

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FATHER & SON PIZZA, 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,	:	
1985 through January 18, 1988.	:	

Petitioner Father & Son Pizza, Inc., 364 Nassau Boulevard, West Hempstead, New York 11552 filed an exception to the order of the Administrative Law Judge issued on April 26, 1990 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 March 1, 1985 through January 18, 1988 (File No. 807841). Petitioner appeared by its president Joseph Valenza. 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 its petition for redetermination of a deficiency or for revision of a determination of sales and use tax.

FINDINGS OF FACT

We find the following facts.

On September 1, 1989, the Bureau of Conciliation and Mediation Services issued a conciliation default order for petitioner's non-appearance at the conciliation conference.

On December 7, 1989, petitioner mailed a petition for redetermination of a deficiency/revision of a determination or for refund of sales and use taxes under Articles 28 and 29 which was received by the Division of Tax Appeals on December 11, 1989.

On March 1, 1990, 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 for failure to file a timely petition. The Notice states that the petition was not mailed until December 7, 1989, or 97 days after September 1, 1989, the date the conciliation default order was issued.

There was no response from petitioner to the Notice of Intent to Dismiss Petition. A copy of the Notice of Intent was also sent to the Division of Taxation. In response, the Division of Taxation submitted an affidavit and documentary evidence establishing that the conciliation default order was mailed to petitioner on September 1, 1989.

On April 26, 1990, the Administrative Law Judge, sua sponte, ordered that the petition be dismissed with prejudice on the grounds that it was not timely filed within 90 days after September 1, 1989 as prescribed by section 170(3-a)(e) of the Tax Law. The Administrative Law Judge found that the petition was not mailed until December 7, 1989 or 97 days after the conciliation default order was issued to petitioner.

On May 23, 1990, petitioner filed with the Tax Appeals Tribunal an exception to the order of the Administrative Law Judge dismissing its 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 (Matter of Wilson, Tax Appeals Tribunal, July 13, 1989). In the order below, the Administrative Law Judge found that the conciliation default order had been mailed to petitioner on September 1, 1989. Petitioner has not presented any evidence

disputing or challenging that finding. Further, the affidavits and documents submitted by the Division of Taxation, which are not disputed by petitioner, confirm that the conciliation default order was in fact mailed to petitioner on September 1, 1989. Accordingly, because petitioner's request for a hearing was not mailed until December 7, 1989 or 97 days later than the date of issuance of the conciliation default order, we find that the petition was not timely filed. Without a timely petition having been filed, this Tribunal has no jurisdiction over the petition and cannot act on it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Father & Son Pizza, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Father & Son Pizza, Inc. is dismissed.

DATED: Troy, New York
April 18, 1991

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

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