DATED: Albany New York

STATE TAX COMMISSION

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PRESIDENT


COMMISSIONER


COMMISSIONER