

STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|----------------|
| In the Matter of the Petitions | : | |
| of | : | |
| SANDRICH FOODS, INC. | : | DETERMINATION |
| AND RICHARD A. FREEDMAN, AS OFFICER | : | DTA NO. 810067 |
| for Revision of Determinations or for Refund | : | |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period June 1, 1985 | : | |
| through November 30, 1987. | : | |

Petitioners, Sandrich Foods, Inc. and Richard A. Freedman, as officer, P.O. Box 1161, Melville, New York 11747, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through November 30, 1987.

On November 7, 1991, the Division of Tax Appeals issued a Notice of Intent to Dismiss the petitions herein on the grounds that they had not been timely filed. By written comments dated December 5, 1991, petitioners opposed the Notice of Intent to Dismiss. After due consideration of the record, Robert F. Mulligan, Administrative Law Judge, renders the following determination.

ISSUE

Whether timely petitions were filed with respect to conciliation orders issued by the Bureau of Conciliation and Mediation Services. FINDINGS OF FACT

(a) On September 1, 1989, the Division of Taxation issued notices of determination and demands for payment of sales and use taxes due bearing notice numbers S890901002N and S890901003N and addressed as follows:

"Richard A. Freedman
24 Villa Circle
Melville, NY 11747"

Sandrich Foods Inc.

The assessments were for the following amounts due for the period June 1, 1985 through

November 30, 1987:

| <u>Notice Number</u> | <u>Tax Due</u> | <u>Penalty Due</u> | <u>Interest</u> | <u>Total</u> |
|----------------------|----------------|--------------------|-----------------|--------------|
| S890901002N | \$155,987.99 | \$46,796.39 | \$67,163.04 | \$269,947.42 |
| S890901003N | -- | 15,598.81 | -- | 15,598.81 |

On each assessment, the letter "X" was typed next to a printed box indicating that the tax assessed had been estimated in accordance with the provisions of Tax Law § 1138(a)(1).

Notice number S890901002N stated:

"YOU ARE LIABLE INDIVIDUALLY AND AS AN OFFICER OF SANDRICH FOODS INC 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."

(b) It also appears that two additional notices of determination and demands for payment of sales and use taxes due were issued on September 1, 1989 addressed to Sandrich Foods, Inc.¹ These were notice number S890901000N, which was virtually identical to aforementioned notice number S890901002N, and notice number S890901001N, which was virtually identical to aforementioned notice number S890901003N.

A Bureau of Conciliation and Mediation Services conference was held on December 17, 1990. Pursuant to the conference, conciliation orders dated March 1, 1991 were issued as follows:

| <u>CMS No.</u> | <u>Notice Nos.</u> | <u>Requestor</u> | <u>Determination</u> | <u>Penalty</u> | <u>Interest</u> |
|----------------|----------------------------|---------------------------------|----------------------|--------------------------------------|--------------------------------------|
| 101214 | S890901000N S890901001N | Sandrich Foods, Inc. | \$124,441.75 | Section 1145(a)(1)(i) and (vi) | Computed at applicable rate |
| 101215 | S890901002N S890901003N | Richard A. Freedman, Officer | \$124,441.75 | Section 1145(a)(1)(i) and (vi) at | Computed applicable rate |

Petitioners filed petitions dated May 30, 1991 by certified mail, return receipt requested. The envelopes containing the petitions were postmarked June 3, 1991. The corporation's

¹This is inferred from the petitions and conciliation orders. The notices issued to the corporation are not in the record.

petition was received by the Division of Tax Appeals on June 6, 1991, while Mr. Freedman's petition was received on June 7, 1991.

On June 20, 1991, the Division of Tax Appeals wrote to petitioners stating that the petitions had been filed 94 days after the conciliation orders had been issued and were thus untimely.² The letter asked petitioners to advise if they desired to contest the finding of lack of timeliness.

Petitioners responded by letter dated July 11, 1991. The envelope containing the letter shows a postage meter date of July 11, 1991 and a postmark which appears to be July 15, 1991. The letter was received by the Division of Tax Appeals on July 19, 1991. In the letter, petitioners claimed that five days should be added because the Civil Practice Law and Rules requires "that five days be added to any time period measured from when a paper is served by mail."

On November 7, 1991, the Division of Tax Appeals issued a Notice of Intent to Dismiss the petitions of Sandrich Foods, Inc. and Richard A. Freedman, as officer. The grounds for dismissal were stated to be that pursuant to Tax Law § 170.3-a(e), a petition must be filed within 90 days from the date a Conciliation Order is issued and that the petitions herein were not mailed within said period, being in fact four days late. Petitioners were given 30 days to submit written comments on the proposed dismissal.

By letter dated December 5, 1991, sent by certified mail on said date and received by the Division of Tax Appeals on December 9, 1991, petitioners submitted comments stating reasons why the petitions should be deemed timely.

Proof of Mailing of Conciliation Orders

The Division of Taxation submitted the following as proof of mailing of the conciliation

²The reference portion of the letter actually stated:

"Re: Springfield Foods, Inc. [sic] and
Richard A. Freedman, as Officer."

orders:

(a) An affidavit of the Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services as to the office procedures for the mailing of conciliation orders. The affidavit provides, in pertinent part, as follows:

"5. That the word processing unit prepares Conciliation Orders and Certified Mail Records (hereinafter 'CMR') listing the taxpayers to which Conciliation Orders are mailed on a particular day by certified mail, including the 'certified control number'. The CMR record is kept by this office in the regular course of business.

6. That the word processing unit forwards the Conciliation Orders and the CMR to a clerk in the Bureau of Conciliation and Mediation assigned to process Conciliation Orders.

7. That the clerk, as part of her regular duties, verifies the names and addresses of taxpayers to receive the Conciliation Orders and assigns and affixes a sequential certified control number sticker to the envelope of each addressee.

8. That the clerk writes the 'certified control number' for each address on the CMR and carries the sealed Conciliation Orders and the CMR to the Department's mail room in Building 8, State Office Campus, where they are deposited in the 'outgoing Certified Mail' basket.

9. That the Conciliation Orders are accepted by the United States Post Office and the mail room returns a copy of the CMR to the Bureau of Conciliation and Mediation with the postmark stamp affixed thereto showing the date of mailing. The CMR is kept in the Bureau of conciliation [sic] and Mediation as a permanent Record."

(b) Attached to the affidavit were two pages of the certified mail record of conciliation orders issued March 1, 1991. Each page referred to 15 certified mail numbers in sequence, and the names and addresses of 14 of the addressees of such mail on each page were redacted. The bottom line of what is apparently page two of five pages shows the following:

| <u>Certified No.</u> | <u>Name and Address</u> | <u>Postage</u> | <u>Fee</u> | <u>Remarks</u> |
|----------------------|---|----------------|------------|----------------|
| P852394294 | Sandrich Foods, Inc. c/o R. A. Freedman P.O. Box 1161 Melville, NY 11747 | .29 | 1.00 | |

The top line of what is marked page three of five pages shows the following:

| <u>Certified No.</u> | <u>Name and Address</u> | <u>Postage</u> | <u>Fee</u> | <u>Remarks</u> |
|----------------------|-------------------------|----------------|------------|----------------|
|----------------------|-------------------------|----------------|------------|----------------|

| | | | |
|------------|--|-----|------|
| P852394295 | Richard A. Freedman Officer of Sandrich | .29 | 1.00 |
|------------|--|-----|------|

Foods, Inc.
P.O. Box 1161
Melville, NY 11747

It is noted that each page lists "Total Number of Pieces Listed by Sender" as 15. On each page, the space after "Total Number of Pieces Received at Post Office" is blank. Also, on each page, the space after the heading "POSTMASTER, PER (Name of receiving employee)" is also blank. The remarks section of each page is blank except for what appears to be a postmark stamp bearing the date of March 1, 1991. The specific Post Office is not identifiable from the copies in the record.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in pertinent part, that whenever a notice of determination of tax due is issued, it:

"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 division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same."

The 90-day time limitation for filing a petition for a hearing is also specified in Tax Law § 2006.4. This latter provision is found in Article 40 of the Tax Law, which pertains to the Division of Tax Appeals.

B. Tax Law § 1147(a)(1) provides, in pertinent part, that:

"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."

C. Subdivision (a) of Tax Law § 170.3-a gives the taxpayer receiving a notice of determination or similar document the option of requesting a conciliation conference in the Bureau of Conciliation and Mediation Services of the Division of Taxation. Subdivision (b) of said section provides that the request for conciliation conference "shall suspend the running of the period of limitations for the filing of a petition protesting such notice and requesting a hearing."

D. Subdivision (e) of Tax Law § 170.3-a provides as follows:

"A conciliation order shall be rendered within thirty days after the proceeding is concluded and such order shall, in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued, notwithstanding any other provision of law to the contrary."

The procedural Rules of the Bureau of Conciliation and Mediation Services contain similar language (20 NYCRR 4000.5[c][4]). Said Rules also provide that service of conciliation orders is to be made by registered or certified mail (20 NYCRR 4000.7[b][6]).

E. It is clear from the foregoing (Conclusions of Law "A", "C" and "D") that the 90-day time limitation is jurisdictional in nature and that the Division of Tax Appeals is barred from reviewing a notice of determination if a taxpayer fails to file a petition within 90 days from the issuance of such notice, or, where a taxpayer has elected a conciliation conference, within 90 days from the date of the issuance of the conciliation order. As noted in Conclusions of Law "B" and "D", both notices of determination and conciliation orders are to be issued by registered or certified mail. It follows, then, that the mailing of conciliation orders demands the same procedural safeguards required for the mailing of notices of determination and notices of deficiency.

F. The Tax Appeals Tribunal has held that proof of proper mailing of notices by the Division of Taxation consists of the following:

"the establishment of a standard procedure for the issuance of such notices by one with knowledge of such procedures, and the introduction of evidence to show that this procedure was followed in the particular case at hand." (Petition of William and Gloria Katz, Tax Appeals Tribunal, November 14, 1991).

G. The evidence here fails both of the above tests. The first shortcoming is, while the affidavit of the Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services discloses the mailing procedures used in issuing conciliation orders, it is noted that a Bureau of Conciliation and Mediation Services employee leaves the certified mail in an outgoing certified mail basket in the Division of Taxation's mail room, together with the certified mail record. Apparently, the conciliation orders are taken to the Post Office by a mail

room employee and a stamp postmark is affixed to the certified mail record.³ The procedure itself is defective, in that no affidavit is made by the person who delivers the conciliation orders to the Post Office. The second problem is that the two pages of the certified mail record in evidence,⁴ while bearing faint postmarks, do not state the number of pieces received by the Post Office and do not contain the signature or the initials of the Post Office employee receiving the certified mail. In fact, the evidence of mailing in this case is even less than the evidence found to be unsatisfactory by the Tax Appeals Tribunal in Katz (supra) and it is hereby determined that there is insufficient evidence to show that the conciliation orders were mailed to petitioners on March 1, 1991. Accordingly, the petitions herein are deemed to be timely filed. The other issues raised in petitioners' comments dated December 5, 1991 are moot.

H. Petitioners, Sandrich, Inc. and Richard A. Freedman, as officer, are to be granted a hearing on the substantive issues raised by the petitions.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

³Apparently, the certified mail record is used instead of a Post Office Form 3877 which it resembles.

⁴It is noted that the other three pages of the certified mail record are not in the record.