

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
GIARI'S PIZZA & SUB SHOP	:	DECISION
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, 1980	:	
through May 31, 1983.	:	

Petitioner, Giari's Pizza & Sub Shop, 70 West Main Street, Cambridge, New York 12816, 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 September 1, 1980 through May 31, 1983 (File No. 52872).

A hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Building 9, W.A. Harriman Campus, Albany, New York, on September 10, 1985 at 9:15 A.M. Petitioners appeared by Richard T. Saxton, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether a timely petition was filed for the audit period in issue.

FINDINGS OF FACT

1. Petitioner, Giari's Pizza & Sub Shop, is a restaurant located in Cambridge, New York. During the period in issue, Mr. A. Christopher Russo was the sole owner and proprietor of the restaurant.

2. On December 15, 1983, Mr. Russo signed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1980 through November 30, 1980 to March 20, 1984.

3. On March 20, 1984, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (No. S840326021A) asserting tax due of \$4,000.00 plus interest for the period September 1, 1980 through February 28, 1981.

4. Two months later, on May 15, 1984, the Audit Division issued to petitioner a Statement of Proposed Audit Adjustment asserting taxes due in the amount of \$18,499.39, plus interest, for the period September 1, 1980 through May 31, 1983. The following statement appears on the statement: "If you DISAGREE with this statement, return one copy of this adjustment with a precise explanation of your disagreement to this office within 30 days" (emphasis in original).

5. On or about May 29, 1984, a petition prepared by Mr. Russo was received in the Tax Appeals Bureau. The petition explicitly refers to the March 20 notice of determination, a copy of which was attached to the petition.

6. On June 14, 1984, approximately two weeks after the petition was filed, the Audit Division issued two more notices of determination and demands for payment of sales and use taxes due against the petitioner. One notice (No. S840326021A) was a revision of the March 20th notice and assessed a tax due of \$2,796.29, plus penalty of \$699.08 and interest of \$1,303.67, for a total amount due of \$4,799.04 for the period September 1, 1980 through February 28, 1981. The other notice (No. S840615016A) assessed a tax due of \$10,798.55, plus penalty of \$2,581.53 and interest of \$3,132.94, for a total amount due of \$16,513.02 for the period March 1, 1981 through May 31, 1983.

7. No petition was filed in response to the notices dated June 14, 1984. Mr. Russo was confused by the issuance of four seemingly duplicate documents in less than three months, and the similarity of the language used on the Statement of Proposed Audit Adjustment and the notices. He intended his original petition

to act as both an application for hearing and an explanation of his disagreement with the Statement of Proposed Audit Adjustment. The narrative portion of the petition addresses the audit methodology and findings as a whole and does not specifically refer to audit periods or amounts in issue. Petitioner asks that the petition of May 29, 1984 be deemed a timely application for a hearing covering the entire audit period.

8. It is the Audit Division's position that petitioner's failure to file a petition within 90 days of the June 14th notices finally and irrevocably fixes the tax determined to be due.

CONCLUSIONS OF LAW

A. That a notice of determination "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 tax commission for a hearing" (emphasis added) [Tax Law §1138(a)(1)]. The instant petition, filed on or about May 29, 1984, explicitly stated the challenged audit period as September 1, 1980 through February 28, 1981 and referred to notice number S840326021A. It cannot be deemed to be a timely application for a hearing to challenge notice number S840615016A, which covered a different audit period and was issued two weeks after the petition was filed. Furthermore, even if the petition is construed to be a protest of the statement of proposed audit adjustment, this fact would not serve to supplant the statutory requirement that a hearing be requested within 90 days after the Tax Commission's issuance of a notice of determination (West Mountain Corporation v. State of New York Department of Taxation and Finance, 105 A.D.2d 989).

B. That a proceeding before the State Tax Commission is commenced by the filing of a timely petition containing sufficient detail to indicate the action


or actions being protested [20 NYCRR 601.3(a) and (c)]. One of the notices issued June 14, 1984, No. S840326021A, merely revised an earlier notice. It could not deprive the State Tax Commission of jurisdiction to hear the underlying controversy once the proceedings before the Commission were commenced. Consequently, petitioner has a right to a hearing on the merits covering the period September 1, 1980 through February 28, 1981.

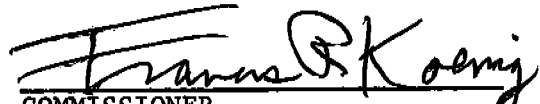
C. That the petition of Giari's Pizza & Sub Shop is granted to the extent indicated in Conclusion of Law "B" and is in every other respect denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER