

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LA SCALA, INC. :
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, 1991 :
through May 31, 1991. :

DECISION
DTA Nos. 815494
and 815495

In the Matter of the Petition :
of :
RUDOLF DEVICH :
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, 1991 :
through May 31, 1991. :

Petitioners La Scala, Inc. and Rudolf Devich, 345 Vreeland Avenue, Leonia, New Jersey 07605-1405, filed an exception to the order of the Administrative Law Judge issued on July 3, 1997. Petitioners appeared by Glass & Shiechel, C.P.A.'s, LLP (Steven S. Shiechel, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

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

ISSUE

Whether petitioners timely filed their petitions following the issuance of the conciliation order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of

fact "8" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

La Scala, Inc. and Rudolf Devich ("petitioners") requested a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"), which was held on July 12, 1995. Steven Shiechel, C.P.A., appeared as petitioners' representative. BCMS, by conciliation orders dated May 10, 1996 and captioned CMS Nos. 140779 and 140780, denied petitioners' request and sustained the statutory notices issued to petitioners. The notice numbers referenced on the orders to La Scala and Devich are L009122523 and L009221917, respectively.

On December 2, 1996 the Division of Tax Appeals received the petitions of La Scala and Devich seeking revision of the statutory notices sustained by the conciliation orders. The envelopes containing the petitions bore United States Postal Service postmarks of November 29, 1996.

On December 31, 1996 the Division of Tax Appeals issued two notices of intent to dismiss petition which explained that petitioners had 90 days from the date the conciliation orders were issued to file petitions. The notices of intent to dismiss further indicated that the conciliation orders in this case were issued on May 10, 1996, but the petitions were not filed until November 29, 1996, or 203 days later.

The Division of Taxation ("Division") submitted the following affidavits, with attachments, in response to the Notice of Intent to Dismiss Petition: (1) Thomas J. English, Assistant Supervisor of Tax Conferences in BCMS since October of 1987, whose duties include being familiar with the procedures and operations of BCMS including the preparation and mailing of conciliation orders, and (2) James Baisley, the Chief Mail Processing Clerk of the New York State Department of Taxation and Finance Mail Processing Center, whose duties include the overall supervision of the entire Mail Processing Center staff, including the staff responsible for the delivery of outgoing mail to branches of the United States Postal Service.

The Division's response was received on January 27, 1997. These affidavits describe the general procedures for the preparation and mailing of conciliation orders and how such

procedures were followed in this case.

Mr. English, in his affidavit, explains that conciliation orders are sent by certified mail. Conciliation orders issued on a given day, together with a certified mail record ("CMR"), are prepared by the word processing unit of BCMS. A CMR lists all taxpayers to whom an order is to be mailed on a given day, and completed CMRs are kept by BCMS. The CMR is comprised of columns for the certified number, name and address of the addressee, postage and fee amounts, and remarks. At the bottom of each page of a CMR are blank spaces for the total number of pieces of mail the sender has listed, the total of pieces of mail received at the post office and a space for the name of the receiving employee at the post office. The word processing unit forwards the conciliation orders for the day together with the CMR to a clerk within BCMS who processes these documents. The clerk verifies the names and addresses of taxpayers who are listed on the CMR and a certified control number is assigned to each conciliation order listed on the CMR. The clerk affixes the sequential certified control stickers to envelopes for each listed taxpayer and then records on the CMR, under the heading 'Certified No.', the certified control number from each envelope next to the appropriate taxpayer's name.

An employee of the Mail Processing Center of the Division then picks up the orders and the CMR. Mr. Baisley's affidavit explains what happens after the orders and the CMR are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center. First, a staff member weighs and seals each envelope and places postage and fee amounts on the letters. Then a clerk checks the names and certified mail numbers to ensure that they are the same on the envelopes and the CMR. An employee of the Mail Processing Center then delivers the envelopes and the CMR to the Colonie Center Branch of the United States Postal Service in Albany. The CMR is the Division's receipt for the certified mail delivered. The CMR is usually picked up from the post office the following day by an employee of the Mail Processing Center, and returned to BCMS.

In support of its position that the procedures outlined above were followed in this case, the Division has submitted a copy of the CMR for May 10, 1996, consisting of four pages. On

page one of the CMR the caption lists BCMS as the sender, states that it is a record of mailing and fees for conciliation orders issued on May 10, 1996 and that it is page one of four. On page two of the CMR, petitioners' names and addresses are listed next to the certified numbers P255252803 and P255252805. At the bottom of the page, the CMR states that 12 pieces of mail were both listed by the sender and received at the post office.¹ Twelve certified control numbers are listed on page two of the CMR sequentially from P255252795 to P255252806. At the bottom of the page, there is a signature in the space for the name of the receiving postal employee. The Baisley affidavit indicated that an employee affixes a postmark and/or his signature to the certified mail record, indicating receipt by the Postal Service. In this case, the postal employee affixed a postmark to the certified mail record, wrote the number of pieces, and initialed the CMR to indicate that this was the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee wrote the "total number of pieces" for the purpose of indicating that 12 pieces were received at the post office is based on the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record. Further, there is a May 10, 1996 United States Postal Service postmark on the bottom of the page. Since each page is in effect its own receipt, the information on the other three pages is not relevant to the current matter, except to show that the entire document was completed in accordance with the general procedure outlined above.

Petitioners submitted a letter, with attachments, in response to the notices of intent to dismiss petition, which was received by the Division of Tax Appeals on January 27, 1997. Petitioners stated that they had been advised by the collection bureau by telephone during November 1996, to file a petition in order to have the matter heard. Petitioners maintain that the auditors assigned to this matter never presented to either petitioners' representative or the BCMS conferee, any proof of the assessment. Petitioners assert that the assessment has, in fact,

¹The names and addresses of the other taxpayers have been redacted to protect their confidentiality.

been paid as a part of a deferred payment arrangement. Petitioners' representative requested that since certain information was never provided to him, he should be given a reaudit or a courtesy conference to receive this evidence. The attachments to the correspondence included copies of the petitions; notices and demands; correspondence with BCMS; correspondence to BCMS from petitioners' representative indicating that the quarter in issue herein should have been paid by a credit generated by misposting to different quarters; the Deferred Payment Agreement, dated April 17, 1992; and copies of checks submitted in accordance with the Deferred Payment Agreement (identified by amount, not by taxpayer designation); and a listing of checks received by the Division and information as to how such checks were applied to petitioners' liabilities.

We modify finding of fact "8" to read as follows:

While reviewing the file, the Administrative Law Judge became aware that the documents submitted by the Division did not address whether petitioners' representative had properly filed a valid power of attorney with the Division prior to the date of the conciliation conference and, if so, whether petitioners' representative was properly served with the conciliation orders in this matter. If there was a failure to serve a duly appointed representative, there would be a tolling of the 90-day period for filing the petition. Both parties were provided an additional 45 days until April 18, 1997 to respond to the issue raised by the Administrative Law Judge. The Division submitted two sets of affidavits, again by Thomas English and James Baisley, which were nearly identical to those previously described, with the same outlined procedures. The same certified mail records were submitted and on page 2 of each, after removal of the redacted portions, Mr. Shiechel's name appeared, indicating that on May 10, 1996 a copy of a conciliation order for each petitioner, bearing certified numbers P255252804 and P255252806, was sent to Steven Shiechel, CPA, Polay & Shiechel, CPAs, 585 Stewart Avenue, Ste. 740, Garden City, NY 11530. The Baisley affidavit outlined the remaining postal procedures for the mailing of the conciliation orders.

Petitioners' response was received on April 18, 1997, and consisted of correspondence and numerous attachments, many of which were previously submitted and already a part of the record. Attachment "F" was an undated copy of an original power of attorney, appointing Melvin Polay, C.P.A. for Rudolf Devich at Polay & Shiechel, 585 Stewart Avenue, Garden City, New York 11545. Petitioners' representative stated in his correspondence that Mr. Polay had passed away on July 3, 1995 which was nine days before the conciliation conference held on July 12, 1995. Petitioners' representative, Steven Shiechel, failed to submit any power of attorney authorizing him to represent petitioners any time prior to November 28, 1996.

Petitioners' representative explained that on or about May 10, 1996, he was unavailable to the conciliation conferee due to the death, and mourning period, of his mother. The next item of correspondence was from Mr. Shiechel to the conciliation conferee dated November 11, 1996, again requesting information as to where petitioners' payments had been posted for the period in issue. Petitioners' remaining arguments in the April 18, 1997 correspondence deal with the payment information and arguments previously addressed by petitioners.²

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first noted that pursuant to Tax Law § 170(3-a)(e), a conciliation order would be binding on petitioners unless, within 90 days of its issuance, they filed a petition with the Division of Tax Appeals challenging such order. The Administrative Law Judge then determined that when the timeliness of a petition is at issue, the Division must establish proper mailing of the conciliation order. In this regard, the Administrative Law Judge found that the Division established proper mailing of the conciliation orders by submitting affidavits describing its general mailing procedure and the mailing record which showed that the procedure was followed in this matter.

The Administrative Law Judge noted that the certified mail record lists the following certified numbers, P255252803, P255252804, P255252805 and P255252806, for the conciliation orders addressed to La Scala, Inc., Rudy Devich and Steven Shiechel, C.P.A.; however, those certified numbers do not appear on the conciliation orders themselves. The Administrative Law Judge found, however, that:

"(1) the conciliation orders are dated May 10, 1996 and the certified mail record contains 'Conciliation Orders Issued May 10, 1996'; (2) petitioner does not dispute the claimed date of issuance of the Conciliation Order; (3) the 'presumption of official regularity' is at work here; and (4) petitioner has not challenged the presumption of official regularity by the introduction of any evidence to the contrary, together, offer sufficient corroboration to tie such orders to the May 10, 1996 issuance date" (Determination, conclusion of law "D").

The Administrative Law Judge then dismissed petitioner's petitions as they were not filed

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We modified this finding of fact to clarify that the Administrative Law Judge raised a question concerning the existence of a valid power of attorney for Mr. Shiechel to represent petitioners at the conciliation conference and to note that petitioners submitted a copy of a power of attorney form for Mr. Polay in response to the Administrative Law Judge's inquiry.

within 90 days from the issuance of the conciliation orders on May 10, 1996.

ARGUMENTS ON EXCEPTION

Petitioners argue that the mailing (presumably, the conciliation orders) was mailed to 585 Stewart Avenue, Garden City, New York 11530 and not to their representative's office at 110 Stewart Avenue in Hicksville, New York. Furthermore, petitioners state that the representative who was to receive the response was in a period of mourning over the death of his mother.

Lastly, petitioners assert that the auditor in this case never provided proof to establish that no sales tax was paid for the quarter March 1, 1991 through May 31, 1991 despite repeated requests for such proof by their representative.

OPINION

We affirm the order of the Administrative Law Judge.

Petitioners argue that the conciliation orders were sent to their representative, however, the address of their representative as stated in the CMR was incorrect. As noted in the findings of fact above, the Administrative Law Judge raised the issue of whether Mr. Shiechel had a valid power of attorney in order to represent petitioners at the conciliation conference. In response to the Administrative Law Judge's inquiry, petitioners submitted a copy of a power of attorney authorizing Melvin Polay, C.P.A. to represent petitioner Rudolf Devich at the conciliation conference. It is also noted that Mr. Polay died nine days prior to the conference and Mr. Shiechel stepped in to represent both petitioners at the conciliation conference. Petitioners did not submit a copy of a power of attorney authorizing new representation by Mr. Shiechel at the conciliation conference.³ However, it is noted that the Division, as indicated by the affidavits and the CMR, mailed a copy of the conciliation orders to Mr. Shiechel at the firm of Polay & Shiechel at the address indicated on the power of attorney form for Mr. Polay. If Mr. Shiechel had a power of attorney authorizing him to represent petitioners indicating that he was associated with a different firm at a different address, it was incumbent on petitioners to

³If Mr. Shiechel failed to submit a valid power of attorney form to the conciliation conferee, the Division did not have a duty to send him copies of the conciliation orders issued to petitioners.

submit that power of attorney form. Yet, as indicated by the record, the only power of attorney form submitted by petitioners was that of Mr. Polay.

Moreover, at no time has Mr. Shiechel denied receiving the conciliation orders at issue. Therefore, based upon the evidence submitted by the Division and the lack of any rebuttal evidence by petitioners, we agree with the Administrative Law Judge that petitioners' representative was properly served with the conciliation orders for the reasons set forth in her determination.

Lastly, petitioners have not taken an exception to the conclusion reached by the Administrative Law Judge that their petitions were not timely filed. Therefore, the Tax Appeals Tribunal lacks jurisdiction to address the remaining arguments contained in petitioners' petitions as they relate to the underlying merits of this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of La Scala, Inc. and Rudolf Devich is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petitions of La Scala, Inc. and Rudolf Devich are dismissed.

DATED: Troy, New York
January 29, 1998

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner