

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
VILLAGE CREST OF LONG ISLAND, INC. :
for Redetermination of a Deficiency/Revision :
of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period 9/01/78 - 2/28/87. :

In the Matter of the Petition :
of :
FREDERICK WALKER, SR. :
OFFICER OF VILLAGE CREST :
OF LONG ISLAND, INC. :

for Redetermination of a Deficiency/Revision :
of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period 9/01/78 - 2/28/87. :

DECISION

In the Matter of the Petition :
of :
ROBERT WALKER :
OFFICER OF VILLAGE CREST :
OF LONG ISLAND, INC. :

for Redetermination of a Deficiency/Revision :
of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period 9/01/78 - 2/28/87. :

Petitioner Village Crest of Long Island, Inc., 284 North Ontario Street, Ronkonkoma, New York 11779, filed an exception to the order of the Administrative Law Judge issued on June 8, 1989 dismissing its petition for redetermination of a deficiency/revision of a determination or for

refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through February 28, 1987 (File No. 806838).

Petitioner Frederick Walker, Sr., officer of Village Crest of Long Island, Inc., 22 Caddy Place, Rocky Point, New York 11778, filed an exception to the order of the Administrative Law Judge issued on June 8, 1989 dismissing his petition for redetermination of a deficiency/revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through February 28, 1987 (File No. 806839).

Petitioner Robert Walker, officer of Village Crest of Long Island, Inc., 284 North Ontario Street, Ronkonkoma, New York 11779, filed an exception to the order of the Administrative Law Judge issued on June 8, 1989 dismissing his petition for redetermination of a deficiency/revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through February 28, 1987 (File No. 806840).

Petitioner Village Crest of Long Island, Inc. appeared by Robert Walker. Petitioner Robert Walker appeared pro se, as did petitioner Frederick Walker, Sr. The Division of Taxation appeared by Williams F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

None of the parties filed a brief on exception.

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 follows.

A conciliation order, dated January 13, 1989, which sustained the Division of Taxation's Notice of Determination and Demand was mailed to each of the petitioners.

Petitioners each delivered a petition for redetermination of a deficiency/revision of a determination or for refund of sales and use taxes for the period September 1, 1978 through February 28, 1987 on April 13, 1989.

The Administrative Law Judge, sua sponte, ordered that the petitions be dismissed with prejudice. He determined that the petitions were not received by the Division of Tax Appeals until April 14, 1989, which was 91 days after the conciliation orders were issued to petitioners.

Petitioners each filed an exception to the Administrative Law Judge's order dismissing the petitions. Petitioners presented a "proof of performance" document from the Federal Express Corporation showing that the petitions were delivered to the Division of Tax Appeals at 9:27 a.m. on April 13, 1989.

In a letter to the Tax Appeals Tribunal, dated October 13, 1989, the Division of Taxation conceded that the information provided by the Federal Express Corporation indicated that the petitions were timely filed.

OPINION

We reverse the orders of the Administrative Law Judge.

Tax Law § 170(e) provides the time requirement for requesting a hearing as follows:

"3-(e) A conciliation order shall be . . . binding upon the department [of Taxation] and the person who requested the [conciliation] conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued . . ."

The proof of delivery record supplied by the Federal Express Corporation conclusively demonstrates that the petitions were received and signed for on behalf of the Division of Tax Appeals on the morning of April 13, 1989, or 90 days after the conciliation orders were issued. Moreover, the Division of Taxation submits that the petitions were filed on a timely basis as required by section 170(3-e) of the Tax Law. There is no evidence to the contrary. Therefore, we hold that petitioners' petitions for a hearing were timely filed and that the Administrative Law Judge erred in ordering their dismissal.

We remand this matter for a hearing on the merits.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exceptions of the petitioners, Village Crest of Long Island, Inc., Robert Walker and Frederick Walker, Sr. are granted;
2. The orders of the Administrative Law Judge are reversed;
3. The cases are remanded to the Chief Administrative Law Judge for a hearing on the merits.

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