

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 of the Administrative Law Judge issued on January 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).

Petitioners did not submit a brief on exception. The Division of Taxation filed a brief in opposition. Neither party requested oral argument.

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

ISSUE

Whether petitioners timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1" and "4" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify the first paragraph of the Administrative Law Judge's finding of fact "1" to read as follows:

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 demand 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 demand 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:¹

<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:

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The first paragraph of the Administrative Law Judge's finding of fact "1" read as follows:

"On January 27, 1989, the Division of Taxation properly issued and mailed 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 sent by certified mail 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 Custom Furniture, Inc. were sent by certified mail to his home address at 100-127 Baker Court, Island Park, New York 11518. The notices sent to Air Flex Custom Furniture, Inc. set forth the following:"

We modify this finding of fact to delete the findings that the notices of determination were properly mailed by certified mail to petitioners on January 27, 1989.

<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).

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, Air Flex's 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'."

We modify finding of fact "4" to read as follows:

Petitioner's representative, Mr. Grosso, did not file another request for conciliation conference until May 12, 1989.²

The Administrative Law Judge's finding of fact "4" read as follows:

"As stated above in finding of fact "1", the notices of determination and demands for payment of sales and use taxes due were issued to petitioners herein on January 27, 1989. However, petitioner's representative, Mr. Grosso, did not file another request for

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

conciliation conference until May 12, 1989."

We modify this fact to delete the reference made to finding of fact "1."

issue of timeliness and indicating that petitioners had not requested a conciliation conference or a hearing in a timely manner.

OPINION

In his determination below, the Administrative Law Judge concluded that petitioners failed to file a timely request for a conciliation conference and the dismissal of their request by the Bureau of Conciliation and Mediation Services (hereinafter "BCMS") was proper. Since the Administrative Law Judge determined that petitioners failed to challenge the assessments within 90 days, he dismissed the petitions as untimely.

On exception, petitioners argue that they did not know that their request for a conciliation conference was premature. Petitioners contend that because the letter, stating that their request was premature, was sent to their representative, and not to petitioners, they were deprived of an opportunity to respond in a timely manner. Petitioners claim that "had Mr. Zambardi known of this 1/12/89 letter he would have instructed Mr. Grosso, CPA, the representative to refile the conciliation request" (Petitioners' exception). Further, petitioners allege that they were never notified of their rights of protest, either in writing or orally, by the Division of Taxation (hereinafter the "Division").

In response, the Division argues that the Administrative Law Judge correctly concluded that the Division issued the notices to petitioners at their last known address. The Division contends that, as a matter of fact, each notice issued to petitioners contained a statement, in conspicuous bold-type, that advised petitioners of their right to apply for a hearing within 90 days of the issuance of said notices. Therefore, this evidence, along with the fact that a request was filed on May 12, 1989, apparently with all notices attached to such request, proves that the Division issued, and petitioners received, the notices at issue herein.

Secondly, the Division disputes the petitioners' contention that the Division deprived petitioners of an opportunity to timely file protest applications by failing to send a copy of the notification of premature filing letter it sent to Mr. Grosso. The Division points out that with respect to Mr. Zambardi individually, the record does not show that there was a premature

request made for a conciliation conference or a 30-day letter sent on his behalf. Rather, the premature request for a conciliation conference was made on behalf of the corporation. Therefore, the Division argues that notification to Mr. Grosso on behalf of the corporation, regarding a request filed on behalf of the corporation, could not have possibly deprived Mr. Zambardi individually, of the opportunity to timely protest.

Furthermore, the Division argues that with respect to the corporation, Mr. Zambardi executed a power of attorney appointing Mr. Grosso as its representative. The Division argues that the executed power of attorney evidences a principal-agent relationship between the corporation and Mr. Grosso. Therefore, the Division contends that, as a matter of law, the notifications contained in the 30-day letters, and the BCMS notification of premature filing letter which were given to Mr. Grosso, as agent, is imputed to the principal. Moreover, the Division alleges that, unlike with the statutory notices at issue herein, the 30-day letters and notification of premature filing letter of January 12, 1989, are governed by no statutory or regulatory provision which requires the Division to mail such items to the corporation directly rather than to a duly appointed representative. The Division contends that out of courtesy it wrote to the corporation's representative providing him with the 30-day letters and notification of premature filing letter.

We remand this case to the Administrative Law Judge with instructions to make a written determination with respect to the mailing evidence submitted by the Division to establish the date that the notices of determination were issued.

At hearing, petitioners' representative objected to the mailing evidence and stated that the Postal Service form 3877 offered by the Division was blank. Upon our review of the evidence, it appears that except for petitioners' names and addresses, the form is incomplete. The form does not contain any postmark or the signature of the post office employee that received the mail. Yet, the affidavit of Michael Sampone submitted by the Division indicates that the Postal Service form 3877 (the Certified Mailing Record) establishes the date of mailing by the postmark on it. Specifically, in paragraph 8 of the Sampone affidavit, it states that:

"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."

Although petitioners' representative raised this issue at hearing (Tr., p. 44), there was no discussion of this issue in the determination made by the Administrative Law Judge. However, in finding of fact "1," the Administrative Law Judge found that the notices of determination and demand for payment were properly issued and mailed. Therefore, based on the existing record, we direct the Administrative Law Judge to refind the facts with respect to the mailing evidence and, in a written opinion, to resolve the apparent contradiction between the affidavit of Michael Sampone and the Postal Service form 3877.

We have remanded this matter for a written opinion of the Administrative Law Judge rather than addressing the issue ourselves because the remand will allow the issue to be fully developed through the two stages of our tax appeals process. If the matter returns for our review, we will have the benefit of the Administrative Law Judge's analysis as well as the parties' responses to the Administrative Law Judge and to each other. Although we believe it is important to allow the two stage process to perform this function, we are also concerned that the remand will delay the resolution of this case. To limit the delay, we request that the Administrative Law Judge issue his determination on this issue within 30 days of the date of this decision without the submission of further briefs by the parties. The parties will have ample opportunity to brief the issues if an exception is taken to the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that this case be remanded so that the Administrative Law Judge can address the issues raised in the discussion herein. Such determination shall be issued within 30 days from the date of this decision.

DATED: Troy, New York
September 12, 1991

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

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

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