

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
GRANVILLE S. MYER : DECISION
D/B/A SCOTTY'S GARAGE :
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 1982 through 1984. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 8, 1989 with respect to the petition of Granville S. Myer d/b/a Scotty's Garage, 2021 Blue Mountain Road, Saugerties, New York 12477 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 1982 through 1984 (File No. 802564). Petitioner appeared by Edward J. Carroll, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

The Division filed a letter in lieu of a formal brief in support of its exception. Petitioner filed a letter in opposition to the Department's exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner substantiated that he is entitled to a refund of sales and use taxes in excess of the amount conceded by the Division of Taxation.

II. Whether any portion of the refund claimed is barred by the statute of limitations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below and we find certain additional facts as indicated below.

Petitioner, Granville S. Myer d/b/a Scotty's Garage, operated a gasoline station which provided automotive repairs. On or about November 19, 1984, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax for the period "1982 through present". The application stated that he overpaid sales tax in the amount of "\$15,000.00 (+)" and that he had been denied access to all documents, records and books in the possession of the Division of Taxation ("Division").

On June 17, 1985, the Division advised petitioner that his claim for refund was denied because on two occasions petitioner failed to substantiate the claim.

On or about September 18, 1985, petitioner filed a petition seeking a refund of sales and use taxes in the amount of \$21,061.78. In order to substantiate this claim, petitioner attached a schedule to the petition which compared the amounts he claimed to have paid from December 1972 through December 1984 with amounts which were reported due on sales and use tax returns during same the period.

Upon review of the material presented, a Tax Appeals Bureau conferee concluded that petitioner was entitled to a refund of \$1,317.16. The Division generally agreed with the conferee's calculations except for overpayments which were made on, respectively, April 16, 1981 and August 31, 1981. It was the Division's position that petitioner was not entitled to a refund of these overpayments because the statute of limitations expired on September 1, 1981. Therefore, the Division maintained that petitioner was entitled to a refund of tax of \$707.16. At the hearing, the Division acknowledged that, due to an error on its part, petitioner was entitled to a refund of an additional \$60.00 beyond the \$707.16 previously agreed to.

In arriving at the amount of the refund, the conferee noted that the amount due on certain returns was paid well after the period to which it applied. For example, the following returns and associated payments were noted:

Return for Period Ended

Date of Payment

February 28, 1977
May 31, 1977
August 31, 1977
November 30, 1977
November 30, 1978

April 16, 1981
December 5, 1981
October 8, 1981
July 23, 1982
November 26, 1982¹

When determining the amount of the refund which should be given to petitioner, the Division declined to give petitioner credit for certain payments because it was determined that the payments were applied to income tax or withholding tax liabilities. The dates and amounts of these checks are as follows:

<u>Date of Check</u>	<u>Amount</u>
January 23, 1979	\$ 50.00
September 12, 1979	48.80
May 7, 1981	50.00
May 15, 1981	100.00
February 18, 1982	350.00
April 29, 1982	50.00
June 11, 1982	30.00
June 18, 1982	50.00

There is no evidence that petitioner specifically directed that any of the foregoing payments be applied to a sales tax liability.

Upon review of a list of checks provided by petitioner, the Division declined to give credit for checks dated September 18, 1978 and December 19, 1978 in the amounts of, respectively, \$1,253.14 and \$1,205.14, because the Division could not find payments which corresponded with these amounts.

At the hearing, petitioner presented a series of documents for the purpose of establishing that he is entitled to a greater refund than that conceded by the Division. These documents will be discussed seriatim:

a) Petitioner presented a cancelled check dated June 20, 1978 on his account at Chase Manhattan Bank. The check, which was drawn in the amount of \$1,180.27, had markings

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The conferee's notes show that the payment on November 26, 1982 resulted in an overpayment of \$2.33.

indicating that it was returned because petitioner's account had insufficient funds. The check contained the handwritten notation "Cleared July statement". However, a copy of a bank statement showing that the check was honored was not offered into evidence.

b) Petitioner offered a cancelled check dated December 20, 1979 payable to the order of "New York State Sales Tax" in the amount of \$2,248.90. Handwritten notations on the check show that the check was for a sales tax return and the amount of the check corresponded with the amount of sales and use tax shown due on petitioner's tax return for the quarterly period ended November 30, 1979. Stamps on the checks indicated that the check was returned for insufficient funds and the testimony presented by the Division was that this check was not applied to petitioner's tax liability because the check was not honored by petitioner's bank. However, a bank statement from petitioner's bank reveals that this check was honored.

c) Petitioner offered a cancelled check dated June 21, 1980 payable to the order of "New York State Department of Taxation and Finance" in the amount of \$2,015.23. A notation on the check indicated that the check was for an ST-100 which is the designation of a sales and use tax return. The amount of the check corresponded with the amount of tax shown due on petitioner's sales and use tax return for the quarterly period ended May 31, 1980. Markings on the check, from a bank, state that the check was returned for insufficient funds and evidence presented by the Division establishes that this check was not applied to any of petitioner's tax liabilities. Nevertheless, a bank statement from petitioner's bank reveals that this check was honored.

d) Petitioner submitted a check dated March 20, 1982 payable to the order of the "New York State Department of Taxation and Finance" in the amount of \$1,169.76. A notation on the check stated that it was for "ST-100" and the amount of the check corresponded with the amount of tax which the taxpayer reported was due for the quarterly period ended February 28, 1982. The Division did not take this payment into consideration in determining the amount of petitioner's refund because it could not find where the payment was credited. A document entitled "schedule of returns filed", which was generated by the Division's computer reveals that

this check was received in conjunction with petitioner's return for the quarterly period ended February 28, 1982.

e) Petitioner presented a check dated June 18, 1982 payable to New York State Sales Tax in the amount of \$265.55. A notation on the check stated that the check was for "March 1, 1982 through May 31, 1982". The Division did not give petitioner credit for the check because it could not ascertain how the check was applied. A bank cancellation on the check establishes that the check was honored.

f) Petitioner submitted a check dated December 15, 1982 payable to the order of the "New York Department of Taxation and Finance" in the amount of \$200.00. The check contained the notation that it was for "122-123-124-125". The Division did not give petitioner credit for the check because the payment was not applied to sales tax.

g) Petitioner presented a savings withdrawal slip in the amount of \$725.78 payable to "New York State Department of Taxation and Finance" authorizing a withdrawal from an account at the State Bank of Albany. Petitioner also presented a series of four bank statements from the State Bank of Albany which reported the following withdrawals from an account entitled New York State Business Tax Escrow Plan:

<u>Date</u>	<u>Amount</u>
September 20, 1982	\$725.78
October 4, 1982	145.00
November 23, 1982	263.17
December 31, 1982	500.00

The Division did not give petitioner credit for any of these withdrawals since it could not establish that these funds were applied to sales tax. The Division also declined to give petitioner credit for a withdrawal of \$1,050.00 on an account at the State Bank of Albany for the same reason.

h) Petitioner offered a copy of a bank check dated September 15, 1983 payable to the New York State Department of Taxation and Finance in the amount of \$1,237.00. This check was taken into account in computing the amount of petitioner's refund.

i) Petitioner submitted a bank check dated September 15, 1983 payable to the Department of Taxation and Finance in the amount of \$905.00. This check was also considered in determining the amount of the refund which the Division agreed to.

j) Petitioner presented a check dated November 9, 1983 payable to the Department of Taxation and Finance in the amount of \$500.00. Markings on the check indicate that the check was to be applied to sales tax liability for the periods ending February 28, 1980 and November 30, 1980 through November 30, 1981. Although an auditor was unable to state at the hearing whether petitioner was given credit for the payment, a review of the notes made by the auditor on a worksheet prepared by petitioner reveals that the Division recognized this payment as being applied to the amount due for the quarterly period ended November 30, 1978.

k) Petitioner offered a check dated December 12, 1983 payable to the Department of Taxation in the amount of \$932.78. A notation on the check indicated that the check was remitted pursuant to a deferred payment agreement and that the payment was for the period ended November 30, 1981. Handwritten notations by an auditor on a worksheet prepared by petitioner reveal that the Division was aware of this payment and that the payment was also applied to the sales tax period ended November 30, 1978.

l) Petitioner presented a Certified Check Voucher dated January 20, 1984 establishing that on January 27, 1984 petitioner had a certified check prepared in favor of the Department of Taxation and Finance. There are no inscriptions on the certified check voucher stating that it was remitted in order to satisfy a particular liability. Moreover, handwritten notations by the auditor on a worksheet prepared by petitioner show that petitioner did not get credit for this check in order to determine the amount of the refund because the payment was not applied to a sales tax liability.

m) Petitioner presented a cancelled check dated June 20, 1984 payable to the Department of Taxation and Finance in the amount of \$347.69. The check contained the notation that it was for the sales tax period March 1, 1984 through May 31, 1984. A check mark by the Division's auditor on a worksheet prepared by petitioner shows that credit was given for this payment.

n) Petitioner presented a series of checks which contained memoranda indicating that the payments were for certain sales tax periods. These checks bore the following dates and amounts:

<u>Date</u>	<u>Amount</u>
December 20, 1983	\$723.96
March 19, 1984	429.59
September 17, 1984	139.64
December 20, 1984	381.77

Check marks by the Division's auditor on petitioner's worksheet show that each of these checks was considered by the Division when it determined the amount of the refund it was willing to grant petitioner.

o) Petitioner offered a series of worksheets which listed, among other things, the sales tax reportedly due on returns from December 1972 through December 1984. Subsequent columns on the return attempted to correlate petitioner's tax payments with the amounts shown due on the returns. No attempt was made to account for the imposition of penalty and interest which would normally arise from the late filing and payment of sales tax liabilities.

From 1975 through 1980 petitioner made sales tax payments between sales tax quarters. He also made some quarterly payments. In 1979 petitioner entered into a verbal agreement with the Division to make payments on his outstanding liabilities. By 1982, petitioner "felt" that he was current in meeting his sales tax obligations. However, petitioner continued making payments and started inquiring about what was being done with the money he was paying. Although there were numerous meetings, petitioner never received a precise explanation of where the monies were being applied. In 1983, petitioner entered into a deferred payment agreement with respect to those returns which were filed without remittance. In the summer of 1984, tax compliance officers padlocked the doors of petitioner's business and demanded payment of \$19,100.00 in satisfaction of certain warrants. Petitioner insisted that he did not owe the money. Nevertheless, he relented and paid the money under protest in order to reopen his business. The Division applied the \$19,100.00 as follows:

<u>Quarter Ending</u>	<u>Amount</u>
February 28, 1979	\$1,733.35
February 29, 1980	3,449.64
November 30, 1980	3,393.49
February 28, 1981	3,340.01
May 31, 1981	1,932.59
August 31, 1981	2,825.07
November 30, 1981	<u>2,426.05</u>
	\$19,100.20

At some juncture, petitioner established a tax escrow account in order to satisfy sales tax obligations at the behest of an employee of the Division. When the account was first established, petitioner executed withdrawal slips in order to make withdrawals from the account. This practice continued through at least September 14, 1982. Petitioner's recollection is that at some point in time he ceased receiving withdrawal slips. Petitioner believes that thereafter the Division made withdrawals from the account without any activity on his part.

Petitioner submits that the checks marked insufficient funds were honored by his bank and evidenced by bank statements. Moreover, since he is in possession of the check, it may be inferred that the check cleared because, if the check had not been honored, it would not have been returned to him. Petitioner contends that this argument is buttressed by the Division's being in possession of other checks which were not honored by the bank. Petitioner also argues that he did not have any employees and therefore the application of any payments to withholding tax was improper. Petitioner submits that the worksheet he submitted establishes that he made an overpayment of \$22,300.45.

We find the following facts in addition to those found by the Administrative Law Judge.

The determination of the Administrative Law Judge was issued on June 8, 1989. On July 27, 1989 the Secretary to the Tax Appeals Tribunal received a letter from petitioner's representative which stated "[e]nclosed herewith please find the Department's Notice of Exception to Administrative Law Judge Marchese's determination herein." Attached to the letter was an exception form which repeated the substance of the exception filed by the Division of Taxation. The letter and exception form were contained in an envelope which bore a postmark with an illegible date. By letter dated December 5, 1989 the Secretary to the Tax

Appeals Tribunal informed petitioner's representative that the exception would be untimely unless petitioner proved that he met the requirements of timely service as set forth in 20 NYCRR 3000.16. Petitioner was given until January 4, 1990 to submit such proof. Petitioner's representative responded by letter dated January 2, 1990 but did not submit any evidence with respect to the mailing of the "exception," nor did petitioner discuss this issue.

OPINION

The Administrative Law Judge determined 1) that application of the statute of limitations in Tax Law § 1139(a) resulted in petitioner's only being able to seek a refund for payments made for the sales tax quarter ending November 30, 1981 and thereafter and 2) that with the exception of four (4) checks, petitioner failed to sustain his burden of proving he was entitled to a refund in excess of the amount conceded by the Division.

On exception, the Division asserts petitioner's refund should not be increased by the amount represented by four checks submitted by the petitioner. The Division asserts that it was correct in not taking these payments into account in determining petitioner's refund. The Division also asserts that the petitioner's exception was not timely filed and was not in the proper form in that it does not set forth grounds for exception nor requested findings.

Although not stated in his exception, petitioner asserts in his letter dated January 2, 1990 that a) the Administrative Law Judge erred in not increasing his refund to the amount requested, b) that he is entitled to the full amount of his refund because of the failure of the Division to prove the existence of outstanding liabilities over and above the amounts shown as due on his returns against which the Division could properly apply petitioner's payments, c) that he is entitled to an accounting of money paid by him to the Division and d) that the statute of limitations should not be applied as determined by the Administrative Law Judge.

We deal first with the question of petitioner's exception. We conclude that petitioner did not file an exception and even if the document was considered an exception, it was not timely filed. The document filed by petitioner on July 27, 1989 stated as the grounds for petitioner's

disagreement exactly those grounds stated by the Division on its exception; these were all portions of the Administrative Law Judge's determination favorable to petitioner. Petitioner did not request any alternative findings of fact or conclusions of law. Since this document does not even suggest that petitioner disagrees with the Administrative Law Judge's determination, we conclude it was not an exception.

Further, an exception is required to be filed within 30 days after the issuance of the Administrative Law Judge's determination (Tax Law § 2006.7; 20 NYCRR 3000.11[a][1]). The document filed by petitioner was not received by the Tribunal until July 27, 1989, more than 30 days after June 8, 1989, the date the Administrative Law Judge's determination was issued. Since the envelope containing the document bore an illegible postmark date, petitioner is not able to benefit from an earlier deemed filing date under the regulations at 20 NYCRR 3000.16(1) based on the postmark date. Finally, although given an opportunity to submit evidence to prove timely mailing by other than the postmark, pursuant to 20 NYCRR 3000.16(a)(3), petitioner submitted nothing. Accordingly, the document filed by petitioner could not be considered as an exception because it was not timely filed.

By failing to file a timely exception, petitioner waived his right to require the Tribunal to review any portion of the Administrative Law Judge's determination. Although the Tribunal has the discretionary power to review the issues petitioner raised in his letter dated January 2, 1990 (see, Matter of Klein's Bailey Foods, Inc., Tax Appeals Tribunal, August 4, 1988; Tax Law § 2006.7; 20 NYCRR 3000.11[e]), we see no reason to exercise this discretion in this case. Therefore, we will not discuss the issues raised by petitioner.

We deal next with the four checks at issue in the Division's exception.

Check #1 dated March 20, 1982 was payable to the order of "The New York State Department of Taxation and Finance" in the amount of \$1,169.76. The check had a notation on it that it was for "ST-100" and was filed with petitioner's return for the February 28, 1982 quarter. The Division did not take this payment into consideration in determining the amount of petitioner's refund because it could not find where the payment was credited.

Check #2 dated June 18, 1982 was payable to "New York State Sales Tax" in the amount of \$265.00 and contained a notation that it was for March 1, 1982 through May 31, 1982. The Division did not give petitioner credit for the check because it could not determine how the check was applied. A bank cancellation on the check established that the check was honored.

The Division asserts on exception that it properly did not take these checks into consideration in determining the amount of petitioner's refund because "they were payments with timely returns, and not for a period for which a notice of determination or notice and demand had been issued" (Division's exception, proposed Conclusion of Law "B4"). We fail to see the relevance of this assertion in the context of the current case. We are here dealing with a claim for refund, the essence of which is that petitioner asserts that he has paid more than he was required to pay. We agree with the Administrative Law Judge that the fact that a payment accompanied a timely filed return does not lead to the conclusion that it is properly excluded in determining whether petitioner, in fact, overpaid his taxes.

The Administrative Law Judge correctly determined with regard to these checks that each was honored by petitioner's bank and contained a directive that the checks be applied to a sales tax liability. We agree with the Administrative Law Judge that the fact that the Division cannot ascertain where a check was applied should not inure to petitioner's detriment.

Check #3 dated November 9, 1983 was payable to the "Department of Taxation and Finance" in the amount of \$500.00. Markings on the check indicate that it was to be applied for the periods ending February 28, 1980 and November 30, 1980 through November 30, 1981. The auditor's workpapers indicated that the Division applied this check to the period ended November 30, 1978.

Check #4 dated December 12, 1983 was payable to the "Department of Taxation and Finance" in the amount of \$932.78 and contained a notation that the check was remitted pursuant to a deferred payment agreement and was for the period ending November 30, 1981, the same period to which petitioner directed check #3 be applied. Handwritten notations by an auditor on a worksheet prepared by the petitioner indicate that the Division was aware of this

payment and that the payment was also applied to the sales tax period ended November 30, 1978.

On exception, the Division asserts that it properly did not consider the checks dated November 9, 1983 and December 12, 1983 because, "although each check contained a clear directive that it be applied to a sales tax liability for a specific quarter, as the quarter had been previously satisfied, the Department was entitled to apply the checks to other open liabilities." (Division's exception, proposed Conclusion of Law "B7".) In fact, the record shows that the Division applied check #3 and check #4 to the same sales tax quarter and not to any other open liability.

Under these circumstances we agree with the Administrative Law Judge that inasmuch as each check contained a sufficiently clear directive that it be applied to a sales tax liability and, further, that it be applied to a period not barred by the statute of limitations, petitioner is entitled to be given credit for such checks in determining the amount of his refund.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Granville S. Myer, d/b/a Scotty's Garage is granted to the extent indicated in conclusions of law "B(4)", "B(7)", "C" and "D" of the Administrative Law Judge's determination but is in all other respects denied; and

4. The Division of Taxation shall grant petitioner's refund to the extent indicated in paragraph "3" above, but such refund is otherwise denied.

DATED: Troy, New York
May 17, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner