

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
STEVE AVLONITIS, OFFICER OF N.S.G.P. RESTAURANT, INC.	:	DETERMINATION DTA NO. 807851
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, 1985 through November 30, 1987.	:	

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Petitioner, Steve Avlonitis, officer of N.S.G.P. Restaurant, Inc., 66 Sunset Avenue, Lynbrook, New York 11563, 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 December 1, 1985 through November 30, 1987.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 5, 1991 at 2:45 P.M. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the denial of petitioner's request for a conciliation conference was proper because the request was not timely made.

FINDINGS OF FACT

The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 3, 1988 against petitioner, Steve Avlonitis, individually and as officer of N.S.G.P. Restaurant, Inc., asserting sales and use taxes due of \$155,208.39, plus penalty and interest, for the period December 1, 1984 through November 30,

1987.<sup>1</sup>

In September 1985, petitioner, who smoked two packs of cigarettes per day, became quite ill. Eventually, on July 20, 1987, he underwent a triple coronary artery bypass operation. Petitioner's ill health led him to sell his business on October 16, 1987.

Due to his ill health, petitioner relied upon his accountant, Andy A. Fradelakis,<sup>2</sup> to respond to the notice of determination dated February 3, 1988. It was not until December 3, 1988 that a request for conciliation conference was filed by Mr. Fradelakis on behalf of petitioner.

The Division of Taxation introduced into evidence the affidavit of Alton Plunkett, a tax auditor, who stated that he "caused to be prepared" the notice of determination at issue and a green U.S. Postal Service certified mail receipt card bearing petitioner's name and address. Mr. Plunkett's affidavit further provided:

"On February 3, 1988, after proofreading the originals of the attached documents I placed a copy of the said notice in an envelope addressed to Mr. Avlonitis at 66 Sunset Avenue, Lynbrook,

NY 11563 and attached the receipt card to the envelope and placed the envelope in the outgoing mail basket in my office for delivery to the Post Office.

Thereafter and on or about February 8, 1988 the green receipt card was returned to me by the U.S. Postal Service and placed by me in the case file maintained in the District Office."

A photocopy of the green receipt card, Postal Service Form 3811, was introduced into

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<sup>1</sup>The notice incorrectly designated the period at issue as commencing on February 28, 1985 and ending on October 30, 1987 at the top of the notice. However, in the body of the notice, it was explained that the first sales tax quarter at issue was the period ending February 28, 1985 and the last sales tax quarter at issue was the period ending November 30, 1987. "November" was typed in over a "whited-out" correction. It is not known who made this change or when the notice was so altered.

<sup>2</sup>Mr. Avlonitis' petition alleged that the notice of determination was received by him and a comparable notice was received by his co-owner, Peter Patsatsis. Petitioner's notice was "held by the Co-Shareowner's accountant, Nicholas Mastrogianni...and misplaced by him during the return of documents to the taxpayer." These allegations in the petition varied from Mr. Avlonitis' testimony which focused on his reliance upon his own accountant, Andy Fradelakis.

evidence as an attachment to Mr. Plunkett's affidavit. It shows the signature of Susan Avlonitis, petitioner's wife, with a date of delivery of February 8, 1988.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that he should be allowed to address the merits of his petition because the taxes asserted as due have no basis in fact. Furthermore, his ill health and reliance on his accountant should excuse any late filing of his request for a conciliation conference.

The Division of Taxation asserts that the Division of Tax Appeals has no jurisdiction to hear the merits of this matter because of the untimely request for a conciliation conference. Consequently, the notice of determination should be sustained.

#### CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a notice of determination of additional sales tax due:

"shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving notice of such determination, shall apply to the division of tax appeals for a hearing...."

B. Tax Law § 1147(a)(1) prescribes how the notice of determination for additional sales tax is to be given as follows:

"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."

C. In Matter of 24 Hour Grocery & Candy, Inc. (Tax Appeals Tribunal, June 27, 1991), the Tribunal noted as follows:

"We have recently held that where the Division has failed to prove when it mailed the notices, but has been able to prove, by the taxpayer's receipt of the notices, that they were in fact mailed, the appropriate remedy is to deem the petition timely filed (Novar TV & Air Conditioning Sales and Service, Tax Appeals Tribunal, May 23, 1991; *cf.*, Matter of Scharff, Tax Appeals Tribunal, October 4, 1990; Matter of Malpica, Tax Appeals Tribunal, June 30, 1987 [where the Division failed to prove both the fact and the date of the mailing of the notice of deficiency]). Therefore, we deem the corporation's petition with respect to the period December 1, 1983 to February 29, 1984 as timely filed."

D. In the matter at hand, it is clear that petitioner received the notice of determination. As noted in Finding of Fact "4", supra, the Division of Taxation introduced into evidence the

return receipt showing delivery to petitioner's wife. However, as noted in Novar TV & Air Conditioning Sales and Service (Tax Appeals Tribunal, May 23, 1991), receipt is insufficient to prove mailing:

"[T]he Division's auditor testified that he personally prepared the notices for mailing, i.e., that he caused the notices and their mailing documents (postal form 3800, Receipt for Certified Mail, and form 3811, Return Receipt) to be typed, and that he inserted the notices in envelopes (Tr., pp. 23-24). The auditor stated that he believed that these two notices were mailed on July 26, 1988 because each of the forms 3800 had a Department date stamp of July 26, 1988 on it (Exhibits L and M). The auditor testified that the Department date stamp indicated to him that, on that date, the Department's mail clerk put the envelopes in a plastic bin provided by the United States Postal Service to be picked up by the Service (Tr., p. 19). The auditor did not testify that he knew when the mail clerk actually placed the envelopes in the postal bin, only that the Department date stamp indicated to him that this occurred on the date stamped. There is no United States postmark on the postal form 3800, nor is there any other direct evidence in the record (e.g., a postmarked postal form [sic] 3877, Application for Registration or Certification) indicating when the Division physically deposited the notices with the Post Office.

Thus, the Division's evidence of when it mailed notices 8L and 10L consists only of evidence of its general office practice, without any direct documentary evidence, e.g., a postmarked form 3800 or form 3877, or direct testimony that the notices were in fact delivered to the post office on the date claimed. The Tax Court has held that evidence of custom and habit is insufficient to prove mailing when it is not corroborated by direct testimony or other direct evidence of mailing (Magazine v. Commissioner, supra). We conclude that the same rule is appropriate here...."

E. As noted in Finding of Fact "4", supra, Mr. Plunkett's affidavit noted that he placed the envelope containing the notice "in the outgoing mail basket". No evidence was introduced concerning "when the Division physically deposited the [notice] with the Post Office." As a result, the situation at hand is very close to the one in Novar (supra), where a postal receipt was determined to be insufficient to prove mailing.

However, in Novar, the request for a conciliation conference was only a few days late. (The statutory notices were dated July 25, 1988, while the conference request was received on October 28, 1988.) In the matter at hand, the conference request was approximately seven months late. The notice was dated February 3, 1988, while the conference request was filed on December 3, 1988. Therefore, even if February 8, 1988, the date of delivery, were used as the date of mailing, petitioner's request for conference was still filed several months late. In

contrast, in Novar, it seems likely that even if the date of delivery<sup>3</sup> was presumed to be the date of mailing, it would not be clear that the request for conference was late-filed. As a result, it is properly concluded that petitioner's request for conciliation conference was not timely made.

F. It is further noted that the late filing of a request for a conciliation conference cannot be excused by a personal tragedy, ill health or extenuating circumstances (see, Matter of Frank Perillo and Lucy Perillo, Tax Appeals Tribunal, August 2, 1990; Matter of Daniel B. Rathgaber, Tax Appeals Tribunal, April 5, 1990).

G. The petition of Steve Avlonitis, officer of N.S.G.P. Restaurant, Inc., is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

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<sup>3</sup>A close review of the Tribunal's decision in Novar (supra) does not reveal the actual date of delivery.