

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
CHARBRU RESTAURANT, INC. : DETERMINATION  
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 September 1, 1982 :  
through November 30, 1985. :

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Petitioner, Charbru Restaurant, Inc., 1902 Jericho Turnpike, New Hyde Park, New York 11040, 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 September 1, 1982 through November 30, 1985 (File No. 807524).

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 24, 1990 at 1:15 P.M., with all briefs to be submitted by October 8, 1990. Petitioner appeared by Bee, De Angelis and Eisman (Peter A. Bee, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly mailed a notice of determination to petitioner, having obtained petitioner's address from a Notification of Sale Transfer or Assignment in Bulk.

II. Whether petitioner timely filed a petition for an administrative hearing to contest the sales and use tax deficiency assessed by the Division of Taxation.

FINDINGS OF FACT

Petitioner, Charbru Restaurant, Inc. (hereinafter "Charbru"), formed in 1982, operated an Italian-American restaurant at 2235 Jericho Turnpike in New Hyde Park, New York, from that time until July 1986. In an effort to expand petitioner's business, Charles Nolan, president of

petitioner, sought to acquire the assets of another restaurant located in the same area. On or about October 11, 1985, a bulk sale transaction occurred between the seller, Nesnick<sup>1</sup> Inc., and Charbru Restaurant, Inc., as purchaser. The location of the property purchased by Charbru was 1902 Jericho Turnpike, also in New Hyde Park.

The Division of Taxation submitted into evidence Form AU-196.10, Notification of Sale, Transfer, or Assignment in Bulk. Although the form appears to have been completed on October 11, 1985, it was not submitted to the Sales Tax Section of the Central Office Audit Bureau until February 1986. The form was accompanied by a letter from Joseph C. Bondi, Esq., the escrow agent for the bulk sale transaction. His correspondence, dated February 11, 1986, was stamped by the Department of Taxation and Finance, Central Office Audit Bureau, as received on February 19, 1986. Enclosed with the letter and the bulk sale form was a personal check from Charles and Barbara Nolan in the sum of \$1,650.00 for the bulk sales tax due in the transaction between Nesnick and Charbru.

The bulk sale notification form filed with the Division requests various information of the purchaser, seller, and escrow agent, if one is used. The purchaser's mailing address was listed as Charbru Restaurant, Inc., c/o Arthur Goldberg, Esq., 55 Northern Boulevard, Greenvale, New York 11548. The seller's mailing address was listed as Nesnick Inc., 1902 Jericho Turnpike, New Hyde Park, New York 11040. The escrow agent was Joseph C. Bondi, Esq. with a mailing address of 1619 Jericho Turnpike, New Hyde Park, New York 11040.

The second portion of the bulk sale form requests vendor information including information with respect to the purchaser and the seller. As completed, the purchaser's name in the vendor identification section was Charbru Restaurant, Inc. with a business or trade name

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<sup>1</sup>The seller corporation named on the bulk sale form is "Nesnick Inc."; however, in the hearing transcript this corporation is frequently referred to as "Nestnick Inc.". The reference is to the same seller.

listed as the same. The next request is for the business location and it was indicated that the business location was 55 Northern Boulevard, Greenvale, New York 11548. With respect to the seller, the seller's name and business or trade name, were listed as Nesnick Inc. and the business location was stated to be 1902 Jericho Turnpike, New Hyde Park, New York 11040. There was an indication in the details of sale that the location of property when transferred was 1902 Jericho Turnpike, New Hyde Park, and the type of business or property sold was a restaurant/diner.

Mr. Nolan by his testimony indicated that it was his intention to expand his restaurant business to a new and larger location. Although he purchased the property located at 1902 Jericho Turnpike in October 1985, it was not until approximately July 1986 that he relocated his restaurant operations to 1902 Jericho Turnpike. His testimony indicates, however, that he did not commence a new business operation with respect to a name change or identification number change, nor did he give taxing authorities any indication that the business was any different from the operation at 2235 Jericho Turnpike.

On March 20, 1986, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$107,570.15 for the period September 1, 1982 through November 30, 1985, plus penalty and interest in the amount of \$20,467.55 and \$20,493.28, respectively, for a total amount due of \$148,530.98. The notice was issued to Charbru Rest, Inc. c/o Arthur Goldberg, Esq., 55 Northern Boulevard, Greenvale, New York, with the following explanation:

"The following taxes are determined to be due from Nestnick, Inc. and represents your liability as purchaser, in accordance with section 1141(c) of the Tax Law."

The notice of determination was later revised as to the total amount reflecting an increase only in the penalty amount of \$300.00 for a new total amount due of \$148,830.98. The revised notice also bore the date of March 20, 1986, and was addressed to Charbru c/o Mr. Goldberg as was the first notice.

The Division of Taxation had conducted a sales tax audit of Nesnick, Inc., for periods prior to the date of the bulk sale to petitioner. The Division asserts that the seller failed to

maintain and make available adequate books and records from which a detailed audit could be conducted and tax computed. The Division of Taxation thus estimated the seller corporation's sales tax liability for the period in question.

A tax auditor from the Mineola District Office, Camille Mulé, was assigned the Nesnick sales tax audit case. Ms. Mulé was questioned on the record as to whether she had any pertinent conversations with Joseph Bondi, the escrow agent for the bulk sale transaction between Nesnick and Charbru. Ms. Mulé referred to her field log on March 10, 1986, and it indicated that she had gone to the Post Office in an attempt to locate the seller, only to find no forwarding address for Nesnick, Inc. She then proceeded to the address where Nesnick previously operated (1902 Jericho) and spoke to construction workers who told her that "a man named Nolan purchased the property a couple of months ago" and that he had a bar close by. She then went to the bar and spoke with Mrs. Nolan who told her they had purchased the land and buildings from the landlord of Nesnick. Mrs. Nolan indicated that Nesnick's attorney was Mr. Bondi and that the Nolan's attorney was Mr. Goldberg. Ms. Mulé could not recall the exact location of her conversation with Mrs. Nolan, but was aware that it was a bar a couple of blocks from the Nesnick address. Ms. Mulé's log indicated that she later spoke to Mr. Bondi and he told her that "the owner of Nesnick disappeared and owes a lot of money."

The first notice of determination mailed to Charbru pertaining to sales tax owed by Nesnick, dated March 20, 1986, was mailed by certified mail, return receipt requested, to Arthur Goldberg, showing a delivery date of March 21, 1986. The second notice merely reflecting the correction of a mathematical error was also mailed by certified mail, return receipt requested, and showed a date of delivery of June 24, 1986. Both receipts were submitted into evidence. Although a signature appeared on each of the receipted cards indicating delivery, Ms. Mulé could not verify who accepted delivery of the respective notices. In fact, Ms. Mulé, when questioned, indicated that, if she had reviewed sales tax returns and found a different address for Charbru than that shown on the notification of bulk sale, she probably would have sent an assessment to each address. Ms. Mulé testified that both notices were sent to the

address she obtained from the bulk sale notice form which indicated that Charbru had a mailing address in care of Arthur Goldberg at 55 Northern Boulevard, Greenvale, New York 11548. Although Ms. Mulé visited the business location of Charbru at 2235 Jericho Turnpike, and spoke to Mrs. Nolan, who admitted purchasing the Nesnick building and assets, Ms. Mulé testified that she was unaware that the operation at 2235 Jericho Turnpike was in fact Charbru Restaurant, Inc. She further testified that although she would be able to determine whether or not Charbru Restaurant had filed sales tax returns if it was a Nassau County-based enterprise, she did not pursue the records to determine if prior sales tax returns had been filed by Charbru.

About a year after petitioner moved its business location from 2235 Jericho Turnpike to 1902 Jericho Turnpike, it was visited by a sales tax agent by the name of Mr. Buckrou regarding sales taxes owed during periods when it operated at 2235 Jericho Turnpike. Mr. Nolan admitted he had fallen behind in some of his tax payments, and he and Mr. Buckrou set up time payments.

Mr. Nolan further testified that near the end of 1987, another auditor, Mr. Wright, assumed responsibility for the Charbru Restaurant tax case. Mr. Wright indicated that he had seen something in the computer file indicating that Mr. Nolan had some other tax problem. Mr. Wright agreed to look into it. Having done so, he indicated that there was a Port Washington address in reference to the other tax problem and that "it had to be a computer mistake", not to worry about it. Several months later Mr. Nolan had an additional conversation with Mr. Wright indicating that there was a computer entry with Mr. Nolan's name on it, again with a Port Washington address. Mr. Nolan testified that he never had a business location in Port Washington. However, Mr. Wright assured him there was some problem and had no idea why he was never notified. Mr. Nolan requested an appointment with Mr. Wright to discuss the problem and promptly contacted both his accountant and a former attorney, Mike Balboni. Mr. Balboni assisted Mr. Nolan in immediately filing a petition with the Division of Tax Appeals on November 2, 1989. The case was later referred to Peter Bee, petitioner's present attorney.

Mr. Nolan testified unequivocally that he never received either of the notices of determination issued on March 20, 1986 until his present attorney, Peter Bee brought them to his attention. Mr. Nolan stated that Mr. Goldberg never informed him that there was a sales tax proceeding, but indicated, approximately a month before petitioner moved its business location in July 1986, only that he would no longer represent petitioner. Presumably, this was several months after Mr. Goldberg had already received the notices of determination. Mr. Nolan indicated that his relationship with Mr. Goldberg became strained with respect to obtaining a license from the State Liquor Authority, and that as a result of arguments between the parties, Mr. Goldberg decided to no longer represent petitioner.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that the Division of Taxation is under an obligation to provide a notice of determination of tax due at the last address from which a party has filed sales tax returns. Petitioner filed prior sales tax returns which preceded the notice of determination sent to Mr. Goldberg. The auditor for the Division of Taxation testified that not only could the address of the first location be established through the computer system, but that she also visited 2235 Jericho Turnpike and had first-hand knowledge of that address. Thus, petitioner believes that the priority of mailing pursuant to Tax Law § 1145(a)(1) has not been met by the Division of Taxation.

In the event it is found that the Division of Taxation complied with the mailing requirements, the statute provides only a presumption of receipt which, petitioner argues, the witness has rebutted by a credible explanation for his conduct following the awareness that a problem with the Tax Department existed. In fact, petitioner maintains that, due to Mr. Nolan's efforts, the problem with respect to the sales tax inherited from Nesnick was revealed.

The Division of Taxation contends that the documentary evidence and testimony given indicates that a notice of determination of sales tax due was sent to Mr. Goldberg at the address provided on the notification of bulk sale and that such notice was sent to that address because at that time his name and address were the only mailing information provided by petitioner

through the bulk sale process. The Division argues that it met the mailing requirements of Tax Law § 1147(a)(1) and that the notice of determination was properly addressed since the notice was sent to the very same address provided by petitioner through its own notification of bulk sale. In addition, the Division argues that it has established that the notice was sent by registered mail and since the petition was not filed until over 3½ years after the notices were sent, the petition is untimely.

#### CONCLUSIONS OF LAW

A. Tax Law § 1147(a)(1) provides as follows:

"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."

B. Tax Law § 1138(a) (former [1]), in effect for the period at issue, provided, in pertinent part, as follows:

"Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such 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 tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same."

C. It has been established that Tax Law § 1147(a)(1) clearly requires that the notice be sent to the last known address of the taxpayer, i.e., "the address given in the last return filed...or in any application made..." (Matter of Karolight, Ltd. and Rachel Mussaffi, officer of Karolight, Ltd., Tax Appeals Tribunal, February 8, 1990). The presumption of receipt arises when the Division demonstrates that it has a routine office practice and procedure for mailing the notice and that the notice was in fact properly addressed and mailed (Matter of T.J. Gulf, Inc. v. New York State Tax Commission, 124 AD2d 314, 508 NYS2d 97, 98). Thus any inquiries into the validity of the notice at issue must address the question of whether it was mailed to petitioner Charbru's "last known address".

Clearly, petitioner's last known address was that which it provided to the Department of Taxation and Finance in the notification of bulk sale. Although one might argue that it would have been prudent to additionally send a notice to the attention of Mr. and Mrs. Nolan at the address where the auditor visited, 2235 Jericho Turnpike, the Division of Taxation complied with the mailing requirements of Tax Law § 1145(a)(1) by utilizing the last known address of which it was appraised. A taxpayer, however, has the right to rebut the presumption of receipt contained in Tax Law § 1147(a)(1), and, if successful, the 90-day period for filing a petition will commence to run as of the date of actual receipt of the notice (Matter of Ruggerite v. State Tax Commn., 64 NY2d 688).

D. Petitioner offered credible testimony in an attempt to establish, it did not receive the notice of determination issued by the Division of Taxation on March 20, 1986. The notices, having been sent to an attorney with whom petitioner was either no longer associated or under a strained association, were apparently intercepted and never forwarded to petitioner. In addition, the Division of Taxation's use of a mailing address unrelated to petitioner's actual location (although a proper choice) lends plausibility to petitioner's contention that the notice was somehow misdirected. This fact coupled with the testimony of Charles Nolan, president of Charbru Restaurant, Inc., lead to the conclusion that petitioner has rebutted the presumption of receipt, and since the 90-day period for the filing of a petition commences to run as of the date of actual notice, it is hereby determined that the petition received by the Division of Tax Appeals on November 2, 1989, was a timely petition for purposes of obtaining an administrative hearing with respect to the alleged sales tax deficiency at issue herein.

E. The petition of Charbru Restaurant, Inc., is granted to the extent that the Division of Tax Appeals shall, with respect to the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to petitioner on March 20, 1986, as revised, schedule said matter for an administrative hearing and for further proceedings not inconsistent herewith.

DATED: Troy, New York

2/28/91



ADMINISTRATIVE LAW JUDGE