

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition

of

**MULTI TRUCKING, INC.**

for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9 of the Tax Law for the Years  
1982 through 1984.

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In the Matter of the Petition

of

**MULTI STATE HANDLING CORP.**

for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9 of the Tax Law for the Years  
1982 through 1984.

ORDER  
DTA NOS. 804829, 804830

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Petitioners, Multi Trucking, Inc. and Multi State Handling Corp., filed an exception to an order of an Administrative Law Judge which granted the Division of Taxation's motion pursuant to 20 NYCRR 3000.5(b) to dismiss the petitions based upon petitioners' having failed to file a petition within 90 days of the notices of deficiency served by the Division.

Petitioners appeared by Robert Henry Fischer, C.P.A., 98 Cypress Drive, Kings Park, New York 11754. The Division appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

***FINDINGS OF FACT***

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference except that finding of fact "3" is modified as set forth below.

In 1986 and 1987 the Division of Taxation conducted a field audit of petitioners for the years 1982 through 1984. The field audits were concluded by the Division on February 12, 1987.

On December 15, 1986 the Division provided petitioners with schedules which listed the proposed adjustments to petitioners' tax liability. The cover letter which accompanied the schedules provided, in part:

"If you disagree with our findings, you may, within thirty (30) days of the date of this letter submit written evidence or information to substantiate your disagreement or you may request an informal conference at this office. If you wish to be represented by an attorney or agent, you must file a properly executed Power of Attorney.

If no protest is filed or if no agreement is reached either by correspondence or conference, a Statutory Notice of Deficiency will be issued which will become a Statutory Assessment unless a petition is filed with the State Tax Commission within 90 days (150 days if taxpayer's address is outside the U.S.). In such event, interest will continue to accrue on the deficiency as finally determined to the date of payment."

On or about December 24, 1986 petitioners mailed petitions to the Department of Taxation and Finance at Two World Trade Center in New York City, challenging the proposed adjustments to their liability. In each matter, the petitions stated:

"We disagree with the proposed adjustments because there are items included in gross receipts such as reimbursements, inter-company adjustments and hired truckers which we feel are not subject to the Franchise Tax on gross earnings."

The cover letter accompanying the petitions concluded with a request that the matters be scheduled for a conference.

We modify finding of fact "3" as follows:

The December 24, 1986 petitions and accompanying letter were signed by petitioners' representative. The petitions indicated that a power of attorney was filed. The record on exception does not contain a copy of such power of attorney.

On March 12, 1987 the Division issued six statements of audit adjustment and six notices of deficiency to petitioner Multi Trucking, Inc. The Division also asserted deficiencies of corporation tax from Multi Trucking, Inc. pursuant to section 184-a of the Tax Law.

On March 12, 1987 the Division issued six statements of audit adjustment and six notices of deficiency to Multi State Handling Corp. The Division also asserted deficiencies of corporation tax from Multi State Handling Corp. pursuant to section 184-a of the Tax Law.

On July 27, 1987 petitioners' representative wrote a letter to the Tax Appeals Bureau wherein he asserted that notices for payment, which were received in the interim, were premature since he filed petitions on December 24, 1986 and had not yet received notice of when a conference would be scheduled. The letter requested that petitioners' representative be contacted when a conference could be scheduled and further requested that demands for payment be suspended until these matters were resolved.

On September 4, 1987 the Bureau of Conciliation and Mediation Services ("BCMS") advised petitioners' representative that the request for a conciliation conference was premature. Apparently unaware that notices of deficiency had already been issued, BCMS further advised petitioners' representative that the Tax Law requires that a timely request for a conciliation conference must be filed within 90 days after the mailing of a Notice of a Deficiency. In essence, the letter concluded that since notices of deficiencies had not been issued, the request for a conference was premature.

In a letter, dated October 1, 1987 BCMS clarified its position by stating that the petitions filed December 24, 1986 were premature and that the letter dated July 27, 1987 could not be accepted as a request for a conciliation conference since it was filed more than 90 days from the date the notices of deficiency were issued.

On November 13, 1987, BCMS issued orders denying petitioners' request for a conciliation conference on the basis that the request dated July 27, 1987 was more than 90 days from the date the notices of deficiency were issued.

On November 19, 1987, petitioners filed new petitions with the Division of Tax Appeals.

### ***OPINION***

The Administrative Law Judge determined that the petitions filed by petitioners with the December 24, 1986 letter were premature since they were filed before the notices were issued. The Administrative Law Judge dismissed the petitions filed on November 13, 1987 because they were not filed within the 90 day period after the notices of deficiency were issued by the Division. Accordingly, petitioners were denied a hearing by the order of the Administrative Law Judge - but

without prejudice to any rights of the petitioners to pay the tax and file a petition for a refund in order to have the petitions considered on the merits (Tax Law {1089[c]}).

On exception the petitioners request that the notices of deficiency issued on March 12, 1987 be set aside and that the conference requested by petitioners in December 1986 be granted.

The nature of the relief sought by the petitioner coupled with the facts of the case, in particular the December 1986 correspondence prepared by the petitioners' representative, raised the question of whether the petitioners' representative was served with the notices of deficiency issued by the Division on March 12, 1987 or whether only the taxpayer was so served. Matter of Bianca v. Frank (43 NY2d 168) would require a tolling of the 90 day period for filing of petitions if, in fact, petitioners' representative was not served with the notices. The record before the Tribunal on exception raised the issue as to whether a power of attorney had been filed by the petitioners' representative and, if so, whether the notices were mailed to the petitioners' representative.

On September 20, 1988 the Tribunal received a stipulation signed by the Division and the petitioners whereby the parties stipulated that:

(1) the exception proceeding before the Tax Appeals Tribunal is discontinued;

(2) the Division withdraws its objections to the petitions filed on December 24, 1986 and accepts them as timely filed protests on behalf of the petitioners to timely issued notices of deficiency; and

(3) the Tax Appeals Tribunal is requested to remand the proceeding to the Administrative Law Judge for a hearing on the merits of the case.

Based on the stipulation of September 20, 1988 and the decision in Matter of Bianca v. Frank (supra), we reverse the order of the Administrative Law Judge and remand the case for a hearing on the merits.

Dated: Albany, New York  
October 6, 1988

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner