

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NATHAN UNGER

DECISION

OFFICER OF ROBERT LANDAU ASSOCIATES, INC.

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 December 1, 1980 :
through August 31, 1984.

Petitioner, Nathan Unger, Officer of Robert Landau Associates, Inc., 59 Windingwood Road, Rye Brook, New York 10575, 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 December 1, 1980 through August 31, 1984 (File No. 68378).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 8, 1986 at 9:30 A.M., with additional evidence to be submitted by August 8, 1986. Petitioner appeared by Jeffrey L. Zivvyak, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the petition challenging the assessment of sales and use tax was timely filed.

FINDINGS OF FACT

1. On December 20, 1984, the Audit Division issued the following notices of determination and demands for payment of sales and use taxes due to petitioner, Nathan Unger, as officer of Robert Landau Associates, Inc. ("the corporation"):

<u>Period</u>	<u>Tax Due</u>	
12/1/80-5/31/84	\$1,512,600.86	(plus interest)
6/1/84-8/31/84	148,066.34	(plus interest)
12/1/83-2/29/84	2,496.06	(plus penalty and interest)
6/1/84-8/31/84	2,496.06	(plus penalty and interest)

2. The notices were mailed to petitioner at the corporation's address, 605 Third Avenue, New York, New York 10158. The notices were stamped "RECEIVED JAN 3 1985" not by petitioner, but evidently by someone at the bankrupt corporation or at the office of the trustee in bankruptcy.

3. Similar notices were issued on the same date to four other corporate officers, but said notices were sent to their respective residence addresses.

4. At the time the notices were issued, the Audit Division was aware of the fact that the corporation was in bankruptcy.

5. Petitioner and his wife filed a timely New York State income tax return for 1983 showing their proper residence address.

6. At the time the notices were mailed, petitioner was no longer working for the corporation. He eventually received the notices "by accident" long after they were mailed and promptly consulted his attorney. The date petitioner received the notices **is** unclear, but it was sometime between January 3, 1985 and March 14, 1985.

7. A petition was prepared by petitioner's attorney and mailed in New York City at the close **of** business on March 20, 1985. The envelope bears the private postage meter date of March 20, 1985 and **is** postmarked the following day, March 21, 1985. The petition was received by the Tax Appeals Bureau **in** Albany **on** the following Monday, March 25, 1985.

CONCLUSIONS OF LAW

A. That a notice of default...

revision of such determination within ninety days after the issuance thereof (Tax Law § 1138(a)(1)).

B. That Tax Law § 1147(a)(1) provides in pertinent part, as follows:

"(a)(1) Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it **is** intended... addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article... or, if no return has been filed... 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 this article by the giving **of** notice shall commence to run from the date of mailing **of** such notice."

C. That although the notices sent to four other officers of the bankrupt corporation were mailed to their residences, the Audit Division mailed the notices in question to petitioner at the corporation's address. Petitioner's residence address was obtainable from his 1983 New York State personal income tax return and the notices issued to him could have been mailed thereto. Accordingly, the presumption **of** receipt by mailing **is** effectively rebutted (~~see~~ Matter of Ruggerite v. State Tax Commission, 97 AD2d 634) and the ninety day period within which **a** petition was required to have been filed commenced with actual receipt of the notices by petitioner (Matter of the Petition of AAA Sign Company et al., State Tax Commission, December 31, 1984).


D. That although the date upon which petitioner received actual notice **is** unclear, the record indicates receipt sometime between January 3, 1985 and March 14, 1985. Thus, even if it were to be found that the petition was mailed on March 21, 1985, rather than March **20**, 1985, such mailing would have been timely.

E. That the petition of Nathan Unger is granted to the extent that it is deemed timely and petitioner is entitled to a hearing on the merits.


DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1987


PRESIDENT


COMMISSIONER


COMMISSIONER