STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CANARIO EXPRESS CORPORATION[1]	:	DECISION DTA NO. 822662
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 1, 2000 through May 31, 2006.	:	

Petitioner, Canario Express Corporation, filed an exception to the determination of the Administrative Law Judge issued on February 24, 2011. Petitioner appeared by State Tax Consulting, Inc. (Jay Oher, CPA). The Division of Taxation appeared by Mark Volk, Esq. (Michael Hall, of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner did not file 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 petitioner has shown reasonable cause for the abatement of penalties.

[1] The petition was filed under the name Canario Express Corporation. The documents in the record indicate that petitioner also used the name Canario Express Communications & Travel Agency Corp. Since the petition was filed under the name Canario Express Corporation, this name, or Canario, will be used in the decision.

FINDINGS OF FACT

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

On September 6, 2006, the Division of Taxation (Division) conducted a survey of Canario Express Corp. (Canario). Canario provided tax and notary services and operated a small store that sold general merchandise in North Tarrytown, New York. The firm also prepared certain documents for a fee. Items sold by the store included money orders, compact disks, cassettes, phone cards, clothing, sports related items, spices, herbs, newspapers, magazines and candy. During the audit period, Canario was not a registered vendor and did not file sales tax returns. Pedro A. Urgiles was the president of the corporation and owned 100 percent of the outstanding stock. During the audit period, Mr. Urgiles was also involved in a separate landscaping business.

On September 6, 2006, the Division of Taxation (Division) delivered an appointment letter to Canario stating that its sales and use tax records had been scheduled for a field audit for the period June 1, 2000 through May 31, 2006. The letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." A schedule of books and records to be produced was attached to the letter.

In response to this request, petitioner provided a day book for 2005, bank statements for a portion of the audit period and federal tax returns for 2000 through 2004. The federal returns were prepared by Mr. Urgiles on the basis of a fiscal year ending January 31. The day book listed only gross sales and did not list or differentiate between taxable and nontaxable sales. Mr. Urgiles did not provide cash register tapes or guest checks.

The auditor could not determine from the records provided how much sales tax was paid and how much was due.

Since source documents were unavailable, the auditor utilized the gross sales reported on the federal returns to determine taxable sales. Petitioner did not offer the federal returns for 2005 and 2006. Therefore, the gross sales for these years were estimated on the basis of the gross sales reported on the federal returns that were filed prior to 2005. In order to determine audited taxable sales, receipts attributed to wire transfers were subtracted from petitioner's reported sales. On the basis of the foregoing, the Division found audited taxable sales of $1,096,825.00. By applying the applicable tax rates to the audited taxable sales, it found that additional tax was due in the amount of $77,077.83. On September 17, 2007, the Division issued a Notice of Determination to petitioner, which assessed sales and use tax in the amount of $77,077.83, plus interest in the amount of $62,085.57 and penalty in the amount of $22,826.57, for a balance due of $161,989.97. Statutory penalty was assessed pursuant to Tax Law § 1145(a)(1) because the taxpayer did not register as a vendor or file sales tax returns during the audit period.

The audit was commenced less than one year after the auditor began his employment with the Division as an auditor. The auditor was supervised during the course of the audit.

During the audit, Mr. Urgiles insisted that he did not have to collect tax for phone card sales because it would be unfair to require him to collect the tax while his competitors sold similar items but without collecting sales tax.

After the audit was completed, petitioner filed sales tax returns for the audit period.

Petitioner filed a request for a conciliation conference, and in an order dated November 21, 2008, the amount of tax assessed was reduced to $58,910.90 plus penalty and interest. The

adjustment was made to reflect the tax paid with the sales tax returns that were filed after the audit and to take into account the sale of nontaxable items such as newspapers.

Mr. Urgiles was born in Ecuador and came to the United States in 1981. He attended Mercy College in Dobbs Ferry, New York, where he earned a four-year degree in accounting.

Mr. Urgiles's primary language is Spanish. He did not speak Spanish to the auditor because the auditor explained that he did not speak Spanish. It was the auditor's understanding that Mr. Urgiles's comprehension of English was sufficient for the conduct of the audit. According to the auditor, had he thought that Mr. Urgiles did not understand him, he would have requested the assistance of a Spanish-speaking auditor to communicate with the taxpayer.

This was the first sales tax audit in which petitioner was involved.

In a letter dated March 11, 2008, the Division advised petitioner, in pertinent part, as follows:

> Our records indicate you are eligible to file an annual sales tax return. Therefore, the Tax Department has *changed your filing status from quarterly to annual*. Your first annual return will cover the period from March 1, 2008 through February 28, 2009. We will mail your first annual sales tax return to you at the end of February 2009. . . . Because *your new status does not take effect until March 1, 2008*, you are still responsible to file your quarterly return for the period December 1, 2007, through February 29, 2008 (due March 20, 2008).
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> * * *
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> If you owe $3,000 or less in sales and compensating use tax per year, you can be an annual sales tax filer. As long as you do not owe more than $3,000 tax in an annual filing period, you can remain an annual sales tax filer. Once you exceed $3,000 tax due in an annual filing period, you must file quarterly returns, beginning with the period you exceeded the $3,000 limit (Emphasis added).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

As petitioner only challenged penalties, the Administrative Law Judge noted that the sole

issue to be resolved was whether Mr. Urgiles established reasonable cause or the abatement of penalties. Initially, the Administrative Law Judge observed that Mr. Urgiles' completion of a four-year college program in accounting proved his English proficiency and that language was no barrier to meeting his sales tax obligations.

The Administrative Law Judge rejected petitioner's challenges to the underlying deficiency. The Administrative Law Judge found little credibility in petitioner's argument that it was a registered vendor because petitioner introduced no supporting evidence, while the Division provided records showing that petitioner, in fact, did not register as a vendor. The Administrative Law Judge determined that petitioner's argument that the majority of its pre-2005 sales consisted of non-taxable items lacked sufficient evidence. As such, the Administrative Law Judge determined that there was no merit to the arguments advanced by petitioner.

Turning to penalties, the Administrative Law Judge observed relevant jurisprudence and concluded that petitioner must establish reasonable cause to abate penalties. Petitioner argued that a March 11, 2008 letter from the Division forms a basis for the abatement of penalties. The Administrative Law Judge rejected this argument because the letter was issued in 2008, whereas the periods at issue involve the years 2000 through 2006. The Administrative Law Judge noted that the March 11, 2008 letter acknowledged that petitioner was moving to annual filing, indicating that, prior to that point, petitioner was required to file on a quarterly basis. The Administrative Law Judge further noted that the letter did not support the proposition that petitioner's sales were less than $3,000.00 at any point during the audit period. As such, the Administrative Law Judge determined that petitioner failed to establish any reasonable cause that would support the abatement of penalties.

Accordingly, the Administrative Law Judge denied petitioner and sustained the Notice of Determination together with penalties and interest.

ARGUMENTS ON EXCEPTION

Petitioner filed neither a brief in support nor a reply brief. However, in an attachment to its exception, petitioner suggests that it was displeased with its representatives and their work.

The Division argues that the Tribunal lacks jurisdiction over this matter because petitioner's exception lacks the proper form. In its brief, the Division contends that petitioner failed to comply with the regulations of the Tax Appeals Tribunal in that petitioner did not serve a copy of the exception upon the Division (20 NYCRR 3000.17[a][1]). The Division further contends that the filed exception lacks the requisite particular findings of fact and conclusions of law with which the party disagrees (20 NYCRR 3000.17[b][1]).

The Division primarily rests on its arguments made before the Administrative Law Judge. The Division argues that petitioner has failed to present any grounds for modifying the Administrative Law Judge's determination and that petitioner failed to present reasonable cause to abate penalties. The Division also contends that petitioner's complaints of inadequate representation do not present sufficient grounds for abating penalties.

OPINION

We first address the Division's procedural challenge to this exception.

Initially, we reject the Division's argument that the exception should be dismissed on the ground that petitioner failed to serve the Division with its papers. The relevant procedural rule is set forth in 20 NYCRR 3000.17(a)(1), which states:

> Within 30 days after the giving of notice of the determination of an administrative law judge, any party may take exception to such determination and seek review

> thereof by the tribunal by filing an exception with the secretary. The exception should be filed with the secretary either in person at the offices . . . or by mail addressed to [the Tribunal's address].
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> * * *
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> A copy of the exception shall be served at the same time on the other party. When the Division of Taxation is the other party, service shall be made on the office of counsel.

Herein, the determination was properly served on petitioner on February 24, 2011. As such, any exception was due to be filed on or before March 28, 2011. The exception filed with the Tax Appeals Tribunal was postmarked on March 23, 2011; however, the Division did not receive the filed documents until an inquiry was made on April 6, 2011.

It is well-settled that this Tribunal may excuse a failure to properly serve the Division if a petitioner has filed a timely notice of exception to the Secretary within the 30-day statutory period provided by Tax Law § 2000(7) (***see e.g. Matter of Cor Brothers Serv. Sta.***, Tax Appeals Tribunal, February 8, 1990; ***Matter of Macbet Realty Corp.***, Tax Appeals Tribunal, November 9, 1989). Our ability to do so is based upon curative provisions of the Civil Practice Law and Rules (CPLR), which empower a court to excuse a party's failure to perform one of the two procedural steps required by CPLR § 5515 to initiate an appeal, provided that one of the two steps has been timely performed so that the court has jurisdiction over the matter (***see*** CPLR § 5520[a]; ***Peck v. Ernst Bros.***, 81 AD2d 940 [1981]).

Herein, petitioner filed a timely appeal of the determination of the Administrative Law Judge. While the Division did not receive petitioner's papers until 14 days later, we find that petitioner's failure to serve the opposing party was not fatal because the Division was not prejudiced in its ability to appear and participate in this action.

We now turn to the argument that the merits of the exception should not be considered because petitioner's challenge lacks particularity. At 20 NYCRR 3000.17(b), this Tribunal's regulations provide as follows:

> Form of exception; briefs. (1) The exception shall contain:
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> (i) the particular findings of fact and conclusions of law with which the party disagrees;
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> (ii) the grounds of the exception, with references, wherever possible, to the relevant pages of the transcript of hearing and exhibits; and
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> (iii) alternative findings of fact and conclusions of law.

Failure to comply with this regulation is fatal because "an appellate court's scope of review with respect to an appellant . . . is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party" (***Hecht v. City of New York***, 60 NY2d 57, 61 [1983]).

None of petitioner's papers identify the part or parts of the determination that petitioner seeks to challenge. The Form TA-14 filed by petitioner, fails to indicate any findings of fact or conclusions of law with which petitioner disagrees. The filed papers neither indicate grounds for disagreement with the determination of the Administrative Law Judge, nor do they advance a legal theory that would support modification of the determination. Petitioner did not clarify its point with a brief, as it elected not to file a brief in support, although it was granted extensions to do so. As such, we conclude that petitioner's papers are fatally defective.

Accordingly, we deny the exception because it fails to comply with the provisions of 20 NYCRR 3000.17(b). Furthermore, we see no reason to modify or reverse the conclusions of the Administrative Law Judge because petitioner failed to provide any argument or grounds for

challenging the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Canario Express Corporation is denied;

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

3. The petition of Canario Express Corporation is denied; and

4. The Notice of Determination, dated September 17, 2007, together with penalties and interest, is sustained.

DATED: Troy, New York
February 16, 2012

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner