

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DISCOVERY AUTOMOTIVE, INC. : DECISION
 : DTA NO. 825633
 :
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 June 1, 2006 through :
August 31, 2009. :

Petitioner, Discovery Automotive, Inc., filed an exception to the order of the Administrative Law Judge issued on November 27, 2013. Petitioner appeared by Bernard Block, EA. The Division of Taxation appeared by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely petition for a hearing before the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below. We also make two additional findings of fact, numbered 12 and 13 herein.

1. The Division of Taxation (Division) issued to petitioner, Discovery Automotive, Inc., at its Canandaigua, New York, address, a notice of determination, numbered L-037314075 and dated February 13, 2012, assessing additional sales and use taxes due in the amount of \$189,071.63, plus penalty and interest, for the period June 1, 2006 through August 31, 2009. By its request for a conciliation conference, dated February 18, 2012, petitioner protested the notice.

2. The Division's Bureau of Conciliation and Mediation Services (BCMS) issued to petitioner a conciliation order (CMS No. 250455), dated January 18, 2013, denying petitioner's request and sustaining the notice of determination. A letter from the conciliation conferee that accompanied the conciliation order stated that, "pursuant to section 170.3-a of the Tax Law, this order will be binding unless you file a petition within thirty (30) days from the date of this order with the Division of Tax Appeals." Petitioner challenged this order by filing a petition with the Division of Tax Appeals. The envelope in which the petition was mailed bears a United States Postal Service (USPS) stamp, dated April 16, 2013, and it, as well as the petition, is date stamped as received by the Division of Tax Appeals on April 18, 2013.

3. To show proof of proper mailing of the conciliation order on January 18, 2013, the Division provided the following: (i) an affidavit, dated August 21, 2013, of John E. Matthews, Esq.; (ii) an affidavit, dated August 15, 2013, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (iii) an affidavit, dated August 13, 2013, of Robert Farrelly, the assistant supervisor of the BCMS; (iv) the "Certified Record for Presort Mail - BCMS Cert. Letter" (CMR); and (v) a copy of petitioner's request for conciliation conference and the conciliation order in response thereto.

4. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS Data Processing Services Unit prepared and

forwarded the conciliation orders, together with the accompanying cover letters, to the particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward the order and cover letter to the BCMS clerk assigned to process conciliation orders.

5. 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 (AFP) Unit, which in turn assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code for each order. The AFP Unit generates a CMR listing those taxpayers and representatives to whom conciliation orders are being sent on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO," and the BCMS numbers are recorded under the heading "Reference No." Each Reference No. is preceded by three zeroes. The AFP Unit assigns the CMR and cover sheet data to a printer located in BCMS and these documents are printed there and delivered to the BCMS clerk assigned to process conciliation orders.

6. The BCMS clerk's regular duties included associating each cover sheet, conciliation order and covering letter, and verifying the names and addresses of taxpayers and their representatives, per BCMS records, with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter and conciliation order into a three-windowed envelope such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear. The "Total Pieces and Amounts" is indicated on the last page of the CMR. The BCMS clerk is to stamp the bottom left corner of each page, "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT," and to stamp the bottom right corner of the last page, "POST OFFICE

Hand write total # of pieces and initial. Do Not stamp over written areas.” The clerk then writes on the top of each page of the CMR the date that the conciliation orders were mailed.

7. In this instance, certified control number 7104 1002 9730 1447 6675 was assigned to the conciliation order to be mailed to petitioner, Discovery Automotive, Inc., and certified control number 7104 1002 9730 1447 6682 was assigned to the conciliation order to be mailed to petitioner’s representative, Bernard Block. The CMS reference number is, in each instance, 000250455. This information appears on page three of the four-page CMR pertaining to these mailings. The address 2866 County Rd #10, Canandaigua, NY 14424 appears with respect to petitioner, and the address 6735 County Rd #30, Bloomfield, NY 14469 appears with respect to Mr. Block. The date “1-18-13” is handwritten in the upper right corner of each of the four pages of the CMR.

8. Under the Division’s standard mailing procedures, the conciliation orders and accompanying CMR are then picked up in BCMS by an employee of the Division’s Mail Processing Center (Center) and deposited in the “Outgoing Certified Mail” basket in the Center. A member of the staff, in turn, weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. In turn, a member of the Center staff delivers the sealed, stamped envelopes to a branch of the USPS in Albany, New York for mailing. A postal employee then affixes a postmark and his or her initials or signature to the CMR to indicate receipt by the post office. 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 Center, each CMR would be picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back

to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

9. Review of the CMR in this case reveals that a USPS employee initialed each page of the CMR, handwrote and circled the number “35” on the last page of the CMR to indicate the number of pieces of mail received by the USPS, and affixed the postmark of the Stuyvesant Plaza branch office of the USPS, dated January 18, 2013, to each page of the CMR, all in accordance with the usual procedures requested by the Division’s Mail Processing Center.

10. The facts set forth above in Findings of Fact 4 through 9 were established through the affidavits of Robert Farrelly and Bruce Peltier. Mr. Farrelly was employed as the Assistant Supervisor of Tax Conferences for BCMS, his duties included supervising the preparation and mailing of conciliation orders, and he is fully familiar with the procedures involved therewith. Mr. Peltier was employed as a Principal Mail and Supply Supervisor in the Division’s Mail Processing Center, his duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS, and he is fully familiar with such procedures.

11. The record of this motion includes a copy of the conciliation order, bearing CMS No. 250455, allegedly mailed by certified mail to petitioner, Discovery Automotive, Inc., as well as to petitioner’s representative, on January 18, 2013. The record also includes a copy of petitioner’s request for conciliation conference, dated February 18, 2012, which lists the same address for petitioner and for petitioner’s representative as are set forth above.

12. The February 13, 2012 notice of determination issued to petitioner asserted fraud penalty pursuant to Tax Law § 1145 (a) (2).

13. The Administrative Law Judge’s order in this matter was issued following the issuance of a notice of intent to dismiss petition by the Division of Tax Appeals. Petitioner’s

representative submitted a letter in opposition to dismissal. In the letter, he asserted that, on January 18, 2013, he spoke to the conciliation conferee who advised him that he had 90 days to file the petition.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division has the authority to issue notices of determination for additional tax and penalties, and that such penalties may include a fraud penalty pursuant to Tax Law § 1145 (a) (2). The Administrative Law Judge also noted that, if fraud penalties are asserted and a taxpayer first contests the notice through BCMS, such taxpayer must file a petition with the Division of Tax Appeals seeking a revision of the determination within 30 days of the mailing of the relevant conciliation order.

The Administrative Law Judge observed the standards regarding a notice of intent to dismiss petition and the timeliness of a petition. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the conciliation order by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing standards. The Administrative Law Judge also found that petitioner failed to prove its contention that it relied on erroneous advice given by the conciliation conferee regarding the deadline for filing the petition. Additionally, the Administrative Law Judge determined that, even if petitioner had so relied, such reliance would be unreasonable. Consequently, the Administrative Law Judge held that petitioner failed to timely file its petition, and that the Division of Tax Appeals lacked jurisdiction to consider this matter. The Administrative Law Judge thus dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner continues to argue, as it did below, that it was given erroneous advice by the conciliation conferee. Specifically, petitioner argues that the conferee advised its representative that petitioner had 90 days to file its petition with the Division of Tax Appeals; that it followed the conferee's advice and met the 90-day deadline; and that, therefore, its petition should be deemed timely.

The Division asserts that the Administrative Law Judge correctly decided the relevant issues and that the order be affirmed.

OPINION

Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalty due under Articles 28 and 29. If a taxpayer requests a conciliation conference with BCMS to seek revision of such notice, such taxpayer generally has 90 days from the date of issuance of the conciliation order to further contest the notice by filing a petition with the Division of Tax Appeals (*see* Tax Law § 170 [3-a] [e]). Under certain circumstances, however, including the assertion of a fraud penalty, the limitations period for filing such a petition is reduced to 30 days (*see* Tax Law § 170 [3-a] [e], [h]). Here, the subject notice of determination asserted a fraud penalty pursuant to Tax Law § 1145 (a) (2). Accordingly, pursuant to Tax Law § 170 (3-a) (e), petitioner had 30 days from the issuance of the conciliation order sustaining the statutory notice to file a petition with the Division of Tax Appeals. A conciliation order is considered issued when it is mailed to the taxpayer (*see Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the statutory time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

When the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of the mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). "To meet its burden of proof, the Division is required to show proof of a standard procedure used by it, and must further show proof that the standard procedure was followed in this instance" (*Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011).

We agree with the Administrative Law Judge's conclusion that the Division met its burden of proof and established that the conciliation order at issue was properly mailed to petitioner and its representative on January 18, 2013. More specifically, we find that the properly completed CMR and the affidavits of Mr. Farrelly and Mr. Peltier were sufficient to prove such mailing (*see Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011).

As indicated in the Administrative Law Judge's order, petitioner concedes that it received the January 18, 2013 conciliation order. Petitioner's representative asserts, however, that on January 18, 2013, he had a telephone conversation with the conciliation conferee wherein the conferee advised him that petitioner had 90 days to file a petition with the Division of Tax Appeals. Petitioner thus contends that it relied to its detriment on erroneous advice from a Division employee and that its petition should therefore be deemed timely filed.

Regarding this contention, we first note that we agree with the Administrative Law Judge that petitioner has not proven that the conciliation conferee gave its representative erroneous advice, as claimed. The evidence of this contention in the record consists solely of petitioner's representative's unsworn assertion, made in a letter filed in response to the notice of intent to dismiss petition.

We also note that petitioner's representative offered certain documents with the exception, purporting to be handwritten telephone call logs and notes, that were not part of the record before the Administrative Law Judge. Such documents were offered to prove petitioner's contention that the conferee gave erroneous advice. This Tribunal has consistently held, however, that we will not consider evidence offered with an exception if such evidence was not part of the record before the Administrative Law Judge (*see e.g., Matter of Strohli*, Tax Appeals Tribunal, December 19, 1996; *Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *confirmed sub nom. Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.*, 116 AD3d 1176 [2014]). Accordingly, we do not consider the documents offered by petitioner with the exception.

Even if petitioner had proven that the conciliation conferee provided erroneous advice, as claimed, we have previously held that reliance on orally communicated erroneous advice regarding a refund claim limitations period was unreasonable given the "clear and unequivocal" language in the relevant statute of limitations (*Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). We have also determined that reliance on erroneous oral advice regarding a deadline for filing a petition was unreasonable where such purported advice was contrary to the "explicit language" contained in an official written notice of the Division of Taxation related to such deadline (*Matter of Lamanna*, Tax Appeals Tribunal, March 31, 2003). In the present matter, the purported erroneous advice is contrary to both the relevant statutory language (i.e., Tax Law § 170 [3-a] [e], [h]) and the language contained in the January 18, 2013 letter accompanying the subject conciliation order. Hence, even if petitioner had shown that the conferee gave erroneous advice to petitioner's representative, as claimed, any reliance on such advice was clearly unreasonable.

Accordingly, petitioner had 30 days from the January 18, 2013 date of issuance of the conciliation order to file a petition with the Division of Tax Appeals. The petition was filed on April 16, 2013. This date falls well beyond the 30-day period of limitations for filing a petition under Tax Law § 170 (3-a) (e). The petition was therefore untimely filed and the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

We conclude, therefore, that the Administrative Law Judge properly dismissed the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Discovery Automotive, Inc. is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Discovery Automotive, Inc. is dismissed, with prejudice.

DATED: Albany, New York
July 24, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner