

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
AAA SIGN COMPANY	:	DECISION
AND DONN COREY, AS OFFICER	:	
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, 1975	:	
Through May 31, 1980.	:	

Petitioners; AAA Sign Company and Donn Corey, as officer, C/O Boreanaz, NeMoyer & Baker, Esqs., 736 Brisbane Bldg., Buffalo, New York 14203, ATTN: Patrick J. Baker, Esq., filed petitions 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, 1975 through May 31, 1980 (File No. 43314).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, General Donovan State Office Building, 125 Main Street, Buffalo, New York, on April 25, 1984 at 9:15 A.M., with all briefs to be submitted by July 3, 1984. Petitioner appeared by Boreanaz, NeMoyer & Baker, Esqs. (Patrick J. Baker, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the mailing of certain notices of determination to petitioners, at addresses other than those reflected on the last returns filed by petitioners, warrants cancellation of the deficiencies assessed by such notices, notwithstanding receipt of actual notice of such deficiencies by petitioners.

II. Whether, assuming cancellation of the deficiencies is not warranted, petitioners timely filed petitions for a hearing to contest such deficiencies.

FINDINGS OF FACT

1. On December 7, 1981, the Audit Division issued to petitioner AAA Sign Corp., two notices of determination and demand for payment of sales and use taxes due as follows:

<u>Notice Number</u>	<u>Quarterly Sales Tax Periods At Issue</u>	<u>Tax Assessed</u>
S811207103C	5/31/75 - 11/30/78	\$25,034.88
S811207104C	11/30/78 - 5/31/80	35,940.21

These notices, which also assessed interest (accrued to date of issuance) and a fraud penalty equal to fifty percent of the assessed amount of tax, represent estimated assessments the basis for issuance of which is explained, in relevant part, by the following statement taken from the face of the notices:

"[s]ince you have not submitted your records for audit as required by section 1142 of the Tax Law, the following taxes have been determined to be due in accordance with available information and in accordance with section 1138 of the Tax Law."

2. The aforementioned notices were addressed to "AAA Sign Corp., S3576 California Road, Orchard Park, N.Y. 14127".

3. On December 7, 1981, the Audit Division also issued two notices of determination and demand, numbered S811207105C and S811207106C, to petitioner Donn Corey, as an officer of AAA Sign Corp. These notices assessed amounts (including interest and fraud penalty) and pertained to sales tax quarterly periods identical to those reflected on the aforementioned notices issued to AAA Sign Corp. These notices issued to Mr. Corey were also estimated assessments, the issuance of which to Mr. Corey was explained, in relevant part, by the following statement taken from the face of the notices:

"[y]ou are personally liable as officer of AAA Sign Corp. 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."

4. The aforementioned notices issued to Mr. Corey were addressed to "Donn Corey, officer of AAA Sign Corp., 65 Countryside Lane, Bldg. #65 Apt. #7, Orchard Park, New York 14127".

5. Each of the above assessments were mailed via certified mail, return receipt requested, but were returned by the Postal Service as unclaimed.

6. Petitioners, at some point thereafter, received actual notice of the existence of these assessments outstanding against them, as evidenced by the filing of petitions on September 8, 1982 to contest sales tax liability for the captioned period at issue¹. Said petitions were initially rejected as untimely, having been filed more than ninety days after the December 7, 1981 date of the notices of determination.

7. The last sales tax return filed by AAA Sign Co. prior to the assessment against it bore an address of "P.O. Box 62, East Aurora, New York 14052". The 1980 and 1981 New York State Income Tax Returns filed by Donn Corey also bore an address of "P.O. Box 62, East Aurora, New York 14052".

8. Audit Division records introduced in evidence at the hearing indicate that the Audit Division's fraud unit, after an audit, specified that assessments be mailed to AAA Sign Co. at the California Drive address and at the P.O. Box 62, East Aurora, New York address. However, the only assessment mailed to AAA Sign Co. was that which was sent to the California Drive address. There is no indication in the proof as to the reason the assessment to Donn Corey was mailed to the Countryside Lane Address.

¹ It is noted that warrants were filed against petitioners with respect to the taxes assessed for the captioned periods in the Erie County Clerk's office on July 2, 1982, and that the petitions herein are dated September 8, 1982.

9. Petitioner asserts that the Audit Division failed to comply with the provisions of Tax Law section 1147(a)(1) in the manner by which the assessments at issue were mailed, and thus such assessments are invalid and should be cancelled. The Audit Division maintains that petitioner did receive actual notice of the assessments, which notice vitiates the alleged defect in the manner of mailing the deficiencies. Finally, the Audit Division does not contest the timeliness of the petition and petitioner's right to a hearing on the merits underlying the deficiencies, if it is determined that the ninety day period within which to file a petition to contest the deficiencies did not commence until petitioner received actual notice of the existence of such deficiencies.

CONCLUSIONS OF LAW

A. That section 1147(a)(1) of the Tax Law provides as follows:

"(a)(1) Any notice authorized or required under the provisions of (Article 28) 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 (Article 28) 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 (Article 28) by the giving of notice shall commence to run from the date of mailing of such notice."

B. That it is not disputed by the Audit Division that the instant notices were mailed other than to the P.O. Box 62, East Aurora, New York address reflected on the last return filed. Therefore, there arises no presumption of petitioners' receipt of the Notices under Tax Law §1147(a)(1). Accordingly, the ninety day period within which to request a hearing to contest the assessments [Tax Law section 1138(a)(1)] did not commence to run as of the December 7, 1981 date reflected on the Notices, and failure to file petitions within ninety days of such dates does not preclude the right to a hearing. [Matter of Ruggerite,

Inc. v. State Tax Commission, 97 A.D.2d 634; Matter of James S. Nisbet, et. al. v. State Tax Commission, Misc. 2d ___, (Sup. Ct., Albany County, April 9, 1984, Williams, J.)].

C. That petitioners, by the filing of petitions, acknowledged that they received, at some point, actual notice of the instant assessments. Although the date on which actual notice was received by petitioners is not specified on the record, the Audit Division concedes and does not contest petitioners' right to a hearing on the merits of the underlying assessments. Since, notwithstanding the addresses used on the notices, there has been actual receipt of notice of the assessments by petitioners, which is the ultimate aim sought to be accomplished by section 1147(a)(1) of the Tax Law, and it is conceded by the Audit Division that petitions were filed within ninety (90) days of such actual notice, it follows that cancellation of the deficiencies is not warranted and that petitioners are entitled to a hearing on the merits of the cases as raised by their petitions. [cf. McPartlin v. Com'r. of Internal Rev. Serv., 653 F2d 1185, (7th Cir., 1981) see also Matter of 900 G.C. Affiliates, Inc., State Tax Comm., August 31, 1979, where under similar circumstances the Commission did not cancel the assessment but rather granted a hearing on the merits.]

D. That the petition of AAA Sign Company and Donn Corey, as officer, is denied insofar as it sought cancellation of the instant assessments based on improper notice, and the matter is referred back to the Tax Appeals Bureau for a hearing and for further proceedings not inconsistent herewith.

DATED: Albany, New York

DEC 31 1984

STATE TAX COMMISSION

Richard A. Allen
PRESIDENT

Francis R. King
COMMISSIONER

Mark J. Doherty
COMMISSIONER