

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
RAMESH SAWLANI : DECISION
for Revision of a Determination or for Refund of Sales and : DTA No. 811357
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1988 through February 28, 1991. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 22, 1994 with respect to the petition of Ramesh Sawlani, 70-45 260th Street, Glen Oaks, New York 11504. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a letter in opposition. A reply brief, had one been filed, was due on April 13, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Koenig took no part in deciding this case.

ISSUE

I. Whether the petition was premature because it was filed prior to the order of a conciliation conferee dated November 5, 1993.

II. Whether petitioner's request for a conciliation conference with respect to a second notice of determination was timely.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2(a)," "3" and "5" which have been modified. We also make additional findings of fact.

The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

(a) A Notice of Determination, numbered L-005374792 and dated March 12, 1992, was issued to petitioner, Ramesh Sawlani, for sales and use taxes due for the period December 1, 1988 through February 28, 1991.

(b) Other notices of determination, which apparently have caused confusion in this matter, were issued and numbered L-005374790 and L-005374791. Some documents pertaining to those notices were included in the Division of Taxation's ("Division") March 30, 1994 submission.

We modify finding of fact "2(a)" to read as follows:

(a) Petitioner requested, under date of May 25, 1992, the forms to request a conciliation conference with respect to notice L-005374792. He did this by signing and dating the box printed in the Disagreement with Findings Section of the Division's Form DTF-968. The stamped and postmarked envelope attached thereto is dated May 25, 1992. (This request is referred to, erroneously, in the Division's March 30, 1994 submission as a request for a conciliation conference.)¹

(b) There is no document in this record indicating when petitioner requested a conciliation conference on notice L-005374792, but it is clear that he did make such a request because a conference was finally held. (A conciliation default order, CMS No. 129025 dated November 5, 1993, was issued with respect to assessment number L005374792). The Division's answer does not deny the fact of such a request.

We modify finding of fact "3" to read as follows:

A Conciliation Order, CMS No. 124388, dated August 28, 1992, was issued stating that a request for conference was not received until July 6, 1992. This order was issued with respect to notice L-005374790.²

¹We modified finding of fact "2(a)" by adding the words "with respect to notice L-005374792" in order to reflect more details of the record.

²We modified the first sentence of finding of fact "3" to state that the order was dated, rather than issued, on August 28, 1992 to more accurately reflect the record. We modified the second sentence of finding of fact "3" which previously read: "This order, however, was issued with respect to notice number L-005374790, which is not

A petition to the Division of Tax Appeals was filed on November 2, 1992 referring to assessment number L-005374792. This was acknowledged as being in proper form by letter of November 25, 1992 from the Division of Tax Appeals.

We modify finding of fact "5" to read as follows:

The answer of the Division was filed on February 16, 1993. This refers to the Conciliation Order, CMS No. 124388, which had found that the request for conference with respect to Notice No. L-005374790 was untimely, and accordingly alleges that the request for conference was not received until July 6, 1992 (see, Finding of Fact "3") and therefore was late.³

A conciliation conference was held by the Bureau of Conciliation and Mediation Services on October 14, 1993. The order of the conciliation conferee (CMS No. 129025), dated November 5, 1993, sustained the notice of determination and dismissed the request. The reason recited was the failure of petitioner to appear. No other reason was given.

(a) On January 3, 1994, petitioner was sent a notice of hearing by the Division of Tax Appeals of a hearing to be held on February 10, 1994.

(b) Also on January 3, 1994, petitioner was notified that since timeliness had been raised as an issue by the answer of the Division of Taxation, the scheduled hearing would be confined to the timeliness issue.

(c) Thereafter, the parties consented to have the controversy determined on submission. The documents submitted by petitioner relate to the merits of this controversy and have not been considered in this determination. The documents submitted by the Division relate solely to timeliness.

We make the following additional findings of fact:

The petition filed in this matter listed in section "5," which requests the listing of the notice/assessment number at issue, that the notice of determination petitioner was challenging was L-

in issue here" because the sentence was erroneous.

³We modified finding of fact "5" by deleting the word "erroneously" after the word "This" in the second sentence because the statement was incorrect.

005374792. On page three of the petition, petitioner indicated in section "7" that a conciliation conference was requested and an order was issued on October 20, 1992. Petitioner did not attach an order, but did append a letter from a conferee indicating that petitioner's request for a conciliation conference was dismissed because it was late filed. The period at issue as listed on the petition was December 1, 1989 to February 28 1991. The letter from the conferee attached to the petition listed the period at issue in the conference referred to as December 1, 1988 to February 28, 1991.

The copies of Notice L-005374790 and L-005374792 submitted by the Division are identical in every respect, except that the latter assesses \$.02 more in interest than does the former.

OPINION

We will first address the petition with respect to Notice L-005374792 and whether the petition was premature because it was made prior to the issuance of the November 5, 1993 conciliation order. The Administrative Law Judge found that this issue was not promptly raised by the Division. The Administrative Law Judge noted that within the 90-day period for filing a petition with the Division of Tax Appeals, but subsequent to the issuance of the order, petitioner received a notice of hearing from the Division of Tax Appeals regarding his already filed petition. The Administrative Law Judge noted that the Division had not raised the issue of whether the petition was premature before petitioner received the notice of hearing. The Administrative Law Judge concluded, "[p]etitioner had every right to think that his prior petition was valid and was still pending or at least that there was no need of an additional petition" (Determination, conclusion of law "A"). As a result, the Administrative Law Judge granted petitioner a hearing on the merits.

The Division, on exception, asserts that petitioner filed the petition prematurely. The Division, however, failed to introduce evidence of the mailing of the conciliation order which would start the 90-day period in which to file a petition. Our position has consistently been that where the Division raises timeliness as an issue, the Division bears the burden of proving the date and fact of mailing of the notice at issue (see, Matter of T.J. Gulf v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97; Matter of Dattilo, Tax Appeals Tribunal, May 11,

1995; Matter of Donegan, Tax Appeals Tribunal, June 25, 1992). Given the Division's failure to do so, petitioner is therefore entitled to a hearing on the merits regarding notice of determination L-005374792. We so conclude based on 20 NYCRR 4000.5(b)(3) which provides that:

"Where a requestor fails to appear personally or by representative and where an adjournment has not been granted, the conciliation conferee may issue a conciliation order dismissing the request for nonappearance. Upon written application filed within 30 days after the issuance of a conciliation order dismissing the timely request, such order may be vacated and a conciliation conference scheduled where the requestor shows a reasonable excuse for the nonappearance. In the alternative, the requestor may file a petition with the Division of Tax Appeals (see Part 3000 of this Title) within 90 days after the conciliation order dismissing the timely request is issued" (emphasis added).

Given the Division's failure to establish the date of the mailing of the conciliation order, we treat the petition as being filed within the 90-day period following the issuance of the conciliation order dismissing the timely request. While our conclusion above renders any substantive review moot, we shall nevertheless address the issue of filing a petition prematurely in order to have a complete record.

Tax Law § 1138 addresses the authority of the Commissioner of Taxation and Finance to make assessments for sales tax due and the taxpayer's right to challenge such assessments:

"[n]otice of . . . [a] determination [of tax due] shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (Tax Law § 1138[a][1]).

Prior to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). The time for filing a request for a conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment, which in this matter was 90 days (Tax Law §§ 170[3-a][a], 1138[a][1]). Filing a request for a conciliation conference suspends the running of the period of limitations for the

filing of a petition with the Division of Tax Appeals (Tax Law § 170[3-a][b]). After an order is rendered by the conferee, the taxpayer then has 90 days to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]).

The option of filing a petition or a request for a conciliation conference is explicitly provided for on the Notice of Taxpayer Rights form (Department of Taxation and Finance form DTF-968[6/91], submitted Document No. 2) which accompanies a Notice of Determination. Form DTF-968 provides in a section titled the "Disagreement with Findings Section" that a taxpayer may pursue one of two options for protesting a Notice of Determination. The taxpayer may ask to receive a Request for a Conciliation Conference form, or a taxpayer may request a petition for a Division of Tax Appeals hearing. If a taxpayer elects to pursue a matter through the BCMS and is not satisfied with the result of a conciliation conference, the "Disagreement with Findings Section" explicitly provides that a taxpayer still has the opportunity to file a petition with the Division of Tax Appeals. Therefore, DTF-968 indicates to taxpayers that a protest of a statutory notice with the two respective agencies is clearly an either/or proposition.

