

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DOUGLASTON GRIMALDI, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NOS. 826988
and Use Taxes under Articles 28 and 29 of the Tax Law : AND 826989
for the Period December 1, 2010 through August 31, 2013. :

In the Matter of the Petition :
of :
FRANK CIOLLI :
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2011 through August 31, 2013. :

Petitioners, Douglaston Grimaldi, Inc., and Frank Ciolli, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 2010 through August 31, 2013, and June 1, 2011 through August 31, 2013, respectively.

On June 22, 2015, the Division of Tax Appeals issued to petitioners notices of intent to dismiss petitions pursuant to 20 NYCRR 3000.9(a)(4). On June 26, 2015, petitioners, appearing by Isaac Sternheim, CPA, submitted correspondence in opposition to dismissal. On July 7, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for

issuance of this determination commenced July 22, 2015. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to hear the merits of this case because petitioners did not file petitions within 90 days of making their request for discontinuance of the conciliation process pursuant to Tax Law § 170(3-a)(b).

FINDINGS OF FACT

1. Petitioner Douglaston Grimaldi, Inc. (Douglaston) had a matter pending before the Bureau of Conciliation and Mediation Services (BCMS) (CMS No. 263321) in relation to a Notice of Determination (L-041776332) issued by the Division of Taxation (Division) to petitioner Douglaston on August 15, 2014.

2. Petitioner Frank Ciolli had a matter pending before BCMS (CMS No. 263327) in relation to a Notice of Determination (L-041781086) issued by the Division to him on August 19, 2014.

3. In a letter to Lorraine Stein of BCMS, dated November 17, 2014, petitioners' representative, Isaac Sternheim, CPA, stated, "We respectfully request a discontinuance of the conciliation process and would prefer to proceed to the Division of Tax Appeals in the abovementioned matters. Please issue the required documents so that we may file petitions with the Division." The letter referenced CMS numbers 263327, 263320 and 263321. A copy of the letter submitted with the Division's documents is stamped as received by BCMS on November 20, 2014. There is no copy of a postmarked envelope in which the request was sent in the record.

4. In response to the foregoing, BCMS sent to petitioners' representative two letters dated November 26, 2014, one referencing Douglaston Grimaldi, Inc., CMS No. 263321, and the other referencing Frank Ciolli, CMS No. 263327. Both letters state:

“The Bureau of Conciliation and Mediation Services acknowledges receipt of your letter regarding the above matter which has been accepted as the filing of a request for discontinuance on November 18, 2014.

If you wish to continue your appeal, you must file a petition for a hearing in the Division of Tax Appeals within ninety (90) days from the date that your request for discontinuance was filed. Petition forms and the Rules of Practice and Procedure may be obtained by writing to:

NYS Division of Tax Appeals
Agency Building 1
Empire State Plaza
Albany, NY 12223
Phone: (518)266-3000

A request for petition forms and rules is not considered the filing of a petition for hearing for purposes of the time limits and does not extend the time limits for filing a petition.”

5. On May 26, 2015, the Division of Tax Appeals received petitions in the matters of Douglaston Grimaldi, Inc., and Frank Ciolli, as officer. The envelope in which the petitions were mailed bore a machine-metered postmark of May 21, 2015. The envelope was sent by certified mail. However, the receipt for such mailing was not provided.

6. On June 22, 2015, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner Douglaston stating:

“You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to Tax Law § 170(3-a)(b), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the date a BCMS request for discontinuance is made.

It appears that the request for discontinuance under protest in this matter, CMS No. 263321, was filed with BCMS on November 17, 2014. However, the petition in this matter was not filed with the Division of Tax Appeals until May 21, 2015, or one hundred eighty-five (185) days later.”

7. On June 22, 2015, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner Frank Ciolli, containing the same language as the notice in Finding of Fact 6, but referencing CMS No. 263327.

8. In a letter dated June 26, 2015, petitioners’ representative responded to the notices of intent to dismiss petitions, stating the following:

“The abovementioned taxpayers never received the Letter of Discontinuance from the Bureau of Conciliation & Mediation Services. The Letter of Discontinuance was apparently not mailed via Certified Mail. After waiting and not receiving the Letter of Discontinuance, we contacted the Bureau of Conciliation & Mediation Services and were told that it had been mailed months previously. We immediately filed a petition with the Division of Tax Appeals. In our letter to the Bureau of Conciliation & Mediation Services we clearly indicated our intent to proceed to the Division of Tax Appeals.

It would be very unfair to deny the taxpayers a hearing in view of the fact that they followed procedures correctly but simply never received a Letter of Discontinuance.”

9. In response to the issuance of the notices of intent to dismiss petitions, the Division submitted a copy of the letter dated November 17, 2015 from petitioners’ representative to BCMS requesting the discontinuance of the conciliation process for CMS numbers 263327, 263320 and 263321. The Division also submitted the letters from BCMS, dated November 26, 2014, acknowledging receipt by BCMS of the letter that was accepted as a request for discontinuance from the conciliation proceedings for the matters of Douglaston and Mr. Ciolli.

CONCLUSIONS OF LAW

A. Tax Law § 681(b) provides that 90 days after the mailing of the Notice of Deficiency such notice shall be an assessment unless the taxpayer files a petition within such 90-day period.

As an alternative to petitioning the Division of Tax Appeals for a hearing, a taxpayer may request an informal conciliation conference at BCMS (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). A timely request for a conciliation conference suspends the running of the 90-day period for filing a petition for a hearing (Tax Law § 170[3-a][b]; 20 NYCRR 4000.3[c]).

B. In this case, petitioners initially chose to pursue an informal conciliation conference. Before the conference was actually held, petitioners made a request to discontinue the conciliation proceeding. The decision to discontinue the process before BCMS is governed by Tax Law § 170(3-a)(b) which provides, in part:

“To discontinue the conciliation proceeding, the recipient of the notice shall make a request in writing and such person shall have ninety days from the time such request of discontinuance is made to petition the division of tax appeals for a hearing The commissioner shall notify the division of tax appeals when any person requests a conference or requests to discontinue such conference.”

The Commissioner’s regulations further provide that at any time before the conciliation order is issued, the requester may discontinue the conciliation conference by filing a written request for discontinuance with BCMS, either in person or by mail (20 NYCRR 4000.6[a]), and that the requester will have 90 days from the time the request for discontinuance is filed to petition for a hearing in the Division of Tax Appeals (20 NYCRR 4000.6[b]).

C. Petitioners argue that they never received a letter of discontinuance from BCMS. They contend that after waiting and not receiving a letter of discontinuance, they contacted BCMS and were told that it had been mailed months previously. They state that they then immediately filed a petition with the Division of Tax Appeals. Petitioners also contend that a letter of discontinuance was not mailed via certified mail.

D. The Tax Law clearly provides that the 90-day period for filing a petition for a hearing commences at the time the recipient of the notice (i.e., petitioners) files a written request for

discontinuance (Tax Law § 170[3-a][b]). Contrary to petitioners' argument, there is no language in the Tax Law that provides for the taxpayer to wait for receipt of a letter of discontinuance from BCMS before the 90-day period begins to run. Indeed, the Tax Law has no provision that requires BCMS to issue a "letter of discontinuance." The Commissioner's regulations likewise provide that the 90-day period runs from the time the request for discontinuance is filed (20 NYCRR 4000.6[b]). While the regulations provide that "[t]he receipt of a request for discontinuance shall be acknowledged," the regulations do not provide that the 90-day period is tolled until such time as BCMS acknowledges receipt of the request (20 NYCRR 4000.6[b]). There is also no requirement that the acknowledgment be sent by certified mail. As such, petitioners had 90 days from the time they filed their written request for discontinuance with BCMS to file a petition.

The filing of a request with BCMS can be made either by delivery in person or by mail (20 NYCRR 4000.7[a][1][i]). If the request is made by mail, the date of the United States postmark as stamped on the envelope in which the request is contained will be deemed the "date of service or filing" (20 NYCRR 4000.7[1][ii]). In this case, there is no postmarked envelope in the record. Nevertheless, the evidence shows that petitioners' request for discontinuance was dated November 17, 2014 and was received by BCMS on November 20, 2014. The request was thus filed some time between November 17 and 20, 2014. If the request was filed on the same date that appears on petitioners' request (November 17, 2014), the petitions filed herein on May 21, 2015 were filed beyond the 90-day time limit (i.e., 185 days later). Using the date most generous to petitioners by assuming the request was filed on the same date as it was received (November 20, 2014), the 90-day period for filing a petition would still have expired prior to the date petitioners filed their petitions with the Division of Tax Appeals.

E. It is recognized that the request for discontinuance was acknowledged in a letter dated November 26, 2014. The acknowledgment was pursuant to a direction in the Commissioner's regulations that provides that the request for discontinuance shall be acknowledged (20 NYCRR 4000.6[b]). Clearly, the time the request for discontinuance is made is distinct from the time the request is acknowledged. Therefore, petitioner's argument that the 90-day period did not commence until BCMS issues a "letter of discontinuance" is misplaced. Moreover, although petitioner's contend that their delay was caused by BCMS's failure to send a letter of discontinuance via certified mail, there is no such requirement in the Tax Law or regulations.

F. Here, petitioners filed their petitions with the Division of Tax Appeals more than 90 days after the request for discontinuance was made. Therefore, the notices became assessments and the Division of Tax Appeals does not have jurisdiction to review the petitions (*see Matter of John Gallin & Son*, Tax Appeals Tribunal, February 24, 1994).

G. The petitions of Douglaston Grimaldi, Inc., and Frank Ciolli are dismissed.

DATED: Albany, New York
September 24, 2015

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE