

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

ELIZABETH HAMMAR
D/B/A LEXINGTON MOTOR CARS

DETERMINATION

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 September 1, 1981 :
through November 30, 1984.

Petitioner, Elizabeth Hammar d/b/a Lexington Motor Cars, 2727 Broadway, Cheektowaga, New York 14225, 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 September 1, 1981 through November 30, 1984 (File No. 65780).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 28, 1987 at 9:15 A.M., with all briefs to be submitted by June 23, 1987. Petitioner appeared by Martin Sanders, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the petition for redetermination herein was timely filed.

FINDINGS OF FACT

1. On August 20, 1985, following an audit, the Audit Division issued to petitioner, Elizabeth Hammar d/b/a Lexington Motor Cars, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1981 through November **30**, 1984, asserting \$168,394.31 in additional tax due

plus penalty and interest of \$98,016.80, for a total amount due of \$266,411.11. Said notice of determination was mailed to petitioner by certified mail on August 20, 1985.

2. On November 19, 1985, Tax Appeals Bureau received the petition of petitioner herein protesting the aforementioned notice of determination. The petition was signed by petitioner's representative and was dated November 14, 1985. The petition was mailed by metered mail which also bore the date of November 14, 1985.

3. Petitioner received the notice of determination on August 22, 1985.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides that *a* notice of determination finally and irrevocably fixes the tax unless the person against whom the tax is assessed makes an application for hearing within 90 days "after the giving of notice of such determination". Additionally, section 1147(a)(1) of the Tax Law provides that "[a]ny period of time which is determined according to the provisions of [Article 28] by the giving of notice shall commence to run from the date of mailing of such notice." (Emphasis supplied.) Accordingly, the tax assessed herein against petitioner is final unless petitioner filed a petition protesting said assessment within 90 days of August 20, 1985, the date of mailing of the notice.

B. That Tax Law § 1147(a)(2) provides, in pertinent part:

"If any return... or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be

filed..., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.... If any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section." (Emphasis supplied.)

C. That, during the period at issue, 20 NYCRR 601.3(c) provided in pertinent part:

"(c) Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, N.Y. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope. Where a machine metered stamp is used on the envelope, the petition shall be deemed filed upon receipt." (Emphasis supplied.)

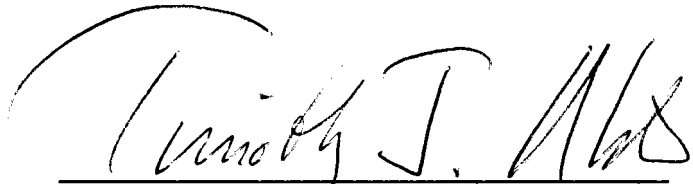
D. That pursuant to section 1147(a)(2) of the Tax Law and 20 NYCRR 601.3(c), for a petition to be timely, it must have been actually delivered to the Tax Commission within ninety days after a notice is properly mailed, or it must have been delivered in an envelope which bears a United States postmark of a date within the ninety day period (see Matter of Micro-Carburetor Corporation, State Tax Commission, June 30, 1986).

E. That petitioner's November 14, 1985 petition was not delivered to the Tax Commission within the prescribed ninety day period. Said petition was, in fact, delivered to the Tax Commission 91 days from the date of mailing of the notice; it was mailed by way of metered mail; and did not bear a United States postmark. Accordingly, petitioner failed to timely file a petition protesting the assessment.

F. That the petition of Elizabeth Hammar d/b/a Lexington Motor Cars is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 20, 1985, is sustained.

DATED: Albany, New York

SEP 17 1987


ADMINISTRATIVE LAW JUDGE