

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HYATT EQUITIES, LLC : ORDER
 : 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, 109 East 42nd Street, New York, New York 10017, 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, 1999 through August 31, 2002.

On March 16, 2007, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On April 13, 2007, petitioner, appearing by Christine Maki, Vice President - Tax, filed written comments to the Notice of Intent, along with other documents. On May 9, 2007, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced May 9, 2007. After due consideration of the documents and arguments submitted, Timothy J. Alston, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. 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.

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

3. 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

4. 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

5. 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.

6. 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.

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

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

9. 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.

10. On November 22, 2006, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated June 16, 2006.

11. 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 22, 2006, or 159 days later.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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

17. 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.

18. 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.

19. 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.

20. 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."

21. 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

22. 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.

23. 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.

24. 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.

25. 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

26. 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.

27. 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.

28. 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.

29. 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.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Conciliation Order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law

§ 170(3-a)(e) and Tax Law § 1138(a)(1)(b), the Conciliation Order in this case and the underlying refund claim denial would be binding upon petitioner unless it filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, since it appeared upon receipt of the subject petition by the Division of Tax Appeals that it was filed late (*see*, Finding of Fact “11”), a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law §2006(5) and 20 NYCRR 3000.9(a)(4).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice or Conciliation Order is in question, the initial inquiry is on the mailing of the notice or Conciliation Order because a properly mailed notice or Conciliation Order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Vanderzee, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject Conciliation Order was mailed as addressed to both petitioner and petitioner's representative, Mr. Dorizas, on June 16, 2006. Specifically, this document lists certified control numbers with corresponding names and addresses and bears USPS postmarks dated June 16, 2006. Additionally, a postal employee wrote "27" next to the total pieces received heading and initialed or signed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see, Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Petitioner contended that the Conciliation Order was not properly issued because it was not mailed to the proper representative in accordance with the language of the power of attorney. Specifically, petitioner contended that the Division should have issued a copy of the Conciliation Order to the first person listed on the power (*see*, Finding of Fact "7"). Petitioner further asserted that the representative to whom the order was issued was not available during parts of the months of July and August as he was out of the continental United States. Petitioner asserted that this representative was not aware that the "decision" was to be sent to him and neither was the petitioner.

While the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period

for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see, e.g., Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29). The Division has satisfied this notice requirement in the instant matter, as it served petitioner's representative at the conciliation conference, Mr. Dorizas, with a copy of the Conciliation Order. Mr. Dorizas was authorized to represent petitioner pursuant to the Power of Attorney dated August 27, 2005.

Although, contrary to the language contained in the Power of Attorney, the Division did not provide notice of the Conciliation Order to the first representative listed thereon, the Division did provide notice to the representative who actually appeared for petitioner at the conference. This satisfies the notice requirement first enunciated by the Tribunal in *Matter of Multi Trucking (supra)*. Moreover, it should be noted that all of the representatives listed on the Power of Attorney worked at the same firm and had the same mailing address.

Petitioner's vague assertion that Mr. Dorizas was not available during "parts of the months of July and August" as he was out of the continental United States is without merit as there is no evidence in the record supporting this claim. Moreover, even if true, the Conciliation Order in this case was issued on June 16, 2006 and the 90-day period for the filing of a petition ran until September 14, 2006. Accordingly, even if Mr. Dorizas was not available during parts of July and August, he still had ample time to respond to the Conciliation Order.

Additionally, as to petitioner's assertion that neither petitioner nor Mr. Dorizas was aware that the Conciliation Order was to be sent to Mr. Dorizas, considering that Mr. Dorizas had actually appeared at the conference, he certainly should have been aware that a copy of the

order might be sent to him. Furthermore, and contrary to its contention, petitioner was made aware that a copy of the order was issued to Mr Dorizas by the cover letter sent to petitioner with the order which indicates that a copy was being sent to Mr. Dorizas (*see*, Finding of Fact “17”).

G. Petitioner also contended that communication between the taxpayer’s representative and the conferee regarding the refund claim continued well after the date of the conciliation conference and that notwithstanding the 30-day issuance rule of Tax Law § 170(3-a)(e) the conferee at no time indicated when the petitioner should expect issuance of the Conciliation Order. Although there is no evidence in the record to support this contention, even if there were, there is no requirement that the Division advise a taxpayer “when to expect” a Conciliation Order. Petitioner further asserts that discussions regarding audit issues were ongoing at the time between the Division, the New York City Department of Finance, and the hotel industry and that petitioner reasonably believed that the issue underlying its refund claim was being addressed in such discussions. Again, there is no evidence in the record to support such a claim, but even if there were, the fact that such discussions were occurring does not obviate the necessity of timely protesting a Conciliation Order.

H. Petitioner further asserted that the Division did not address the Conciliation Order to the correct taxpayer. Petitioner asserted that on its sales tax returns, its name is stated as Hyatt Corporation as agent of Hyatt Equities, LLC d/b/a Grand Hyatt of New York. This contention is without merit, as the name of the taxpayer on the Conciliation Order is identical to the name on the request for conciliation conference.

I. As noted previously, petitioner’s petition was filed on November 22, 2006. This date falls well beyond the 90-day period of limitations for the filing of a petition following the issuance of a Conciliation Order and was therefore untimely (*see*, Tax Law § 170[3-a][a]).

J. The petition of Hyatt Equities, LLC is hereby dismissed.

DATED: Troy, New York
June 21, 2007

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE