

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

HYATT EQUITIES, LLC : DECISION
DTA NO. 821447

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 December 1, 1999 through August 31, 2002. :

Petitioner, Hyatt Equities, LLC, filed an exception to the order of the Administrative Law Judge issued on June 21, 2007. Petitioner appeared by Grant Thornton LLP (Harold Hecht, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Neither parties filed briefs in this matter. Petitioner's request for oral argument was denied.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

Petitioner, Hyatt Equities, LLC, timely filed a request for a conciliation conference dated August 30, 2005 with the Bureau of Conciliation and Mediation Services ("BCMS") in protest of a refund denial dated June 7, 2005.

Petitioner identified itself in its request for conference as "Hyatt Equities, LLC" and listed its address as "109 E. 42nd Street, New York, NY."

Petitioner's request also listed the names and address of its representatives as follows:

A. Laskowski, H. Hecht, A Thierman, S. Dorizas
c/o Grant Thornton, 666 Third Avenue, New York, NY 10017

A Power of Attorney dated August 27, 2005 executed on petitioner's behalf by Christine Maki, identified on the power as petitioner's "VP Tax," appointed the following persons, listed in the following order, to represent petitioner in respect of its refund claim:

Alex Laskowski
Harold Hecht
Alison Thierman
Spiro Dorizas

The Power of Attorney listed Grant Thornton LLP, 666 Third Avenue, New York, NY 10017, as the mailing address for all four of the representatives listed.

With respect to the issuance of statutory notices, the Power of Attorney provided, in relevant part:

In those instances where statutory notices and certain other communications involving the above tax matter(s) are sent to a representative, these documents will be sent to the first representative named above.

As indicated above, Alex Laskowski was the first representative listed on the subject power.

Petitioner's conciliation conference was held on January 24, 2006. Petitioner was represented at the conference by Spiro Dorizas, CPA.

BCMS subsequently issued to petitioner, Hyatt Equities, LLC, a Conciliation Order (CMS No. 210967) dated June 16, 2006, which denied petitioner's request and sustained the Division of Taxation's ("Division") refund denial dated June 7, 2005.

On November 24, 2006, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated June 16, 2006.

On March 16, 2007, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the Conciliation Order in this matter was issued on June 16, 2006, but that the petition was not filed until November 24, 2006.

In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of James Steven Vanderzee and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders issued by the Division on June 16, 2006, and a copy of the subject June 16, 2006 Conciliation Order.

The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service ("USPS") certified mail and confirmation of the mailing through receipt of a postmarked copy of the CMR by BCMS.

The BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, and forwards them to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

The name, mailing address, order date and BCMS number for each Conciliation Order to be issued are electronically sent to the Division's Advanced Function Printing Unit ("AFP"). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that

indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

Attached to petitioner's petition is a cover sheet dated June 16, 2006 bearing BCMS number 210967 and a certified control number 7104 1002 9730 1303 7617 addressed as follows:

Spiro Dorizas
Grant Thornton, LLP
666 Third Avenue
New York, NY 10017

Also attached to the petition is a cover letter, dated June 16, 2006, addressed to petitioner, requesting that petitioner take notice of the enclosed Conciliation Order and further advising that such order would be binding unless petitioner filed a petition within 90 days of the date of the order with the Division of Tax Appeals. The cover letter indicates that a copy thereof was being sent to Spiro Dorizas, CPA, Grant Thornton, LLP, 666 Third Avenue, New York, NY 10017.

The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

The clerk, as part of her regular duties, associates each cover sheet, Conciliation Order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover

letter, and Conciliation Order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

On the last page of the CMR the BCMS clerk stamps “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas” and also stamps “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit.”

The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “6/16/06” is written in the upper right corner of each page of the CMR

The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up, in BCMS, by an employee of the Division’s Mail Processing Center.

Mr. Farrelly attested to the truth and accuracy of the copy of the three-page CMR attached to his affidavit which contains a list of the conciliation orders issued by the Division on June 16, 2006. This CMR lists 27 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a BCMS number, the name and address of the addressee, and postage and fee amounts.

Information regarding the Conciliation Order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1303 7600 is reference/CMS number 000210967, along with petitioner’s name and address as set forth on the request for conciliation conference.

Page one of the CMR also contains information regarding a Conciliation Order issued to petitioner’s representative. Specifically, corresponding to certified control number 7104 1002

9730 1303 7617 is reference/CMS number 000210967 along with the name and address of petitioner's representative as follows:

Spiro Dorizas
666 Third Avenue
New York, NY 10017

The affidavit of James Steven Vanderzee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a Conciliation Order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and signs or initials the CMR indicating receipt by the post office.

In this particular instance, the postal employee affixed a postmark dated June 16, 2006 to each page of the three-page CMR. The postal employee also wrote his or her signature and the number "27" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

The CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Vanderzee's staff on the following day after its initial delivery and is then delivered to the

originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Vanderzee states that on June 16, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Hyatt Equities, LLC, 109 East 42nd Street, New York, NY 10017, and a piece of certified mail addressed to Spiro Dorizas, 666 Third Avenue, New York, NY 10017, to a branch of the USPS in Albany, New York in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on June 16, 2006 for the records of BCMS. Mr. Vanderzee asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner on June 16, 2006.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that where the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order. The Division must prove a standard procedure used by it for the issuance of conciliation orders by one with knowledge of the relevant procedures. It must also prove that the standard procedure was followed in the particular instance in question. Based on the affidavits of two of its employees submitted in support of the Notice of Intent to Dismiss Petition, the Administrative Law Judge concluded that the Division had established that it mailed the conciliation order to petitioner and its representative by certified mail on June 16, 2006 at their last known addresses. Since the petition was filed with the Division of Tax Appeals on November 24, 2006, the Administrative

Law Judge concluded that the petition was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of petitioners case.

The Administrative Law Judge noted that petitioner contended that the Division should have issued a copy of the Conciliation Order to the first person listed on the power of attorney. Further, petitioner asserted that the representative to whom the order was issued was not available during parts of the month of July and August and that this representative was not aware that the “decision” was to be sent to him. The Administrative Law Judge determined that the Division satisfied the notice requirement since it served petitioner’s representative who appeared at the conciliation conference with a copy of the Conciliation Order. Further, the Administrative Law Judge pointed out that all of the representatives listed on the Power of Attorney worked at the same firm and had the same mailing address. Therefore, the Administrative Law Judge found that petitioner submitted no credible evidence that it filed its petition within the time required, i.e., by September 14, 2006.

ARGUMENTS ON EXCEPTION

On exception, petitioner disagrees that the Conciliation Order was properly served on its representative as required under *Matter of Bianca v. Frank*, 43 NY2d 168 [1977].

It is the Division’s contention that the Administrative Law Judge correctly decided the relevant issues. Therefore, the order should be affirmed for the reasons therein.

OPINION

Tax Law § 170(3-a)(e) and 1138(a)(1)(b) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued.

A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see, Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170 [3-a][e]). When the timeliness of a petition is at issue, the Division must establish proper mailing of the conciliation order (*see, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has met its burden to establish proper mailing of the conciliation order to petitioner and to petitioner’s representative on June 16, 2006 by submitting affidavits describing its general mailing record, which showed that the procedure was followed in this case (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner’s petition was not filed until November 24, 2006, which is 71 days late. The law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see, Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Therefore, we affirm the determination of the Administrative Law Judge, that because petitioner failed to file its petition protesting the conciliation order within 90 days of issuance, such petition was untimely filed and properly dismissed.

We next address petitioner’s assertion that the conciliation order was not properly served on its representative. While the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer’s representative, we have held that the 90-day period for filing a petition or request for conciliation conference is tolled if the taxpayer’s representative is not served with the statutory notice (*see, Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank, supra*). We find that petitioner’s reliance on **Bianca** is misplaced because the Division served petitioner’s representative at the conciliation

conference with a copy of the conciliation order. Although the Division did not provide notice of the conciliation order to the first representative listed on the power of attorney, the Division did provide notice to Mr. Dorizas, who actually appeared for petitioner at the conciliation conference. Moreover, all of the representatives listed on the power of attorney worked at the same firm. Therefore, we find that this satisfies the notice requirement as set forth in *Matter of Multi Trucking (supra)* and we affirm the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Hyatt Equities, LLC is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Hyatt Equities, LLC is dismissed.

DATED: Troy, New York
May 22, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner