

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STAGE DELICATESSEN EAST, INC.	:	DECISION
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 December 1, 1984 through	:	
February 28, 1985.	:	

Petitioner, Stage Delicatessen East, Inc., 96 4th Street, Garden City, New York 11530, filed an exception to the determination of the Administrative Law Judge issued on August 11, 1988 with respect to its 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 December 1, 1984 through February 28, 1985 (File No. 802770). Petitioner appeared by Pace, Stuart and Black (Rinaldo A. Pace, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

Neither petitioner nor the Division submitted a brief on exception.

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

ISSUES

I. Whether the petition was filed within 90 days after the issuance of the notice of determination as set forth at Tax Law section 1138(a)(1).

II. Whether petitioner, as the purchaser of a restaurant in a bulk sale, is liable for sales taxes determined to be due from a prior owner.

III. Whether the Division correctly estimated tax due from the prior owner of the restaurant.

FINDINGS OF FACT

On July 25, 1985, the Division of Taxation ("Division") issued to petitioner, Stage Delicatessen East, Inc. ("Stage"), a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due for the period December 1, 1984 through February 28, 1985, assessing tax of \$10,000.00. The notice explained that the tax was determined to be due from the Sugar Plum Restaurant and represented Stage's liability as the purchaser in a bulk sale pursuant to Tax Law section 1141(c). It also stated that Stage's liability was limited to the selling price of the assets purchased.

The petition was sent to the State Tax Commission via Federal Express on October 23, 1985, the ninetieth day after the notice was issued. The petition was delivered to the State Tax Commission on October 24, 1985.

On April 8, 1985, the Division received a Notice of Sale, Transfer or Assignment in Bulk from Stage. Relevant portions of the notice declare Stage to be the purchaser in a pending sale, scheduled to occur on or about May 11, 1985. The seller is shown as Food Quotes, Inc. ("Food Quotes"), and the seller's business or trade name is shown alternatively as Sugar Plum Restaurant and Reatherford's Plum. The seller's certificate of authority identification number was left blank.

On April 8, 1985, the Division issued to Stage and to Stage's escrow agent notices of a possible claim for sales tax due. The notices instructed the parties to make no distribution of funds or property before being authorized to do so by the Division. On May 2, 1985, the Division issued to Food Quotes a notice to seller requesting certain information, including: a final tax return for the period ended March 1, 1985, any sales tax returns not previously filed and the seller's tax identification number. Food Quotes was a New York corporation which operated the Sugar Plum Restaurant. From 1979 through April 1981, Joseph Valin was a shareholder of Food Quotes.

On April 28, 1981, Mr. Valin transferred his entire interest in Food Quotes to three individuals: Ronald Reatherford, Gail Rose and Frank Piccolo. Concurrent with that transfer, Food Quotes agreed to pay Mr. Valin \$120,000.00 plus interest. To secure this debt, Food Quotes executed a series of 84 promissory notes and a security agreement pursuant to section 3 of the Uniform Commercial Code. By the agreement, Food Quotes conveyed to Mr. Valin a security interest in all furniture, fixtures and equipment on the premises of the Sugar Plum Restaurant. In

addition, certain documents were placed in escrow, including: the resignations of Reatherford, Rose and Piccolo as officers of Food Quotes; all stock certificates issued to Reatherford, Rose and Piccolo; an original lease for the premises of Sugar Plum Restaurant executed on April 5, 1979; and an assignment of the lease from Food Quotes to Valin. The security agreement was executed on April 28, 1981 and filed in the offices of the Registrar of Suffolk County and the Secretary of State.

The Sugar Plum Restaurant continued to be operated by Food Quotes until August 4, 1984 when the restaurant ceased doing business. On September 4, 1984, Valin notified Reatherford, Rose and Piccolo that they were in default and demanded payment of notes and rent. On September 11, 1984, Reatherford and Rose Advised Valin that they were abandoning possession of the premises. Piccolo did the same shortly thereafter. On October 8, 1984, Mr. Valin sold and transferred his security and secured position to Mr. Piccolo for the sum of \$97,149.67. The assignment to Mr. Piccolo was filed with the Secretary of State on October 28, 1984 and with the Suffolk County Clerk on October 25, 1984. Mr. Piccolo then proceeded to foreclose on the personal property of Food Quotes as provided for by the security agreement.

On November 12, 1984, a public auction was held at the premises of Sugar Plum Restaurant, and Mr. Piccolo received an auctioneer's title to the personal property owned by Food Quotes. On February 19, 1985, Frank Piccolo, as the owner of the lease to the premises and the restaurant equipment, entered into a contract of sale with Stage. The subjects of the sale were: all equipment and merchandise contained in the restaurant's premises, good will and the assignment of the lease to the premises known as the Sugar Plum Restaurant. The purchase price was \$240,000.00.

OPINION

In the decision below the Administrative Law Judge determined the petitioner's petition was not timely filed since it was delivered by a courier more than 90 days after issuance of statutory notice. Upon making this conclusion the Administrative Law Judge determined that there was no jurisdiction to determine the other issues raised by petitioner.

On exception petitioner contends that its petition was timely filed. Specifically, petitioner relies upon the decision in Matter of Harron's Electrical Service (Tax Appeals Tribunal,

February 19, 1988) for support. Additionally, petitioner claims that it was never given an opportunity to reply to a brief of the Law Bureau. Further, petitioner contends that it is not liable for the sales taxes of Food Quotes, Inc.

In response the Division relies on the decision of the Administrative Law Judge in support of its position.

We affirm the determination of the Administrative Law Judge.

Tax Law section 1138(a)(1) requires that a petition challenging a notice of determination issued under Article 28 of the Tax Law be filed within 90 days after the giving of such notice of determination. Further, the general rule requires physical delivery, i.e., the petition must be filed within the ninety day period required by section 1138(a)(1) (Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988). However, in cases when the United States Postal Service is used to effect delivery, Tax Law section 1147(a)(2) provides that the date of the postmark as made by the United States Post Office shall be deemed the date of delivery. In the case at hand delivery was not made by way of the United States mail. Rather, delivery was made via Federal Express, a private courier. Accordingly, the general rule that physical delivery is deemed to be the date of delivery applies.¹

We agree with the Administrative Law Judge that petitioner's reliance upon Matter of Harron's Electrical Service (*supra*) is misplaced. Harron's is distinguishable from the present case because it concerned the application of Tax Law section 1147(a)(2), 20 NYCRR 535.1(b)(2) and the rules for deemed delivery promulgated by the State Tax Commission pursuant to such statute and regulation to a situation where delivery had been effected by the United States mail. In the instant case petitioner chose a private carrier as its method of delivery. Thus, Tax Law section 1147(a)(2), 20 NYCRR 535.1(b)(2) and the rules for deemed delivery promulgated thereunder by the State Tax

¹We note that our interpretation of the statutes and regulations before us conforms with both Federal statutory provisions (I.R.C. § 7502; Treas. Reg. § 301.7502-1) and Federal case law (see, Pugsley v. Commissioner, 749 F2d 691; Blank v. Commissioner, 76 T.C. 400). Additionally, this interpretation has now been articulated in part 3000.16 of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.16).

Commission do not apply. As a result, we conclude that the petition at issue was not timely filed. Further, we will not address the remaining issues as we are without jurisdiction to address them since the petition was not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Stage Delicatessen East, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Stage Delicatessen East, Inc. is denied and the Notice of Determination issued on July 25, 1985 is sustained.

Dated: Albany, New York
March 9, 1989

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner