

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BEVERLY HILLS AUTO GROUP CORP. : ORDER
 : DTA NO. 822345
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, 2000 through August 31, 2003. :

Petitioner, Beverly Hills Auto Group Corp., 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, 2000 through August 31, 2003.

On June 30, 2008, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On July 21, 2008, petitioner, appearing by Hankin, Handwerker & Mazel, PLLC (Mark L. Hankin, Esq., of counsel), filed written comments in response to the Notice of Intent. On July 30, 2008, 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 July 30, 2008. After due consideration of the documents and arguments submitted, Catherine M. Bennett, 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, Beverly Hills Auto Group, Corp., timely filed a request for a conciliation conference dated May 3, 2007 with the Bureau of Conciliation and Mediation Services (BCMS) in protest of statutory assessment No. L-028347789-4.

2. Petitioner's conciliation conference was held on December 19, 2007. Petitioner was represented at the conference by Mark L. Hankin, Esq.

3. BCMS subsequently issued to petitioner a Conciliation Order (CMS No. 219193) dated March 21, 2008, which denied petitioner's request and sustained the Division of Taxation's (Division) statutory assessment.

4. Petitioner then filed a petition with the Division of Tax Appeals, which was stamped as having been hand delivered on June 20, 2008, seeking an administrative hearing to review the Conciliation Order dated March 21, 2008. Official notice is taken pursuant to Section 306 of the State Administrative Procedure Act that a review of the records of the Division of Tax Appeals in the present case reveals no receipt of a petition from petitioner by regular mail or any other conveyance other than by hand delivery on June 20, 2008.

5. On June 30, 2008, 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 March 21, 2008, but that the petition was not filed, by hand delivery, until June 20, 2008, or 91 days later.

6. 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 March 21, 2008, and a copy of the subject March 21, 2008 Conciliation Order.

7. 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.

8. 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.

9. 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.

10. 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 and delivers them to the BCMS clerk assigned to process conciliation orders.

11. 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.

12. 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."

13. 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 "3/21/08" is written in the upper right corner of each page of the CMR

14. 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.

15. The copy of the five-page CMR attached to Mr. Farrelly's affidavit contains a list of the conciliation orders issued by the Division on March 21, 2008. This CMR lists 45 certified control numbers, taking into account 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.

16. Information regarding the Conciliation Order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0674 9336 is reference/CMS number 000219193, along with petitioner's name and address as set forth on the request for conciliation conference.

17. 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 0674 9114 is reference/CMS number 000219193 along with the name and address of petitioner's representative as follows:

Mark L. Hankin
Hankin Handwerker & Mazel PLLC
7 Penn Plaza-Suite 904 New York NY 10001

18. 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.

19. In this case, the postal employee affixed a postmark dated March 21, 2008, to each page of the five-page CMR. The postal employee also wrote his or her signature and the number "45" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

20. 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.

21. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerzee states that on March 21, 2008, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Beverly Hills Auto Group Corp., 6107 Northern Blvd., Woodside, NY 11377-2241, and a piece of certified mail addressed to Mark L. Hankin, Hankin Handwerker & Mazel PLLC, 7 Penn Plaza, Suite 904, New York, NY 10001, 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 March 21, 2008 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 March 21, 2008.

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 assessment 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 5), 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; 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. Hankin, on March 21, 2008. Specifically, this document lists

certified control numbers with corresponding names and addresses and bears USPS postmarks dated March 21, 2008. Additionally, a postal employee wrote “45” 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 served or received by the company, and as a result, petitioner’s time to file its petition was tolled. It is clear from the evidence that the Division properly mailed the Order to petitioner and the presumption of delivery has been met by the Division’s proof of its standard procedure and that its standard procedure was followed in this case.

G. Petitioner also contends that the petition was served by regular mail on June 19, 2008, in addition to being served personally at the Division of Tax Appeals on June 20, 2008. A thorough review of the records at the Division of Tax Appeals shows no receipt of the petition by regular mail, or any other conveyance other than by the hand delivery on June 20, 2008. Even if given an opportunity for a hearing to bring forth testimony of such mailing, case law is well established that testimony concerning the mailing of documents by taxpayers is not sufficient to prove that the petition was mailed to the Division by June 19, 2008 (*see Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995, *confirmed* 222 AD2d 28, 645 NYS2d 352 [1996]; *Matter of Schumacher*, Tax Appeals Tribunal, February 9, 1995; *Matter of Miller v. United States*, 784 F2d 728, 86-1 US Tax Cas ¶ 9261 [1986]; *Matter of Sipam*, Tax Appeals Tribunal, March 10, 1988).

H. As noted previously, the Division has met its burden of proving that the petition in issue was filed on June 20, 2008. This date falls one day 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]). Thus, the Division of Tax Appeals has no jurisdiction to hear the merits of this matter.

I. The petition of Beverly Hills Auto Group Corp. is hereby dismissed.

DATED:Troy, New York
October 23, 2008

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE