

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
IRA HAYES FUCHS	:	DECISION
	:	DTA No. 812323
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 March 1, 1983 through February 28, 1986.	:	

Petitioner Ira Hayes Fuchs, 395 South End Avenue, New York, New York 10280, filed an exception to the determination of the Administrative Law Judge issued on August 18, 1994. Petitioner appeared by Jerome R. Rosenberg, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

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

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioner's request for conciliation conference was properly dismissed as late filed.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner, Ira Fuchs, as officer of Micro Installations Inc., two notices of determination and demands for payment of sales and use taxes due dated September 11, 1986 assessing, respectively, sales and use taxes due for the period March 1, 1983 through February 28, 1986 in the amount of \$78,311.85, plus penalty and

interest, and additional penalty due for the period June 1, 1985 through February 28, 1986 in the amount of \$5,022.11.

On August 5, 1993, petitioner mailed a request for conciliation conference to the Bureau of Conciliation and Mediation Services ("BCMS"). The request recites the date of notice/assessment as May 17, 1993, the same date as the attached consolidated statement of tax liabilities which sets forth the sales tax at issue.

The conciliation conferee issued an order on October 1, 1993 dismissing petitioner's request as late filed.

Petitioner filed a petition with the Division of Tax Appeals, dated October 25, 1993, challenging the entire assessment on the grounds that: petitioner did not receive proper notice of the alleged tax deficiency; most of the company's computer systems were sold outside of New York; and the assessment was arbitrary in that there was no prior sales tax examination and thus no basis for the assessment. Attached to the petition was the first page of the aforementioned consolidated statement of tax liabilities.

On May 24, 1994, the Division brought a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notices of determination, as required by Tax Law §§ 170(3-a) and 1138(a)(1).

In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of William C. Riddervold, Daniel B. LaFar and Charles Brennan, employees of the Division; copies of the two notices of determination issued to petitioner; a copy of the certified mail record containing a list of notices allegedly issued by the Division on September 11, 1986; and a copy of the envelope which contained petitioner's request for conciliation conference and the face page of such request.

The affidavit of William C. Riddervold, Program Manager for the Division's Sales Tax Field Audit Management Division, sets forth the Division's general procedure for the

preparation and mailing of notices of determination to taxpayers. Mr. Riddervold explains that such notices were always sent by certified mail and receipts were not requested. A certified mail record (PS Form 3877 and AU-372.1) was prepared by a keyboard specialist in the regular course of business. The certified mail record lists those taxpayers to whom notices were mailed and the certified control number assigned to each notice or group of notices. The affidavit also states that certified control number P-28432 was assigned to the notices issued to petitioner (notice numbers S860911139C and S860911142C).

In addition, the affidavit explains that, as a part of his or her regular duties, a member of the Sales Tax Field Audit Management staff verified the names and addresses on envelopes containing the notices of determination against the certified mail record and assigned a sequential certified control number to each envelope. Each number was then recorded on the certified mail record, and all notices identified on the mail record of September 11, 1986 were delivered to the Mail and Supply Section of the Department of Taxation and Finance. The staff member then signed the back of Form AU-372.1, attesting to the delivery of the notices to the mail room.

After the notices were accepted by the United States Postal Service, the mail room returned a postmarked copy of the certified mail record to the Sales Tax Field Office Management Office, with the attestation of Mail and Supply Section employees that the notices were properly deposited in a branch of the United States Postal Service.

Mr. Riddervold concludes that, based on copies of the two notices of determination issued to petitioner and the certified mail record for September 11, 1986, such notices were properly sent to petitioner by certified mail. To the best of his knowledge, neither of these notices was ever returned to the Division as undelivered or refused.

The mailing record (AU-372.1) attached to Mr. Riddervold's affidavit lists notice numbers S860911139C and S860911142C. These numbers match those on the notices issued to petitioner. On the reverse side of this record are two attestations, each signed by the attester and a witness. The first says that all the notices listed were delivered to the Mail and Supply Section

of the Division, and that the envelopes in which they were enclosed, addressed to the taxpayer at the address shown on the notice, were sealed and stamped. The second attestation says that all the notices listed were deposited in a branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes. Both statements are date stamped September 11, 1986.

The PS Form 3877 attached to Mr. Riddervold's affidavit also bears a U.S. Postal Service date stamp of September 11, 1986. This form indicates that article number P-28432 was addressed to "Ira Fuchs, off. of above, 23 W. 9th St. #2R, NY, NY 10011." Three columns over, under the heading "handling charge", the notations "139C" and "142C" appear. Mr. Riddervold explains in his affidavit that the notice numbers in the right hand column of the certified mail record are abbreviated by the last three digits and the final letter of the notice number. It is noted that this form is not signed by a Postal Service employee, and it does not contain totals for the number of pieces listed by the sender and received at the post office.

The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. Mr. LaFar states that the certified mail record is the Division's record of receipt by the Roessleville Branch of the United States Postal Service for pieces of certified mail. Mr. LaFar also asserts that the staff's regular procedures were followed in mailing the notices of determination in question to petitioner on September 11, 1986.

The affidavit of Charles Brennan, a mail clerk for the Division, also sets forth the regular procedures followed by the mail and supply room staff when delivering mail to the United States Postal Service. Mr. Brennan states that on September 11, 1986 he delivered a piece of certified mail, addressed to petitioner, to the Roessleville Branch of the United States Postal Service. Mr. Brennan attested to this on the AU-372.1.

The envelope in which petitioner's request for conciliation conference was mailed bears a U.S. postmark of August 5, 1993. Both the envelope and the face page of the request bear a BCMS received stamp of August 9, 1993.

On June 2, 1994 petitioner, by his representative, filed a motion in opposition to summary determination on the grounds that material issues of fact still exist. Specifically, petitioner asserts that he was not informed as to the basis of the assessment and that:

"Although a Notice of Determination may well have been sent to Petitioner on September 1, 1986, Micro Installations, Inc., by whom Mr. Fuchs was employed, was merged into Docugraphix, Inc. in July, 1986. Mr. Fuchs was terminated from his position in February, 1987. Mr. Fuchs' actual notice of a sales tax problem occurred on May 17, 1993 The request for a conciliation conference was made on August 5, 1993, which is within 90 days of taxpayer's actual notice."

In support of his motion in opposition of summary determination, petitioner submitted a copy of a consolidated statement of tax liabilities and notice of assessment resolution, dated May 17, 1993, which referenced the sales taxes at issue herein.

OPINION

The Administrative Law Judge granted the Division's motion for summary judgment on the ground that petitioner failed to file a request for a conciliation conference before the Division or petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination.

The Administrative Law Judge determined that:

"[t]hrough the evidence it has submitted, the Division has established that the notices of determination in question were, in fact, mailed to petitioner on September 11, 1986.

"First, the Division introduced adequate proof of its standard mailing procedures via affidavits of several Division employees involved in the notice generation and issuance process. In particular, the Riddervold, LaFar, and Brennan affidavits generally describe the various stages involved in the preparation and mailing of notices. These affidavits, consistent in all respects with the information listed on the notices in question, directly support the September 11, 1986 date and fact of mailing of the subject notices (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992).

"Second, the Division established that the general issuance procedure was followed on September 11, 1986 in the generation and mailing of petitioner's notices. PS Form 3877, which lists petitioner and is date stamped September 11, 1986 by the United States Postal Service, is "direct documentary evidence of the date and fact of mailing by certified mail" (see, Gonzalez v. Commr., 63 TCM 3087). As explained by Mr. Riddervold, the notations corresponding to petitioner's listing ("139C" and "142C") match the last three digits and final letter of the notice numbers,

as set forth in the notices themselves and in the Division's AU-372.1. Given a properly completed Form 3877, a presumption arises that the notices were properly mailed to petitioner (id.).

"Petitioner has failed to rebut this presumption. First, petitioner's assertion that the 90-day period commenced on May 17, 1993, the date of the notice of assessment resolution and consolidated statement of tax liabilities, is without merit. Such period begins on the date a notice of determination is issued (see, Conclusion of Law 'B').

"In order to successfully rebut the presumption of receipt which arises once the Division has proven proper mailing, a taxpayer must do more than merely deny having received it (T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97). Rather, he or she must show that routine procedure was not followed or that it was followed so carelessly as to warrant an assumption that the notice was not mailed (id.). In the alternative, the taxpayer could meet his burden by showing that the post office may have failed to deliver the notice (id., citing Ruggerite v. New York State Tax Commission, 64 NY2d 688, 485 NYS2d 517 [holding that taxpayer rebutted presumption where notice was returned as unclaimed])" (Determination, conclusions of law "C" and "D").

The Administrative Law Judge rejected the implication in petitioner's affidavit in opposition to the motion for summary judgment that he did not receive the notices of determination because of a July 1986 merger involving his employer and because his employment was terminated in February 1987. The Administrative Law Judge found that, although the merger occurred prior to the issuance of the notices, there was nothing in the record to indicate that the merger resulted in a change of address. Further, he found that petitioner's employment ceased after the notices were issued so that was not a factor.

On exception, petitioner first asserts that the Form 3877 submitted by the Division in support of its contention that the notices were properly mailed, is clearly incomplete. Specifically, petitioner asserts that the form is missing "(1) the Postmaster's signature, (2) the total number of pieces listed by Sender, (3) the total number of pieces received at the post office, (4) an indication of the type of mail service requested, and (5) whether the Division wants or does not want postal insurance" (Petitioner's brief, p. 7). Relying on our decisions in Matter of Air Flex Custom Furniture (Tax Appeals Tribunal, November 25, 1992) and Matter of Novar TV & Air Conditioning Sales & Serv. (supra), the Form 3877 is incomplete and, thus, the Division did not meet its burden to show that the notices were properly mailed.

On exception, the Division asserts that the determination of the Administrative Law Judge is correct.

Our first concern is whether the notices were issued by the Division to petitioner. In his response to the Motion for summary judgment, petitioner implied that he did not receive the notices. We conclude based on the record that the Division, through the introduction of copies of the two notices, has proved that it issued the notices to petitioner.

However, the fact that the Division has proven that it issued notices to petitioner does not prove the date of mailing of the notices to petitioner. On this issue, we find insufficient evidence in the record to determine the date on which the notice was mailed to petitioner. Specifically, we find that the Form 3877 does not contain totals for the number of pieces listed by the sender, i.e., the Division, and number of pieces received at the post office. Therefore, the Form 3877 does not establish that petitioner's notices were received by the post office (see, Matter of Sabando Auto Parts, Tax Appeals Tribunal, March 9, 1995 and Matter of Turek, Tax Appeals Tribunal, January 19, 1995). In view of this fact, we find that the Division has not established the date on which the notices of determination were mailed to petitioner. Therefore, we deem petitioner's petition timely and remand the matter to the Division for conduct of a conciliation conference.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ira Hayes Fuchs is granted;
2. The determination of the Administrative Law Judge is reversed; and

3. The request for a conciliation conference filed by Ira Hayes Fuchs is granted.

DATED: Troy, New York
April 20, 1995

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner