

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

HARRON'S ELECTRIC SERVICE, 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 December 1, 1977 through :
August 31, 1980.

Petitioner, Harron's Electric Service, Inc. , 80 West Main Street, Gouverneur, New York 13642, filed an exception to the determination of the Administrative Law Judge issued on September 24, 1987 with respect to its petition for a revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1977 through August 31, 1980 (File No. 803298). The petitioner appeared by Sheldon G. Kall, Esq. The Division of Taxation appeared by William Collins, Esq. (James Della Porta, Esq., of Counsel).

Neither the petitioner nor the Division of Taxation requested oral argument and only the Division submitted a brief in support of its position. The petitioner, for the first time, raises the application of section 2103(2) of the Civil Practice Law and Rules to the facts in this case. After reviewing the hearing record, the determination, the exception and the Division of Taxation's brief, the Tax Appeals Tribunal renders the following decision.

FINDINGS OF FACT

On December 7, 1981, the Audit Division issued to petitioner, a notice of determination and demand for payment of sales and use taxes for the period December 1. 1977 through

August 31, 1980 asserting \$10,191.79 in taxes due, together with interest of \$2,105.18 for a total amount of \$12,296.97.

On March 9, 1982 the Tax Appeals Bureau of the State Tax Commission received the petition of the petitioner protesting the notice of determination and demand. The envelope in which the petition was wrapped bore a machine-metered stamp dated March 4, 1982. In addition, the envelope bore a certified mail sticker and the remains of a return receipt request sticker. The Tax Appeals Bureau rejected the petition as untimely, indicating to petitioner that under sections 1138 and 1147(a)(2) of the Tax Law and regulations of the Commission (20 NYCRR 601.3), the petition had to be received by March 7, 1982, i.e., within 90 days after the notice of determination and demand was mailed out (December 7, 1981), and since it was received on March 9, 1982 it was not timely filed. We would note in this regard that the due date for the petition - March 7, 1982 - was a Sunday and that therefore March 8, 1982 was the applicable date for timely receipt under section 1147(a)(3) of the Tax Law.

At the hearing, petitioner contended that the petition was deposited in a United States postal mail box on March 4, 1982. Petitioner's representative introduced into evidence an affidavit, dated October 23, 1986, signed by his secretary attesting that she typed the petition dated February 27, 1982 and that on March 4, 1982 she typed the envelope, inserted the petition in the envelope, affixed the proper postage, gave the envelope to petitioner at approximately 4:00 p.m. and saw petitioner's representative leave the office and return five minutes later stating he mailed the document.

Petitioner, at hearing, asserted that the petition must have been received by the Department by the March 7, 1982 deadline and supposed that the delay in transmitting the

petition to the Tax Appeals Bureau was the result of internal delay of the Department's mail operation.

Although the envelope bore certified mail sticker 382645, petitioner introduced no evidence to indicate the handling of the document by the United States Postal Service. Further, while the envelope bore the remainder of the return receipt attachment, petitioner could not produce the receipt at hearing.

The Administrative Law Judge concluded that the petition was not timely filed since it was not delivered within the 90 day period set forth in section 1138(a)(1). In determining the date of delivery of the petition, the Administrative Law Judge applied section 601.3(c) of the Tax Commission's Rules of Practice. This rule states, in pertinent part, "Where a machine metered stamp is used on the envelope, the petition shall be deemed filed upon receipt." (20 NYCRR 601.3[c].)

ISSUE

The initial question raised on this appeal is whether the Administrative Law Judge properly applied section 601.3(c) of the Rules of Practice in determining the delivery date of the instant petition. This issue arises because our review indicates that another regulation, 20 NYCRR 535.1 contained in the Tax Commission sales tax regulations, sets forth specific rules to determine the delivery dates of sales tax documents when mailed. Among the rules contained in this latter regulation are rules providing for the deemed delivery of sales tax documents bearing a postmark made by other than the United States Postal Service (20 NYCRR 535.1[b][21]). These sales tax regulations, if applicable to the instant petition, may alter its delivery date. As a result, our inquiries are three-fold: the first is whether the rules of section

535.1 apply generally to determine the timeliness of sales tax petitions; the second is whether this regulation was in effect to determine the delivery date of the particular petition before us; and finally, if in effect, what is the delivery date of the instant petition pursuant to these sales tax regulations.

OPINION

Effective June 29, 1976, the Tax Commission, coincidental with a reorganization of its hearing function and creation of the Tax Appeals Bureau of the Commission, adopted its Rules of Practice (20 NYCRR part 601) to govern the commencement and conduct of all hearings before the Commission. These rules were general in nature, in that they prescribed the hearing practice for all taxes and in all instances where a hearing was permitted or required by the Tax Law (20 NYCRR 601.1). Inter alia, the Rules provided that the petition must be filed within the time limitations prescribed by the applicable provisions of the Tax Law. If the petition was filed by mail, the Rules deemed it filed on the date of the United States postmark stamped on the envelope. As quoted above, the Rules stated that where a machine metered stamp was used on the envelope, the petition was deemed filed upon receipt (20 NYCRR 601.3; 601.13). No other regulations dealing with mailing of petitions existed at the time the Rules of Practice were adopted.

In 1976 the Legislature (L 1976, ch 94, §5) amended section 1147 of the Tax Law concerning the sales tax to include specific provisions concerning the mailing of documents by taxpayers. These amendments, set forth at section 1147(a)(2) of the Tax Law,¹ provide for

¹ Section 1147(a)(2) of the Tax Law provides as follows:

(2) If any return, claim, statement, notice, application, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau,

deemed delivery when the United States Postal Service is used to effect delivery and give authority for the Tax Commission, by regulation, to prescribe deemed delivery rules where a document bears a postmark made by other than the United States Postal Service. The documents covered by this legislation were "any return, claim, statement, notice, application or any other document required to be filed (Tax Law, § 1147[a][2], emphasis added). This term "application" relates directly to section 1138(a)(1) which provides that the notice of deficiency shall become final unless the taxpayer within ninety days after the giving of notice of such " . . . shall apply to the tax commission for a hearing This legislation was obviously patterned after the delivery mailing rules in Tax Law section 619(a) with respect to the personal income tax. The distinguishing feature is that the income tax provisions utilize the term petition (see, Tax Law §§ 689; 681[b]; 691[a]). The sales tax, as noted, utilizes the term application.

Although this legislative amendment to the sales tax preceded the adoption of the Rules of Practice, the Rules did not exercise the authority given by the legislation to prescribe deemed delivery dates for sales tax petitions bearing a postmark made by other than the United States Postal Service.

office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subdivision shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made. If any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section. This subdivision shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulation of the tax commission.

Effective April 19, 1983 the Tax Commission adopted Part 535 of the sales tax regulations (20 NYCRR part 535). At section 535.1(b),² these regulations set forth mailing rules for sales

²20 NYCRR 535.1(b) provides as follows:

(b) Mailing of documents by taxpayers. (1) Any document required to be filed under the provisions of article 28 of the Tax Law or under a tax enacted pursuant to the authority of article 29 of the Tax Law and administered by the Tax Commission will not be considered to be timely mailed or timely filed unless the document is mailed in accordance with the following requirements:

(i) The document must be contained in an envelope or other appropriate wrapper and must be properly addressed to the Tax Commission, bureau, office, officer or person with which or with whom the document is required to be filed.

Cross references:

For further information on the address to which petitions for hearings before the Tax Commission are to be mailed, see Part 601 of this Title.

For further information on the address to which sales tax returns are to be mailed, see Part 533 of this Subchapter.

For further information on the address to which applications for refunds or credits of sales tax are to be mailed, see Part 535 of this Subchapter.

For further information on the address to which notices of bulk sales are to be mailed, see Part 537 of this Subchapter.

(ii) The envelope containing the document must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid. For this purpose, such document is considered to be deposited in the mail of the United States when it is deposited with the domestic mail service of the United States Postal Service. The domestic mail service of the United States Postal Service includes mail transmitted within, among, and between the United States,, its territories and possessions, and Army-Air Force (APO) and Navy (FPO) post offices.

(iii) The envelope or other wrapper containing the document must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing such document). If the postmark stamped by the United States Postal Service on the envelope or wrapper containing the document does not bear a date which falls within the prescribed period or on or before the prescribed date for filing such document in accordance with this Subchapter, the document will be considered not to be timely filed, regardless of when the envelope or wrapper containing such document is deposited in the mail. Accordingly, the sender assumes the risk that the envelope containing the document will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing such document), but see paragraph (3) of this subdivision with respect to the use of registered mail or certified mail to avoid this risk. Furthermore, if the postmark made by the United States Postal Service on the envelope or wrapper containing such document is not legible, the person who is required to file the document has the burden of proving when the postmark was made.

(iv) Any document mailed in accordance with the requirements of subparagraphs (i)-(iii) of this paragraph will be considered to be timely mailed or timely filed even if it is actually delivered to the appropriate address, after the applicable prescribed period or prescribed date.

(2)(i) If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service:

(a) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extension of time granted for filing the document); and

(b) the document must be received at the appropriate address, not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States

tax documents which are based on the amendments made to section 1147 of the Tax Law by Chapter 94 of the Laws of 1976. These sales tax regulations are clearly patterned after the income tax mailing regulations (20 NYCRR 146.4) adopted by the Tax Commission in 1982. Further, the income tax regulations were clearly patterned after Internal Revenue Code section 7502 (see, *Matter of Mancuso*, State Tax Commn., TSB-H-83-[2731-I, Oct. 14, 1983; *Matter of Leirvik*, State Tax Commn., TSB-H-86-[261-I, Jan. 17, 1986).

At section 535.1(b)(2) the sales tax regulation explicitly exercises the power given to the Tax Commission in the 1976 legislation to make deemed delivery rules for documents bearing a postmark made by other than the United States Postal Service. This section provides that if such a postmark bears a date which falls within the prescribed period of time or on or before the prescribed date for filing of the document, then the document will be deemed to be timely

Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document). (ii) In case the document is received after the time when a document so mailed and so postmarked by the United States Postal Service would ordinarily be received, such document will be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received, if the person who is required to file the document establishes:

(a) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;

(b) that the delay in receiving the document was due to a delay in the transmission of mail; and

(c) the cause of such delay.

(iii) If the envelope or wrapper containing the document has a postmark made by the United States Postal Service in addition to the postmark -not so made, the postmark which was not made by the United States Postal Service will be disregarded, and whether the envelope was mailed in accordance with this subdivision will be determined solely by applying the provisions of subdivision (a) of this section.

(3)(i) If an envelope or wrapper containing a document is sent by United States registered mail, the date of such registration is treated as the postmark date and the date of delivery.

(ii) If an envelope or wrapper containing a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee to whom such envelope is presented, the date of the postmark on such receipt is treated as the postmark date of the document and the date of delivery.

(4) The term document, as used in this section, means any New York State sales tax return, claim, statement, notice, application or other document required to be filed under the authority of any provision of article 28 or under a tax enacted pursuant to the authority of article 29 of the Tax Law and administered by the Tax Commission.

received if it reaches the Department within the time when a document mailed and postmarked by the United States Postal Service would have been received.

Section 535.1(b)(4) of the sales tax regulation defines the documents to which the section applies as "any New York State sales tax return, claim, statement, notice, application or other document required to be filed under the authority of any provision of Article 28 or under a tax enacted pursuant to the authority of Article 29 of the Tax Law and administered by the Tax Commission." This list of documents tracks the provisions of section 1147(a)(2) of the Tax Law noted earlier and again includes a petition for hearing before the Tax Commission because a petition is an application for a hearing, pursuant to section 1138(a)(1) of the Tax Law.

In short, what is apparent is that the Tax Commission, coincidental with a reorganization of its hearing function in 1976, adopted an initial set of general regulations, the Rules of Practice, governing the commencement of proceedings before it. Subsequently, in 1983, the Commission adopted comprehensive, specific regulations governing the mailing of documents, including petitions, by taxpayers for purposes of the sales tax. These specific rules for sales tax documents had been preceded by the almost identical mailing rules for income tax documents.

This comprehensive, specific treatment by the Tax Commission on the mailing of documents leads us to conclude that for sales and personal income tax the question of delivery for mailing of documents should generally be determined under these regulations, sections 535.1(b) and 146.4 and not sections 601.3 and 601.13 of the Rules of Practice. This conclusion is supported by the general rule of construction that where there is an apparent conflict between a general act and a special act, the special act controls the case (see, McKinney's Statutes § 397;

East End Trust Co. v. Otten, 255 NY 283; Warren Refining & Chemical Co. v. Sebring, 192 AD 14).

The next level of our inquiry is whether section 535.1(b) of the regulation applies to determine the delivery date of the petition in question. This issue arises because this petition was filed in March 1982, prior to the adoption of the regulation, April 19, 1983, but the regulation was in effect at the time the hearing on the issue of timeliness occurred, October 24, 1986.

We conclude that this regulation is procedural in nature and as a procedural regulation, it was applicable to all hearings pending at the time of its adoption (see McKinney's Statutes §55; Battlefields, Inc. v. County Legislature of Rockland County, 86 Misc 2d 181, affd 56 AD2d 586; Longines-Wittnauer Watch Co., Inc. v. Barnes & Reinecke, 15 NY2d 443). Accordingly, the date of delivery and thus the timeliness of the instant petition should have been determined by the Administrative Law Judge pursuant to the rules of section 535.1(b) of the regulations.

Our final inquiry is whether the instant petition satisfies the conditions of section 535.1(b)(2)(i) of the regulation, to benefit from the regulation's deemed delivery rule. The first condition is that the petition must contain a postmark made by other than the United States Postal Service which falls within or before the prescribed date for filing (20 NYCRR 535.1[b][21][i][a]). This petition bears a machine metered stamp. We conclude that a machine metered stamp is a postmark made by other than the United States Postal Service as used in this regulation. This conclusion is supported by the regulation itself which specifically excludes metered mail from the category of postmarks made by other than the United States Postal Service in a later provision, for another purpose (20 NYCRR 535.1[b][2][ii][a]) and by opinions

of the Federal Tax Court and Court of Appeals construing the same words in section 7502 of the Internal Revenue Code and Treasury Regulation 301.7502-1(c)(1)(iii)(b) (Pugsley v. Commissioner of Internal Revenue, 749 F2d 691, 693; Blank v. Commissioner of Internal Revenue, 76 TC 400, 405). The second part of this first condition is also satisfied because the date of the metered stamp, March 4, 1982, was within the prescribed filing period which ended on March 8, 1982

The next condition of the regulation is that the petition must be received within the time that a document mailed and postmarked by the United States Postal Service would be received (20 NYCRR 535.1[b][2][i][b]). The petition was received by the Tax Appeals Bureau on March 9, five days after the date of the meter stamp. Five days is, in our opinion, not later than the date a document would ordinarily be received when mailed through the United States Postal Service. We find support for this conclusion in that subdivision 2 of section 2103 of the Civil Practice Law and Rules in effect recognizes five days as the ordinary time of mailing. We think it is reasonable to apply that standard here, although it is clear that the time extensions provided for in subdivision 2 of section 2103 do not apply to administrative hearings (see, Fiedelman v. New York State Department of Health, 58 NY2d 80).

Accordingly, the instant petition satisfies the conditions of section 535.1(b)(2) of the sales tax regulations and is, pursuant to these regulations, deemed to have been delivered on the date of its metered mail stamp, March 4, 1982. This date of delivery is within the ninety day time period required by section 1138(a)(1) of the Tax Law.

Accordingly, it is the decision of this Tribunal that the petition for hearing was timely filed and we remand the case back to the Administrative Law Judge for a hearing on the merits.

FEB 19, 1988

John P. Dugan
President

Francis R. Koenig
Commissioner