

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

L & W AUTO REPAIRS, 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, 1979
through November 30, 1980.

Petitioner, L & W Auto Repairs, Inc., c/o Isaac Sternheim & Co., 5612 18th Avenue, Brooklyn, New York 11204, 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, 1979 through November 30, 1980 (File No. 61353).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on June 17, 1986 at 1:15 P.M. with all briefs to be submitted by July 30, 1986. Petitioner appeared by Isaac Sternheim, CPA. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly issued a Notice of Determination and Demand 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,

II. Whether petitioner timely applied for a hearing.

FINDINGS OF FACT

1. On March 17, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, L & W Auto Repairs, Inc. ("L & W"), covering the period March 1, 1979 through November 30, 1980 for taxes due of \$53,596.22, plus fraud penalty of \$26,798.13 and interest

of \$13,947.66, for a total of \$94,342.01. The notice was issued as a result of L & W's failure to produce books and records for audit. On the same date, notices in the same amount were issued against Louis Iacona as president of L & W and Walter Schmalenberger as vice president. Said notices held the officers personally liable for the taxes due from L & W under sections 1131(1) and 1133 of the Tax Law.

2. The notice issued to L & W was sent to 2434 Grand Avenue, Bellmore, New York 11710, which was the address shown on a sales tax return marked "final return" filed on March 18, 1981 for the period June 1, 1980 through August 31, 1980. Accompanying the return was the Certificate of Authority of L & W which indicated that the corporation was dissolved and the last day of business was September 14, 1980. This notice was returned undelivered. The envelope indicated that the addressee moved and left no forwarding address.

3. The notice issued to Louis Iacona was sent to 2151 Johnson Place, Bellmore, New York 11710. This notice was also returned undelivered.

4. On January 2, 1982, the Audit Division had received a response from Walter Schmalenberger to a letter which scheduled a field examination of L & W's books and records. The response indicated that Mr. Schmalenberger's address at the time was 634 14th Street, West Babylon, New York 11704. The notice issued to Walter Schmalenberger dated March 20, 1982, was sent to said address and was not returned by the United States Postal Service.

5. The mailing record of the Department of Taxation and Finance for certified mail dated March 17, 1982 listed the three notices referred to in Findings of Fact "2", "3" and "4".

6. Counsel for the Audit Division did not have a copy of the original petition that was filed with respect to the above notices. However, a letter addressed to L & W from the Tax Appeals Bureau dated February 18, 1983 makes reference to the three notices and indicates that a petition was received on October 22, 1982 or 210 days after the date the notices were issued. Consequently, L & W was advised that the petition was not timely filed and was denied a hearing.

7. On June 3, 1985, the Tax Appeals Bureau received a petition from L & W's representative, Isaac Sternheim, which requested a hearing on the jurisdictional issue of the timeliness of the petition.

8. L & W took the position that it was not given proper notice of additional taxes due since the notice was sent to the former business address of L & W and the Audit Division was aware that L & W ceased doing business in September 1980.

CONCLUSIONS OF LAW

A. 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.

B. That section 1147(a)(1) of the Tax Law provides that any notice required under the provisions of Article 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.

Subsection (2) provides that if any return, claim, statement, application, or other document required to be filed within a prescribed period under Article 28 is delivered after such period, the date of the United State postmark stamped on the envelope shall be deemed to be the date of delivery.

C. That the Audit Division properly gave L & W notice of the additional taxes determined due by mailing the notice by certified mail to the address given on the last return filed as provided in sections 1138(a) and 1147(a)(1) of the Tax Law. The Audit Division also gave proper notice to the corporate officers, Louis Iacona and Walter Schmalenberger. 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 (Matter of Ruggerite, Inc. v. State Tax Commission, 64 NY2d 688).


D. That although the notice sent to L & W was not received, there was presumptive evidence of receipt of the notice sent to Walter Schmalenberger on March 17, 1982. Said notice clearly indicated that taxes were due from L & W. Accordingly, petitioner had actual notice of the Audit Division's determination of taxes due on March 17, 1982 and did not file a petition or make application for a hearing with respect thereto before the expiration of ninety days from such notice. As a result thereof, the liability of petitioner was finally and irrevocably fixed.

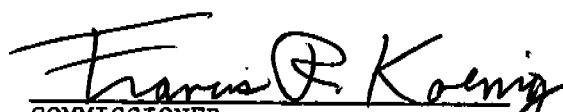
E. That the petition of L & W Auto Repairs, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 17, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER