

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
TRANSWORLD CORPORATION : DECISION
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Years 1983 :
and 1984. :
:

Petitioner Transworld Corporation, P.O. Box 904, Paramus, New Jersey 07653-0904, filed an exception to the determination of the Administrative Law Judge issued on March 29, 1990 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1983 and 1984 (File No. 805436). Petitioner appeared by Bernard G. Cappiello, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Petitioner filed a brief on exception. The Division did not. Oral argument was requested by petitioner but was denied.

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

ISSUE

Whether petitioner filed a timely petition for hearing or request for conciliation conference with respect to notices of deficiency of corporation franchise tax.

FINDINGS OF FACT

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

On September 25, 1987, the Division of Taxation mailed the following notices of deficiency to petitioner, Transworld Corporation, by certified mail:

- (a) for 1983 - \$167,891.00 in tax, plus interest;

(b) for 1983 - \$28,584.00 in tax (Metropolitan Transportation Business Tax Surcharge), plus interest;

(c) for 1984 - \$470,170.00 in tax, plus interest; and

(d) for 1984 - \$79,929.00 in tax (Metropolitan Transportation Business Tax Surcharge), plus interest.

Statements of audit adjustment explaining that the deficiencies were based on a "recent field audit" were also mailed to petitioner on September 25, 1987.

A document entitled "Petition For Hearing"¹ was prepared by Thomas F. Lombardi, petitioner's Director of Tax Research and Compliance, and Bernard G. Cappiello, petitioner's Staff Vice-President - Taxes. On Wednesday, December 23, 1987, the petition was placed in an envelope addressed to the Bureau of Conciliation and Mediation Services in Albany, New York and United States postage stamps totalling \$.90 in value were placed on the envelope.

Mr. Lombardi took the aforementioned envelope with him as he left his office at approximately 5:20 P.M. on December 23, 1987. Minutes later, he deposited the envelope in an official United States Postal Service collection box located in the lobby of 605 Third Avenue, New York, New York, the building in which petitioner's offices were then located.

Petitioner's offices were closed on Christmas Eve, Thursday, December 24, 1987. However, the office building known as 605 Third Avenue was open on that day. The next day, Friday, December 25, 1987 was Christmas Day, a legal holiday.

The envelope containing the petition was postmarked by the United States Postal Service with the date December 28, 1987, a Monday. It was received by the Bureau of Conciliation and Mediation Services in Albany on January 4, 1988.

¹ Effective September 1, 1987, the Bureau of Conciliation and Mediation Services assumed the conference function of the former Tax Appeals Bureau, while the Division of Tax Appeals assumed that Bureau's hearing function.

The petition was rejected as untimely as it had been received after December 24, 1987, the ninetieth day after the mailing of the notices of deficiency, and bore a postmark later than said date.

OPINION

The Administrative Law Judge determined that since the petition was due on December 24, 1987 and was not received until January 4, 1988, it was untimely and, therefore, properly rejected by the Bureau of Conciliation and Mediation Services.

On exception, petitioner argues that the Administrative Law Judge erred in his determination that the Bureau of Conciliation and Mediation Services (hereinafter the Bureau) was justified and acted properly in denying the petition because it reached its offices in Albany after the 90 day filing period had expired. Petitioner especially relies on the fact that the Administrative Law Judge expressly accepted the fact that the envelope containing the petition was deposited in a United States mail facility on the 89th day with proper postage affixed to the envelope.

We affirm the determination of the Administrative Law Judge.

The general rule is one of physical delivery, i.e., the petition must be filed with the Bureau within the 90 day period required by Tax Law § 1089(b). Certainly this can be accomplished by any means, including mailing of the document. However, when mail is used Tax Law § 1091(a) concerning the mailing of petitions for redetermination of deficiency is specific as to the method of proving timely mailing.

Tax Law § 1091(a) provides that if a petition or other document required to be filed within a prescribed period or on or before a prescribed date is, after such period delivered by United States mail, the date of the United States postmark stamped on the envelope shall be deemed the date of delivery. However, this subsection only applies if the postmark date falls within the prescribed period. Furthermore, if the taxpayer uses registered or certified mail, the receipt is prima facie evidence of delivery. Where the taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service or that the document may not be delivered at all (see, Matter of Sipam, Tax Appeals Tribunal, March 10, 1988).

Tax Law § 1091(a) is patterned after Internal Revenue Code § 7502 (see, Matter of Harron's Electric Service, Tax Appeals Tribunal, February 19, 1988).

The scheme of the statutes and implementing regulations is designed to avoid testimony as to the date of mailing in favor of tangible evidence in the form of an official government notation (see, Shipley v. Commr., 572 F2d 212, 78-1 USTC ¶ 9211). When a legible postmark appears on an envelope, no evidence that the petition was mailed on some other day will be allowed; the untimely postmark is the controlling factor (see, Shipley v. Commr., *supra*; Drake v. Commr., 554 F2d 736, 77-2 USTC ¶ 9483; Nelson v. Commr., T.C. Memo 1981-360, 42 TCM 372).

In this case, petitioner asserts that it would be unfair and inequitable not to allow a petitioner who files a petition with a postmark outside the statutory period to offer proof that the petition was deposited with a United States postal facility prior to the expiration of the 90 day period even though the postmark was after the 90 day period. Petitioner's assertion is not a correct reading of the law. The Tax Law does not provide that a petition is timely filed upon deposit in a United States Postal Service facility. The petition is due at the Bureau's office within the 90 day period or must be postmarked within this 90 day period. Here, the postmark on the envelope bore a December 28, 1987 date, which is four days after the expiration of the prescribed period. Therefore, the petition is untimely.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of petitioner Transworld Corporation is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Transworld Corporation is denied; and

4. The notices of determination dated September 25, 1987 are sustained.

DATED: Troy, New York
October 11, 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