

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MATT PETROLEUM CORPORATION : DECISION
for Redetermination of a Deficiency or for : DTA No. 812104
Refund of Petroleum Business Tax under Article :
13-A of the Tax Law for the Years 1988, 1989 :
and 1990. :

Petitioner Matt Petroleum Corporation, P.O. Box 536, Leland Avenue, Utica, New York 13503, filed an exception to the order of the Administrative Law Judge issued on October 21, 1993. Petitioner appeared by its president, John L. Matt, Jr. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation submitted a letter on February 3, 1994 stating it would not be filing a brief, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely protested a notice and demand for payment assessing petroleum business tax due for the years 1988, 1989 and 1990.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Matt Petroleum Corporation ("Matt"), operates as a distributor of petroleum products. John L. Matt, Jr., is petitioner's president.

On September 19 and 24, 1991 a valid power of attorney was respectively, signed and witnessed, granting authority to Michael J. Spohn to represent Matt in connection with an audit conducted by the Division of Taxation ("the Division") concerning the taxes at issue herein.

On March 24, 1992 a second power of attorney was executed, also valid, giving authority to Guy J. Graziano to represent Matt in the same matter mentioned above. This power of attorney states, "All Powers of Attorney heretofore filed or granted for this purpose are hereby revoked."

On April 27, 1992 a Notice and Demand for Payment of Tax Due was issued to Matt in the amount of \$102,865.00, plus penalty and interest of \$73,531.17, for the years 1988, 1989, and 1990. Petitioner requested a conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") and, on October 21, 1992 a Conciliation Conference was held at 333 East Washington Street, Syracuse, New York.

On January 15, 1993 the conferee issued a Conciliation Order denying petitioner's request and sustaining the Division's April 27, 1992 notice and demand. In this order, the conferee noted that "[Matt Petroleum] appeared by John Matt, President" at the conference. No mention is made of either Mr. Spohn or Mr. Graziano.

Included as part of the record herein is an affidavit made by Michael J. Spohn, wherein he states that he, along with John Matt, was present at the conciliation conference. However, this affidavit does not indicate whether or not Mr. Graziano was present.

Petitioner also included an affidavit made by John L. Matt, Jr., accompanied by a copy of a letter dated January 20, 1993 (five days after the alleged date of issuance of the Conciliation Order). Mr. Matt's affidavit asserts that the January 20, 1993 letter was written by Guy J. Graziano to the Director of BCMS. The letter reads as follows:

"The purpose of this correspondence is to advise you that I no longer represent Matt Petroleum Corporation (taxpayer). On or about June 15, 1992, your office granted me special permission to represent the taxpayer. A power of attorney (Corporate) has been on file with New York State since March 24, 1992.

"Please take whatever steps your office deems necessary to nullify the power of attorney appointing me as the representative of the taxpayer."

In his affidavit, Mr. Matt reiterates the information contained in the letter, agreeing that "Mr. Graziano released himself on January 20, 1993."

On June 1, 1993 Mr. Spohn submitted, by registered mail, a written offer-in-compromise to the conciliation conferee, on behalf of petitioner. The conferee, in turn, referred the offer to the Tax Compliance Division.

By a letter dated June 3, 1993 the Division responded to Mr. Spohn's offer as follows:

"Please be advised that it is after careful review that I must deny your request. The State has very strong guidelines concerning Offers In Compromise and you clearly do not meet the criteria. A taxpayer must be out of business, completely destitute, bankrupt, and have no hope for future earnings. This is not the case in this instance. Matt Petroleum has had a minimum of \$500,000.00 in gross sales the past few years and per the information you submitted, over \$700,000.00 in assets."

On July 1, 1993 the Division of Tax Appeals received, by Federal Express, a petition challenging the Conciliation Order sustaining the Division's notice and demand. The petition states that the conciliation conferee did not send a copy of the Conciliation Order to the representative originally designated by petitioner, Michael J. Spohn. Furthermore, petitioner alleges that Mr. Graziano, who did receive a copy of the order, did not communicate this information to Mr. Spohn.

By letter dated August 5, 1993, the Division of Tax Appeals advised petitioner as follows:

"You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

"Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within 90 days from the date a Conciliation Order is issued.

"The Conciliation Order was issued on January 15, 1993 but the petition was not filed until July 1, 1993 or one hundred and sixty-seven days later.

"Pursuant to section 3000.5(b)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments."

Copies of this notice were sent to the Division and to Michael J. Spohn. The letter to petitioner, sent c/o John Matt, noted that the Division of Tax Appeals had not received a power of attorney for Mr. Spohn, and that until such document was submitted, no further information concerning this matter would be provided to Mr. Spohn.

On August 31, 1993 the Division of Tax Appeals received the Division's written comments concerning the Notice of Intent to Dismiss. Included therein were affidavits made by Joseph Chyrywaty and by Daniel B. LaFar, a copy of the Division's Certified Mail Record for January 15, 1993, a copy of the Conciliation Order dated January 15, 1993, and a copy of Guy J. Graziano's power of attorney, as on record with the Division.

On September 3, 1993 the Division of Tax Appeals received from petitioner its written comments, which included the affidavits of John Matt and Michael Spohn, the copy of Guy J. Graziano's letter of January 20, 1993, and a copy of Michael Spohn's power of attorney signed September 19, 1991, and witnessed September 24, 1991.

Joseph Chyrywaty is the Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services. His affidavit sets forth the routine procedures followed in the ordinary course of business of BCMS in the preparation and mailing of conciliation orders. Attached to his affidavit are two exhibits denominated "A" and "B". Exhibit "A" consists of a two-page BCMS certified mail record, bearing the date January 15, 1993. Exhibit "B" is a copy of the one-page Conciliation Order issued in this matter and dated, as noted previously, January 15, 1993.

The Chyrywaty affidavit states that all conciliation orders mailed within the United States are sent by certified mail. BCMS prepares and maintains Certified Mail Records ("CMR's") which reflect a listing of all taxpayers to which conciliation orders are sent by certified mail on each particular day.¹

More specifically, as a regular part of the procedure of preparing conciliation orders for mailing, a clerk in BCMS verifies the names and addresses of taxpayers who are listed on the CMR. A certified mail control number is assigned to each Conciliation Order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer. The clerk records on the CMR the certified control number from each envelope next to the appropriate taxpayer's name.

¹Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

Each page of the CMR is a separate and individual CMR for the conciliation orders listed on that page only, and each page contains spaces to record the "Total Number of Pieces Listed by Sender", and the "Total Number of Pieces Received at Post Office". There is also a space on each individual CMR for the receiving postal employee to sign, in acknowledgment of receipt. After the postal employee signs and/or affixes the postmark acknowledging receipt on the particular date, the CMR is returned to BCMS and maintained in the regular course of business as a permanent record.

Daniel B. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mail room. Mr. LaFar's duties include the supervision of Mail Room staff in delivering outgoing Division mail to branch offices of the United States Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the Mail Room in the regular course of business, and which allegedly were followed, in particular, on January 15, 1993.

More specifically, documents, including conciliation orders, which are placed in the "Outgoing Certified Mail" basket in the Mail Room, are retrieved by a Mail Room employee and are weighed and sealed, and postage and fees are affixed. Postage and fee amounts are then recorded on the CMR. A Mail Room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the Mail Room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. A postal employee, in turn, affixes his or her signature and/or a postmark to the CMR acknowledging receipt of the items of certified mail recited therein. After the CMR has been signed and/or stamped by the United States Postal Service, it is returned the following day to the originating office within the Division (here BCMS).

The two-page CMR attached as Exhibit "A" to the Chyrywaty affidavit shows the addresses of conciliation orders mailed on January 15, 1993. The certified control numbers on the CMR run consecutively. On page two of this CMR, it shows that an envelope bearing certified control number P147439974 was addressed to Matt Petroleum Corporation, Leland

Avenue, P.O. Box 536, Utica, N.Y. 13503. This CMR also shows that a second envelope bearing certified control number P147439975 was addressed to Guy J. Graziano, Sr., 75 Richland Drive, Berkeley Heights, N.J. 07922. Page one of this CMR indicates that 13 items of mail containing conciliation orders were delivered to the United States Postal Service for certified mailing. Page two of this CMR shows that eight additional pieces of certified mail containing conciliation orders were delivered and accepted for mailing by the United States Postal Service. Both pages of this CMR bear a January 15, 1993 postmark affixed by the Roessleville Branch of the United States Postal Service and both pages contain the signature of the postal employee acknowledging the receipt and acceptance of the items of certified mail recited therein. Although the names and addresses of Matt Petroleum and Mr. Graziano are present on the CMR, there is no indication of any conciliation order addressed to Michael J. Spohn for that particular day.

The LaFar affidavit affirms that on January 15, 1993, an employee of the Mail Room delivered eight sealed postpaid envelopes for delivery by certified mail to the Roessleville Branch of the United States Postal Service, in Albany, New York. These envelopes included two pieces of certified mail (bearing Certified Nos. P147439974 and P147439975) addressed to petitioner at Leland Avenue, P.O. Box 536, Utica, N.Y. 13503 and to Guy J. Graziano, Sr., at 75 Richland Drive, Berkeley Heights, N.J. 07922, respectively.

OPINION

The Administrative Law Judge determined that petitioner did not file its petition within 90 days of the issuance of the Conciliation Order. The Administrative Law Judge further determined that the Division met its burden of proof to demonstrate that the Conciliation Order was properly mailed. The Administrative Law Judge found that the certified mailing record and the LaFar and Chyrywaty affidavits provided documentary evidence that the Conciliation Order was mailed on January 15, 1993 to petitioner and Mr. Graziano. As the petition in this matter was due on April 15, 1993 but was not filed until July 1, 1993, it was not timely.

With respect to petitioner's contention that the Division failed to serve a copy of the Conciliation Order on its proper representative, the Administrative Law Judge found that

petitioner failed to establish that Mr. Graziano was not its representative and that Mr. Spohn was its only representative. The Administrative Law Judge, interpreting the requirements of 20 NYCRR 2390.1(b), found that although there was no evidence that Mr. Spohn was informed of the revocation of his authority by the second power of attorney or that the Division had received notification that Mr. Spohn had been informed of such revocation, this was ultimately of no consequence. The Administrative Law Judge found that, even if Mr. Spohn's authority was not revoked by the second power of attorney, the second power of attorney was not invalid because the regulation does not say the second power of attorney would have been invalidly executed. The Administrative Law Judge further found that if "a petitioner has more than one representative, only one may be designated to receive copies of communications and notices (20 NYCRR 2390.5[a])" (Determination, conclusion of law "G"). Therefore, by mailing a copy of the Conciliation Order to Mr. Graziano, the Division fulfilled its obligation of serving petitioner's representative.

The Administrative Law Judge also found that there was no evidence to show that on the date the Conciliation Order was issued to petitioner Mr. Graziano was no longer petitioner's representative. The letter from Mr. Graziano, which released him from representing petitioner, was dated January 20, 1993, five days after the Conciliation Order was mailed. In addition, the Administrative Law Judge found that there was "scant evidence as to who was present at the conciliation conference, and what powers of attorney, if any, were presented to the conferee at that time" (Determination, conclusion of law "G"). The Administrative Law Judge noted that the Conciliation Order states that petitioner appeared pro se, by its president, John Matt, and that Mr. Spohn's affidavit indicates he was present along with John Matt, the Division's representative and the conferee.

Finally, the Administrative Law Judge found that, even if Mr. Graziano's power of attorney had been terminated, Mr. Spohn's power of attorney would not automatically be revived, if it had been revoked. The Administrative Law Judge stated that "a new power of attorney would have

to have been executed in favor of Michael Spohn, and there is no indication that this occurred" (Determination, conclusion of law "G").

On exception, petitioner does not dispute the fact that a second power of attorney was executed giving authority to Mr. Graziano to represent it, but asserts that "the ambiguous statement 'All Powers of Attorney heretofore filed or granted for this purpose are hereby revoked,' which is a standard line on the state's provided form . . . puts taxpayer in a controlled position" (Exception, p. 1). Petitioner continues to argue that Mr. Graziano released himself from authority to represent petitioner and was no longer its representative.

Petitioner also continues to argue that Mr. Spohn was its representative, maintained all of its records and was at the conciliation conference held on October 21, 1992. Petitioner argues that the "Tribunal should grant a deposition, under oath" that Mr. Spohn was at the conciliation conference and that "testimony under oath is needed" to establish that Mr. Graziano was not at the conference (Exception, p. 1).

We affirm the determination of the Administrative Law Judge for the reasons set forth in such determination except that we unequivocally find that Mr. Spohn's power of attorney was not revoked by the filing of the second power of attorney, the one appointing Mr. Graziano.

20 NYCRR 2390.1(b) provides that:

"[t]he revocation of the authority of the former attorney or agent shall not be effective so far as the Department of Taxation and Finance is concerned until notice, that the authority of such attorney or agent has been revoked and that the former attorney or agent has been notified in writing by the taxpayer of such revocation, is received by the Department of Taxation and Finance."

In this matter, no evidence has been put forth to show that Mr. Spohn received notice of the second power of attorney or that the Department of Taxation and Finance received notice that Mr. Spohn was notified. Therefore, the revocation of "all powers of attorney previously filed," that is, Mr. Spohn's power of attorney is "not effective so far as the Department of Taxation and Finance is concerned." However, we agree with all of the Administrative Law Judge's other conclusions including that although the second power of attorney failed to revoke Mr. Spohn's

initial power of attorney, the second power of attorney appointing Mr. Graziano was still validly executed and petitioner had two representatives in this matter. In this regard, the Division properly mailed the Conciliation Order to one of petitioner's representatives, Mr. Graziano.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Matt Petroleum Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Matt Petroleum Corporation is dismissed.

DATED: Troy, New York
July 7, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner