STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

WINNERS GARAGE, INC.

: DETERMINATION

for Review of a Proposed Refusal to Renew a Certificate of Authority under Articles 28 and 29 of the Tax Law for for the Period Ended August 31, 2007. : DTA NO. 823285

Petitioner, Winners Garage, Inc., filed a petition to review a Notice of Proposed Refusal to Renew a Certificate of Authority under Articles 28 and 29 of the Tax Law. Said petition was received by the Division of Tax Appeals on October 13, 2009 and a hearing was scheduled for October 21, 2009.

Pursuant to Tax Law § 1134(a)(4)(D), an expedited hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 21, 2009 at 10:30 A.M., with all briefs to be submitted by March 1, 2010, at the direction, and with the permission, of petitioner. Petitioner appeared by Mr. Lev Wolkowicki, its corporate vice president. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Hall, of counsel).

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

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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 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.

7. 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.

8. 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.)

9. 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.)

10. 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.

11. 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 U.S. 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.

12. Heidi Corina was a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepared U.S. Postal Service 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.

13. 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.[1]

CONCLUSIONS OF LAW

A. Tax Law § 1134(a)(4) provides, in pertinent part, as follows:

---

[1]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, 274 NYS2d 537; 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. (***Trifon Kolovinas***, Tax Appeals Tribunal, December 28, 1990.)

> (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 or any related statute, as defined in section eighteen hundred of this chapter, has been finally determined to be due from such person and has not been paid in full, (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].)

B. Upon receipt of petitioner's application to renew its sales tax certificate of authority, the Division of Taxation found that it 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.

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

C. Petitioner contends that the Division's proposed refusal to renew should be denied because there exists no tax finally determined to be due from the assessment number L-031573327-9, because it properly petitioned that Notice of Determination and was never afforded a hearing pursuant to Tax Law § 1138(a)(1). Petitioner raises two specific challenges to the assessment. The first is that it never received it and the second is 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 Adjustment, which it believes was a proper request that should have tolled the 90-day period in which the notice became a fixed and final assessment. Petitioner's arguments are in error for the reasons set out below.

Pursuant to Tax Law § 1138(a)(1) the notice of determination "shall be an 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 the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is 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).

D. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (***Id.***)

E. It is undisputed that at the time the Notice of Determination was issued, Winners Garage's sales and use tax return for the quarter ended November 30, 2008 was the last return filed by it before the notice was issued. The address on the Mailing Cover Sheet and the notice is the same address reported on the sales tax return. Thus, the notice was sent to petitioner's last known address. Although an exact mailing date cannot be established, further documentation from the USPS establishes that the notice was received at Winners Garage's last known address on February 23, 2009. It follows that the Division has introduced adequate proof through the

affidavit of Ms. Corina, the request for delivery information and the USPS response that the notice was delivered to petitioner's last known address.

F. Based upon a receipt date of February 23, 2009, Winners Garage had 90 days or until May 26, 2009[2] 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. It follows that the request was untimely, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (***see Matter of Cato***; ***Matter of DeWeese***; ***Matter of Sak Smoke Shop***) and the notice became an assessment of the tax asserted pursuant to Tax Law § 1138(a)(1).

G. Petitioner did not timely request a conciliation conference by its response to the Statement of Proposed Audit Change. The law is well settled that a taxpayer's protest filed prior to receiving a Notice of Determination is not an adequate protest (***Matter of West Mountain v. Department of Tax & Finance*** (105 AD2d 989, 482 NYS2d 140, ***affd*** 64 NY2d 991, 489 NYS2d 62). The court in ***West Mountain*** held that a timely filed letter protesting a statement of proposed audit adjustment could not supplant the statutory requirement that a petition for a hearing be filed within 90 days after issuance of the Notice of Determination. 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.

Further, where a petition has been filed before a notice of determination has been issued, the petition must be dismissed because "review by the Division of Tax Appeals would be

---

[2] The 90th day, May 24, 2009, was a Sunday and the 91st day, May 25, 2009, was a legal holiday, Memorial Day, so petitioner had until May 26, 2009 to file its petition.

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,*** Tax Appeals Tribunal, March 22, 1990.)

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 expiration of the consent to extend the period of limitations on assessment on March 20, 2009. 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 terms of the notice were clear and unequivocal, even printing the deadline for filing a petition or request for conference in bold type, "**5/20/09**" (***See*** Finding of Fact 8). Therefore, petitioner was placed on notice of its duty to file a petition for hearing or request for conference in response to the Notice of Determination.

In addition, the Notice of Taxpayer Rights, provided to petitioner with the CMS-1 by the auditor and again with the Notice of Determination, clearly instructed petitioner of what it was expected to do in response to receipt of the Notice of Determination. Thus, petitioner cannot now say it did not know that it was under a duty to file a petition or request for conference within 90 days of receiving the Notice of Determination.

H. Petitioner contends that the Division did not follow its own guidelines, publications and instructions in handling the audit and timing of the issuance of the Notice of Determination in this matter. While the Tax Appeals Tribunal has determined that audit guidelines which were in effect and therefore applicable to a specific audit period may be relevant for limited purposes (***see Matter of Veeder***, Tax Appeals Tribunal, January 20, 1994 [criticism of audit methodology];

Matter of Tweed, Tax Appeals Tribunal, May 23, 1996 [aid in interpretation of statutory term]), it has not elevated reliance on them above other, more authoritative sources. The guidelines are indications of policy (Webster's Ninth New Collegiate Dictionary 541 [1983]) and do not have the legal force and effect of a statute or regulation.

An example is found in Tax Law § 3030 (c)(5)(B)(iii), which provides, in pertinent part:

> the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow the applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

Clause (iv) further provides:

> the term 'applicable published guidance' means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and
>
> (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.

Notably missing from this list of guidance were the Division's audit guidelines, instructions and general publications, which the Legislature did not hold in the same regard as a published source of guidance in administrative proceedings.

I. It is somewhat 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, without clarification of the letter by the author, it cannot be determined what Mr. Rances was thinking when directing these statements to petitioner. Adding to the confusion was his letter of September 30, 2009, in which he directed Mr. Wolkowicki to send the request for conference to the address in Albany set forth on the form.

Reliance on the advice of an employee of the Division to the exclusion of the Tax Law does not provide a defense to not timely filing a petition in response to the Notice of Determination. Petitioner does not have the right to rely on the auditor's misleading statements as it has no right to rely on statements that are contrary to law (***Heckler v. Community Health Services of Crawford County***, 467 US 51).

Nor should the Division be estopped from denying petitioner's application for renewal of its certificate of authority because of misleading information provided by a Division employee. Generally, the doctrine of estoppel does not apply to government acts "absent a showing of exceptional facts which require its application to avoid a manifest injustice" (***Matter of Harry's Exxon Service Station***, Tax Appeals Tribunal, December 6, 1988) and should be applied with the "utmost caution and restraint" where a "profound and unconscionable injury" has resulted from reliance upon the government's action (***Schuster v. Commr.***, 312 F2d 311, 317). Moreover, estoppel is generally unavailable to prevent the correction of a mistake of law since ruling otherwise would subordinate the authority of the Legislature to the acts of "wayward or unknowledgeable" officials (***Schuster v. Commr.***).

J. Petitioner objected to acceptance of the Division's brief in this matter because it was not submitted by the deadline established for its submission at hearing, to wit, February 15, 2010. However, that date was a public holiday, Presidents' Day, and the brief was mailed by certified mail, and therefore filed, on the next business day, February 16, 2009. Therefore, the brief was timely and was accepted. (20 NYCRR 3000.22[c].)

K. The petition of Winners Garage, Inc. is denied and the Division of Taxation's Notice of Proposed Refusal to Renew petitioner's Certificate of Authority, dated September 21, 2009, is sustained.

DATED: Troy, New York
March 18, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE