

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
A S A RESTAURANT INC.	:	DECISION
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 March 1, 1984 through	:	
August 31, 1987.	:	

Petitioner, A S A Restaurant Inc., 1923 Kings Highway, Brooklyn, New York 11229, filed an exception to the order of the Administrative Law Judge issued on September 7, 1989 dismissing its petition for redetermination of a deficiency or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through August 31, 1987 (File No. 806928). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Neither party filed a brief on exception. 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

Whether a petition filed on May 17, 1989 requesting a hearing was timely filed.

FINDINGS OF FACT

The Division of Taxation issued to petitioner a Notice of Determination and Demand for Sales and Use Taxes Due dated September 12, 1988 for the period March 1, 1984 through August 31, 1987.

Petitioner filed a petition for a hearing dated May 16, 1989 which was received by the Division of Tax Appeals on May 19, 1989. The envelope containing the petition bears an office metered mail postmark of May 17, 1989. The Division of Tax Appeals petition form (TA-10)

provides petitioners with a choice of several alternative boxes to check off regarding conciliation conferences. A petitioner can either check that a conciliation conference was not requested, or that a conciliation order was issued, in which case the petitioner is required to fill in the date the order was issued and attach a legible copy of it. Petitioner in this case checked the box stating that a conciliation conference was not requested and attached a copy of the November 12, 1988 Notice of Determination and Demand for Sales and Use Taxes Due.

The Administrative Law Judge dismissed the petition as untimely since it was not filed within 90 days after November 12, 1988, the date on the Notice of Determination.

On April 21, 1989, the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request which provided as follows:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on September 12, 1988, but the request was not received until March 16, 1989, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied."

A copy of this conciliation order was first submitted to the Division of Tax Appeals by the representative of the Division of Taxation as an attachment to a letter addressed to the Secretary to the Tribunal and received by the Secretary's office on April 18, 1990.

OPINION

On exception, petitioner asserts that a timely request for a conciliation conference was submitted, and further asserts certain substantive arguments regarding the Notice of Determination. The Division of Taxation has conceded that the petition filed with the Division of Tax Appeals was a timely protest of the April 21, 1989 conciliation order.

The Administrative Law Judge dismissed the petition in this matter as untimely based upon the record before him. Petitioner in this case not only did not attach a copy of the conciliation order that was the basis for the petition, but affirmatively stated that a conciliation conference had not been requested. Upon review of this matter on exception, the representative

of the Division of Taxation became aware of the conciliation order. By letter dated January 4, 1990, he informed the Tribunal of its existence, and conceded that the order was issued on April 21, 1989, making the petition received on May 19, 1989 timely. The Division of Taxation then submitted to the Tribunal a copy of the conciliation order, by letter dated April 17, 1990.

While the order of the Administrative Law Judge was correct based upon the information contained in the record at the time it was issued, we must reverse the order of the Administrative Law Judge based upon the concession of the Division and the conciliation order submitted during the course of the exception process. Accordingly, we find the petition timely and remand this matter for a hearing to determine if petitioner's request for a conciliation conference was timely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner A S A Restaurant Inc. is granted to the extent the exception requests a hearing to be held on the conciliation order issued April 21, 1989, and in all other respects is denied;
2. The order of the Administrative Law Judge is reversed; and
3. The matter is remanded to the Chief Administrative Law Judge to schedule a hearing to determine if A S A Restaurant Inc. timely requested a conciliation conference.

DATED: Troy, New York
August 17, 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

