

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
THE DUMPLING COVE, LLC
for Revision of a Determination or for Refund of Sales
and Use Taxes under Articles 28 and 29 of the Tax Law
for the Periods June 1, 2014 through August 31, 2017.

DECISION
DTA NO. 829759

Petitioner, The Dumpling Cove, LLC, filed an exception to the determination of the Supervising Administrative Law Judge issued on September 3, 2020. Petitioner appeared by Kereith Mair, its principal. The Division of Taxation appeared by Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner’s request for oral argument was denied. The six-month period for issuance of this decision began on February 4, 2021, the due date of petitioner’s reply brief.

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

ISSUE

Whether the Supervising Administrative Law Judge properly dismissed the petition for lack of jurisdiction.

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge, except that we have added an additional finding of fact, numbered 5, to more fully reflect the record. This additional finding of fact, together with the facts as determined by the Supervising Administrative Law Judge, are set forth below.

1. On January 16, 2018, petitioner, The Dumpling Cove, LLC, by its owner Kereith Mair, signed a consent to a statement of proposed audit change for sales and use taxes for the period June 1, 2014 through August 31, 2017. The consent specifically waived the right to a hearing to contest the validity and amount of the tax, interest and penalty consented to for that period.

2. A warrant, ID E-040934848-W001-3, for the period ending August 31, 2017, was docketed against petitioner in the Bronx County Clerk's Office on July 19, 2018.

3. Petitioner filed a petition that was received by the Division of Tax Appeals on December 4, 2019. The envelope containing the petition bears a United States Postal Service (USPS) postmark dated November 27, 2019.

4. The petition challenged warrant ID E-040934848-W001-3. Petitioner asserted that the assessment of sales tax owed for the periods between 2014 and 2017 was not based on a reasonable interpretation of the gross taxable sales for the said periods. It did not challenge any other notice in its petition.¹

¹ We take notice of the fact that the petition originally filed in this matter referenced notices issued in both petitioner's and Mr. Mair's names. The Supervising Administrative Law Judge separated Mr. Mair's protest of the notices issued in his name individually and assigned it its own petition, DTA No. 829794.

5. The Supervising Administrative Law Judge issued notices of intent to dismiss the petition to petitioner and the Division on May 11, 2020, granting them both 30 days to respond to the notice. As part of the file for this petition, the Division of Tax Appeals created a certified mail record (CMR) for notices of intent to dismiss petition issued on that day. The CMR consists of four entries on one page and bears a date stamp of May 11, 2020 from the Empire State Plaza, Albany, New York branch of the USPS. The CMR indicates that a total of four items of mail were received by the post office on that date, including one addressed to petitioner (certified mail number 7018 1130 0000 6931 6901) at an address in the Bronx, New York. The file contains no information regarding certified mail addressed to petitioner that was returned by the post office to the Division of Tax Appeals as undeliverable.

THE DETERMINATION OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

The Supervising Administrative Law Judge began his determination by noting that the Division of Tax Appeals is a forum of limited jurisdiction and its power to adjudicate disputes is exclusively statutory. It is authorized to provide hearings to any petitioner, upon request, unless the right to a hearing is specifically provided for, modified or denied by another provision of the Tax Law.

Next, the Supervising Administrative Law Judge cited the section of the Tax Law that authorizes the Division to enter into agreements with taxpayers regarding their tax liabilities. The Supervising Administrative Law Judge emphasized the final and conclusive nature of such agreements, except upon a showing of fraud, malfeasance, or misrepresentation of a material fact.

The Supervising Administrative Law Judge observed that the consent signed by Mr. Mair on behalf of petitioner was made by the authority granted under the Tax Law and, as petitioner

had not alleged fraud, malfeasance, or misrepresentation of a material fact, petitioner was precluded from challenging the agreement. Additionally, as the petition in this matter was premised upon a tax warrant, which is not one of the written notices providing a taxpayer with a right to a hearing with the Division of Tax Appeals, the Supervising Administrative Law Judge concluded that the Division of Tax Appeals was without jurisdiction to hear the merits of petitioner's protest of its tax liabilities. Accordingly, the Supervising Administrative Law Judge dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Supervising Administrative Law Judge erred by failing to provide notice of a potential dismissal of its petition. Petitioner states that it was unclear as to whether the notice of intent to dismiss applied to it or to its principal, Mr. Mair, and it believed that the notice of intent to dismiss applied only to Mr. Mair. It states that it was not provided with proper notice of the impending dismissal because the notice of intent to dismiss with respect to petitioner did not identify the specific assessments that were at issue. It urges this Tribunal to remand this matter for consideration of the merits of its protest.

The Division argues that the Supervising Administrative Law Judge correctly determined that the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest. The Division notes that the petition is premised on a tax warrant, which is not a notice that provides a taxpayer a right to a hearing before the Division of Tax Appeals. The Division points to a consent agreement executed on January 16, 2018, by Mr. Mair on behalf of petitioner, wherein petitioner waived its right to challenge the assessment. The Division asks us to affirm the determination of the Supervising Administrative Law Judge.

OPINION

The Division of Tax Appeals is a forum of limited jurisdiction and its power to adjudicate disputes is solely statutory (Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds*, 151 Misc 2d 326 [Sup Ct, Albany Cty 1991]). As such, the Division of Tax Appeals' authority is limited to "provid[ing] a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter" (Tax Law § 2006 [4]).

Petitioner here argues that it was not provided with notice of intent to dismiss the petition, which caused it to fail to timely reply as to why the petition should not be dismissed. This contention, however, is at odds with the record in this matter. Pursuant to SAPA § 306 (4), official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (*Matter of Ordway*, 196 NY 95 [1909]), this Tribunal may take official notice of the record of its proceedings (*see Bracken v Axelrod*, 93 AD2d 913 [3d Dept 1983], *lv denied* 59 NY2d 606 [1983]). Our examination of the file reveals that a notice of intent to dismiss was issued to petitioner and mailed by USPS certified mail on May 11, 2020, to the same street address in the Bronx, New York, as that listed as petitioner's mailing address in the notice of exception in this proceeding. That notice bears the caption "In the Matter of the Petition of The Dumpling Cove, LLC" and DTA number 829759, and includes a clarification that it pertains only to the notices in petitioner's name and not to notices issued to Mr. Mair individually, which were severed into a separate petition and assigned a different DTA number. We find no defect in the notice itself or in its mailing to petitioner, and accordingly find no merit in petitioner's argument that it was not provided with proper notice of intent to dismiss its petition.

We agree with the Supervising Administrative Law Judge that the Tax Law does not provide jurisdiction to the Division of Tax Appeals for reviewing petitions or providing hearings based on tax warrants (Tax Law §§ 2006 [4], 2008 [1]; *see* 20 NYCRR 3000.1 [k]; *see also Matter of Francis*, Tax Appeals Tribunal, June 18, 2009; *Matter of Scott*, Tax Appeals Tribunal, May 29, 2008). Even if a statutory notice granting hearing rights was attached to the petition in the first instance, we find that the consent executed by Mr. Mair on behalf of petitioner extinguished its right to a hearing to contest the validity of the tax and interest determined to be owed (Tax Law § 1138 [c] [“[a] person liable for the collection or payment of tax . . . shall be entitled to have a tax due assessed prior to the ninety-day period [for the filing of a petition challenging such tax] by filing with the [Division] a signed statement in writing . . . consenting thereto”]; *see also Matter of Brewsky’s Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001; *Matter of SICA Elec. & Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998; *Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992). Petitioner’s consent to the proposed audit changes made that assessment fixed and final and, consequently, the Division of Tax Appeals lacks jurisdiction over the petition (*id.*).

Even though we conclude that we lack jurisdiction to consider the merits of petitioner’s protest, we note that petitioner is not without recourse. Pursuant to the consent agreement, petitioner may pay the assessment and apply for a refund or credit of the amount it believes to represent an overpayment for the tax periods here at issue (Tax Law § 1139 [c]; *see also Matter of Brewsky’s Goodtimes Corp.*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Dumpling Cove, LLC is denied;
2. The determination of the Supervising Administrative Law Judge is affirmed; and

3. The petition of The Dumpling Cove, LLC is dismissed with prejudice.

DATED: Albany, New York
August 4, 2021

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner