

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLEMENCIA RANCHERO	:	DETERMINATION
	:	DTA NO. 818933
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, 1997 through August 31, 2000.	:	

Petitioner, Clemencia Ranchero, 112 Walton Street, Brooklyn, New York 11206, 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, 1997 through August 31, 2000.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York 10019 on May 9, 2003 at 10:30 A.M. Petitioner appeared by Ramon Arrendell, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (William Fowler and Ross Isso).

Since neither party elected to reserve time to file a brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether the Division of Taxation properly denied petitioner's Request for Conciliation Conference on the basis that said request was filed more than 90 days after the issuance of a Notice of Determination.

FINDINGS OF FACT

1. During the period at issue, petitioner, Clemencia Ranchero, owned and operated as a sole proprietor a grocery store known as Los Rancheritos. The store was located at 339 Broadway, Brooklyn, New York.

2. On September 18, 2000, the Division of Taxation (“Division”) received a Notification of Sale, Transfer or Assignment in Bulk signed by Isidoro Garcia which indicated that petitioner had sold the grocery store to Mr. Garcia on September 13, 2000 for the sum of \$20,000.00. The Notification of Sale, Transfer or Assignment in Bulk revealed that the purchase price consisted of \$2,000.00 for tangible personal property and \$18,000.00 for intangible property.

3. After receipt of the Notification of Sale, Transfer or Assignment in Bulk, the Division commenced an audit of petitioner’s books and records, and said examination determined that petitioner had failed to collect and remit the proper sales and use tax due for the period September 1, 1997 through August 31, 2000. On December 26, 2000, the Division issued a Notice of Determination to petitioner for the period September 1, 1997 through August 31, 2000 asserting that \$35,215.00 of additional tax was due, together with interest of \$7,884.09 and penalty of \$8,882.57. The notice was addressed to “Clemencia Ranchero, Los Rancheritos, 339 Broadway, Brooklyn, NY 11211-7302.”

4. On February 22, 2001, the Division’s technician assigned to the audit received a telephone call from petitioner’s daughter inquiring as to the status of her mother’s case. The technician informed petitioner’s daughter that a Notice of Determination had been issued on December 26, 2000. When petitioner’s daughter advised the technician that the Notice of Determination dated December 26, 2000 had not been received by her mother, the technician

arranged for a copy of the notice to be sent by certified mail to petitioner at her home address on February 23, 2001.

5. On June 28, 2001, petitioner protested the Notice of Determination by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). By Conciliation Order Dismissing Request dated July 20, 2001, BCMS denied petitioner's request for a conciliation conference on the basis that the Tax Law requires a request to be filed within 90 days of the date of the statutory notice and since the request was not mailed until June 28, 2001, it was late filed. Petitioner timely filed a petition with the Division of Tax Appeals protesting BCMS's denial of her request for a conciliation conference and this proceeding ensued. Since the Division has raised the issue regarding the timeliness of petitioner's Request for Conciliation Conference, the scope of the small claims hearing held herein was limited to this threshold jurisdictional issue. In instances where the timeliness of the Request for Conciliation Conference is in dispute, the Division has the burden of proving proper mailing of the Notice of Determination.

6. To establish the date that the Notice of Determination was mailed, that it has a standard procedure for the issuance of notices of determination and that the standard procedure was followed in this case, the Division offered in evidence its certified mailing records, a copy of the Notice of Determination and the affidavits of two employees familiar with the creation, processing and mailing of notices of determination. The Division's evidence regarding the creation and mailing of the Notice of Determination on February 23, 2001 sufficiently establishes that the Division has a standard procedure for issuance of notices of determination and that said procedures were followed in the instant matter.

7. Although not conceded, there appears to be no dispute on petitioner's part that she received the Notice of Determination mailed on February 23, 2001 in a timely manner and that her Request for Conciliation Conference postmarked on June 28, 2001 was not filed in a timely manner.

CONCLUSIONS OF LAW

A. Where a taxpayer files a Request for Conciliation Conference and the timeliness of said request is in question, the Division has the burden of proving that the notice was properly mailed (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the instant matter, the Division has presented sufficient evidence to prove that the Notice of Determination was properly mailed to petitioner at her last known address on February 23, 2001 (Tax Law § 1138[a][1]; *Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Accordingly, in order to timely contest the Notice of Determination, petitioner was required to file the Request for Conciliation Conference within 90 days of the issuance of the notice, i.e., on or before May 24, 2001 (Tax Law § 1138[a][1]; § 170[3-a]).

B. There is no dispute in the instant matter that petitioner's Request for Conciliation Conference was filed on June 28, 2001 and that said request was mailed more than one month after it was required to be filed. Accordingly, it must be concluded that the Request for Conciliation Conference was filed beyond the statutory 90-day time period for the filing of such a request and that the Division of Tax Appeals is without jurisdiction to hear this matter.

C. Although the Division of Tax Appeals lacks jurisdiction to entertain the petition at this time, petitioner is not without a remedy. Prior to January 1, 1997, sales tax asserted due in a notice of determination was finally and irrevocably fixed as a consequence of a taxpayer's

failure to timely contest such notice. However, the Laws of 1996 (ch 267) amended Tax Law § 1138(a)(1) by deleting the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but made applicable to taxable years commencing on and after January 1, 1997 as specified in section 3 of Laws of 1996 (ch 267). As a result, petitioner, for the period at issue, which is subsequent to January 1, 1997, may pay the assessment and apply for a refund. If her refund is disallowed, petitioner may then file a petition or a request for a conciliation conference and have the merits of her claim reviewed.

D. The petition of Clemencia Ranchero is dismissed.

DATED: Troy, New York
July 17, 2003

/s/ Brian L. Friedman
PRESIDING OFFICER