

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DHAN GURU JI CORPORATION : DECISION
for Revision of a Determination or for Refund of Sales and : DTA NO. 828082
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2014 through August 31, 2015. :

Petitioner, Dhan Guru Ji Corporation, filed an exception to the determination of the Administrative Law Judge issued on November 2, 2017. Petitioner appeared by its president, Parvinder Kaur. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioner did not submit a brief in support of its exception. The Division of Taxation submitted a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. Petitioner's reply brief was due March 9, 2018, which date began the six-month period for issuance of this decision.

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

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have added footnote 1 below to more fully reflect the record. As so modified, the Administrative Law Judge's findings of fact are set forth below.

1. On February 8, 2017, the Division of Tax Appeals received a petition from petitioner, Dhan Guru Ji Corporation, which protested a notice of determination issued to it. The envelope containing the petition bears a United States Postal Service (USPS) postmark of February 3, 2017. The notice of determination, assessment number L-044437084, dated February 18, 2016, was issued to petitioner at an address in New Windsor, New York.

2. On May 25, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner. The notice of intent indicated that the relevant notice of determination was issued on February 18, 2016, but that the petition was not filed until February 3, 2017, or 351 days later.

3. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted the affidavits of Robert Farrelly, dated June 29, 2017, and Fred Ramundo, dated June 30, 2017, both employees of the Division. The Division also submitted a copy of the notice of determination issued to petitioner, a copy of a request for conciliation conference filed by petitioner, a copy of the conciliation order dated June 3, 2016 (CMS No. 270644) dismissing request issued to petitioner, and a copy of the certified mail record (CMR) containing a list of conciliation orders issued by the Division on June 3, 2016.¹

¹ Although the notice of intent was issued due to the apparent late-filing of the petition following the Division's issuance of the notice of determination on February 18, 2016 (*see* finding of fact 1), we note that the administrative law judge treated the notice of intent as addressing the apparent late-filing of the petition in response to the June 3, 2016 conciliation order dismissing petitioner's request for a conciliation conference. Thus, as did the

4. The affidavit of Robert Farrelly, Supervisor of Tax Conferences for the Bureau of Conciliation and Mediation Services (BCMS), sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminated in the mailing of the conciliation order dismissing request by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail or CMR.

5. The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

6. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

7. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

administrative law judge, we deem this exception to be a protest of the conciliation order dismissing the request for a conciliation conference. This is appropriate as it reflects the actual procedural history of this matter.

8. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

9. It was the general office practice that the BCMS clerk stamp on the bottom left corner "Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR.

10. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case, "6-3-16" was written in the upper right corner of each page of the CMR.

11. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division's Mail Processing Center.

12. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR, which contained a list of the 35 conciliation orders issued by the Division on June 3, 2016. The CMR also listed 35 certified control numbers. Each such certified control number was assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

13. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Corresponding to certified control number 7104 1002 9730 0848 3887 was

reference number 000270644,² along with the name and the New Windsor, New York, address of petitioner. The New Windsor, New York, address for petitioner is the same address used by petitioner in its request for conciliation conference and the petition filed herein.

14. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her signature to the CMR indicating receipt by the post office.

15. In this particular instance, the postal employee affixed a postmark dated June 3, 2016 and initialed each page of the four-page CMR. The postal employee also circled the number "35" on page four to indicate the "Total Pieces Received at Post Office."

16. Mr. Ramundo stated that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Ramundo's staff on the following day after its initial delivery and is then

² We note that this reference number corresponds to the CMS number of the conciliation order described in finding of fact 3 (CMS 270644).

delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

17. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo states that on June 3, 2016, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Dhan Guru Ji Corporation to a branch of the USPS in Albany, New York, in a sealed envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to, and accepted by, the post office on June 3, 2016, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner on June 3, 2016.

18. Petitioner responded to the notice of intent to dismiss with a letter from its president, Parvinder Kaur, admitting that the petition in this matter was not timely filed due to the fact that the person she hired to contest the underlying notice of determination failed to properly handle the matter. Petitioner requests that its petition be considered on the merits.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by noting the 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order. The Administrative Law Judge observed that because the petition in this matter appeared to be filed after that deadline, the Division of Tax Appeals issued a notice of intent to dismiss petition.

The Administrative Law Judge noted that where the timeliness of a taxpayer's protest against a conciliation order is in question, the Division bears the burden of showing proper mailing of the statutory notice. According to the Administrative Law Judge, in order to show proper mailing, the Division must show evidence of a standard procedure for issuance of a statutory notice and evidence that such procedure was followed in this instance.

The Administrative Law Judge found that the Division met this burden by introducing evidence of its standard mailing procedures for statutory notices and that such procedures were followed in mailing the conciliation order here at issue through the affidavits of the Division employees. Furthermore, the Administrative Law Judge noted that the properly completed certified mail record submitted with the affidavits of the Division's employees constituted documentary evidence of the date and fact of the mailing of the subject conciliation order to petitioner.

The Administrative Law Judge concluded that because the petition in this case was filed more than 90 days after the issuance of the conciliation order, the Division of Tax Appeals lacked jurisdiction to address it. Consequently, the Administrative Law Judge dismissed the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner maintains on exception that the petition was timely and asks that we consider the merits of its protest. The Division argues that the Administrative Law Judge correctly determined that the petition in this matter was untimely and thus the Division of Tax Appeals lacks jurisdiction to address the merits of the petition. Furthermore, the Division posits that petitioner offered no evidence to substantiate its position that the petition was timely filed and asks that the determination of the Administrative Law Judge be sustained.

OPINION

We agree with the Division that the Administrative Law Judge correctly determined that the petition in this matter was untimely filed and thus the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest of the conciliation order issued on June 3, 2016 (*see* Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c]). Our review of the record accords with the Administrative Law Judge's finding that the Division demonstrated proper mailing of the conciliation order to petitioner on June 3, 2016 through its submission of the affidavits of two of its employees familiar with its mailing procedures and the attached completed certified mail record (*see Matter of Katz*, Tax Appeals Tribunal, November 16, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Auto Parts Ctr., Inc.*, Tax Appeals Tribunal, February 9, 1995). As the petition was not filed until February 3, 2017, or beyond the 90-day statutory deadline for filing a protest of a statutory notice, we must conclude that the petition in this matter is untimely and the Division of Tax Appeals lacks jurisdiction to reach the merits of petitioner's protest (*see Matter of Rotondi Indus. Corp.*, Tax Appeals Tribunal, July 6, 2006).

Although the determination included petitioner's response to the notice of intent arguing that the late filing of its petition should be excused due to its reliance on its representative who did not properly handle this matter, the Administrative Law Judge did not address this argument in her conclusions. While we prefer to have the benefit of an Administrative Law Judge's research and analysis, we believe no purpose would be served by remanding this case to the Administrative Law Judge for further consideration. It is clear that under our prior decisions a petitioner cannot alleviate its responsibility to timely file its petition by asserting reliance upon its representative to do so (*see Matter of Avlonitis, Tax Appeals Tribunal*, February 20, 1992).

This is because extenuating circumstances do not provide a basis to excuse the late filing of a petition (*see Matter of Perillo, Tax Appeals Tribunal*, August 2, 1990; *Matter of Rathgaber, Tax Appeals Tribunal*, April 5, 1990), even where a petitioner has relied on the advice and assistance of a representative to its detriment.

Deadlines for filing petitions are strictly enforced and petitions filed even one day late must be dismissed (*see Matter of Am. Woodcraft, Tax Appeals Tribunal*, May 15, 2003).

Therefore, in view of the above, we are without jurisdiction over this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED: Albany, New York
September 6, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner