

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEROME STEVENS PHARMACEUTICALS, INC. : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 819553
Corporation Franchise Tax under Article 9-A of the Tax :
Law for the Fiscal Years Ended September 30, 1986, :
September 30, 1987 and September 30, 1988. :
:

Petitioner, Jerome Stevens Pharmaceuticals, Inc., 60 DaVinci Drive, Bohemia, New York 11716, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended September 30, 1986, September 30, 1987 and September 30, 1988.

On December 3, 2003, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the grounds that there are no material issues of fact and that the facts mandate a determination in its favor. Petitioner's response was served on December 17, 2003, which date began the 90-day period for issuing this determination. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel). Petitioner appeared by Robert A. Wagner, Esq. Based upon the pleadings and motion papers, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. Petitioner, Jerome Stevens Pharmaceuticals, Inc., filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking review of a Notice of Disallowance of a refund claim, dated December 15, 2001. On the Request for Conciliation Conference, petitioner’s address appeared as “60 DaVinci Drive, Bohemia, New York 11716,” and the address for petitioner’s representative (Robert A. Wagner, Esq.) appeared as “1615 Northern Boulevard, Manhasset, New York 11030.”

2. Following a conference held on September 5, 2002, the conciliation conferee issued a Conciliation Order (CMS No. 189977), dated November 29, 2002, which denied petitioner’s request and sustained the Notice of Disallowance.

3. On July 10, 2003, the Division of Tax Appeals received the petition of Jerome Stevens Pharmaceuticals, Inc. seeking a redetermination of the denial by the Division of Taxation (“Division”) of its refund claim which was sustained by the conciliation order. Petitioner had sent the petition by FedEx Express standard overnight service with delivery to be completed by July 10, 2003. The petition was mailed by Robert A. Wagner, Esq.

4. On December 4, 2003, the Division, by its attorney, John E. Matthews, Esq., filed a motion requesting that the petition be dismissed or, in the alternative, that summary determination be granted in favor of the Division based on petitioner’s failure to file a timely

petition. The motion stated that the petition was not filed until July 10, 2003 or more than 90 day after the issuance of the Conciliation Order dated November 29, 2002.

5. The Division submitted affidavits from the following employees, with attachments, in support of its motion to dismiss: Carl DeCesare, Assistant Supervisor of Tax Conferences in BCMS since October 2002, whose duties include being familiar with the procedures and operations of BCMS including the preparation and mailing of conciliation orders, and Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division since March 1999, who is familiar with the operations and procedures of the Mail Processing Center (“mail room”) and whose duties include supervising the delivery of outgoing mail to the post office.

6. Mr. DeCesare, in his affidavit, explains that conciliation orders and the accompanying cover letters are prepared by the BCMS Data Management Service Unit. The computer generated conciliation orders and cover letters are predated with the intended date of mailing. The Data Management Services Unit then forwards the conciliation orders and cover letters to the BCMS conciliation conferees for signature, who in turn forward the orders and letters to a clerk in BCMS assigned to process conciliation orders.

The name, mailing address, order date, and BCMS number for each conciliation order to be issued are electronically sent to the Division’s Advanced Function Printing Unit (“AFP”). For each mailing, the AFP assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer’s name, mailing address, BCMS number, certified control number and certified control number bar code. The AFP also generates a computer printout entitled “Assessments Receivable, Certified Record for Non-Presort Mail” (“CMR”). The CMR is a listing of taxpayers and representatives to whom conciliation orders

are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS number is recorded under the heading "Reference No." and is preceded by three zeros. The AFP prints the CMR and cover sheets on a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

7. The clerk, as part of her regular duties, associates each cover sheet, conciliation order and cover letter. The clerk verifies the taxpayer's name and address with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter and conciliation order into a three-windowed envelope where the BCMS return address, certified mail control number, bar code and name and address of the taxpayer appear.

8. The "Total Pieces and Amounts Listed" is indicated on the last page of the CMR. The clerk in BCMS stamps on the bottom left corner "Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" and also stamps on the bottom right corner of the last page "POST OFFICE Hand Write total # of pieces and initial." The clerk then indicates on the top of each page the date that the conciliation orders were mailed, in this case "November 29, 2002." The CMR is kept by BCMS in the regular course of business. Page 5 of the CMR originally listed 51 pieces of mail; however, the number of pieces received at the post office shows 50 in order to reflect the fact that one piece of mail had been "pulled" from the mailing record.

9. A piece may be pulled for any number of reasons including, but not limited to, a discrepancy in the name or address. Any piece of mail so pulled will be segregated from the remaining group of orders for correction and issuance at a later time.

A review of the CMR in the present matter reflects that one piece of mail was pulled. The piece of mail that was pulled is listed on page 3 of the CMR. A line was placed through the entry for this taxpayer by the clerk after the order was pulled. It should be noted that no such mark is made on or near the listing for petitioner or its representative. The clerk then changed on page 5 of the CMR the total pieces and amounts listed from "51" to "50."

10. The CMR for the conciliation orders allegedly mailed on November 29, 2002 consists of five pages. The conciliation order allegedly mailed to petitioner is listed on page 3 of the CMR, and is assigned certified control number 7104 1002 9739 0143 5563, while the copy allegedly mailed to petitioner's representative, Robert A. Wagner, is listed on page 2 and is assigned certified control number 7104 1002 9739 0143 5464. On each page of the CMR is a United States postmark of November 29, 2002. On the bottom of each page are the initials of a United States Postal Service ("USPS") employee and the handwritten notation of the employee indicating the number of pieces listed on the page. The sum of the number of pieces per page is 50.

The CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders are then picked up in BCMS by an employee of the Department of Taxation and Finance's Mail Processing Center. The Mail Processing Center is responsible for delivering the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

11. Mr. DeCesare attested to the truth and accuracy of the copy of the five-page CMR attached to his affidavit which contains a list of the conciliation orders allegedly issued by the Division on November 29, 2002. The names and addresses of other taxpayers to whom

conciliation orders were issued, as reflected on the CMR in question, have been redacted to preserve the confidentiality of information relating to such other taxpayers.

Attached to Mr. DeCesare's affidavit is a copy of the Conciliation Order (CMS No. 189977), dated November 29, 2002, which denied petitioner's request and sustained the denial of the refund claim.

12. The Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record. These procedures were the normal and regular procedures of BCMS on November 29, 2002.

13. Mr. Peltier's affidavit attests to the regular procedures followed by the mail room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. After a conciliation order 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. A clerk counts the envelopes and checks the names and certified mail numbers to ensure that they are the same on the envelopes and the CMR.

An employee of the mail room then delivers the envelopes and the CMR to a branch of the USPS in the Albany, New York area. An employee affixes a postmark and his initials or signature to the certified mail record, indicating receipt by the Postal Service. In this case, the postal employee affixed a postmark, wrote the number of pieces and initialed each page of the certified mail record. The postal employee, on page 5 of the CMR, wrote the number "50" to indicate that this was the total number of pieces received at the post office. Mr. Peltier's

knowledge that the postal employee wrote the “total number of pieces” for the purpose of indicating that 50 pieces were received at the post office is based on the fact that the Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record.

In the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and is delivered to the originating office, in this case BCMS, by a member of the mail room staff. The regular procedures of the Mail Processing Center concerning the mailing of certified mail were followed in the mailing to petitioner and his representative on November 29, 2002.

14. In response to the Division’s motion, Mr. Wagner submitted an affidavit from Ronald Steinlauf, an officer of petitioner, dated December 11, 2003, and an affidavit signed by himself, dated December 15, 2003. Both individuals state that they are responsible for the receipt and review of all mail in their respective offices, that there is nothing in the records of either office indicating that a conciliation order was received, that there is no copy of a conciliation order in their files except the copy of the conciliation order that was received in response to a letter written by Mr. Wagner, dated May 14, 2003, stating that he had not received a conciliation order. According to Mr. Wagner, the first conciliation order he received was by fax transmission on June 9, 2003.

CONCLUSIONS OF LAW

A. Following the issuance by the Division of a notice of disallowance of a refund claim, a taxpayer may file a petition with the Division of Tax Appeals within two years after the issuance

of the notice of disallowance (Tax Law § 1089[c]). Petitioner also had the option, pursuant to Tax Law § 170(3-a)(a), to file a request for a conciliation conference with BCMS. Petitioner chose the latter option in this case, and a conciliation order dated November 29, 2002 sustaining the notice of disallowance was issued. Pursuant to Tax Law § 170(3-a)(e), the conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the order. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989; *Matter of Trans County Construction Inc.*, Tax Appeals Tribunal, August 24, 1995). The filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where a taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

C. If the order is properly mailed by the Division, there is a presumption of receipt by the person to whom it was addressed (*Engel v. Lichterman*, 95 AD2d 536, 467 NYS2d 642, 643, *affd* 62 NY2d 943, 479 NYS2d 188). The petitioner then has the right to rebut this presumption (*see, Matter of Ruggerite, Inc. v. State Tax Commn.*, 64 NY2d 688, 485 NYS2d 517, 518).

Thus, it is crucial that the Division prove that the order was properly issued, even in the face of

possible rebuttal evidence introduced by petitioner.

D. The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular case under consideration (*see, Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

E. The Division introduced adequate proof of its standard mailing procedures for conciliation orders via the affidavits of two of its employees, Carl DeCesare and Bruce Peltier, both of whom were involved in the process of issuing or mailing of conciliation orders. These affidavits generally describe the various stages of the order generation and mailing process and also attest to the authenticity of the copies of the conciliation order and CMR.

The Division also established that the general issuance procedure was followed on November 29, 2002 in the generation and mailing of the conciliation order at issue herein. First, pages two and three of the five-page CMR submitted list Mr. Wagner's address and petitioner's address as they are shown on petitioner's Request for a Conciliation Conference. Second, there are 50 entries on the pages of the CMR, each page containing the initials of a USPS employee, the number of entries on the page and a USPS postmark by an Albany branch with the date November 29, 2002. Finally, at the bottom of page 5, the number "50" has been filled in both as the "Total Number of Pieces Listed by Sender," and as the "Total Number of Pieces Received at Post Office." In conclusion, the proof offered by the Division substantiates that the conciliation order was issued, by certified mail, to petitioner and its representative on November 29, 2002.

F. Petitioner's petition was sent by FedEx Express on July 9, 2003 to the Division of Tax

Appeals and received on July 10, 2003 and thus, is deemed filed on July 9, 2003 (*see*, Tax Law § 1091[a][2][B]) or well beyond the 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The assertion by petitioner that neither the corporation nor its representative received copies of the conciliation order following its issuance on November 29, 2002 is insufficient to overcome the presumption of receipt of the conciliation order by the persons to whom it was properly addressed.

The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). February 27, 2003 was the last date petitioner could timely file a petition with the Division of Tax Appeals, and since the petition was filed on July 10, 2003, the petition was not timely filed. Since the petition was not timely filed, the Division of Tax Appeals lacks jurisdiction to review it (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

G. The petition of Jerome Stevens Pharmaceuticals, Inc. is dismissed.

DATED: Troy, New York
February 5, 2004

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE