

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
AIR FLEX CUSTOM FURNITURE, INC.	:	DETERMINATION
AND EMIL ZAMBARDI, AS OFFICER	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1985	:	
through February 29, 1988.	:	

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Petitioners, Air Flex Custom Furniture, Inc. and Emil Zambardi, as officer, 361 Rockaway Avenue, Valley Stream, New York 11581, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1985 through February 29, 1988 (File No. 807485).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 17, 1990, at 2:45 P.M., with all briefs to be filed by December 14, 1990. Petitioner appeared by Lawrence R. Cole, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUE

Whether petitioners timely filed a request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals.

FINDINGS OF FACT

On January 27, 1989, the Division of Taxation properly issued and mailed to both petitioners, Air Flex Custom Furniture, Inc. ("Air Flex") and Emil Zambardi, as officer, six notices of determination and demands for payment of sales and use taxes due. The three notices sent to Air Flex were sent by certified mail to its address at 361 Rockaway Avenue, Valley

Stream, New York 11581 and the three identical notices of determination and demands for payment of sales and use taxes due sent to Emil Zambardi as officer of Air Flex Custom Furniture, Inc. were sent by certified mail to his home address at 100-127 Baker Court, Island Park, New York 11518. The notices sent to Air Flex Custom Furniture, Inc. set forth the following:

<u>Notice Number</u>	<u>Date of Notice</u>	<u>Total Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S890127327C	1/27/89	\$38,667.64	\$10,349.46	\$9,601.62	\$58,618.72
S890127328C	1/27/89	0	3,836.37	0	3,836.37
S890127329C	1/27/89	0	7,502.16	0	7,502.16

As stated above, three notices were also sent to Emil Zambardi, officer of Air Flex Custom Furniture, Inc., which set forth the following information:

<u>Notice Number</u>	<u>Date of Notice</u>	<u>Total Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S890127330C	1/27/89	\$38,667.64	\$10,349.46	\$9,601.62	\$58,618.72
S890127331C	1/27/89	0	3,836.37	0	3,836.37
S890127332C	1/27/89	0	7,502.16	0	7,502.16

These notices were issued to both petitioners following an audit of the books and records of Air Flex and each of the notices indicates that the tax assessed was estimated in accordance with the provisions of Tax Law § 1138(a)(1).

Previously, on or about September 18, 1988, the Division of Taxation issued three statements of proposed audit adjustment to Air Flex in care of its former representative, one Anthony Grosso, C.P.A., the first of which indicated additional tax due of \$38,667.64 plus penalty and interest to be computed, the second, penalty of \$3,836.37 and the third, penalty of \$7,502.16.

On December 10, 1988, petitioner's then representative, Anthony Grosso, C.P.A., submitted a request for a conciliation conference. On January 12, 1989, a letter was sent by the Bureau of Conciliation and Mediation Services to Anthony L. Grosso acknowledging his request for conciliation conference but deeming the request premature. The letter went on to explain the following:

"However, this request was deemed premature. The Tax Law requires that, to be timely, a request must be filed within ninety days after the mailing of a Notice of

Deficiency (or Determination) by the Audit Division. Our records show that neither document has yet been mailed.

Therefore, this matter has not yet reached a deficiency stage and you may be able to resolve this controversy with the Audit Division. You should immediately contact the issuing office indicating your disagreement with their 'proposed adjustments'."

As stated above in Finding of Fact "1", the notices of determination and demands for payment of sales and use taxes due were issued to petitioners herein on January 27, 1989. However, petitioner's representative, Mr. Grosso, did not file another request for conciliation conference until May 12, 1989.

On July 21, 1989, the Bureau of Conciliation and Mediation Services issued a Conciliation Order dismissing petitioners' request for the conciliation conference indicating that a request must be filed within 90 days of the date of the statutory notice. The order explained that since the notices were issued on January 27, 1989, but the request was not mailed until May 12, 1989, or in excess of 90 days, the request was filed too late and the request for a conciliation conference had to be denied.

The Division of Taxation had on file a Power of Attorney appointing Anthony L. Grosso, C.P.A., of Grosso, Golub and La Capra, P.C., 2 Roosevelt Avenue, Port Jefferson Station, New York 11776, as the representative for Air Flex for sales tax during the periods March 1, 1985 to "present", presumably the date of the power, April 25, 1988. The power was executed but not dated by Emil Zambardi, president of Air Flex Custom Furniture, Inc. and was signed and stamped by a notary public, Marilyn Berkowitz, on April 25, 1988. It was also signed by Anthony L. Grosso, C.P.A. In the acknowledgment, the notary public failed to properly fill in the date on which Emil Zambardi came before her, his corporate office or the county of execution. However, at hearing, Emil Zambardi indicated that he was indeed president of the corporation and that he did recall signing the power of attorney before Marilyn Berkowitz on the date next to her name, April 25, 1988. Mr. Zambardi did not state that he ever revoked Mr. Grosso's power of attorney prior to March 2, 1990, when he executed a new power on behalf of Air Flex to Lawrence Cole, C.P.A., his current representative. All books and records produced on audit were provided by Mr. Grosso and all meetings with the

auditor took place at Mr. Grosso's office. When Mr. Zambardi received the notices of determination he immediately presented them to Mr. Grosso for further action.

On October 19, 1989, Air Flex and Emil Zambardi, as officer, filed a petition with the Division of Tax Appeals seeking a hearing on the merits of the case. The Division of Taxation, by its Law Bureau, filed an answer to the petition on January 8, 1990 affirmatively raising the issue of timeliness and indicating that petitioners had not requested a conciliation conference or a hearing in a timely manner.

#### CONCLUSIONS OF LAW

A. The regulation at 20 NYCRR 4000.3(c) promulgated pursuant to Tax Law § 170(3-a)(b) provides, in part, as follows:

"Time Limitations. The request [for conciliation conference] must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals, and there can be no extension of those time limitations."

The statutory time limitations referred to in the regulation are found within Tax Law § 1138[a][1]:

"Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same." (Emphasis added.)

Therefore, it was incumbent upon Air Flex and Emil Zambardi, as officer, to file the request for conciliation conference within 90 days of the issuance of the notice of determination. Since they failed to do so, and since no extension of the statutory period for filing is permitted, they failed to file a timely request and the dismissal of their request by the Bureau of Conciliation and Mediation Services was proper. (Tax Law § 170[3-a][b]; 20 NYCRR 4000.3[c].)

B. Petitioners' argument that its premature protest of the notices of determination was "within 90 days after giving of notice" pursuant to Tax Law § 1138(a) is clearly in error. The Tax Appeals Tribunal discussed the matter thoroughly in Matter of Hagop Yeghukian (Tax Appeals Tribunal, March 22, 1990) wherein it stated as follows:

"The issue that is before us, whether a taxpayer's protest filed prior to receiving a Notice of Determination is an adequate protest, has been settled by the Appellate Division decision in Matter of West Mountain v. Department of Taxation and Fin., (105 AD2d 989, 42 NYS2d 140, aff'd 64 NY2d 991, 49 NYS2d 62). The court in West Mountain held that a timely filed letter protesting a statement of proposed audit adjustment could not supplant the statutory requirement that a petition for a hearing be filed within 90 days after the issuance of the Notice of Determination. Under West Mountain, the petitioner's letter protesting the Consent to Fixing of Tax, filed prior to petitioner's receipt of the Notice of Determination, could not function as a petition of the notice. This conclusion is supported by Tax Law § 1138(c) and by the function of the Consent to Fixing Tax stated in its legislative history."

C. Petitioners argue that the Division's failure to obtain a properly executed power of attorney was directly related to their failure to timely file a request for a conciliation conference. The flaw to which petitioner objects is the failure by the notary public to properly acknowledge the signature of Emil Zambardi as president of Air Flex. Additionally, Emil Zambardi did not date his signature. The notary public did sign her name and date it and affixed her notary public stamp.

The Commissioner's regulations governing the form of the power of attorney are found at 20 NYCRR 600.5(c) and provide as follows:

"(c) Acknowledgment. The power of attorney must be acknowledged before a notary public or, in lieu thereof, witnessed by two disinterested individuals."

This provision is consistent with the statute prescribing a short form general power of attorney found in the New York General Obligations Law § 5-1501. That section provides that the execution of the short form power of attorney must be duly acknowledged by the principal in the manner prescribed for the acknowledgment of a conveyance of real property. New York Real Property Law § 309 provides examples of such acknowledgments and the Power of Attorney (corporate) formerly found on "Form DTF-14.1 (10/84)" is in substantial agreement with those examples. Additional support for the propriety of this acknowledgment is found in New York General Construction Law § 11.

A power of attorney is a written authorization to an agent to perform specified acts on behalf of his principal, which acts, when performed, have a binding effect upon the principal. It is an instrument by which the authority of one person to act in the place instead of another as

attorney in fact is set forth. It is a mere contract of agency, that is, an authorization by a principal for the accomplishment on his behalf of a particular purpose or the performance of a particular act. (See 2 NY Jur 2d, Agency, § 62.)

Given the facts and circumstances of this matter, and from the credible testimony of Emil Zambardi, president of Air Flex, it is clear he entrusted full authority to Anthony L. Grosso, C.P.A. to represent Air Flex before the Department of Taxation and Finance in connection with this proceeding. All books and records produced on audit were provided by Mr. Grosso and all meetings with the auditor took place at Mr. Grosso's office. When Mr. Zambardi received the notices of determination, he immediately presented them to Mr. Grosso for further action. From all of the evidence, it is clear that Mr. Zambardi believed he had appointed Mr. Grosso as his legal representative in this matter and all his actions were consistent with and ratified such authorization.<sup>1</sup>

Even if the power were found to be invalid, Mr. Zambardi was properly served notices of determination, which he acknowledged under oath. Therefore, he was obligated to challenge the assessments within 90 days as clearly stated on the notices. Since he did not do so, the determinations were considered final.

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<sup>1</sup>It is noted that the petition for the hearing in this matter was filed by Mr. Grosso and executed by him as well. Therefore, if it were held that the power was invalid, the petition would be a nullity and petitioners would lose their entitlement to this hearing.

D. The petition of Air Flex Custom Furniture Inc. and Emil Zambardi, as officer of said corporation, is dismissed.

DATED: Troy, New York

1/10/91

ADMINISTRATIVE LAW JUDGE