STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION
KAROLIGHT, LTD ON REMAND DTA NO. 802708	:	
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, 1981 through February 29, 1984.	:	

Petitioner, Karolight, Ltd., 189-13 Union Turnpike, Flushing, New York 11366, filed a petition 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, 1981 through February 29, 1984.

An initial determination was issued by an Administrative Law Judge on June 15, 1989. On exception, the Tax Appeals Tribunal reversed the order of the Administrative Law Judge and remanded the case to an Administrative Law Judge for a new hearing on "the issue of whether the notice had been sent in compliance with Tax Law section 1147(a)(1)." A subsequent hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 7, 1991 at 9:15 A.M., with all briefs to be submitted by May 16, 1991. The Division of Taxation submitted its brief on April 10, 1991 and petitioner submitted its brief on May 15, 1991. Petitioner appeared by Alan Frankel, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether the Division of Taxation complied with the requirement of Tax Law § 1147(a)(1) that the notice of determination be sent to petitioner's last known address.

FINDINGS OF FACT

Findings of Fact "2" through "8" were found by the Tax Appeals Tribunal in its decision issued on February 8, 1990.

Pursuant to a field audit of Karolight, Ltd., form AU-16, Notice of Determination and Demand for Payment of Sales and Use Taxes Due, bearing notice number S850720939M and the date of July 20, 1985, was issued to said petitioner in the amount of $13,927.93, plus interest of $4,181.75, for a total amount due of $18,109.68 for the period June 1, 1981 through February 29, 1984. The aforesaid notice of determination was actually sent, by certified mail, to this petitioner on July 11, 1985 and was addressed to Karolight, Ltd. at 189-11 Union Turnpike, Flushing, New York 11355. Previously, on August 15, 1984, Karolight, Ltd., by its president, Karol Fisher, executed a consent whereby he agreed on behalf of the corporation that sales and use taxes for the period June 1, 1981 through August 31, 1982 could be assessed at any time on or before September 20, 1985.

The correct address of Karolight, Ltd. is 189-13 Union Turnpike, Flushing, New York 11366. It is apparent, therefore, that both the street number and zip code were incorrect on the notice of determination issued to this petitioner.

The certified mail claim check indicates that an initial delivery of the notice of determination was attempted on July 13, 1985 and that this petitioner was provided with a second notice of arrival on July 18, 1985 upon its failure to claim this piece of certified mail. When Karolight, Ltd. again failed to claim the certified mail, the U.S. Postal Service, on July 29, 1985, returned the notice of determination to the Division of Taxation marked "unclaimed".[1]

The record herein indicates that Karolight, Ltd. did not receive the notice of determination. Its original petition, dated October 11, 1985 and signed by Rachel Mussaffi, Secretary, refers to notice number S850720940M which, in fact, was the assessment number contained on a notice and demand issued to Rachel Mussaffi, as officer of Karolight, Ltd. In any event, the petition of Karolight, Ltd. was mailed by certified mail, return receipt requested,

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[1]The Tribunal modified the Administrative Law Judge's ("ALJ's") finding below with respect to this numbered fact to remove the ALJ's implication that petitioner Karolight, Ltd. had any notice of the attempted delivery because this implication was unsupported by the record.

on October 19, 1985 and was received by the Tax Appeals Bureau on October 23, 1985. Both the envelope containing the petition and the receipt for certified mail produced by Karolight, Ltd. bore a U.S. Postal Service postmark of October 19, 1985.[2]

If the notice of determination was sent by certified mail to petitioner at the proper address on July 11, 1985, the 90-day period for application for an administrative hearing would have expired on October 9, 1985. If such notice was deemed to have been mailed on July 20, 1985 (the date set forth on the notice), the 90-day period would have expired on

October 18, 1985. In either case, the petition of Karolight, Ltd., mailed on October 19, 1985 would be untimely. However, subsequent to the hearing, the Division of Taxation, in a letter dated April 3, 1989 which accompanied its memorandum of law, conceded that the certified mailing documents relating to the notice of determination issued to Karolight, Ltd. appeared to rebut the presumption of receipt of such notice by this petitioner and the Division, therefore, agreed that Karolight, Ltd. is entitled to an administrative hearing on the substantive issues of the sales and use tax assessment at issue herein.

Form AU-16.1, Notice and Demand for Payment of Sales and Use Taxes Due (notice number S850720940M) bearing the date of July 20, 1985, was issued by the Division of Taxation to Rachel Mussaffi, as officer of Karolight, Ltd. in the amount of $13,927.93, plus interest of $4,181.75, for a total amount due of $18,109.68 for the period June 1, 1981 through February 29, 1984. According to the certified mailing documents submitted by the Division of Taxation, the notice and demand was sent by certified mail to this petitioner on July 11, 1985. The Domestic Return Receipt (PS Form 3811) indicates that Ms. Mussaffi signed for the certified mail (the date of delivery is not set forth thereon) and such form was mailed back to the Division of Taxation on July 13, 1985. The following explanation was contained on the

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[2]The Tribunal modified the ALJ's finding below with respect to this numbered fact to remove the statement that it was unclear from the record whether Karolight, Ltd. ever received the notice of determination. The Tribunal noted that the ALJ's statement was completely inconsistent with the record and the fact that the notice was returned by the Post Office marked "unclaimed".

notice and demand:

"You are personally liable as officer of Karolight, Ltd. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law.

Period Ending	Per. Desig.	Tax Due	Interest due
8/31/81	182	1,892.94	911.32
11/30/81	282	1,834.82	806.98
2/28/82	382	1,058.40	422.29
5/31/82	482	756.05	270.98
8/31/82	183	1,192.50	379.05

11/30/82	283	1,004.66	279.03
2/28/83	383	1,045.54	251.90
5/31/83	483	1,150.46	245.72
8/31/83	184	503.47	93.78
11/30/83	284	2,107.14	336.40
2/29/84	384	1,381.95	184.30
Totals		13,927.93	4,181.75"

The notice and demand did not advise this petitioner that she had the right to apply for an administrative hearing by filing an application therefor with the former State Tax Commission within 90 days from the date of the notice (July 20, 1985).

The petition of Rachel Mussaffi was dated October 11, 1985, but was mailed by certified mail, return receipt requested, on October 19, 1985 and was received by the Tax Appeals Bureau on October 23, 1985. Both the envelope containing the petition and the receipt for certified mail bore a U.S. Postal Service postmark of October 19, 1985. As in the case with Karolight, Ltd., the 90-day period for the filing of a petition for an administrative hearing would have expired on October 18, 1985.

After the initial hearing held on March 3, 1989, the ALJ determined on June 15, 1989 that, with respect to Rachel Mussaffi, officer of Karolight, Ltd., the Division of Taxation erroneously issued a notice and demand in lieu of a notice of determination and that because the notice and demand failed to properly apprise Rachel Mussaffi of her rights to contest the Division's determination, the assessment against her must be cancelled. No exception was filed with the Tax Appeals Tribunal with respect to Rachel Mussaffi.

With respect to petitioner Karolight, Ltd., the ALJ determined that it was entitled to an administrative hearing upon the Division's concession that the certified mailing documents relating to the notice of determination issued to Karolight, Ltd. appeared to rebut the presumption of receipt of such notice.

On exception to the ALJ's determination, petitioner Karolight, Ltd. argued that the Division mailed the notice of determination to it at an incorrect address and that the statute of limitations for an assessment against it has expired because Tax Law § 1147(b) provides that no assessment of additional tax shall be made after the expiration of more than three years from the

date of the filing of a return.

The Tax Appeals Tribunal reversed the determination with respect to petitioner Karolight, Ltd. and remanded the case to an ALJ for a new hearing on the issue of whether the notice had been sent in compliance with Tax Law § 1147(a)(1). Referring to the requirements of Tax Law § 1147(a)(1), the Tribunal held that "any inquiries into the validity of the notice at issue must address the question of whether it was mailed to petitioner Karolight, Ltd.'s 'last known address'." The Tribunal noted in the circumstances of this case that if it was found that the notice of determination was properly mailed to petitioner Karolight, Ltd.'s "last known address", the 90-day period for requesting a hearing under Tax Law § 1138 would not have been triggered and petitioner would have been entitled to a hearing (citing Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, 946, affd 64 NY2d 688, 485 NYS2d 517). In contrast, the Tribunal noted that if it was found that the notice of determination was not mailed to Karolight, Ltd.'s last known address and petitioner never actually received the notice, the notice would be invalid. The Tribunal concluded from the record that Karolight, Ltd. did not receive the notice. However, it also found that the record was devoid of any evidence to suggest that the address which appeared on the notice of determination was or was not Karolight, Ltd.'s last known address; that no party raised the issue during the hearing; and that without any evidence on this issue, it was unable to determine whether the notice was sent to petitioner Karolight, Ltd.'s last known address as required by Tax Law § 1147(a)(1). Therefore, the Tribunal remanded this case for a hearing on the limited issue of whether the notice was sent in compliance with Tax Law § 1147(a)(1).

At the subsequent hearing scheduled on February 7, 1991, the Division introduced seven ST-100 sales tax returns for the quarters ended August 31, 1981, August 31, 1982, February 28, 1983, February 29, 1984, May 31, 1984, May 31, 1985 and August 31, 1985. All of these returns had attached to the front preprinted labels with petitioner's name and address. On the returns for the quarters ended August 31, 1981, August 31, 1982, February 28, 1983, February 29, 1984 and May 31, 1985, the labels contained the address "Karolight, Ltd., 189-11-

Union TPK, Flushing, New York 11355" (emphasis added). On the two returns for the quarters ended May 31, 1985 and August 31, 1985, the labels contained the address "Karolight, Ltd., 189-11-Union TPK, Flushing, New York 11366" (emphasis added). The return for the quarter ended May 31, 1985 had stamped on the front page "Late Received Jul 02 1985 Chemical Bank".

At the second hearing, the Division also referred to the Statement of Proposed Audit Adjustment submitted in evidence at the prior hearing as the Division's Exhibit "C". On the top of the document the name and address of petitioner was handwritten as follows:

"Karolight, Ltd.
189 11 Union Tpke.
Flushing, New York 11355"

The Statement of Proposed Audit Adjustment was dated June 10, 1985 and indicated $13,927.93 tax due for the audit period. Below the stated tax was the handwritten notation, "We are disagree [sic] with this statement." At the bottom of the document was the signature, Rachel Mussaffi, as secretary and the date July 5, 1985. In his direct testimony, Mr. Richard Gudanek, the supervising auditor on the case,[3] responded as follows to questions concerning this document:

"Q Can you identify that document?

A This is a 30-day letter or a 1608. This was in our audit file that I reviewed.

Q Now, Mr. Gudanek, there is a handwritten statement on the bottom of the form, isn't there?

A Yes. We disagree with the statement. It is signed by Rachel Mussaffi. She was a secretary of the corporation of Karolight.

Q Okay. Now, Mr. Gudanek, was this form returned to the City after it was issued?

A Yes.

Q So this is a marked-up copy of the original that went out?

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[3]Mr. Gudanek testified that his involvement with the case was as a supervisor and that the auditor on the case was Mr. Joe Albert.

A Yes, it is.

Q Then it is my understanding, or is it your testimony, that this is a copy of the statement of audit changes that were returned by the taxpayer?

A Yes, it is.

Q Okay, and that is in the audit file for this matter?

A Yes, the original is in the audit file." (Tr. at 22.)

Among the evidence submitted by petitioner were copies of the front pages of three ST-100 sales tax returns for the quarters ended August 31, 1982, November 30, 1982 and August 31, 1983. The first two returns had attached to the front preprinted labels with petitioner's name and address as follows: "Karolight, Ltd., 189 11-Union TPK, Flushing, N.Y. 11355"; the third return contained the handwritten notation "Karolight" in place of a preprinted label. On these returns, to the right of the labels or notation "Karolight", was the printed notation "If incorrect on label, please enter correct information below." Beneath this printed statement, on all three documents, there was the handwritten notation "11366" to indicate a correction to the zip code.[4]

Petitioner also submitted into evidence copies of six cancelled checks made out to "New York State Sales Tax" dated, respectively, May 16, 1981, June 17, 1981, September 18, 1981, March 20, 1985, June 18, 1985 and September 19, 1985. These checks had the name and address of petitioner preprinted on the checks as follows:

"Karolight Ltd.
189-13 Union Turnpike
Flushing, New York 11366".

Mr. Karol Fisher, president of Karolight, Ltd., testified that because he rents two adjacent stores, the correct street address could be either 189-11 or 189-13 Union Turnpike.

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[4]In cross-referencing petitioner's copy of the sales tax return for the quarter ending August 31, 1982 to the original return put into evidence as the Division's Exhibit "BB2", it was noted on the record that the original copy was cut and taped over the space that would have indicated the handwritten correction to the zip code; however, ink marks at the top of the cut portion indicate that some correction may have been made to the zip code.

However, with regard to the zip

code, he testified that the zip code has always been 11366, that he attempted to correct the Division's use of the incorrect zip code (11355) on many occasions, and that because of the incorrect zip code, he would not always receive the mail from the Division.[5] Specifically, Mr. Fisher indicated that the sales tax return for the quarter ended August 31, 1983 did not have attached to it the preprinted label because he probably never received the form in the mail.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argued that the last return filed by it prior to the issuance in July 1985 of the notice of determination was the ST-100 sales tax return for the quarter ended May 31, 1985. Petitioner noted that this return clearly indicated on the preprinted label the corrected zip code and that the Division sent the notice to the incorrect address. Petitioner therefore contended that the requirements of Tax Law § 1147(a)(1) have not been met and that the statute of limitations has expired for assessment of tax for the audit period in question.

The Division argued that it complied with Tax Law § 1147(a)(1) because the last known address given in the last return or any application filed by petitioner was identical to that of the notice. Specifically, the Division contended that it was required to use the address contained on the Statement of Audit Adjustment because petitioner returned that document on July 5, 1985 subsequent to the ST-100 received by the Division on July 2, 1985. The Division further argued that the only difference between the

incorrect and correct addresses was the last two digits on the zip code and that it was clear that petitioner received mail containing the incorrect zip code as best illustrated by petitioner's return of the Statement of Audit Adjustment only days before the mailing of the notice at issue. The

[5]Thus, although technically the notice contained an incorrect street address, petitioner contends that it was only the use of the incorrect zip code that would prevent mail from arriving at the correct address.

Division claimed that although it previously acknowledged that petitioner's right to a hearing was based upon the return of the original notice as "unclaimed", it has not conceded that the notice failed to find its way to petitioner. The Division concluded that the failure of petitioner to receive the notice was not the result of an insufficient address or the use of an address that was undeliverable inasmuch as the three-digit prefix of the zip code was correct and was unique to Flushing, New York, and prior mailings with the incorrect zip code to petitioner, including the Statement of Audit Adjustment, were received by petitioner.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal remanded this case on the very limited factual issue of whether the notice contained the address given in the last return filed by petitioner or in any application made by it pursuant to Tax Law § 1147(a)(1). The Tribunal also has stated the legal standard to be applied in the facts of this case; to wit, if it is found that the notice of determination was not mailed to petitioner's last known address and petitioner never actually received the notice, the notice would be invalid. The Tribunal further stated that:

> "Under these facts, we would grant Karolight's request to dismiss the assessment absent a showing that a valid notice was remailed[6] to Karolight, Ltd. during the three-year period of limitations." (Id. at 8.)

B. Here, petitioner had corrected the incorrect zip code on three prior sales tax returns, the last of which was for the quarter ended August 31, 1983. Apparently, the change was eventually made by the Division. The return for the quarter ended May 31, 1985 had attached to it the preprinted label with the correct address and was stamped received on July 2, 1985. The notice at issue was dated July 20, 1985 and was mailed on July 11, 1985. Thus, the address on the last return filed by petitioner prior to the notice of determination contained the corrected zip code.

C. Referring to the requirement in Tax Law § 1147(a)(1) that the notice contain the

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[6] The Tribunal already found that Karolight, Ltd. did not receive the notice and modified the ALJ's facts accordingly.

address given in the last return filed by petitioner or any application made by petitioner, the Division claims that the last application filed by petitioner was the Statement of Proposed Audit Adjustment that Rachel Mussaffi, as secretary, signed on July 5, 1985. The Division also asserts that the incorrect zip code did not constitute an insufficient address inasmuch as petitioner received mail with the incorrect zip code as demonstrated by the receipt by petitioner of the Statement of Proposed Audit Adjustment. These arguments are unpersuasive.

First, the fact that the zip code was incorrect by only the last two digits is not insignificant. The Division referred in its brief to section 122.61 of the Domestic Mail Manual which it quoted as follows:

> "The first three digits [of the zip code] identify the delivery area of the sectional center facility (SCF) or major city post office serving the area in which the address is located. The next
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> two digits (the fourth and fifth digits) identify the delivery area of the associate post office or branch station of the major city post office serving the address..." (Div. Brf. at 4).

The Division attached a copy of section 122.63b of the Domestic Mail Manual which indicated that the first three digits of the zip code "113" were unique to Flushing, New York. However, as noted above, the last two digits of the zip code identify the delivery area of the associate post office or branch station of the major city (Flushing) post office. Therefore, if the last two digits of the zip code were incorrect, the mail would be routed to the wrong branch station or delivery area and, therefore, such mail might not find its way to the correct address. Although the testimony and evidence indicates that mail containing the incorrect zip code would at times arrive at petitioner's correct address, there is also credible testimony and evidence which indicates that at times mail containing the incorrect zip code was not received by petitioner (see Findings of Fact "15" and "17"). The Division's assertion that the Statement of Proposed Audit Adjustment constitutes evidence that petitioner received mail with the incorrect address has not been established in the record. The evidence submitted by the Division consisted of the Statement of Proposed Audit Adjustment (Div. Ex. "C") itself. The address with the incorrect zip code is handwritten on the top of the page; however, there is no testimony, mailing envelope

or mailing log to indicate that this document was even mailed to petitioner (see Finding of Fact "14").

Second, the fact that Rachel Mussaffi, as secretary, signed on July 5, 1985 the Statement of Proposed Audit Adjustment which contained the incorrect zip code does not constitute an "application" by "petitioner" within the meaning of Tax Law § 1147(a)(1) so as to supersede the corrected address on the last sales tax return filed. Petitioner had filed at least three sales tax returns with corrections to the zip code since August of 1982. The preprinted labels attached to the returns for the quarters ended May 31, 1985 and August 31, 1985 indicate that the Division itself had finally made the correction to the zip code on the preprinted labels. However, for some reason the Division subsequently repeated the same error on the Statement of Proposed Audit Adjustment. To consider that document an "application" by "petitioner" within the meaning of Tax Law § 1147(a)(1) in these circumstances would be grossly unfair to petitioner. After the notice at issue was returned by the Post Office as "unclaimed", it would appear that it was incumbent upon the Division to examine whether the address on the notice was the same address given in the last return filed by petitioner. It should be noted that, in contrast to the sales tax returns, nowhere on the Statement of Proposed Audit Adjustment was there a statement that petitioner should make any corrections to the address contained on the top of the document. Also, as noted above, there is no indication that the Statement of Proposed Audit Adjustment was delivered to petitioner by mail. Under Tax Law § 1147(a)(1) the term "application by" the person for whom the notice was intended would appear to imply that the address itself would be supplied by that person, which does not appear to be the situation with regard to the Statement of Proposed Audit Adjustment.

In sum, the notice of determination did not comply with the requirements of Tax Law § 1147(a)(1). Thus, according to the Tribunal's directive, inasmuch as there was no proof offered at the hearing that a notice was remailed to petitioner during the three-year limitations period, the assessment should be dismissed.

D. The petition of Karolight, Ltd. is granted and the Notice of Determination and

Demand for Payment of Sales and Use Taxes Due, dated July 20, 1985, is cancelled.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE