

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CENTRAL AVENUE AUTOMOTIVE : DETERMINATION
SERVICES, INC., AND MICHAEL PORCELLI AND :
ALBERT PORCELLI AS OFFICERS :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1983 :
through February 28, 1987. :

Petitioners, Central Avenue Automotive Services, Inc., and Michael Porcelli and Albert Porcelli, as officers, 6431 Central Avenue, Glendale, New York 11385, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through February 28, 1987 (File No. 805866).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on August 1, 1990 at 9:15 A.M., with all briefs to be submitted by November 30, 1990. Petitioners appeared by Leopold Kaplan, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Division of Tax Appeals has the discretion to provide a hearing, where petitioners concededly filed their request for a conciliation conference after the expiration of the statute of limitations.

FINDINGS OF FACT

On November 20, 1987, the Division of Taxation ("Division") mailed to petitioners a series of notices of determination and demands for payment of sales and use taxes due, assessing tax, penalty and interest as follows:

<u>Petitioner</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
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Central Avenue Automotive Services, Inc.	12/1/83-2/28/87		\$78,103.09	\$19,470.60	\$25,229.30
Central Avenue Automotive Services, Inc.	6/1/85-2/28/87	--		\$ 3,823.47	--
Michael Porcelli	12/1/83-2/28/87		\$78,103.09	\$19,470.60	\$25,229.30
Michael Porcelli	6/1/85-2/28/87	--		\$ 3,823.47	--
Albert Porcelli	12/1/83-2/28/87		\$78,103.09	\$19,470.60	\$25,229.30
Albert Porcelli	6/1/85-2/28/87	--		\$ 3,823.47	--

The notices of determination were all mailed by United States Post Office certified mail.

The issuance of the notices of determination followed a sales tax audit of Central's books and records. As a result of that audit, a Statement of Proposed Audit Adjustment was sent to Central. By letter dated July 17, 1987, Central's representative requested a hearing with the Division. That letter is addressed to "Department of Taxation and Finance, 97-77 Queens Boulevard, Rego Park, New York 11374." It references "Statement of Proposed Audit Adjustment/June 18, 1987".

On September 15, 1987, a conference was held at the Division's offices with the auditor, his supervisor, Michael Porcelli, and Central's accountant. No agreement was reached as a result of this meeting, and the notices of determination which are the subject of this proceeding were mailed thereafter.

On February 26, 1988, the Division received a Request for Conciliation Conference signed by Michael Porcelli, referencing Central's taxpayer identification number. The date line was altered to read "Re-dated 2/22/88". The request states: "I again request a conciliation conference." The request was sent by certified mail, return receipt requested. The envelope in which the request was received bears a United States Post Office postmark of February 22, 1988, which is 94 days after the mailing of the notices of determination.

Petitioners' attorney sent a letter to the Division dated February 22, 1988, referencing notice number S871120170C (the notice of determination assessing tax, penalty and interest against Michael Porcelli), and stating, in pertinent part:

"I am the attorney for Central Avenue Automotive Services, Inc., the recipient of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, and dated November 20, 1987, photocopies of which are annexed hereto.

It is my understanding that upon receipt of these notices, my client forwarded to your office a request for a conciliation conference (your form TA-9 9/87), together with photocopies of the notices that were received, and as annexed hereto. The request was forwarded within the 90 days set forth on these notices, and to the present date no advice has been received from your department as to place and date of the conciliation conference.

Would you be kind enough to send the notice of conciliation conference to my client at 6431 Central Avenue, Glendale, New York 11385 and a copy to me so that both my client and myself can be informed of the prospective conference date."

The Division issued a conciliation order dated April 22, 1988, dismissing the requests of Central and Michael Porcelli on the ground that their request for a conference was not received within 90 days of the issuance of the notices of determination.¹

Petitioners concede that the request for conference was mailed 94 days after the mailing of the notices of determination. They did not

produce evidence of an earlier request for a conciliation conference referred to in their attorney's letter of February 22, 1988.

CONCLUSIONS OF LAW

A. Petitioners take the position that the Division of Tax Appeals has the discretion to redetermine the tax due regardless of the timeliness of the request for a conciliation conference.

In support of their position, petitioners cite the following provisions of the Tax Law:

"Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same." (Tax Law § 1138[a][1].) (Emphasis added.)

"Such determination shall finally and irrevocably fix the tax and liability for the tax with respect to such person unless such person, within ninety days after the giving of notice of such determination, shall apply to the tax commission for a hearing. The tax commission may, nevertheless, of its own motion, redetermine such determination of tax or liability for tax.... Furthermore, the tax commission may, of its own motion, abate on behalf of any such person, any part of the tax determined to be erroneous or excessive whether or not such tax had become finally and irrevocably fixed with respect to such person but no claim for abatement

¹There is no evidence in the record that Albert Porcelli filed a separate request for a conciliation conference or request for a hearing.

may be filed by any such person." (Tax Law § 1138[a][3][B].) (Emphasis added.)

Petitioners argue that the Tax Appeals Tribunal has the same authority as the Commissioner to redetermine tax due on its own motion. This position is incompatible with the wording of Tax Law § 1138(a)(1) which clearly differentiates between the Commissioner of Taxation and Finance and the Division of Tax Appeals. The jurisdiction of the Division of Tax Appeals is limited by Tax Law § 2006(4) which provides that the Tax Appeals Tribunal has the power and duty:

"To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter. Where such a request is made by a person seeking review of taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing to review such liability."

B. The Bureau of Conciliation and Mediation Services is responsible for providing conciliation conferences at the option of the taxpayer (Tax Law § 170[3-a][a]). A request for a conference suspends the running of the period of limitations for the filing of a petition requesting an administrative hearing (Tax Law § 170[3-a][b]). Since petitioners' request for a conciliation conference was not mailed until after 90 days from the issuance of the notices of determination, the hearing right provided by Tax Law § 2006(4) is not available. Moreover, the Tax Appeals Tribunal does not have the power to waive or extend the 90-day statutory period (Matter of Daniel B. Rathgaber, Tax Appeals Tribunal, April 5, 1990).

C. The petition of Central Avenue Automotive Services, Inc., and Michael Porcelli and Albert Porcelli, as officers, is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE