

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NOVAR TV & AIR CONDITIONER	:	
SALES & SERVICE, INC.	:	DETERMINATION
AND BALMES ROSA, AS OFFICER	:	
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 December 1, 1984	:	
through November 30, 1987.	:	

Petitioners, Novar TV & Air Conditioner Sales & Service, Inc., and Balmes Rosa as Officer, 4059 Murdock Avenue, Bronx, New York 10462, filed a petition for revision of a determination or for refund of sales and use taxes for the period December 1, 1984 through November 30, 1987 (File No. 806675).

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 24, 1990 at 9:15 A.M. and continued to completion on June 22, 1990 at 10:00 A.M. Petitioner appeared by Joseph A. Cofino, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether petitioners filed either a request for a conciliation conference or a request for an administrative hearing within 90 days of the mailing of any of eight notices of determination.

FINDINGS OF FACT

In January 1988, the Division of Taxation ("Division") began a field audit of the business operations and records of petitioner Novar Television & Air Conditioner Service, Inc. ("Novar"). As a result of this audit, four notices of determination and demands for payment of sales and use taxes due, covering the periods December 1, 1984 through November 30, 1987, were issued to Novar and an additional four notices, covering the same periods, were issued to

petitioner Balmes Rosa, as an officer of Novar. Four of the eight notices were dated July 25, 1988 and assessed sales tax, penalty and interest as follows:

<u>Notice Number</u>	<u>Issued to</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
S880725007L	Novar	\$21,886.51	\$5,908.48	\$6,250.14
S880725008L	Novar		1,943.65	
S880725009L	Balmes Rosa	21,886.51	5,908.48	6,250.14
S880725010L	Balmes Rosa		1,943.65	

The remaining notices were dated September 14, 1988 and assessed sales tax, penalty and interest as follows:

<u>Notice Number</u>	<u>Issued to</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
S880914006L	Balmes Rosa	\$2,330.96	\$ 655.09	\$903.02
S880914007L	Novar	2,330.96	655.09	903.02
S880914009L	Novar		144.69	
S880914010L	Balmes Rosa		144.69	

The four notices dated July 25, 1988 were mailed by certified mail. Postal receipts, mailing logs and testimony established the mailing date of these notices as July 26, 1988. The auditor in charge of this audit testified that the remaining notices, dated September 14, 1988, were mailed on September 19, 1988.

On October 28, 1988, the Division received a request for a conciliation conference regarding notice number S880725010L. It was mailed by certified mail, and the envelope containing the request was postmarked October 25, 1988. The request was signed by Balmes Rosa and dated September 10, 1988.

The Division denied petitioner's request for a conference on the ground that the request was not mailed within 90 days of the mailing of the notices. The conciliation order addresses two notice numbers: S880725008L and S880725010L, although the request for a conference listed only the latter number. The Division denies receiving a request for a conciliation conference or an administrative hearing with respect to the six remaining notices.

Petitioners offered no evidence to support their assertion that timely requests for hearing were mailed by petitioners.

CONCLUSIONS OF LAW

A. Section 1138(a)(1) of the Tax Law requires that a petition challenging a notice of determination issued under article 28 of the Tax Law be filed within 90 days after the giving of such notice. This 90-day period begins to run from the date of mailing of the notice (Tax Law § 1147[a][1]). The Bureau of Conciliation and Mediation Services is responsible for providing conciliation conferences at the option of any taxpayer who, among other things, has received a notice of determination (Tax Law § 170[3-a][a]). A request for a conference suspends the running of the period of limitations for the filing of a petition requesting an administrative hearing (Tax Law § 170[3-a][b]).

Generally, a petition or request for conference is deemed to be filed upon physical delivery; however, when either is delivered by United States mail, it is deemed delivered on the date of the United States postmark stamped on the envelope (Tax Law § 1147[a][2]). Here, the Division proved that on July 26, 1988, it mailed two notices to Novar and two to Mr. Rosa; consequently, the statutory period for challenging those notices expired on October 24, 1988. The request for a conciliation conference mentioned only one of those notices, and the envelope in which it was received was postmarked October 25, 1988, 91 days after the mailing of the notices.

B. The Division's only witness testified that the four notices dated September 14, 1988 were mailed on September 19, 1988. Petitioners did not deny receipt of those notices, and there is no evidence in the record that either petitioner challenged those notices at any time. In fact, petitioners were unable to present any evidence at all to establish that either of them mailed a timely request for a conciliation conference or hearing regarding any of the notices at issue here. Accordingly, the Division of Tax Appeals is without jurisdiction to consider the facts and issues raised in the petition.

C. The petition of Novar TV & Air Conditioner Sales and Service, Inc., and Balmes Rosa, as Officer, is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE