

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MY WAY TRUCKING, INC. : ORDER
DTA NO. 821055
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, 2003 through February 29, 2004. :

Petitioner, My Way Trucking, Inc., 194 Pennsylvania Avenue, Medford, New York 11763, filed a petition 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, 2003 through February 29, 2004.¹

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 15, 2006, for an order dismissing the petition or in the alternative granting summary determination in this matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b), on the grounds that petitioner failed to file a timely petition contesting the statutory notice at issue. Petitioner's response² to the motion was due on September 14, 2006, which date commenced the 90-day period for issuance of this order. After

¹ Pursuant to Tax Law § 1136(b), sales tax returns are filed for quarterly periods ending on the last day of February, May, August and November. A review of the petition in this matter discloses that petitioner is seeking a refund of sales tax "filed and paid . . . in 12/2003." Taxes paid in December of 2003 would be encompassed by a quarterly sales tax return for the period or quarter ended February 29, 2004 which is reflected by the caption at the top of this page. Although the petitioner indicated that this matter involved the year 2004 in the caption it completed at the start of its petition, the period at issue has been fine-tuned to more accurately reflect what is at issue in this proceeding. It has been presumed that petitioner is a quarterly sales tax filer which is not specifically disclosed in the sparse record created for this motion.

² No response was ever received from petitioner.

due consideration of the affidavit and documents presented by the Division of Taxation, Frank W. Barrie, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner failed to file a timely petition so that its petition should be dismissed or summary determination in favor of the Division of Taxation should be granted as a matter of law.

FINDINGS OF FACT

1. Petitioner, My Way Trucking, Inc., filed a request dated December 19, 2005 for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking a review of a determination by the Division of Taxation (“Division”) dated May 14, 2004 which “denied in full” petitioner’s claim for a refund of sales tax.

2. The denial dated May 14, 2004 of petitioner’s refund claim referenced a claim number 2004030402 in the “amount of claim” of \$1,575.44. It provided notice concerning the right of the petitioner to appeal the denial as follows:

This determination denying your claim in full will, according to section 1139(b) of the Sales and Use Tax Law, be final and irrevocable unless you apply for a hearing. If you decide to appeal this determination, complete the enclosed CMS-1, Request for Conciliation Conference, and mail it within 90 days of the date of this letter.

The denial was typed under the following letterhead:

New York State Department of
Taxation and Finance
Audit Division-Desk Audit-Sales Tax
W A Harriman Campus
Albany New York 12227

At the bottom of the denial, the Division’s auditor, Heather Bell, provided her telephone number and hours of availability during the workweek.

3. The petitioner, by a letter dated April 9, 2005 which is nearly a year after the denial dated May 14, 2004, sent certain documents in support of its refund claim to the following addressee:

Mrs Heather Bell
NYS Assessment Receivable
PO Box 4127
Binghamton, NY 13902-4127

4. Approximately six months later, petitioner received a letter in response dated October 24, 2005 response from Claudia Cannavo of the Division's sales tax desk audit section in Albany. This response noted that petitioner's letter of April 9, 2005 to Ms. Bell at an incorrect address in Binghamton "was forwarded to us." Petitioner was advised as follows:

On 05/14/04, we fully denied your application for credit or refund of sales or use tax. . . . Our letter of 05/14/04 clearly stated the reasons for the denial. . . . Included with our letter was a CMS-1, Request for Conciliation Conference, for which you were advised you had 90 days from the date of the letter to mail if you disagreed with our denial. We have no record of having received the [request for conciliation conference]. Therefore, our determination is final and irrevocable.

5. By a letter dated December 2, 2005, petitioner again argued its case for a refund of sales tax and also noted that the letter dated May 14, 2004 denying its refund claim referenced by auditor Claudia Cannavo "was never received by us." Petitioner noted that "If it had been, we absolutely would have requested a conference on the matter."

6. As noted in Finding of Fact "1", petitioner filed a request for conference dated December 19, 2005, which was mailed on December 22, 2005. Soon thereafter, a conciliation order dismissing request dated January 13, 2006 was issued against petitioner on the basis that its request was "late filed":

Since the notice was issued on May 14, 2004, but the request was not mailed until December 22, 2005, or in excess of 90 days, the request is late filed.

7. Petitioner then filed its petition dated March 20, 2006 contesting the Division's denial of its refund claim:

The taxpayer's prior bookkeeper filed and paid sales tax in 12/2003. The taxpayer is a subcontractor (*third party*). My costomer [sic] charged and collected the sales tax from the consomer [sic]. I just brought it from point A to point B. I *never* charged or collected sales tax. (Emphasis in original.)

CONCLUSIONS OF LAW

A. Tax Law § 1139(b) provides in relevant part as follows:

If an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, the commissioner of taxation and finance shall grant or deny such application in whole or in part within six months of receipt of the application in a form which is able to be processed and *shall notify such applicant by mail* accordingly. Such determination shall be final and irrevocable unless such applicant shall, within ninety days *after the mailing of notice* of such determination, petition the division of tax appeals for a hearing. (Emphasis added.)

In lieu of petitioning for a hearing, a taxpayer may request a conference at the Division's Bureau of Conciliation and Mediation Services (Tax Law § 170[3-a][a]).

B. The Division contends that its denial of petitioner's refund claim has become "final and irrevocable" due to the alleged failure of petitioner to timely petition for a hearing or request a conference with BCMS in lieu of a hearing. However, based upon the statutory language emphasized above, such denial does not become "final and irrevocable" unless a taxpayer fails to petition for a hearing or request a conference within 90 days "after the mailing of notice" of the Division's denial of the taxpayer's refund claim. Here, the Division has not established its mailing of the notice denying petitioner's refund claim. In fact, the Division's motion papers do not include any evidence at all of its mailing of the denial of petitioner's refund claim. In addition, as noted in the Findings of Fact, petitioner has denied ever receiving such notice. The petitioner's denial of receipt of such notice is further supported by the fact that it contacted the

auditor, nearly a year after the denial dated May 14, 2004, at an address in Binghamton unrelated to the Albany address provided by the auditor in the denial of petitioner's refund claim.

C. A motion for summary determination may be granted, if upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]). The Division's motion for summary determination or for an order dismissing the petition is properly denied in light of the conclusion that it has not established that its denial of petitioner's refund claim has become final and irrevocable. Without proof of mailing of such denial, the 90-day period for contesting the denial as provided for in Tax Law § 1139(b) never began to run. In a string of decisions beginning with *Matter of Katz* (November 14, 1991), the Tax Appeals Tribunal imposed on the Division of Taxation a significant burden when the Division seeks to deny the jurisdiction of the Division of Tax Appeals over a taxpayer's petition challenging a notice of deficiency, on the basis that the notice had become an unchallengeable assessment pursuant to Tax Law § 681(b) (*see also, Matter of Cal-Al Burrito Company, Inc.*, Tax Appeals Tribunal, July 30, 1998). The Division of Taxation bears a similar burden when it seeks to deny the jurisdiction of the Division of Tax Appeals over a taxpayer's petition challenging a denial of a claim of refund or credit (*Matter of Gasit, Inc.*, Tax Appeals Tribunal, July 19, 1990). The statutory language in Tax Law § 1139(b) cited above is similar to the language of Tax Law § 681(b) which provides that "After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment . . . except only for any such tax . . . as to which the taxpayer has within such ninety day period filed . . . a petition"

D. The motion of the Division of Taxation dated August 15, 2006 is denied, and this matter shall be set down for hearing in due course.

DATED: Troy, New York
November 30, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE