

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SY ASSOCIATES	:	DECISION
for Revision of a Determination or for Refund of Tax on	:	DTA No. 811389
Gains Derived from Certain Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 14, 1994 with respect to the petition of Sy Associates, c/o Marks, Shron & Company, 111 Great Neck Road, Great Neck, New York 11021. Petitioner appeared by Gordon I. Remer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief which was received on February 10, 1995 and began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed a request for a conciliation conference before the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

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

On February 26, 1992, petitioner, Sy Associates, as claimant, filed a Claim for Refund of Real Property Transfer Gains Tax, Form TP-165.8, in the amount of \$383,255.00. The basis of

the claim was that the Division of Taxation ("Division") erroneously disallowed capital improvement costs incurred in connection with the development of the property for the construction of a new facility.

On the claim for refund form, the "Address of claimant" was listed as:

c/o Marks Shron & Company
111 Great Neck Road
Great Neck, New York 11021

The "Name and telephone number of person to contact" was indicated as:

Arnold A. Gruber
(516) 466-6550

The Division issued, on March 18, 1992, a letter denying the refund claim. This letter was addressed to:

Arnold A. Gruber
c/o Marks Shron and Company
111 Great Neck Road
Great Neck, New York 11021

The letter stated that development costs could only be allowed when incurred in connection with the actual physical improvement of the property. Since no capital improvements were made to the property in the subject transfer, the costs in question could not be allowed. Accordingly, the refund claim of Sy Associates was denied in its entirety. The letter concluded by stating that:

"In accordance with Section 1445.2 of the Tax Law, this determination shall be final and irrevocable unless claimant within ninety (90) days files either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition for Tax Appeals Hearing with the Division of Tax Appeals. The enclosed form TA-9.1 explains this procedure."

The letter was signed by an employee of the Department of Taxation and Finance.

Form TA-9.1 states, in part, that the request must be filed within a certain time period from the date notice of the Division's action was mailed. The form adds that reference to the notice received will assist in determining the time limit. The form further states that the time limits are established by law and cannot be extended and recommends that certified or registered mail be used.

On June 29, 1992, the Bureau of Conciliation and Mediation Services received petitioner's Request for Conciliation Conference, which indicates it was signed on April 7, 1992. Attached to the request was a power of attorney in which petitioner, showing an address of "c/o Marks Shron and Company, 111 Great Neck Road, Great Neck, New York 11021", appointed Arnold A. Gruber and Thomas H. Zick, of the same address, to represent it in a refund claim matter. The power of attorney is dated April 7, 1992. Also attached is the second page of the Division's denial letter of March 18, 1992. The copy of the envelope which contained the request bears a United States Postal Service postmark of June 24, 1992.

The Bureau of Conciliation and Mediation Services issued, on August 21, 1992, a Conciliation Order Dismissing Request. The order stated that:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on March 18, 1992, but the request was not mailed until June 24, 1992, or in excess of 90 days, the request is late filed."

Petitioner's attorney, Gordon I. Remer, Esq., testified that it is his normal office practice to note on the client's files each action taken. According to Mr. Remer's testimony, petitioner's file contains a notation that the request for conciliation services was placed in his office's outgoing mail box on May 14, 1992, as was the usual practice in his office. A copy of the power of attorney which accompanied the request contains the following notation in the upper right hand corner: "Mailed 5/14/92 to Conciliation Bureau."

During the course of the hearing, the parties entered into two related stipulations of fact which concerned situations involving the comparison of the dates of letters to the dates on the envelopes in which they were mailed. The situations were as follows:

- (a) A letter from the Division's Law Bureau was dated August 26, 1993, while the envelope in which it was mailed contained a machine-metered stamp of August 30, 1993;
- and

(b) A letter from the Division's Transaction & Transfer Tax Bureau was dated August 9, 1993, while the envelope in which it was mailed contained a machine-metered stamp of August 11, 1993.

In support of its position, the Division introduced an affidavit of George Gaffney, a Tax Technician II employed in the Real Property Transfer Gains Tax Unit of the Division. As part of his regular duties, Mr. Gaffney supervised the clerical staff of the Processing Section within his unit with respect to the generation and issuance of notices of determination denying refund claims to taxpayers. Mr. Gaffney explained that when a determination had been made that a claim for refund of real property transfer gains tax was to be denied, the Gains Tax Unit would prepare a written notice of determination denying the application for refund. In the present matter, the written notice of determination is the March 18, 1992 letter denying the refund claim. Mr. Gaffney further explained that it is the procedure of the Division to bring the completed notice of determination to the clerical staff of the Gains Tax Unit for mailing; that the clerical staff prepares an envelope for mailing the notice and then places the notice inside the envelope; that the proper certified mail documentation, including Postal Service Form 3877 (firm registration book) and Postal Service Form 3811 (domestic return receipt), is prepared; that the clerical staff of the Gains Tax Unit makes three copies of the form and attaches those copies to the envelope containing the notice of determination; and that the envelope and the attached Postal Service Form 3877's are delivered to the registry unit of the Division's mailroom located at Building 8, W. A. Harriman Campus, Albany, New York. It is at the registry unit that metered postage is affixed to the envelope containing the notice of determination.

Following delivery of the notice to the mailroom and the affixing of the postage to the envelope, Mr. Gaffney explained that the envelope containing the notice of determination and the completed Postal Service Forms 3877 and 3811 were delivered by a mailroom employee to an office of the United States Postal Service. An employee of the Postal Service reviews the Postal Service Form 3877 to verify that the mail pieces listed on such form were, in fact, received. The

Postal Service employee then stamps the Form 3877, indicating the date of mailing.

Approximately once a month, batches of Postal Service Form 3877's are returned by employees of the Division's mailroom to the Gains Tax Unit. The Gains Tax Unit then stores the forms in the usual course of its business.

Attached to the Gaffney affidavit was a Postal Form 3877 listing one item with the number P150016 413 appearing next to the same address as that which appears on the notice of determination.¹ At the top of the form is handwritten "Gains Tax" and "3/18/92". The form contains a U.S. Postal Service postmark of March 18, 1992. The signature boxes for the "Postmaster, Per (Name of receiving employee)" is blank; the box indicating the total number of pieces of mail listed by the sender, i.e., the Division, is blank; the box indicating the total number of pieces received at the post office is blank; the check box indicating the type of mail service desired, i.e., "Registered", "Insured", "COD", "Certified" or "Express", is not filled in; and the box indicating whether the sender wants or does not want postal insurance is not checked.

Also attached to the affidavit is a Postal Service Form 3811 containing the same article number (P150016 413) and address (Arnold A. Gruber, c/o Marks, Shron & Company, 111 Great Neck Road, Great Neck, New York 11021) as appears on the notice of determination. The Postal Form 3811 also indicates that the article was signed for and delivered on March 26, 1992. Delivery on March 26, 1992 to the address indicated was admitted by petitioner.

In paragraphs 6 and 8 of his affidavit, Mr. Gaffney concluded, based upon his review of the notice of determination, Postal Forms 3877 and 3811 and his personal knowledge of the operations and procedures of the Processing Section of the Gains Tax Unit, that the notice of determination dated March 18, 1992, which denied petitioner's claim for refund, was delivered to the U.S. Postal Service on March 18, 1992 and received by the addressee on March 26, 1992.

¹The address shown on Postal Form 3877 is the same as that which appears on the notice of determination except that it omits the State and zip code.

OPINION

First, the Administrative Law Judge found that, with respect to petitioner's claim that the notice of determination was not properly issued because the Commissioner of Taxation and Finance did not sign it, Tax Law § 2(1) provides that the Commissioner may delegate his authority to Division employees. In this instance, the individual who signed the March 18, 1992 letter properly did so as a delegate of the Commissioner. Second, with respect to petitioner's claim that the notice was not mailed to him as required by Tax Law § 1445(2), the Administrative Law Judge found that the Division mailed the notice to Arnold A. Gruber at c/o Marks, Shron & Company, 111 Great Neck Road, Great Neck, New York 11021 as this was the name and address shown for the claimant on the claim for refund and, further, Mr. Gruber was shown on the claim for refund as the "person to contact." Third, with respect to petitioner's claim that the March 18, 1992 letter did not constitute a notice of determination, the Administrative Law Judge found that the March 18, 1992 letter did constitute a notice of determination, and the letter, "the attached Form TA-9.1 and Tax Law § 1445(2) referenced in the letter [provided] ample notification of when the 90-day period [commenced]" (Determination, conclusion of law "B").

With respect to the Division's burden to demonstrate proper mailing, the Administrative Law Judge found that the Division failed to establish proper mailing of the notice and the mailing date of the notice. The Administrative Law Judge found that while the Form 3877 contains a United States Postal Service postmark, it is "incomplete as it lacks any signature or initials by a receiving Postal Service employee; the total number of pieces of mail listed by the sender, i.e., the Division; the total number of pieces received at the post office; and the type of mail service desired . . ." (Determination, conclusion of law "D"). Therefore, the Administrative Law Judge determined that the Division must provide evidence of when the Notice was delivered to the United States Postal Service. The Administrative Law Judge found that the Division failed to make this showing as the record contains no "affidavit from either the mailroom clerk who

delivered the notice at issue to the U.S. Postal Service or the postal worker who actually received it" (Determination, conclusion of law "D").

With regard to the Gaffney affidavit, the Administrative Law Judge found that the affidavit provided some description of the Division's procedure for creating and mailing notices of determination. However, the Administrative Law Judge found there was no affidavit setting forth the Division's standard procedure for the mailing of notices of determination and whether the procedure was followed in mailing the March 18, 1992 notice.

The Administrative Law Judge also found that there is no evidence "tying the particular notice at issue to the respective mailing documents" (Determination, conclusion of law "D"). The forms 3877 and 3811 only show that the Division mailed something to petitioner on March 18, 1992 as the identifying number on the forms does not appear on the notice.

Finally, the Administrative Law Judge stated that when the Division cannot prove the date of mailing of the notice, but petitioner admits to having received the notice, the 90-day period begins to run from the date of receipt of the notice. The Administrative Law Judge remanded the matter to the Bureau of Conciliation and Mediation Services for a conference because petitioner's request for a conciliation conference was timely filed within 90 days of petitioner's receipt of the notice.

On exception, the Division, relying on Matter of Cataldo v. Commissioner (60 T.C. 522, affd 499 F2d 550, 74-2 USTC ¶ 9533), argues that an affidavit from the mailroom employee who delivered the notice or from the postal clerk who received the notice is unnecessary. The Division further argues that "a postmarked Form 3877 functions as a receipt from the Post Office in return for the article mailed (Domestic Mail Manual, Issue 42, §§ 912.45, 913.441; Matter of Magazine, 89 T.C. 321)" (Division's brief, p. 5).

The Division next argues that although there were omissions in the preparation of Form 3877, it has sustained its burden of going forward with the evidence. The Division relies on Wheat v. Commissioner (T.C. Memo 1992-268, 63 TCM 2955) where there were certain

omissions in the preparation of Form 3624 (which required the same information as Form 3877), but where the Court found that the respondent, by the other evidence submitted, met its burden of production. In addition, the Division asserts that "[t]he chances of miscounting the number of items of mail received at the post office or failing to identify an entry for which there is no envelope are virtually nil" since in this matter the Form 3877 was used to mail only one article of mail (Division's brief, pp. 7-8).

Finally, the Division argues that "[t]he undisputed actual receipt of the Notice of Determination on March 26, 1992, eight days after the claimed date of mailing, corroborates the Division of Taxation's Form 3877 and the affidavit of George Gaffney" (Division's brief, p. 8). In support for its position, the Division relies on Matter of Kropf (Tax Appeals Tribunal, March 21, 1991). The Division argues that in Kropf any evidentiary problems with regard to the Division's failure to introduce evidence of office practice were not raised because the return receipt introduced by the Division indicated delivery of an item on April 30, 1986, and the return receipt corroborated an April 17, 1986 mailing date.

In response, petitioner agrees with the Administrative Law Judge's conclusion that Form 3877 is incomplete. Petitioner also states that "Form 3877 is insufficient to establish what was mailed on March 18, 1992" (Petitioner's brief, p. 5).

Petitioner, relying on Matter of Air Flex Custom Furniture (Tax Appeals Tribunal, November 25, 1992), argues that "[s]ince Form 3877 is incomplete, it does not establish the Division's routine procedures, and should not be deemed sufficient proof of mailing" (Petitioner's brief, p. 3). Petitioner further argues that when Form 3877 is incomplete, the Division must provide evidence of when the Notice was delivered to the United States Postal Service. In addition, petitioner argues that the Gaffney affidavit "provides no explanation of the routine procedures concerning outgoing mail followed by the mailroom in the regular course of business" and does not establish proof of mailing (Petitioner's brief, p. 3). Petitioner asserts that the Division has not provided any other evidence to prove that its mailing procedures were

followed in this case and, therefore, has not met its burden of proof to establish mailing of the Notice on March 18, 1992.

Petitioner also argues that the Division's reliance on Cataldo v. Commissioner (supra) is misplaced as the proof submitted by the Division in this matter is substantially less than that offered in Cataldo.

Next, petitioner, relying on Matter of Novar TV & Air Conditioner Sales & Serv. (Tax Appeals Tribunal, May 23, 1991), argues that there, even though receipt of a Notice of Determination by a taxpayer was established, this was insufficient to establish the Division's proof of mailing. With respect to the Division's reliance on Matter of Kropf (supra) that the return receipt corroborated the Division's proof of mailing, petitioner argues that in Kropf the evidence submitted was sufficient to meet the Division's burden of proof, i.e., Postal Service Form 3877, a mailing log, a Division form listing the assessment against the taxpayer and signed statements indicating the assessment was mailed to the taxpayer. Here, petitioner argues, "no mailing log, signed statements or Division form has been offered and, accordingly, the Division has not sustained [its] burden of proof" (Petitioner's brief, p. 7).

Finally, petitioner stresses that when a claim for refund involves a large amount, i.e., \$383,255.00, the Division "must submit more substantial proof of its routine procedures than an incomplete form and a speculative affidavit" (Petitioner's brief, p. 4).

In its reply brief, the Division argues that "the quantum of proof necessary to prove proper mailing has no relationship whatsoever to the amount of the particular refund requested" and that the Division has proven the Notice of Determination was mailed to petitioner on March 18, 1992 (Division's reply brief, p. 1).

The Division next argues that the "Gaffney affidavit is sufficiently detailed for the purposes of proving mailing" (Division's reply brief, p. 1). The Division asserts that the affidavit establishes the following:

"[t]he Notice of Determination denying the Claim for Refund is manually prepared by the Gains Tax Unit (par. 3). Once the Notice has been prepared, clerical staff in the Gains Tax Unit prepares an envelope and Forms 3877 and 3811 (par. 4). The clerical staff sends the prepared envelope along with three copies of the Form 3877 to the Division of Taxation's registry unit where postage is applied (par. 5). The Department's mail room delivers the mail item and the Form 3877 to the Postal Service who accepts the mail item(s) and postmarks the Form 3877 (par. 6). The postmarked Form 3877 is later returned to the Gains Tax Unit (par. 7)" (Division's reply brief, p. 2)

The Division, relying on Matter of T.J. Gulf v. New York State Tax Commn. (124 AD2d 314, 508 NYS2d 97), further argues that petitioner must "demonstrate that 'routine office practices were not followed or that those practices were performed so carelessly that it would be unreasonable to assume that the notice was mailed' (Matter of T.J. Gulf v. New York State Tax Commn., supra, 508 NYS2d 97, 98)" (Division's reply brief, p. 2). The Division asserts that petitioner has made no such showing and, therefore, it has established proper mailing of the Notice of Determination. In addition, the Division argues that "[t]he Gaffney affidavit, the postmarked Form 3877, the Form 3811 and the admission of receipt by the taxpayer, suffice to establish proper mailing of the Notice of Determination on March 18, 1992" (Division's reply brief, p. 2).

We reverse the determination of the Administrative Law Judge for the following reasons.

First, we find that the Postal Form 3877, while containing certain omissions, is sufficient to establish that the notice denying the refund claim was delivered to the post office on March 18, 1992. We agree with the Division that since the Form 3877 was used to mail only one article of mail, "[t]he chances of miscounting the number of items of mail received at the post office or failing to identify an entry for which there is no envelope are virtually nil" (Division's brief, pp. 7-8). We cannot believe that the post office would place a postmark on Form 3877 without receiving the one piece of mail described on that form. While this Tribunal found the Form 3877 to be defective in several cases where there was no entry for the total number of pieces received at the Post Office, the forms 3877 in those cases all listed more than one taxpayer

(see, Matter of Huang, Tax Appeals Tribunal, April 27, 1995; Matter of Fuchs, Tax Appeals Tribunal, April 20, 1995; Matter of Sabando Auto Parts, Tax Appeals Tribunal, March 9, 1995; Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995; Matter of Turek, Tax Appeals Tribunal, January 19, 1995).

Because we find that the Postal Form 3877 was sufficient to establish that the refund denial was delivered to the post office on March 18, 1992, we do not look to the Gaffney affidavit, as the Administrative Law Judge did, to establish this fact. However, we find that the Gaffney affidavit is adequate for the purposes of establishing the Division's routine office practices. Mr. Gaffney has set forth that he is the supervisor of the unit that generates and issues notices of determination. He then describes the procedure for the issuance of notices of determination, including the preparation of the notices and the certified mail documentation; their delivery to the registry unit of the Division to have the proper postage affixed; and their ultimate delivery to the United States Post Office by a Division mailroom employee. We find that although Mr. Gaffney is not an employee of the mailroom, it is reasonable to conclude that in his position as supervisor of the unit that prepares notices of determination Mr. Gaffney is familiar with the basic manner in which the notices prepared by his unit are delivered to the United States Post Office by the Division's mailroom.

With respect to petitioner's reliance on Matter of Air Flex Custom Furniture (*supra*) that an incomplete Form 3877 does not provide sufficient proof of mailing, we find the facts of that case to be distinguishable from the facts before us. In Air Flex, the Form 3877 did not contain a postmark and was, in fact, completely blank except for mailing entries corresponding to the petitioners' mailings.

On the other hand, we agree with the Division's reliance on Matter of Kropf (*supra*). In Kropf, the Tribunal found that the return receipt corroborated the mailing date indicated on the Form 3877 and that this evidence was sufficient to prove the date of mailing. The Tribunal stated that in view of this corroboration, "the evidentiary problems which would otherwise be

raised by the Division's failure to introduce evidence of office practice are not present here" (Matter of Kropf, supra). We find that the return receipt in this matter does corroborate a March 18, 1992 date of mailing.

Next, we reject petitioner's argument that the Form 3877 does not establish what was mailed on March 18, 1992. The name and address of the sender is indicated at the top of Form 3877 to be Gains Tax, Carnevaes. Petitioner also admitted receiving the notice denying the refund claim from the Gains Tax Unit on March 26, 1992, eight days later. We believe an inference can be drawn from these facts that the certified mail listed on the Form 3877 was the notice denying the refund claim petitioner received on March 26, 1992.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Sy Associates is denied; and
4. The Notice of Determination issued on March 18, 1992 is sustained.

DATED: Troy, New York
August 3, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner