STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHARBRU RESTAURANT, INC.	:	DECISION DTA No. 807524
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 September 1, 1982 through November 30, 1985.	:	

Petitioner Charbru Restaurant, Inc., 1902 Jericho Turnpike, New Hyde Park, New York 11040, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on February 28, 1991. Petitioner appeared by Bee and Eisman (Peter A. Bee, Esq. and Mitchell P. Klein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

On April 3, 1991 and April 12, 1991, the Tax Appeals Tribunal issued Notices of Intent to Dismiss Exception to petitioner and the Division of Taxation, respectively, informing the parties that it appeared that the Tax Appeals Tribunal did not have jurisdiction to entertain the exception because all of the issues contained in the petition were not finally resolved by the determination of the Administrative Law Judge. Both petitioner and the Division of Taxation filed responses to the Notices. On its own motion, after due consideration of the exceptions filed, the Notices issued, the responses of the parties, and the record, the Tax Appeals Tribunal withdrew both Notices of Intent.

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in support of its exception. Petitioner filed a reply brief to the Division of Taxation's letter. Oral argument, requested by both parties, was heard on November 12, 1992. Petitioner's brief in reply to the Division of Taxation's letter brief was received on January 4, 1993 and began the Tax Appeals Tribunal's six-month time period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation properly mailed a Notice of Determination to petitioner, having obtained petitioner's address from a Notification of Sale, Transfer or Assignment in Bulk.

II. Whether petitioner timely filed a petition for an administrative hearing to contest the sales and use tax deficiency assessed by the Division of Taxation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Charbru Restaurant, Inc. (hereinafter "Charbru"), formed in 1982, operated an Italian-American restaurant at 2235 Jericho Turnpike in New Hyde Park, New York, from that time until July 1986. In an effort to expand petitioner's business, Charles Nolan, president of petitioner, sought to acquire the assets of another restaurant located in the same area. On or about October 11, 1985, a bulk sale transaction occurred between the seller, Nesnick Inc.,[1] and Charbru Restaurant, Inc., as purchaser. The location of the property purchased by Charbru was 1902 Jericho Turnpike, also in New Hyde Park.

The Division of Taxation (hereinafter the "Division") submitted into evidence Form AU-196.10, Notification of Sale, Transfer, or Assignment in Bulk. Although the form appears to have been completed on October 11, 1985, it was not submitted to the Sales Tax Section of the Central Office Audit Bureau until February 1986. The form was accompanied by a letter from Joseph C. Bondi, Esq., the escrow agent for the bulk sale transaction. His correspondence, dated February 11, 1986, was stamped by the Department of Taxation and Finance, Central Office Audit Bureau, as received on February 19, 1986. Enclosed with the letter and the bulk

[1]The seller corporation named on the bulk sale form is "Nesnick Inc."; however, in the hearing transcript this corporation is frequently referred to as "Nestnick Inc." The reference is to the same seller.

sale form was a personal check from Charles and Barbara Nolan in the sum of $1,650.00 for the bulk sales tax due in the transaction between Nesnick and Charbru.

The bulk sale notification form filed with the Division requests various information of the purchaser, seller, and escrow agent, if one is used. The purchaser's mailing address was listed as Charbru Restaurant, Inc., c/o Arthur Goldberg, Esq., 55 Northern Boulevard, Greenvale, New York 11548. The seller's mailing address was listed as Nesnick Inc., 1902 Jericho Turnpike, New Hyde Park, New York 11040. The escrow agent was Joseph C. Bondi, Esq. with a mailing address of 1619 Jericho Turnpike, New Hyde Park, New York 11040.

The second portion of the bulk sale form requests vendor information including information with respect to the purchaser and the seller. As completed, the purchaser's name in the vendor identification section was Charbru Restaurant, Inc. with a business or trade name listed as the same. The next request is for the business location and it was indicated that the business location was 55 Northern Boulevard, Greenvale, New York 11548. With respect to the seller, the seller's name and business or trade name, were listed as Nesnick Inc. and the business location was stated to be 1902 Jericho Turnpike, New Hyde Park, New York 11040. There was an indication in the details of sale that the location of property when transferred was 1902 Jericho Turnpike, New Hyde Park, and the type of business or property sold was a restaurant/diner.

Mr. Nolan by his testimony indicated that it was his intention to expand his restaurant business to a new and larger location. Although he purchased the property located at 1902 Jericho Turnpike in October 1985, it was not until approximately July 1986 that he relocated his restaurant operations to 1902 Jericho Turnpike. His testimony indicates, however, that he did not commence a new business operation with respect to a name change or identification number change, nor did he give taxing authorities any indication that the business was any different from the operation at 2235 Jericho Turnpike.

On March 20, 1986, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $107,570.15 for the period September 1, 1982 through November 30, 1985, plus penalty and interest in the amount of $20,467.55 and $20,493.28, respectively, for a total amount due of $148,530.98. The notice was issued to Charbru Rest, Inc. c/o Arthur Goldberg, Esq., 55 Northern Boulevard, Greenvale, New York, with the following explanation:

> "The following taxes are determined to be due from Nestnick, Inc. and represents your liability as purchaser, in accordance with section 1141(c) of the Tax Law."

The notice of determination was later revised as to the total amount reflecting an increase only in the penalty amount of $300.00 for a new total amount due of $148,830.98. The revised notice also bore the date of March 20, 1986, and was addressed to Charbru c/o Mr. Goldberg as was the first notice.

The Division had conducted a sales tax audit of Nesnick, Inc., for periods prior to the date of the bulk sale to petitioner. The Division asserts that the seller failed to maintain and make available adequate books and records from which a detailed audit could be conducted and tax computed. The Division thus estimated the seller corporation's sales tax liability for the period in question.

A tax auditor from the Mineola District Office, Camille Mulė, was assigned the Nesnick sales tax audit case. Ms. Mulė was questioned on the record as to whether she had any pertinent conversations with Joseph Bondi, the escrow agent for the bulk sale transaction between Nesnick and Charbru. Ms. Mulė referred to her field log on March 10, 1986, and it indicated that she had gone to the Post Office in an attempt to locate the seller, only to find no forwarding address for Nesnick, Inc. She then proceeded to the address where Nesnick previously operated (1902 Jericho) and spoke to construction workers who told her that "a man named Nolan purchased the property a couple of months ago" and that he had a bar close by. She then went to the bar and spoke with Mrs. Nolan who told her they had purchased the land and buildings from the landlord of Nesnick. Mrs. Nolan indicated that Nesnick's attorney was Mr. Bondi and

that the Nolan's attorney was Mr. Goldberg. Ms. Mulė could not recall the exact location of her conversation with Mrs. Nolan, but was aware that it was a bar a couple of blocks from the Nesnick address. Ms. Mulė's log indicated that she later spoke to Mr. Bondi and he told her that "the owner of Nesnick disappeared and owes a lot of money."

The first notice of determination mailed to Charbru pertaining to sales tax owed by Nesnick, dated March 20, 1986, was mailed by certified mail, return receipt requested, to Arthur Goldberg, showing a delivery date of March 21, 1986. The second notice merely reflecting the correction of a mathematical error was also mailed by certified mail, return receipt requested, and showed a date of delivery of June 24, 1986. Both receipts were submitted into evidence. Although a signature appeared on each of the receipted cards indicating delivery, Ms. Mulė could not verify who accepted delivery of the respective notices. In fact, Ms. Mulė, when questioned, indicated that, if she had reviewed sales tax returns and found a different address for Charbru than that shown on the notification of bulk sale, she probably would have sent an assessment to each address. Ms. Mulė testified that both notices were sent to the address she obtained from the bulk sale notice form which indicated that Charbru had a mailing address in care of Arthur Goldberg at 55 Northern Boulevard, Greenvale, New York 11548. Although Ms. Mulė visited the business location of Charbru at 2235 Jericho Turnpike, and spoke to Mrs. Nolan, who admitted purchasing the Nesnick building and assets, Ms. Mulė testified that she was unaware that the operation at 2235 Jericho Turnpike was in fact Charbru Restaurant, Inc. She further testified that although she would be able to determine whether or not Charbru Restaurant had filed sales tax returns if it was a Nassau County-based enterprise, she did not pursue the records to determine if prior sales tax returns had been filed by Charbru.

About a year after petitioner moved its business location from 2235 Jericho Turnpike to 1902 Jericho Turnpike, it was visited by a sales tax agent by the name of Mr. Buckrou regarding sales taxes owed during periods when it operated at 2235 Jericho Turnpike. Mr. Nolan admitted he had fallen behind in some of his tax payments, and he and Mr. Buckrou set up time payments.

Mr. Nolan further testified that near the end of 1987, another auditor, Mr. Wright, assumed responsibility for the Charbru Restaurant tax case. Mr. Wright indicated that he had seen something in the computer file indicating that Mr. Nolan had some other tax problem. Mr. Wright agreed to look into it. Having done so, he indicated that there was a Port Washington address in reference to the other tax problem and that "it had to be a computer mistake", not to worry about it. Several months later Mr. Nolan had an additional conversation with Mr. Wright indicating that there was a computer entry with Mr. Nolan's name on it, again with a Port Washington address. Mr. Nolan testified that he never had a business location in Port Washington. However, Mr. Wright assured him there was some problem and had no idea why he was never notified. Mr. Nolan requested an appointment with Mr. Wright to discuss the problem and promptly contacted both his accountant and a former attorney, Mike Balboni. Mr. Balboni assisted Mr. Nolan in immediately filing a petition with the Division of Tax Appeals on November 2, 1989. The case was later referred to Peter Bee, petitioner's present attorney.

Mr. Nolan testified unequivocally that he never received either of the notices of determination issued on March 20, 1986 until his present attorney, Peter Bee brought them to his attention. Mr. Nolan stated that Mr. Goldberg never informed him that there was a sales tax proceeding, but indicated, approximately a month before petitioner moved its business location in July 1986, only that he would no longer represent petitioner. Presumably, this was several months after Mr. Goldberg had already received the notices of determination. Mr. Nolan indicated that his relationship with Mr. Goldberg became strained with respect to obtaining a license from the State Liquor Authority, and that as a result of arguments between the parties, Mr. Goldberg decided to no longer represent petitioner.

OPINION

The Administrative Law Judge determined that the Division complied with the requirements of section 1147(a)(1) of the Tax Law when it mailed the Notice of Determination to petitioner at the address set forth on the Notification of Sale, Transfer or Assignment in Bulk (hereinafter "the notice of bulk sale"). Thus, the Administrative Law Judge concluded that the Notice of Determination had been properly mailed. The Administrative Law Judge also found that petitioner had successfully rebutted the presumption of receipt of the notice, determined that petitioner's petition was timely, and directed that the matter be scheduled for a hearing on the merits.

In its exception, petitioner asserts that the address set forth on the notice of bulk sale is not the proper address to be used because of the language of Tax Law § 1147(a)(1), which requires that a Notice of Determination be sent to the address set forth on the last sales tax return filed, the address used in any application made, or such address as may be obtainable when no prior returns or applications have been filed or made. Petitioner contends that the notice of bulk sale is not an application and that it was, therefore, improper to use that address for the issuance of a Notice of Determination. Petitioner relies on the determination of the Administrative Law Judge concerning the timeliness of its petition.

In its exception, the Division contends that it was proper to send the Notice of Determination to the address set forth on the notice of bulk sale. The Division asserts that, if petitioner wanted any assessments related to the bulk sale to be sent to an address other than that set forth on the notice of bulk sale, it was incumbent upon petitioner to designate the other address on the form since, according to the Division, the address on the notice of bulk sale was the "best" address available to the auditor (Division's letter brief on exception, p. 3).

The Division asserts that the notice of bulk sale was the last document received by the Division before the mailing of the assessment, and that this document constitutes a tax return because (i) it contains information concerning the bulk sale and the value of the tangible

personal property being transferred, and (ii) the tax required to be paid on the property being transferred is to be remitted with the filing of the form.

The Division also argues that Matter of Ruggerite, Inc. v. State Tax Commn. (97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517) is inapplicable because Ruggerite addresses the scenario where there is no proof of receipt of the notice, while in this case there is proof that the notice was received at the address to which it was sent. The Division argues (i) that this proof of receipt is conclusive evidence that petitioner actually or constructively received the notice at issue; (ii) that the Administrative Law Judge's conclusion that the notices were intercepted by petitioner's former attorney is incorrect because (a) the address was given as petitioner's address, not as the address of petitioner's representative and (b) the attorney still represented petitioner at the time the notices were mailed; (iii) that the fact that petitioner claims nonreceipt and that the time to file a petition has not begun to run is rejected by State and Federal case law (citing Matter of American Cars 'R' Us v. Chu, 147 AD2d 797, 537 NYS2d 672 and Houghton v. Commissioner, 48 TC 656); and (iv) that, alternatively, the address listed on the notice of bulk sale was that of petitioner's agent and agency principles require that receipt by an agent be treated as receipt by the principal.

Finally, the Division argues that, even if it is found that petitioner successfully rebutted the presumption of receipt, petitioner has still not shown by clear and convincing evidence that the petition was filed within 90 days of when petitioner became aware of the assessment.

In its reply brief, petitioner asserts that the Division failed to use due diligence when determining petitioner's last known address (citing Powell v. Commissioner, 958 F2d 53, 92-1 USTC ¶ 50,147, cert denied ___ US ___, 113 S Ct 440). Further, petitioner argues that the notice of bulk sale does not constitute a "return filed" or "application made" under Tax Law § 1147(a)(1). Finally, petitioner contends that it has successfully rebutted the presumption of receipt of the notice.

The first issue before us is whether we should decide these exceptions on the merits or dismiss them as premature. Although the determination of the Administrative Law Judge did not finally resolve all matters and issues contained in the petition (see, 20 NYCRR 3000.5[a][5]), we have decided to exercise our discretion and entertain the exceptions filed by the parties because the Administrative Law Judge's determination was issued after a full hearing was held on the timeliness question. As a substantial amount of time has already been devoted by the parties and the Administrative Law Judge to develop and decide this issue, we conclude that the interests of judicial economy are best served by deciding the issues raised in the exceptions at this time. We have the discretion to decide these exceptions because they are not ones over which the statute denies our subject matter jurisdiction (see, e.g., Tax Law §§ 2006[5][ii] and 2006[7]).

Next we address whether the Division complied with the mailing instructions set forth at section 1147(a)(1) of the Tax Law.[2]

We reverse the determination of the Administrative Law Judge.

Tax Law § 1147(a)(1) states:

> "[a]ny notice authorized or required under the provisions of [Article 28] 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 [it is] 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]).

The address used by the Division in the present case was the address set forth on the notice of bulk sale. Petitioner argues that this was improper, stating that the statute requires the

---

[2] In Matter of Karolight, Ltd. (Tax Appeals Tribunal, February 8, 1990), we referred to these mailing instructions as requiring a mailing to the "last known address." We intended this designation only as a shorthand method of referring to the requirements of section 1147(a)(1), not, as apparently interpreted by the Administrative Law Judge in this case (see, Determination, p. 9), as a substitute for the specific requirements of such section.

Division first to look to the last return filed. The Division argues that the bulk sale notice was a return.

Neither the Division nor petitioner has directed us to any authority defining what a "return" is to support their respective contentions.[3] From our own investigation, we conclude that whether the notice of bulk sale was a return within the meaning of section 1147(a)(1) should be determined based on whether the document functioned as a return, and not, as petitioner contends, on whether the document was denominated a return on its face (see, Florsheim Bros. Drygoods Co. v. United States, 280 US 453, 2 USTC ¶ 485). The notice of bulk sale provided the Division with, among other things (see, Matter of WIXT-TV, Inc., Tax Appeals Tribunal, August 2, 1990), the data necessary to determine the amount of petitioner's potential liability under section 1141(c). The notice also began the 90-day period of limitations for the Division to assess this liability. These are functions of a return (see, Florsheim Bros. Drygoods Co. v. United States, supra).

If the bulk sale notice was not a return, then we would conclude that it was an application within the meaning of section 1147(a)(1) of the Tax Law. The pertinent portion of the ordinary, everyday definition (see, Matter of Leisure Vue v. Commissioner of Taxation & Fin., 172 AD2d 872, 568 NYS2d 175) of "application" is an "appeal, request, petition" (Merriam-Webster New International Dictionary 105 [3d ed 1986]). In our view, the bulk sale notice is a request by the purchaser to the Division for a statement, within 90 days, of the amount of the Division's claim against the seller (see, Tax Law § 1141[c]; see also, 20 NYCRR 537.6[c]).

Our conclusion that the bulk sale notice is a return or an application as these terms are used in section 1147(a)(1) of the Tax Law is supported by the fact that this conclusion results in

---

[3]In support of its argument that the bulk sale notice is a return, the Division states that the tax that is to be paid on any tangible personal property being transferred in the bulk sale is to accompany the filing of the form itself (Division's brief on exception, p. 5). Again, the Division does not cite any authority for this statement. Even more surprising, is the fact that this statement is contradicted by the Division's regulations which provide that the purchaser may pay any tax within 20 days after the sale (20 NYCRR 537.3[e]). The Division's statement is also fundamentally illogical. The bulk sale notice is required to be made 10 days prior to the transfer (Tax Law § 1141[c]). Thus, if the purchaser was required to pay the tax with the bulk sale notice, the tax would be due prior to the sale, i.e., the taxable event (Tax Law § 1105[a]).

a reasonable interpretation of the mailing provisions. To follow petitioner's reasoning would mean that the address given on the bulk sale notice by the purchaser, specifically with regard to the transfer in bulk, would have to be disregarded by the Division, in favor of older information on documents not necessarily related to the bulk sale.

For all of the above reasons, we conclude that the Division complied with the requirements of section 1147(a)(1) by mailing the Notice of Determination to petitioner at the address listed as its mailing address on the notice of bulk sale.

Since we have determined that the notice was mailed to the proper address, the next issue concerns receipt of the notice. Initially, we note that rebutting the presumption of receipt of a notice is relevant only in a situation where receipt has not been proven; the present facts are distinguishable (cf., Matter of Ruggerite, Inc. v. State Tax Commn., supra [where uncontroverted proof existed that the notice had not been received]).

In this case, the notice of bulk sale designates the mailing address of the purchaser, petitioner, as "CHARBRU RESTAURANT, INC., c/o Arthur Goldberg, Esq., 55 Northern Blvd., Greenvale, NY 11548" (Exhibit "J"). Both the Notice of Determination and the revised Notice of Determination sent to the 55 Northern Blvd. address were accepted, as evinced by the PS Form 3811 return receipts offered into evidence (Exhibits "F" and "H"). The PS Form 3811 return receipts relating to the Notice of Determination and revised Notice of Determination were received by the Division on March 24, 1986 and June 26, 1986, respectively (Exhibits "F" and "H"). Charles Nolan, president of Charbru Restaurant, Inc., testified that Mr. Arthur Goldberg, his then-designated representative, had been his attorney up until July of 1986 (Hearing Tr., p. 50). Thus, both the Notice and revised Notice had been sent to petitioner's designated representative at the address set forth on the notice of bulk sale, and were received at that address (see, Matter of Mareno v. State of New York Tax Commn., 144 AD2d 114, 534 NYS2d 453, 454 [where the court held that the Division "could readily rely on the certified postal receipt as confirmation that petitioner received the Notice of Determination . . ."]).

Petitioner was aware of a significant change in the circumstances regarding its then-appointed representative, Mr. Goldberg, i.e., Mr. Goldberg dismissed petitioner as a client in May or June of 1986, yet there is no assertion that petitioner made any effort to notify the Division that the address set forth on the notice of bulk sale was no longer valid, nor is there an assertion that petitioner in any way attempted to contact the Division to present a new address for correspondence relating to the bulk sale.[4] Thus, based on the evidence presented, there was no reason for the Division to believe that any other action was necessary (Matter of Mareno v. State of New York Tax Commn., supra). Accordingly, we find that receipt of the notices has been demonstrated and that, therefore, rebuttal of the presumption of receipt is not possible.

Tax Law § 1138(a)(1) provides that a Notice of 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, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (Tax Law § 1138[a][1]).

Although the Division's evidence lacks proof of when the Notice was actually delivered to the United States Postal Service for mailing, the return receipts (PS Form 3811) relating to the notices have been offered (Exhibits "F" and "H"). These documents reveal that both the Notice of Determination and the revised Notice of Determination were received at the 55 Northern Blvd., Greenvale, NY address in 1986. Since petitioner's petition was received by the Division in 1989 (Exhibit "C"), it is obvious that the 90-day time period set out in section 1138 has not been met (see, Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992; Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

---

[4]20 NYCRR 537.2(e)(1) provides:

> "[a] purchaser who has previously filed a notice of sale with the Department of Taxation and Finance must file a revised notice with the department if any of the information which was required to be included in the original notice, in accordance with subdivision (d) of [20 NYCRR 537.2], changes, was incorrect or was not available at the time the original notice was filed" (20 NYCRR 537.2[e][l]).

1. The exception of Charbru Restaurant, Inc. is denied and the exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed; and

3. The petition of Charbru Restaurant, Inc. is dismissed.

DATED: Troy, New York
June 3, 1993

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

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

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