

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

AMERICAN HOME ASSURANCE CO. :

DECISION
DTA NO. 818159

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 March 1, 1992 through May 31, 1995. :

Petitioner American Home Assurance Co., 70 Pine Street, New York, New York 10270, filed an exception to the determination of the Administrative Law Judge issued on August 30, 2001. Petitioner appeared by Lawrence R. Cole, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the statute of limitations for claiming a refund of tax was tolled because the Division of Taxation failed to furnish petitioner's representative with a copy of the Statement of Proposed Audit Adjustment.

FINDINGS OF FACT

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

On September 5, 1995, the Division of Taxation (“Division”) commenced an audit of petitioner’s books and records for the period March 1, 1992 through May 31, 1995. The Division's Field Audit Report states that the audit was conducted directly with the taxpayer and does not indicate that a power of attorney was ever filed. The officer or employee assisting in the audit is identified as Americo Cortina. The Tax Field Audit Record, a handwritten log maintained by the auditor, indicates that at some point petitioner's representative in this proceeding, Lawrence R. Cole, became actively engaged in the audit. Entries for April 14, 1997, May 13, 1997, June 12, 1997 and June 18, 1997 show conversations between the auditor and Mr. Cole.

At the conclusion of the audit, the Division issued to petitioner a Statement of Proposed Audit Adjustment, dated March 5, 1998 (the “Statement”), asserting sales and use taxes due for the period June 1, 1992 through May 31, 1995 of \$105,918.27, plus interest, for a total amount due of \$150,071.84. The Statement notes that a refund of \$2,531.07, plus interest, had been determined on audit and would be applied to the total amount shown as due on the Statement. Mr. Cole did not receive a copy of the Statement.

On March 18, 1998, petitioner, by its assistant comptroller and vice president, executed a consent which appears on the bottom of the Statement. The consent states:

The Tax Law provides that a taxpayer is entitled to have tax, penalty and interest due finally and irrevocably fixed by filing a signed consent with the Commissioner of Taxation and Finance. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax, penalty and interest

due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this statement constitutes such a consent. You may consider an approval of this matter final if you are not notified to the contrary within 60 days from the date the signed consent is received by the Department of Taxation and Finance.

The Division issued to petitioner a Notice and Demand for Payment, dated July 6, 1998, for the period March 1, 1992 through May 31, 1995. It reflects the amounts determined to be due in the Statement of Proposed Audit Adjustment of March 5, 1998, and payments of those amounts leaving a balance due of zero. The identification number on the notice is L-015268232-7.

On June 28, 1999, petitioner filed a petition with the Division of Tax Appeals requesting, among other things, refund of taxes paid for the period March 1, 1992 through May 31, 1995 (DTA Number 817188). The Division filed a motion for summary determination requesting dismissal of the petition on the ground that petitioner never filed a claim for refund of the taxes paid for that period and, therefore, that the Division of Tax Appeals lacked subject matter jurisdiction over the petition. On November 2, 2000, this Administrative Law Judge issued an order which arrived at the following conclusion:

Petitioner never filed a written document claiming a refund of the taxes paid for the period March 1, 1992 through May 31, 1995, and the Division never issued a notice of denial of a refund for that period. Therefore, the Division of Tax Appeals has no jurisdiction to address petitioner's claim that it is owed a refund of tax for that period.

The Division's motion for summary determination was granted, and the petition was dismissed to the extent that it sought a refund of tax paid for the period March 1, 1992 through May 31, 1995. Petitioner did not file an exception to the Order. Pursuant to a Stipulation for

Discontinuance of Proceeding dated June 4, 2001 and June 7, 2001, the remaining issues raised in the petition were settled by the parties.

On or about June 6, 2000, the interim period between having filed a petition with the Division of Tax Appeals and the issuance of the Order of November 2, 2000, petitioner filed a Request for a Conciliation Conference which states:

To the best of our knowledge and believe [sic], the Department of Taxation and Finance, Audit Division, did not send us a copy of the "Notice and Demand for Payment of Tax Due," L-015268232-7 dated 7/2/98 or "Statement of Proposed Audit Adjustment," AU-3 dated 3/5/98. We had a valid power of attorney form DTF-14 on file with the Department.

Please show proof that these documents were sent to and received by us. Thank you.

We disagree with the findings.

A Conciliation Order Dismissing Request, dated June 30, 2000, was issued by the Division denying petitioner's request for a conference. It states: "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on July 6, 1998, but the request was not mailed until June 7, 2000, or in excess of ninety days, the request is late filed." Apparently, the Conciliation Order is referring to the Notice and Demand issued on July 6, 1998 (L-015268232).

On September 5, 2000, the instant petition was filed. That petition is signed by Lawrence R. Cole, petitioner's representative. It alleges: (1) that a power of attorney appointing Mr. Cole to represent petitioner was on file with the Division; (2) that the Division did not mail a copy of the Statement of Proposed Audit Adjustment to Mr. Cole; (3) that Mr. Cole's client, petitioner, paid the assessment in error because the Division failed to notify Mr. Cole; (4) that, had Mr.

Cole been notified, he never would have allowed his client to pay the tax and interest. Petitioner requests that the Statement of Proposed Audit Adjustment be provided to Mr. Cole.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that in order to obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, to show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor. If there is any doubt as to the existence of a triable issue or where the material issue of fact is arguable, summary determination should be denied.

The Administrative Law Judge reviewed the contents of her November 2, 2000 order which concluded that petitioner had not filed either a formal or an informal claim for refund of taxes paid for the period March 1, 1992 through May 31, 1995 and which dismissed that portion of the petition of June 28, 1999 to the extent that it sought a redetermination of sales tax due and a refund of tax paid for that period.

With respect to the Division's motion for summary determination concerning the relief requested in the September 5, 2000 petition, the Administrative Law Judge found that the only legal issue was whether the Division's failure to serve a copy of the Statement of Proposed Audit Adjustment on petitioner's representative, Mr. Cole, tolled the statute of limitations on refund claims arising from petitioner's payment of the tax shown as due on that Statement. The Administrative Law Judge concluded that Mr. Cole was not required to be served with the Statement in order to trigger the statute of limitations.

The Administrative Law Judge noted that pursuant to Tax Law § 1139(c), a claim for a refund of sales tax shall be filed by the taxpayer within three years from the time the return was

filed or two years from the time the tax was paid, whichever of such periods expires the later. Although the exact date of payment is not in the record, the Administrative Law Judge concluded that the tax was paid by July 6, 1998, the date of the Notice and Demand.

The Administrative Law Judge noted case law which held that once a representative appears in a matter, a statute of limitations cannot begin to run unless that representative is served with the determination or notice sought to be reviewed. However, the Administrative Law Judge found that in this case, the statute of limitations did not start to run from the issuance of a notice by the Division but was triggered by the payment of the tax. As the payment was an act of petitioner, the Division did not have an affirmative duty to inform petitioner's representative that his client had paid the tax. Pursuant to former Tax Law § 1138, the signing of the consent by petitioner finally and irrevocably fixed the tax but it did not trigger a statutory time period. Therefore, the Administrative Law Judge concluded that the Division's failure to serve petitioner's representative with a copy of the Statement of Proposed Audit Adjustment did not serve to toll the statute of limitations for filing a refund claim.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that its representative served as such from at least December 2, 1996 and not from April 14, 1997, as found by the Administrative Law Judge. Petitioner maintains that the Administrative Law Judge failed to address why petitioner's representative was not entitled to receive a copy of the Statement of Proposed Audit Adjustment or the Notice and Demand for Payment. Relying on *Matter of Bianca v. Frank* (43 NY2d 168, 401 NYS2d 29), petitioner maintains that its representative was entitled to service of the Statement of Proposed Audit Adjustment, as that document purported to have legal effect on the

proceeding. Petitioner argues that had its representative received that Statement, the representative would have counseled petitioner not to consent to pay the tax. Petitioner asserts that what triggered the statute of limitations is not at issue. Petitioner also alleges that an entry in the auditor's Field Audit Record constituted sufficient notification of a challenge to the audit findings. Petitioner contends that failure to notify petitioner's representative constitutes a denial of due process.

In opposition, the Division argues that petitioner did not file a claim for refund of tax within two years from the time that the tax was paid. Therefore, the Division of Tax Appeals has no jurisdiction to review this matter. The Administrative Law Judge issued an order dismissing petitioner's claim for refund on the basis that filing a petition with the Division of Tax Appeals did not constitute filing a claim for refund. As this matter has been finally adjudicated, petitioner should be estopped from bringing the refund issue into litigation. The only way for petitioner to obtain a review of its tax liability after signing the Statement of Proposed Audit Adjustment was to pay the tax and file a timely application for a refund. Petitioner's failure to discuss the Statement of Proposed Audit Adjustment with its representative before executing the document and remitting payment cannot serve as a basis for declaring the consent a nullity.

OPINION

Pursuant to Tax Law § 1139(c), a claim for a refund of sales tax must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. In this case, the applicable period for claiming a refund was two years from the date on which the tax was paid. Petitioner paid the sales tax at issue to the Division not later than July 6, 1998. Despite petitioner's protestations to

the contrary, the date of such payment is the operative date for determining whether or not a claim for refund is timely. Petitioner did not file a claim for refund, either formally or informally, within that two year period. As a result, the Administrative Law Judge issued an order on November 2, 2000 which dismissed the June 28, 1999 petition claiming a refund. No exception was taken to that order and, as a result, such order became final and was not subject to further review.

In its petition filed on September 5, 2000, petitioner claims for the first time before the Division of Tax Appeals that the statute of limitations for filing a claim for refund of sales tax paid on July 6, 1998 should have been tolled. The statute of limitations is an affirmative defense and it is deemed waived if not raised (*Matter of Halpern*, Tax Appeals Tribunal, April 9, 1998). Although petitioner first raised this affirmative defense in a proceeding before the Bureau of Conciliation and Mediation Services (“BCMS”), this was not the equivalent of presenting such affirmative defense as part of the proceeding before the Division of Tax Appeals. Thus, in order to preserve its affirmative defense, petitioner had to raise it in the proceeding concerning the June 28, 1999 petition. As it was not raised in that proceeding, it was deemed waived and petitioner cannot now attempt to relitigate the matters finally resolved in that previous litigation.

There can be no doubt that petitioner was aware of this affirmative defense during the pendency of the first proceeding. The BCMS conference request raising the issue of failure to notify petitioner’s representative was filed on June 6, 2000 while the fate of petitioner’s June 28, 1999 petition requesting a refund of tax was still pending before the Division of Tax Appeals. That petition was not dismissed until the order of the Administrative Law Judge was issued on November 2, 2000.

Further, we agree with the conclusion of the Administrative Law Judge that even if petitioner's representative had filed a valid power of attorney with the Division during the course of the audit of petitioner, the failure of the Division to issue a copy of the Statement of Proposed Audit Adjustment to petitioner's representative does not toll the running of the statute of limitations for claiming a refund of sales and use tax paid by petitioner. As the Administrative Law Judge correctly pointed out, once a representative appears in a matter, a statute of limitations cannot begin to run unless that representative is served with the determination or notice sought to be reviewed. However, in this case, the statute of limitations for claiming a refund began to run when petitioner paid its sales and use tax. Neither the issuance of the Statement of Proposed Audit Adjustment nor the signing of the consent to fix tax by petitioner triggered the running of a statutory time period. Therefore, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of American Home Assurance Co. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of American Home Assurance Co. is dismissed.

DATED: Troy, New York
August 8, 2002

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner