

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AIR FLEX CUSTOM FURNITURE, INC. AND EMIL ZAMBARDI, AS OFFICER	:	DECISION DTA No. 807485
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, 1985 through February 29, 1988.	:	

Petitioners Air Flex Custom Furniture, Inc. and Emil Zambardi, as officer, 361 Rockaway Avenue, Valley Stream, New York 11581 filed an exception to the determination on remand of the Administrative Law Judge issued on October 10, 1991 with respect to their petition 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, 1985 through February 29, 1988. Petitioners appeared by Lawrence R. Cole, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Both parties filed briefs 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.

ISSUE

Whether the Division of Taxation proved that it mailed the notices at issue to petitioners on January 27, 1989.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in his determination on remand except for findings of fact "8" and "9" which have been modified. We have also made

an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

The Division of Taxation issued to both petitioners, Air Flex Custom Furniture, Inc. ("Air Flex") and Emil Zambardi, as officer, six notices of determination and demands for payment of sales and use taxes due. The three notices sent to Air Flex were mailed to its address at 361 Rockaway Avenue, Valley Stream, New York 11581 and the three identical notices of determination and demands for payment of sales and use taxes due sent to Emil Zambardi, as officer of Air Flex, were mailed to his home address at 100-127 Baker Court, Island Park, New York 11518. The notices sent to Air Flex set forth the following:

<u>Notice Number</u>	<u>Date of Notice</u>	<u>Total Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S890127327C	1/27/89	\$38,667.64	\$10,349.46	\$9,601.62	\$58,618.72
S890127328C	1/27/89	0	3,836.37	0	3,836.37
S890127329C	1/27/89	0	7,502.16	0	7,502.16

As stated above, three notices were also sent to Emil Zambardi, officer of Air Flex Custom Furniture, Inc., which set forth the following information:

<u>Notice Number</u>	<u>Date of Notice</u>	<u>Total Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S890127330C	1/27/89	\$38,667.64	\$10,349.46	\$9,601.62	\$58,618.72
S890127331C	1/27/89	0	3,836.37	0	3,836.37
S890127332C	1/27/89	0	7,502.16	0	7,502.16

These notices were issued to both petitioners following an audit of the books and records of Air Flex and each of the notices indicates that the tax assessed was estimated in accordance with the provisions of Tax Law § 1138(a)(1). Petitioners conceded receipt of the notices (Tr. 25-26).

Previously, on or about September 18, 1988, the Division of Taxation issued three statements of proposed audit adjustment to Air Flex in care of its former representative, one Anthony Grosso, C.P.A., the first of which indicated additional tax due of \$38,667.64 plus penalty and interest to be computed, the second, penalty of \$3,836.37 and the third, penalty of \$7,502.16.

On December 10, 1988, petitioners' then representative, Anthony Grosso, C.P.A., submitted a request for a conciliation conference. On January 12, 1989, a letter was sent by the Bureau of Conciliation and Mediation Services to Anthony L. Grosso acknowledging his request for conciliation conference but deeming the request premature. The letter went on to explain the following:

"However, this request was deemed premature. The Tax Law requires that, to be timely, a request must be filed within ninety days after the mailing of a Notice of Deficiency (or Determination) by the Audit Division. Our records show that neither document has yet been mailed.

Therefore, this matter has not yet reached a deficiency stage and you may be able to resolve this controversy with the Audit Division. You should immediately contact the issuing office indicating your disagreement with their 'proposed adjustments'."

Petitioners' representative, Mr. Grosso, did not file another request for conciliation conference until May 12, 1989.

On July 21, 1989, the Bureau of Conciliation and Mediation Services issued a Conciliation Order dismissing petitioners' request for the conciliation conference indicating that a request must be filed within 90 days of the date of the statutory notice. The order explained that since the notices were issued on January 27, 1989, but the request was not mailed until May 12, 1989, or in excess of 90 days, the request was filed too late and the request for a conciliation conference had to be denied.

The Division of Taxation had on file a power of attorney appointing Anthony L. Grosso, C.P.A., of Grosso, Golub and La Capra, P.C., 2 Roosevelt Avenue, Port Jefferson Station, New York 11776, as the representative for Air Flex for sales tax during the periods March 1, 1985 to "present," presumably the date of the power, April 25, 1988. The power was executed but not dated by Emil Zambardi, president of Air Flex Custom Furniture, Inc. and was signed and stamped by a notary public, Marilyn Berkowitz, on April 25, 1988. It was also signed by Anthony L. Grosso, C.P.A. In the acknowledgment, the notary public failed to properly fill in the date on which Emil Zambardi came before her, his corporate office or the county of execution. However, at hearing, Emil Zambardi indicated that he was indeed president of the corporation and that he did recall signing the power of attorney before Marilyn Berkowitz on

the date next to her name, April 25, 1988. Mr. Zambardi did not state that he ever revoked Mr. Grosso's power of attorney prior to March 2, 1990, when he executed a new power on behalf of Air Flex to Lawrence Cole, C.P.A., his current representative. All books and records produced on audit were provided by Mr. Grosso and all meetings with the auditor took place at Mr. Grosso's office. When Mr. Zambardi received the notices of determination he immediately presented them to Mr. Grosso for further action.

On October 19, 1989, Air Flex and Emil Zambardi, as officer, filed a petition with the Division of Tax Appeals seeking a hearing on the merits of the case. The Division of Taxation, by its Law Bureau, filed an answer to the petition on January 8, 1990 affirmatively raising the issue of timeliness and indicating that petitioners had not requested a conciliation conference or a hearing in a timely manner.

ADDITIONAL FINDINGS OF FACT ON REMAND

We modify finding of fact "8" of the Administrative Law Judge's determination on remand to read as follows:

The affidavit of Michael J. Sampone, Tax Audit Administrator of the District Office Audit Bureau, sworn to July 13, 1990, described the procedures followed in preparing and mailing notices of determination. In describing the mailing of the notices, Mr. Sampone noted the following:

"7. The staff member writes the 'certified control number' for each address on the Certified Mailing Record and deposits the Notices of Determination and Demand and the Certified Mailing Record in the Mail and Supply Section 'outgoing mail' basket located in the DOAB, from which they are picked up by an employee of the Mail and Supply Section and transported to the mail room.

"8. After the Notices of Determination and Demand are accepted by the United States Post Office, the Mail and Supply Section returns a copy of the Certified Mailing Record, with the postmark stamp affixed thereto showing the date of mailing, to the DOAB with the attestation of employees of the Mail and Supply Section that the notices described were deposited in a branch of the United States Post Office, enclosed in sealed post paid envelopes. This signifies that the Notices of Determination and Demand have been accepted by the United States Post Office. The Certified Mailing Record is kept in the regular course of business in this office. Certified mailing receipts are not requested from the United States Post Office or recipients of notices."

Mr. Lafar's affidavit states, in pertinent part, at paragraphs "7" and "8":

"7. Attached hereto and marked Exhibit 'A' is the CMR for the DOAB indicating the mailing by certified mail Notices of Determination to Air Flex Custom Furniture, Inc., 361 Rockaway Avenue, Valley Stream, NY and to Emil Zambardi, Officer of Air Flex Custom Furniture, Inc., 100-127 Baker Court, Island Park, New York, on January 27, 1989. Portions of the CMR have been redacted to protect the confidentiality of other taxpayers served with Notices of Determination on the same date.

"8. Based upon review of the CMR (Exhibit 'A') and my personal knowledge of the operations and procedures of the Mail and Supply Section and the mailing practices of the DOAB, I have concluded that the Notices of Determination were properly sent by certified mail to Air Flex Custom Furniture, Inc., 361 Rockaway Avenue, Valley Stream, New York and to Emil Zambardi, Officer of Air Flex Custom Furniture, Inc., 100-127 Baker Court, Island Park, New York on January 27, 1989."

Both affidavits have an Exhibit "A" which includes the uncompleted Postal Service Form 3877 and the Division's Form AU-372.1.¹

We modify finding of fact "9" of the Administrative Law Judge's determination on remand to read as follows:

Although the mail and supply clerk apparently failed to have a postmark affixed to the certified mailing record, the attestations on the reverse of Form AU-372.1 state that the other procedures were followed in delivering the notices herein into the custody of the United States Postal Service as described in Mr. Sampone's affidavit. All of the documentary evidence led Mr. Sampone to conclude that the notices were properly sent by certified mail to petitioners herein on January 27, 1989.²

The attestations contained on the back of Form AU-372.1, mailing record, dated January 27, 1989, stated the following:

"Au-372.1 (5/78) (back)

1

We have modified finding of fact "8" to include the pertinent portions of Mr. Lafar's affidavit and to show that the certified mailing record referred to includes both the Postal Form 3877 and the Division's Form AU-372.1.

2

We have modified this finding by substituting the word "state" for the word "indicate" in the first sentence of the finding of fact.

'On JANUARY 27, 1989, I delivered all notices identified on the reverse of this sheet to the Mail and Supply Section of the Department of Taxation and Finance, Albany, N.Y., and there witnessed the sealing and stamping of the envelopes in which they were enclosed. Each such notice was enclosed in an envelope addressed to the taxpayer named therein, at the address shown on the notice.'

/s/ Karen Shea
Audit Division

Witnessed by: /s/ Pat Westfall
Mail and Supply Section

Dated: JANUARY 27, 1989

'On JANUARY 27, 19 , I deposited in a branch of the United States Post Office of Albany, New York all notices described above, all enclosed in sealed postpaid envelopes.'

/s/ C. Brennan
Mail and Supply Section

Witnessed by: /s/ T. D. Paley
Mail and Supply Section

Dated: JANUARY 27, 1989"

A second affidavit of Daniel D. Lafar, Principal Mail and Supply Clerk, sworn to July 27, 1990, supplements the Sampone affidavit with a discussion of the general office procedure for the delivery of outgoing mail to the United States Postal Service, indicating the same procedures outlined in the Sampone affidavit. After reviewing the documentation in this case, Mr. Lafar concluded that the notices herein were properly mailed to petitioners on January 27, 1989.

We also find as an additional finding of fact, the following:

A determination on this petition was first issued by an Administrative Law Judge on January 10, 1991. Petitioner filed an exception with the Tax Appeals Tribunal asserting that the Postal Service Form 3877 submitted by the Division of Taxation to prove the date the determinations were mailed was blank except for petitioners' names and addresses. Our review confirmed petitioners' assertion and the fact that this was inconsistent with an affidavit submitted by the Division of Taxation which stated that the Postal Service Form 3877 (the Certified Mailing Record) establishes the date of mailing by the postmark on it. Although the mailing evidence had been raised by petitioners at hearing,

the Administrative Law Judge had not addressed this issue in the determination. We remanded the case to the Administrative Law Judge and directed that this issue be addressed and a new determination be rendered within 30 days from the date of our decision (i.e., September 12, 1991). On September 13, 1991, the Division of Taxation requested an opportunity to substitute the original Postal Service Form 3877 as redacted in lieu of copies attached to the affidavits of Messrs. Sampone and Lafar. The Administrative Law Judge rejected this request on the basis that it was the introduction of "new" evidence into the record. By letter of October 3, 1991, the Administrative Law Judge suggested that the Division of Taxation might want to consider a motion to reopen the record once the determination on remand was issued. That determination on remand was issued October 10, 1991. The Division of Taxation did not make a motion to reopen the record.

OPINION

The law is clear that the Division of Taxation (hereinafter the "Division") must give a notice of determination of sales tax due to the person liable for the collection or payment of the tax; and that the notice finally and irrevocably fixes the tax unless the person against whom it is assessed, within 90 days after giving of the notice of determination, applies to the Division of Tax Appeals for a hearing, or unless the Commissioner of Taxation and Finance of his own motion shall redetermine the same (Tax Law § 1138[a][1]). As an alternative to proceeding directly to a formal hearing, a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services in the Department of Taxation and Finance (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 20 NYCRR 4000.5[c]). The time for filing a request for a conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment, in this case 90 days (Tax Law §§ 170[3-a][a], 1138[a][1]; see, 20 NYCRR 4000.3[c]).

The law provides that: the Division promptly mail a notice of determination by registered or certified mail; the mailing of the notice is presumptive evidence of the receipt of the same by the person to whom addressed; and the 90-day period in which to protest the notice begins to run from the date of mailing of the notice (Tax Law § 1147[a][1]). A notice is mailed when it is delivered to the custody of the United States Postal Service for mailing (Matter of Novar TV & Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

Finally, the law is clear that when the timeliness of a filed petition is at issue, the burden is on the Division to demonstrate proper mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioning Sales & Serv., *supra*; *see also*, Cataldo v. Commissioner, 60 TC 522). The Division may prove the mailing by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioning Sales & Serv., *supra*; *see also*, Cataldo v. Commissioner, *supra*).

A properly completed Postal Service Form 3877 represents direct documentary evidence of the date and the fact of mailing (*see*, Coleman v. Commissioner, 94 TC 82; Wheat v. Commissioner, T.C. Memo 1992-268, 63 TCM 2955; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992).³ Moreover, exact compliance with the Form 3877 procedures reflects compliance with the Division's own procedures and raises a presumption of official regularity in favor of the Division (*see*, Wheat v. Commissioner, *supra*).

A failure to comply precisely with the Form 3877 mailing procedure may not be fatal if the evidence is otherwise sufficient to prove mailing (*see*, Coleman v. Commissioner, *supra*; Wheat v. Commissioner, *supra*). Where the Division relies upon imprecise mailing procedures and other corroborative evidence, the presumption of official regularity does not apply. The crux of the matter is that the Division must introduce evidence showing that the notice of determination was properly delivered to the Postal Service for mailing (*see*, Coleman v. Commissioner, *supra*).

The Administrative Law Judge, relying on Magazine v. Commissioner (89 TC 321) and Shuford v. Commissioner (60 TCM 452, *affd* 937 F2d 609), determined that the lack of a postmark on the Postal Service Form 3877 was not fatally defective and did not prevent the Division from proving, through the submission of other documentary evidence or testimony, that the notices at issue were mailed on January 27, 1989, as asserted by the Division. The

³Other documents bearing a United States Postal Service postmark which indicate mailing are Form 3800 (Individual Certified Mail Receipt) and Form 3811 (Domestic Return Receipt).

Administrative Law Judge, based on the affidavits of Messrs. Sampone and Lafar and the attestations of Ms. Shea and Mr. Brennan (Exhibit "F"), concluded that the Division proved that it mailed the notices to petitioners on January 27, 1989.

On exception, petitioners assert that the Division failed to meet its burden of showing when the notices were mailed. Petitioners assert that there is more here than a mere failure of the Postal Form 3877 to include a postmark and that, in fact, a review of the Form (Exhibit "F") shows that it is "completely blank" except for the mailing entries corresponding to petitioners' mailings. Petitioners assert that the affidavits and the attestations are not sufficient to allow the Division to meet the burden of showing that the notices were, in fact, mailed on January 27, 1989.

On exception, the Division asserts that petitioners have failed to show "good cause" for an extension of time to file an exception. On the merits, the Division asserts that the determination of the Administrative Law Judge is correct; specifically, that the hearing record contains credible evidence establishing that the notices at issue were mailed on January 27, 1989. In its brief on exception, the Division, relying on 20 NYCRR 3000.10(d)(2), "makes a motion to substitute for the copies of the certified mailing record the original certified mailing record as redacted" (Division's brief on exception, p. 12).

We reverse the determination of the Administrative Law Judge. Initially, we deal with and deny the Division's motion in its brief to substitute for the copies of the certified mailing record the original certified mailing record as redacted. First, our regulations allow substitution of copies for originals, not originals for copies. The regulations do not relate to post-hearing substitution of originals for copies. Moreover, the issue of the incompleteness of Form 3877 by petitioners was raised at hearing (Tr., p. 44) and should have been responded to by the Division at that point. There was no response.⁴ Further, it seems apparent that the reason for the

⁴In response to petitioners' objection to the admission of Postal Form 3877 because it was incomplete, the Administrative Law Judge stated: "I'll note the missing information for the record and your objection to its admission, but I will accept it in evidence and accord it weight according to or in light of those admissions. Anything further . . ." (Tr., p. 44). The parties then proceeded to summation.

substitution request is that the original of Form 3877 may include information not on the copy. If that is the case, it would constitute new evidence. This Tribunal has made it clear that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons, we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991; Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988).

We also find, based on our examination of the record, that petitioners had "good cause" to ask for an extension of time to file an exception.

With regard to the substantive issue, we find that the Division has not met its burden of proving that the notices were mailed on January 27, 1989. First, petitioners are correct that, except for the mailing entries corresponding to petitioners' mailings, the Form 3877 is completely blank. Specifically, there is no postmark; the signature box for the "Postmaster, per the name of the receiving employee" is blank; the box indicating the total number of pieces of mail listed by the sender, i.e., the Division, is blank; the box indicating the total number of pieces received at the post office is blank; the check box indicating the type of mail service desired, i.e., registered, insured, COD, Certified or Express, is not filled in; and the box indicating whether the sender wants or does not want postal insurance is not checked. In short, there is no evidence from the Postal Service that it received the documents for mailing.

Second, we find the documentary evidence submitted by the Division insufficient to overcome this incomplete Form 3877 and to prove the Division delivered the notice to the Post

Office for mailing. The attestation of Mr. Brennan, which is on the reverse side of the Division's own Mailing Record (form Au-372.1), states only that: "[o]n January 27, 19__, I deposited in a branch of the United States Post Office of Albany, New York all notices described above, all enclosed in sealed postpaid envelopes" (Exhibit "F").

Mr. Lafar's affidavit states, in pertinent part, at paragraphs "7" and "8":

"7. Attached hereto and marked Exhibit 'A' is the CMR for the DOAB indicating the mailing by certified mail Notices of Determination to Air Flex Custom Furniture, Inc., 361 Rockaway Avenue, Valley Stream, NY and to Emil Zambardi, Officer of Air Flex Custom Furniture, Inc., 100-127 Baker Court, Island Park, New York, on January 27, 1989. Portions of the CMR have been redacted to protect the confidentiality of other taxpayers served with Notices of Determination on the same date.

"8. Based upon review of the CMR (Exhibit 'A') and my personal knowledge of the operations and procedures of the Mail and Supply Section and the mailing practices of the DOAB, I have concluded that the Notices of Determination were properly sent by certified mail to Air Flex Custom Furniture, Inc., 361 Rockaway Avenue, Valley Stream, New York and to Emil Zambardi, Officer of Air Flex Custom Furniture, Inc., 100-127 Baker Court, Island Park, New York on January 27, 1989."

Taken as a whole, these documents do nothing more than restate the Division's procedures and iterate the Division's position that the documents were mailed on January 27, 1989. They do not, in any way, overcome the failure of the Division to prove by other evidence that, in fact, the postal service received the documents for mailing (see, e.g., Coleman v. Commissioner, supra [where the IRS alleged an October 31 mailing date for the notices at issue which were listed on a partially completed Form 3877, the fact that the IRS was able to show that contiguous Forms 3877 were properly completed and were stapled to the Form 3877 at issue, and that other notices on the completed forms were actually delivered on November 1, strongly suggested an October 31 mailing for the notices at issue and constituted evidence sufficient to allow the IRS to meet its burden of proof]; Wheat v. Commissioner, supra [where the partially completed Form 3624, a form equivalent to the Form 3877, bore the post office date stamp with the mailing date at issue]; c.f., Matter of Clark, Tax Appeals Tribunal, June 18, 1992; Matter of Katz, supra [where we found an alleged certified mailing record insufficient because it was impossible to tie together several sheets offered by the Division]). There is no

such direct corroborative evidence here. We conclude that the statements, standing alone, do not provide direct evidence that the notices were mailed on January 27, 1989.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Air Flex Custom Furniture, Inc. and Emil Zambardi, as Officer is granted; and
2. The determination on remand of the Administrative Law Judge is reversed and the matter is remanded for a Conciliation Conference.

DATED: Troy, New York
November 25, 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