

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions :

of :

EAST END STUDENT TRANSPORTATION CORP. :
AND JOHN AND MARY MENSCH, AS OFFICERS¹ :

DECISION
DTA Nos. 801661,
801662, 801663

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, 1976 through August 31, 1982.

Petitioners East End Student Transportation Corp. and John and Mary Mensch, as officers, 242 West Montauk Highway, Box 261, Hampton Bay, New York 11946 filed an exception to the determination of the Administrative Law Judge issued on June 27, 1991 with respect to their petitions 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, 1976 through August 31, 1982. Petitioners appeared by Peter R. Newman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Each party filed a brief on exception. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the statute of limitations is a bar to the notices of determination issued in this matter.

II. Whether the notices of determination were properly mailed.

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The Division of Taxation conceded that Mary Mensch was not a "responsible officer" of the corporate petitioner; thus, any assessment issued to her as officer of East End Student Transportation Corp. will not be discussed herein.

III. Whether the Division of Taxation ("Division") properly determined that petitioners were liable for the sales tax on gasoline purchased for use in fulfilling a contract between the corporate petitioner and a school district.

IV. Whether the Division properly determined that petitioner John Mensch was liable as an officer for the tax due from the corporation.

V. Whether the Division properly determined that penalties should be imposed against petitioners in this matter.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

Petitioner East End Student Transportation Corp. ("East End") was a transportation corporation engaged in the business of furnishing bus transportation services to school districts for handicapped students. Petitioner John Mensch, during all periods in issue, was the president and chief operating officer of East End. The business was incorporated March 1, 1976.

One of the issues in the case deals with the provisions of a contract between East End and the William Floyd School District pursuant to which bus transportation services were provided. A memorandum introduced into evidence discussed a portion of an audit of the William Floyd Union Free School District as it related to these petitioners. It disclosed that the school district had been acquiring gasoline for East End and had reduced the total contract price by the amount of gasoline used by the transportation company. No sales tax was being paid on this gasoline. Thus, the audit of East End ensued.

Attached to the memorandum was an excerpt from the State Comptroller's report on the school investigation which disclosed the following details about the arrangement between the school district and East End:

"Gasoline Purchases For Bus Contractor

During the 1979-80 fiscal year, the school district was billed by a gasoline company for gasoline delivered to the bus company's garages. This arrangement was not part of the bid specification.

The district issued checks made payable to the bus company which the company endorsed and made payable to the gasoline company. These payments were deducted from regular contract payments.

During the 1979-80 fiscal year, the district was billed for 178,600 gallons of gasoline at a cost of \$165,130.00. Although a school district may purchase gasoline for its bus contractors, such agreement must be part of the contract. Under the method used the procedure may constitute a sale of gasoline by the district which would require that applicable federal and state taxes be paid to appropriate agencies.

The appropriate tax enforcement agencies have been notified."

At the commencement of the audit, a request was made for petitioners' books and records, including the general ledger, cash receipts and cash disbursements journals, for the period June 1, 1979 to May 31, 1982. Records were provided and reviewed by the auditor. The auditor discussed obtaining invoices with the accountant and was informed that those applicable to the early part of the audit period, i.e., 1979 and 1980, were not readily available. Later in the hearing, testimony revealed that as a result of an unrelated investigation of the William Floyd School District, some of petitioners' books and records had been subpoenaed and never returned to petitioners. As a result of not being able to obtain the source documentation to support disbursement entries, the auditor deemed the records inadequate. In order to analyze proper taxation of certain purchases, the auditor then chose a later month in the audit period when invoices were available, May 1982, and used it as a test month for the purpose of projecting any potential taxation over the entire audit period. His procedure consisted of reviewing the cash disbursements journal for the month and making a record of checks written, including the name of the payee and the expense account charged. The auditor then requested the invoice that corresponded to the particular check. Upon examination of the invoices, he would determine

whether sales tax was paid where appropriate. Upon his examination of tire purchases for May 1982, he determined that no sales tax had been paid. He then totalled the tire purchases listed in the disbursements records for the entire audit period, June 1, 1979 through May 31, 1982, and the amount of \$10,213.95 was calculated as purchases upon which no tax was paid. Petitioners submitted no evidence to the contrary.

The equipment rental account for the test period, May 1982, was also reviewed. When petitioners' accountant raised an objection to the use of a test period for this category, the auditor agreed to review the account by actual disbursements even though many invoices were unavailable. He found \$61,980.95 in purchases on which tax was not paid for the audit period.

The auditor also reviewed the auto maintenance account. Approximately 90.5% of the purchases tested for May 1982 failed to show tax as paid. The auditor thus applied that percentage to all the maintenance account expenses reported for the audit period. The total maintenance expense upon which no tax was paid was \$158,196.27.

Thus, the auditor concluded that, for the period June 1, 1979 through May 31, 1982, total expense purchases found subject to tax was \$230,391.17 resulting in tax due in the amount of \$16,310.95.

Fixed assets were examined separately for the audit period. Based upon missing invoices and invoices indicating no sales tax paid, the auditor determined that there were purchases of fixed assets in the amount of \$184,645.51 upon which no tax had been paid, resulting in tax due of \$13,074.17.

At the conclusion of the audit of expense purchases for June 1, 1979 through May 31, 1982, the auditor evaluated what he had observed while reviewing test period invoices and petitioners' records. It appeared to the auditor as though petitioners were purchasing items as "exempt" by using a Federal identification number in lieu of a properly issued sales tax number. As a result, he extended the audit to include the period March 1, 1976 through May 31, 1979. The auditor made a request for books and records covering this time frame; however, no books

and records were produced. He ultimately estimated tax due of \$59,818.72 for the extended audit period from a projection of that determined for the original audit period.

Introduced into evidence were three resale certificates obtained from East End's suppliers. The vendors listed on all three certificates were automotive related companies: a brake service company, Key Chrysler and Southhampton Tire Center. Two of them bore the alleged certificate of authority number 11-2390674 and were issued in blanket form in 1977. The other listed its identification number as 11-2432997 and was issued as a blanket certificate in 1981. All made reference to the purchaser as being East End, although one was actually listed as "Montauk Bus Co., Inc. DAB [sic] East End Student Transp."

The Division offered into evidence an affidavit of an employee who independently reviewed the Division's records to determine the validity of the identification numbers being used by East End. In the statement, he identified 11-2390674 as the Federal registration number for East End and 11-2432997 as a withholding tax number. A third number was also mentioned; however, it did not appear on the resale certificates introduced into evidence. None of the numbers was a valid number for a registered vendor in New York.

John Mensch's testimony indicated that East End was not a registered vendor and that he neither signed the resale certificates nor authorized any employee to do so on East End's behalf. Mr. Mensch did not, however, deny having taken advantage of exempt purchases by the use of such certificates.

The primary portion of the audit involved the analysis of the gasoline purchases. The auditor testified that RAD Oil Co. ("RAD") provided the Division, upon request, with the gallonage of gasoline ordered by the school district. During June 1, 1979 through May 31, 1982, 511,000 gallons were purchased. Petitioners stipulated on the record that the number of gallons is not disputed. The delivery by RAD was drop shipped to East End's yard for service to the district. The school would draft a check to East End which would then endorse the check over to RAD in payment of such gasoline. Examples of such checks were introduced into evidence. Pursuant to the testimony of John Mensch, check number 11295 bears his actual

endorsement and the other two are a signature stamp of his endorsement. It was suggested that the actual check endorsement be compared to the resale certificate signatures that Mr. Mensch asserts are not his or authorized by him.

The gasoline delivered between June 1, 1979 and May 31, 1982, the original audit period, resulted in tax due in the amount of \$33,014.34. Since the contract with William Floyd did not begin until November 1978, the tax on gasoline purchases was not extended to a time prior to that date.

On September 20, 1984, six notices of determination and demands for payment of sales and use taxes due were issued, two each to East End Student Transportation Corp., Mary Mensch, as officer, and John Mensch, as officer. The assessments asserted the following liability:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
3-1-76 to 8-31-79	\$ 61,524.32	\$15,381.08	\$57,439.09	\$134,344.49
9-1-79 to 5-31-82	<u>67,172.65</u>	16,793.18	31,413.48	115,379.31
	<u>\$128,696.97</u>			

The notices of determination dated September 20, 1984 were mailed by certified mail, return receipt requested, to the corporate and individual petitioners. All signed return receipts were maintained by the Division indicating delivery, with one exception. Notice of determination number S840920004F, issued to John Mensch covering the period September 1, 1979 to May 31, 1982, though bearing the same mailing address as the other notice addressed to Mr. Mensch and the two addressed to Mary Mensch, was returned to the Division. The Division retained the returned notice. An examination of the envelope revealed the following: the postmark was September 20, 1984; it was in fact mailed certified, return receipt requested; and the Postal Service attempted delivery on what appears to be September 21, September 26 and October 6, 1984. It was stamped "unclaimed" by the Postal Service and returned to the Division (Suffolk District Office) on October 11, 1984.

On December 18, 1985, a Notice of Assessment Review was issued on each of the six notices, reflecting revisions by the Suffolk District Office and a recalculation of interest to January 10, 1986. The revised assessments asserted the following tax, penalty and interest due:

<u>Period</u>	<u>Tax</u>	<u>Penalty and Interest</u>	<u>Total</u>
3-1-76 to 8-31-79	\$ 53,596.96	\$79,200.86	\$132,797.82
9-1-79 to 5-31-82	<u>61,643.60</u>	59,487.97	121,131.57
	<u>\$115,240.56</u>		

After a conciliation conference, various adjustments also were made to the tax asserted as due. The resulting tax liability asserted (exclusive of penalties and interest) was \$88,033.06 as follows:

	<u>Additional Tax on School Gas</u>	<u>Additional Tax on Expenses</u>	<u>Additional Tax on Fixed Assets</u>	<u>Total Tax Due</u>
05/76	\$ 0.00	\$ 1,343.95	\$ 0.00	\$ 1,343.95
08/76	0.00	1,343.95	0.00	1,343.95
11/76	0.00	1,343.95	0.00	1,343.95
02/77	0.00	1,343.95	0.00	1,343.95
05/77	0.00	1,343.95	0.00	1,343.95
08/77	0.00	1,343.95	0.00	1,343.95
11/77	0.00	1,343.95	0.00	1,343.95
02/78	0.00	1,343.95	0.00	1,343.95
05/78	0.00	1,343.95	0.00	1,343.95
08/78	0.00	1,343.95	0.00	1,343.95
11/78	2,720.75	1,343.95	0.00	4,064.70
02/79	2,720.75	1,343.95	0.00	4,064.70
05/79	2,720.75	1,343.95	0.00	4,064.70
08/79	0.00	755.86	0.00	755.86
11/79	2,636.00	865.68	0.00	3,501.68
02/80	3,365.60	1,016.91	0.00	4,382.51
05/80	3,454.92	834.14	0.00	4,289.06
08/80	1,851.43	1,121.10	0.00	2,972.53
11/80	2,738.12	929.72	0.00	3,667.84
12/81	3,788.23	1,917.60	0.00	5,705.83
05/81	3,205.80	1,336.34	0.00	4,542.14
08/81	1,378.94	2,210.04	8,753.43	12,342.41
11/81	3,385.81	1,928.74	3,621.30	8,935.85
02/82	3,883.72	1,627.85	641.44	6,153.01
05/82	<u>3,325.77</u>	<u>1,766.97</u>	<u>58.00</u>	<u>5,150.74</u>
Totals	<u>\$41,176.59</u>	<u>\$33,782.30</u>	<u>\$13,074.17</u>	<u>\$88,033.06</u>

Petitioner John Mensch testified that the arrangement with respect to the gasoline being purchased by the district came about during 1979 when the economy was experiencing a

gasoline crisis. He asserted that only companies with a fuel allocation could obtain an adequate fuel supply. School districts, however, did receive a special allocation. Petitioners claim that as a result of these restrictions the school district and East End reformed the contract so that the school district would be making the purchases of fuel for East End to fulfill its contract obligations. Mr. Mensch further stated that the district dealt directly with RAD and that the gasoline was delivered directly to the district. This continued for approximately 18 months. A copy of the reformed contract was not provided.

The unavailability of petitioners' records was attributed to the fact that the records of the school district were subpoenaed by the District Attorney. These records included some of petitioners' records that were provided in cooperation with an investigation which resulted in an indictment against the Superintendent of Schools.

The audit file contained several newspaper articles printed by Newsday in February and March 1983 regarding the charges against the Superintendent of William Floyd. The last of these articles indicated that the accused was being "exonerated from the 37 counts having to do with school district matters." He pled guilty to three misdemeanors involving personal income tax evasion.

The corporate petitioner filed no sales tax returns for any portion of the audit period.

In addition to the facts found by the Administrative Law Judge, we find the following:

The "Specification and Bid Form" for the handicapped student transportation contract with the William Floyd School District for the period September 1, 1978 through June 30, 1979 stated that gasoline would be provided by the successful bidder at his own expense (Exhibit "G"). The transportation contract between East End and the William Floyd School District arose as a result of this Specification and Bid and was extended for the years 1980/81 and 1981/82.

OPINION

The Administrative Law Judge determined that the statute of limitations could not bar any of the assessments at issue because East End had not filed any sales tax returns. The Administrative Law Judge also concluded that the notices of determination making these assessments had been properly issued and mailed, as evidenced by the return receipts in the

record and the returned notice number S840920004F. With respect to the gasoline purchases at issue, the Administrative Law Judge held that East End purchased the gasoline from RAD through the school district. The Administrative Law Judge determined that the purchase by East End was a taxable retail sale, that East End, as the customer, was liable for the tax pursuant to section 1133(b) of the Tax Law and that there is no provision exempting the purchase of gasoline even though it was used in providing transportation services to an exempt organization. The Administrative Law Judge also held that John Mensch was a person responsible for the sales taxes of East End and personally liable for these taxes pursuant to section 1131(1) of the Tax Law. Finally, the Administrative Law Judge held that petitioners had not established reasonable cause for their failure to comply with the Tax Law and, thus, there was no basis for abating the penalties imposed.

On exception, petitioners resubmitted their post-hearing brief in which they contend that there was no proof ever made of the timely mailing of the notices of determination; that the school district purchased the gasoline and that East End had no right to use the gasoline except for the transportation of school district students; that the Division did not prove that any penalty should be asserted; that East End was not a vendor and for that reason John Mensch cannot have any personal liability for the tax; that East End was not required to file returns and that the statute of limitations has run. In a covering letter resubmitting this brief on exception, petitioners assert that the Division should have the burden of proving that East End was a vendor and that the Division did not meet this burden. In a reply brief, petitioners renew each of these arguments and argue further that the fact that John Mensch did not receive the notice of determination issued to him means that the presumption of delivery was rebutted.

In response, the Division asserts that since East End was not registered as a vendor, it could not legally issue resale certificates and, thus, its purchases were not exempt as purchases for resale. Further, the Division argues that because East End did not pay sales tax on its purchases when purchased, it was required to file returns and pay tax on these purchases. Since the required returns were not filed, the Division argues, the tax can be assessed at any time.

With respect to John Mensch's personal liability, the Division asserts that pursuant to the Tribunal's decision in Matter of Laschever (Tax Appeals Tribunal, March 23, 1989), Mr. Mensch is liable for the sales tax owed by East End on its purchases. The Division next argues that East End owed sales tax on its purchases of gasoline because East End has not established any basis for exemption. The Division also argues that it established the mailing of all of the notices of determination by introduction of the return receipt for each notice. With regard to the notice mailed to John Mensch, the Division contends that it was properly mailed by certified mail and the failure of John Mensch to receive it does not affect the validity of the notice, but merely provides John Mensch with an opportunity to request a hearing. Since Mr. Mensch was afforded a hearing with respect to this notice, the Division argues that the question of receipt is moot.

Petitioners' principal assertion is that the contract between East End and the school district was reformed so that the school district would purchase gasoline for its own use rather than East End purchasing the gasoline as the original contract requires. Notably, however, petitioners have failed to introduce a copy of the reformed contract. Petitioners' excuse that the reformed contract and other records were not available because they had been furnished to the Suffolk County District Attorney in connection with its investigation of the school district is not at all persuasive given the fact that the petition for hearing in this case was filed in 1984 and the investigation of the district has long been concluded.

In the absence of such evidence, we agree with the Administrative Law Judge that the record indicates that East End purchased the gasoline at retail and that such purchases were subject to sales tax under section 1105(a) of the Tax Law. The evidence indicating that East End purchased the gasoline includes the specifications for the contract covering the period in issue which required East End to make these purchases, and the fact that East End took delivery of the gasoline and paid for these purchases (by endorsing over to RAD the checks the school district made out to East End). Although it is not certain from the record before us whether East End bought this gasoline directly from RAD (the school district serving merely as a

conduit), or whether East End bought the gasoline from the school district (the school district having purchased it for resale from RAD), the identity of the vendor is not relevant to the transactions in issue which involve property of a kind ordinarily sold by private persons (see, Tax Law § 1116[a][1]). The determinative fact is that East End bought the gasoline at retail and the determinative law, petitioners' assertions notwithstanding, is that petitioners had the burden to prove that these purchases were not taxable (Tax Law § 1132[c]; 20 NYCRR 3000.10[d][2][4]). This petitioners have not done.

We also find petitioners' argument about whether East End was a vendor to be irrelevant. Under section 1133(b) of the Tax Law, East End, as a customer, is liable for the sales tax that was not paid on the corporation's purchases and was required to file a return to report this tax. As the Administrative Law Judge correctly noted, we have already established that a responsible officer of a corporation is liable for the sales tax due on the corporation's purchases (Matter of Laschever, supra). Further, as we have previously held in Matter of Airport Indus. Park (Tax Appeals Tribunal, April 11, 1991) and Matter of WIXT-TV, Inc. (Tax Appeals Tribunal, August 2, 1990), where a purchaser has failed to file the return required by section 1133(b) of the Tax Law, section 1147(b) of the Tax Law allows the tax to be assessed at any time. Thus, we agree with the Administrative Law Judge that the statute of limitations did not bar the assessments in this case and that John Mensch was properly held liable for the tax of East End.

Next, we are perplexed by petitioners' assertion that the record contains no proof of the mailing of the notices of determination. As indicated in the facts, the record includes return receipts for all of the notices (Exhibit "G"), except for notice number S840920004F.

With respect to notice number S840920004F, as stated in the facts, the record indicates that this notice was mailed by return receipt requested and that the Postal Service attempted delivery on three dates before it was returned, marked unclaimed, to the Division. Further, the record does not suggest that the address to which the notice was mailed was in any way incorrect (cf., Matter of Karolight, Ltd., Tax Appeals Tribunal, February 8, 1990 [where the record revealed that the notice had been mailed to an address that was not the taxpayer's]).

Therefore, we conclude that the Division mailed the notice in accordance with the requirements of section 1147(a)(1) of the Tax Law. Under Matter of Ruggerite, Inc. v. State Tax Commn. (97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517), a notice that is properly mailed, but not received, allows the petitioner an opportunity for a hearing, even though not timely requested. Since John Mensch had a hearing with respect to notice number S840920004F (his petition was denied on the merits, not dismissed), we agree with the Division that his failure to receive the notice is of no consequence.

Lastly, we note that petitioners, contrary to their assertions, bore the burden of proof on the penalty issue (see, Matter of F & W Oldsmobile v. Tax Commn., 106 AD2d 792, 484 NYS2d 188), and we agree with the Administrative Law Judge that they did not sustain this burden.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of East End Student Transportation Corp. and John Mensch, as officer is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of East End Student Transportation Corp. and John Mensch, as officer are denied; and

4. The notices of determination dated September 20, 1984, as modified by the conciliation conference, are sustained.

DATED: Troy, New York
March 26, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner