

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
FDA of Utica, Inc. :
d/b/a Trackside Tavern :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 12/1/84 - 2/28/85.

State of New York :

ss.:

County of Albany :


David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 11th day of March, 1987, he/she served the within notice of 1138 by certified mail upon FDA of Utica, Inc., d/b/a Trackside Tavern the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

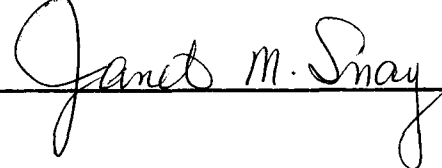
FDA of Utica, Inc.
d/b/a Trackside Tavern
401 Main Street
Utica, NY 13105

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
11th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
FDA of Utica, Inc. :
d/b/a Trackside Tavern :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 12/1/84 - 2/28/85.

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 11th day of March, 1987, he served the within notice of 1138 by certified mail upon Bruce E. Wood, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bruce E. Wood
Lombardi, Devorsetz, Stinziano & Smith
555 East Genesee St.
Syracuse, NY 132022159

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
11th day of March, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

March 11, 1987

FDA of Utica, Inc.
d/b/a Trakside Tavern
401 Main Street
Utica, NY 13105

Gentlemen:

Please take notice of the 1138 of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 4 months of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Bruce E. Wood
Lombardi, Devorsetz, Stinziano & Smith
555 East Genesee St.
Syracuse, NY 132022159

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FDA OF UTICA, INC.	:	DECISION
D/B/A TRACKSIDE TAVERN	:	
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, 1984	:	
through February 28, 1985.	:	

Petitioner, FDA of Utica, Inc. d/b/a Trackside Tavern, 401 Main Street, Utica, New York 13105, 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, 1984 through February 28, 1985 (File No. 65937).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on July 8, 1986 at 1:15 P.M., with all briefs and evidence to be submitted by August 18, 1986. Petitioner appeared by Lombardi, Devorsetz, Stinziano & Smith, Esqs. (Bruce E. Wood, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division's issuance of a Notice of Claim to Purchaser to petitioner was timely and proper.

II. Whether the Audit Division's issuance of a notice of determination to petitioner was timely and proper.

III. Whether petitioner filed a petition for a hearing with the Tax Commission within 90 days of the issuance of the notice of determination.

FINDINGS OF FACT

1. On November 21, 1984, petitioner, FDA of Utica, Inc. d/b/a Trackside Tavern, filed a Notification of Sale, Transfer or Assignment in Bulk with respect to petitioner's purchase of certain property from one Donald Scholl. The notification was sent by United States certified mail and was actually received by the Audit Division on November 23, 1984. The scheduled date of the bulk sale listed on the notification was December 5, 1984. The notification was filed on behalf of petitioner by Francis D. Stinziano, Esq., listed on the notification as petitioner's attorney.

2. The notification listed the following as the mailing address of the purchaser in the bulk sale:

FDA of Utica, Inc.
c/o Robert A. Fields
R.D. 1
Holland Patent, New York 13354

3. The notification listed the following as the purchaser's business location:

FDA of Utica, Inc.
Trackside Tavern
401 Main Street
Utica, New York 13105

4. On November 28, 1984, the Audit Division issued a Notice of Claim to Purchaser in connection with its receipt of petitioner's Notification of Sale, Transfer or Assignment in Bulk. Said notice was mailed on November 28, 1984 and addressed to petitioner at the mailing address set forth in Finding of Fact "2".

5. Shortly after petitioner's filing of the bulk sale notification, the transaction, which involved the purchase of a bar, was consummated and petitioner entered into possession at the location set forth in Finding of Fact "3".

6. On February 22, 1985, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting \$19,000.00 in sales tax due. The assessment represented petitioner's liability as purchaser of assets in a bulk sale from Donald Scholl. The notice of determination was sent by certified mail on February 22, 1985 to petitioner at the address set forth in Finding of Fact "3".

7. At no time did petitioner deny receipt of the notice of determination.

8. On June 6, 1985, the Audit Division received a letter, dated May 21, 1985, and signed by Francis D. Stinziano. The letter made reference to petitioner and stated the following:

"The above referenced corporation has received several notices of sales tax due. Our client purchased from Donald Scholl d/b/a Trackside Tavern and any of the tax liability is his.

We have previously provided to your department the proper notification of the sale."

9. The envelope containing the May 21, 1985 letter bore a metered mail stamp with the date May 21, 1985 indicated as the date of mailing. The envelope was addressed as follows:

"State of New York
Department of Taxation and Finance
State Campus
Albany, New York 12201"

10. The zip code portion of the address, which was typewritten, was crossed out in ink and below the crossed-out zip code was written in ink "12227", the correct zip code for the Department of Taxation and Finance in Albany. No evidence was presented at the hearing as to when the typewritten zip code was crossed out and the correct zip code written on the envelope.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part, that a purchaser in a bulk sale of business assets must notify the Tax Commission of the proposed sale at least ten days before either taking possession of or paying for the subject of the sale. In view of Finding of Fact "1", petitioner properly fulfilled its obligations under this section.

B. That, with respect to a bulk sale notification received more than ten days prior to the taking possession of or payment for the subject of the sale, 20 NYCRR 537.2(c)(6) provides that:

"Every timely notice received more than 10 days prior to the date of taking possession of, or payment for, the business assets shall be deemed to have been received not more than 10 days prior to the date of taking possession of, or payment for, the business assets, whichever comes first, regardless of the date when the notice is actually received."

C. That the deemed date of receipt of petitioner's Notification of Sale, Transfer or Assignment in Bulk was November 25, 1985; that is, ten days prior to December 5, 1985, the scheduled date of sale as listed on the notification.

D. That a bulk sale purchaser is relieved of liability for taxes due from the seller if proper notice of the bulk sale has been given to the Tax Commission and:

"(1) the Tax Commission, within five business days (excluding Saturdays, Sundays and legal holidays) from the date of actual receipt, or if applicable the date of deemed receipt, whichever date is later, of a proper and timely notice given by the purchaser ..., fails to inform such purchaser ...by mailing to him within such time a notice that a possible claim for taxes exists against the seller ...; [or]

(2) the Tax Commission, after receipt of a proper notice both as to service or contents...fails to give notice of the total amount of any taxes due from the seller...within 90 days after receipt of the notice;" (20 NYCRR 537.3[C]).

E. That section 1147(a)(1) of the Tax Law provides the following:

"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 in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article 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 this article by the giving of notice shall commence to run from the date of mailing of such notice."

F. That, in light of the aforecited statutes and regulations, the Audit Division's notice of claim issued to petitioner on November 28, 1984 was in all respects proper. Inasmuch as the deemed date of receipt of petitioner's notification of bulk sale was November 25, 1984, the notice of claim was mailed to petitioner within the prescribed five business day time limit. Further, the notice was mailed to petitioner at the mailing address listed on the bulk sale notification form (Finding of Fact "2"). In connection with said notice of claim, it is noted that whenever the Tax Commission informs the purchaser that a possible claim for taxes exists, any sums of money or other consideration which the purchaser is required to transfer over to the seller shall be subject to a first priority right and lien for any such taxes determined to be due from the seller (Tax Law § 1141[c]).

G. That the Audit Division's issuance of the notice of determination to petitioner on February 22, 1985 was in all respects proper. Petitioner's bulk sale notification was deemed received on November 25, 1984 and the notice of determination was issued on February 22, 1985, 89 days later. The notice was therefore timely. In addition, the notice was mailed via certified mail to petitioner at the business address listed on petitioner's bulk sale notification

form. The notice thus met the mailing requirements of section 1147(a)(1) of the Tax Law.

H. That section 1138(a)(1) of the Tax Law provides that a notice of determination finally and irrevocably fixes the tax unless the person against whom the tax is assessed makes an application for hearing within 90 days "after the giving of notice of such determination". Accordingly, inasmuch as the Audit Division met the mailing requirements as set forth in section 1147(a)(1) of the Tax Law, the tax assessed herein against petitioner is final unless petitioner filed a petition protesting said assessment within 90 days of February 22, 1985, the date of mailing of the notice.

I. That Tax Law §1147(a)(2) provides, in pertinent part:

"If any return ... or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed..., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.... If any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section." (Emphasis supplied.)

J. That pursuant to section 1147(a)(2) of the Tax Law, for a petition to be timely, it must be actually delivered to the Tax Commission within ninety days after a notice is properly mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period (see Matter of Micro-Carburetor Corporation, State Tax Commission, June 30, 1986).

K. That, assuming, arguendo, that petitioner's May 21, 1985 letter did constitute a petition, said letter was not delivered to the Tax Commission

within the prescribed ninety day period. It is noted that said letter was mailed by way of metered mail and did not bear a United States postmark. It is further noted that said letter was not delivered to the Tax Commission until June 6, 1985, a date which fell well outside the ninety day period. Accordingly, petitioner failed to timely file a petition protesting the assessment.

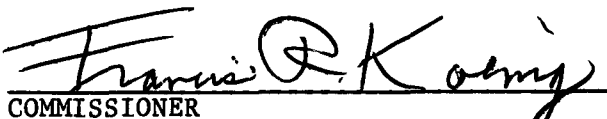
L. That the petition of FDA of Utica, Inc. d/b/a Trackside Tavern is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 22, 1985, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER