

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
VLADIMIR FELDMAN : DECISION
for Redetermination of a Deficiency/Revision of a :
Determination or for Refund of Sales and Use Tax :
under Article(s) 28 and 29 of the Tax Law for the :
Period 6/1/82-11/30/84.

Petitioner, Vladimir Feldman, as officer of F's Foreign Car Corp. of Queens, 33-47 14th Street, Apt. 9-A, Long Island City, New York 11106 filed an exception to an order of the Administrative Law Judge issued on June 23, 1988 dismissing his petition for redetermination of a deficiency/revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period June 1, 1982 through November 30, 1984 (File No. 805654). Petitioner appeared by Steven R. Goldberg, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Neither petitioner nor the Division submitted a brief. Petitioner's request for oral argument was denied.

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

ISSUE

- I. Whether petitioner timely filed for a hearing.
- II. Whether an issue of fact is raised on exception requiring a remand for a hearing.

FINDINGS OF FACT

The Division of Taxation issued to petitioner Vladimir Feldman, as officer of F's Foreign Car Corp. of Queens, a Notice of Assessment Review dated September 26, 1986 which revised a Notice of Determination dated December 19, 1985 for the period June 1, 1982 through November 30, 1984.

A pre-hearing conference was conducted on June 25, 1987 at the request of F's Foreign Car Corp. of Queens and Vladislav, Vladimir and Vera Feldman with respect to notices of determination issued for the period June 1, 1982 through November 30, 1984. A conciliation order, dated January 15, 1988 was issued sustaining the notices.

A pre-hearing conference was also conducted on June 25, 1987 at the request of F's Foreign Cars Corp. of Queens, Vladimir Feldman, as officer, with respect to notices of determination issued for the period June 1, 1982 through August 31, 1985. A conciliation order, dated January 15, 1988 was issued sustaining the notices.

A pre-hearing conference was also conducted on June 25, 1987 at the request of F's Foreign Cars Corp., V. Feldman, as officer, with respect to a Notice of Determination issued for the period June 1, 1985 through August 31, 1985. A conciliation order dated January 15, 1988 was issued sustaining the notice.

Vladimir Feldman, officer of F's Foreign Car Corp. of Queens filed a petition for a hearing with respect to the periods June 1, 1982 through November 30, 1984 and June 1, 1985 through August 31, 1985. The petition was received by the Division of Tax Appeals on June 2, 1988. The envelope in which the petition was contained bore a postmark of May 31, 1988.

The Administrative Law Judge found that the petition had been mailed on May 31, 1988, 137 days after the January 15, 1988 conciliation order. Having not been filed within 90 days of the January 15, 1988 order, pursuant to Tax Law § 170.3-a(e), the Administrative Law Judge dismissed petitioner's petition as untimely.

OPINION

Petitioner takes exception to the determination that his petition was not timely filed.

Under prior law and regulations, if a taxpayer timely filed a petition with the Department of Taxation and Finance protesting a Notice of Determination, then the State Tax Commission, in its discretion, could schedule a pre-hearing conference in an attempt to resolve the disputed issues (Tax Law § 1138[a] former 20 NYCRR 601.4).

Under the current law, a taxpayer, upon receipt of a tax assessment, is entitled to request a conciliation conference with the Division of Taxation which results in the issuance of a conciliation order (Tax Law § 170.3-a[a] and [e]). The taxpayer may then challenge the conciliation order by filing a petition with the Division of Tax Appeals within 90 days after the conciliation order is issued (Tax Law §§ 170.3-a[e] and 2006[4]). The current two part system was enacted by Chapter 282 of the Laws of 1986. The act provides that it would "apply to all proceedings commenced prior to [September 1, 1987] which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent this act can be made applicable" (L 1986, ch 282, § 32).

The record indicates that petitioner received a pre-hearing conference on June 25, 1987, two months before Chapter 282 went into effect. Although no petition requesting the June 25, 1987 pre-hearing conference is in the record, it appears that a petition was timely filed because the pre-hearing conference was held and the January 25, 1988 conciliation orders were not denied based on untimely petitions. Thus, this case may present facts like those in Matter of Cap Equipment Rental Corporation (Tax Appeals Tribunal, March 2, 1989) where we found that since the taxpayers had timely requested a pre-hearing conference under the old law, they were entitled to a hearing under the new law. The rationale for the Cap Equipment decision was that Chapter 282 was not intended to abrogate the rights of taxpayers to a hearing they were entitled to prior to the effective date of the law. However, the record here is not adequate to determine that petitioner did in fact file a timely petition prior to September 1, 1987. Accordingly, we remand this case for a hearing to determine this fact.

Our decision deals only with the petition of Vladimir Feldman because the Administrative Law Judge's order dismissed only this petition. As indicated in the facts, however, two of the three conciliation orders issued to Vladimir Feldman were also issued to others. If any of the others listed on the conciliation order filed a timely petition prior to September 1, 1987, they would also be entitled under the principle articulated in Cap Equipment to a hearing on their petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The order of the Administrative Law Judge is reversed;
2. The matter is remanded to the Chief Administrative Law Judge to schedule a hearing on the issue of whether Vladimir Feldman filed a timely petition prior to September 1, 1987.

DATED: Troy, New York
February 8, 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