In considering whether a petition is timely filed, it is settled that a petition which is filed before the issuance of the notice of determination must be dismissed as premature (Matter of West Mountain Corp. v. State Dept. of Taxation & Fin., 105 AD2d 989, 482 NYS2d 140, affd 64 NY2d 991, 489 NYS2d 62; Matter of Upland, Inc., Tax Appeals Tribunal, April 12, 1990; Matter of Yegnukian, Tax Appeals Tribunal, March 22, 1990). Where a petition has been filed before a notice of determination has been issued, the petition must be dismissed because "[r]eview by the Division of Tax Appeals would be premature and meaningless if the Division of Taxation's assessment was only a proposed one, subject to change under the internal procedures within the Division of Taxation [citation omitted]" (Matter of Yegnukian, supra).

Similar problems would arise if a petition in the Division of Tax Appeals could be filed before a conciliation order was issued. Accepting a petition before an order has been issued in the BCMS would result in both agencies, the Division of Tax Appeals and the BCMS, having

jurisdiction over this matter concurrently. A conferee may modify or dismiss the notice or settle the matter, all of which would affect what would be at issue before the Division of Tax Appeals. Further, this power in the conferee would be inconsistent with Tax Law § 2010(4) which provides that an Administrative Law Judge's determination finally decides all matters unless an exception is filed with the Tax Appeals Tribunal (Tribunal) and section 2016 of the Tax Law which states that a Tribunal decision finally decides all issues unless an Article 78 proceeding is commenced. To maintain an orderly and efficient system of review, an order must be rendered before a petition may be filed.⁴

Our position with respect to premature filing of a petition is consistent with the court review of agency actions provided for by Article 78 of the Civil Practice Law and Rules (CPLR) which allows review only of final agency acts (CPLR 7801; see also, Matter of Top Tile Bldg. Supply Corp. v. New York State Tax Commn., 105 AD2d 936, 481 NYS2d 903, affd 65 NY2d 895, 493 NYS2d 311). In Top Tile Building Supply, after an evidentiary hearing had begun before the State Tax Commission and two days before it was concluded, petitioners commenced an Article 78 proceeding. The Appellate Division affirmed the decision of special term dismissing the case pending the final determination of the State Tax Commission (see also, Matter of Plaza Realty Investors v. New York State Division of Housing & Community Renewal, 173 AD2d 290, 569 NYS2d 683 [appellate review premature given that agency had yet to render a final determination]). To diverge from this general principle would disrupt the entire process in place to review actions of the Division of Taxation. For example, the possibility would exist that while a taxpayer is seeking Article 78 review from a decision of the Tax Appeals Tribunal, a conferee order could be issued addressing the same statutory notice. This possibility would raise the question of the finality of the Tribunal's decision, which, consequently, could affect the

⁴The one exception to this rule is where a taxpayer requests a conciliation conference and elects to discontinue the proceeding by giving written notice to the BCMS. The taxpayer has 90 days from the date of the request in order to file a petition (Tax Law § 170[3-a][b]). Such request was not made by petitioner in this matter.

taxpayer's ability to seek review of the decision via Article 78 of the CPLR. In order to avoid such uncertainty, petitions filed prematurely must be rejected as untimely.

We turn next to the Administrative Law Judge's rationale for holding that the petition was not filed prematurely. It appears from the tenor of the Administrative Law Judge's determination that he was applying the doctrine of estoppel in holding that petitioner was entitled to rely on the fact that the Division did not raise the issue of premature filing before petitioner received a notice of hearing. We disagree.

We first note that the doctrine of estoppel is to be applied to governmental acts only upon a showing of exceptional facts which require its application to avoid a manifest injustice (Matter of Consolidated Rail Corp., Tax Appeals Tribunal, August 24, 1995, citing Matter of Sheppard-Pollack v. Tully, 64 AD2d 296, 409 NYS2d 847 and Matter of Turner Constr. Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78). The doctrine applies to positive acts as well as omissions when there was a duty to act (Boeckmann v. Board of Educ., Hempstead, 207 AD2d 773, 616 NYS2d 395).

In order for estoppel to be applied, petitioner must show that he was entitled to rely on the fact the Division did not raise the issue of premature filing before petitioner received the notice of hearing, that in fact petitioner did so rely, and reliance was reasonable (Matter of AGL Welding Supply Co., Tax Appeals Tribunal, May 11, 1995). We find the Administrative Law Judge erred in applying the doctrine of estoppel in this matter.

The Administrative Law Judge's determination is premised on the fact that the Division did not raise the premature filing issue in its answer after receiving the petition from the Division of Tax Appeals pursuant to 20 NYCRR 3000.4(c).⁵ The Administrative Law Judge failed to recognize that the Division's omission, i.e., filing an answer without addressing the premature petition, was precipitated by errors committed by petitioner. The petition was filed listing one notice of determination on the face of the petition, while appending a letter from a conferee

⁵The Division first raised the issue on submission in lieu of a hearing.

addressing a different notice of determination. The conferee's letter did not have the Notice of Determination number, but only listed the CMS number, therefore, one could not initially determine that the order referred to in the conferee's letter did not correspond to the notice of determination listed on the front of the petition. As a result, the filing of the petition gave the impression that the notice of determination listed on the petition had already been addressed by a conferee, an order rendered and that the petition was timely filed and conferred jurisdiction on the Division of Tax Appeals.

As stated above, the confusion that the Administrative Law Judge refers to in his finding of fact "1(b)" was precipitated by petitioner attaching the wrong conferee letter to the petition. As a result, petitioner would not be entitled to rely on the Division's omission of any reference in its answer to the petition being prematurely filed.

We next turn to the issue of whether petitioner timely filed a request for a conciliation conference with respect to Notice of Determination #L-005374790.

The Administrative Law Judge found that the Division's assertion that the petition of November 2, 1992 was late with respect to the conciliation conferee's order dated August 28, 1992 (CMS No. 124388) was not properly before the Division of Tax Appeals because that order was not at issue.

While petitioner did not fully comply with the formal requirements of 20 NYCRR 3000.3(b), given that the Division's answer addressed the matter, it is clear that there was enough information to advise the Division of petitioner's claim (Matter of Crispo, Tax Appeals Tribunal, April 13, 1995). As a result, the Administrative Law Judge erred in not addressing the Division's argument.

Given that the Division raised the issue of timeliness of the request for a conciliation conference, we also conclude that the Administrative Law Judge erred by not addressing the sufficiency of the Division's showing of the date of mailing of the notices of determination. Therefore, we remand this case to the Administrative Law Judge with instructions to make a

written determination with respect to the sufficiency of the mailing evidence submitted by the Division to establish the date that the notices of determination were issued (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, September 12, 1991). We request that in his determination the Administrative Law Judge particularly focus on whether the following affect the sufficiency of the Division's showing: the date on the upper left-hand corner of the certified mail record was changed manually by a Division employee; that there are two blocks of certified control numbers in Exhibit "A," i.e., 1 through 7 and 1 through 31 as opposed to the numbers running consecutively; and that the postal representative only signed and affixed a postmark to page 1 of the 38 page certified mail record.

To ensure that these obviously related matters are considered together, we request that the following procedure be followed on remand:

1. A hearing will be held and a determination issued, as expeditiously as possible, on the merits with respect to L-005374792.
2. In this hearing on the merits, the parties and the Administrative Law Judge are requested to address the fact that the copies of notices L-005374792 and L-005374790 submitted by the Division are identical except that L-005374792 assesses \$.02 more in interest than does L-005374790.
3. In the same determination, the Administrative Law Judge will issue his determination as to whether the Division of Taxation proved that the request for a conciliation conference with respect to L-005374790 was untimely. No additional evidence or arguments will be received by the Administrative Law Judge on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. This matter is remanded for the issuance of an amended determination by the Administrative Law Judge addressing whether the Division of Taxation has met its burden of proving the issuance of Notice of Determination L-005374790 through the evidence submitted and for a hearing to be held on the merits with respect to Notice of Determination L-005374792;

2. The exception of the Division of Taxation with respect to Notice of Determination L-005374792 is denied;

3. The determination of the Administrative Law Judge with respect to Notice of Determination L-005374792 is affirmed on different grounds; and

4. The petition of Ramesh Sawlani is granted to the extent that petitioner is entitled to a hearing on the merits with regard to Notice of Determination L-005374792.

DATED: Troy, New York
September 14, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner