

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PINE VALLEY APARTMENTS, INC.	:	DECISION
	:	DTA No. 811938
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner Pine Valley Apartments, Inc., c/o Berger, Stern & Webb, 600 Madison Avenue, New York, New York 10022, filed an exception to the order of the Administrative Law Judge issued on August 19, 1993. Petitioner appeared by Berger, Stern & Webb (Charles S. Webb, III, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief which was received on December 10, 1993 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "9" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation (hereinafter the "Division") filed an affidavit of Joseph Chyrywat, Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services of the Department of Taxation and Finance. This affidavit sets forth the routine procedures followed in the ordinary course of business of the Bureau of Conciliation and Mediation Services ("BCMS") in the preparation and mailing of conciliation orders (hereinafter "the Chyrywat affidavit"). Attached to this affidavit are two exhibits denominated "A" and "B". Exhibit A consists of a two-page certified mail record of the BCMS, bearing the date of February 19, 1993. Exhibit B is a one-page Conciliation Order dated February 19, 1993 in the Matter of Pine Valley Apartments, Inc.

The Chyrywat affidavit states that all conciliation orders are mailed by certified mail. BCMS prepares and maintains Certified Mail Records ("CMR's") which are a listing of taxpayers to which conciliation orders are sent by certified mail on a particular day.

As part of the regular procedure of preparing conciliation orders for mailing, a clerk in BCMS verifies the names and addresses of taxpayers who are listed on the CMR. A certified mail control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer. The clerk records on the CMR the certified control number from each envelope next to the appropriate taxpayer's name.

Each page of the CMR is a separate and individual CMR for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender," and the "Total Number of Pieces Received at Post Office". There is also a space on each individual CMR for the receiving postal employee to sign in acknowledging receipt. After being signed by the postal employee and having the postmark for the particular date affixed to the CMR, it is returned to BCMS and maintained in the regular course of business as a permanent record.

The Division also submitted the affidavit of Daniel B. Lafar, Principal Mail and Supply Clerk with the Department of Taxation and Finance (hereinafter "the Lafar affidavit"). Mr. Lafar is fully familiar with the operation and procedures of the Mail and Supply Room ("the Mail Room"). Mr. Lafar's duties include the supervision of Mail Room staff in delivering outgoing Department mail to branch offices of the United States Postal Service. Mr. Lafar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the Mail Room in the regular course of business, and which were followed in particular, on February 19, 1993.

As part of these procedures, when conciliation orders are placed in the "Outgoing Certified Mail" basket in the Mail Room, each envelope is weighed, sealed and postage and fees are affixed. Postage and fee amounts are then recorded on the CMR. A Mail Room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the Mail Room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. A postal employee then affixes his or her signature and/or a postmark to the certified mail record acknowledging receipt by the post office of the items of certified mail recited therein. After the CMR has been signed and/or stamped by the United States Postal Service it is returned to the originating office of the Department of Taxation and Finance.

The two-page CMR attached as Exhibit A of the Chyrywaty affidavit shows the addressees of conciliation orders mailed on February 19, 1993. The certified control numbers on the CMR run consecutively.¹ On page two of this CMR, it shows that an envelope bearing certified control number P229447562 was addressed to Pine Valley Apartments, Inc., 40 Howard Street, Albany, New York 12207. This CMR also shows that a second envelope bearing certified mail control number P229447563 was addressed to petitioner's representative, Charles S. Webb, III, Esq., at 600 Madison Avenue, New York, New York 10022. Page one of this CMR shows that 15 items of mail containing conciliation orders were delivered to the

¹Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

United States Postal Service for certified mailing. Page two of this CMR shows that 13 additional pieces of certified mail containing conciliation orders were delivered and accepted for mailing by the United States Postal Service. Both pages of this CMR bear a February 19, 1993 postmark affixed by the Roessleville Branch of the United States Postal Service and both pages contain the signature of the postal employee acknowledging the receipt and acceptance of the items of certified mail recited therein.

The Lafar affidavit affirms that on February 19, 1993, an employee of the Mail Room delivered 13 sealed postpaid envelopes for delivery by certified mail to the Roessleville Branch of the United States Postal Service, in Albany, New York. These envelopes included two pieces of certified mail (bearing Certified Nos. P229447562 and P229447563) addressed to petitioner at 40 Howard Street, Albany, New York 12207 and to its representative, Charles S. Webb, III, Esq., 600 Madison Avenue, New York, New York 10022, respectively.

We modify finding of fact "9" of the Administrative Law Judge's order to read as follows:

Petitioner, through its attorney Charles S. Webb, III, Esq., filed an Affirmation in Opposition to the Notice of Intent to Dismiss. Mr. Webb admits that the conciliation order in this matter was issued February 19, 1993. Also, petitioner does not dispute the manner or the dates in which it filed the petitions.²

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Finding of fact "9" of the Administrative Law Judge's order read as follows:

"Petitioner, through its attorney, Charles S. Webb, III, Esq., filed an Affirmation in Opposition to the Notice of Intent to Dismiss. Mr. Webb admits that the Conciliation Order in this matter was issued February 19, 1993, but states that:

'CPLR 2103B [sic] provides for the general rule that five days shall be added to a prescribed period in situations such as this where a time period commences to run. Accordingly, the commencement of the ninety days should not have occurred until February 24, 1993, thus permitting the filing of a petition on or before May 25, 1993.'

Petitioner does not dispute the manner or the dates in which it filed the petitions, but instead argues that in either case, the petitions would have been timely based upon CPLR 2103(b). If petitioner is correct, then both the petition it filed by regular United States mail and the one filed by Federal Express would be timely."

Finding of fact "9" was modified to reflect the fact that petitioner has abandoned the argument based on CPLR 2103(b) on exception. As such, it is not relevant to this decision and need not be addressed.

Petitioner separately filed copies of the same petition in which it challenged the order of the conciliation conferee. One copy of this petition was filed by regular first-class mail. The envelope bears an office-metered stamp of May 20, 1993, but the postmark affixed by the United States Postal Service is May 21, 1993. This petition was indated stamped as received by the Division of Tax Appeals on May 24, 1993.

A second copy of this petition was also filed with the Division of Tax Appeals by mailing via Federal Express. The Federal Express envelope indicates that it was sent by petitioner on May 20, 1993. This copy of the petition is indated stamped as received by the Division of Tax Appeals on May 21, 1993. Petitioner does not dispute that this petition was mailed and received by the Division of Tax Appeals on the dates indicated.

OPINION

The Administrative Law Judge issued an order dismissing petitioner's petition because petitioner's filing of the petition before the Division of Tax Appeals was untimely. The Administrative Law Judge concluded that: (1) Civil Practice Law and Rules 2103(b)(2) has no application to the service of papers by administrative agencies prior to the commencement of judicial proceedings; (2) May 20, 1993 was the last day petitioner could timely file a petition with the Division of Tax Appeals; (3) the petition which was mailed by regular first-class mail was deemed filed May 21, 1993; (4) the petition delivered by Federal Express was deemed filed May 21, 1993; and (5) as such, neither copy of the petition was timely filed.

On exception, petitioner asserts that under the regulations, specifically 20 NYCRR 3000.16(b)(1), since the petition mailed by United States Postal Service had an office metered postmark that fell within the prescribed period and the document was delivered within a time when a similar document postmarked by the United States Postal Service would ordinarily be received, the petition was timely filed. We disagree.

Petitioner's interpretation of the regulations as applied to the facts is incorrect. The regulations at 20 NYCRR 3000.16(b)(1) apply when only a postmark other than a United States

Postal Service postmark appears on the envelope or wrapper. Petitioner, in relying on 20 NYCRR 3000.16(b)(1), has failed to consider 20 NYCRR 3000.16(b)(3) which states:

"[i]f the envelope or wrapper containing the document has a postmark made by the United States Postal Service in addition to the postmark not so made, the postmark which was not made by the United States Postal Service will be disregarded, and whether the envelope or wrapper was mailed in accordance with this subdivision will be determined solely by applying the provisions of subdivision (a) of this section" (emphasis added).

20 NYCRR 3000.16(a)(1) reads, in pertinent part, as follows:

"the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing. Where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing."

Applying these regulations to the matter at hand, it is clear that as to the document sent via United States Postal Service, the date of the United States postmark controls and the office metered postmark is disregarded (Matter of Rubo Sales Corp., Tax Appeals Tribunal, February 25, 1993). Thus, the deemed date of filing was May 21, 1993. It is equally clear that as to the petition delivered by Federal Express, the deemed date of filing was the date of delivery, May 21, 1993 (Matter of Stage Delicatessen East, Tax Appeals Tribunal, March 9, 1989). As such, both petitions were untimely filed and the Division of Tax Appeals is without jurisdiction to review the merits of the case (Tax Law § 170(3)-a[e]).

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of Pine Valley Apartments, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Pine Valley Apartments, Inc. is dismissed.

DATED: Troy, New York
May 19, 1994

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

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