

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HAGOP YEGNUKIAN :
(a/k/a Hagop Yeghnoukian) :
OFFICER OF MASSIS AUTO CORP. : 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 March 1, 1981 through May 31, 1981. :

Petitioner, Hagop Yegnukian,¹ 33-21 83rd Street, Jackson Heights, New York 11378, filed an exception to the determination of the Administrative Law Judge issued on October 6, 1988 which denied his 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 March 1, 1981 through May 31, 1981 (File Nos. 802957 and 802958). Petitioner appeared by Garo Yegnukian. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief on exception. The Division filed a letter in lieu of a brief.

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

ISSUE

Whether petitioner Hagop Yegnukian timely filed a petition for an administrative hearing to contest sales and use tax deficiencies assessed pursuant to the issuance of a notice of determination and demand for payment of sales and use taxes due which was issued to petitioner by the Division of Taxation.

¹Although neither party raised the issue, petitioner's name was spelled "Yeghnoukian" in his original petition and in the Notice of Determination. Since that time, however, the spelling "Yegnukian" began being used by both parties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On May 3, 1985, the Division of Taxation issued to petitioner Hagop Yegnukian, officer of Massis Auto Corp., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$15,789.50, plus penalty and interest, for a total amount due of \$28,830.83 for the period March 1, 1981 through May 31, 1981. On the same date, the Division of Taxation issued a notice of determination to Massis Auto Corp. (hereinafter "the corporation") in the identical amount for the identical period. The notice of determination issued to Hagop Yegnukian was sent, by certified mail, to said petitioner at his residence at 33-21 83rd Street, Jackson Heights, New York 11372. At the time of the issuance of the notice of determination, Mr. Yegnukian did reside and, for a number of years prior thereto, had resided at the aforesaid Jackson Heights address. The notice of determination issued to the corporation was sent, by certified mail, to its last known address and the address as set forth on the last sales and use tax return filed by the corporation, i.e., 49-01 Northern Boulevard, Long Island City, New York 11101.

Prior to the issuance of the aforesaid notices of determination, the Division of Taxation, on November 20, 1984, issued to the corporation a Consent to Fixing of Tax Not Previously Determined and Assessed which asserted additional sales and use taxes due in the amount of \$84,670.60, plus penalty and interest, for a total amount due of \$125,310.70 for the period March 1, 1981 through February 28, 1982. In response to the issuance of this document, the corporation's then representative, Elliot Sagor, Esq., prepared form TA-11, Petition, which was dated February 15, 1985. Mr. Sagor sent the petition to the auditor, Astreal LaMarque. On February 21, 1985, Mr. LaMarque sent a letter to Mr. Sagor which advised him that the corporation's petition was premature since a statutory notice had yet to be issued.

On April 8, 1985, the corporation sold the gasoline, oil and auto repair business located at 49-01 Northern Boulevard, Long Island City, New York to William Gonzalez. At the time of the issuance of the notice of determination to the corporation, said corporation was no longer in business at this address. Garo Yegnukian, representative of petitioner Hagop Yegnukian, alleges that he notified the Division of Taxation that all future correspondence directed to the corporation should be sent to the home address of Hagop Yegnukian, although no proof of said notification of address change was produced herein.

It is uncontroverted that the notice of determination sent to the corporation by certified mail on May 3, 1985 was returned to the Division of Taxation as undeliverable. The notice of determination issued to Hagop Yegnukian was not returned to the Division of Taxation although petitioner does not recall ever having received said document.

Petitioner received a collection letter dated October 22, 1985 from the Tax Compliance Division of the Department of Taxation and Finance. On November 29, 1985, a warrant was filed in the office of the Clerk of the County of Queens against petitioner and the corporation in the amount of \$15,789.50, plus penalty and interest, for the taxable period ending May 31, 1981. Petitioner and the corporation thereupon contacted Robert Farrelly, the conferee who, at that time, had been involved with petitioner and the corporation relative to other taxable periods for which petitions had been filed. Mr. Farrelly advised petitioner and the corporation to send him a letter of protest setting forth all relevant facts leading up to the filing of the aforesaid warrants. On December 23, 1985, Hagop Yegnukian sent such letter of protest, dated December 20, 1985, along with a copy of the petition originally sent to Mr. LaMarque (dated February 15, 1985). The letter and petition were received by the Tax Appeals Bureau on December 27, 1985.²

²It should be noted that an additional copy of this letter sent to Robert Farrelly and a copy of the petition of the corporation were determined by the Tax Appeals Bureau to constitute the original petition and/or protest letter for each petitioner herein. By letter dated February 4, 1986 to Hagop Yegnukian, the Tax Appeals Bureau advised Mr. Yegnukian that, since a petition or protest letter for each petitioner was not mailed until December 23, 1985, the petitions were untimely and the matters were being referred to the Tax Compliance Bureau for collection.

OPINION

In the determination below, the Administrative Law Judge found that petitioner Hagop Yegnukian did not file a timely petition protesting the Notice of Determination and Demand issued by the Division of Taxation. Hagop Yegnukian's petition was dismissed. The Administrative Law Judge granted the petition of Massis Auto Corporation for a hearing to redetermine the tax assessment against the corporation. The Administrative Law Judge found that the petition of Massis Auto Corporation was timely filed.

On exception, petitioner objects to the Administrative Law Judge's finding that the clause "within 90 days after giving of notice" in Tax Law § 1138(a) excludes his protest, filed prior to his receipt of the Notice of Determination and Demand. He also objects to the finding that he failed to rebut the presumption that he received the Division's Notice of Determination. In the alternative, petitioner requests that the Tribunal postpone its decision on petitioner's exception until the hearing on the merits of the petition of Massis Auto Corporation is completed.

The Division argues that the words "within 90 days after giving of notice of such determination", should be strictly construed to mean that only petitions filed within 90 days after receiving a Notice of Determination and Demand should be considered timely.

We agree with the Division and affirm the Administrative Law Judge's determination.

Tax Law § 1138(a)(1) provides:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available . . . 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 90 days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing. . . ." (Tax Law § 1138[a][1].)

The Notice of Determination carries a reminder of the 90 day time limit (Form AU-16).

Petitioner argues that his protest, filed on February 15, 1985, after the corporation received the Division's Consent to Fixing of Tax form, dated November 20, 1984, is a timely filed petition. Petitioner reasons that the Consent to Fixing of Tax was adequate notice of the Division's assessment against him and therefore that his February 15, 1985 protest in response to it was a timely filed petition.

Petitioner relies on federal income tax cases to support this argument. In the cases petitioner cites to support his proposition that his first protest was timely, however, the relevant issue is not the adequacy of the taxpayer's response, as is the case here, but the adequacy of the government's initial notice of deficiency. Thus, we conclude that these cases are not dispositive of the issue before us.

The issue that is before us, whether a taxpayer's protest filed prior to receiving a Notice of Determination is an adequate protest, has been settled by the Appellate Division decision in Matter of West Mountain v. Department of Tax & Fin. (105 AD2d 989, 482 NYS2d 140, affd. 64 NY2d 991, 489 NYS2d 62). The court in West Mountain held that a timely filed letter protesting a statement of proposed audit adjustment could not supplant the statutory requirement that a petition for a hearing be filed within 90 days after issuance of the Notice of Determination. Under West Mountain, the petitioner's letter protesting the Consent to Fixing of Tax, filed prior to petitioner's receipt of the Notice of Determination, could not function as a petition of the notice. This conclusion is supported by Tax Law § 1138(c) and by the function of the Consent to Fixing of Tax stated in its legislative history.

Tax Law § 1138(c) refers to the Consent to Fixing of Tax form providing that:

"A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

Upon receipt of the Consent to Fixing of Tax, therefore, petitioner was entitled to formally agree with the tax assessment by signing the Consent form. Upon signing the form and paying

the tax the taxpayer could fix his tax "finally and irrevocably" unless he then protested it and applied for a refund (Tax Law § 1139[c]). The primary purpose of § 1138(c) is to give taxpayers a chance to limit the amount of interest to be charged on unpaid sales and use tax. It is also meant to give taxpayers a chance to avoid the "formal procedure for a determination of a tax" deficiency (L 1968, ch 206). A Notice of Determination, on the other hand, is the statutorily mandated notice procedure by which the Division of Taxation assesses tax (Tax Law § 1138[a][1]). In not signing the Consent to Fixing of Tax form, therefore, petitioner prompted the formal tax assessment procedure through the issuance of a Notice of Determination.

One result of the Notice of Determination is to afford the taxpayer an opportunity to appeal to the Division of Tax Appeals (see, Commissioner v. Forest Glen Creamery, 98 F2d 968, 38-2 USTC ¶ 9398, cert denied 306 US 639; see also, Commissioner v. Stewart, 186 F2d 239, 51-1 USTC ¶ 9151). Review by the Division of Tax Appeals would be premature and meaningless if the Division of Taxation's assessment was only a proposed one, subject to change under the internal procedures within the Division of Taxation (see, Malinckrodt, Inc. v. Director of Revenue, No. R1-81-0152 Mo. Admin. Hearing Comm., May 7, 1985).

The inconclusiveness of the Consent to Fixing of Tax as a deficiency determination coupled with the plain language of the statute which specifically states that a petition be filed within 90 days "after giving of notice of such determination" compels us to agree with the Administrative Law Judge's dismissal of the petition.

We must also note that petitioner's representative was informed that the February 15, 1985 protest was premature, and petitioner was told in the Notice of Determination which he later received that a petition could be filed within 90 days thereafter. Further undermining petitioner's argument is the fact that the Consent to Fixing of Tax form was sent to the corporation and not to the petitioner. The protest filed in response to the Consent to Fixing of Tax was also on behalf of the corporation and not petitioner. Petitioner's argument, therefore, that the early protest satisfied the requirement that he file a petition on his own behalf fails.

Petitioner also argues that he did not receive the Division's Notice of Determination and that his testimony of non-receipt was sufficient to rebut the presumption that he did receive it. We do not agree.

Tax Law § 1147(a)(1) provides:

"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, . . . 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. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

Tax Law § 1147(a)(1) is clear that the mailing of the determination is presumptive evidence that it was received (Matter of Ruggerite v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517). The requirement that the Division mail notices of determination by certified or registered mail gives taxpayers the means to rebut the presumption of delivery. For instance, in this case the Division's records showed that the Notice of Determination sent to Massis Auto Corporation was returned as undeliverable (see, Matter of Ruggerite v. State Tax Commn., supra). Petitioner's testimony that he did not receive the Notice of Determination, without more, however, is insufficient to rebut the presumption of receipt (see, T.J. Gulf v. State Tax Commn., 124 AD2d 314, 508 NYS2d 97).

Petitioner's request for a declaratory judgment based on the argument that he is not a person required to collect the Massis Auto Corporation tax is rejected as is his argument that Tax Law § 1138(a)(1) is inapplicable to his case. Since the petition was untimely filed, we cannot reach issues based on the merits of petitioner's case (Matter of Davidson, Tax Appeals Tribunal, March 23, 1989). Petitioner's request that the statute being applied be declared unconstitutional is also rejected. This Tribunal is empowered to affirm, reverse or modify the determination of the Administrative Law Judge and to rule on the validity of Tax Department regulations (Tax Law § 2006[7]). The enabling legislation does not encompass constitutional challenges to the

tax statute as written (Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). It is presumed that the statute is constitutional (see, Matter of Jones, State Tax Commn., June 29, 1983).

Although petitioner's request for a hearing to redetermine the tax liability against him is denied, any redetermination decreasing the corporation's tax liability will result in a decrease of petitioner's outstanding liability (Halperin v. Chu, 134 Misc2d 105, 509 NYS2d 692, 694, affd. 138 AD2d 915, 526 NYS2d 660, lv denied, 72 NY2d 938, 532 NYS2d 845).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Hagop Yegnukian is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of petitioner Hagop Yegnukian is dismissed; and
4. The Notice of Determination and Demand dated on May 3, 1985 is sustained.

DATED: Troy, New York
March 22, 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