

**304 W. 14th Pizza Corp. v Commissioner of the N.Y.  
State Dept. of Taxation & Fin.**

2009 NY Slip Op 32234(U)

September 25, 2009

Supreme Court, New York County

Docket Number: 102999/09

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Marilyn Shapiro  
Justice

PART 8

304 W. 14<sup>th</sup> Street Pizza Corp.

INDEX NO. 102999/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

- v -  
NYS DEPT. OF TAXATION & FINANCE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion ~~and~~ cross motion  
are ~~be~~ decided in accord with  
the annexed memorandum.

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/25/09

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER  
*Justice*

PART 8

304 W. 14<sup>TH</sup> PIZZA CORP. and ILIR BUNJAKU,

INDEX NO. 102999/09

Plaintiffs,

MOTION DATE \_\_\_\_\_

-against-

MOTION SEQ. NO. 001

COMMISSIONER OF THE NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,

Defendant.

The following papers, numbered 1 to 9 were read on this motion:

	<u>PAPERS NUMBERED</u>
Order to Show Cause – Affirmation – Exhibits	1,2
Notice of Cross-Motion – Affirmation – Exhibits	3,4
Memorandum of Law in Support	5
Memorandum of Law in Opposition	6
Sur- Reply – Exhibits	7
Reply Memorandum of Law	8
Reply Affidavits – Exhibits	9

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that the motion and cross-motion are decided as follows:

This is a declaratory judgement action by a family-run pizzeria and its owner against the Department of Taxation to cancel a sales tax deficit. Plaintiffs move to enjoin the defendant from closing their business and seizing its assets during the pendency of the action.

### Background

The record shows that, beginning in 2007, defendant conducted an audit to determine plaintiffs' compliance with the reporting and payment provisions of Article 28 of the New York State Tax Laws governing the collection, payment and remittance of sales tax. Plaintiffs were represented in the audit by an accountant. In November, 2007, defendant assessed the sum of \$326,850.78 for taxes due and owing for periods from 11/03 to 5/06.

Plaintiffs challenge the legitimacy of these sums and contends, that their attorney repeatedly sought to reach an agreement with the Department and have them terminate their improper and illegal attempts to collect these fictitiously based assessments.

The plaintiffs further contend that, on February 25, 2009, "unannounced and without warning," the department arrived at their place of business, locked it, and advised them the premises would be inventoried and sold at auction within 10 days absent payment of over \$350,000.

Defendant cross-moves to dismiss the complaint on the ground that, based upon the plaintiffs' failure to exhaust their administrative remedies, this Court lacks subject matter jurisdiction.

Defendant asserts that, in November 2007, plaintiffs were advised of the assessment by a form entitled "Proposed Audit Change for Sales and Use Tax" on which it stated:

If you disagree with this statement, please fill out the contact information below and return one copy of this statement and a precise explanation of your disagreement, by 12/17/2007.

Plaintiffs did not respond.

Defendant issued a notice of determination in January, 2008, which was sent to both plaintiffs and to their accountant. The notice provided a method for challenge to which plaintiffs failed to respond.

Finally, defendant forwarded a notice to the plaintiffs and their accountant in May, 2008, which stated:

IF WE DO NOT RECEIVE full payment of the total amount due, or your proof of payment, by 6/09/08, we will take legal action to collect the balance due.

Each notice advised the plaintiffs that, absent receipt of a response, the notice would become an assessment subject to collection.

Defendant filed and docketed a warrant against the corporate plaintiff and sent a copy to the corporation in July, 2008.

Plaintiffs respond that (1) defendant has failed to prove that the notices were mailed or received; and (2) the Court may review an assessment which is fictitious.

#### Discussion

Section 1147(a)(1) of the Tax Law creates a statutory presumption that “[t]he mailing of[a notice by the Tax Department] shall be presumptive evidence of the receipt of the same by the person to whom addressed.” The law is clear that a taxpayer has the

right to rebut the presumption; however, the rebuttal must consist of more than a mere denial of receipt. The taxpayer must show that routine office practices were not followed or that those practices were performed so carelessly that it would be unreasonable to assume that the notice was mailed. (*TJ Gulf, Inc v New York State Tax comm*, 124 AD2d 314 [3d Dept 1986]) This Court finds that defendant has demonstrated that its routine office practices were followed. The attorney's affirmation submitted by the plaintiffs is insufficient to rebut the statutory presumption of receipt.

Moreover, where, as here, the contested assessment was made as the result of an audit in which the plaintiffs participated and submitted evidence, it cannot be deemed "wholly fictitious" as a matter of law. (*Reader's Digest Asso v Friedlander*, 100 AD2d 871 [2d Dept 1984])[“Whether these records were, in fact, complete and adequate and whether the tax determinations ... can survive scrutiny must be determined by the administrative process subject to ultimate judicial review in a proceeding pursuant to CPLR article 78 (Tax Law, § 1138, subd [a], pars [1], [4])”] Thus the plaintiffs were not relieved from exhausting their administrative remedies.

Finally, the time for asserting a claim that could have been brought under Article 78 cannot be extended through the simple expedient of denominating the action one for declaratory judgment. (*NYCHH v McBarnette*, 84 NY2d 194 [ 1995]) This Court finds that, pursuant to CPLR 217, a four-month statute of limitations is applicable to these claims, rendering them time-barred.

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that motion by defendant to dismiss the complaint is granted.

This reflects the decision and order of the court.

Dated: 9/25/09

MARILYN SHAFER  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK