

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CENTRAL AVENUE AUTOMOTIVE SERVICES, INC. :
AND MICHAEL PORCELLI AND ALBERT PORCELLI, : DECISION
AS OFFICERS : DTA No. 805866
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1983 :
through February 28, 1987. :
:

Petitioners Central Avenue Automotive Services, Inc. and Michael Porcelli and Albert Porcelli, as officers, 6431 Central Avenue, Glendale, New York 11385 filed an exception to the determination of the Administrative Law Judge issued on February 28, 1991 with respect to their petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through February 28, 1987. Petitioners appeared by Leopold Kaplan, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Neither party filed a brief on exception. Petitioners' request for oral argument was denied.

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

ISSUE

Whether the Division of Tax Appeals has the discretion to provide a hearing where petitioners concededly filed their request for a conciliation conference after the expiration of the statute of limitations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On November 20, 1987, the Division of Taxation ("Division") mailed to petitioners a series of notices of determination and demands for payment of sales and use taxes due, assessing tax, penalty and interest as follows:

<u>Petition</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
Central Avenue Automotive Services, Inc.	12/1/83-2/28/87	\$78,103.09	\$19,470.60	\$25,229.30
Central Avenue Automotive Services, Inc.	6/1/85-2/28/87	--	\$ 3,823.47	--
Michael Porcelli	12/1/83-2/28/87	\$78,103.09	\$19,470.60	\$25,229.30
Michael Porcelli	6/1/85-2/28/87	--	\$ 3,823.47	--
Albert Porcelli	12/1/83-2/28/87	\$78,103.09	\$19,470.60	\$25,229.30
Albert Porcelli	6/1/85-2/28/87	--	\$ 3,823.47	--

The notices of determination were all mailed by United States Post Office certified mail.

The issuance of the notices of determination followed a sales tax audit of Central's books and records. As a result of that audit, a Statement of Proposed Audit Adjustment was sent to Central. By letter dated July 17, 1987, Central's representative requested a hearing with the Division. That letter is addressed to "Department of Taxation and Finance, 97-77 Queens Boulevard, Rego Park, New York 11374." It references "Statement of Proposed Audit Adjustment/June 18, 1987".

On September 15, 1987, a conference was held at the Division's offices with the auditor, his supervisor, Michael Porcelli, and Central's accountant. No agreement was reached as a result of this meeting, and the notices of determination which are the subject of this proceeding were mailed thereafter.

On February 26, 1988, the Division received a Request for Conciliation Conference signed by Michael Porcelli, referencing Central's taxpayer identification number. The date line

was altered to read "Re-dated 2/22/88". The request states: "I again request a conciliation conference." The request was sent by certified mail, return receipt requested. The envelope in which the request was received bears a United States Post Office postmark of February 22, 1988, which is 94 days after the mailing of the notices of determination.

Petitioners' attorney sent a letter to the Division dated February 22, 1988, referencing notice number S871120170C (the notice of determination assessing tax, penalty and interest against Michael Porcelli), and stating, in pertinent part:

"I am the attorney for Central Avenue Automotive Services, Inc., the recipient of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, and dated November 20, 1987, photocopies of which are annexed hereto.

"It is my understanding that upon receipt of these notices, my client forwarded to your office a request for a conciliation conference (your form TA-9 9/87), together with photocopies of the notices that were received, and as annexed hereto. The request was forwarded within the 90 days set forth on these notices, and to the present date no advice has been received from your department as to place and date of the conciliation conference.

"Would you be kind enough to send the notice of conciliation conference to my client at 6431 Central Avenue, Glendale, New York 11385 and a copy to me so that both my client and myself can be informed of the prospective conference date."

The Division issued a conciliation order dated April 22, 1988, dismissing the requests of Central and Michael Porcelli on the ground that their request for a conference was not received within 90 days of the issuance of the notices of determination.¹

Petitioners concede that the request for conference was mailed 94 days after the mailing of the notices of determination. They did not produce evidence of an earlier request for a conciliation conference referred to in their attorney's letter of February 22, 1988.

OPINION

The Administrative Law Judge determined that the Division of Taxation (hereinafter the "Division") does not have the discretion to redetermine tax due on its own motion; that the

¹There is no evidence in the record that Albert Porcelli filed a separate request for a conciliation conference or request for a hearing.

failure of petitioners to timely file a request for a conciliation conference deprives petitioners of a right to a hearing; and that the Division is without authority to grant such a hearing.

Petitioners, on exception, reassert their argument at hearing that Tax Law § 1138(1) provides the Division with the authority to redetermine tax on its own motion and that the Division has the authority to grant petitioners a hearing. Petitioners assert that the fact that the request for conference was only four days late is a persuasive factor to be taken into consideration with regard to their plea for relief in this case.

The Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

The request for a conciliation conference was admittedly late filed. There is no authority for the Tribunal to grant a hearing to petitioners under these facts.

Petitioners misread section 1138(1) of the Tax Law. The reference to the State Tax Commission and its authority to redetermine taxes upon its own motion predates the creation of the Division of Tax Appeals and the Tax Appeals Tribunal on September 1, 1987. Under prior law, the administration of taxes and the resolution of disputes between taxpayers and the Department was vested in a single body, i.e., the State Tax Commission. The referenced language concerned the administrative authority of the former Commission. Under current law, the sole function of the Division of Tax Appeals is the resolution of controversies between taxpayers and the Division (Tax Law §§ 2000 and 2006). The Division is governed by the provision of its enabling legislation. Nowhere is there authority for the Division or the Tribunal to waive the statute of limitations for the filing of a request for a conciliation conference or to redetermine taxes on its own motion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Central Avenue Automotive Services, Inc. and Michael Porcelli and Albert Porcelli, as officers is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Central Avenue Automotive Services, Inc. and Michael Porcelli and Albert Procelli, as officers is dismissed.

DATED: Troy, New York
August 22, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner