STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BERGEN ASSOCIATES	:	DETERMINATION DTA NO. 810178
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner, Bergen Associates, 140 Remsen Street, Brooklyn, New York 11201, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 21, 1992 at 1:00 P.M. Neither party filed a brief. Petitioner appeared by Mervin J. Wolf, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioner filed a timely request for a conciliation conference.

FINDINGS OF FACT

On March 29, 1991, the Division of Taxation (hereinafter the "Division") issued two notices of determination to petitioner, Bergen Associates, for Real Property Gains Tax under article 31-B of the Tax Law. Each notice contained the following statements:

> "YOU MUST complete the enclosed Payment Document whether you AGREE or DISAGREE with this NOTICE OF DETERMINATION.
>
> * * *
>
> "IF YOU DISAGREE with the amount due, refer to the enclosed Notice of Taxpayer Rights to determine your options and complete the Disagreement With Findings Section. Attach a photocopy of all pages of this billing notice to the Payment Document.
>
> "NOTE: You must file a Request for Conciliation Conference or a Petition

For A Tax Appeals Hearing by 6/27/91.

* * *

"If we do not receive a response to this notice by 06/27/91:

This notice will become finally and irrevocably fixed and subject to collection action."

Pursuant to State Administrative Procedure Act § 306(4) official notice is taken of the following facts: the Notice of Taxpayer Rights referred to in the notices of determination is a Division publication (TA-13), a copy of which was placed in evidence at this hearing. Generally, it advises taxpayers of the procedure to be followed to protest an action by the Department of Taxation and Finance. As relevant here, it advises taxpayers that a protest may be made by filing either a request for a conciliation conference or a petition for a hearing, and it provides instructions for doing so. The auditor provided petitioner with a copy of this document at the commencement of the audit

As evidence of the fact and date of mailing of the notices of determination, the Division submitted an affidavit of Mary K. Randolph, Head Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the New York State Department of Taxation and Finance; a copy of a page of a certified mail record; and an affidavit of Denise Thurber, an employee of the District Office Real Property Transfer Gains Tax Unit of the Department of Taxation and Finance.

CARTS is the Department's computer system for generating, among other things, notices of determination to taxpayers with assessed gains tax deficiencies. Ms. Randolph's duties include supervising the mailing of notices of determination and maintaining certified mail records. Ms. Randolph explained the procedure by which notices are generated and issued. She indicated that:

> "[a]fter reviewing [the notices of determination and the certified mail record], I am certain that the notices of determination which are the subject of this case were issued and mailed on March 29, 1991."

In her affidavit, Ms. Randolph explained the office practice regarding the mailing of notices of determination. The affidavit states that notices of determination generated by CARTS are predated with the anticipated date of mailing of the notice, and each notice is assigned a certified control number which is printed on the notice and on a certified mail record. Ms. Randolph states that in the regular course of business the Division does not request or retain return receipts from certified or registered mail.

According to Ms. Randolph, some notices of determination, including the ones in issue, are forwarded by CARTS to the Department's District Office Gains Tax Unit for review and mailing. When this procedure is followed, the certified mail record is returned to Ms. Randolph's office where it is maintained as a record of mailing. Ms. Randolph indicated that notices of determination are placed in envelopes and delivered to a United States Postal Service representative who "verifies that (s)he has received a properly addressed envelope for each name on the certified mail record and then affixes his or her signature and/or a U.S. Postmark to a page or pages of the certified mail record."

Attached to the affidavit of Mary K. Randolph, as Exhibit "A", is a copy of a page of a document headed: "New York State Department of Taxation and Finance / Assessments Receivable / Certified Record for Non-Presort Manual Mail", identified by Ms. Randolph as the certified mail record. Certain identifying information is printed at the top of the page. As pertinent here, there is a date which originally read "03/20/91"; however, the numerals "20" were crossed out and the numerals "29" were inserted by hand. Ms. Randolph's affidavit explains that the date of March 20, 1991 was the date that the certified mail record was printed and states:

> "[t]he certified mail is printed approximately 10 days in advance of the anticipated date of mailing of the particular Notice so that there is sufficient lead time for the Notice(s) to be manually reviewed and processed for postage, etc. by the Department's Mechanical Section."

Also printed at the top of the certified mail record is the statement "Page : 4".

The statement "Mail Room. Return Listing to CARTS Control Unit" is stamped on the certified mail record. Only two pieces of certified mail are listed on the document. The certified mail numbers correspond to the numbers printed on the top of the notices of determination issued to petitioner. Also listed on the document are notice numbers corresponding to the notices of determination issued to petitioner and petitioner's name and address, 140 Remsen Street, Brooklyn, New York 11201-4211. The document indicates that "Total Pieces and Amounts Listed" is two. There is a blank space next to the statement: "Total Pieces Received at Post Office". There is a date stamp on the document, clearly showing the date "March 29, 1991". While the stamp appears to be a Postal Service stamp, there is no legible marking that unequivocally establishes this fact. Ms. Randolph indicates in her affidavit that the stamp is a United States postmark.

In her affidavit, Ms. Randolph states that the document submitted is the fourth page of an eight-page certified mail record. She also states:

> "Since page 4 bears a United States postmark and all pages other than page 4 relate to other taxpayers whose names would have to be redacted to preserve confidentiality, only page 4 has been attached to this affidavit."

Denise Thurber is employed in the District Office Real Property Transfer Gains Tax Unit of the Department of Taxation and Finance, and her duties include the processing of notices of determination. According to her affidavit, she received the certified mail record bearing petitioner's name before it was postmarked by the United States Postal Service and "prepared the notices listed therein for mailing". As pertinent here, her affidavit states:

> "I inserted the notices in window envelopes and placed them to be picked up by the Department's Mail Room staff and delivered to the United States Postal Service. The postmark on Exhibit A indicates that the Notices were accepted by the Postal Service on March 29, 1991."

The Division did not offer testimony or an affidavit from any member of the mailroom staff.

Petitioner's representative, Mr. Wolf, conceded that the notices of determination were received, although he could not remember whether he received them directly from the Division or petitioner received them and forwarded copies to Mr. Wolf. Mr. Wolf also conceded that

petitioner did not file a request for a conciliation conference or petition for hearing until August 1984, more than 90 days from the alleged date of the mailing of the notices of determination. He stated that, based on a conversation with the auditor, he personally believed that it was not necessary for petitioner to file a request for a conciliation conference within 90 days of the mailing of the notices of determination.

The Division issued notices of determination to petitioner following an audit conducted by Medhat Saad. On or about February 5, 1991, the Division issued to petitioner a Statement of Proposed Audit Adjustment, asserting additional real property transfer gains tax due of $32,595.00. Mr. Wolf responded to this statement by letter to Mr. Saad dated February 22, 1991. In that letter, he stated that petitioner disagreed with the statement of proposed audit adjustments and provided the basis for petitioner's position that the transfers of real property were not subject to gains tax.

After receiving Mr. Wolf's letter, Mr. Saad reviewed additional information provided by petitioner. The Division then issued to petitioner a second Statement of Proposed Audit Adjustment, dated February 22, 1991, asserting tax due of $9,624.00. Mr. Wolf responded with a letter to Mr. Saad, dated February 28, 1991, which was identical to the earlier letter, dated February 22, 1991.

The letters to addressed to Mr. Saad state, inter alia:

> "1. We do not agree with your computation of construction period interest.
>
> "2. We do not agree with your computation of construction costs.
>
> "3. We do not agree that these properties should be aggregated and therefore would not be subject to the 'gains tax.'"

The letters then go on to state petitioner's legal and factual positions with regard to Mr. Saad's audit. The letters make no mention of either a conference or petition.

Mr. Wolf testified that he had a conversation with Mr. Saad that led him to believe that by sending the letters to Mr. Saad he had effectively protested the audit. The record contains contradictory evidence with regard to whether that conversation occurred before or after the issuance of the notices of determination. At one point, Mr. Wolf testified:

> "I got a notice of determination, at which time I called Mr. Saad up and Mr. Saad said he had -- I asked him if he had the protest and he said yes, he had the protest and he was sending the case up to Albany and he was sending the protest with the case. That was my understanding of it, and I let it go at that." (Transcript at 11).

This testimony is in accord with a letter sent by Mr. Wolf to the Division's Problem Resolution Unit, stating: "Mr. Saad informed me that he would forward the protest with the file when he closed out the case at his end." In an affidavit, Mr. Saad confirmed that such a conversation took place, but he alleged that the conversation occurred after the audit was closed on March 4, 1991 and before the notices of determination were issued by the Division's Gains Tax Unit in Albany. Mr. Saad states in his affidavit:

> "I informed Mr. Wolf that I had closed the case and sent it to Albany to be processed for Notices of Determination. I then told him that for the purposes of protesting our findings, he should wait for the Notices of Determination to arrive and then follow the instructions with the Notice of Determination as to how to formally protest the case. At no time did I tell Mr. Wolf, or say anything that would lead him to believe, that any letter sent to us in February 1991 protesting the Statements of Audit Adjustment would suffice as a protest to the Notices of Determination."

On July 12, 1991, the Division's Tax Compliance Bureau issued to petitioner two notices and demands for Payment of Tax Due, in the amounts of $27,529.85 and $9,959.22, respectively.

Petitioner requested a conciliation conference by mail on Form TA-9.1, dated August 21, 1991, and stamped received by the Division on August 26, 1991. The Form was signed by Mr. Wolf who provided the Division with the following explanation of the basis for petitioner's claim:

> "We request a conciliation conference to question first the timely filing of our protest and also to the facts on which our protest is based. When we received Mr. Saad's statement of proposed audit adjustments dated 2/22/91 we immediately answered it on 2/28/91. When we received notice on 3/29/91 I called Mr. Saad and he told me it was not necessary to protest again as he would send protest with the file. Please note that I responded immediately to notice of 2/22/91 & 7/21/91 and if nessary [sic] I also would have answered it. I only would have had to photocopy my original letter. I request a chance to present our case."

Under cross-examination by the Division's attorney, Mr. Wolf conceded that Mr. Saad never advised him not to file a request for a conciliation conference or a petition for a hearing.

By order dated October 25, 1991, the Division dismissed petitioner's request for a

conciliation conference as untimely because the notices were issued on March 29, 1991, but the request was not received until August 26, 1991, or in excess of 90 days from the issuance of the notices.

By petition dated November 15, 1991, petitioner challenged the notices of determination on the ground that the transfers of real property are not subject to the gains tax and on other grounds originally set forth in Mr. Wolf's letters to Mr. Saad.

In its answer dated January 3, 1992, the Division requested that the petition be dismissed as untimely.

By letter dated February 18, 1992, the Calendar Clerk of the Division of Tax Appeals advised petitioner that the timeliness of the petition was a threshold matter to be resolved before a hearing would be held on the merits of the case.

CONCLUSIONS OF LAW

A. At hearing, petitioner attributed its failure to timely file a request for a conciliation conference to the statements made by Mr. Saad in a telephone conversation with Mr. Wolf. Petitioner asserts that Mr. Wolf's February letters to Mr. Saad put the Division on notice of its disagreement with the audit findings, and it argues that the Division should not be allowed to rely on what petitioner deems to be a technicality to deny it a hearing on the merits of the case. It is the Division's position that the petition should be dismissed as untimely. Moreover, the Division disputes Mr. Wolf's testimony with regard to his conversation with Mr. Saad and argues that the evidence does not support a finding that Mr. Wolf was misled by Mr. Saad.

B. Tax Law § 1444(1) provides that a notice of determination shall finally and irrevocably fix the tax assessed unless the taxpayer to whom the notice is issued files a petition for redetermination of the tax due within 90 days of "the giving of the notice of such determination". Notice is given pursuant to section 1444(1) when the notice of determination is mailed (Matter of 25 Tudor Associates, Tax Appeals Tribunal, June 18, 1992). Thus, the date of mailing commences the running of the 90-day period in which petitioner must file a petition pursuant to Tax Law § 1444(1). If this date cannot be established, then the commencement of

the 90-day period cannot be ascertained, and petitioner's petition will be deemed timely (Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). Accordingly, the first determination which must be made here is whether the Division has established the date on which the notices of determination were mailed to petitioner.

The date of mailing may be proven by the Division through evidence establishing the standard procedure for mailing notices of determination offered by one with knowledge of such procedures and evidence showing that this procedure was followed in the particular case at hand (Matter of Novar TV & Air Conditioner Sales & Serv., supra).

In this case, the affidavits of Mary K. Randolph and Denise Thurber were offered to establish the general procedure for the mailing of notices of determination pursuant to section 1444(1), and their affidavits, along with the certified mailing record, were offered to establish that the general procedure was followed in this instance. There is a notable gap in the Division's proof. The Division did not offer evidence from the individual who actually delivers the envelopes and certified mail record to the United States Post Office. The affidavits of persons with personal knowledge of the mailing of the notices only traces the notices from the point at which they were generated by computer to the point at which Ms. Thurber "placed" the envelopes (and presumably the certified mail record) "to be picked up by the Department's Mail Room staff and delivered to the United States Postal Service" (Affidavit of Denise Thurber). Where a properly completed postal form 3877 is offered as evidence, the Division may not be required to produce the affidavit of the employee who delivered the items listed to the postmaster, because such a form is deemed highly probative evidence that the items listed on the form were actually mailed to the specified addressee (see, Matter of James M. Donegan and J. Michael Sills, Tax Appeals Tribunal, June 25, 1992; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; United States v. Ahrens, 530 F2d 781, 76-1 USTC ¶ 9241). The computer generated form offered by the Division as evidence of the actual mailing of the notices, the certified mail record, differs from a postal form 3877 in two significant respects. First, it makes no provision for the postmaster's signature to verify receipt, and second, the certified mail

record offered in evidence does not list the total number of items received by the postmaster, although a space is provided for this information. The question then is whether the certified mail record, without an accompanying affidavit, is adequate to establish that the general procedure for mailing (described in Ms. Randolph's affidavit) was followed in this case. I conclude that it is.

The evidence offered in this case differs in several crucial respects from that evidence found to be deficient in several recent cases decided by the Tax Appeals Tribunal. In Matter of Katz (supra), the Tribunal found the Division's evidence wanting primarily because the page of the certified mail record bearing petitioner's name did not bear a United States postmark and the page on which the postmark appeared could not be related to the page bearing the petitioner's name (see also, Matter of 25 Tudor Assoc., Tax Appeals Tribunal, June 18, 1992; Matter of James S. Clark, Jr., and Joice M. Clark, Tax Appeals Tribunal, June 18, 1992). That is not the case here where the page of the certified mail record entered in evidence lists only two items, both addressed to petitioner, and bears a United States Postal Service postmark.[1] I find that the postmark is sufficient to show receipt by the Post Office of the items enumerated on the form, the envelopes containing the notices addressed to petitioner, although the postmaster's signature does not also appear. I also note that the space provided for the postmaster to indicate the total number of items received is blank, but I find this defect immaterial since the only items listed on the form are the two addressed to petitioner (cf., Matter of Katz, supra [where the certified mail record suggested that fewer items were mailed than had originally been listed, and the evidence did not eliminate the possibility that the items withdrawn included the notices in dispute). Based on the evidence offered by the Division, I find that the Division has proven the mailing of the notices on March 29, 1991.

C. Petitioner concedes that it did not request a conciliation conference within 90 days of

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[1]While the postmark on the copy of the certified mail record offered in evidence is somewhat illegible, it does appear to be a United States Post Office postmark, and two persons have sworn under oath that it is.

the mailing but argues that the failure to

request a timely conciliation conference should not deprive it of a hearing because the February letters sent to the auditor clearly expressed petitioner's disagreement with the tax assessments and petitioner's intention to protest the audit results. This argument is rejected. It is a well-settled rule that letters of protest sent in response to statements of audit adjustment do not relieve a taxpayer of the need to file a request for a hearing within 90 days of the mailing of a statutory notice (see, Matter of West Mountain v. State Tax Commn., 105 AD2d 989, 482 NYS2d 140, affd 64 NY2d 991, 489 NYS2d 62).

D. Petitioner also argues that it should not be deprived of a hearing because the failure to timely respond to the notices resulted from statements made by Mr. Saad to Mr. Wolf. While petitioner's representative did not frame his argument in terms of an estoppel, that is essentially the doctrine upon which petitioner relies. As a preliminary to resolving this issue, it is first necessary to make a factual determination of what was said by Mr. Saad and when it was said. In the Request for Conciliation Conference signed by Mr. Wolf, Mr. Wolf clearly stated that he spoke to Mr. Saad after receiving the notices of determination and Mr. Saad stated that it would not be necessary to protest again because the earlier protest letters would be sent to Albany. If proof existed that Mr. Saad made such a statement, it would serve to prohibit the Division from denying the timeliness of petitioner's request for a conciliation conference (see, Matter of Eastern Tier, Tax Appeals Tribunal, December 6, 1990). However, the assertion made in the the Request for Conciliation Conference is not supported by the evidence in the record.

The first disputed fact is when the telephone conversation between Mr. Wolf and Mr. Saad took place, before or after the notices of determination were issued. Both agree that there was a telephone conversation in which Mr. Saad informed Mr. Wolf that petitioner's case was closed. Mr. Saad states in his affidavit that he informed Mr. Wolf that the case had been sent "to Albany to be processed for Notices of Determination" (Affidavit of Medhat Saad). Mr. Wolf testified that the telephone conversation occurred after the notices of determination were

received by petitioner (transcript at 11; petitioner's Request for Conciliation Conference also indicated that the conversation took place after the notices were received). This is in direct conflict with Mr. Saad's affidavit; moreover, Mr. Wolf's own statements lend support to Mr. Saad's version of the events. In recounting the conversation, Mr. Wolf repeatedly stated that he was told that the letters had been, or would be, forwarded to Albany with the file. The file was forwarded to Albany between March 4, 1990 (the date the case was closed by Mr. Saad) and March 29, 1990 (the date the notices of determination were issued in Albany). The purpose of forwarding the case file to Albany was to have the notices issued. After considering the various statements made by Mr. Wolf, the affidavit of Mr. Saad and all other evidence in the record, I conclude that Mr. Wolf's recollection of when the conversation took place is not credible. Therefore, it is concluded that the conversation took place between the time of Mr. Wolf's second letter to Mr. Saad (February 28, 1991) and the mailing of the notices of determination.

The second factual dispute to be resolved is whether Mr. Saad told Mr. Wolf that it would not be necessary to file another letter of protest in response to the notices of determination. In his testimony, Mr. Wolf backed away from the claim that Mr. Saad expressly told him that he need not file a protest to the notices of determination. At page 14 of the transcript, Mr. Wolf testified: "I had taken [Mr. Saad's] word that he was sending up the protest with the letter and that it would suffice." However, he later conceded that Mr. Saad "did not say not to file [a request for conference or petition for hearing].... He told me that he was sending that protest up with the case. That is what he told me" (transcript at 17). It is concluded that Mr. Saad said no more than that he was sending up the protest with the case.

Having determined what was said by Mr. Saad, the next question to be addressed is whether it was reasonable for petitioner to conclude from his statement that petitioner need not file a request for a conciliation conference or a petition for a hearing within 90 days of the mailing of the statutory notices. I cannot find that it was.

Mr. Wolf's letters to Mr. Saad were sent before any notices of determination were issued. They do not request a conference or hearing before the Division of Tax Appeals or refer, even

indirectly, to such proceedings. The notices of determination sent to petitioner explicitly advised petitioner of the necessity to file a request for a conciliation conference or a petition for hearing. Petitioner was informed that failure to respond to the notices would result in their becoming "finally and irrevocably fixed and subject to collection action." The notices could not have been clearer. Since petitioner never requested a conference or hearing in its letters to Mr. Wolf, it was not reasonable for petitioner to conclude that it had done all that was necessary to obtain a conference or hearing in this matter (cf., Matter of Eastern Tier, supra [where the petitioner sent a letter to the auditor requesting a conference and was advised in writing that a conference would be held after the notices of determination were issued, the Division was estopped from denying the timeliness of the petitioner's request]). As petitioner did not file a request for a conciliation conference or petition for a hearing within 90 days of the mailing of the notices of determination, the Division of Tax Appeals is without jurisdiction to address the merits of this case.

E. The petition of Bergen Associates is dismissed.

DATED: Troy, New York
July 23, 1992

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE