

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BERGEN ASSOCIATES** : DECISION  
for Revision of a Determination or for Refund : DTA No. 810178  
of Tax on Gains Derived from Certain Real :  
Property Transfers under Article 31-B of the :  
Tax Law. :

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Petitioner Bergen Associates, 140 Remsen Street, Brooklyn, New York 11201 filed an exception to the determination of the Administrative Law Judge issued on July 23, 1992 with respect to its petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law. Petitioner appeared by Mervin J. Wolf, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "9" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On March 29, 1991, the Division of Taxation (hereinafter the "Division") issued two notices of determination to petitioner, Bergen Associates, for Real Property Gains Tax under article 31-B of the Tax Law. Each notice contained the following statements:

"YOU MUST complete the enclosed Payment Document whether you AGREE or DISAGREE with this NOTICE OF DETERMINATION.

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"IF YOU DISAGREE with the amount due, refer to the enclosed Notice of Taxpayer Rights to determine your options and complete the Disagreement With Findings Section. Attach a photocopy of all pages of this billing notice to the Payment Document.

"NOTE: You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 6/27/91.

\* \* \*

"If we do not receive a response to this notice by 06/27/91:

This notice will become finally and irrevocably fixed and subject to collection action."

Pursuant to State Administrative Procedure Act § 306(4) official notice is taken of the following facts: the Notice of Taxpayer Rights referred to in the notices of determination is a Division publication (TA-13), a copy of which was placed in evidence at this hearing. Generally, it advises taxpayers of the procedure to be followed to protest an action by the Department of Taxation and Finance. As relevant here, it advises taxpayers that a protest may be made by filing either a request for a conciliation conference or a petition for a hearing, and it provides instructions for doing so. The auditor provided petitioner with a copy of this document at the commencement of the audit.

As evidence of the fact and date of mailing of the notices of determination, the Division submitted an affidavit of Mary K. Randolph, Head Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the New York State Department of Taxation and Finance; a copy of a page of a certified mail record; and an affidavit of Denise Thurber, an employee of the District Office Real Property Transfer Gains Tax Unit of the Department of Taxation and Finance.

CARTS is the Department's computer system for generating, among other things, notices of determination to taxpayers with assessed gains tax deficiencies. Ms. Randolph's duties include supervising the mailing of notices of determination and maintaining certified mail records. Ms. Randolph explained the procedure by which notices are generated and issued. She indicated that:

"[a]fter reviewing [the notices of determination and the certified mail record], I am certain that the notices of determination which are the subject of this case were issued and mailed on March 29, 1991."

In her affidavit, Ms. Randolph explained the office practice regarding the mailing of notices of determination. The affidavit states that notices of determination generated by CARTS are predated with the anticipated date of mailing of the notice, and each notice is assigned a certified control number which is printed on the notice and on a certified mail record. Ms. Randolph states that in the regular course of business the Division does not request or retain return receipts from certified or registered mail.

According to Ms. Randolph, some notices of determination, including the ones in issue, are forwarded by CARTS to the Department's District Office Gains Tax Unit for review and mailing. When this procedure is followed, the certified mail record is returned to Ms. Randolph's office where it is maintained as a record of mailing. Ms. Randolph indicated that notices of determination are placed in envelopes and delivered to a United States Postal Service representative who "verifies that (s)he has received a properly addressed envelope for each name on the certified mail record and then affixes his or her signature and/or a U.S. Postmark to a page or pages of the certified mail record."

Attached to the affidavit of Mary K. Randolph, as Exhibit "A", is a copy of a page of a document headed: "New York State Department of Taxation and Finance / Assessments Receivable / Certified Record for Non-Presort Manual Mail", identified by Ms. Randolph as the certified mail record. Certain identifying information is printed at the top of the page. As pertinent here, there is a date which originally read "03/20/91"; however, the numerals "20" were crossed out and the numerals "29" were inserted by hand. Ms. Randolph's affidavit explains that the date of March 20, 1991 was the date that the certified mail record was printed and states:

"[t]he certified mail is printed approximately 10 days in advance of the anticipated date of mailing of the particular Notice so that there is sufficient lead time for the Notice(s) to be manually reviewed and processed for postage, etc. by the Department's Mechanical Section."

Also printed at the top of the certified mail record is the statement "Page : 4".

The statement "Mail Room. Return Listing to CARTS Control Unit" is stamped on the certified mail record. Only two pieces of certified mail are listed on the document. The certified mail numbers correspond to the numbers printed on the top of the notices of determination issued to petitioner. Also listed on the document are notice numbers corresponding to the notices of determination issued to petitioner and petitioner's name and address, 140 Remsen Street, Brooklyn, New York 11201-4211. The document indicates that "Total Pieces and Amounts Listed" is two. There is a blank space next to the statement: "Total Pieces Received at Post Office." There is a date stamp on the document, clearly showing the date "March 29, 1991." While the stamp appears to be a Postal Service stamp, there is no legible marking that unequivocally establishes this fact. Ms. Randolph indicates in her affidavit that the stamp is a United States postmark.

In her affidavit, Ms. Randolph states that the document submitted is the fourth page of an eight-page certified mail record. She also states:

"Since page 4 bears a United States postmark and all pages other than page 4 relate to other taxpayers whose names would have to be redacted to preserve confidentiality, only page 4 has been attached to this affidavit."

Denise Thurber is employed in the District Office Real Property Transfer Gains Tax Unit of the Department of Taxation and Finance, and her duties include the processing of notices of determination. According to her affidavit, she received the certified mail record bearing petitioner's name before it was postmarked by the United States Postal Service and "prepared the notices listed therein for mailing." As pertinent here, her affidavit states:

"I inserted the notices in window envelopes and placed them to be picked up by the Department's Mail Room staff and delivered to the United States Postal Service. The postmark on Exhibit A indicates that the Notices were accepted by the Postal Service on March 29, 1991."

The Division did not offer testimony or an affidavit from any member of the mailroom staff.

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

Petitioner's representative, Mr. Wolf, conceded that the notices of determination were received, although he could not remember whether he received them directly from the Division or petitioner received them and forwarded copies to Mr. Wolf. Mr. Wolf also conceded that petitioner did not file a request for a conciliation conference or petition for hearing until August 1991, more than 90 days from the alleged date of the mailing of the notices of determination. He stated that, based on a conversation with the auditor, he personally believed that it was not necessary for petitioner to file a request for a conciliation conference within 90 days of the mailing of the notices of determination.<sup>1</sup>

The Division issued notices of determination to petitioner following an audit conducted by Medhat Saad. On or about February 5, 1991, the Division issued to petitioner a Statement of Proposed Audit Adjustment, asserting additional real property transfer gains tax due of \$32,595.00. Mr. Wolf responded to this statement by letter to Mr. Saad dated February 22, 1991. In that letter, he stated that petitioner disagreed with the statement of proposed audit adjustments and provided the basis for petitioner's position that the transfers of real property were not subject to gains tax.

After receiving Mr. Wolf's letter, Mr. Saad reviewed additional information provided by petitioner. The Division then issued to petitioner a second Statement of Proposed Audit Adjustment, dated February 22, 1991, asserting tax due of \$9,624.00. Mr. Wolf responded with a letter to Mr. Saad, dated February 28, 1991, which was identical to the earlier letter, dated February 22, 1991.

The letters to addressed to Mr. Saad state, inter alia:

- "1. We do not agree with your computation of construction period interest.
- "2. We do not agree with your computation of construction costs.
- "3. We do not agree that these properties should be aggregated and therefore would not be subject to the 'gains tax.'"

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We changed the second sentence of the Administrative Law Judge's finding of fact "9" to more accurately reflect the record. The sentence originally read: "Mr. Wolf also conceded that petitioner did not file a request for a conciliation conference or petition for hearing until August 1984, more than 90 days from the alleged date of the mailing of the notices of determination."

The letters then go on to state petitioner's legal and factual positions with regard to Mr. Saad's audit. The letters make no mention of either a conference or petition.

Mr. Wolf testified that he had a conversation with Mr. Saad that led him to believe that by sending the letters to Mr. Saad he had effectively protested the audit. The record contains contradictory evidence with regard to whether that conversation occurred before or after the issuance of the notices of determination. At one point, Mr. Wolf testified:

"I got a notice of determination, at which time I called Mr. Saad up and Mr. Saad said he had -- I asked him if he had the protest and he said yes, he had the protest and he was sending the case up to Albany and he was sending the protest with the case. That was my understanding of it, and I let it go at that." (Transcript at 11).

This testimony is in accord with a letter sent by Mr. Wolf to the Division's Problem Resolution Unit, stating: "Mr. Saad informed me that he would forward the protest with the file when he closed out the case at his end." In an affidavit, Mr. Saad confirmed that such a conversation took place, but he alleged that the conversation occurred after the audit was closed on March 4, 1991 and before the notices of determination were issued by the Division's Gains Tax Unit in Albany. Mr. Saad states in his affidavit:

"I informed Mr. Wolf that I had closed the case and sent it to Albany to be processed for Notices of Determination. I then told him that for the purposes of protesting our findings, he should wait for the Notices of Determination to arrive and then follow the instructions with the Notice of Determination as to how to formally protest the case. At no time did I tell Mr. Wolf, or say anything that would lead him to believe, that any letter sent to us in February 1991 protesting the Statements of Audit Adjustment would suffice as a protest to the Notices of Determination."

On July 12, 1991, the Division's Tax Compliance Bureau issued to petitioner two notices and demands for Payment of Tax Due, in the amounts of \$27,529.85 and \$9,959.22, respectively.

Petitioner requested a conciliation conference by mail on Form TA-9.1, dated August 21, 1991, and stamped received by the Division on August 26, 1991. The Form was signed by Mr. Wolf who provided the Division with the following explanation of the basis for petitioner's claim:

"We request a conciliation conference to question first the timely filing of our protest and also to the facts on which our protest is based. When we received

Mr. Saad's statement of proposed audit adjustments dated 2/22/91 we immediately answered it on 2/28/91. When we received notice on 3/29/91 I called Mr. Saad and he told me it was not necessary to protest again as he would send protest with the file. Please note that I responded immediately to notice of 2/22/91 & 7/21/91 and if necessary [sic] I also would have answered it. I only would have had to photocopy my original letter. I request a chance to present our case."

Under cross-examination by the Division's attorney, Mr. Wolf conceded that Mr. Saad never advised him not to file a request for a conciliation conference or a petition for a hearing.

By order dated October 25, 1991, the Division dismissed petitioner's request for a conciliation conference as untimely because the notices were issued on March 29, 1991, but the request was not received until August 26, 1991, or in excess of 90 days from the issuance of the notices.

By petition dated November 15, 1991, petitioner challenged the notices of determination on the ground that the transfers of real property are not subject to the gains tax and on other grounds originally set forth in Mr. Wolf's letters to Mr. Saad.

In its answer dated January 3, 1992, the Division requested that the petition be dismissed as untimely.

By letter dated February 18, 1992, the Calendar Clerk of the Division of Tax Appeals advised petitioner that the timeliness of the petition was a threshold matter to be resolved before a hearing would be held on the merits of the case.

### ***OPINION***

In the determination below, the Administrative Law Judge held that: 1) the Division established that the notices of determination were mailed to petitioner on March 29, 1991, thus commencing the 90-day period in which petitioner was required to request a conciliation conference but which petitioner concedes it did not do; 2) petitioner's expression of its disagreement with the tax assessments and its intention to protest the audit results to Mr. Wolf did not excuse petitioner's failure to file a request for hearing within this 90-day period; and 3) petitioner did not establish the elements necessary to find that the Division should be estopped from denying the timeliness of petitioner's request for a conciliation conference.

On exception, petitioner argues that the Division has not established that its customary mailing procedures were followed when mailing the notices of determination to petitioner. Thus, the Division failed to establish when the notices were mailed and, therefore, the request for a conciliation conference must be deemed timely filed. Specifically, petitioner argues that the Division failed to provide an affidavit of a person with personal knowledge that the notices were delivered to the post office, as well as a completed postal form 3877.

Petitioner also contends that the instructions printed on the Statements of Proposed Audit Adjustments imply that if the taxpayer disagrees with a proposed adjustment in a timely fashion, a notice of determination will not be issued to a taxpayer without further communication from the Division. Because the Division never responded to petitioner's letters of disagreement to the proposed audit adjustments, petitioner contends that it was entitled to believe that it would be given an opportunity to discuss the basis for its disagreement prior to the issuance of the notices of determination. Thus, it contends that the Division should be estopped from denying the timeliness of its petition.

In response, the Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

Because the Administrative Law Judge correctly and adequately dealt with the first of the two issues raised by petitioner on appeal, i.e., the timeliness issue, we will address only the second issue.

Petitioner argues, under the principle of estoppel, that its failure to timely request a conciliation conference or petition for a hearing after receiving the notices of deficiency was justified due to its reliance on the instructions contained on the Statements of Proposed Audit Adjustment. These instructions state, in part:

"[f]ailure to either agree or disagree with this Statement within 30 days from the date of this statement will result in the issuance of a Notice of Determination of Tax Due under the Real Property Transfer Gains Tax" (Exhibit "1").

Petitioner argues that the clear implication of this language is that "if a taxpayer disagrees with the proposed adjustment in a timely fashion, a notice of determination will not be issued

without further communication from the Division" (Exception, p. 1[b]). Because petitioner expressed its disagreement with the audit adjustments in two letters to the Division's auditor, Mr. Saad, it argues that the Division could not rightfully issue notices of determination without first responding to the documented reasons for its disagreement.

In order to determine whether estoppel should be invoked, three requirements must be met. The party seeking estoppel must show: that there was a right to rely on a representation, whether there was such reliance, and whether the reliance was to the detriment of the party who relied upon the representation (Matter of Harry's Exxon Serv. Sta., Tax Appeals Tribunal, December 6, 1988). Petitioner, in stating its belief that it was entitled to discuss the validity of the disputed tax with the Division, fails to recognize two keys facts: first, the letters petitioner sent to Mr. Saad failed to request either a conference or hearing; second, after these letters were sent, the notices of determination received by petitioner informed it that 1) it was necessary to file a request for a conciliation conference or hearing, and 2) failure to respond to the notices within 90 days would result in the notices becoming "finally and irrevocably fixed and subject to collection action." In light of these clear instructions and petitioner's failure to make any request for a conference or hearing in its prior letters, we hold that petitioner had no right to rely on the earlier instructions contained in the Statements of Audit Adjustment (cf., Matter of Eastern Tier Carrier Corp., Tax Appeals Tribunal, December 6, 1990 [where the petitioner sent a letter to the auditor requesting a conference and was advised in writing that a conference would be held after the notices of determination were issued, the Division was estopped from denying the timeliness of the petitioner's request]). Because petitioner did not file a request for a conciliation conference or petition for a hearing within 90 days of the mailing of the notices of determination, we are without jurisdiction to address the merits of this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bergen Associates is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Bergen Associates is dismissed.

DATED: Troy, New York  
January 21, 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