

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**WINNERS GARAGE, INC.** :

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 December 1, 2004 through :  
August 31, 2007. :

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DECISION  
DTA NOS. 823312 AND  
823313

In the Matter of the Petition :

of :

**LEV WOLKOWICKI** :

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 December 1, 2005 through :  
August 31, 2007. :

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Petitioners, Winners Garage, Inc. and Lev Wolkowicki, filed an exception to the order of the Administrative Law Judge issued on January 7, 2010. Petitioner, Lev Wolkowicki, appeared *pro se* and on behalf of the corporation. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation did not file a brief in opposition. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

***ISSUE***

Whether the Administrative Law Judge correctly determined that the Division of Tax Appeals has no jurisdiction to consider the merits of the issues raised by petitioners in their petitions.

***FINDINGS OF FACT***

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

***Lev Wolkowicki***

The Division of Taxation (Division) issued to petitioner, Lev Wolkowicki, at his Valley Stream, New York address a Notice of Determination, assessment no. L-031576442, dated February 20, 2009, which assessed sales and use taxes for the period December 1, 2005 through August 31, 2007 in the amount of \$134,290.09, plus penalty and interest. An explanation in the notice stated that it must be challenged by filing a request for conciliation conference or a petition for a Division of Tax Appeals hearing by May 21, 2009.

On October 12, 2009, Mr. Wolkowicki filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination issued on February 20, 2009. The petition was delivered to the Division of Tax Appeals by FedEx Express and was dated October 12, 2009.

On November 5, 2009, the Petition Intake Unit of the Division of Tax Appeals issued to Mr. Wolkowicki a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the Notice of Determination appeared to have been issued on February 20, 2009 and the petition appeared to have been filed on October 12, 2009, or 234 days later.

To show proof of proper mailing of the notice dated February 20, 2009, the Division provided the following: (i) an affidavit, dated November 12, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated November 10, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 20, 2009; and (iv) a copy of petitioner's New York State Resident Income Tax Return, Form IT-201, for the tax year 2007, which was the last filing from petitioner prior to the issuance of the notice.

The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices, as follows. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, the one-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, a new date of "2/20/09" was written on the first page to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number, the assessment numbers and the names and addresses of the recipients are listed on the CMR. The CMR contains information on the subject notice and establishes that on February 20, 2009, a notice with the control number 7104 1002 9730 1206 0456 was sent to Mr. Wolkowicki at his Valley Stream, New York address.

The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures,

as follows. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a review of the certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various United States Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark to the CMR. Corresponding to "Total Pieces and Amounts," is the preprinted number 102. This number is circled and the page is initialed, confirming that the notices were received. The USPS postmark is from the Colonie Center branch and bears the date February 20, 2009, confirming that the notices were mailed on that date.

Petitioner's Valley Stream, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his resident income tax return for the tax year 2007. This is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

***Winners Garage, Inc.***

The Division of Taxation (Division) issued to petitioner Winners Garage, Inc., of Woodside, New York, a Notice of Determination, assessment no. L-031573327, dated February 19, 2009, which assessed sales and use taxes for the period December 1, 2004 through August 31, 2007 in the amount of \$211,907.10, plus penalty and interest. An explanation in the notice stated that it must be challenged by filing a request for conciliation conference or a petition for a Division of Tax Appeals hearing by May 20, 2009. The Mailing Cover Sheet of the Notice of Determination issued to Winners Garage, Inc., contains the certified control number 7104 1002 9730 1205 2888.

The last tax return filed by Winners Garage before the issuance of the Notice of Determination was 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 its address as Woodside, New York.

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 October 12, 2009.

On November 5, 2009, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the Notice of Determination appeared to have been issued on February 19, 2009 and the petition appeared to have been filed on October 12, 2009, or 235 days later.

The Division offered the affidavits of Patricia Finn Sears, James Steven VanDerZee and Heidi Corina, employees of the Division. The first two affidavits concerned the mailing

procedures followed by the Division in mailing notices of determination and were nearly identical to those for Mr. Wolkowicki. The last affidavit pertained to correspondence between Ms. Corina and the USPS. The Division also offered a copy of portions of the CMR containing a list of the notices of determination allegedly issued by the Division on February 19, 2009, including petitioner's, and a copy of the petition dated October 12, 2009. The CMR indicates a Notice of Determination, number L-031573327, was issued to Winners Garage by certified mail with the certified number noted above. However, the postmarks on the CMR were too faint to determine a mailing date.

Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares USPS Form 3811-A. Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

Attached to Ms. Corina's affidavit is a copy of the Form 3811-A that was requested for petitioner. This form requests information regarding a piece of mail bearing certified control number 7104 1002 9730 1205 2888 and addressed to Winners Garage at its Woodside, New York, address. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated November 6, 2009. The letter states 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 contains a scanned image of the recipient as "Renee Perlman" above the handwritten name "Renee Perlman." The address of the recipient is shown as the address on Winners Garage's last return filed before the issuance date.

The envelope used to mail the two petitions was sent via FedEx Express and bore the sender's name "Lev Wolkowicki," the company name "Winners Garage, Inc." and the address in Woodside, New York. The date on the envelope is October 12, 2009, and the petitions were received by the Division of Tax Appeals on October 13, 2009.

Petitioners requested a conciliation conference on February 11, 2009 following the issuance by the Division of a Statement of Proposed Audit Changes for Sales and Use Tax, dated January 13, 2009. Petitioners claim that such a request was timely and should entitle them to a hearing on the notices of determination at issue herein.

***THE ORDER OF THE ADMINISTRATIVE LAW JUDGE***

***Winners Garage, Inc.***

In his order, the Administrative Law Judge noted that pursuant to Tax Law § 1138(a)(1), a notice of determination issued by the Division for sales and use tax becomes 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 or requests a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) seeking revision of the determination within 90 days of the mailing of the notice. The Administrative Law Judge concluded that 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.

The Administrative Law Judge recited the statutory requirement 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 of the Tax Law 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. The Administrative Law Judge further noted that the mailing of such a notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.

The Administrative Law Judge found that at the time the notice of determination was issued, petitioner'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 Administrative Law Judge observed that the notice was sent to the same address reported on the sales tax return. The Administrative Law Judge held that documentation from the USPS submitted by the Division established that the notice was received at petitioner's last known address on February 23, 2009. Therefore, the Administrative Law Judge concluded that the Division had introduced adequate proof that the notice was delivered to petitioner's last known address.

The Administrative Law Judge noted that Winners Garage had until May 26, 2009 to mail a request for a conciliation conference or to file a petition for a hearing. As the envelope used to mail the petition was mailed by FedEx Express on October 12, 2009 and received by the Division of Tax Appeals on October 13, 2009, the Administrative Law Judge concluded that the request was untimely and the Division of Tax Appeals has no jurisdiction over the matter and is precluded from considering the merits of the case.

***Lev Wolkowicki***

The Administrative Law Judge observed that where the timeliness of a petition or a request for a conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address. The Administrative Law Judge cited applicable case law establishing that in order to prove the fact and date of mailing of the subject notice, the Division must show its standard procedure for the issuance of the statutory notice by one with knowledge of the relevant procedures, and provide

proof that the standard procedure was followed in the particular instance in question. The Administrative Law Judge found that the Division offered sufficient proof to establish the mailing of the statutory notice on February 20, 2009 to Mr. Wolkowicki's last known address. Since the petition was not mailed until October 12, 2009, which is beyond the 90-day period, the Administrative Law Judge concluded that the Division of Tax Appeals has no jurisdiction to hear and determine this matter.

The Administrative Law Judge stated that petitioners' arguments had been considered and rejected. Relying on applicable case law, the Administrative Law Judge held that a request for either a conciliation conference or for a hearing that was filed prior to the issuance of the notices of determination was premature and invalid. The Administrative Law Judge further held that petitioners were clearly notified by an explanation contained in each of the notices of determination that the notices must be challenged by filing a request for conciliation conference or by filing a petition for a Division of Tax Appeals hearing by May 20, 2009 or May 21, 2009, respectively. As a result, the Administrative Law Judge dismissed the petitions of Winners Garage, Inc. and Lev Wolkowicki.

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners argue that they timely filed petitions with the Division of Tax Appeals. Petitioners maintain that the Division failed to contact taxpayers after receiving their response to the Statement of Proposed Audit Adjustment, in which petitioners requested a conciliation conference. Petitioners assert that the Division should have explained to petitioners that a protest cannot be filed until after the assessment document is issued, as provided for in the Division's General Audit Guidelines. Petitioners argue that the auditor allowed petitioners additional time to document their protest and failed to advise petitioners of their appeal rights.

Petitioners believe that they made a good faith attempt to comply with the Division's rules and should be allowed an opportunity to be heard.

***OPINION***

In this proceeding, the sole issue before us is whether or not the Administrative Law Judge properly determined that the Division of Tax Appeals lacks jurisdiction to entertain the merits of petitioners' claim. As petitioners failed to timely file a request for a conciliation conference with BCMS or, alternatively, a petition with the Division of Tax Appeals, we do not have jurisdiction to consider petitioners' challenge to the Notices of Determination. Tax Law § 1138(a)(1) provides that unless a notice of determination is timely protested, it becomes an assessment of the amount of tax specified in such notice.

Petitioners argue that the auditor did not comply with certain provisions of the Division's General Audit Guidelines and, as a result, petitioners are not bound by the requirement to file a timely request for conciliation conference or petition. We disagree. The Division's audit guidelines do not have the force and effect of law or regulation and cannot supersede the requirements of the Tax Law. Further, we point out, as did the Administrative Law Judge, that a request for a conciliation conference filed prior to the issuance of a notice of determination must be disregarded. As we stated in *Matter of Sawlani* (Tax Appeals Tribunal, September 14, 1995):

In considering whether a petition is timely filed, it is settled that a petition which is filed before the issuance of the notice of determination must be dismissed as premature (*Matter of West Mountain Corp. v. State Dept. of Taxation & Fin.*, 105 AD2d 989, 482 NYS2d 140, *affd* 64 NY2d 991, 489 NYS2d 62; *Matter of Upland, Inc.*, Tax Appeals Tribunal, April 12, 1990; *Matter of Yegnuikian*, Tax Appeals Tribunal, March 22, 1990). Where a petition has been filed before a notice of determination has been issued, the petition must be dismissed because "[r]eview by the Division of Tax Appeals would be 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 Yegnuikian, supra*).

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioners have offered no evidence below, and no argument on exception, that would provide a basis for us to modify the order in any respect. Thus, we affirm the order of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Winners Garage, Inc. and Lev Wolkowicki is denied;
2. The order of the Administrative Law Judge is affirmed;
3. The petitions of Winners Garage, Inc. and Lev Wolkowicki are dismissed; and
4. The Notices of Determination dated February 19, 2009 and February 20, 2009 are sustained.

DATED: Troy, New York  
May 20, 2010

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

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