

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RUTLAND ROAD RESTAURANT CORP.	:	DECISION
	:	DTA NO. 822702
for Revision of a Determination or for Refund of	:	
New York State Sales and Use Tax under Articles 28	:	
and 29 of the Tax Law for the Periods March 1, 2005	:	
through February 28, 2007.	:	

Petitioner, Rutland Road Restaurant Corp., filed an exception to the order of the Administrative Law Judge issued on April 16, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, 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 subject matter jurisdiction to entertain the petition.

FINDINGS OF FACT

We find the following facts.

The petition in this matter appears to challenge a Notice of Determination (L-030579842-8) asserting tax in the amount of \$45,372.40 for the period March 1, 2005 through February 28, 2007.

On December 26, 2008, a letter was sent by the Petition Intake Unit in the Division of Tax Appeals to petitioner, advising that the petition was not complete in that it did not include a copy of the Notice of Determination. Petitioner did not respond. On March 3, 2009, a Notice of Intent to Dismiss Petition was sent to petitioner giving an additional 30 days for petitioner to respond with the necessary document. Petitioner did not submit a copy of the Notice of Determination.

On April 16, 2009, Administrative Law Judge Daniel J. Ranalli issued an Order Dismissing Petition for lack of jurisdiction. This exception followed.

OPINION

We affirm the order of the Administrative Law Judge.

The Tax Law provides with regard to sales and use tax that:

After ninety days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing . . . (Tax Law § 1138[a][1]).

In the alternative, a taxpayer may also, within the same 90 day period, file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) (*see*, Tax Law §§ 170[3-a], 2006 [4]; 20 NYCRR 4000.3[c]). If a taxpayer first elects to file a request for a conciliation conference with BCMS, the conciliation order is binding upon the Department and the taxpayer, unless a petition is filed with the Division of Tax Appeals within 90 days after the conciliation order is issued (*see*, Tax Law § 170[3-a][e], 20 NYCRR 4000.3[c], 4000.6[b]).

A proceeding in the Division of Tax Appeals is commenced by filing a petition challenging a statutory notice pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law §§ 2000, 2006[4]; 20 NYCRR 3000.1[k]). The Rules of

Practice and Procedure of the Tax Appeals Tribunal require that where a statutory notice has been issued, it must be attached to a petition for purposes of determining whether the petition is timely filed (20 NYCRR 3000.3[b][8]).

In this case, the Notice of Determination was not attached to the petition. Petitioner was notified that the petition was not in proper format, in that it did not include a copy of the Notice of Determination as required by section 3000.3(b)(8) of the Tribunal's regulations, and was given 30 additional days to provide it. Petitioner did not provide the requested copy that would enable the Division of Tax Appeals to determine the timeliness of the petition. Consequently, the Division of Tax Appeals is without jurisdiction to hear and determine this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rutland Road Restaurant Corp. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Rutland Road Restaurant Corp. is dismissed with prejudice.

DATED: Troy, New York
December 3, 2009

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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