

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NOVAR TV & AIR CONDITIONER SALES & SERVICE, INC. AND BALMES ROSA, AS OFFICER	:	DECISION
for 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 November 30, 1987.	:	

Petitioners Novar TV & Air Conditioner Sales & Service, Inc. and Balmes Rosa as Officer, 4059 Murdock Avenue, Bronx, New York 10462 filed an exception to the determination of the Administrative Law Judge issued on October 11, 1990 with respect to their petition for 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 November 30, 1987 (File No. 806675). Petitioner appeared by Joseph A. Cofino, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel)

Neither party filed a brief on exception, nor was oral argument requested.

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

ISSUE

Whether petitioners filed a request for a conciliation conference within 90 days of the mailing of two notices of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that findings of fact "1," "2," and "4" have been modified and finding of fact "5" has been deleted.¹

¹Finding of fact "5" was deleted because it is not relevant to the petition before us.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

In January 1988, the Division of Taxation ("Division") began a field audit of the business operations and records of petitioner Novar Television & Air Conditioner Service, Inc. ("Novar"). As a result of this audit, a notice of determination and demand for payment of sales and use taxes due, numbered S880725008L, covering the period December 1, 1984 through November 30, 1987, was issued to Novar and an additional notice, numbered S880725010L, covering the same period, was issued to petitioner Balmes Rosa, as an officer of Novar. The notices were dated July 25, 1988 and each assessed penalty in the amount of \$1,943.65.²

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

²The Administrative Law Judge's finding of fact "1" read as follows:

"1. In January 1988, the Division of Taxation ("Division") began a field audit of the business operations and records of petitioner Novar Television & Air Conditioner Service, Inc. ("Novar"). As a result of this audit, four notices of determination and demands for payment of sales and use taxes due, covering the periods December 1, 1984 through November 30, 1987, were issued to Novar and an additional four notices, covering the same periods, were issued to petitioner Balmes Rosa, as an officer of Novar. Four of the eight notices were dated July 25, 1988 and assessed sales tax, penalty and interest as follows:

<u>Notice Number</u>	<u>Issued To</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
S880725007L	Novar	\$21,886.51	\$5,908.48	\$6,250.14
S880725008L	Novar		1,943.65	
S880725009L	Balmes Rosa	21,886.51	5,908.48	6,250.14
S880725010L	Balmes Rosa		1,943.65	

The remaining notices were dated September 14, 1988 and assessed sales tax, penalty and interest as follows:

<u>Notice Number</u>	<u>Issued To</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
S880914006L	Balmes Rosa	\$2,330.96	\$ 655.09	\$903.02
S880914007L	Novar	2,330.96	655.09	903.02
S880914009L	Novar		144.69	
S880914010L	Balmes Rosa		144.69	

We modified this fact to address only those notices of determination which the record discloses have been petitioned by petitioners.

The two notices were mailed by certified mail. The Division did not establish when these notices were mailed.³

On October 28, 1988, the Division received a request for a conciliation conference regarding notice number S880725010L. It was mailed by certified mail, and the envelope containing the request was postmarked October 25, 1988. The request was signed by Balmes Rosa and dated September 10, 1988.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

The Division denied petitioners' request for a conference on the ground that the request was not mailed within 90 days of the mailing of the notices. The conciliation order addresses two notice numbers: S880725008L and S880725010L, although the request for a conference listed only the latter number.⁴

OPINION

The Administrative Law Judge found that the Division mailed four notices of determination to petitioners, two to each petitioner, on July 26, 1988. The Administrative Law Judge also found that the Division's witness testified that four additional notices, again two to each petitioner, were mailed on September 19, 1988. The Administrative Law Judge also determined that petitioners were unable to present any evidence that either of them mailed a

³The Administrative Law Judge's finding of fact "2" read as follows:

"2. The four notices dated July 25, 1988 were mailed by certified mail. Postal receipts, mailing logs and testimony established the mailing date of these notices as July 26, 1988. The auditor in charge of this audit testified that the remaining notices, dated September 14, 1988, were mailed on September 19, 1988."

We modified this fact to state the conclusion we conclude is warranted by the record.

⁴Finding of fact "4" of the Administrative Law Judge's determination read as follows:

"4. The Division denied petitioner's request for a conference on the ground that the request was not mailed within 90 days of the mailing of the notices. The conciliation order addresses two notice numbers S880725008L and S880725010L, although the request for a conference listed only the latter number. The Division denies receiving a request for a conciliation conference or an administrative hearing with respect to the six remaining notices."

We modified this fact to address only those notices of determination the record discloses have been petitioned by petitioners.

timely request for a conciliation conference or hearing regarding any of the issues raised in the petition and concluded that the Division of Tax Appeals is without jurisdiction to consider the merits of the petition filed by petitioners.

On exception, petitioners argue that they timely challenged "the determination under Article 28 within the 90 day period," that the Division of Tax Appeals has jurisdiction to hear this appeal, the Division's witness was in fact "equivocal at best as concerns the mailing of the notices of determination" and that the denial of petitioners' request for an adjournment on the return date was unreasonable and petitioners are entitled to said adjournment (Petitioners' exception).

In response, the Division asks that the Administrative Law Judge's determination be sustained.

We reverse the determination of the Administrative Law Judge.

First, we note that we see absolutely nothing in the record that indicates that petitioners ever requested an adjournment. Thus, we have no basis to address petitioners' contention that their request was unreasonably denied.

Next, we must address the scope of our jurisdiction and what issues are properly before us in this case. Petitioners filed a petition which listed notice numbers S880725008L (hereinafter "8L") and S880725010L (hereinafter "10L"). Attached to the petition was a conciliation order issued to petitioners dismissing their request for a conciliation conference with respect to notices 8L and 10L on the basis that the request was not timely filed (Exhibit H). By filing a timely petition and attaching a copy of the conciliation order⁵ to their petition, petitioners established their right to a hearing to challenge the conciliation order (Tax Law §§ 170[3-a][e] and 2006.4). Therefore, we conclude that we have jurisdiction to determine whether the Division of Taxation properly denied petitioners' request for a conciliation conference with respect to notices 8L and 10L.

⁵Petitioners did not attach a copy of any notice of determination to their petition, but since the conciliation order was the document that gave rise to their right to a hearing, it was only the conciliation order that was required to be attached to the petition as the "statutory notice being protested" (20 NYCRR 3000.3[b][8] and 3000.1[k]).

Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Magazine v. Commissioner, 89 TC 321; Trimble v. Commissioner, T.C Memo 1989-419, 57 TCM 1256; Southern California Loan Assn., 4 B.T.A. 223, 224-225). A notice of deficiency is mailed when it is delivered to the custody of the Postal Service for mailing (see, August v. Commissioner, 54 TC 1535, 1538). The Division may prove the act of mailing by establishing its customary procedure for the mailing of such notices and by introducing evidence that such procedure was followed in this case (see, Cataldo v. Commissioner, 60 TC 522, 524, affd 499 F2d 550, 74-2 USTC ¶ 9533; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Matter of Kropf, Tax Appeals Tribunal, March 21, 1991 [where we concluded that evidence of office practice was not required where the return receipt corroborated the Postal Form 3877]). Our review of the instant record indicates that the Division has failed to establish the date on which it mailed the notices 8L and 10L.

More specifically, the Division's auditor testified that he personally prepared the notices for mailing, i.e., that he caused the notices and their mailing documents (postal form 3800, Receipt for Certified Mail, and form 3811, Return Receipt) to be typed, and that he inserted the notices in envelopes (Tr., pp. 23-24). The auditor stated that he believed that these two notices were mailed on July 26, 1988 because each of the forms 3800 had a Department date stamp of July 26, 1988 on it (Exhibits L and M). The auditor testified that the Department date stamp indicated to him that, on that date, the Department's mail clerk put the envelopes in a plastic bin provided by the United States Postal Service to be picked up by the Service (Tr., p 19). The auditor did not testify that he knew when the mail clerk actually placed the envelopes in the postal bin, only that the Department date stamp indicated to him that this occurred on the date stamped. There is no United States postmark on the postal form 3800, nor is there any other direct evidence in the record (e.g., a postmarked postal from 3877, Application for Registration

or Certification) indicating when the Division physically deposited the notices with the Post Office.

Thus, the Division's evidence of when it mailed notices 8L and 10L consists only of evidence of its general office practice, without any direct documentary evidence, e.g., a postmarked form 3800 or form 3877, or direct testimony that the notices were in fact delivered to the post office on the date claimed. The Tax Court has held that evidence of custom and habit is insufficient to prove mailing when it is not corroborated by direct testimony or other direct evidence of mailing (Magazine v. Commissioner, *supra*). We conclude that the same rule is appropriate here, and find that the Division has failed to prove when it mailed notices 8L and 10L.

Where the Division has failed to prove when it mailed the notices, but has been able to prove, by the taxpayer's receipt of the notices, that they were in fact mailed, the appropriate remedy is to deem the petition timely filed (cf. Matter of Scharff, Tax Appeals Tribunal, October 4, 1990; Matter of Malpica, Tax Appeals Tribunal, June 30, 1987 [where the Division failed to prove both the fact and the date of the mailing of the notice of deficiency]). Therefore, we deem petitioners' petition timely filed and remand this matter for a hearing on the merits with respect to notices 8L and 10L.

Finally, we address whether we have jurisdiction over any other notices of determination purportedly issued to petitioners. Although the Administrative Law Judge did not specifically sustain these other notices, she did make findings of fact with respect to these notices. We conclude that the Administrative Law Judge erred in making such findings of fact because there was no evidence in the record before her that a petition had been filed with respect to such notices. The Division of Tax Appeals has jurisdiction to provide a hearing only upon the request of the taxpayer (Tax Law § 2006.4). Since there is nothing in the record to indicate that these petitioners had requested a hearing with respect to any other notice of determination, we had no jurisdiction to hold such a hearing. Accordingly, we have set aside any facts found by the Administrative Law Judge with respect to any other notices. If petitioners file a petition with

respect to any other notices, at that time we will have jurisdiction to make findings as to whether the petitions were timely filed and the notices actually issued.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded for a hearing to be held with respect to notices S880725008L and S880725010L.

DATED: Troy, New York
May 23, 1991

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

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

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