

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MATT PETROLEUM CORPORATION	:	DECISION
D/B/A GRACE PETROLEUM CO.	:	DTA NO. 816978
	:	
for Review of a Cancellation, Revocation or Denial of	:	
a License or Registration as a Residual Petroleum	:	
Product Business under Article 13-A of the Tax Law.	:	

Petitioner Matt Petroleum Corporation d/b/a Grace Petroleum Co., P. O. Box 536, Utica, New York 13502, filed an exception to the order of the Administrative Law Judge issued on May 13, 1999. Petitioner appeared by its president, John L. Matt, Jr. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Christina L Seifert, Esq., of counsel).

Petitioner filed a letter in lieu of a brief in support of its exception. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed a petition for a hearing with the Division of Tax Appeals.

FINDINGS OF FACT

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

Petitioner, Matt Petroleum Corporation d/b/a Grace Petroleum Company, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”), and a conference was held on September 17, 1998. Petitioner appeared by Michael J. Spohn who was then the corporation’s authorized representative.

Following a conference, BCMS issued a Conciliation Order, dated October 30, 1998, denying petitioner’s request and sustaining a Notice of Cancellation of a Residual Petroleum Products Registration.

On February 22, 1999, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and bore a metered mail date stamp of February 16, 1999. The petition was signed by John L. Matt, Jr., President. Mr. Matt also executed a document entitled Proof of Services certifying that the petition was mailed on February 16, 1999. The document bears the following legend: “PROOF OF SERVICE FOR INSTITUTIONALIZED OR INCARCENATED [sic] LITIGANTS.”

On March 3, 1999, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner with a copy to the Division of Taxation (“Division”). The notice states:

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 ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on October 30, 1998 but the petition was not filed until February 16, 1999 or one hundred and nine days later.

Pursuant to section 3000.9(a)(4) 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 regarding the proposed dismissal.

In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division's mailing procedures for conciliation orders; a copy of a certified mail record; and a copy of the conciliation order which denied petitioner's request and sustained the statutory notice.

The affidavit of Thomas English, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the mailing documents including a document which lists the taxpayers to whom conciliation orders are being sent by certified mail on a given day. This document is referred to as a certified mail record. A certified control number is assigned to each conciliation order listed on the certified mail record. According to Mr. English, each page of a certified mail record is a separate certified mail record 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" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to affix his or her signature.

Mr. English states that the copy of the three-page certified mail record attached to his affidavit is a true and accurate copy of the original. It contains a list of the conciliation orders allegedly issued by the Division on October 30, 1998. The certified control numbers on this

document run consecutively throughout the three pages, from Z257570719 through Z257570754. All the names and addresses listed on the certified mail record have been redacted except the entries for petitioner and its representative, Michael J. Spohn. Their names and addresses appear on page 3 of the certified mail record with the certified mail number Z257570753 appearing next to the name Matt Petroleum Corp, PO Box 536, Leland Avenue, Utica, NY 13503, and the certified mail number Z257570754 appearing next to the name Michael J. Spohn, 300 Oriskany Boulevard, Yorkville, NY 13495.

Each of the three pages of the certified mail record submitted is date stamped October 30, 1998 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York, and each contains a postal employee's initials verifying receipt. At the bottom of page three, the page on which petitioner's certified number is listed, the number "12" has been entered as the "Total Number of Pieces Listed by Sender," and the number "12" has also been entered as the "Total Number of Pieces Received at Post Office." There are 12 certified mail numbers listed on page three of the certified mail record.

Mr. English states that after the certified mail records and the conciliation orders are prepared for mailing, they are picked up in the offices of BCMS by an employee of the Division's Mail Processing Center.

Attached to Mr. English's affidavit as Exhibit "B" is a copy of the Conciliation Order, CMS No. 170055, dated October 30, 1998, which denied petitioner's request and sustained the statutory notice.

The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in

the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service. Mr. Baisley states that after a notice is placed in the “outgoing certified mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, a member of the mail processing center staff delivers them to the Colonie Center branch of the United States Postal Service (“USPS”) in Albany. The postal employee affixes either a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley explains that the certified mail record becomes the Division’s record of receipt by the USPS for the items of certified mail listed on that document. In this case, the postal employee wrote the total number of pieces, initialed the certified mail record, and affixed a postmark which indicates that this was the total number received at the post office. Mr. Baisley’s knowledge that the postal employee wrote the total number of pieces to indicate that 12 pieces were received at the post office is based on the fact that the Division's Mail Processing Center requested that postal employees either circle the number of pieces received or indicate the number of pieces received by writing that number on the mail record. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

In response to the Notice of Intent to Dismiss Petition, John L. Matt, Jr., petitioner’s president, submitted a letter which was mailed by certified mail on April 2, 1999. As pertinent, the letter states:

Please be advised that I am the sole stock [sic] holder and decision maker of Matt Petroleum Corp D/B/A Grace Petroleum Co. That your department received my petition Feb. 16, 1999. The Conciliation Order was brought to my attention on December 10, 1999 [sic] for I was incarcerated in the U.S. Bureau of prisons during the possible receipt of the Conciliation Order.

I believe that the petition filed meets the criteria on the above captioned matter in regards to incarcerated Stock Holders.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, pursuant to applicable provisions of the Tax Law, a conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing with the Division of Tax Appeals within 90 days after the conciliation order was issued. Timely filing of a petition is a jurisdictional requirement and the Division of Tax Appeals has no authority to consider a petition not filed within the applicable time period.

The Administrative Law Judge also noted that where the timeliness of a petition is at issue, the Division has the burden of proving proper mailing of the conciliation order. This is accomplished by demonstrating the standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures and by proving that the standard procedure was followed in the particular instance in question. After reviewing the affidavits of the two Division employees submitted as proof of the proper mailing of the conciliation order, the Administrative Law Judge concluded that the Division had adequately established that it mailed the conciliation order to petitioner by certified mail on October 30, 1998 and that a copy of the conciliation order was mailed to Michael J. Spohn, petitioner's authorized representative, on the same date. Since petitioner's petition was deemed filed with the Division of Tax Appeals on February 16, 1999, which was 109 days after the mailing of the conciliation order, the

Administrative Law Judge concluded that the Division of Tax Appeals had no authority to hear petitioner's challenge to the conciliation order. As a result, the Administrative Law Judge dismissed the petition of Matt Petroleum Corporation, d/b/a Grace Petroleum Co. with prejudice.

ARGUMENTS ON EXCEPTION

On exception, petitioner, by its president, John L. Matt, Jr., argues that at the time the BCMS order was issued on October 30, 1998, he was incarcerated in Federal prison. Thus, he did not receive the BCMS order and was unable to communicate with Michael Spohn, the person who held a power of attorney from petitioner. In addition, petitioner presented a letter from Michael Spohn concerning Mr. Spohn's inability to communicate with John L. Matt, Jr., President of petitioner, until on or about December 7, 1998 due to Mr. Matt's incarceration. Mr. Spohn indicated that it was his belief that the 90-day period for filing a petition with the Division of Tax Appeals was tolled until the date of Mr. Matt's release from prison.

The Division, in opposition, argues that the Administrative Law Judge was correct in dismissing the petition of Matt Petroleum Corporation, d/b/a Grace Petroleum Co. with prejudice.

OPINION

We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and we see no reason to modify her order in any respect. As explained by the Administrative Law Judge, the filing of a petition within 90 days of the issuance of a BCMS order is a prerequisite to the jurisdiction of the Division of Tax Appeals. Absent this timely filing, the Division of Tax Appeals has no authority to consider the merits of a petition. Petitioner has pointed to no authority nor are we aware of any which would extend the time for

filing a petition of a corporate taxpayer due to the incarceration of its president. As a result, we affirm the order of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Matt Petroleum Corporation d/b/a Grace Petroleum Co. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Matt Petroleum Corporation d/b/a Grace Petroleum Co. is dismissed.

DATED: Troy, New York
January 20, 2000

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner