

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
LINDA B. KAISER, OFFICER OF LBK FOOD :
SERVICES LTD. :
for Revision of Determinations or for Refund of Sales :
and Use Taxes Under Articles 28 and 29 of the Tax Law :
for the Periods June 1, 1992 through August 31, 1992, :
December 1, 1992 through May 31, 1993 and September 1, :
1993 through February 28, 1994. :

DECISION
DTA Nos. 813962
813963, 813964
813965, 813966,
813967, 813968
813969

In the Matter of the Petitions of :
of :
LINDA B. KAISER, OFFICER OF LBK FOOD :
SERVICES LTD. :
for Redetermination of Deficiencies or for Refund of :
Personal Income Tax Under Article 22 of the Tax Law for :
the Periods October 1, 1992 through December 31, 1992, :
March 30, 1992 through March 30, 1993 and August 3, :
1993 through September 28, 1993. :

Petitioner Linda B. Kaiser, Officer of LBK Food Services Ltd., 43 Charleswood Drive, Pittsford, New York 14534-2747, filed an exception to the determination of the Administrative Law Judge issued on December 7, 1995. Petitioner appeared by Harris, Beach & Wilcox (Eric R. Paley, David M. Mehalick and Hugh R. Thomas, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation's letter stating it would not be filing a brief in opposition was received on March 5, 1996 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner timely filed her request for a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days of the issuance of the notices of determination and notices of deficiency.

FINDINGS OF FACT

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

In support of its motion for summary determination, the Division submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts that since petitioner did not file requests for conciliation conferences or petitions with the Division of Tax Appeals within the 90-day period prescribed by Tax Law § 170(3-a); § 689(b) and § 1138(a)(1), the late requests for conciliation conferences were properly denied and the petitions before the Division of Tax Appeals should be dismissed with prejudice, for lack of jurisdiction.

The Division included with its affidavit copies of petitioner's petitions, received by the Division of Tax Appeals on June 22, 1995, which separately challenged five notices of determination dated September 19, 1994, which assessed a deficiency of sales and use taxes and three notices of deficiency, dated September 19, 1994, which asserted a deficiency of personal income tax as follows:

<u>PERIOD ENDED</u>	<u>NOTICES OF DETERMINATION</u>			<u>PAYMENT/ CREDITS</u>	<u>BALANCE DUE</u>
	<u>TAX</u>	<u>INTEREST</u>	<u>PENALTY</u>		
8/31/92	\$10,472.18	\$2,835.67	\$3,141.61	\$ 0.00	\$16,449.46
2/28/93	6,341.55	1,251.69	1,712.12	0.00	9,305.36
5/31/93	7,789.28	1,259.61	1,869.38	0.00	10,918.27
11/30/93	14,969.82	1,396.27	2,689.25	525.00	18,530.34
2/28/94	4,767.09	208.93	635.05	2,000.00	3,611.07

NOTICES OF DEFICIENCY

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>INTEREST</u>	<u>PENALTY</u>	<u>PAYMENTS/ CREDITS</u>	<u>BALANCE DUE</u>
12/31/92	\$ 0.00	\$ 0.00	\$ 617.16	\$ 0.00	\$ 617.16
3/30/93	0.00	0.00	218.61	0.00	218.61
8/03/93 ¹	0.00	0.00	789.01	0.00	789.01
8/31/93	0.00	0.00	725.66	0.00	725.66
9/28/93	0.00	0.00	562.34	0.00	562.34

The petitions which challenged the notices of deficiency included a copy of conciliation order, CMS No. 146081, dated March 24, 1995, which denied petitioner's request for a conciliation conference because "the notices were issued on September 19, 1994, but the request was not mailed until February 17, 1995, or in excess of 90 days, the request is late filed." The petitions which challenged the notices of determination included a copy of conciliation order, CMS No. 146082, dated March 24, 1995, which denied petitioner's request for a conciliation conference for the same reason that the request for a conciliation conference was denied on the notices of deficiency. In addition to the foregoing, the Division included a copy of the Division's answer to petitioner's petition, dated July 20, 1995 (Exhibit "1"), the affidavit of Geraldine Mahon with attached exhibits (Exhibit "2"), the affidavit of Daniel LaFar (Exhibit "3"), the affidavit of Monica Amell (Exhibit "4"), and copies of the respective requests for conciliation conference, dated January 31, 1995, signed by petitioner (Exhibit "5"). The last exhibit included a copy of an envelope addressed to the Department of Taxation and Finance, Bureau of Conciliation and Mediation Services. The envelope was sent by certified mail, return receipt requested and bore a United States Postal Service Stamp of February 17, 1995.²

¹One Notice of Deficiency was issued by the Division to assert a deficiency of personal income tax for the periods ending August 3, 1993, August 31, 1993 and September 28, 1993.

²The affidavit of Christina Seifert, Esq., states that attached to her affidavit, as Exhibit 6, are copies of two envelopes which contained petitioner's requests for a conciliation conference. In fact, the Division did not offer an Exhibit 6. However, a copy of one envelope was included with Exhibit 5. Therefore, it is assumed that one envelope was used to request the conciliation conferences.

In support of the Division's motion for summary determination, three affidavits were submitted pertaining to the mailing of the notices. The first affidavit was that of Geraldine Mahon, a principal clerk of the Case and Resource Tracking System ("CARTS") control unit, attached to which, as Exhibit "A" was a copy of the certified mail record dated September 19, 1994 and as exhibit "B", the notices which were petitioned (Notice L009520083 was not petitioned).

In her affidavit, Ms. Mahon stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the "certified mail record". Each of the notices is assigned a certified control number which is recorded on the certified mail record.

Ms. Mahon averred that the certified mail record pertaining to this mailing consisted of 29 fan-folded (connected) pages and included the 6 notices of determination and 3 notices of deficiency issued to Linda B. Kaiser. She described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until ordered otherwise by a staff member of the Division. The document itself consists of 29 pages each with 11 entries with the exception of page 29 which has 4 entries for a total of 312 entries. On the final page (page 29), the "total pieces and amounts listed" is stated to be 312. The Postal Service representative circled the "total pieces" to indicate that there were no deletions. Having examined the document, Ms. Mahon certifies that it is a true and accurate copy of the certified mail record issued by the Division on September 19, 1994, which includes the six notices of determination and the three notices of deficiency issued to Linda B. Kaiser. In the upper left hand corner of the certified mail record, the date "09/08/94" appears and was changed manually to "9-19-94". The original date, September 8, 1994, was the date that the certified mail record was printed, which is approximately 10 days in advance of the anticipated mailing of the notices. This procedure allows for sufficient lead time for the notices to be manually reviewed and processed for

postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's mail room who are responsible for altering the date so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a postal service representative who affixes his or her initials or signature and/or a U.S. postmark to a page or pages of the certified mail record. In this case the postal representative signed page 29 of the certified mail record.

As Ms. Mahon points out, pages pages 27 and 28 of the certified mail record indicate that nine notices numbered L 009520080 through L 009520088 were sent to Linda B. Kaiser, 43 Charleswood Dr., Pittsford, N.Y., 14534-2747 by certified mail using control numbers P 911 005 094 through P 911 005 102. The notice numbers and the certified control numbers correspond with those found on the notices issued to petitioner on September 19, 1994. Further, Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

Ms. Mahon concludes that the procedures followed and described are the normal and regular procedures of the CARTS control unit.

This certified mail record consists of 29 consecutively numbered pages, wherein the certified control numbers run successively from P 911 004 804 on page 1 to P 911 005 115 on page 29.

The affidavit of Daniel B. LaFar, the 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 branches of the U.S. Postal Service ("USPS"). Mr. LaFar states that after a notice is placed in the "outgoing certified mail" basket in the mail room, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail room clerk counts the envelopes and

verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. LaFar maintains that a member of the mail room staff delivers them to the Roessleville branch of the USPS in Albany. The postal employee affixes a postmark and/or his or her signature to the certified mail record as an indication of receipt by the USPS. He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In this case the postal employee signed the certified mail record, affixed the postmark of the Roessleville branch of the United States Postal Service in Albany, New York to each page of the certified mail record, and circled the "total number of pieces listed", which indicates that this was the total number received at the post office. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. LaFar concluded that on September 19, 1994 an employee of the mail and supply room delivered nine pieces of certified mail addressed to Linda B. Kaiser, 43 Charleswood Dr., Pittsford, N.Y. 14534-2747, to the Roessleville Branch of the United States Postal Service in Albany, in sealed postpaid envelopes for delivery by certified mail. In addition, based on his review of the documents, Mr. LaFar determined that a member of his staff obtained a copy of the certified mail record, with the postmark delivered to and accepted by the Postal Service on September 19, 1994, for the records maintained by the CARTS control unit of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed in the mailing of the item of certified mail at issue herein.

The affidavit of Monica Amell, a senior mail and supply clerk employed in the registry unit of the New York State Department of Taxation and Finance, was also submitted by the Division describing her request on Form 3811-A for verification of delivery of the notices

mailed to petitioner on September 19, 1994 by certified mail. Her affidavit indicated that as a part of her duties as mail and supply clerk in the registry unit she prepares forms which are used by a mailer to request return receipts after mailing. In this particular case, Form 3811-A was prepared for each of the notices, and sent to the post office where the piece of mail in question was delivered. She further explains that the delivery post office fills in Form 3811-A based upon its delivery records with the name of the individual or organization that received the piece of mail and the date of delivery. Ms. Amell attached to her affidavit the Form 3811-A prepared for this taxpayer for each of the notices which were issued. On each form she provided the mailing date of September 19, 1994, the respective certified number and the name and address of the taxpayer and mailed the same to the post office on July 20, 1995. The form was thereafter returned to her with the name "L. Kaiser", written in a box designating to whom delivery was made, and the date September 21, 1994 handwritten in the box denoting the date of delivery.

In response to the foregoing, petitioner, Linda B. Kaiser, submitted a letter which stated that the difficulty began in 1987 when she and her husband were evicted from a very lucrative business. Petitioner and her husband were not given any formal notice until December 21, 1987 when they received an eviction notice. Further, they were not allowed to enter the building to obtain the records, supplies or equipment which belonged to them. During the following five-month period, petitioner and her husband, attempted, without success, to find work.

While they were looking for work, petitioner and her husband were approached by a Sam Loria to go into a new business on a "no money down" basis. Petitioner and her husband were required to refurbish the premises and their banker agreed with the arrangements. However petitioner and her husband were not aware of the extent of the repairs needed. Further, it took time to build up a clientele. In addition, it was difficult to make the bank payments. Eventually, petitioner's banker was dismissed from the lending institution and the bank required payment on petitioner's notes. This prompted petitioner and her husband to file a petition for bankruptcy.

While their bankruptcy petition was pending, petitioner and her husband's payment of taxes fell into arrears. Petitioner and her husband agreed to discontinue their bankruptcy proceeding with the understanding that they would try to make an offer in compromise by attempting to remortgage their house. Petitioner submits that unless they can obtain a settlement, no mortgage company will refinance because of existing State and Federal tax liens.

Petitioner states that she is 52 years old and her husband is 56. In the past year, petitioner's husband had skin cancer and was diagnosed with diabetes. Petitioner also states, among other things, that their son has been paying their living expenses which include a mortgage and insurance payments. In conclusion petitioner states that she and her husband want to pay what is possible with the money they can obtain or borrow from their family.

OPINION

The Administrative Law Judge found that the Division was entitled to summary determination because it had established that there was no material issue of fact in dispute in this case. He found that the Division had met its burden to establish proper mailing of the notices of determination and the notices of deficiency on September 19, 1994 by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter. The Administrative Law Judge also found that the Division had submitted Forms 3811-A entitled "Domestic Return Receipt (After Mailing)" for verification of the delivery of the notices mailed to petitioner. These forms showed that the subject notices had been delivered to "L. Kaiser."

Petitioner asserted that certain personal and financial difficulties led to her inability to meet her tax liability. However, the Administrative Law Judge determined that:

"The Division has introduced evidence in support of its motion for summary determination -- namely that it properly mailed the notices in issue on September 19, 1994. In response, petitioner listed a series of unfortunate events which warrant sympathy. However, petitioner's statements do not address the question of whether she filed a petition challenging any of the notices within the requisite 90-day period. Under these circumstances, the Division, as the proponent of this motion for summary determination, has succeeded in carrying its

burden of showing that it is entitled to judgment as a matter of law because there is no material issue of fact in dispute in this case" (Determination, conclusion of law "E").

The Administrative Law Judge dismissed the petition because the effect of his determination was to deny the Division of Tax Appeals jurisdiction over the matter.

On exception, petitioner admitted that her request for a conciliation conference was filed late. She noted: "[i]t seems that postal clerks spent hours of time in a futile attempt to confirm lateness and we do not deny lateness - However, we were misinformed upon our proper rights . . ." (Petitioner's exception, p. 2). In her exception, petitioner proposes an offer in compromise to resolve her tax liability.

Tax Law § 1147(a)(1) provides that a notice of determination of sales and use tax due shall be mailed by registered or certified mail to the person for whom it is intended in a postpaid envelope addressed to such person at their last known address and "[t]he mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed." 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 § 681(a) provides that a notice of deficiency of income tax "shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state" and, pursuant to Tax Law § 681(b),

"[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition"

A taxpayer has the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) rather than filing a petition with the Division of Tax Appeals (20 NYCRR 4000.3[a]). Such request must also be filed within the 90-day period

for filing a petition. The failure of a taxpayer to file a petition or a request for a conciliation conference within that 90-day period precludes the Division of Tax Appeals from hearing the case since it has no jurisdiction over the matter (see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

We note that the only issue for determination herein is whether or not petitioner timely filed her request for a conciliation conference within the 90-day period allotted to her. The Administrative Law Judge determined that the Division introduced sufficient evidence to establish its standard procedure for the issuance of notices and to show that its standard procedure was followed with the particular notices at issue in this case. Further, the evidence of compliance with the Division's procedures was bolstered by evidence of the delivery of such notices by the U.S. Postal Service to "L. Kaiser." We agree with his determination.

Petitioner raises for the first time on exception the argument that she was misinformed of her right to protest. First, this is a factual issue which may not be raised initially on exception (Matter of Howard Enterprises, Tax Appeals Tribunal, August 4, 1994). Second, we note that petitioner appended a copy of each of the notices at issue to her petitions. These notices clearly state on their face that the petitioner has a right to request a BCMS conference or to petition the Division of Tax Appeals and provides the time limit for doing so.

Although petitioner seeks our assistance on her exception in making an offer in compromise to settle her tax liability, we note that Tax Law § 171-Eighteenth-a authorizes the Commissioner of Taxation and Finance or the Attorney General to enter into an offer in compromise with a taxpayer under certain conditions. The Division of Tax Appeals has no similar authority.

The Administrative Law Judge correctly and adequately addressed all of the issues raised before him and we find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Linda B. Kaiser, Officer of LBK Food Services Ltd. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petitions of Linda B. Kaiser, Officer of LBK Food Services, Inc. are dismissed.

DATED: Troy, New York
August 1, 1996

/s/Donald C. DeWitt
Donald C. DeWitt
President

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