STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN GALLIN & SON, INC.	:	DECISION DTA No. 811229
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 30, 1987 through September 30, 1990.	:	

Petitioner John Gallin & Son, Inc., 40 Gold Street, New York, New York 10038, filed an exception to the determination of the Administrative Law Judge issued on April 15, 1993. Petitioner appeared by Gerard W. Cunningham, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh and James P. Connolly, Esqs., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply to the Division of Taxation's brief. The reply brief was received by the Tax Appeals Tribunal on September 9, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner's motion to strike the Division of Taxation's affirmative defense concerning timeliness of the petition should be granted.

II. Whether the Division of Tax Appeals has jurisdiction to hear the merits of this case because petitioner did not file a petition within 90 days of "making" its request for discontinuance of the conciliation process pursuant to Tax Law § 170.3-a(b).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, John Gallin & Son, Inc., filed an application, dated October 20, 1990, for a $25,000.00 refund for the period June 30, 1987 to September 30, 1990. The ground asserted for the refund was that sales tax was improperly collected on the service of constructing flooring which was a component part of a capital improvement project.

Petitioner filed a second application, dated November 1, 1990, for an $8,500.00 refund for the period June 30, 1987 to September 30, 1990 with respect to sales tax paid on the service of supplying scaffolding which allegedly was a component part of the completion of a capital improvement project.

By letter dated June 14, 1991, the Division of Taxation ("Division") denied both refund claims on the ground that raised flooring and scaffolding did not qualify as capital improvements.

On July 5, 1991, petitioner requested a conciliation conference. On February 25, 1992, a conciliation conference was held.

By letter dated May 11, 1992, the conciliation conferee informed petitioner that after reviewing all the evidence submitted at the conference, he determined that the refund denial would be sustained. The conferee also stated that if petitioner did not execute, within 15 days, the consent forms attached to the letter, he was required by law to issue a Conciliation Order.

On May 22, 1992, petitioner sent to the conciliation conferee further documentary evidence for the conferee's review before issuing the Conciliation Order.

Thereafter, petitioner's counsel sent to the conciliation conferee a letter, dated June 8, 1992, stating the following:

> "Please be advised that our client wishes to withdraw its request for a Conciliation Conference at this time and proceed immediately to a formal hearing.
>
> "We will appreciate your complying with this request and arranging for an early hearing date."

The envelope in which the letter was mailed was postmarked June 9, 1992.

In response, the conciliation conferee sent to petitioner the following letter, dated

June 16, 1992:

> "The Bureau of Conciliation and Mediation Services acknowledges receipt of your letter of June 8, 1992 which has been accepted as a request for discontinuance in the above referenced matter.
>
> "Please take notice that pursuant to section 170.3-a of the Tax Law, 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. The petition forms must be sent to:
>
> Division of Tax Appeals
> Riverfront Professional Tower
> 500 Federal Street - 4th Floor
> Troy, NY 12180-2894
>
> "I have enclosed petition forms for your convenience."

Petitioner filed a petition, dated September 11, 1992, for review of the Division's refund denial. Petitioner sent the petition by certified mail. The receipt of such mailing was postmarked September 13, 1992, and the return receipt indicated delivery to the Division of Tax Appeals on September 16, 1992.

By letter dated October 1, 1992, Frank A. Landers of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals informed petitioner that its petition was not timely filed. The letter contained the following statements:

> "A review of the petition and your request of discontinuance which was furnished by the Bureau of Conciliation and Mediation Services reveals that the petition is untimely. The statutory authority for a discontinuance, section 170.3-a.(b), provides that a taxpayer shall have ninety days from the time a request of discontinuance is made to petition the Division of Tax Appeals for a hearing.
>
> "While your request of discontinuance was made on June 8, 1992, the petition was not filed until September 13, 1992 or 97 days later. Unfortunately, since the petition was not filed within the 90-day period, your client is not entitled to a hearing.
>
> "If you have any questions concerning this matter, please do not hesitate to contact me."

In response, petitioner sent a letter, dated October 8, 1992, to Mr. Landers disagreeing with his conclusion that petitioner was not entitled to a hearing. Petitioner argued that there is no evidence its letter dated June 8, 1992 was actually mailed out on that date and even if it had been mailed on June 8, it could not have been received on June 8; that the conferee did not

indicate in his June 16, 1992 letter the date on which the request for a discontinuance was "accepted" or "filed" and, therefore, the only reasonable date upon which it could rely as the commencement date of the 90-day period was June 16, 1992. Petitioner further argued that Mr. Landers' letter created additional confusion by stating that the 90-day period starts from the time a request for a discontinuance "is made", whereas nowhere in the conferee's June 16, 1992 letter did the conferee state when petitioner's request had been "made."

By letter dated November 3, 1992, Mr. Landers informed petitioner as follows:

> "In view of the substantial questions raised by you, the petition has been accepted for a hearing to determine if the Division of Tax Appeals has jurisdiction over the taxpayer.
>
> "If you have any questions concerning this matter, please feel free to contact me."

By letter dated November 12, 1992, Frank McMahon, also of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals, informed petitioner as follows:

> "The Division of Tax Appeals acknowledges receipt of your petition . . . .
>
> "As this petition is deemed in proper form, it has been forwarded to the law bureau for preparation of the answer.
>
> "Any further questions you may have regarding the status of this appeal should refer to files reference number DTA 811229 and be directed to my attention."

The Division filed an answer, dated January 4, 1993, wherein it asserted as an affirmative defense that petitioner did not timely file its petition within 90 days of its discontinuance of the conciliation process.

Petitioner filed a motion, dated January 15, 1993, requesting the Division of Tax Appeals ("DTA") to issue an order striking the Division's affirmative defense that the petition was not timely filed.[1] In support of its motion, petitioner alleged as follows:

> "By the terms of the Division's letter dated November 12, 1992, the Petitioner was notified that its Petition was deemed proper. Based thereon, the Petitioner was lead [sic] to believe it was unnecessary [sic] to re-file an updated Petition with the Division. If the question of timeliness is allowed to be raised, again and decided in favor of the Division, the Petitioner will have forfeited a substantial period of time for which it could apply for a refund thereby denying the Petitioner its right to seek part of the requested Refund.

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[1]Petitioner requested oral argument on the motion. This request is denied.

> "The attempt by the Division to re-assert the question of timeliness in its Answer to the Petition is in direct contradiction with the written decision of the Division as stated in its letter of November 12, 1992 and is improper."

On February 17, 1993, the Division cross-moved to dismiss the petition on the ground it was untimely filed and, therefore, the DTA had no jurisdiction to hear the merits of the case. The Division asserted that the date commencing the 90-day period for filing a petition with the DTA was the mailing date (June 9, 1992) of the June 8, 1992 letter requesting the discontinuance. In response to petitioner's motion to strike the Division's affirmative defense of timeliness, the Division argued that the November 12, 1992 letter was neither misleading nor did it result in any detriment to petitioner.

Petitioner responded to the Division's cross motion by reply affidavit of Gerard W. Cunningham, dated March 19, 1993. In that affidavit, Mr. Cunningham argued that petitioner's June 8, 1992 letter which requested the discontinuance also requested a formal hearing at an early hearing date. Mr. Cunningham asserted that the June 8 letter, therefore, should be sufficient to constitute a "petition for hearing." Mr. Cunningham also contended, in the alternative, that the conferee's June 16, 1992 letter advising petitioner of the conferee's acceptance of the discontinuance commenced the 90-day period for filing the petition and that, therefore, its mailing of the petition on September 13, 1992 was within the 90-day period. Mr. Cunningham further argued that the Division caused the confusion and ambiguity concerning the date which commenced the 90-day period and, therefore, it is justifiable to use the June 16, 1992 commencement date. With respect to petitioner's motion to strike, Mr. Cunningham states:

> "According to its letter dated November 3, 1992 . . . the taxpayer's petition herein 'has been accepted for a hearing to determine if the Division of Tax Appeals has jurisdiction . . . .'
> Mr. Connolly's affidavit fails to disclose the time, date and outcome of such hearing, which obviously resulted in a determination of jurisdiction."

OPINION

The Administrative Law Judge denied petitioner's motion for an order striking the Division's affirmative defense that the petition was not timely filed. The Administrative Law

Judge rejected petitioner's argument that the DTA had already ruled in favor of petitioner on the timeliness issue in its November 12, 1992 letter. The Administrative Law Judge further rejected petitioner's assertion in its reply affidavit that a hearing had been held and a determination issued with respect to the jurisdictional question. The Administrative Law Judge stated that petitioner's counsel must have realized that petitioner did not attend a hearing or receive a determination on this question. The Administrative Law Judge also rejected petitioner's claim of detrimental reliance on the November 12, 1992 letter, stating that the claim made no sense.

The Administrative Law Judge further found that petitioner's June 8, 1992 letter to the conferee did not constitute a petition for a hearing with the DTA. The Administrative Law Judge stated that none of the requirements of 20 NYCRR 3000.3(a), (b) or (c) were met by the June 8 letter to the conferee. The Administrative Law Judge noted that, in Matter of Eastern Tier Carrier Corp. (Tax Appeals Tribunal, December 6, 1990), the Tax Appeals Tribunal did grant an informal request for a conference even though the above requirements were not met. However, the Administrative Law Judge found "the critical factors the Tribunal considered in reaching its result [in Eastern Tier] do not exist in this case" (Determination, conclusion of law "B").

In addition, the Administrative Law Judge found no merit to petitioner's argument that, due to the confusion as to the commencement of the 90-day period which resulted from the conferee's letter, the only date it could reasonably rely on to commence the 90-day period was the date of the conferee's letter, July 16, 1992. The Administrative Law Judge stated that the regulation at 20 NYCRR 4000.6(b) provides that the 90-day period commences from the time the request for discontinuance is filed. She further stated that filing of requests with the Bureau of Conciliation and Mediation Services may be made by mail or by delivery in person (20 NYCRR 4000.7[a][1][i]) and that when a request is made by mail the date of the United States postmark stamped on the envelope will be deemed to be the date of filing (20 NYCRR 4000.7[a][1][ii]).

Finally, the Administrative Law Judge granted the Division's cross motion to dismiss the petition. The Administrative Law Judge found that the petition was not timely filed as the certified mail receipt was postmarked September 13, 1992, 95 days after petitioner filed its request for discontinuance.

On exception, petitioner continues to argue that its June 8, 1992 letter clearly contained a written request for a hearing and should be considered a petition for a hearing.

Petitioner also argues that it was justified in relying on the June 16, 1992 date of the conferee's letter because neither the statute nor the regulations provide an accurate date for the commencement of the 90-day period for filing a petition after a request for discontinuance has been made. In support of this position, petitioner now argues that 20 NYCRR 4000.7(a)(1)(ii) is not applicable to determine the date of filing in this case as petitioner's request for discontinuance was not a document required to be served or filed within a prescribed period or on or before a prescribed date. Petitioner then states that since its request was not required to be filed within a prescribed period or on or before a prescribed date, it could not be delivered after such date. Therefore, section 4000.7(a)(1)(ii) does not apply in this situation and cannot be made to apply for the purpose of establishing a filing date.

Petitioner further asserts that it was justified in relying on the date of the acknowledgment letter as commencing the 90-day period because this letter accepted petitioner's request for discontinuance and "[o]ne does not ordinarily act upon a request until acceptance has been granted" (Petitioner's brief, p. 15).

Finally, petitioner, citing McKinney's Statutes § 313, argues that due to the ambiguity regarding the commencement of the 90-day period, petitioner is entitled "to a reading most favorable to him" (Petitioner's brief, p. 17).

In response, the Division argues that petitioner's claim, that it was justified in relying on the the date of the acknowledgement letter because neither the Tax Law nor the Division's regulations clearly state what constitutes a filing of a request for discontinuance, lacks merit. The Division, citing Tax Law § 170(3-a) and 20 NYCRR 4000.6, argues that these provisions

clearly provide that a taxpayer has 90 days from when a request for discontinuance is made to petition for a hearing and that a request is made when the request is filed. The Division further argues that 20 NYCRR 4000.7(a)(1)(ii) clearly specifies what constitutes the date of filing and that the Administrative Law Judge was correct in concluding that the date of the postmark on the envelope containing the request for discontinuance was the date of filing.

With regard to petitioner's argument that 20 NYCRR 4000.7(a)(1)(ii) does not apply in this situation because the request for discontinuance did not have to be filed by a prescribed date, the Division asserts that such requests do have to be filed before a prescribed date, that is, before the issuance of a conciliation order. Therefore, the Division argues that "[s]ince the postmark constitutes the date of mailing for documents delivered to BCMS after the prescribed date or period, the postmark date should also constitute the date of filing as to documents filed prior to the prescribed date or period" (Division's brief in opposition, pp. 5-6).

In its reply brief, petitioner continues to argue that 20 NYCRR 4000.7(a)(1)(ii) does not apply to this situation. Petitioner states that "there is no 'prescribed date' for the filing of the request to discontinue conciliation, hence there cannot possibly be a filing after the 'prescribed date'" (Petitioner's reply brief, emphasis in original).

The only new argument raised by petitioner on exception is whether the request to discontinue the conciliation conference was required to be filed before a prescribed date so that 20 NYCRR 4000.7(a)(1)(ii) was correctly applied to this case by the Administrative Law Judge. We agree with the Division that the request to discontinue the conciliation conference had to be made before the conciliation order was issued (see, 20 NYCRR 4000.6[a]); therefore, the Administrative Law Judge correctly applied 20 NYCRR 4000.7(a)(1)(ii). All of the remaining arguments raised by petitioner were completely and accurately addressed by the Administrative Law Judge. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Gallin & Son, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of John Gallin & Son, Inc. is dismissed.

DATED: Troy, New York
February 24, 1994

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

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