

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

LUCIANO STEMBERGER  
OFFICER OF PIEMONTE RESTAURANT, INC.

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 March 1, 1976  
through February 29, 1980.

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Petitioner, Luciano Stemberger, Officer of Piemonte Restaurant, Inc., 32-56  
43rd Street, Long Island City, New York 11103, 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 March 1, 1976 through February 29, 1980 (File No.  
60791).

A hearing was held before Brian L. Friedman, Hearing Officer, at the  
offices of the State Tax Commission, Two World Trade Center, New York, New  
York, on October 21, 1986 at 9:15 A.M., with all briefs to be submitted by  
November 21, 1986. Petitioner appeared by Michael W. Holland, Esq. The Audit  
Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly issued notices of determination  
and demands for payment of sales and use taxes due to petitioner in accordance  
with the provisions of sections 1138(a) and 1147(a)(1) of the Tax Law and, if  
so,

11. Whether petitioner timely applied for a hearing.

FINDINGS OF FACT

1. On November 20, 1984, the Audit Division issued to Luciano Stemberger (hereinafter "petitioner"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, bearing Notice Number S841120772M, covering the period March 1, 1976 through February 28, 1979, in the amount of \$3,145.87, plus penalty and interest, for a total amount due of \$6,564.36. On the same date, an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due, bearing Notice Number S841120742M, was issued by the Audit Division to petitioner, covering the period March 1, 1978 through February 29, 1980, in the amount of \$13,777.90, plus penalty and interest, for a total amount due of \$26,639.04. Each notice contained the following explanation:

"THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS."

Each notice was mailed, by certified mail, to petitioner at 32 56-43rd Street, Astoria, New York 11103. The actual address of petitioner was 32-56 43rd Street. The notice bearing Notice Number S841120742M incorrectly spelled petitioner's last name "S-T-E-M-O-B-E-R-G-E-R". The other notice spelled petitioner's name correctly. Neither notice was returned to the Department of Taxation and Finance as undeliverable.

2. On March 15, 1985, the Department of Taxation and Finance received from petitioner, a petition bearing the date of January 2, 1985<sup>1</sup>.

3. On April 9, 1985, the Tax Appeals Bureau advised petitioner's representative that the petition received on March 15, 1985 was not filed within ninety days from the date of the notices of determination and demands for payment of sales and use taxes due and further advised that the matter had been referred to the Tax Compliance Bureau for collection. The Tax Appeals Bureau did, however, subsequently grant to petitioner a hearing on the issue of timeliness of the filing of the petition.

4. At the hearing held herein, petitioner did not appear. Petitioner's representative, Michael W. Holland, ~~Esq.~~, stated that, as of the date of the issuance of the notices, petitioner did not reside at the 43rd Street, Astoria, New York address and that the notices were subsequently forwarded to him. He further stated that petitioner came to his office during the last week of December 1984 with the notices and that the petition was then prepared and signed by petitioner on January 2, 1985. Mr. Holland did not recall whether the petition was mailed or remained in his file, but he admitted that it may not have been sent out until early March of 1985.

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1 At the top of his petition, petitioner listed as the Notice Number of the notice protested as S841120742M which was the notice issued for the period March 1, 1978 through February 29, 1980. In paragraphs "2" and "3" of his petition, however, petitioner protested the amount of tax and the period assessed by the notice bearing Notice Number S841120772M. In its answer, the Audit Division addressed the periods and amounts contained in both

5. Petitioner's representative, in his letter brief dated November 19, 1986, alleges that the notices issued by the Audit Division failed to comply with the statutory provisions of the Tax Law. Said allegations are as follows:

- a. That the notices failed to comply with the provisions of section 1138(a)(2) of the Tax Law by reason of the fact that the statements advising petitioner that the taxes assessed were estimated, that the tax may be challenged through a hearing process and that the petition for such challenge must be filed with the Tax Commission within ninety days, must be in bold face type. Petitioner contends that capitalizing the letters in this portion of the notice does not satisfy the requirement of section 1138(a)(2) of the Tax Law;
- b. That one of the notices contained a misspelling of petitioner's name, both were sent to 32 56-43rd Street rather than 32-56 43rd Street, both notices failed to contain an apartment number and both were sent to Astoria, New York when, in fact, the proper address was 32-56 43rd Street, Long Island City, New York 11103.

6. The petition filed by petitioner lists his address as 32-56 43rd Street, Astoria, New York 11103.

7. Petitioner offered **no** evidence that he had notified the Department of Taxation and Finance of a change of address. Furthermore, no credible evidence was presented to show that the notices issued by the Audit Division were not received by petitioner at the 43rd Street, Astoria, New York address.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(2) of the Tax Law provides as follows:

Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days."

B. That by capitalizing each **of** the letters in the statement contained in

estimated, that the tax may be challenged through a hearing process and that the petition for such challenge must be filed with the Tax Commission within ninety days, the Audit Division was in substantial compliance with the provisions of section 1138(a)(2) of the Tax Law and, as such, the notices are not jurisdictionally defective, as alleged by petitioner, for failure to set forth such statement in bold face type.

C. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that a notice of determination of tax due shall be given to the person liable for the collection or payment of the tax and such 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, or unless the Tax Commission of its own motion shall redetermine the same.

D. That section 1147(a)(1) of the Tax Law provides that any notice required under the provisions **of** Articles 28 and 29 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 or application made. A notice of determination shall be mailed promptly by registered or certified mail and 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. The mailing of such notice shall be presumptive evidence of the receipt by the person to whom it is addressed.

E. That a taxpayer has the right to rebut the presumption **of** receipt contained in section 1147(a)(1) of the Tax Law and, if successful, the ninety day period for filing a petition will commence to run as of the date of actual receipt of the notice. (Notice of Determination, State Tax Commission, 6/1/56)

688). The Audit Division properly mailed the notices by certified mail, to petitioner at the address given in the last return filed by said petitioner. No evidence was offered by petitioner to indicate that he had, prior to the issuance of said notices, notified the Audit Division of a change of address. His petition, dated and signed subsequent to the issuance of the notices, indicated that his address was 32-56 43rd Street, Astoria, New York 11103. It is not disputed that, on one of such notices, petitioner's name was misspelled and, on both of such notices, petitioner's address was listed as 32 56-43rd Street rather than 32-56 43rd Street. However, the evidence introduced at the hearing held herein clearly indicates that petitioner received the notices, took the notices to his representative for preparation of a petition and signed the petition on January 2, 1985, a date which was 47 days prior to the expiration of the 90 day period for filing of a petition.

F. That although the notices sent to petitioner did, in fact, contain errors in the spelling of petitioner's name and in his address, there was presumptive evidence of receipt of the notices sent to petitioner on November 20, 1984. Petitioner did not file a petition or make application for a hearing with respect to the Audit Division's determination of taxes due prior to the expiration of 90 days from the issuance of such notices. As a result thereof, the liability of petitioner was finally and irrevocably fixed.


G. That the petition of Luciano Stemberger is denied and the notices of determination and demands for payment of sales and use taxes due, issued November 20, 1984, are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 10 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER