

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
KAROLIGHT, LTD. :
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 June 1, 1981 :
through February 29, 1984. :
: **DECISION**

In the Matter of the Petition :
of :
RACHEL MUSSAFFI :
OFFICER OF KAROLIGHT, LTD. :
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 June 1, 1981 :
through February 29, 1984. :

Petitioners, Karolight, Ltd. and Rachel Mussaffi, Officer of Karolight, Ltd., 189-13 Union Turnpike, Flushing, New York 11366 filed an exception to the determination of the Administrative Law Judge issued on June 15, 1989 with respect to a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through February 29, 1984 (File Nos. 802708 and 802709). Petitioner Karolight, Ltd. appeared by Karol Fisher, President. Petitioner Rachel Mussaffi appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners did not file a brief in support of their exception. A brief in opposition to the exception was not filed by the Division.

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

ISSUE

Whether the mailing of an incorrectly addressed Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Karolight, Ltd. constitutes a proper notice of tax assessment.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and the relevant facts are stated below except that we modify findings of fact "3" and "4" of the Administrative Law Judge's determination as indicated below.

Pursuant to a field audit of Karolight, Ltd., form AU-16, Notice of Determination and Demand for Payment of Sales and Use Taxes Due, bearing notice number S850720939M and the date of July 20, 1985, was issued to said petitioner in the amount of \$13,927.93, plus interest of \$4,181.75, for a total amount due of \$18,109.68 for the period June 1, 1981 through February 29, 1984. The aforesaid notice of determination was actually sent, by certified mail, to this petitioner on July 11, 1985 and was addressed to Karolight, Ltd. at 189-11 Union Turnpike, Flushing, New York 11355. Previously, on August 15, 1984, Karolight, Ltd., by its president, Karol Fisher, executed a consent whereby he agreed on behalf of the corporation that sales and use taxes for the period June 1, 1981 through August 31, 1982 could be assessed at any time on or before September 20, 1985.

The correct address of Karolight, Ltd. is 189-13 Union Turnpike, Flushing, New York 11366. It is apparent, therefore, that both the street number and zip code were incorrect on the notice of determination issued to this petitioner.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

The certified mail claim check indicates that an initial delivery of the notice of determination was attempted on July 13, 1985 and that the U.S. Postal Service attempted to give the addressee a second notice of arrival on July 18, 1985. On July 29, 1985 the Postal Service returned the notice of determination to the Division of Taxation marked "unclaimed".¹

Finding of fact "4" of the Administrative Law Judge's determination is modified to read as follows:

The record herein indicates that Karolight, Ltd. did not receive the notice of determination. Its original petition, dated October 11, 1985 and signed by Rachel Mussaffi, Secretary, refers to notice number S850720940M which, in fact, was the assessment number contained on a notice and demand issued to Rachel Mussaffi, as officer of Karolight, Ltd. In any event, the petition of Karolight, Ltd. was mailed by certified mail, return receipt requested, on October 19, 1985 and was received by the Tax Appeals Bureau on October 23, 1985. Both the envelope containing the petition and the receipt for certified mail produced by Karolight, Ltd. bore a U.S. Postal Service postmark of October 19, 1985.²

If the notice of determination was sent by certified mail to petitioner Karolight, Ltd. at the proper address on July 11, 1985, the 90-day period for application for an administrative hearing would have expired on October 9, 1985. If such notice was deemed to have been mailed on July 20, 1985 (the date set forth on the notice), the 90-day period would have expired on

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Finding of fact "3" of the Administrative Law Judge's determination read as follows:

"The certified mail claim check indicates that an initial delivery of the notice of determination was attempted on July 13, 1985 and that this petitioner was provided with a second notice of arrival on July 18, 1985 upon its failure to claim this piece of certified mail. When Karolight, Ltd. again failed to claim the certified mail, the U.S. Postal Service, on July 29, 1985, returned the notice of determination to the Division of Taxation marked 'unclaimed'."

We modified the finding of fact to remove the implication that petitioner Karolight, Ltd. had any notice of the attempted delivery because this implication was unsupported by the record.

2

Finding of fact "4" of the Administrative Law Judge's determination read as follows:

"It is unclear from the record herein whether or not Karolight, Ltd. ever received the notice of determination. Its original petition, dated October 11, 1985 and signed by Rachel Mussaffi, Secretary, refers to notice number S850720940M which, in fact, was the assessment number contained on a notice and demand issued to Rachel Mussaffi, as officer of Karolight, Ltd. In any event, the petition of Karolight, Ltd. was mailed by certified mail, return receipt requested, on October 19, 1985 and was received by the Tax Appeals Bureau on October 23, 1985. Both the envelope containing the petition and the receipt for certified mail produced by Karolight, Ltd. bore a U.S. Postal Service postmark of October 19, 1985."

The fact was modified because the Administrative Law Judge's statement that the record was unclear as to whether the notice was received by Karolight, Ltd. was completely inconsistent with the record and the fact that the notice was returned by the post office marked "unclaimed."

October 18, 1985. In either case, the petition of Karolight, Ltd., mailed on October 19, 1985 would be untimely. However, subsequent to the hearing, the Division of Taxation, in a letter dated April 3, 1989 which accompanied its memorandum of law, conceded that the certified mailing documents relating to the notice of determination issued to Karolight, Ltd. appeared to rebut the presumption of receipt of such notice by this petitioner and the Division, therefore, agreed that Karolight, Ltd. is entitled to an administrative hearing on the substantive issues of the sales and use tax assessment at issue herein.

Form AU-16.1, Notice and Demand for Payment of Sales and Use Taxes Due (notice number S850720940M) bearing the date of July 20, 1985, was issued by the Division of Taxation to Rachel Mussaffi, as officer of Karolight, Ltd. in the amount of \$13,927.93, plus interest of \$4,181.75, for a total amount due of \$18,109.68 for the period June 1, 1981 through February 29, 1984. According to the certified mailing documents submitted by the Division of Taxation, the notice and demand was sent by certified mail to this petitioner on July 11, 1985. The Domestic Return Receipt (PS Form 3811) indicates that Ms. Mussaffi signed for the certified mail (the date of delivery is not set forth thereon) and such form was mailed back to the Division of Taxation on July 13, 1985. The following explanation was contained on the notice and demand:

"You are personally liable as officer of Karolight, Ltd. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

<u>Period Ending</u>	<u>Per. Desig.</u>	<u>Tax Due</u>	<u>Interest due</u>
8/31/81	182	1,892.94	911.32
11/30/81	282	1,834.82	806.98
2/28/82	382	1,058.40	422.29
5/31/82	482	756.05	270.98
8/31/82	183	1,192.50	379.05
11/30/82	283	1,004.66	279.03
2/28/83	383	1,045.54	251.90
5/31/83	483	1,150.46	245.72
8/31/83	184	503.47	93.78
11/30/83	284	2,107.14	336.40
2/29/84	384	1,381.95	184.30
Totals		13,927.93	4,181.75"

The notice and demand did not advise this petitioner that she had the right to apply for an administrative hearing by filing an application therefor with the former State Tax Commission within 90 days from the date of the notice (July 20, 1985).

The petition of Rachel Mussaffi was dated October 11, 1985, but was mailed by certified mail, return receipt requested, on October 19, 1985 and was received by the Tax Appeals Bureau on October 23, 1985. Both the envelope containing the petition and the receipt for certified mail bore a U.S. Postal Service postmark of October 19, 1985. As in the case with Karolight, Ltd., the 90-day period for the filing of a petition for an administrative hearing would have expired on October 18, 1985.

OPINION

The Administrative Law Judge determined that, with respect to petitioner Rachel Mussaffi, officer of Karolight, Ltd., the Division of Taxation erroneously issued a notice and demand in lieu of a notice of determination to such petitioner. Since the notice and demand failed to properly apprise petitioner of her rights to contest the Division's determination, the Administrative Law Judge concluded it must be cancelled. With respect to petitioner Karolight, Ltd., the Administrative Law Judge held that such petitioner was entitled to an administrative hearing upon the Division's concession that the certified mailing documents relating to the notice of determination issued to Karolight, Ltd. appeared to rebut the presumption of receipt of such notice.

On exception only the determination of the Administrative Law Judge with respect to petitioner Karolight, Ltd. has been challenged. Petitioner Karolight, Ltd. asserts that the Division mailed the notice of determination to Karolight at the incorrect address. Since Tax Law § 1147(b) provides no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, Karolight, Ltd. argues that the assessment against it must be dismissed because the statute of limitations has expired.

The Division, in response, contends that despite the fact that the notice was improperly addressed, the requirements of Tax Law § 1147(a)(1) were satisfied by Karolight, Ltd.'s actual

receipt of the subject notice of determination. Hence, the Division asserts that it properly issued a Notice of Determination and Demand to petitioner Karolight, Ltd. Even assuming Karolight, Ltd. never received a copy of the Notice of Determination and Demand, the Division maintains, the notice is not invalid. The effect of lack of receipt according to the Division is that petitioner Karolight, Ltd. is entitled to an administrative hearing but not an outright cancellation of the notice.

We reverse the determination of the Administrative Law Judge with respect to Karolight, Ltd.

Tax Law § 1138(a)(1) affords the taxpayer an opportunity for an hearing and provides, insofar as pertinent, as follows:

"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. . ."

Tax Law § 1147(a)(1) requires the notice to be given as follows:

"(a)(1) Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. 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 . . ."

Tax Law § 1147(b) sets a three-year limitation for assessing additional tax as follows:

"(b) . . . However, except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return . . ."

learly, the statute requires that the notice be sent to the last known address of the taxpayer, i.e., "the address given in the last return filed . . . or in any application made . . ." (Tax Law § 1147[a][1]). The presumption of receipt arises when the Division demonstrates that it has a routine office practice and procedure for mailing the notice and that the notice was in fact properly addressed and mailed (Matter of T.J. Gulf, Inc. v. State Tax Commn., 124 AD2d 314, 508 NYS2d 97, 98). Therefore, any inquiries into the validity of the notice at issue must

address the question of whether it was mailed to petitioner Karolight, Ltd.'s "last known address".

If it was found that the notice of determination was properly mailed to petitioner Karolight, Ltd.'s last known address, the fact that it was returned to the Division marked "unclaimed", coupled with a showing that the Postal Service failed to comply with its own mailing procedures, would have rebutted the presumption of receipt (Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, 946, aff'd, 64 NY2d 688, 485 NYS2d 517). Under these circumstances, the 90-day time period for requesting a hearing under section 1138 of the Tax Law would not have been triggered and petitioner would have been entitled to a hearing (Matter of Ruggerite, Inc. v. State Tax Commn., supra).

If, however, it was found that the notice of determination was not mailed to petitioner Karolight, Ltd.'s last known address and petitioner Karolight, Ltd. never actually received the notice, the notice would be invalid (Matter of C. Riegel, Inc., State Tax Commission, April 26, 1986; see also, Shelton v. Commr., 63 TC 193). Under these facts, we would grant Karolight's request to dismiss the assessment absent a showing that a valid notice was remailed to Karolight, Ltd. during the three-year period of limitations.

In this case, the record is devoid of any evidence to suggest that the address which appeared on the notice of determination was or was not petitioner Karolight, Ltd.'s last known address. At no time did petitioner Karolight, Ltd. or the Division raise this issue during the hearing. Without any evidence on this issue, we are unable to determine whether the notice was sent to petitioner Karolight, Ltd.'s last known address as required by Tax Law § 1147(a)(1).

