

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>HOWARD AND NANCY POWERS</b>	:	DECISION
<b>D/B/A VILLAGE PINE SHOP</b>	:	DTA No. 804958
	:	
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, 1979	:	
through February 28, 1987.	:	

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Petitioners Howard and Nancy Powers d/b/a Village Pine Shop, R.D. #5, Montrose, Pennsylvania 18801 filed an exception to the determination of the Administrative Law Judge issued on March 14, 1991 with respect to their 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 December 1, 1979 through February 28, 1987. Petitioners appeared by Joel A. Scelsi, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

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

***ISSUE***

Whether petitioners timely filed their petition for revision of a determination or for refund of sales and use taxes.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "2" and "4" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify findings of fact "1," "2" and "4" of the Administrative Law Judge's determination to read as follows:

The Division of Taxation mailed to petitioners, Howard and Nancy Powers d/b/a Village Pine Shop, four notices of determination and demand for payment of sales and use taxes due which, together, assessed \$69,919.08 in tax due, plus penalty and interest, for the period December 1, 1979 through February 28, 1987. One of the notices in issue assessed penalties only, so-called omnibus penalties, for the period June 1, 1985 through February 28, 1987.

The four notices in question were mailed by the Division by U.S. Postal Service certified mail, return receipt requested, to petitioners at the following address:

"Howard & Nancy Powers T/A  
Village Pine Shop  
R.D. #5  
Montrose, PA 18801"

Each of the four notices of determination indicated, on their face, "05 20 87" as the "Date of Notice."<sup>1</sup>

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<sup>1</sup>The Administrative Law Judge's findings of fact "1," "2" and "4" read as follows:

"1. On May 14, 1987, the Division of Taxation mailed to petitioners, Howard and Nancy Powers d/b/a Village Pine Shop, four notices of determination and demands for payment of sales and use taxes due which, together, assessed \$69,919.08 in tax due, plus penalty and interest, for the period December 1, 1979 through February 28, 1987. One of the notices in issue assessed penalties only, so-called omnibus penalties, for the period June 1, 1985 through February 28, 1987."

"2. The four notices in question were mailed by the Division on May 14, 1987 by U.S. Postal Service certified mail, return receipt requested, to petitioners at the following address:

'Howard & Nancy Powers T/A  
Village Pine Shop  
R.D. #5  
Montrose, PA 18801'

"4. Although the four notices of determination herein were mailed on May 14, 1987, each indicated '05 20 87' as the 'Date of Notice'."

We modified these findings of fact to delete the date of May 14, 1987, as the date that the notices were mailed by the Division to petitioners. This date was deleted because the Division's mailing log does not have a postmark on it which would indicate the date of mailing. The record does not contain any postal form (postal form 3800, "Certified Mail Receipt" or postal form 3877, "Application for Registration or Certification") bearing a United States postmark.

The return receipt card ("Domestic Resturn Receipt" Form 3811) associated with the envelope containing the four notices of determination mailed to petitioners indicates receipt of said envelope at the address listed above by a Renee Powers on May 15, 1987.

A petition protesting the four notices of determination herein was received by the former Tax Appeals Bureau on August 25, 1987. The envelope in which the petition was mailed bore a machine metered postmark of August 19, 1987. Said envelope also indicated that the petition was mailed via certified mail. The envelope contained no U.S. Postal Service postmark. The petition itself was dated August 15, 1987 and was signed by petitioner's then-representative, Joseph Garbarino.

The certified mail receipt associated with the petition contained the following handwritten marking:

"8/18/87  
Petition to NYS  
Howard & Nancy Powers"

The certified mail receipt contained no U.S. Postal Service stamp of any kind.

### ***OPINION***

The Administrative Law Judge determined that petitioners' petition was untimely as it bore a machine metered postmark date of August 19, 1987, a date which fell outside of the 90 day period for filing a petition.

On exception, petitioners argue that the 90 day period runs from May 20, 1987 (the date on the face of the notices) and that their petition is timely as it was picked up by a postal service employee from their accountant's office on August 18, 1987, the 90th day of the period.

The Division, on exception, relies on the testimony and evidence presented at the hearing and the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

The Tax Appeals Tribunal's Rules of Practice and Procedure provide as follows:

"(1) If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e. office metered mail):

"(i) 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 . . ." (20 NYCRR 3000.16[b]).

We find that petitioners have not met their burden to prove timely mailing of the petition.<sup>2</sup> As found by the Administrative Law Judge, petitioners' petition is late even if the period is measured from May 20, 1987, the date on the face of the notice. The affidavit of the United States postal worker submitted by petitioners does not establish that the petition in question was picked up by the postal worker on August 18, 1987. The affidavit is only a statement that the postal worker signed certified mail receipt slips for petitioners' accountant. It does not state that the postal worker signed the certified mail receipt in question. In any event, section 1147(a)(2) of the Tax Law deems a petition to have been delivered on the date of the postmark. Thus, the date the mail was picked up by the postal worker is not relevant. Absent a United States postmark on the slip, we are governed by the machine metered postmark on the envelope that contained the petition (20 NYCRR 3000.16[b]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Howard and Nancy Powers d/b/a Village Pine Shop is denied;
2. The determination of the Administrative Law Judge is affirmed; and

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<sup>2</sup>Although we have deleted the May 14, 1987 date from the findings of fact, we find that the Division has met its burden to prove mailing of the notices as evidenced by postal form 3811 ("Domestic Return Receipt") showing receipt by Renee Powers of the notices on May 15, 1987.

3. The petition of Howard and Nancy Powers d/b/a Village Pine Shop is dismissed.

DATED: Troy, New York  
September 26, 1991

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Maria T. Jones

Maria T. Jones  
Commissioner