

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ANTHONY DICHIARA : DECISION
 : DTA NO. 826304
for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period March 1, 2013 through :
February 12, 2014 and for Redetermination of a :
Deficiency or for Refund of Personal Income Tax :
under Article 22 of the Tax Law for the Year 2013. :

Petitioner, Anthony DiChiara, filed an exception to the determination of the Administrative Law Judge issued on October 6, 2014. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner did not file a reply brief. Neither party requested oral argument. The six-month period for the issuance of this decision began on April 22, 2015, the due date for petitioner's reply brief.

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

ISSUE

Whether the petition should be dismissed for lack of subject matter jurisdiction.

FINDINGS OF FACT

We find the following facts.

1. On August 7, 2014, the Supervising Administrative Law Judge issued to petitioner,

Anthony DiChiara, a notice of intent to dismiss petition (notice of intent). The notice of intent indicates that the petition in this matter was filed in protest of five notices and demands for payment of tax due, identified as assessment numbers L-040811115, L-040811116, L-040811117, L-040814614 and L-040671079; that there are no hearing rights under the Tax Law to protest such notices; and that, accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition.

2. The notice of intent allowed the parties 30 days to submit written comments on the proposed dismissal. Petitioner did not submit any such comments.

3. On October 6, 2014, the Supervising Administrative Law Judge issued a determination dismissing the petition filed in this matter. The determination repeated the language in the notice of intent summarized above (*see* Finding of Fact 1).

4. A review of the petition filed in this matter reveals that the petition was filed in protest of four notices and demands (assessment numbers L-040811115, L-040811116, L-040811117, L-040814614); a notice of adjustment - withholding (assessment number L-040671079); two warrants (bearing docketed dates of September 24, 2012 and February 18, 2014, respectively); a tax compliance levy dated April 21, 2014; and a consolidated statement of tax liabilities dated February 21, 2014.

OPINION

The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that “the supervising administrative law judge, upon his or her own motion, may, upon notice to the parties, issue a determination dismissing the petition on the ground that: (i) the division of tax appeals lacks jurisdiction of the subject matter of the petition” (20 NYCRR 3000.9 [a] [4]). The Rules further provide that “the notice of intent to dismiss shall inform the parties of the facts and

the reasons providing the basis for the intended dismissal [and] . . . shall also provide the parties with 30 days to submit written comments on the proposed dismissal” (*id.*).

Here, the notice of intent indicates a proposed dismissal of the petition with respect to certain of the protested documents, but not to others. The determination, however, dismissed the petition in its entirety. By specifying that certain documents were jurisdictionally defective and omitting reference to other protested documents, the notice of intent failed to make clear that the proposed dismissal encompassed the entire petition. “[P]etitioner was entitled to receive a notice of intent that accurately reflects the material facts contained in the record” (*Matter of Kyte*, Tax Appeals Tribunal, October 17, 2013). Accordingly, we conclude that the notice of intent failed to inform petitioner of the “facts and reasons” for the intended dismissal as required under our Rules of Practice and Procedure.

Therefore, we hereby rescind the determination of the Supervising Administrative Law Judge dismissing the petition and remand this matter for the issuance of an amended notice of intent and for such further proceedings required as a consequence thereof.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter be remanded to the Division of Tax Appeals for appropriate action in accordance with this decision.

DATED: Albany, New York
October 8, 2015

/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