

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>DISCOVERY AUTOMOTIVE, INC.</b>	:	<b>ORDER</b>
for Revision of a Determination or for Refund of	:	DTA NO. 825633
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 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 June 1, 2006 through August 31, 2009.

On June 7, 2013, 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 11, 2013, petitioner, appearing by Bernard Block, EA, submitted a letter in opposition to dismissal. On August 21, 2013, the Division of Taxation, by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), having been granted an extension of time to do so, submitted an affidavit and 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 August 21, 2013. After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following order.

***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***

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 inserts 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.

**CONCLUSIONS OF LAW**

A. Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination for additional tax or penalties due under Articles 28 and 29. Penalties asserted may include a fraud penalty pursuant to Tax Law § 1145(a)(2). A taxpayer may file a petition with the Division of Tax Appeals seeking a revision of such determination, or alternatively, a request for conciliation conference with BCMS, within 30 days of the receipt of the notice of determination when the fraud penalty is assessed (*see* Tax Law § 2008[2][a]; § 170[3-a][h]). Following the issuance of a conciliation order, a taxpayer has 30 days to file a petition with the Division of Tax Appeals (*see* Tax Law § 170[3-a][e]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond the statutory time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). A notice of determination thus becomes an assessment subject to collection unless the taxpayer files a timely petition with the Division of Tax Appeals (Tax Law § 1138[a][1]). In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 30-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. “The standard for reviewing a Notice of Intent To Dismiss Petition is the same as reviewing a motion for summary determination” (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

C. As provided in section 3000.9(b)(1) of the Rules, a motion for summary determination “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented.”

D. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 597 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573, 536 NYS2d 177, 179 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382, 206 NYS2d 879, 881 [1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1992] citing *Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

E. Where the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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). That is, 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 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).

F. In this case, the CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establish the Division's standard mailing procedure. Additionally, the CMR has 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). The Division has thus met its burden of proof and established that the protested Conciliation Order was mailed, as addressed, to petitioner and its representative on January 18, 2013.

G. When an order is found to have been properly mailed by the Division, a presumption arises that it was delivered to the intended recipient (*see Matter of Chung*, Tax Appeals Tribunal, September 22, 2011). That is, "[o]nce the Division has introduced adequate proof to establish a presumption of receipt by the taxpayer, the burden is on petitioner to rebut that presumption by introducing evidence of non-receipt" (*Matter of Deepak*, Tax Appeals, Tribunal, December 22, 2011). In this case, however, petitioner did not introduce evidence of nonreceipt. Rather, petitioner conceded that it received the protested Conciliation Order and further filed a petition with the Division of Tax Appeals. However, in response to the Notice of Intent to Dismiss the petition as being filed beyond the 30-day time limit, petitioner's representative asserts that upon receipt of the Conciliation Order, he contacted the conciliation conferee concerning the 30-day statutory time frame for filing the petition. Petitioner's representative



claims that the conferee advised him he had 90 days to file the petition. Petitioner's representative then filed the petition with the Division of Tax Appeals on April 16, 2013, 88 days after the issuance of the Conciliation Order. In essence, petitioner seeks to circumvent the 30-day period prescribed by Tax Law § 170(3-a)(e) by arguing detrimental reliance on erroneous advice from a Division employee.

H. Initially it is noted that there is nothing in the record to establish that such advice was provided to petitioner's representative by the conciliation conferee. Assuming that such advice was provided, it is well established that in matters contemplating the propriety of a petitioner's reliance on misleading or erroneous instructions received from Division employees, it must first be determined whether such reliance was reasonable (*see Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). The explicit language of the instructions contained in the letter accompanying the conciliation order correctly provided that it would be binding unless petitioner filed a petition with the Division of Tax Appeals within 30 days of the issuance of the conciliation order (*see* Finding of Fact 2). In addition, the alleged advice is "contradicted [by] the explicit language" of Tax Law § 170(3-a)(e) insofar as the protest period set forth in this statute following the issuance of a conciliation order is "clear and unequivocal" (*Matter of Glover Bottled Gas Corp.*). Therefore, it was unreasonable for petitioner to rely on the alleged advice of the conferee (*Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003; *see also Matter of Glover Bottled Gas Corp.*), and petitioner's request for equitable relief on this basis is without merit.

I. Moreover, relying on the alleged advice of an employee of the Division that is contrary to the Tax Law is not a defense to the failure to timely file a petition (*see Matter of Winners Garage*, Tax Appeals Tribunal, June 10, 2010; *Matter of Glover Bottled Gas Corp.*). As the

U.S. Supreme Court stated in *Heckler v. Community Health Servs.*, “those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law” (467 US 51, 63 [1984]; *see also Broz v. Commr.*, 137 TC 46 [2011]). Therefore, the alleged erroneous advice of the conferee, even if established, is insufficient to overcome the requirement of Tax Law § 170(3-a)(e) that petitions filed in protest of conciliation orders be filed with the Division of Tax Appeals within 30 days of being issued.

J. The petition in this matter was filed on April 16, 2013, in excess of the 30-day limitations period. It is firmly established that the deadlines for filing requests or petitions are strictly enforced (*see e.g. Matter of Lamanna; Matter of Standard Notions*, Tax Appeals Tribunal, February 23, 2006). Furthermore, the Division of Tax Appeals has no authority to waive the filing period in particular cases (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). Accordingly, as the petition was untimely filed, the Division of Tax Appeals is without jurisdiction to consider the merits of petitioner’s protest.

K. The petition of Discovery Automotive, Inc., is dismissed.

DATED: Albany, New York  
November 27, 2013

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE