

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ASTORIA LEASING CORP</b>	:	DETERMINATION
<b>AND NELLIE GAJESKI</b>	:	DTA NO. 815812
	:	
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 June 1, 1982	:	
through December 31, 1995.	:	

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Petitioners, Astoria Leasing Corp. and Nellie Gajeski, 20-37 Hazen Street, Jackson Heights, New York 11370-1130, 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 June 1, 1982 through December 31, 1995.

The Division of Taxation by its representative, Steven U. Teitlebaum, Esq. (Kathleen Dix, Esq., of counsel), brought a motion dated September 17, 1997 and received September 19, 1997 seeking an order dismissing the petition and/or an order of summary determination in the above-referenced matter pursuant to section 3000.9(a)(i),(ii) and (b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by Cunningham and Cunningham, P.C. (Gerard W. Cunningham, Esq., of counsel), responded to the Division's motion with an affidavit and an affirmation in opposition filed on November 17, 1997, followed by a memorandum in opposition filed on November 26, 1997. The Division of Taxation filed a reply affirmation in support on December 11, 1997, which date commenced the 90-day period for the issuance of this determination pursuant to section 3000.5(d) of the Rules. Based upon the motion papers, affirmation and documents submitted therewith, petitioners' affidavit, affirmation and memorandum in opposition, the Division's reply affirmation, and all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.



***ISSUE***

Whether the Division of Taxation is entitled to summary determination or dismissal of the petition herein on the basis that the underlying relief sought in the petition (a refund) is time barred and is also precluded, in part, by a stipulation for discontinuance of a prior proceeding.

***FINDINGS OF FACT***

1. This motion to dismiss and/or for summary determination arises as the result of a petition filed by petitioners, Astoria Leasing Corp. ("Astoria") and Nellie Gajeski, challenging the partial denial of their application for refund in the amount of \$665,000.00. More specifically, on January 16, 1996, petitioners filed an application seeking refund of sales and use taxes for three distinct periods, as follows:

Period One----06/01/82 through 02/28/88;

Period Two----12/01/88 through 11/30/91;

Period Three--01/01/93 through 12/31/95.

2. The Division of Taxation ("Division") granted petitioners' refund request for Period Three, in the amount of \$441.38, and such period is no longer in issue. However, petitioners' request for Period One and Period Two was denied by the Division as not timely filed. On May 2, 1997, petitioners challenged this denial for such two periods by filing a petition.

***-PERIOD ONE-***

3. With regard to Period One, the Division's motion papers include three notices of determination and demands for payment of sales and use taxes due addressed to petitioner Astoria and containing the following information:

<u>NOTICE DATE</u>	<u>NOTICE NUMBER</u>	<u>PERIOD</u>	<u>TOTAL AMOUNT DUE</u>
09/20/88	S880920927K	06/01/82 - 11/30/85	\$117,066.64
09/20/88	S880920928K	06/01/85 - 02/28/88	6,477.87
09/20/88	S880920929K	12/01/85 - 02/28/88	78,301.71 <sup>1</sup>

4. The Division's motion papers also include three notices of determination addressed to

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<sup>1</sup>The "total amount due" figures include penalty and interest to the date of the notices



petitioner Nellie Gajeski. These notices, bearing notice numbers S880920924K, S880920925K and S880920926K, list the same date (09/20/88), cover the same cumulative period (06/01/82 through 02/28/88), and assess the same amounts as the notices pertaining to petitioner Astoria. The notices addressed to Nellie Gajeski assess liability against her as an officer responsible to collect and remit tax on behalf of petitioner Astoria.<sup>2</sup>

5. The Division points out that the tax assessed for Period One was payable between 09/20/82 and 03/20/88 (i.e., within 20 days of the close of each of the respective sales tax quarterly periods involved). In turn, such tax was paid in full between July 15, 1992 and December 17, 1992, as the result of the Division's levy against petitioner Astoria's bank accounts.

6. Petitioner Astoria alleges that it never received service of any of the notices of determination. Petitioner Astoria admits receiving a Notice and Demand for Payment of Tax Due and a Consolidated Statement of Tax Liabilities, each dated April 6, 1992. The Notice and Demand and the Consolidated Statement were not included herein as part of the record. However, petitioners allege that the Notice and Demand referred to assessment numbers L-004598919-8, L004598920-8 and L-004598921-7, and that the Consolidated Statement referred to assessment numbers L-04598919-8 and L-004598921-7, with such latter items described as "two assessments never served on [Astoria]". Petitioner Astoria also denies being served with a warrant which allegedly referred to assessment numbers S880920927K, S880920928K and S880920929K.

7. Petitioner Nellie Gajeski admits receipt of the notices numbered S880920924K, S880920925K and S880920926K, but denies receipt of any additional items from the Division. Attached to the petition in this matter was a photocopy of a warrant, addressed to petitioner Nellie Gajeski as an officer of Astoria, listing assessment numbers S880920924K,

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<sup>2</sup>The motion papers filed in this matter with respect to Period One refer to notice numbers commencing with the letter "S", as above, and also to notice numbers commencing with the letter "L". In this regard, the Division's reply affirmation explains that the Division's computer system was changed after the date of the "S" notices (09/20/88) and that, as a result, notices beginning with the letter "S" under its former computer system were converted (or renumbered) to have assessment numbers commencing with the letter "L" for tracking on its new computer system. It appears that such conversion involved only renumbering, and did not result in reissuance of the notices.



S880920925K and S880920926K and seeking collection in the amount of \$220,091.99, including penalty and interest.

***-PERIOD TWO-***

8. With regard to Period Two, the Division's motion papers include a Notice of Determination dated January 4, 1993 addressed to petitioner Astoria, and a Notice of Determination dated January 26, 1993 addressed to petitioner Nellie Gajeski. These notices bear assessment I.D. numbers L-006904498-4 and L-006984204-3, respectively, and each assesses tax in the amount of \$120,622.90, exclusive of penalty and interest, for the period 12/01/88 through 11/30/91. The notice addressed to Nellie Gajeski assesses tax against her as an officer responsible to collect and remit taxes on behalf of petitioner Astoria.

9. The Division's motion papers also include a document entitled "Stipulation for Discontinuance of Proceeding". This document is captioned:

‘In the Matter of the Petition

of

Astoria Leasing Corp. and Nellie Gajeski

for Redetermination of a Deficiency/Revision of a  
Determination or Refund under Article(s) 28 and 29  
of the Tax Law for the Year(s)/Period(s) 12/1/88 -11/30/91".

The Stipulation for Discontinuance references Division of Tax Appeals proceeding numbers 812640 and 812664, specifies notice/assessment numbers L-006904498 and L-006984204, and goes on to state as follows:

"The above-entitled proceeding having been resolved, it is hereby stipulated and agreed by and between the parties herein that such proceeding be and the same is discontinued, with prejudice, and that the deficiency/determination or refund is recomputed as follows:

Deficiency/determination or (refund) \$98,000  
Interest Statutory  
Penalty Statutory"

10. The Stipulation for Discontinuance is dated October 11, 1994 and is signed by Isaac Sternheim as petitioners' representative and by Andrew S. Haber as the Division's representative. Finally, the Division's motion papers include, for each petitioner, a fully



executed power of attorney form appointing Mr. Sternheim as each petitioner's authorized representative with respect to proceedings involving sales and use taxes for 1988 through 1991. The power of attorney form for Astoria is signed by Nellie Gajeski as president of Astoria.

11. In response, petitioner Astoria denies receiving the Notice of Determination (L-006904498-4) for Period Two. Petitioner Nellie Gajeski, in contrast, admits receipt of the Notice of Determination (L-006984204-3) for such period, but alleges the same pertained (at least in part) to periods extending back more than three years from the January 26, 1993 date of such notice. Both petitioners go on to deny receipt of any warrants with respect to Period Two, and note that their application for refund was filed on January 16, 1996.

12. The Division's position in this matter is that with respect to Period One, petitioners' refund claim was properly denied as untimely since petitioners failed to file a petition within 90 days of the date of the notices or, assuming nonreceipt of the notices in petitioner Astoria's case, within 90 days of actual notice of the assessments. The Division asserts that petitioner Astoria had actual notice of the assessments upon receipt of the Notice and Demand in April 1992 or, at the latest, upon levy of its bank accounts in later 1992. In turn, the Division points out that petitioner Nellie Gajeski does not dispute receipt of the notices addressed to her, that there is no evidence of any protest by her against such notices, and that she is thus clearly time-barred from contesting the notices. As to Period Two, the Division points out that a prior proceeding before the Division of Tax Appeals was commenced by both petitioners but was thereafter discontinued by stipulation, with prejudice, thus leaving the Division of Tax Appeals without jurisdiction over the matter.

13. Petitioners, in contrast, argue that the Division has produced no proof of service of the subject notices for which receipt was denied. Accordingly, petitioners assert that the time period within which to challenge such notices is tolled, and that the Division's motion must fail and a hearing must be granted. As to Period Two petitioners, through the affidavit of Nellie Gajeski, allege that any stipulation to discontinue was not entered into on consent and was never agreed to by Nellie Gajeski or by any other responsible officer on behalf of Astoria.



Petitioners argue that since the validity of the stipulation is challenged, petitioners have established the existence of material issues of fact requiring denial of the subject motion for summary determination.

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

#### ***-PERIOD ONE-***

A. With respect to Period One, the Division seeks dismissal of the petition based on petitioners' failure to have protested the assessments within 90 days of their issuance or, assuming nonreceipt of the notices, within 90 days of actual notice of the assessments. Alternatively, the Division maintains that the petition should be dismissed because the underlying refund claim was untimely as filed more than three years from the date the tax was payable or two years from the time the tax was paid. Petitioners argue, in contrast, that Astoria never received service of any of the notices of determination with respect to Period One, and that the Division has produced no proof of service of such notices. In turn, petitioners maintain that the time period within which to seek a hearing did not commence to run, and that petitioners must be granted a hearing on the merits of their claim.

B. The record herein provides no evidence as to when the notices in question, dated September 20, 1988, were issued, and no proof of when, or if, such notices of determination were in fact received by petitioner Astoria. It is well established that in a case where the timeliness of a protest is at issue, the Division has the burden of establishing the triggering date for the 90 day protest period specified under Tax Law § 1138(a)(1) (*see, e.g., Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In this case, the Division has not established that the protest period commenced as of the September 20, 1988 date on the face of the Period One notices.<sup>3</sup> However, nonreceipt of the notices themselves will not necessarily result in cancellation of the liabilities. Rather, under such circumstances, the time period within which to protest a liability is tolled and does not commence to run until the

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<sup>3</sup>Under Tax Law § 170(3-a)(a), a taxpayer has the option of protesting a notice by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). As with Tax Law § 1138(a)(1), the time period within which such a request must be made is within 90 days of the issuance of the notice.



date the taxpayer receives actual notice of the liability (*Cohen v. New York State Dept of Taxation and Finance*, 234 AD2d 739, 651 NYS2d 650; *Mean Alice's, Inc. v. Dept of Tax. & Fin.*, Sup Ct, Erie County, October 22, 1987, *Fudeman, J.; Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 469 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517, 474 NE2d 1185). In this case, petitioner Astoria admits receiving a Notice and Demand for Payment of Tax Due and a Consolidated Statement of Tax Liabilities, each dated April 6, 1992. The Notice and Demand referred to assessment numbers L-004598919-8, L-004598920-8 and L-004598921-7, while the Consolidated Statement referred to assessment numbers L-004598919-8 and L-004598921-7. In addition, petitioner Astoria's bank accounts were levied upon resulting in payment of the tax in question for Period One between July 15, 1992 and December 17, 1992. Using either the April 6, 1992 date of the Notice and Demand and the Consolidated Statement, or the latest bank account levy date of December 17, 1992, as the date of actual notice of the tax liabilities at issue for Period One (*see, Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990), there is no claim or evidence that petitioner Astoria made any protest within 90 days of either of such dates. Without such protest, the liabilities became fixed and final under Tax Law § 1138(a)(1). Petitioner Nellie Gajeski admits receipt of the notices of determination for Period One. In turn, there is no claim or evidence that Nellie Gajeski made any protest within 90 days of such receipt. Accordingly, the liabilities against her also became fixed and final per Tax Law § 1138(a)(1).

C. This matter came on as a motion for dismissal (or for summary determination) with regard to a petition protesting the Division's denial of petitioners' claim for refund. In the context of a refund claim, Tax Law § 1139(c) provides that such a claim must be made within the later of three years of the time the tax return was filed or two years from the time the tax was paid. For Period One, the underlying tax returns were due to be filed and the tax was payable between September 20, 1982 and March 20, 1988 (i.e., within 20 days of the close of each of the sales tax quarterly periods in question), and petitioners have alleged that all of such returns were filed in a timely manner. In turn, the tax was paid as the result of bank account



levies between July 15, 1992 and December 17, 1992 (see, Finding of Fact "5"). Accepting the latest of such levy dates, i.e., December 17, 1992, as the date of actual notice and payment (*see, Matter of Glover Bottled Gas Corp., supra*), and comparing such date to the January 16, 1996 refund claim date, shows clearly that such refund claim was not timely filed per Tax Law § 1139(c).

D. In sum, over three years passed between the latest possible date of actual notice and the filing of petitioners' refund claim. With no protest by either petitioner within 90 days of actual notice of the liabilities and, in the alternative, no timely refund claim within either three years of the time the tax returns were filed or two years from the time the tax was paid, the Division of Tax Appeals is without jurisdiction to address the merits of petitioners' refund claim (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 16, 1989). Accordingly, the petition must be dismissed with respect to Period One.

#### ***-PERIOD TWO-***

E. Turning to Period Two, the Division seeks dismissal of the petition based on the existence of a prior challenge by petitioners which was discontinued with prejudice via a Stipulation for Discontinuance. Petitioners, in contrast, seek to re-open the Stipulation for Discontinuance. Petitioners maintain, through the affidavit of Nellie Gajeski, that they did not consent or agree to such stipulation (or any other stipulation). Although unstated, petitioners appear to argue that neither Nellie Gajeski nor any other officer of Astoria was personally consulted with regard to the stipulation.

F. Section 171 of the Tax Law, paragraph 18, provides that the Commissioner of Taxation and Finance shall:

"[h]ave authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect to any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement or any



determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded" (Tax Law § 171[18]; emphasis added).

G. In *Matter of Maurice Brahms* (Tax Appeals Tribunal, July 3, 1997), the Tribunal refused to vacate a Stipulation for Discontinuance containing the identical wording of the Stipulation for Discontinuance at issue here. The Tribunal, citing to *Matter of D & C Glass Corp.* (Tax Appeals Tribunal, June 11, 1992), explained that:

"while it may be appropriate to reopen a closed matter in extraordinary circumstances, the need for finality of proceedings requires 'a strict view of attempts by either petitioners or the Division to reopen or to reargue matters which have been closed'."

H. In this case, petitioners have offered nothing by way of either argument or allegation that the Division committed fraud, malfeasance, or misrepresentation of a material fact with regard to the Stipulation for Discontinuance, or that there exist "extraordinary circumstances" sufficient to compel vacatur of such Stipulation. The Stipulation, which recites that it is for discontinuance with prejudice, is completely executed on its face. In addition, there is no allegation or argument raised that the underlying power of attorney forms appointing petitioners' representative (Isaac Sternheim) in the discontinued matters are somehow invalid or infirm. Such forms are completely executed on their faces. By executing such forms, petitioners gave authority to their representative to appear on their behalf and act in their stead specifically with regard to the period in question here, i.e., "proceedings involving sales and use taxes [for the period] 1988 through 1991." Petitioners' complaint that they were not consulted or did not personally agree or execute the Stipulation for Discontinuance is not a sufficient basis to vacate the stipulation and reopen the closed matter.

I. There are additional factors which militate against petitioners' attempt to vacate and reopen the stipulation with regard to Period Two. First, while petitioner Nellie Gajeski admits receipt of a Notice of Determination (L-006984204) for such period, petitioner Astoria denies receipt of such a Notice (L-006904498). However, such denial must be contrasted with the fact that a proceeding was clearly commenced in the Division of Tax Appeals challenging both of such notices. This is borne out by the face of the Stipulation which includes and identifies



Notice/Assessment No. L-006904498 (the Notice pertaining to Astoria) as covered by the Stipulation. At the least, therefore, petitioner Astoria received actual notice of the liability for Period Two and protested the same. In addition, a substantial period of time passed before petitioners acted with respect to Period Two. That is, the Stipulation is dated as executed on October 11, 1994, yet petitioners' refund claim was not filed until January 16, 1996. Finally, and perhaps most importantly, the Stipulation effects a recomputation and reduction of petitioners' tax liability, from \$120,622.90 plus penalty and interest per the notices of determination, to \$98,000.00 plus penalty and interest per the Stipulation for Discontinuance. This benefit alone, a reduction of some \$22,622.90, clearly weighs against petitioners' request to vacate the Stipulation. In sum, petitioners commenced a proceeding in the Division of Tax Appeals challenging notices L-006904498 and L-006984204, and thereafter stipulated to discontinue such proceeding, with prejudice, upon a \$22,622.90 reduction to the amount at issue in such proceeding. Petitioners have not alleged, much less established, any basis upon which to cast doubt on the validity or binding and conclusive effect of the Stipulation for Discontinuance. Thus, petitioners' challenge to the notices for Period Two has been concluded and the Division of Tax Appeals has no further jurisdiction, via the subject refund claim or otherwise, over such notices. Accordingly, the petition is dismissed with respect to Period Two.

J. The Division's motion for dismissal of the petition is hereby granted.

DATED: Troy, New York  
March 5, 1998

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE