

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>WINNERS GARAGE, INC.</b>	:	DECISION
for Review of a Proposed Refusal to Renew a Certificate	:	DTA NO. 823285
of Authority under Articles 28 and 29 of the Tax Law for	:	
for the Period Ended August 31, 2007.	:	

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Petitioner, Winners Garage, Inc., filed an exception to the determination of the Administrative Law Judge issued March 18, 2010 with respect to its petition to review a Notice of Proposed Refusal to Renew a Certificate of Authority under Articles 28 and 29 of the Tax Law.

Pursuant to Tax Law § 1134(a)(4)(D), this matter is being treated as an expedited proceeding. Petitioner appeared by Andrew B. Schultz, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Hall, of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was held on May 12, 2010 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

***ISSUE***

Whether the Division of Taxation has established an adequate basis for its proposed refusal to renew petitioner's certificate of authority under Articles 28 and 29 of the Tax Law.

***FINDINGS OF FACT***

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

Petitioner, Winners Garage, Inc., at all times relevant herein, was a taxi management company licensed by the Limousine and Taxi Commission, which acted as a middleman between taxi medallion owners and drivers.

On July 6, 2009 and again on September 4, 2009, the Division of Taxation (Division) mailed to petitioner a notification to renew its sales tax certificate of authority. In response, petitioner mailed to the Division its application to renew the certificate of authority, which prompted the Division to perform a routine search of its records to determine if petitioner or any of its officers, directors or employees had any outstanding liabilities. The inspection revealed that there were such liabilities.

The Division issued to petitioner a Notice of Proposed Refusal to Renew a Sales Tax Certificate of Authority, dated September 21, 2009, which informed petitioner that its certificate of authority could not be renewed because petitioner owed the Division moneys pursuant to a fixed and final assessment, assessment identification number L-031573327-9. The Notice of Proposed Refusal stated that petitioner's certificate would be renewed if the amount due was paid within 90 days of the date of the notice, i.e., September 21, 2009.

Petitioner exercised its right to contest the Notice of Proposed Refusal by filing a petition with the Division of Tax Appeals on October 12, 2009.

Notice number L-031573327-9 was issued to petitioner on February 19, 2009 as a result of a sales tax audit of petitioner's books and records for the period December 1, 2004 through August 31, 2007, which yielded additional tax of \$211,907.10, plus penalty and interest. The

Mailing Cover Sheet of the Notice of Determination issued to Winners Garage, Inc. contains the certified control number 7104 1002 9730 1205 2888.

In addition, Mr. Lev Wolkowicki was determined to be a responsible officer of the corporation and was issued a Notice of Determination, number L-031576442-3, on February 20, 2009, for the period December 1, 2005 through August 31, 2007, which set forth additional tax due of \$134,290.09, plus penalty and interest. However, this assessment was not referred to as a basis for the Notice of Proposed Refusal to Renew on the Consolidated Statement of Tax Liabilities attached to the notice.

By letter dated January 13, 2009, the Division sent petitioner a Statement of Proposed Audit Change. In addition, the letter also included consents extending the period of limitation on assessment for both petitioner and Mr. Wolkowicki, in the event that petitioner chose to wait for resolution of a prior case to determine the outcome of the current matter as well. Petitioner never returned these consents to the Division. Therefore, the Division had until March 20, 2009 to issue its notices of determination to petitioner and Mr. Wolkowicki pursuant to the terms of an executed consent to extend the period of limitations on assessment, dated July 9, 2008 and fully executed on August 2, 2008.

The Statement of Proposed Audit Change for Sales and Use Tax informed petitioner that the audit of its records for the period December 1, 2004 through August 31, 2007 had determined that petitioner owed additional sales and use tax for the audit period in the sum of \$211,907.10 plus penalty and interest. The statement requested that petitioner either agree or disagree with the findings and respond to the statement by February 12, 2009 or face immediate issuance of a Notice of Determination. Petitioner indicated his disagreement with the audit findings and stated the following:

The Assessment is arbitrary, unreasonable and not correct based upon the previously submitted information. I request a conciliation conference to correct this amount. Please contact me to set up a meeting. Yours sincerely Lev.

The statement, with petitioner's comments, was received by the Division on February 11, 2009.

In compliance with petitioner's request, by letter dated February 11, 2009, the Division mailed Mr. Wolkowicki a form CMS-1-MN, Request for Conciliation Conference, and Notice of Taxpayer Rights. In the letter, the auditor, Jose Rances, invited Mr. Wolkowicki to fill out the request and return it to him at the Queens District Office to schedule "that meeting," even though the Notice of Taxpayer Rights directs taxpayers to direct such requests to the Bureau of Conciliation and Mediation Services in Albany.

On September 30, 2009, in response to his request, the auditor sent Mr. Wolkowicki, as "president" of Winners Garage, Inc., a second form CMS-1, Request for Conciliation Conference, saying that it was the same form the Queens District Office had sent him on February 11, 2009. This time, Mr. Rances instructed Mr. Wolkowicki to mail the form to the address listed on the CMS-1 and refrained from stating that "they" would schedule the conference.

The Notice of Determination issued to petitioner on February 19, 2009, included the following instructions:

Read the enclosed Notice of Taxpayer Rights for an explanation of your options.

To request a Conciliation Conference, complete the enclosed Request for Conciliation Conference and return it in the envelope provided. You must attach a photocopy of all pages of this Notice to the Request for Conciliation Conference.

To request Form TA-10, Petition for a Division of Tax Appeals Hearing, follow the instructions on the enclosed Notice of Taxpayer Rights.

**NOTE: You must file the Request for Conciliation Conference or a Petition for a Division of Tax Appeals hearing by 05/20/09.** (Emphasis in original.)

The Notice of Taxpayer Rights sent to petitioner provided, in part, as follows:

If you disagree with an action taken by the Department of Taxation and Finance (the issuance of a tax deficiency/determination, the denial of a refund claim or the denial or revocation of a license, registration or exemption certificate), you may protest by filing a Request for Conciliation Conference **or** by filing a Petition for a Tax Appeals Hearing.

The request or petition **must** be filed within a certain period from the date the Department mailed you notice of its action. Please refer to the notice you received to determine your time limit. These time limits are established by the Tax Law and cannot be extended. (Emphasis in original.)

On October 12, 2009, Winners Garage filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination issued on February 19, 2009. The petition was delivered to the Division of Tax Appeals by FedEx Express and was dated and delivered to FedEx Express on October 12, 2009.

The Division offered the affidavits of Patricia Finn Sears, James Steven VanDerZee and Heidi Corina, employees of the Division, in support of its mailing of the Notice of Determination to Winners Garage, Inc., on February 19, 2009. The first two affidavits concerned the mailing procedures followed by the Division in mailing notices of determination. The last affidavit pertained to correspondence between Ms. Corina and the United States Postal Service (USPS). The Division also offered a copy of portions of the certified mailing record (CMR) containing a list of the notices of determination allegedly issued by the Division on February 19, 2009, including petitioner's. The CMR indicated that a Notice of Determination, number L-031573327, was issued to Winners Garage by certified mail with the certified number 7104 1002 9730 1205 2888. However, the postmarks on the CMR were too faint to determine a mailing date.

Heidi Corina was a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepared USPS Form 3811-A. Form 3811-A was used by the mailer to request return receipts after mailing. A Form 3811-A was sent to the post office for mail delivered on or after July 24, 2000. The Postal Service provided whatever information it had concerning delivery when delivery could be confirmed.

Attached to Ms. Corina's affidavit was a copy of the Form 3811-A that was requested for petitioner. This form requested information regarding a piece of mail bearing certified control number 7104 1002 9730 1205 2888 and addressed to Winners Garage, Inc., at its Woodside, New York, address. Also attached to Ms. Corina's affidavit was the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated November 6, 2009. The letter stated in part: "The delivery record shows that this item was delivered on 02/23/2009 at 11:06 AM in WOODSIDE, NY 11377." The letter also contained a scanned image of the recipient as "Renee Perlman" above the handwritten name "Renee Perlman." The address of the recipient/petitioner, 34 14 64 St., was shown below. This address was the same as that shown on petitioner's last tax return filed by it before the issuance of the Notice of Determination, i.e., a New York State and Local Quarterly Sales and Use Tax Return for the period September 1, 2008 through November 30, 2008. The return listed petitioner's address as 34 14 64 St. Woodside, New York.<sup>1</sup>

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<sup>1</sup>Official notice is being taken of the record of another matter before the Division of Tax Appeals pursuant to State Administrative Procedure Act § 306(4), which provides that "official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." Courts of the State of New York may take judicial notice of their own record of the proceeding of the case before them, the records of cases involving one or more of the same parties or the records of cases involving totally different parties (*Berger v. Dynamic Imports, Inc.*, 51 Misc 2d 988 [1966]; 57 NY Jur 2d, Evidence and Witnesses, § 47). The record of the proceeding before the Division of Tax Appeals of which official notice is being taken is *Matter of Winners Garage, Inc.*, NYS Division of Tax Appeals, ALJ Unit, January 7, 2010, a copy of which was duly served on petitioner. (*Matter of Kolovinas*, Tax Appeals Tribunal, December 28, 1990).

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

At the outset, the Administrative Law Judge reviewed the applicable law. Tax Law

§ 1134(a)(4) provides, in pertinent part, as follows:

(B) Where a person files a certificate of registration for a certificate of authority under this subdivision and in considering such application the commissioner ascertains that (i) any tax imposed under this chapter . . . has been finally determined to be due from such person and has not been paid in full, [or] (ii) a tax due under this article or any law, ordinance or resolution enacted pursuant to the authority of article twenty-nine of this chapter has been finally determined to be due from an officer, director, partner or employee of such person . . . has not been paid . . . , the commissioner may refuse to issue a certificate of authority (*see also*, 20 NYCRR 539.3[a][1],[2]).

The Administrative Law Judge observed that, upon receipt of petitioner's application to renew its sales tax certificate of authority, the Division found that petitioner had an outstanding tax liability, notice number L-031573327-9, a fixed and final assessment that emanated from an audit of petitioner for the period December 1, 2004 through August 31, 2007, stating additional tax of \$211,907.10 plus penalty and interest.

Accordingly, on September 21, 2009, the Division issued to petitioner the Notice of Proposed Refusal to Renew a Sales Tax Certificate of Authority.

Petitioner argued below that the Division's proposed refusal to renew should be denied because there exists no tax finally determined to be due from assessment number L-031573327-9. This assertion was based on petitioner's claim that it had properly petitioned that Notice of Determination and was never afforded a hearing pursuant to Tax Law § 1138(a)(1). Petitioner raised two specific challenges to the assessment. First, petitioner argued that it never received the subject Notice of Determination. Second, petitioner stated that, even if the notice was properly sent to it, the company clearly requested a conciliation conference in its response to the Statement of Proposed Audit Change. Petitioner argued its belief that it was a proper request that should

have tolled the 90-day period in which the notice became a fixed and final assessment. The Administrative Law Judge rejected all of petitioner's arguments for the following reasons.

The Administrative Law Judge noted that Tax Law § 1138(a)(1) provides that the notice of determination shall be the assessment of the amount of tax specified unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of that notice. The Administrative Law Judge also pointed out that, in the alternative, the statute permits a taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) following the issuance of a Notice of Determination so long as that same 90-day time period to file a petition for a hearing with respect of such notice has not elapsed (Tax Law § 170[3-a][a]).

The Administrative Law Judge observed that it was undisputed that at the time the Notice of Determination was issued, the sales and use tax return for the quarter ended November 30, 2008 was the last return filed by Winners Garage before the notice was issued, and that the address on the Mailing Cover Sheet and the Notice is the same address reported on the sales tax return. Therefore, the Administrative Law Judge found that the Notice was sent to petitioner's last known address. The Administrative Law Judge also noted that further documentation from the USPS established that the Notice was received at the last known address of Winners Garage on February 23, 2009. Therefore, the Administrative Law Judge found that evidence in the record, i.e., the address appearing on petitioner's then last filed sales tax return, the affidavit of Ms. Corina, the request for delivery information and the USPS response, were sufficient to establish that the Notice was delivered to petitioner's last known address.



Based upon a receipt date of February 23, 2009, the Administrative Law Judge found that Winners Garage had 90 days or until May 26, 2009<sup>2</sup> to request a conciliation conference or mail a petition for hearing. The petition was dated and delivered to FedEx Express on October 12, 2009 and received by the Division of Tax Appeals on October 13, 2009. Accordingly, the Administrative Law Judge found that petitioner failed to timely protest the statutory notice and that the Division of Tax Appeals had no jurisdiction over the matter. Therefore, the Administrative Law Judge concluded that the Division of Tax Appeals was precluded from hearing the merits of the case (*see, Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989) and the notice became an assessment of the tax asserted pursuant to Tax Law § 1138(a)(1).

The Administrative Law Judge also noted that a taxpayer's protest filed prior to receiving a Notice of Determination is not an adequate protest (*Matter of West Mtn. v. Dept. of Taxation & Fin.*, 105 AD2d 989 [1984], *affd* 64 NY2d 991 [1985]). The Administrative Law Judge observed that under *West Mountain*, petitioner's note protesting the findings set forth in the Statement of Proposed Audit Change, filed prior to petitioner's receipt of the Notice of Determination, could not function as a petition of the Notice. Therefore, the Administrative Law Judge concluded that petitioner did not timely request a conciliation conference by its response to the Statement of Proposed Audit Change.

Further, the Administrative Law Judge noted that, where a petition is filed before a notice of determination has been issued, the petition must be dismissed because “[r]eview by the Division of Tax Appeals would be premature and meaningless if the Division of Taxation’s assessment was

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<sup>2</sup> The 90<sup>th</sup> day fell on May 24, 2009. As May 24, 2009 was a Sunday and May 25, 2009 was a legal holiday, petitioner had until May 26, 2009 to file its petition.

only a proposed one, subject to change under the internal procedures within the Division of Taxation [citation omitted].” (*Matter of Yegnukian*, Tax Appeals Tribunal, March 22, 1990).

The Administrative Law Judge pointed out that petitioner returned the Statement of Proposed Audit Change almost a month after receiving it, and although this was within the time period prescribed, the Division issued the Notice of Determination due to the impending March 20, 2009 expiration of the period of limitations on assessment. Since petitioner had not returned the consents, which would have further extended this deadline for issuance of a notice of determination, the Division issued the Notice.

The Administrative Law Judge found that the terms of the Notice were clear and unequivocal, even printing the deadline for filing a petition or request for a conciliation conference in bold type, “**5/20/09.**” Therefore, the Administrative Law Judge found that petitioner was placed on notice of its duty to file a petition for hearing or a request for a conciliation conference in response to the Notice of Determination.

The Administrative Law Judge also pointed out that the Notice of Taxpayer Rights, provided to petitioner with the CMS-1 form by the auditor and again with the Notice of Determination, clearly instructed petitioner of what it was expected to do in response to its receipt of the Notice of Determination. Thus, the Administrative Law Judge rejected petitioner’s claim that it did not know that the law required a taxpayer to file a petition or a request for a conciliation conference within 90 days of receiving the Notice of Determination.

Petitioner next argued that the Division did not follow its own guidelines and instructions in handling the audit and timing of the issuance of the Notice of Determination in this matter. In rejecting this argument, the Administrative Law Judge pointed out that we have determined that audit guidelines may be relevant for limited purposes, but such guidelines cannot be elevated above

the terms of the statute (*see, Matter of Veeder*, Tax Appeals Tribunal, January 20, 1994 [criticism of audit methodology]). The Administrative Law Judge noted that guidelines are policy statements and do not have the force and effect of law.

The Administrative Law Judge acknowledged that it was disconcerting that Mr. Rances, the auditor, provided a form CMS-1 to petitioner in response to the returned Statement of Proposed Audit Change, with the added statement that it should be returned to the Queens District Office so that “they” could arrange a conference. However, the Administrative Law Judge found that without clarification of the letter by the author, it could not be determined what Mr. Rances was thinking when directing these statements to petitioner. In any event, the Administrative Law Judge observed that reliance on the advice of an employee of the Division that is contrary to the Tax Law does not provide a defense to the failure to timely file a petition in response to the Notice of Determination.

The Administrative Law Judge also rejected the argument that the Division should be estopped from denying petitioner’s application for renewal of its certificate of authority because of misleading information provided by a Division employee. The Administrative Law Judge noted that the doctrine of estoppel does not apply to government acts absent a showing of exceptional facts, which are absent from this case.

### ***ARGUMENTS ON EXCEPTION***

Petitioner, on exception, argues that the Administrative Law Judge erred in: i) finding that the Division established an adequate basis for refusing to renew its certificate of authority; ii) finding that petitioner’s statement in response to the Statement of Proposed Audit Change did not constitute a timely-filed request for a conciliation conference; and iii) in finding that the petition filed with the Division of Tax Appeals on October 12, 2009 was untimely.

Petitioner seeks a ruling that its petition was timely, and seeks a hearing on the merits.

***OPINION***

The Division issued to petitioner Winners Garage, Inc., of Woodside, New York, a Notice of Determination, assessment no. L-031573327-9, dated February 19, 2009, which assessed sales and use taxes for the period December 1, 2004 through August 31, 2007 in the amount of \$211,907.10, plus penalty and interest.

We reject petitioner's claim that it was confused by the Division's employee, Mr. Rances. We note that the Statement of Proposed Audit Change was sent to petitioner on January 13, 2009. Petitioner responded in writing indicating its disagreement with the tax asserted and requested a form for requesting a conciliation conference be sent. The form was sent to petitioner on February 11, 2009. It was at that time that petitioner was invited by Mr. Rances to fill out the conciliation form and return it to him to schedule that meeting. We note that the record does not show that petitioner took any action in reliance on Mr. Rances' invitation. Specifically, petitioner did not file the request for a conciliation conference with Mr. Rances, so its claim that it relied on the misinformation or misdirection of Mr. Rances is rejected. In fact, from February 11, 2009 (when Mr. Rances sent him the first application for a conciliation conference) until September 30, 2009, petitioner did nothing at all on this issue. It was not until September 30, 2009 that petitioner took any action. On that date, petitioner requested that Mr. Rances send another application form for a conciliation conference. Mr. Rances sent petitioner the second conciliation conference request form and this time properly advised petitioner to file it with BCMS. None was filed. Instead, petitioner filed a petition with the Division of Tax Appeals on October 12, 2009. At that point, any such filing was already untimely. The language on the Notice of Determination stated in bold face type: **"NOTE: You must file the Request for Conciliation Conference or a Petition for a**

**Division of Tax Appeals hearing by 05/20/09.”** At oral argument in this matter, petitioner’s attorney was invited to explain petitioner’s conduct in the face of this language. No adequate explanation was provided.

Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioner has offered no evidence below and no argument on exception that would justify us modifying the determination in any respect.

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

1. The exception of Winners Garage, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Winners Garage, Inc. is denied; and
4. The Division of Taxation’s Notice of Proposed Refusal to Renew a Certificate of

Authority to petitioner, dated September 21, 2009, is sustained.

DATED: Troy, New York  
June 10, 2010

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

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