STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLOTTE E. LANTZ	:	DETERMINATION
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, 1987.	:	

Petitioner, Charlotte E. Lantz, 977 Wendam Court, Port Orange, Florida 32019, filed a 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 September 1, 1984 through August 31, 1987 (File No. 807076).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 14, 1990 at 10:30 A.M., with all briefs to be submitted by September 30, 1990. Petitioner appeared by Semon & Mondshein, Esqs. (Linda Taub, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

On December 20, 1987, the Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due, each addressed to petitioner, Charlotte E. Lantz, as an officer of Zara Contracting Co., Inc., at Engel Street, Hicksville, New York 11801. The first of these notices assessed sales tax due in the amount of $474,296.29for the period September 1, 1984 through August 31, 1987, plus penalty and interest. The second such notice assessed additional "omnibus" penalty for the period June 1, 1985 through August 31, 1987.

In response to the aforementioned notices, a petition dated January 27, 1988 and

stamped as received by the Division of Taxation's Bureau of Conciliation and Mediation Services ("BCMS") on February 4, 1988 was filed. This petition, treated as a request for a conciliation conference by BCMS, indicated the taxpayer as Charlotte E. Lantz and listed her address as Engel Street, Hicksville, New York 11801. It also listed petitioner's representative as Semon and Mondshein, Esqs., with an address at 100 Crossways Park West, Woodbury, New York 11797. The Engel Street address is the address of petitioner's former employer, Zara Contracting Co., Inc. ("Zara").

A conciliation conference on the petition was held on October 27, 1988. Thereafter, on March 17, 1989, a conciliation order was issued denying petitioner's request for redetermination of the above-described notices of determination. The conciliation order identified petitioner as "Charlotte E. Lantz, Off. of Zara Contracting Co., Inc.", and was accompanied by a letter, also dated March 17, 1989, which identified petitioner as "Charlotte E. Lantz, Off. of Zara Contracting Co., Inc., Engel Street, Hicksville, New York 11801". BCMS certified mail records as well as affidavits of two persons involved in the preparation and mailing of conciliation orders reveal that the conciliation order was mailed to petitioner at the Engel Street address shown above and to her representative, Semon and Mondshein, at the 100 Crossways Park West, Woodbury, New York address listed above. The same records indicate that the conciliation order issued to petitioner at the Engel Street address was returned as "refused", and was remailed by ordinary mail, as opposed to certified mail, to the same address on March 24, 1989 and March 27, 1989. No evidence was offered as to who refused initial delivery, or why. Similarly, there is no evidence as to when (specifically), or by whom, the remailed notice was received. As to the initial mailing, petitioner's representative opined:

> "They [BCMS] knew that Zara Contracting was out of business and defunct, and they mailed to an address where nobody knows, presumably nobody knows Charlotte Lantz anymore. That is why the mailing was refused.
>
> The documents were returned and remailed. Now, certainly, when Ms. Lantz received the documents that were mailed, a Petition was filed and the Petition was filed in a timely manner, considering the dates of the remailing.
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> Moreover, I do not believe that a Petitioner who moves after Conciliation Conference has any legal requirement of notifying the Conciliation Board or

anyone else that she has moved.

If, in fact, the Tribunal [sic] had mailed their documents to her home address, as they had done in other instances, they would have been forwarded to her in Florida."

A petition dated June 20, 1989 challenging the conciliation order was filed with the Division of Tax Appeals. This petition, though dated June 20, 1989, bears a Division of Tax Appeals indate stamp of June 21, 1989. Said petition was filed via Federal Express. This June 21, 1989 date of receipt is some 96 days after the March 17, 1989 date of initial issuance of the conciliation order. The petition lists petitioner's address as 977 Wendam Court, Port Orange, Florida.

On September 28, 1989, an administrative law judge in the Division of Tax Appeals issued an order dismissing the petition as untimely since it had been received by the Division more than 90 days after the date of issuance of the conciliation order (Tax Law § 170.3-a[e]). This order indicates that the conciliation order was mailed to petitioner at "petitioner's last known address at 977 Wendam Court, Port Orange, Florida 32019".

Petitioner challenged this order dismissing the petition via the filing of an exception with the Tax Appeals Tribunal. On December 28, 1989, the Tribunal issued its decision remanding the matter for a hearing to determine whether the conciliation order had been mailed to petitioner's last known address, as required by Tax Law § 1147(a)(1) and, in turn, whether or not a timely petition had been filed. The instant proceedings ensued as a result of the Tribunal's decision remanding the matter.

Submitted in evidence at hearing were certain petitions and conciliation orders pertaining to notices of determination (sales tax) and notices of deficiency (income tax) issued to petitioner for periods other than that at issue herein. More specifically, notices of deficiency had been issued to petitioner asserting personal income tax liability against her (as a person responsible to collect and remit withholding tax on behalf of Zara) for the periods April 1, 1984 through December 31, 1985 and December 1, 1985 through December 31, 1986, respectively. In addition, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due

had been issued to petitioner (assessing her as a person required to collect and remit sales tax on behalf of Zara) for the period June 1, 1981 through August 31, 1984. Petitions were filed on these matters with the Division of Tax Appeals. These petitions, each dated September 22, 1988, show petitioner's address as 977 Wendam Court, Port Orange, Florida. However, conciliation orders issued earlier with respect to these other matters indicate petitioner's address to be 43 Croyden Lane in Hicksville, New York. The preceding petitions or requests seeking conciliation conferences on these other matters were not offered in evidence; hence, the specific address listed for petitioner thereon, presumably the 43 Croyden Lane, Hicksville address, is, in fact, unknown. It is noted that each of the three petitions filed with the Division of Tax Appeals in protest to the conciliation orders includes the address of petitioner's attorneys, Semon and Mondshein, at 100 Crossways Park West.

SUMMARY OF THE PARTIES' POSITIONS

The Division maintains that the conciliation order dismissing the petition was correctly mailed to petitioner at her then-last known address at Engel Street, Hicksville, New York. The Division concedes that the administrative law judge's order dismissing the petition, dated September 28, 1989, is erroneous insofar as it indicates that the conciliation order was issued to petitioner at 977 Wendam Court, Port Orange, Florida, rather showing, via affidavits and certified mailing records that the conciliation order was mailed by certified mail to petitioner at the Engel Street, Hicksville, New York address, as well as to the address of petitioner's representative. The Division notes that there are no specific statutory requirements or regulatory statement with respect to conciliation orders, but, at least tacitly, admits that the same should be mailed to a petitioner at his or her last known address. In sum, the Division argues that the conciliation order was properly mailed to petitioner's last known address.

Petitioner argues, by contrast, that the Division failed to mail the conciliation order to petitioner's last known address and that such error was the sole reason for the delay in the filing of a timely petition with the Division of Tax Appeals challenging such order. Petitioner argues that no harm has occurred as the result of the delay in filing of the petition and, further, that

there is a meritorious case underlying the petition, thereby demanding that petitioner be granted a hearing.

CONCLUSIONS OF LAW

A. The Division of Taxation's Bureau of Conciliation and Mediation Services is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170[3-a]; 20 NYCRR 4000.1[c]). Conciliation orders are binding upon "the department [of taxation] and the person who requested the conference," unless such person petitions the Division of Tax Appeals for a hearing "within ninety days after the conciliation order is issued" (Tax Law § 170[3-a][e]; 20 NYCRR 4000.6[b]).

B. The first issue is whether the conciliation order in this matter was mailed to petitioner's last known address as required by Tax Law § 1147(a)(1) (see, Matter of Robert G. Wilson and GSA Corporation d/b/a GSA Partners, Tax Appeals Tribunal, July 13, 1989; Matter of Charlotte E. Lantz, Tax Appeals Tribunal, December 28, 1989).[1] Based upon the evidence submitted, the conciliation order in question was properly mailed to petitioner's last known address. More specifically, the order was mailed to petitioner's last known address in this matter (i.e., Engel Street, Hicksville, New York). This conclusion is supported on several bases. First, the petition in this

case filed by petitioner requesting a conciliation conference specifically listed the Engel Street address. This petition was indated on February 4, 1988 (see Finding of Fact "2"). Thereafter, a conciliation conference was held on October 27, 1988. There is no evidence that petitioner gave notice of a different address at or before the conference with respect to the matter at hand.

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[1]While BCMS regulations do not specify any requirement for mailing to the conference requester's last known address, such requirement must at least be read in by implication. Not only is such a construction sensible, it is consistent with Tax Law § 1147(a)(1). Moreover, in its remand order herein, the Tribunal remanded upon the specific direction to determine "whether the conciliation order was mailed to petitioner's last known address as required...", thereby enabling a determination as to whether a timely petition was filed.

Petitioner's representative argues, nonetheless, that the conciliation order should have been sent to the 43 Croyden Lane "home" address to which conciliation orders in other matters had been mailed, (presumably in accord with such address having been listed on conciliation conference requests filed in those matters), and that it would have been forwarded to petitioner in Florida (see Finding of Fact "3"). As to these other addresses, it is noted that the petitions in the other matters, which specify the Wendam Court, Port Orange, Florida address, were filed on September 22, 1988 (prior to the conference in this matter), and that the 43 Croyden Lane address apparently is derived from requests for conciliation conferences filed well before such September 22, 1988 date. Also, the petitions in the other matters, which list the Florida address, were filed with the Division of Tax Appeals as opposed to BCMS.[2] Finding no

evidence of any change of address having been given to BCMS for this matter at the time of the

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[2]Petitioner argued that filing petitions (in other matters) with the Division of Tax Appeals should constitute a change of address for this matter then pending with BCMS. However, this argument fails to consider that the Division of Taxation, which includes BCMS, and the Division of Tax Appeals are separate and distinct entities (compare Tax Law §§ 2000, 2002 with Tax Law § 170[3-a][a][g]).

The Division of Tax Appeals was created pursuant to Article 40 of the Tax Law and became effective September 1, 1987. Section 2002 specifically provides that "There shall be in the department of taxation and finance a separate and independent division of tax appeals.... The powers, functions, duties and obligations of the division shall be separate from and independent of the authority of the commissioner of taxation and finance." Tax Law § 2000 states, in part, "This article is enacted to establish an independent division of tax appeals within the department of taxation and finance...."

The Division of Tax Appeals was created to provide for independent reviews and resolutions of controversies resulting from determinations issued by the Department. The Division of Tax Appeals includes the Tax Appeals Tribunal (consisting of three commissioners appointed by the Governor for a term of nine years). The Tax Appeals Tribunal has the power of appointment and removal of its employees and prepares and submits a budget to the Commissioner of the Department which cannot be revised in any manner by the Commissioner (Tax Law § 2006). It is clear, from both the legislative intent contained in Tax Law § 2000 and the provisions of Article 40, that the Division of Tax Appeals is a separate entity from the Division of Taxation. While the nicety of such a distinction may sometimes be lost on a pro se petitioner, petitioner herein (or her representatives) knew enough to file separate petitions first with BCMS, subsequently with the Division of Tax Appeals and, in this matter, thereafter with the Tax Appeals Tribunal.

October 27, 1988 conference, and no evidence of any notification of change between the date of such conference and the issuance of the subject conciliation order, it follows that the conciliation order was properly mailed to petitioner's last known address as of the date it was mailed by BCMS. Given that the last known address for the subject appeal was Engel Street, and that the other addresses (the Croyden Lane and Florida addresses) pertained to matters of appeal other than that at issue herein, leads to a conclusion that BCMS properly mailed the conciliation order to petitioner's last known address at the time the order was issued.

C. As to the address, or change of address, petitioner has some duty to clarify and in this case nothing affirmative was done. The consequences of such a failure, including the possibilities of misdelivery or untimely delivery, must fall upon petitioner. In fact, were BCMS to have mailed the order to an address different from that specified on the petition requesting a conference (absent some specific direction from petitioner to do so) would leave petitioner able to claim (conversely) that such was an improper mailing. Filing petitions or requests for conference in other matters is not notice of a change of address for a distinct pending matter. The Division should not be faulted for mailing to the address discrete to a given matter, as provided by petitioner, absent some notice or direction not to do so. A taxpayer, having given a specific address may and should expect to have such address honored until he or she changes it. In fact, a taxpayer may desire (and have some valid reason) to specify different addresses for different taxes and/or different matters challenged.

D. Having concluded that BCMS properly mailed the subject conciliation order, coupled with a petition filed more than 90 days thereafter would appear to result in there being no jurisdiction to address the merits of the case (Matter of SAK Smoke Shop, Inc., Tax Appeals Tribunal, January 6, 1989), thus leaving the notices finally and irrevocably fixed (Tax Law § 1138[a]). However, the inquiry is not ended. Although neither the legislation creating BCMS nor BCMS regulations specify as much, consistency dictates an inquiry into whether the order was received. While the BCMS order is not a notice of determination and demand for sales tax,

the underlying documents are such notices of determination. Hence, it is only consistent to apply to the issuance of the subject conciliation order the same standard of notice as applies in mailing issues relative to sales tax matters. In short the focus of inquiry becomes, after proper mailing is established, whether the ensuing presumption of receipt has, in fact, been rebutted by the taxpayer.[3]

E. In Ruggerite v. State Tax Commn. (64 NY2d 688, 485 NYS2d 517), the former State Tax Commission's attempt to give notice by properly addressed certified mail was held insufficient where the notice was returned "unclaimed". The court's holding was based upon the return of the notice as unclaimed coupled with a finding that the Postal Service failed to comply

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[3]While the arguments at hearing were focused on mailing, the issue of receipt was not specifically addressed as to its consequence. However, the effect is brought to bear by the language of Tax Law § 1147(a)(1) as follows:

> "A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed" (emphasis added).

Tax Law § 681(a), by contrast, concerning the mailing of a Notice of Deficiency for additional income tax, does not include a similar provision which shifts the focus of analysis onto whether the taxpayer is in "receipt of the same". Rather, the focus is on the mailing of the Notice of Deficiency. A review of the statutory provisions concerning claims for refund of sales tax as compared to those for refund of income tax would seem to provide an explanation for the less generous standard of review of the timeliness of petitions in income tax matters. Under Tax Law § 687, petitioners may pay the assessment and then apply for a refund. Under Tax Law § 689, if their refund claim is disallowed or "six months have expired since the claim was filed", petitioners may file a petition and have the merits of their claim reviewed in the Division of Tax Appeals. The Tax Law, with regard to the filing of refund claims for sales tax paid, would seem to be much harsher. Tax Law § 1139(c), as in effect prior to 1987 amendments (which became effective September 1, 1987), provided, in part, as follows:

> "A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided" (emphasis added).

Further, under Tax Law § 1138(a)(1), sales tax is finally and irrevocably fixed unless a timely petition for a hearing (or request for conciliation conference) is filed.

with its own mailing procedures. In sum, these factors together were sufficient to rebut the presumption of receipt which attaches to a properly mailed notice under Tax Law § 1147(a)(1). Under such circumstances, the 90-day time period for requesting a hearing under section 1138 of the Tax Law was not triggered and petitioner was entitled to a hearing (Matter of Ruggerite v. State Tax Commn., supra).

F. Matter of Ruggerite (supra) was decided in December 1984. In February 1989, the Appellate Division was faced with the Matter of American Cars-R-Us, Inc. v. State Tax Commn. (147 AD2d 795, 537 NYS2d 672). In this case, the former State Tax Commission's attempt to give a taxpayer notice by properly addressed certified mail was held sufficient where, although the notice was never actually "received", the evidence established that the notice was delivered to petitioner's last known address, but was refused there by petitioner's manager. The court first distinguished Ruggerite based upon the fact that in American Cars-R-Us, the notice was refused upon delivery as opposed to unclaimed. The court further pointed out that in American Cars-R-Us, the Division provided affidavits of the Postal Service employees that the letter was refused by petitioner's agent (its manager) and that the letter carriers followed proper postal service procedures. It was also noted that petitioner continuously used the address to which the notice was mailed and that the Division's attempt to give petitioner notice by certified mail was proper. The court concluded that even though the notice was in fact not delivered, petitioner nonetheless failed to rebut the presumption of receipt under Tax Law § 1147(a)(1) via any probative evidence substantiating its conclusory allegations of error by the Division. As noted in Matter of T.J. Gulf, Inc. v. State Tax Commn. (124 AD2d 314, 508 NYS2d 97), the rebuttable presumption of receipt arising when the Division establishes proper mailing may not be overcome where the only evidence against receipt is testimony amounting to no more than mere denial of receipt.

G. The foregoing cases make clear that rebutting the presumption of receipt devolves to an evidentiary analysis. On this record, the limited evidence available does not, in my view, overcome or rebut the presumption of receipt. Essential to this conclusion are the BCMS

mailing records, which indicate that the notice was returned as "refused" as opposed to "unclaimed". The record contains only allegations that "someone at that address [Engel Street] refused the letter". Petitioner has submitted no proof in support of the allegation that Zara Contracting was, at the time, out of business and defunct, or that the address to which the order was mailed was an address where "nobody knows, presumably nobody knows Charlotte Lantz anymore" (see Finding of Fact "3"). It is equally possible that either petitioner herself or some agent of petitioner refused delivery. There is evidence of petitioner's Florida address in the present record, as well as reference to petitioner having a home address at 43 Croyden Lane, Hicksville, New York. In fact, it seems petitioner's representative would have chosen the 43 Croyden Lane address as proper even though petitioner may have been in Florida at the time. Absent further evidence it cannot be concluded that petitioner was in Florida at the time delivery was attempted or, rather, was at one of the New York addresses (including Engel Street). Further, there is no evidence that the Postal Service did not attempt to deliver the notice or otherwise failed to follow its own regulations (see, Matter of Ruggerite v. State Tax Commission, supra). Finally, it remains puzzling that the notices were remailed to the same address (Engel Street) by ordinary mail just a few days later and were apparently received at such address by or on behalf of petitioner. On balance, the weight of the evidence is insufficient to rebut the presumption of receipt in this case.

H. The analysis above is not unmindful of the fact that BCMS records reflect that the notices were in fact returned, a clear indication of nonreceipt. So too, in American Cars-R-Us (supra), the Division admitted the notice was returned. However, the Court still concluded the presumption of receipt had not been rebutted by the taxpayer. The key factor is a decision to not equate refusal with nonreceipt. To do so, at its logical extreme, would allow a taxpayer to forever frustrate and defeat service of notice. Rather, "refusal", absent clearer evidence, is better equated with "deemed receipt". It falls to the taxpayer to rebut the presumption by providing evidence overcoming the refusal, and that has not been done. In summary, there is, other than allegations:

- no evidence that Zara was out of business or "defunct";

- no evidence that petitioner was in Florida or at 43 Croyden Lane as opposed to Engel Street;

- no evidence as to who was at Engel Street at the time of attempted delivery or who refused delivery of the notice;

- no evidence that the Postal Service failed in any manner to comply with proper procedures; and

- no evidence as to how, where and when petitioner received the notice as remailed by ordinary mail.

On balance, it cannot be said that petitioner has overcome the presumption of delivery of the properly mailed and addressed conciliation order.

I. The petition of Charlotte E. Lantz is hereby dismissed.

DATED: Troy, New York

4/11/91

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ADMINISTRATIVE LAW JUDGE