

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
YSC FASHION CORPORATION	:	DECISION
	:	DTA No. 807355
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1985 through June 27, 1988.	:	

Petitioner YSC Fashion Corporation, 347 West 36th Street, 8th Floor, New York, New York 10018 filed an exception to the determination of the Administrative Law Judge issued on May 2, 1991 with respect to its petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through June 27, 1988. Petitioner appeared by Brian B. Song, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief.

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

ISSUE

Whether petitioner's request for a conciliation conference was timely filed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On October 12, 1988, the Division of Taxation issued to YSC Fashion Corporation ("YSC") two notices of determination and demands for payment of sales and use taxes due. One notice of determination assessed tax in the amount of \$2,445.71, plus penalty and interest, for a

total amount due of \$3,547.75 for the period September 1, 1985 through June 27, 1988 and contained the following explanation:

"Since you did not submit the information requested on our Notice to the Seller Letter, we are unable to complete our desk audit. Therefore, as a result of a test based on the sellers price of business assets, the following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law."

The other notice of determination assessed penalty pursuant to Tax Law § 1145 in the amount of \$10,000.00 and contained the following explanation:

"The following penalties are being imposed pursuant to Section 1145 of the Tax Law and are based on the results of an audit of your records. This notice is in addition to Notice S881012704C."

At the hearing, the Division of Taxation produced a certified mail record along with an affidavit of Frances Esposito, a clerk in the clerical unit of the Central Office Audit Bureau, both of which indicate that the notices of determination referred to above, were sent, by certified mail, to YSC at 347 West 36th Street, New York, New York 10018 on October 12, 1988.

Ms. Esposito's affidavit states that the Division does not request the U.S. Postal Service to obtain a certified mailing receipt from the recipients of a notice of determination assessing sales tax.

On March 24, 1989, YSC's representative, Brian B. Song, C.P.A., mailed, by certified mail, Form TA-9.1 (Request for Conciliation Conference) which was received by the Bureau of Conciliation and Mediation Services on March 28, 1989. This form indicated that a previous request for a conciliation conference had been filed on or about December 10, 1988 along with a corporate power of attorney form but, due to the fact that no response had been received from the Division relative to the previous request, this form was again being filed. Attached to the form (dated March 16, 1989) was a photocopy of what YSC contends was a previously filed Form TA-9.1 which bears the date of November 30, 1988.

On June 9, 1989, the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request (CMS No. 94958) which stated as follows:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued

on October 12, 1988, but the request was not mailed until March 24, 1989, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied."

YSC thereupon timely filed a petition with the Division of Tax Appeals seeking administrative review of the conciliation order.

OPINION

The Administrative Law Judge determined that YSC's request for a conciliation conference was not filed within 90 days of the issuance of the notices of determination and that the testimony and affidavit of YSC's representative were insufficient to prove timely filing of the request.

On exception, petitioner asserts that the Administrative Law Judge failed to properly apply the laws of this State with regard to mailing. Petitioner, citing Matter of Reidy's Cafe (State Tax Commn., July 12, 1986), argues that it met its obligation for timely filing.

The Division of Taxation (hereinafter the "Division"), in opposition, argues that because petitioner failed to submit documentary evidence of mailing and because the testimony of the accountant is insufficient as a matter of law to prove timely mailing, the Administrative Law Judge's determination should be affirmed.

We affirm the determination of the Administrative Law Judge.

Petitioner claims that its accountant's testimony that a timely request for a conciliation conference was mailed on November 30, 1988 establishes that a request for a conciliation conference was made within 90 days of the issuance of the notices of determination. However, the Division contends that no request for a conciliation conference was made by petitioner except for the one mailed on March 24, 1989, which was not timely. Furthermore, petitioner has not submitted any evidence (e.g., a receipt of timely mailing by certified or registered mail) that the request it alleges was timely filed was, in fact, filed within 90 days after the notices of determination were issued.

Section 1147(a)(2) of the Tax Law has been interpreted to hold that proof of ordinary mailing is insufficient to prove timely filing of a petition or other document where there is no actual delivery of the petition. Since Tax Law § 1147(a)(2) is modeled after Internal Revenue Code § 7502, we will look to the Federal courts' interpretation of section 7502 for guidance. For example, in Deutsch v. Commissioner (599 F2d 44, cert denied 444 US 1015), the Circuit Court stated that section 7502 of the Internal Revenue Code:

" . . . provides guidance for determining when a petition is mailed. In certain cases, the date of the postmark or the date of registration will be deemed the date of delivery to the Tax Court. However, in the present case, there is no postmark or registration receipt that indicates timely mailing. Further, the legislative history indicates that section 7502 is only applicable if the petition is actually delivered Delivery for these purposes is synonymous with receipt of the item" (Deutsch v. Commissioner, supra, at 46).

The court further noted that, "courts have consistently rejected testimony or other evidence as proof of the actual date of mailing" (Deutsch v. Commissioner, supra, at 46). Therefore, we find the testimony of petitioner's representative that a timely request was mailed on November 30, 1988 insufficient as a matter of law to prove timely filing where there is no actual delivery of the document (see, Matter of Messinger, Tax Appeals Tribunal, March 16, 1989; Matter of Sipam Corp., Tax Appeals Tribunal, March 10, 1988).

We find petitioner's reliance on Matter of Reidy's Cafe (supra) misplaced. That case is clearly distinguishable from the matter before us. In Reidy, a petition was received by the former State Tax Commission, whereas in this matter, the request for a conciliation conference that petitioner claims was timely filed was never received by the Bureau of Conciliation and Mediation Services.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

4. The notices of determination dated October 12, 1988 are sustained.

DATED: Troy, New York
January 23, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner