

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>STEVE AVLONITIS, OFFICER OF N.S.G.P. RESTAURANT, INC.</b>	:	DECISION DTA No. 807851
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, 1985 through November 30, 1987.	:	

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Petitioner Steve Avlonitis, Officer of N.S.G.P. Restaurant, Inc., 66 Sunset Avenue, Lynbrook, New York 11563 filed an exception to the determination of the Administrative Law Judge issued on August 22, 1991 with respect to 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 December 1, 1985 through November 30, 1987. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Neither party filed a brief on exception. Oral argument, at petitioner's request, was denied.

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

***ISSUE***

Whether the denial of petitioner's request for a conciliation conference was proper because the request was not timely made

***FINDINGS OF FACT***

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

The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 3, 1988 against petitioner, Steve Avlonitis, individually and as officer of N.S.G.P. Restaurant, Inc., asserting sales and use taxes due of \$155,208.39, plus penalty and interest, for the period December 1, 1984 through November 30, 1987.<sup>1</sup>

In September 1985, petitioner, who smoked two packs of cigarettes per day, became quite ill. Eventually, on July 20, 1987, he underwent a triple coronary artery bypass operation. Petitioner's ill health led him to sell his business on October 16, 1987.

Due to his ill health, petitioner relied upon his accountant, Andy A. Fradelakis,<sup>2</sup> to respond to the notice of determination dated February 3, 1988. It was not until December 3, 1988 that a request for conciliation conference was filed by Mr. Fradelakis on behalf of petitioner.

The Division of Taxation introduced into evidence the affidavit of Alton Plunkett, a tax auditor, who stated that he "caused to be prepared" the notice of determination at issue and a green U.S. Postal Service certified mail receipt card bearing petitioner's name and address.

Mr. Plunkett's affidavit further provided:

"On February 3, 1988, after proofreading the originals of the attached documents I placed a copy of the said notice in an envelope addressed to Mr. Avlonitis at 66 Sunset Avenue, Lynbrook, NY 11563 and attached the receipt card to the envelope and placed the envelope in the outgoing mail basket in my office for delivery to the Post Office.

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<sup>1</sup>The notice incorrectly designated the period at issue as commencing on February 28, 1985 and ending on October 30, 1987 at the top of the notice. However, in the body of the notice, it was explained that the first sales tax quarter at issue was the period ending February 28, 1985 and the last sales tax quarter at issue was the period ending November 30, 1987. "November" was typed in over a "whited-out" correction. It is not known who made this change or when the notice was so altered.

<sup>2</sup>Mr. Avlonitis' petition alleged that the notice of determination was received by him and a comparable notice was received by his co-owner, Peter Patsatsis. Petitioner's notice was "held by the Co-Shareowner's accountant, Nicholas Mastrogiovanni . . . and misplaced by him during the return of documents to the taxpayer." These allegations in the petition varied from Mr. Avlonitis' testimony which focused on his reliance upon his own accountant, Andy Fradelakis.

Thereafter and on or about February 8, 1988 the green receipt card was returned to me by the U.S. Postal Service and placed by me in the case file maintained in the District Office."

A photocopy of the green receipt card, Postal Service Form 3811, was introduced into evidence as an attachment to Mr. Plunkett's affidavit. It shows the signature of Susan Avlonitis, petitioner's wife, with a date of delivery of February 8, 1988.

### ***OPINION***

The Administrative Law Judge issued a determination dismissing petitioner's petition because petitioner's request for a conciliation conference was not timely made.

On exception, petitioner argues that, due to his illness and his reliance on his accountant and his partner to handle all business transactions, his lateness in filing a request for a conciliation conference should be excused.

The Division of Taxation (hereinafter the "Division") responds, on exception, that the determination of the Administrative Law Judge should be upheld.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1138(a)(1) reads, in pertinent part, as follows:

"[n]otice 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 ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing . . . ."

Tax Law § 1138(a)(1) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of determination of tax due. As an alternative to petitioning the Division of Tax Appeals for a hearing, the taxpayer "may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services" (20 NYCRR 4000.3[a]). Tax Law § 170(3-a) provides, in part, that the Bureau of Conciliation and Mediation Services (hereinafter the "BCMS") shall provide a conference at the option of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed" (Tax Law § 170[3-a]).

The filing of a written request, and one conformed copy, with the BCMS "susends the running of the period of limitations for the filing of a petition for a hearing" (20 NYCRR 4000.3[c]).

Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Magazine v. Commissioner, 89 TC 321). Therefore, before addressing the timeliness of petitioner's request for a conciliation conference, we will review the evidence relating to the issuance of the notice of determination by the Division. The Division's evidence consists of an affidavit by Alton Plunkett, an auditor in the Metropolitan District Office. In his affidavit, Mr. Plunkett states that he prepared the notice of determination in question and, on February 3, 1988, he placed it in an envelope addressed to Mr. Steve Avlonitis at 66 Sunset Avenue, Lynbrook, New York 11563, attached a green United States Postal Service certified mail receipt card bearing the name and address of Mr. Steve Avlonitis to the envelope and placed the envelope and the receipt card in the outgoing mail basket in his office for delivery to the post office. He further states that on or about February 8, 1988 the receipt card was returned to him by the United States Postal Service. However, there is no evidence of when the notice was actually delivered to the post office, e.g., a postmarked form 3800 or 3877.

While the Division's evidence, which lacks any direct proof of when the notice was delivered to the post office, may not be sufficient to prove the date of mailing of the notice (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991; see also, Magazine v. Commissioner, supra), the return receipt in this case indicates delivery was made of the notice of determination on February 8, 1988. Using the delivery date of February 8, 1988 to calculate the 90-day period, rather than the alleged mailing date of February 3, 1988, petitioner's request is still not timely. We find the matter before us distinguishable from Matter of Novar TV & Air

Conditioner Sales & Serv. (Tax Appeals Tribunal, May 23, 1991) because the facts in Novar do not indicate a date of delivery that would have rendered the petitions untimely.

In the matter before us, petitioner's request for a conciliation conference, using the February 8, 1988 delivery date to commence the 90-day period, was required to be filed by May 9, 1988. However, the request for a conciliation conference was not received until December 6, 1988, almost eight months later. Therefore, we find petitioner's request was not timely filed.

In addition, since this Tribunal is not empowered to waive the 90-day statutory time limit, we have no basis to consider the reasons for late filing that petitioner set forth in his exception. Therefore, in view of the above, we are without jurisdiction over this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Steve Avlonitis is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Steve Avlonitis is dismissed.

DATED: Troy, New York  
February 20, 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