The Division argues that so long as petitioner Karolight, Ltd. received the notice, the requirement of § 1147(a)(1) is satisfied. The Division alleges that during the hearing before the Administrative Law Judge, Karol Fisher, the president of Karolight, Ltd., testified that the notice was actually received by petitioner Karolight, Ltd. We are unpersuaded that this was the case. The pertinent portion of Mr. Fisher's testimony is as follows (the questions are those of the Administrative Law Judge):

Q: You can state whatever you would like to.

A: Those days when we came a few times to hearings between those two gentlemen, came to the Brooklyn downtown to -- hard to explain -- to bring out case and to present as much as possible.

In this time we came to them and after that they said that has to go in front of different committee, and then we got this paper in the mail and when we got the paper in the mail I recall distinctly

they were showing this to my attention, and mail it and -- First Class Mail, or whatever mail you call it was not certified.

Then we had to certify something about the dates and Rachel called up one of the officers and they told her that they didn't receive it, and this time I said, "Let's do it Certified to be in the records for the thing." And --

Q: You are not saying that the corporation did not receive this Notice of Determination and Demand?

A: No --

Q: You did receive this?

A: But I do not recall what date. It could be later, I don't recall the date exactly, the exact date, but they made this Certified Mail.

Q: This was supposed to be by Certified Mail?

A: Do you have a copy of the Certified Mail? (Transcript p. 27.)

This portion of the testimony is very ambiguous. It is doubtful that Mr. Fisher fully understood the questions that were asked. Furthermore, as a matter of logistics, Karolight, Ltd. could not have received the notice mailed to Karolight, Ltd., at 189-11 Union Turnpike, Flushing, New York 11355, because it was returned to the Division marked "unclaimed". It is probable that Mr. Fisher was confusing the notice with the one that was sent to Rachel Mussaffi, officer of Karolight, Ltd.

Finally, the Division's argument on the issue of receipt of notice is entirely inconsistent with its position adopted prior to the Administrative Law Judge's determination. There, in a post hearing letter addressed to the Administrative Law Judge, the Division stated it would not challenge Karolight, Ltd.'s right to a hearing and "[t]he documentation of certified mailing submitted to the court on March 13, 1989 would appear to rebut the presumption of receipt of a notice of determination by Karolight."

Now the Division seeks to nullify its concession and to counter its own documentary mailing evidence solely on the basis of an ambiguous segment of Mr. Fisher's testimony. Under the circumstances, we think that the only possible conclusion is that Karolight, Ltd. did not receive the notice and have modified the Administrative Law Judge's facts accordingly.

Citing Ruggerite and Mean Alice's, Inc. v. New York State Department of Taxation (Sup Ct, Erie County, Oct. 22, 1987, Fudeman, J.), the Division further argues that even if petitioner Karolight, Ltd. never received a copy of the notice, the notice is not invalid and the result is that petitioner Karolight, Ltd. is entitled to an administrative hearing but not an outright cancellation of the notice. We reject such an argument. In Ruggerite, the Division had sent the petitioner "by certified mail, a correctly addressed notice of sales tax deficiency . . ." (Ruggerite, Inc. v. State Tax Commn., *supra*, 97 AD2d 634, 468 NYS2d 945, 945 [emphasis added]). Thus, the issue in Ruggerite was not whether the Division had properly issued the notice but the effect of the post office's failure to deliver the notice. The decision in Mean Alice's, Inc. does not state that it also involved only the nonreceipt of a properly addressed notice, but since it cites Ruggerite as authority we conclude it must.

Since we lack a factual basis to resolve the issue of whether the notice of determination was properly issued to Karolight, Ltd., we remand this matter for a hearing on the issue of whether the notice was sent in compliance with Tax Law § 1147(a)(1).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The order of the Administrative Law Judge is reversed; and

2. The case is remanded to the Administrative Law Judge for a new hearing to be scheduled on the issue of whether the notice had been sent in compliance with Tax Law section 1147(a)(1).

DATED: Troy, New York
February 8, 1990

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

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

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