

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CHARLES MCNEIL, OFFICER OF : **DECISION**
AFTER DARK INN, 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 December 1, 1984 :
through April 24, 1986. :
:

Petitioner, Charles McNeil, Officer of After Dark Inn, Inc., 190 Woodcrest Drive, West Seneca, New York 14220, filed an exception to the order of the Administrative Law Judge issued on January 11, 1990 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 December 1, 1984 through April 24, 1986 (File No. 807473). Petitioner appeared by Joseph S. DePaolo, C.P.A. 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 petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as follows.

On April 18, 1989, the Bureau of Conciliation and Mediation Services (hereinafter the Bureau) held a conciliation conference upon the request of petitioner.

As a result of this conference, the Bureau issued a conciliation order to petitioner dated July 21, 1989.

Petitioner filed a petition for revision of a determination of sales and use tax for the period December 1, 1984 through April 24, 1986. The envelope containing the petition bears a machine metered postmark date of October 20, 1989.

On November 9, 1989, Frank A. Landers of the Division of Tax Appeals' Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss Petition to petitioner's representative Joseph S. DePaolo for failure to file a timely petition. The Notice stated that the petition was not mailed until October 20, 1989 or 91 days after July 21, 1989, the date the conciliation order was issued.

In response to the Notice of Intent, petitioner's representative submitted a letter asking that the prescribed period for filing the petition in this matter be extended 24 hours.

A copy of the Notice of Intent to Dismiss Petition was also sent to the Division of Taxation. In response, the Division has submitted an affidavit and documentary evidence establishing that the conciliation order was mailed to petitioner on July 21, 1989 at petitioner's last known address at 190 Woodcrest Drive, Buffalo, New York 14220.

On January 11, 1990, the Administrative Law Judge, sua sponte, ordered that the petition be dismissed with prejudice on the ground that it was not timely filed within the 90 day period prescribed by § 170.3-a(e) of the Tax Law. The Administrative Law Judge found that the petition was not mailed until October 20, 1989 or 91 days after the conciliation order was issued on July 21, 1989.

On February 5, 1990, petitioner filed with the Tax Appeals Tribunal an exception to the order of the Administrative Law Judge dismissing his petition.

OPINION

We affirm the order of the Administrative Law Judge.

Tax Law § 170.3-a(e) provides that a conciliation order shall not be binding on the taxpayer if the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is "issued" within the meaning of Tax Law § 170.3-a(e) at the time of its mailing to the taxpayer (Robert G. Wilson & GSA Corp., Tax Appeals Tribunal, July 13, 1989). In the order below, the Administrative Law Judge found that the conciliation order had been mailed to petitioner on July 21, 1989. Petitioner has not challenged that finding. Further, the affidavits submitted by the Division to the Administrative Law Judge, which are not disputed by petitioner, confirm that the conciliation order was in fact mailed to petitioner on July 21, 1989.

On exception, petitioner does not dispute the fact that the petition was untimely filed. Instead, petitioner argues that extenuating circumstances existed that justified the late filing of the petition. The circumstances which petitioner believes justify such late filing consist of repeated delays in obtaining records and information needed to properly prepare the petition. Petitioner further argues that the anxiety caused by the delay in obtaining the needed information and the fact that the 90 day period contained two 31 day months caused the miscalculation of the 90 day period.

The Tax Appeals Tribunal Rules of Practice and Procedure provide that:

- "(b) Postmarks not made by the United States Postal Service.
(1) If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e., office metered mail):
 - (i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document . . ." (20 NYCRR 3000.16[b][1]).

Neither the Tax Law nor the Rules of Practice and Procedure provide for an extension of the 90 day period when the postmark is clearly outside the prescribed 90 day period. Therefore, we find that petitioner has failed to timely file his petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Charles McNeil, Officer of After Dark Inn, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Charles McNeil, Officer of After Dark Inn, Inc. is denied.

DATED: Troy, New York
May 24, 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