

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROEBLING LIQUORS, INC. and SIDNEY COOPER, OFFICER</b>	:	ORDER DTA NO. 814192
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, 1990 through May 31, 1993.	:	

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Petitioners, Roebing Liquors, Inc. and Sidney Cooper, officer, move for an order reopening the record of this proceeding. Petitioner Roebing Liquors, Inc., appeared by John D. Chestara, Esq. and petitioner Sidney Cooper appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel). Based upon the motion papers and the hearing record, Arthur S. Bray, Administrative Law Judge, renders the following order.

***FINDINGS OF FACT***

1. Petitioner's motion to reopen the hearing should be considered in the context of the events which transpired at the hearing. The transcript of the hearing shows that the Division of Taxation ("Division") offered 2 affidavits and 3 pages of a 28-page mailing log in response to an issue regarding whether the notices of determination were properly mailed to petitioners. The corporate petitioner's representative, Mr. Chestara, objected to the receipt of the mailing log without testimony by the Division explaining certain handwritten changes to said log. Later, Mr. Chestara asked that a copy of the entire 28-page mailing log be produced. It was presumed that the mailing log would contain the names of both the corporate and individual petitioners. In response, the Administrative Law Judge asked the Division to provide a complete copy of the mailing log but delete the names and addresses of those individuals who were not petitioners in this matter. On the next day of the hearing, the Division offered a redacted copy of the

complete mailing log. However, the mailing log did not have a listing for the notice of determination which the Division maintained was issued to Mr. Cooper. As a result, the Division requested a period of two weeks, after the close of the hearing, to submit the mailing log which listed the notice that the Division maintained was issued to Mr. Cooper. The Division also wished to submit affidavits explaining why the notice issued to Mr. Cooper and the notice issued to the corporation were not on the same mailing log. In response to this request, Mr. Cooper objected to the introduction of evidence after the close of the hearing. Mr. Cooper wished to reserve the opportunity to request that the hearing be reopened because "the two affidavits and two logs taken together may reveal new information and new questions that are not apparent to us now." (Transcript, p. 868.) Following the objection, the Administrative Law Judge replied that he would give the Division an opportunity to submit additional evidence after the close of the hearing but that petitioners would have the right to respond and, if necessary, move to reopen the hearing.

2. After the hearing was concluded the Division submitted two affidavits, a certified mailing record and a copy of the Notice of Determination allegedly issued to Sidney Cooper. The submission of the foregoing documents prompted the present motion to reopen the hearing.

3. In support of the motion, petitioners state that near the conclusion of the hearing the dates and timeliness of the notices of determination were brought into issue by the testimony of Mr. Cooper. It is maintained that the proof so adduced is that Roebing Liquors, Inc. ("Roebing") never received a notice despite the fact that the notice bearing Roebing's name is dated December 13, 1993. Petitioners submit that the Division now maintains that the notice was mailed December 3, 1993.

4. Petitioners allege that petitioner Sidney Cooper testified that he received the notice issued to him as an officer but that he never saw the notice issued to Roebing until the hearing. As a result, petitioners wish to argue that the latter notice was not properly mailed.

5. Petitioners maintain that the Division has not presented any convincing or satisfactory proof that the notice issued to Roebing was properly mailed. It is contended that the only

evidence of mailing is two affidavits which leave much unsaid and unanswered. Petitioners find it peculiar that the notice issued to Roebing would be dated December 13, 1993 but, according to the Division, was mailed on December 3, 1993. According to Roebing's representative, the postmark was apparently changed by hand from December 2, 1993 to December 3, 1993.

6. Petitioners submit that they should be allowed to subpoena the authors of the affidavits to test their testimony, knowledge of procedures and the reliability of the procedures.

7. Petitioners also ask that the hearing be reopened in order to modify one of their exhibits and "to resolve any other issues leftover."

8. In response to the foregoing, the Division submits that, in accordance with section 3000.16 of the Rules of Practice and Procedure, there are no grounds for reopening this proceeding because there has been no showing of newly-discovered evidence, fraud, misrepresentation or misconduct by the opposing party.

9. Petitioners submitted a response to the Division's letter and the Division replied with a letter which objected to any consideration of petitioners' response. Further consideration of the response will be addressed in the Conclusions of Law.

### ***CONCLUSIONS OF LAW***

A. Initially, it is recognized that the Division has accurately noted that section 3000.5(b) of the Rules of Practice and Procedure provides that "[r]eplies to responses will not be entertained except with the permission of the administrative law judge or the secretary." Since petitioner submitted a response without first obtaining permission to do so, it was not considered.

B. The granting of a motion to reopen the record is dependent upon the sound exercise of discretion (see, Matter of Byram, Tax Appeals Tribunal, August 11, 1994). When the motion has been made following a hearing, the exercise of this discretion has been limited (see, Matter of Byram, *supra*; Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

C. In this case, the granting of Division's request to submit additional evidence after the

hearing was conditioned upon petitioners' opportunity to move to reopen the hearing in order to question the evidence presented. Under these circumstances, fairness requires that the hearing be reopened in order to permit petitioners to question the affiants and the documentary evidence regarding the mailing of the notices of determination. The hearing will be strictly limited to issues pertaining to the mailing of the notices and the correction of one of petitioners' exhibits.

It should be noted that the Division's reliance upon section 3000.16 of the Rules of Practice and Procedure is misplaced. This section pertains to motions to reopen a record or for reargument after a determination of an administrative law judge has been rendered. A determination has not yet been rendered in this matter.

D. Petitioner's motion to reopen the record is granted and the parties may have two weeks from the date of this order to agree upon a date for a hearing at the offices of the Division of Tax Appeals in Troy, New York. If the parties are unable to agree upon a new hearing date within this period of time, the Division of Tax Appeals will set a new date for the hearing.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE