

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ASTORIA LEASING CORP. :
AND NELLIE GAJESKI :

DECISION
DTA NO. 815812

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 June 1, 1982 through December 31, 1995. :

Petitioners Astoria Leasing Corp. and Nellie Gajeski, 20-37 Hazen Street, Jackson Heights, New York 11370-1130, filed an exception to the determination of the Administrative Law Judge issued on March 5, 1998. Petitioners appeared by Gabor, Staum & Associates (Richard M. Gabor, Esq., of counsel) . The Division of Taxation appeared by Terrence M. Boyle, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether the Division of Taxation is entitled to summary determination or dismissal of the petition herein on the basis that the underlying relief sought in the petition (a refund) is time barred and is also precluded, in part, by a stipulation for discontinuance of a prior proceeding.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact “1” which has been modified. The Administrative Law Judge’s findings of fact and the modified finding of fact are set forth below. In addition, we have deleted findings of fact “12” and “13” of the Administrative Law Judge’s determination since they are not properly characterized as findings of fact.

We modify finding of fact “1” of the Administrative Law Judge’s determination to read as follows:

The Division of Taxation (“Division”) brought a motion seeking an order dismissing the petition and/or an order of summary determination in the above-referenced matter pursuant to section 3000.9(a)(i), (ii) and (b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners filed an affirmation and affidavit in opposition. This motion to dismiss and/or for summary determination arises as the result of a petition filed by petitioners, Astoria Leasing Corp. ("Astoria") and Nellie Gajeski, challenging the partial denial of their application for refund in the amount of \$665,000.00. More specifically, on January 16, 1996, petitioners filed an application seeking refund of sales and use taxes for three distinct periods, as follows:

Period One---06/01/82 through 02/28/88
Period Two---12/01/88 through 11/30/91
Period Three--01/01/93 through 12/31/95.¹

The Division granted petitioners' refund request for Period Three, in the amount of \$441.38, and such period is no longer in issue. However, petitioners' request for Period One and Period Two was denied by the Division as not timely filed. On May 2, 1997, petitioners challenged this denial for such two periods by filing a petition.

¹We modified finding of fact “1” of the Administrative Law Judge’s determination by adding the first two sentences thereto.

-PERIOD ONE-

With regard to Period One, the Division's motion papers include three notices of determination and demands for payment of sales and use taxes due addressed to petitioner Astoria and containing the following information:

<u>NOTICE DATE</u>	<u>NOTICE NUMBER</u>	<u>PERIOD</u>	<u>TOTAL AMOUNT DUE</u>
09/20/88	S880920927K	06/01/82 - 11/30/85	\$117,066.64
09/20/88	S880920928K	06/01/85 - 02/28/88	6,477.87
09/20/88	S880920929K	12/01/85 - 02/28/88	78,301.71 ²

The Division's motion papers also include three notices of determination addressed to petitioner Nellie Gajeski. These notices, bearing notice numbers S880920924K, S880920925K and S880920926K, list the same date (09/20/88), cover the same cumulative period (06/01/82 through 02/28/88), and assess the same amounts as the notices pertaining to petitioner Astoria. The notices addressed to Nellie Gajeski assess liability against her as an officer responsible to collect and remit tax on behalf of petitioner Astoria.³

The Division points out that the tax assessed for Period One was payable between 09/20/82 and 03/20/88 (i.e., within 20 days of the close of each of the respective sales tax quarterly periods

²The "total amount due" figures include penalty and interest to the date of the notices.

³The motion papers filed in this matter with respect to Period One refer to notice numbers commencing with the letter "S", as above, and also to notice numbers commencing with the letter "L". In this regard, the Division's reply affirmation explains that the Division's computer system was changed after the date of the "S" notices (09/20/88) and that, as a result, notices beginning with the letter "S" under its former computer system were converted (or renumbered) to have assessment numbers commencing with the letter "L" for tracking on its new computer system. It appears that such conversion involved only renumbering, and did not result in reissuance of the notices.

involved). In turn, such tax was paid in full between July 15, 1992 and December 17, 1992, as the result of the Division's levy against petitioner Astoria's bank accounts.

Petitioner Astoria alleges that it never received service of any of the notices of determination. Petitioner Astoria admits receiving a Notice and Demand for Payment of Tax Due and a Consolidated Statement of Tax Liabilities, each dated April 6, 1992. The Notice and Demand and the Consolidated Statement were not included herein as part of the record. However, petitioners allege that the Notice and Demand referred to assessment numbers L-004598919-8, L-004598920-8 and L-004598921-7, and that the Consolidated Statement referred to assessment numbers L-004598919-8 and L-004598921-7, with such latter items described as "two assessments never served on [Astoria]". Petitioner Astoria also denies being served with a warrant which allegedly referred to assessment numbers S880920927K, S880920928K and S880920929K.

Petitioner Nellie Gajeski admits receipt of the notices numbered S880920924K, S880920925K and S880920926K, but denies receipt of any additional items from the Division. Attached to the petition in this matter was a photocopy of a warrant, addressed to petitioner Nellie Gajeski as an officer of Astoria, listing assessment numbers S880920924K, S880920925K and S880920926K and seeking collection in the amount of \$220,091.99, including penalty and interest.

-PERIOD TWO-

With regard to Period Two, the Division's motion papers include a Notice of Determination dated January 4, 1993 addressed to petitioner Astoria, and a Notice of Determination dated January 26, 1993 addressed to petitioner Nellie Gajeski. These notices bear

assessment I.D. numbers L-006904498-4 and L-006984204-3, respectively, and each assesses tax in the amount of \$120,622.90, exclusive of penalty and interest, for the period 12/01/88 through 11/30/91. The notice addressed to Nellie Gajeski assesses tax against her as an officer responsible to collect and remit taxes on behalf of petitioner Astoria.

The Division's motion papers also include a document entitled "Stipulation for Discontinuance of Proceeding". This document is captioned:

In the Matter of the Petition
of
Astoria Leasing Corp. and Nellie Gajeski
for Redetermination of a Deficiency/Revision of a
Determination or Refund under Article(s) 28 and 29
of the Tax Law for the Year(s)/Period(s) 12/1/88 -11/30/91.

The Stipulation for Discontinuance references Division of Tax Appeals proceeding numbers 812640 and 812664, specifies notice/assessment numbers L-006904498 and L-006984204, and goes on to state as follows:

The above-entitled proceeding having been resolved, it is hereby stipulated and agreed by and between the parties herein that such proceeding be and the same is discontinued, with prejudice, and that the deficiency/determination or refund is recomputed as follows:

Deficiency/determination or (refund) \$98,000
Interest Statutory
Penalty Statutory

The Stipulation for Discontinuance is dated October 11, 1994 and is signed by Isaac Sternheim as petitioners' representative and by Andrew S. Haber as the Division's representative. Finally, the Division's motion papers include, for each petitioner, a fully executed power of

attorney form appointing Mr. Sternheim as each petitioner's authorized representative with respect to proceedings involving sales and use taxes for 1988 through 1991. The power of attorney form for Astoria is signed by Nellie Gajeski as president of Astoria.

In response, petitioner Astoria denies receiving the Notice of Determination (L-006904498-4) for Period Two. Petitioner Nellie Gajeski, in contrast, admits receipt of the Notice of Determination (L-006984204-3) for such period, but alleges the same pertained (at least in part) to periods extending back more than three years from the January 26, 1993 date of such notice. Both petitioners go on to deny receipt of any warrants with respect to Period Two, and note that their application for refund was filed on January 16, 1996.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

-PERIOD ONE-

Using either April 6, 1992, or the latest bank account levy date of December 17, 1992, as the date of actual notice of the tax liabilities at issue for Period One, the Administrative Law Judge found no claim or evidence that petitioner Astoria made any protest within 90 days of either of such dates. Without such protest, the Administrative Law Judge concluded, the liabilities were fixed and final (Tax Law § 1138[a][1]). Petitioner Nellie Gajeski admitted receipt of the notices of determination for Period One but, again, there was no claim or evidence that she made any protest within 90 days of such receipt. Accordingly, the Administrative Law Judge concluded the liabilities against her were also fixed and final.

This matter evolved as a motion for dismissal with respect to a petition protesting the Division's denial of petitioners' claim for refund. The Administrative Law Judge found that, for Period One, the underlying tax returns were due to be filed and the tax was payable between

September 20, 1982 and March 20, 1988, and petitioners alleged that all of such returns were timely filed. In turn, the tax was paid as the result of bank account levies sometime between July 15, 1992 and December 17, 1992. The Administrative Law Judge accepted the latest of such levy dates, i.e., December 17, 1992, as the date of actual notice and payment citing to ***Matter of Glover Bottled Gas Corp.*** (Tax Appeals Tribunal, September 27, 1990). Comparing such date to the January 16, 1996 refund claim date, the Administrative Law Judge concluded over three years had passed between the latest possible date of actual notice and the filing of petitioners' refund claim. Since petitioners failed to protest within 90 days of actual notice of the liabilities or, in the alternative, failed to timely file a refund claim, the Administrative Law Judge concluded that the Division of Tax Appeals had no jurisdiction to address the merits of petitioners' refund claim.

-PERIOD TWO-

The Administrative Law Judge, citing our decision in ***Matter of Brahms*** (Tax Appeals Tribunal, July 3, 1997, ***confirmed Matter of Brahms v. Tax Appeals Tribunal***, ___AD2d___, 681 NYS2d 699), refused to vacate the Stipulation for Discontinuance. The Administrative Law Judge noted that the stipulation in ***Brahms*** contained the identical wording of the stipulation at issue here. Further, the Administrative Law Judge pointed out that petitioners failed to argue or prove that the Division committed fraud, malfeasance, or misrepresentation of a material fact with regard to the stipulation. In addition, petitioners failed to show the existence of "extraordinary circumstances" sufficient to compel vacatur of the stipulation. The stipulation, which recites that it is for discontinuance *with prejudice*, is fully executed by the parties. Finally, the Administrative Law Judge noted, there is no allegation or proof by petitioners that

the underlying power of attorney forms appointing petitioners' representative, Isaac Sternheim, in the discontinued matters are invalid or infirm. The Administrative Law Judge rejected petitioners' complaint that they were not consulted or did not personally agree or execute the Stipulation for Discontinuance as insufficient to vacate the stipulation and reopen the closed matter.

The Administrative Law Judge also found additional factors which weighed against petitioners' attempt to vacate and reopen the stipulation with regard to Period Two. First, while petitioner Nellie Gajeski admits receipt of a Notice of Determination (L-006984204) for such period, petitioner Astoria denies receipt of such a Notice (L-006904498). However, such denial must be contrasted with the fact that a proceeding was commenced in the Division of Tax Appeals *challenging both such notices*. In addition, a substantial period of time passed before petitioners acted with respect to Period Two. That is, the stipulation is dated as executed on October 11, 1994, yet petitioners' refund claim was not filed until January 16, 1996. Finally, the Administrative Law Judge viewed as particularly significant the fact that the stipulation recomputed and reduced petitioners' tax liability. This tax benefit alone, the Administrative Law Judge stated, militates against vacatur of the stipulation. Therefore, the Administrative Law Judge found that petitioners failed to establish any basis upon which to vacate the Stipulation for Discontinuance, and that the Division of Tax Appeals has no jurisdiction, via the subject refund claim or otherwise, over such notices. Accordingly, the Administrative Law Judge dismissed the petition with respect to Period Two.

ARGUMENTS ON EXCEPTION

Petitioners continue to argue that the stipulation executed between their representative and the Division was invalid and, furthermore, that all their claims were timely filed. Therefore, petitioners request that this case be remanded to the Division for further audit.

In opposition, the Division states that the Administrative Law Judge's determination was well-reasoned and correct in every respect. Therefore, it respectfully requests that the determination be sustained.

OPINION

This matter is before us through a motion to dismiss or for summary determination of a petition challenging the Division's denial of an application for refund for the two periods.

We affirm so much of the Administrative Law Judge's determination as dismissed the petition with regard to Period Two. We agree with the Administrative Law Judge that there has been no showing by petitioners that would support vacatur of the duly executed Stipulation of Discontinuance dated October 11, 1994.

We now address petitioners' claims for Period One. Tax Law former § 1138(a)(1) provided, in part, 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 . . . shall apply to the division of tax appeals for a hearing" The law, as then in effect, also provided that a taxpayer is not entitled to a refund of tax, interest or penalty determined to be due pursuant to

Tax Law § 1138 where all opportunities for administrative and judicial review have been exhausted (Tax Law former § 1139[c]).⁴

For Period One, Nellie Gajeski admitted she received the notices of determination. That being the case, the only issue with respect to the notices issued to her on September 20, 1988 is whether she challenged the validity of the notices of determination within the 90-day period allowed. There is no evidence in this record that would support such a conclusion. Therefore, we affirm so much of the Administrative Law Judge's determination as concludes that the Division of Tax Appeals is without jurisdiction to address the merits of Nellie Gajeski's refund claim for Period One.

We now address Astoria's claim for Period One.

Tax Law § 1147(a)(1) provides:

Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

⁴The Administrative Law Judge erred in stating that "Tax Law § 1139(c) provides that a [refund] claim must be made within the later of three years of the time the tax return was filed or two years from the time the tax was paid" (Determination, conclusion of law "C"). This more liberal language referred to by the Administrative Law Judge was not added until 1996 by Chapter 267 of the Laws of 1996.

In the present matter, petitioner Astoria claims that it never received the subject notices of determination, but does admit receiving a Notice and Demand covering the tax referred to in the subject assessments.

The Administrative Law Judge noted that there was no evidence in the record as to when the notices in question, dated September 20, 1988, were issued and no proof of when or if such notices of determination were, in fact, received by Astoria. However, since Astoria admitted receiving the Notice and Demand dated April 6, 1992, and the taxes for Period One were paid by levy upon Astoria's bank accounts sometime between July 15 and December 17, 1992, the Administrative Law Judge concluded that Astoria had actual notice of the assessments. The Administrative Law Judge found no evidence that Astoria made any protest of the notices of determination within 90 days of either April 6, 1992 or the period July 15 to December 17, 1992 and, therefore, the tax asserted became fixed and final.

We reverse the Administrative Law Judge on this issue.

While we agree that Astoria, at some point, had actual notice of the assessments in question by virtue of the events recited above, that is not sufficient to meet the Division's burden here. The Division has brought this motion either for dismissal of the petition or for summary determination, based on its assertion that the petition is untimely. To prevail on either motion, the Division was required to offer some proof of a date certain when Astoria received actual or presumptive notice of the determination of tax due (*Matter of Agosto v. Tax Commn.*, 68 NY2d 891, 508 NYS2d 934, *revg* 118 AD2d 894, 499 NYS2d 457; *Matter of Riehm*, Tax Appeals Tribunal, April 4, 1991, *annulled on other grounds Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228 [actual notice even though proper mailing not shown]; *cf.*,

Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517 [sales tax, proper mailing under Tax Law § 1147(a)(1)]; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991 [income tax, proof of proper mailing, presumption of receipt]).

Where the timeliness of a petition for a hearing is at issue, the Division has the burden of going forward to establish that it mailed the Notice of Deficiency at issue to the taxpayer at his last known address (*see, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). Once deemed “properly mailed,” the risk of nondelivery is on the taxpayer, i.e., “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*Matter of Katz, supra, quoting Dorff v. Commissioner*, T.C. Memo 1988-117, 55 TCM 412). The evidence required of the Division consists of the following: (i) the establishment of a standard procedure for the issuance of such notices by one with knowledge of such procedure, and (ii) the introduction of evidence to show that this mailing procedure was followed in the particular case at hand (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (*see, Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111). A notice is issued when it is delivered to the custody of the postal service for mailing (*Matter of Novar TV & Air Conditioner Sales & Serv., supra*). The 90-day period for challenging the assessment commences on the date of mailing the notice at issue (*see, Tax Law § 1147[a][1]; Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995).

Had the Division offered proof of proper mailing, a presumption of delivery for the Notice of Determination would obtain and petitioner Astoria would have had 90 days from the date the notice was issued to either request a conciliation conference with the Bureau of Conciliation and Mediation Services (Tax Law § 170[3-a][a]), or to file a petition for a hearing with the Division of Tax Appeals (Tax Law §§ 1138(a)(1), 2008). Absent such a timely protest, the notice would have become a fixed and final assessment of the amount of tax asserted due thereon pursuant to Tax Law § 1138(a) and no refund claim could have been filed after the payment or collection of such assessment pursuant to Tax Law § 1139(c). Here, however, the Division produced no evidence of mailing of the Notice of Determination. As a result, the Division cannot avail itself of the “presumption of receipt” and we cannot conclude that petitioner’s time to protest the Notice of Determination ever began to run.

The Administrative Law Judge determined that nonreceipt of the notices of determination tolls the time period for protesting the notices until the date the taxpayer receives actual notice of the liability. Thus, he considered either the date of the Notice and Demand (April 6, 1992) or the latest bank account levy date (December 17, 1992) as the date of actual notice and the date which commenced petitioner’s 90-day period within which to file a protest.

The accuracy of the Administrative Law Judge’s conclusion is premised on proof by the Division of the issuance of the notices of determination, a fact not in evidence on this motion. Thus, we disagree with that portion of the Administrative Law Judge’s conclusion. If the Division would have us conclude that the period of limitation had expired on petitioner’s petition, we require evidence in support of the motion showing proper mailing by the Division (Tax Law § 1147[a][1]; *Matter of T.J. Gulf, Inc. v. New York State Tax Commn.*, 124 AD2d

314, 508 NYS2d 97). In the absence of such evidence, the Division has failed to carry its burden and its motion to dismiss or for summary determination with respect to Astoria for Period One is denied.

Therefore, we remand this matter to the Administrative Law Judge for a hearing on all issues with regard to Astoria and Period One, including timeliness. We do not now decide whether petitioner, Astoria, has acted timely, but only that the Division has failed to carry its evidentiary burden on its motion. Upon the hearing to be held in this matter, the Administrative Law Judge will first take evidence on the threshold issue of timeliness and, unless the Division meets its burden to show that Astoria's refund claim was filed untimely, the hearing shall proceed on the remaining issues.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception relating to Astoria Leasing Corp. with respect to Period One is granted, but in all other respects is denied;
2. The exception relating to Nellie Gajeski in all respects is denied;
3. The determination of the Administrative Law Judge is reversed in accordance with paragraph "1" above, but is otherwise affirmed;
4. The petition of Astoria Leasing Corp. and Nellie Gajeski is dismissed with respect to Period Two;
5. The petition of Nellie Gajeski is dismissed with respect to Period One; and

6. The matter relating to Astoria Leasing Corp. with respect to Period One is remanded for a hearing consistent with this decision.

DATED: Troy, New York
May 27, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner