

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CRESCENZIO DIAZ</b>	:	DECISION
	:	DTA No. 812430
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 September 1, 1984 through August 31, 1988.	:	

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Petitioner Crescenzo Diaz, 86-23 Eton Street, Jamaica Estates, New York 11423, filed an exception to the determination of the Administrative Law Judge issued on July 6, 1995. Petitioner appeared by Alvin Silverman, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter on October 4, 1995 stating it would not be filing a brief, which date 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's request for a conciliation conference, which he concedes was made later than 90 days after the issuance of the notices of determination, is nevertheless effective to obtain a review on the issue of whether the assessment was timely made.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact "4" and "6" which have been modified. The Administrative Law Judge's findings of facts and the modified findings of fact are set forth below.

East 170th Food Corporation of 308 East 170th Street, Bronx, New York was the owner of a grocery store doing business as Met Food. The business was owned by petitioner

Crescenzo Diaz's wife.

Petitioner, Crescenzo Diaz, was either the president or manager of the business during most or all of the period under review.

All of the business's sales tax returns were timely filed. The business was sold (by sale of stock) to a Mr. George Horton. Petitioner claims the sale occurred on June 28, 1988.<sup>1</sup> However, Mr. George Horton was contacted at the business location by the auditor on March 20, 1990, according to the auditor's log. Previous contacts with the business had been with Mr. Fine, the accountant for the business.

In 1991, Alvin Silverman became the representative of both the business and Mr. Horton, who owned the business at that time. (Mr. Silverman began representing petitioner in 1993.)

A series of consents extending the period of limitations for assessment, which petitioner denies signing though they bear his name, were dated November 10, 1987, February 5, 1988, February 8, 1988, September 7, 1988, November 10, 1988, February 23, 1989, April 25, 1989 and December 18, 1989. In support of his denial of signing the consents, petitioner states that he was not even in the store after its sale in June 1988. It is noted that, although petitioner's name appears on the consents, each of the signatures appears to be in a different handwriting from the others. The auditor's log shows no contact with petitioner by name or any awareness of his post-1987 home address on Eton Street. The last consent extended the limitation period to June 20, 1990.

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

A Notice of Determination, dated May 15, 1990, was issued to petitioner as an officer of East 170th Food Corporation d/b/a Met Supermarket for the period September 1, 1984 through February 29, 1988. The tax due was \$65,873.99, plus penalty of \$18,938.10 and interest of \$39,840.35, for a total amount due of \$124,652.44.

An additional Notice of Determination, also dated May 15,

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<sup>1</sup>Petitioner's representative has submitted no legal papers to show this date, although he was asked to do so.

1990, was issued to petitioner for the period March 1, 1988 through August 31, 1988 for tax due of \$7,529.54, plus penalty of \$2,216.34 and interest of \$1,770.22, for a total amount due of \$11,516.10.

A third Notice of Determination, dated May 15, 1990, was issued to petitioner for the period June 1,

1985 through August 31, 1988 for a penalty of \$5,692.14.<sup>2</sup>

These notices against petitioner were issued after a field audit of the business, East 170th Food Corporation.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

The notices dated May 15, 1990 were sent to petitioner as an "officer" of East 170th Food Corporation at 184-09 90th Avenue, Jamaica, New York 11423. Petitioner had lived at that address in Hollis, New York prior to 1988. These notices were returned to the Division of Taxation ("Division") for a better address. The Division does not claim that this was proper mailing.

The notices dated May 15, 1990 were remailed on August 14, 1990 to petitioner as "officer of East 170th Food Corp." at his home address on Eton Street, the same address as on petitioner's 1987 and 1989 personal income tax returns. To demonstrate proper mailing the Division submitted the affidavits of William C. Ridderwold, Daniel LaFar and Charles Brennan, all Division employees, as well as postal forms 3877 and certified mailing records. It is the timeliness of these notices that is contested by petitioner. At the time of receipt, petitioner and his accountant treated the notice as a nullity; they never consented to it.<sup>3</sup>

A warrant was issued against petitioner on March 30, 1993 for the amounts of tax due of \$65,873.99 and \$7,529.54, plus penalty and interest, for a total due of \$183,086.83.

A request for conciliation conference, dated June 10, 1993, was mailed to the Division

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We modified this finding to reflect the fact that all of the notices issued to petitioner were dated May 15, 1990.

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We modified this finding to reflect the fact that notices remailed to petitioner on August 14, 1990 were dated May 15, 1990.

by certified mail on June 11, 1993. This request (as well as the later petition to the Division of Tax Appeals) clearly states that petitioner was not an officer of East 170th Food Corporation at the time of the signing of the consents to extend the limitations period, that he did not sign them, and that the "statute of limitations expired."

The request was denied by a Conciliation Order dated August 27, 1993 as filed later than 90 days after the issuance of the notices of determination.

A petition certified by the U.S. Postal Service on November 23, 1993 was received by the Division of Tax Appeals on Friday, November 26, 1993, within 90 days of the Conciliation Order of August 27, 1993.

### ***OPINION***

The Administrative Law Judge found that while "there is some doubt in this case whether the notices of determination of tax due were timely issued against this petitioner," that "[d]espite this . . . the statute of limitations argument is an affirmative defense which can only be addressed if there is jurisdiction to decide the merits of the case in the first place" (Determination, conclusion of law "B"). Relying on Matter of Servomation Corp. v. State Tax Commn. (60 AD2d 374, 400 NYS2d 887), the Administrative Law Judge stated that "[i]f an affirmative objection is not timely made, then the assessment has the taxpayer's consent" (Determination, conclusion of law "C"). The Administrative Law Judge determined that here petitioner's request for a conciliation conference was not timely. He found that the Division of Taxation established that the notices were mailed on August 14, 1990 and petitioner has not contested this mailing date. Since the request for conference was not filed until June 11, 1993, it was not timely filed within the 90-day period.

The Administrative Law Judge, went on to distinguish Shelton v. Commissioner (63 TC 193) where it was found that defects such as a notice which contained an incorrect address or was not mailed by certified mail "violate the express terms of the statutory provision authorizing the notice . . . and are considered to be 'jurisdictional' and thus can be raised by a petition which is otherwise late filed" (Determination, conclusion of law "C"). Since

petitioner's limitations argument is an affirmative defense and not a jurisdictional issue, it cannot be raised in a request for conference that was late filed.

On exception, petitioner continues to argue that the 90-day period to file a petition was never triggered because the notices of determination mailed to petitioner on May 15, 1990 were not mailed to the correct address. In addition, petitioner argues that when the notices were mailed to his correct address on August 14, 1990, this was after the deadline for mailing the notices which was June 20, 1990. Petitioner argues that the issue of the timeliness of his request for a conference is not reached since the 90-day period was never triggered. Therefore, he asserts his request was proper.

We affirm the determination of the Administrative Law Judge. The notices mailed to petitioner on May 15, 1990 were mailed to an incorrect address and the Division is not contesting this fact. The only notices at issue in this matter were mailed on August 14, 1990 and were mailed to petitioner's correct address. Since the Division has established that the notices were mailed to petitioner on August 14, 1990 by the submission of affidavits describing its general mailing procedures and the mailing records showing that the procedure was followed in this matter, any petition or request for a conciliation conference had to be filed within 90 days from August 14, 1990. Since petitioner's request for a conciliation conference was not mailed until June 11, 1993, it was not timely. The issue of whether the notices themselves were mailed within the period of limitation for assessment of sales and use taxes is an affirmative defense (Matter of Servomation Corp. v. State Tax Commn., *supra*) and, without a timely request for a hearing having been filed, this Tribunal has no jurisdiction to address this issue (Tax Law § 170[3-a][e]; Matter of Batavia Coal & Oil, Tax Appeals Tribunal, February 2, 1995).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Crescenzo Diaz is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Crescenzo Diaz is dismissed.

DATED: Troy, New York  
March 14, 1996

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Donald C. DeWitt

Donald C. DeWitt  
Commissioner