

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CITY LINE AUTO MALL, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 819890  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period Ending August 31, 2003. :

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Petitioner, City Line Auto Mall, Inc., 35-18 43<sup>rd</sup> Street, Long Island, New York 11101, 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 ending August 31, 2003.

The Division of Taxation, appearing by Mark F. Volk, Esq. (Susan Hutchison, Esq., of counsel), brought a motion to dismiss the petition pursuant to 20 NYCRR 3000.9(a)(1)(ii), on the ground that the Division of Tax Appeals lacks subject matter jurisdiction.

The Division of Taxation submitted a Notice of Motion and the affirmation of Susan Hutchison, Esq., in support of its motion. Petitioner, appearing by Ernest H. Hammer, Esq., filed an Affirmation in Response to the Division of Taxation's Dismissal Motion, with attachments, on May 10, 2004, which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings, the affirmation and other documents submitted in support of the motion of the Division of Taxation, and petitioner's response to the motion, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUES***

Whether the petition must be dismissed for lack of subject matter jurisdiction.

***FINDINGS OF FACT***

1. City Line Auto Mall, Inc., (“petitioner”) filed a Chapter 11 bankruptcy petition on September 11, 2003.
2. The Division of Taxation (“Division”), Bankruptcy Section, issued a Pre-Petition Proof of Claim, dated January 27, 2004, to the United States Bankruptcy Court, Eastern District of New York, which listed, among other secured and unsecured liabilities, an unsecured priority tax liability of petitioner in the amount of \$212,587.50 plus interest.
3. The Division files a Pre-Petition Proof of Claim with the United States Bankruptcy Court for all claims that have arisen prior to the date of the filing of the bankruptcy petition. The Division’s claim as referenced under audit number X352877176-9 in the Pre-Petition Proof of Claim is an estimate of the amount of tax, penalty and interest that may be due under an open audit. The Division anticipated that it would be issuing a formal assessment, i.e., a Notice of Determination, in the near future.
4. Petitioner filed a petition with the Division of Tax Appeals on or about February 24, 2004 contesting the Pre-Petition Proof of Claim, specifically Notice No. X352877176-9 in the amount of \$212,587.50, stating that the audit had not yet been conducted.
5. The Division brought this motion to dismiss on the basis that the Division of Tax Appeals lacks subject matter jurisdiction inasmuch as no formal assessment or notice giving the petitioner a right to a hearing before the Division of Tax Appeals has been issued by the Division of Taxation.
6. Petitioner maintains that the Division’s Pre-Petition Proof of Claim reveals an audit assessment in the amount of \$212,587.50, plus penalty and interest that is clearly appealable and properly reviewed by the Division of Tax Appeals. On that basis, petitioner opposes the

Division's motion to dismiss and requests that, pursuant to petitioner's FOIL request, the Division be directed to serve and file its entire record pertaining to the subject assessment.

***CONCLUSIONS OF LAW***

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a notice of determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such determination "shall finally and irrevocably fix the tax" 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 the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. The Division correctly notes that Tax Law § 2008 provides a right to commence a proceeding in the Division of Tax Appeals by filing a petition "protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or a credit application . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law."

C. Petitioner claims that his protest of the Division's Pre-Petition Proof of Claim should be considered a valid protest of Notice No. X352877176-9, giving the Division of Tax Appeals subject matter jurisdiction. However, in considering whether a petition is timely filed, it is well settled that a petition which is filed before the issuance of the notice of determination must be

dismissed as premature (*Matter of West Mountain Corp. v. State Dept. of Taxation & Fin.*, 105 AD2d 989, 482 NYS2d 140, *affd* 64 NY2d 991, 489 NYS2d 62 [where it was held petitioner's protest of the Division's statement of proposed adjustment cannot serve to supplant the statutory requirement that a hearing be requested within 90 days of the issuance of the Division's notice of determination]; *Matter of Upland, Inc.*, Tax Appeals Tribunal, April 12, 1990; *Matter of Yegnukian*, Tax Appeals Tribunal, March 22, 1990). The Pre-Petition Proof of Claim is merely an estimate of the amount of tax, penalty and interest that may be due under an open audit where a formal notice of amounts due has not yet been issued. It does not take the place of the notice requirement dictated by the statute (Tax Law § 1138[a][1]). Where a petition has been 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 only a proposed one, subject to change under the internal procedures within the Division of Taxation [citation omitted]" (*Matter of Yegnukian, supra*). The position of the Tax Appeals Tribunal with respect to premature filing of a petition is consistent with the court review of agency actions provided for by Article 78 of the Civil Practice Law and Rules (CPLR) which allows review only of final agency acts (CPLR 7801; *see also, Matter of Top Tile Bldg. Supply Corp. v. New York State Tax Commn.*, 105 AD2d 936, 481 NYS2d 903, *affd* 65 NY2d 895, 493 NYS2d 311). To diverge from this general principle would disrupt the entire process in place to review actions of the Division of Taxation.

Accordingly, the Division of Tax Appeals does not have jurisdiction over this matter.

D. It is noted that petitioner is not foreclosed from asserting its rights pursuant to Tax Law § 1138(a)(1) to file a petition and request a hearing once a Notice of Determination is issued.

E. Accordingly, the Division of Taxation's motion to dismiss the petition is granted, and the petition of City Line Auto Mall, Inc., is dismissed.

DATED: Troy, New York  
August 5, 2004

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE