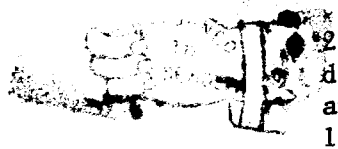
TA-26 (7/85)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
W. A. Harriman Campus
ALBANY, N.Y. 12227

CERTIFIED

P-602 466 557

MAIL



29-37 West 52nd Street Corp.
d/b/a New York, New York
and Maurice Brahms, as Officer
19 West 44th Street
New York, NY 10036

RECEIVED

SEP 24 1987

DIV. OF TAX APPEALS

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

August 28, 1987

29-37 West 52nd Street Corp.
d/b/a New York, New York
and Maurice Brahms, as Officer
19 West 44th Street
New York, NY 10036

Gentlemen:

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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Stuart Smith
Shea & Gould, Esqs.
330 Madison Avenue
New York, NY 10017

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
29-37 WEST 52ND STREET CORP. D/B/A NEW YORK, NEW YORK AND MAURICE BRAHMS, AS OFFICER	:	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 September 1, 1977 through February 28, 1982.	:	

Petitioners, 29-37 West 52nd Street Corp. d/b/a New York, New York and Maurice Brahms, as officer, 19 West 44th Street, New York, New York 10036, 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 September 1, 1977 through February 28, 1982 (File No. 70674).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 13, 1987 at 1:15 P.M., with all briefs to be submitted by March 24, 1987. Petitioners appeared by Shea & Gould, Esqs. (Stuart Smith and Jane Herman, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether petitions to contest certain assessments were filed with the State Tax Commission within 90 days of the issuance of such assessments as required by section 1138(a)(1) of the Tax Law.

II. Whether, if so, any portion of the assessments at issue are barred as untimely by operation of the statute of limitations.

III. Whether Maurice Brahms is personally liable for any or all of the taxes assessed and at issue in this proceeding pursuant to Tax Law §§ 1131(1) and 1133(a).

IV. Whether the assessment of fraud penalties (Tax Law § 1145[a][2]) herein was appropriate and should be sustained.

FINDINGS OF FACT

1. On June 20, 1983 the Audit Division issued to petitioner 29-37 West 52nd Street Corp. d/b/a New York, New York two notices of determination and demands for payment of sales and use taxes due spanning in the aggregate the period September 1, 1977 through February 28, 1982, and assessing sales and use taxes due in the aggregate amount of $368,327.18, plus interest, together with a fraud penalty equal to 50 percent of the tax assessed per the notices (Tax Law § 1145[a][2]).

2. Also on June 20, 1983, the Audit Division issued to Maurice Brahms, officer of 29-37 West 52nd Street Corp. d/b/a New York, New York, two separate notices of determination and demands for payment of sales and use taxes due, spanning in the aggregate the period September 1, 1977 through February 28, 1982, and assessing sales and use taxes due against Mr. Brahms in the aggregate amount of $255,265.42 plus interest, together with a fraud penalty equal to 50 percent of the tax assessed. Mr. Brahms was assessed as a person responsible for collection and remittance of tax on behalf of the petitioner corporation.

3. In late July or early August of 1983, a separate petition in response to each of the aforementioned four notices was prepared by one Leo Kaden, a certified public accountant engaged by petitioners with respect to these notices. In his diary, Mr. Kaden made note of the petitions for later mailing within the prescribed 90 day filing period. On the file folder in which the

petitions were held for later mailing, Mr. Kaden computed the last date on which the petitions were due to be filed as September 18, 1983.

4. Mr. Kaden prepared the petitions himself, and in accordance with his office practice he instructed his secretary, one Muriel Richman, to make certain that the envelope containing the petitions was mailed before she left for the day on Friday, September 16, 1983.

5. Ms. Richman is the person responsible for mailing items from Mr. Kaden's office and is also responsible for the operation of the Pitney Bowes postal meter mailing machine in the office. Ms. Richman testified that the petitions at issue were placed in an oversized envelope, weighed and postmarked on the Pitney Bowes machine, and taken to the post office at 43rd Street, New York City (between 5th and 6th Avenues), between 1:30 P.M. and 2:00 P.M. on Friday, September 16, 1983. Ms. Richman testified that she handed the envelope containing the petitions to the postal clerk at the post office. She noted that she delivered the envelope to the post office because the oversized envelope would not fit into the mail slot in the office building, and that the mail baskets in the lobby of the office building in which an oversized envelope could be deposited were not then available.

6. Each of the petitions bears the Tax Appeals Bureau indate stamp of September 26, 1983, as does the envelope in which the petitions were mailed. The same envelope also bears a Pitney Bowes metered mail stamp with the date September 16, 1983. There is no United States Postal Service postmark on the envelope.

7. During October 1983, Mr. Kaden was advised that each of the petitions filed was untimely since they had not been received within 90 days of the date of issuance of the notices of determination and demand. The Audit Division has

accordingly taken the position that the tax as assessed on the notices of determination and demand was irrevocably fixed and determined, and that without a timely petition the Commission has no jurisdiction to review the matter.

8. By contrast, petitioners assert that evidence has been adduced to show that the petitions were mailed on Friday, September 16, 1983, that such mailing constituted timely filing of the petitions, and that the delay in delivery of the petitions to the Tax Appeals Bureau was the result of postal service delays.

9. The hearing in this matter was limited essentially to the issue (and evidence thereon) concerning the timeliness of the petitions. However, certain additional evidence was offered concerning the execution of consents with respect to the statute of limitations.

10. The assessments at issue in this matter arose as a result of a newspaper article stating that four owners of several New York discos pled guilty to skimming approximately $2 million in cash from disco receipts. The four individuals involved, one of whom was Maurice Brahms, owned the discos known as New York, New York, The Infinity, Bond International Casino, and several other discos and pled guilty to skimming a total of $2,097,480.00 from their operations during the years 1977, 1978 and 1979.

11. On November 19, 1980, Maurice Brahms signed a consent extending the period of limitation for assessment of sales and use taxes for the periods ended September 1, 1977 through August 31, 1980, thereby extending the period of limitation on assessment to December 20, 1981.

12. Mr. Brahms was incarcerated for Federal income tax evasion during the period spanning January 5, 1981 to January 19, 1983. On January 2, 1981, Mr. Brahms entered into an agreement providing for the management of 29-37 West

42nd Street Corp. for the period January 2, 1981 through April 30, 1986 by K & S Management Corp., Michael Kirvan and Alan Schacter. During the period of his incarceration, it is alleged that Mr. Brahms complied with all prision rules, including those forbidding a prisoner from conducting a business while incarcerated.

13. Prior to his incarceration, Mr. Brahms hired Mr. Kaden as the accountant for 29-37 West 52nd Street Corp. Shortly thereafter Mr. Kaden resigned[1], and recommended one Philip Weisser as a successor accountant. Mr. Weisser was, in turn, hired by Mr. Schacter.

14. On November 4, 1981 Mr. Weisser signed a consent extending the period of limitation for assessing sales and use taxes for the period September 1, 1977 through August 31, 1981, thereby extending the period of limitation to June 20, 1982. On December 17, 1982 Mr. Weisser executed a subsequent consent pertaining to sales and use taxes for the period September 1, 1977 through May 31, 1980 extending the period of limitation to June 20, 1983. Both of these forms were signed by Mr. Weisser, with an indication that his signature was authorized by power of attorney. Petitioners note that since the earlier of these consents expired on June 20, 1982, and was not followed by any consent until that dated December 17, 1982, there is a time gap between the two consents.

15. A Power of Attorney (Federal Form 2848) appointing Philip Weisser to act on behalf of 29-37 West 42nd Street Corp. with respect to sales taxes for the period September 1, 1977 through August 31, 1981 is signed by Mr. Schacter as manager and dated August 21, 1981, but is neither witnessed nor notarized.

---

1 Mr. Kaden was re-engaged by Mr. Brahms in July or August 1983, with respect to the assessments at issue herein (see Finding of Fact"3").

Petitioners thus assert that assessment in any event is barred for the periods ended September 1, 1977 through February 29, 1980 due to the gap in the consents, as described, and/or due to an invalid power of attorney.

16. The Audit Division asserts, by contrast, that since timely petitions were not filed, the issue of an affirmative defense such as the statute of limitations may not be raised herein by petitioners. The Audit Division also maintains that fraud is asserted herein (Tax Law § 1145[a][2]), thus vitiating the otherwise applicable three year period of limitation on assessment (Tax Law § 1147[b]) and rendering all portions of the assessments timely.

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 that such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall within 90 days after giving notice of such determination, 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 20 NYCRR 601.3(c), which pertains specifically to the time limitations for filing a petition to commence a proceeding before the Commission, provides in 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. Where a machine metered stamp is used on the envelope the petition shall be deemed filed upon receipt." (Emphasis supplied.)

D. That as the foregoing indicates, in order to be timely, a petition must be filed within 90 days of the date of mailing of the notices of determination and demand. Here 90 days from the June 20, 1983 date of mailing of the notices of determination fell on September 18, 1983. Since September 18, 1983 was a Sunday, the last date for filing a timely petition would have been September 19, 1983 (B & C Getty Service Station, State Tax Commn., November 7, 1985).

E. That there is evidence indicating the petitions in this matter were mailed on Friday, September 16, 1983. However, given that the petitions were mailed utilizing a postage meter, and that the envelope in which the petitions were delivered does not bear a United States Postal Service postmark, the issue of timeliness must be resolved on the basis of receipt. In effect, by mailing so near the end of the 90 day limitation period and, more importantly, by using metered mail, petitioner chose to run the risk that there would be no postal service postmark and that the time of filing would be based upon receipt. Here the petitions were not received until September 26, 1983. Accordingly, such petitions were not timely filed and thus the tax as assessed was finally and irrevocably fixed. (Matter of Donald Siegel, State Tax Commn., June 30, 1986;

Matter of Mathew Prainito d/b/a Village Pizza, State Tax Commn., January 28, 1986.)

F. That inasmuch as timely petitions were not filed, the Commission is without jurisdiction in the context of this proceeding to redetermine the assessments issued against petitioners. Accordingly, no decision is rendered with respect to Issues II, III or IV.

G. That the petitions of 29-37 West 52nd Street Corp. d/b/a New York, New York and Maurice Brahms, as officer, are hereby denied and the notices of determination and demands for payment of sales and use taxes due dated June 20, 1983 are sustained.

DATED: Albany, New York

AUG 2 8 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

Maurice Brahms, as Officer

I have signed the above decision, but because the issues presented are significant and are on the cutting edge of a continuing disagreement between myself and the majority of my brethren, I have sought permission to take the unusual step of adding this concurring opinion. The Commission rejects the instant petition as untimely. The hearing officer has found that the Noticesof Determination were issued on June 20, 1983, with the time to appeal consequently expiring on September 18, 1983 (or, in this instance, because September 18 was a Sunday, on September 19, 1983). On September 26, 1983, the Tax Appeals Bureau received the petition, in an envelope which bore a machine-metered postmark of September 16, 1983.

At the hearing, the preparer of the petition, a certified public accountant, testified that he prepared the document in July or August 1983 and then diaried the matter, so that it would be mailed on September 16. He further testified that he told his secretary to take it to the Post Office on September 16, 1983. The practioner's secretary was produced and testified that she recalled taking it to the Post Office on the date in question. Because the mail was metered, the majority relies upon the Commission regulation (20 NYCRR 601.3) which provides that machine-metered mail shall be considered filed on the date of receipt.

I have already indicated in recent dissents that I reject our strict reliance on section 601.3(b) as arbitrary. I have further indicated that it is unfair and unreasonable to allow machine meters, which are in widespread use, to change the nature of a filing so that it is deemed accomplished upon receipt rather than upon mailing. I have further criticized the confusion resulting from the more liberal language in 20 NYCRR 535.1 which leads taxpayers and practitioners to believe that a machine-metered mailing, if it arrives in reasonable time, will be deemed mailed and filed on the date of the machine postmark. While section 535.1 is intended to refer to tax payments and tax form filings, it describes its own rule as relating to "any document required to be filed under the provisions of Article 28 of the Tax Law" (relating to sales tax), and it is headed "General Mailing Rules." That it engenders confusion may be discerned from the brief filed by counsel for the instant petitioners which brief contains an entire point relating to the aforesaid section 535.1 and exploring its implications. The Commission clearly intended that section 601.3 shall control submissions of Tax Appeals petitions, and the timing thereof. Nevertheless, the parallel existence of the two provisions constitutes a source of confusion especially where, as here, it would not be entirely reasonable to anticipate that metered mailing would have the effect imposed by section 601.3. Finally, the testimony of a

professional, together with that of his employee, may properly establish timely mailing. It is particularly impressive that, here, both testified as to specific memories of the mailing, and that two persons were produced whose testimony showed no inconsistencies. It is not to be presumed that a professional practitioner would commit perjury on behalf of one of many clients, especially if such perjury could easily be discovered through the device of comparing the testimony with that of another participant.

The above reasoning is in line with my previous dissents. Yet, in this instance I find myself concurring in the majority's decision against petitioner for the following reasons, relating specifically to the matter at hand. The practitioner testified that he prepared the petition well in advance of the final date but, instead of mailing it, diaried it for submission at a point weeks or months later. Thus, the last minute nature of the submission, which was a direct cause of its late receipt was the result of a voluntary, if not willful, choice. It is difficult to understand the business or professional basis for a conscious choice to lay aside a prepared document and mail it only upon the last available business date. Nevertheless, regardless of the motivation, the admitted actions of the preparers tend to balance the equities in the Commission's favor. Second, the actual mailing was accomplished by a clerical employee and not by the practitioner himself. Thus, the practitioner could offer no testimony to the actual mailing, unlike the situation in Matter of Donald Siegel (State Tax Commission, June 30, 1986), in which I dissented. If the mailing did not actually occur in timely fashion, it could have been the result of the unadmitted forgetfulness of one party who is not subject to professional strictures for unethical conduct. Finally, and most tellingly, the petition did not arrive until September 26, ten days after the claimed mailing date. While it is possible the mail could be delayed for ten days, common experience dictates that this is not the usual situation. Testimony was elicited at the hearing concerning similar delays in the case of certified mail. Common experience also dictates that certified mail may often take longer to deliver than ordinary first-class mail.

The arrival of the petition a full week late (and ten days after the claimed mailing) suggests that it may not have been timely mailed. An inference may be drawn contradicting the testimony at the hearing, which while probative, was certainly not conclusive. Even if the strict application of section 601.3 were to be regarded as unfair or capricious, the applicable remedy might fall far short of being so liberal as to require acceptance of the instant petition.

In fact, in a recent dissent, I proposed that metered mail be accepted when received after the final date for filing, if its receipt comes so soon after such date as to logically require the conclusion that the item was timely mailed. The facts here do not require such a conclusion, and that is the primary basis for this concurrence.

It is not unreasonable or arbitrary to expect that the user of a machine meter would have the foresight to know that he was at the mercy of the vagaries of postal delivery, because a metered date, being subject to manipulation by the user, would not be probative of the date of actual mailing. Thus, the meter user, knowing that no official postmark may be entered on the envelope, voluntarily foregoes the availability of evidence on the envelope as to the mailing date. While I deplore the regulatory provision that use of the meter arbitrarily changes the point of filing, I cannot fault the impact of meter use on a case like the one at hand. This is, in fact, the precise situation that the meter user must dread - the situation in which the ten day lapse between claimed mailing and receipt renders the metered date suspect.

Petitioner's brief attempts to explain away the elapsed time pursuant to the more liberal provisions of 20 NYCRR 535.1(b)(2)(ii). However, those provisions do not relate to the submission of petitions to the Tax Appeals Bureau, which is governed by subsequent provisions in the regulations. While I would prefer that the Tax Appeals regulations be more liberal and reasonable, there is nothing in any of our regulations to require that the provisions of 20 NYCRR 535 be lifted in their entirety and applied to tax appeals. It is a valiant effort on the part of petitioner's counsel, and part of a generally distinguished presentation, but it cannot be controlling here, and the testimony by petitioner's accountant and his secretary, admittedly self-serving in nature, cannot explain away the significant divergence between the date of mailing and the date of receipt.

For all of the above reasons, I concur in the result reached, despite my significant reservations about the Commission's regulations on submissions via machine-metered mail.

AUG 2 8 1987

MARK FRIEDLANDER
Commissioner