

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Donald Siegel : AFFIDAVIT OF MAILING
as an Officer of Corey Products Inc. :
:
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article(s) 28 & 29 of the Tax Law for the :
Period 6/1/79 - 5/31/82. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of June, 1986, he/she served the within notice of Decision by certified mail upon Donald Siegel, as an Officer of Corey Products Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Siegel
as an Officer of Corey Products Inc.
2128 Oliver Way
Merrick, New York 11566

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
30th day of June, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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Period 6/1/79 - 5/31/82. :

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of June, 1986, he served the within notice of Decision by certified mail upon Allan R. Henis, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allan R. Henis
25 South Road
Harrison, NY 10528

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
30th day of June, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

June 30, 1986

Donald Siegel
as an Officer of Corey Products Inc.
2128 Oliver Way
Merrick, New York 11566

Dear Mr. Siegel:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Allan R. Henis
25 South Road
Harrison, NY 10528

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DONALD SIEGEL,	:	DECISION
as an Officer of Corey Products, 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, 1979	:	
through May 31, 1982.	:	

Petitioner, Donald Siegel, as an officer of Corey Products, Inc., 2128 Oliver Way, Merrick, New York 11566, 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, 1979 through May 31, 1982 (File No. 50352).

A hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 8, 1984 at 1:15 P.M., continued on August 20, 1984 at 1:15 P.M. and continued to conclusion on August 21, 1984 at 9:30 A.M., with all briefs submitted by November 15, 1984. Petitioner appeared by Allan Richard Henis, P.C. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether Donald Siegel timely filed a petition to request revision of the assessment against him as an officer of Corey Products, Inc.

II. Whether, as the result of a test period analysis, the Audit Division properly disallowed all sales claimed by Corey Products, Inc. to be exempt from sales tax during the audit period.

III. Whether the remaining audit adjustments, relating to disallowed credit memoranda and a debit to the sales tax accrual account of Corey Products, Inc., were correct and proper.

FINDINGS OF FACT

1. On October 12, 1982, subsequent to an examination of the books and records of Corey Products, Inc. ("Corey"), the Audit Division issued to Donald Siegel, as an officer of Corey, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales tax under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through May 31, 1982 in the amount of \$15,052.33, plus interest.

2. Corey was engaged in the business of selling office supplies and word processing supplies, primarily to law firms. Petitioner was the president and held the majority of the outstanding stock. Alan Zuniss was the only other officer and shareholder.

3. In May, 1982, Corey filed an assignment for the benefit of creditors in the Supreme Court, New York County. Robert Rubinger, Esq. was appointed trustee and Ivan Babitt, CPA was appointed accountant. Shortly after the assignment, Mr. Babitt and one of his associates visited the Corey business premises to take possession of all the books and records. On August 6, 1982, Mr. Babitt executed on Corey's behalf a consent extending the period of limitations for assessment of sales and use taxes for the period June 1, 1979 through August 31, 1979 to December 20, 1982.

4. In December, 1982, after receipt of the assessment under consideration, petitioner telephoned Mr. Henis, his representative in this proceeding, for advice. Mr. Henis in turn contacted Corey's certified public accountants to obtain various workpapers and summaries relating to Corey's sales tax liability;

he also telephoned the court-appointed counsel for the corporation in assignment, who advised him that he (Mr. Henis) would have to undertake any action with respect to petitioner's individual liability. Mr. Henis conducted "a cursory check of the law to see what the contents were that were necessary in a petition." He thereafter drafted a letter to the Audit Division's "New York District Office Sales Tax" for petitioner's signature, which letter stated, in relevant part, "The undersigned hereby applies for a revision of the above Notice of Determination made under date of 10/12/82 in the amount of \$15,052 and requests a Hearing pursuant to Section 1138 of the Tax Law." On January 6, 1983, petitioner and Mr. Henis met at a restaurant in New York City. Petitioner reviewed and signed the letter prepared by his counsel. Mr. Henis testified that en route from the restaurant to Grand Central Station, he deposited the letter in a post office receptacle. Mr. Henis further testified that from the time of petitioner's telephone call to him in December, 1982 to the time he mailed the letter, he was mindful of the ninety-day period for submitting a protest on petitioner's behalf.

5. The Audit Division has no record of having received petitioner's letter of January 6, 1983.

6. In January, 1984, a warrant was issued and a judgment filed for payment of the taxes assessed by the Notice of Determination and Demand. In his brief, petitioner noted that the Audit Division did not undertake any activity or initiate any contact with him or Corey between January 6, 1983 and the date of the warrant and judgment. Nor, apparently, did petitioner contact the Division during this one-year period concerning its lack of response to his letter of protest.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available; it further provides that 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. The burden of proof is on petitioner to show that he filed a timely petition, and the Tax Commission has taken a strict position regarding the statutorily-established ninety-day period to petition for a hearing. (See Matter of Saul's Pharmacy, Inc., September 28, 1983, wherein a petition postmarked on the ninety-first day after the issuance of an assessment was deemed untimely.)

B. That petitioner's representative performed only a "cursory check" of the provisions governing the filing of a petition; petitioner did not contact the Audit Division between January 6, 1983 and the issuance of the warrant, despite having received no acknowledgement of nor response to his January 6, 1983 letter; and Audit Division records do not reflect receipt of petitioner's letter. In view of these circumstances, it cannot be concluded that petitioner met his burden to demonstrate that he filed a petition in a timely fashion.

C. That the foregoing conclusion renders the second and third issues moot.

D. That the petition of Donald Siegel, as an officer of Corey Products, Inc., is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 12, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986

Richard A. Allen
PRESIDENT

Francis R. Koehn
COMMISSIONER

COMMISSIONER

DONALD SIEGEL

I dissent. It is no easy task, as the sole attorney on the Tax Commission, to undertake a defense of the general credibility of counselors-at-law. Nevertheless, my disagreement with the majority in this case turns on just that issue. The majority has rejected the instant petition as untimely, despite the sworn testimony of the attorney representing taxpayer, that he mailed a protest letter within the 90-day period. A copy of the protest letter, appropriately dated, was submitted as an exhibit at the hearing. The Department of Taxation and Finance has no record of receiving such letter. Taxpayer's attorney testified as to the precise circumstances of the signing of the letter by the client, and the mailing of same by the attorney. The hearing officer, in preparing her initial report, stated clearly that petitioner had provided "... the credible testimony of his attorney that the petition was signed and mailed on January 6, 1983."

Despite the finding of the hearing officer, the majority of the Commission directed a decision against the petitioner on the grounds that Department records did not reflect receipt of petitioner's letter; and that neither petitioner nor his representative contacted the Department for the year following the purported sending of the letter to determine the status of the proceeding. The majority directed a conclusion that these facts showed petitioner to have failed to meet his burden of proof. It is the majority's position, that, as a matter of law, unsupported testimony of a taxpayer or his representative cannot prevail in the face of those facts set forth, supra.

I disagree with the majority's view. We have, in the past, refused to accept the unsupported testimony of a taxpayer that a petition (or a protest letter) was timely mailed. However, a fundamental difference exists where the taxpayer's representative, who is a member of a responsible profession, makes the same claim. Here, an attorney subject to disbarment proceedings, or other ethical sanctions, has come forward with a precise description of activities engaged in on behalf of a client. He has produced a copy of the letter which, according to his testimony, he mailed in timely fashion. The sanctions for unethical conduct are sufficiently severe so as to lay to rest the suspicion that taxpayer's representative would lie with impunity. Moreover, since taxpayer is said to have signed the letter within the jurisdictional period, the representative's story inherently involves the testimony of two persons, which may be compared by a hearing officer and examined for inconsistencies. This is a far cry from the situation in which a single taxpayer, unbound by ethical considerations, comes forward to describe, without documentary support, activities which he claims to have engaged in alone.

Re: Donald Siegel

This is not to say that each and every taxpayer representative must be believed. The demeanor, attitude and overall reliability of the witness must be assessed by the hearing officer and the taxpayer can prevail only in those circumstances where the credibility of the taxpayer and his representative can be properly established to the satisfaction of the trier of fact. That credibility was established here, as is evident from the initial report of the hearing officer.

In addition, the Department of Taxation and Finance cannot escape blame for the inability of petitioners to provide documentary support for their claims of timely mailing. The Rules of Practice before the State Tax Commission do not require that a petition be mailed by certified mail, or with a return receipt attached. If that requirement existed, proof of mailing could be easily established in all cases. In the absence of such requirement, no taxpayer can be charged with having failed to meet his burden, merely because there is no proof of mailing.

Nor should the taxpayer bear the full burden of the Department's failure to find a copy of the protest letter in its files. The Notice of Determination which starts the running of the 90-day period advises taxpayer of the deadline he faces, but offers no guidance as to the address to which the appeal must be sent. In fact, in order to be properly added to the list of appellants, taxpayer's protest letter (or petition) must be received by the Tax Appeals Bureau in Albany. The Notice of Determination makes no reference to the Tax Appeals Bureau.

At some point during the last several years, taxpayers receiving a Notice of Determination were also sent a pamphlet containing the purported rules of the administrative appeals process. Those rules contained an inaccurate direction to the taxpayer to address his appeal to the district office which issued the Notice of Determination. That direction was outdated, since, as has been indicated above, appeals, in order to be processed properly, should have been directed elsewhere. It is not clear whether this taxpayer received the inaccurate direction along with the Notice of Determination. Yet, the letter which he produced (and which he testified was timely mailed) was in fact mailed to the local district office. Whether it was so directed because the taxpayer received inaccurate instructions from the Department, or because the taxpayer received no instructions whatsoever, is beside the point. In fact, the local district office was not the location for the processing of such letters, a fact which may explain departmental inability to

Re: Donald Siegel

find the letter in its files.

The majority fears, perhaps justly, that the acceptance of unsupported testimony as to timeliness, might encourage abuse. This concern would be more persuasive in the instance of unsupported testimony by a single lay petitioner, as to matters affecting his own tax liability. Where, however, the unsupported testimony, to be disbelieved, would have to be the contrivance of two persons, including a presumably responsible professional, both of whom appear credible to the hearing officer, the chances of abuse are vastly reduced. It must be remembered, of course, that credibility is the ultimate test, and that not every tale of timeliness need be believed by the hearing officer, even if sworn to by the legendary "forty bishops" cited by Justice Cardozo.

In this instance I would find for taxpayer.

JUN 30 1986



MARK FRIEDLANDER
Commissioner