

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DHAN GURU JI CORPORATION : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 828082
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2014 through August 21, 2015. :

Petitioner, Dhan Guru Ji Corporation, 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 June 1, 2014 through August 21, 2015.

On May 25, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the grounds that the petition did not appear to be timely filed. By request of the Division of Taxation, the 30-day period to respond to the notice of intent to dismiss petition was extended to August 10, 2017. On June 6, 2017, petitioner filed a letter in opposition to the notice. On July 27, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Adam Roberts, 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 determination commenced on August 10, 2017. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order dismissing request.

FINDINGS OF FACT

1. On February 8, 2017, the Division of Tax Appeals received a petition from petitioner, Dhan Guru Ji Corporation, which protested a notice of determination issued to it. The envelope containing the petition bears a United States Postal Service (USPS) postmark of February 3, 2017. The notice of determination, assessment number L-044437084, dated February 18, 2016, was issued to petitioner at an address in New Windsor, New York.

2. On May 25, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner. The notice of intent indicated that the relevant notice of determination was issued on February 18, 2016, but that the petition was not filed until February 3, 2017, or 351 days later.

3. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted the affidavits of Robert Farrelly, dated June 29, 2017, and Fred Ramundo, dated June 30, 2017, both employees of the Division. The Division also submitted a copy of the notice of determination issued to petitioner, a copy of a request for conciliation conference filed by petitioner, a copy of the conciliation order dismissing request issued to petitioner, and a copy of the certified mail record (CMR) containing a list of conciliation orders issued by the Division on June 3, 2016.

4. The affidavit of Robert Farrelly, Supervisor of Tax Conferences for the Bureau of Conciliation and Mediation Services (BCMS), sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminated in the

mailing of the conciliation order dismissing request by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail or CMR.

5. The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

6. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

7. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

8. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

9. It was the general office practice that the BCMS clerk stamps on the bottom left corner “Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the last page of the CMR.

10. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “6-3-16” was written in the upper right corner of each page of the CMR.

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

12. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR, which contained a list of the 35 conciliation orders issued by the Division on June 3, 2016. The CMR also listed 35 certified control numbers. Each such certified control number was assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

13. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Corresponding to certified control number 7104 1002 9730 0848 3887 was reference number 000270644, along with the name and the New Windsor, New York, address of petitioner. The New Windsor, New York, address for petitioner is the same address used by petitioner in its request for conciliation conference and the petition filed herein.

14. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to

branch offices of the USPS. He stated that after a conciliation order was placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her signature to the CMR indicating receipt by the post office.

15. In this particular instance, the postal employee affixed a postmark dated June 3, 2016 and initialed each page of the four-page CMR. The postal employee also circled the number “35” on page four to indicate the “Total Pieces Received at Post Office.”

16. Mr. Ramundo stated that 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. Ramundo’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.

17. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo states that on June 3, 2016, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Dhan Guru Ji Corporation to a branch of the USPS in Albany, New York, in a sealed envelope 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 3, 2016, for the records of the Division. Mr. Ramundo 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 3, 2016.

18. Petitioner responded to the notice of intent to dismiss with a letter from its president, Parvinder Kaur, admitting that the petition in this matter was not timely filed due to the fact that the person he hired to contest the underlying notice of determination failed to properly handle the matter. Petitioner requests that its petition be considered on the merits.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c]). Pursuant to Tax Law § 170 (3-a) (e), the conciliation order in this case would be binding upon petitioner unless it filed a timely petition. 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, a notice of intent to dismiss petition was issued pursuant to Tax Law § 2006 (4) and 20 NYCRR 3000.9 (a) (4).

B. Where, as here, the timeliness of a taxpayer's protest against a conciliation order is in question, the initial inquiry is on whether the conciliation order was properly mailed (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is "issued" within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*).

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*, Tax Appeals Tribunal, November 16, 1991; *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. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing, 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 petitioner on June 3, 2016. Specifically, this document lists the certified control number with the corresponding name and address of petitioner and bears a USPS postmark dated June 3, 2016. Additionally, a postal employee circled “35” next to the total pieces received heading and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and constitutes documentary evidence of both the date and fact of mailing the order (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

F. As noted previously, petitioner’s petition was filed on February 3, 2017. This date falls well beyond the 90-day period of limitations for the filing of a petition following the issuance of the conciliation order and was, therefore, untimely (*see Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015; *Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003). As such, the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Rotondi Indus.*, Tax Appeals Tribunal, July 6, 2006).

G. The petition of Dhan Guru Ji Corporation is hereby dismissed.

DATED: Albany, New York
November 2, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE