

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PARK CITY BUILDERS	:	
OF NEW YORK, INC.	:	DECISION
	:	DTA NO. 823121
for Revision of a Determination or for Refund of	:	
Sales and Use Tax under Articles 28 and 29 of	:	
the Tax Law for the Years 2006 and 2007.	:	

Petitioner, Park City Builders of New York, Inc., filed an exception to the order of the Administrative Law Judge issued on August 6, 2009 dismissing the petition. Petitioner appeared by Benjamin L. Heintz, Vice President. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this decision.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

We find the following facts.

Petitioner filed a petition dated June 22, 2009, which was received by the Division of Tax Appeals on June 26, 2009 in an envelope with a United States Postal Service (“USPS”) postmark of June 23, 2009. The petition contested a conciliation order dated February 6, 2009, which sustained the statutory notice (Refund Denial dated May 8, 2008) issued to petitioner.

The Petition Intake, Review and Exception Unit of the Division of Tax Appeals, in reviewing the petition filed on June 23, 2009, determined that the petition appeared to have been filed late, in that it was filed 137 days after the issuance of the conciliation order dated February 6, 2009. On June 30, 2009, the Petition Intake, Review and Exception Unit issued a Notice of Intent to Dismiss Petition to both petitioner and the Division of Taxation (“Division”) allowing the parties 30 days within which to submit written comments on the proposed dismissal. In the June 30, 2009 letter accompanying the Notice of Intent to Dismiss Petition, petitioner was advised that “The last date on which you could have filed a timely petition was May 7, 2009.”

The Division responded to the Notice of Intent to Dismiss Petition on July 27, 2009 and included therewith, in support of the proposed dismissal, proof of mailing on February 6, 2009 of the conciliation order dated February 6, 2009. The Division’s proof of mailing consisted of (i) an affidavit dated July 22, 2009 of Robert Farrelley, the Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services (“BCMS”), and (ii) an affidavit dated July 24, 2009 of James Steven VanDerzee, the Principal Mail and Supply Supervisor of the Division’s Registry Unit.

The affidavit of Robert Farrelley sets forth the Division’s general practice and procedure for processing conciliation orders. Further, an attached copy of the certified mail record for conciliation orders issued on February 6, 2009 shows that a Conciliation Order dated February 6, 2009 was sent to petitioner at “c/o Benjamin Heintz, P. O. Box 356, Hamilton, NY 13346” by

certified mail using certified control number 7104 1002 9730 1163 8977 on February 6, 2009, as indicated by an affixed USPS postmark.

The affidavit of James Steven VanDerzee describes the operations and procedures followed by the mail processing center, as follows. After the conciliation orders are placed in an “Outgoing Certified Mail” basket, a member of Mr. VanDerzee’s staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and may also place his or her initials or signature on the certified mail record indicating receipt by the post office. Here, the postal employee affixed a postmark to each page of the certified mail record, wrote the number “31” on page “3” to indicate the “Total pieces received at post office” and initialed the certified mail record on page “3” to indicate that “31” pieces, including the one addressed to petitioner, were the total number of pieces received at the post office on February 6, 2009.

Petitioner did not respond to the Notice of Intent to Dismiss Petition.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge, *sua sponte*, ordered that the petition be dismissed with prejudice on the ground that it was not filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petition was not filed until June 23, 2009 or 137 days after the conciliation order was issued on February 6, 2009.

ARGUMENTS ON EXCEPTION

Petitioner has presented arguments concerning the merits of its tax refund claim and asserts that its failure to timely file a petition with the Division of Tax Appeals was the result of a

misunderstood communication with the Conciliation Conferee prior to the issuance of the conciliation order, which led petitioner to believe that it would automatically have a hearing before the Division of Tax Appeals.

OPINION

We affirm the order of the Administrative Law Judge.

The Tax Law provides, with regard to an application for refund of sales and use tax, in pertinent part that:

If an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, the commissioner of taxation and finance shall grant or deny such application in whole or in part within six months of receipt of the application in a form which is able to be processed and shall notify such applicant by mail accordingly. Such determination shall be final and irrevocable unless such applicant shall, within ninety days after the mailing of notice of such determination, petition the division of tax appeals for a hearing (Tax Law § 1139[b]).

In the alternative, a taxpayer may also, within the same 90-day period, file a request for a conciliation conference with BCMS (*see*, Tax Law §§ 170[3-a], 2006 [4]; 20 NYCRR 4000.3[c]). If a taxpayer first elects to file a request for a conciliation conference with BCMS, the conciliation order is binding upon the Department and the taxpayer, unless a petition is filed with the Division of Tax Appeals within 90 days after the conciliation order is issued (*see*, Tax Law § 170[3-a][e], 20 NYCRR 4000.3[c], 4000.6[b]).

A conciliation order is issued within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see, Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (*see*, Tax Law § 170[3-a][e]). When the timeliness of the petition is at issue, the Division must establish proper mailing of the conciliation order (*see, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has

met its burden to establish proper mailing of the conciliation order to petitioner on February 6, 2009 by submitting affidavits describing its general mailing procedure and the mailing record, which showed that the procedure was followed in this case (*see, generally, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner's petition was not filed until June 23, 2009 or 137 days after the conciliation order was issued. The law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see, Matter of Northern Ford-Mercury*, Tax Appeals Tribunal, May 20, 2004). Despite petitioner's belief that it need take no further action after issuance of the conciliation order to obtain a hearing before the Division of Tax Appeals, we note that the petition contained a copy of a cover letter sent to petitioner with the conciliation order. That cover letter states, in applicable part that:

Please take further notice that pursuant to section 170.3-a of the Tax Law, this order will be binding unless you file a petition with ninety (90) days from the date of this order with the Division of Tax Appeals.

Therefore, we affirm the conclusion of the Administrative Law Judge that since petitioner failed to file its petition protesting the conciliation order within 90 days of its issuance, such petition was properly dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Park City Builders of New York, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Park City Builders of New York, Inc. is dismissed with prejudice.

DATED: Troy, New York
March 25, 2010

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner