

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANTHONY DICHIARA	:	DETERMINATION
D/B/A ITALIAN PIZZA	:	DTA NO. 825950
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, 2006 through August 31, 2012.	:	

Petitioner, Anthony DiChiara d/b/a Italian Pizza, filed a 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, 2006 through August 31, 2012.

On May 30, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that (i) the petition did not appear to have been timely filed with respect to the certain statutory notices being petitioned; (ii) the petitioner was not in proper form for failure to include certain of the statutory notices being protested, as required; and (iii) the Division of Tax Appeals lacked subject matter jurisdiction because the petition was filed in protest of certain notices and demands with respect to which there is no right to a hearing. By Order of the undersigned on December 18, 2014, the Notice of Intent to Dismiss was rescinded as to two of the notices, but was otherwise sustained and the remaining notices were dismissed. On December 15, 2015, petitioner and the Division of Taxation filed a Stipulation for Discontinuance of Proceeding with respect to the two notices not dismissed.

Based upon the Order issued on the Notice of Intent to Dismiss, the Stipulation for

Discontinuance of Proceeding, and all the pleadings and documents submitted herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Order issued in this matter on December 18, 2014, in conjunction with a Stipulation for Discontinuance of Proceeding filed on December 15, 2015, closes this matter in the Division of Tax Appeals such that this determination constitutes a final determination pursuant to Tax Law § 3030(c)(5).

FINDINGS OF FACT

1. On September 12, 2013. petitioner, Anthony DiChiara d/b/a Italian Pizza, filed a petition with the Division of Tax Appeals protesting the following notices of determination, notice of estimated determination, and notices and demands for payment:

a) five notices of determination, bearing assessment numbers L-037286262, L-037286263, L-037286264, L-037286265 and L-037286266 pertaining, respectively, to the periods ended August 31, 2011, May 31, 2011, February 28, 2011, February 28, 2010 and February 28, 2007, and assessing sales and use taxes in the respective amounts of \$2,184.71, \$1,000.14, \$5,359.58, \$5,250.04 and \$2,880.75, plus penalty and interest.

b) a notice of estimated determination and a notice of determination, bearing assessment numbers L-034391491 and L-033802832 pertaining, respectively, to the period ended February 28, 2010 and to the periods ended May 31, 2006 through February 28, 2009. The former assesses sales and use tax in the amount of \$5,250.04, plus penalty and interest, and the latter assesses sales and use tax in the aggregate amount of \$70,301.55, plus interest.

c) six notices and demands for payment, bearing assessment numbers L-035621284, L-036478362, L-036860233, L-037310604, L-038281610 and L-038710836, and reflecting issuance dates of April 11, 2011, August 2, 2011, November 2, 2011, February 10, 2012, July 13, 2012 and October 19, 2010, respectively. These notices assess sales and use tax in the amounts of \$5,359.58, \$1,000.14, \$2,184.71, \$1,410.50, \$1,853.86 and \$1,492.38, plus penalty and interest, and pertain, respectively, to the sales tax quarterly

periods ended February 28, 2011, May 31, 2011, August 31, 2011, November 30, 2011, May 31, 2012 and August 31, 2012.

d) two additional assessment numbers, L-037907949 and L-0326671546, were referenced in the petition and accompanying materials, but copies of the statutory notices pertaining to these assessment numbers were not included with the petition. In addition, the assessment referenced as number L-0326671546 includes ten digits as opposed to the nine digits as would properly be set forth in such a statutory notice.

2. On May 30, 2014, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a Notice of Intent to Dismiss Petition, which stated, in pertinent part:

Pursuant to § 2006(4) of the Tax Law, a petition must be filed within ninety (90) days from the date a statutory notice is issued. Pursuant to § 173-a(3)(c) of the Tax Law, the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition that is filed in protest of a Notice and Demand for Payment of Tax Due. Additionally, § 3000.3(b)(8) of the Tax Law requires the petition to contain a copy of each statutory notice being protested.

* * *

Two notices of determination, Assessment Nos. L-034391491 and L-033802832, were issued to petitioner on July 26, 2010 and May 13, 2010, respectively. However, the petition was not filed with the Division of Tax Appeals until September 12, 2012, or one thousand one hundred forty four (1,144) and one thousand two hundred and eighteen (1,218) days later respectively. Five notices of determination, Assessment Nos. L-037286262, L-037286263, L-037286264, L-037286265 and L-037286266, were issued to petitioner on February 2, 2012. However, the petition was not filed with the Division of Tax Appeals until September 12, 2013, or five hundred and eighty eight (588) days later.

The notices and demands include Assessment Nos. L-035621284, L-036478362, L-036860233, L-037310604, L-038281610, L-038710836 and L-032667154. Since no hearing rights exist to protest a Notice and Demand, the Division of Tax Appeals lacks jurisdiction. Therefore, the Division of Tax Appeals is without jurisdiction to consider the merits of this petition with respect to these four [sic] notices and demands.

Additional notices in the petition include Assessment Nos. L-037907949 and “L-0326671546” [sic]. Petitioner did not include in the petition the required statutory notices and therefore the petition is not in proper form with respect to these two notices. Also, the second notice does not appear to have a proper nine-digit assessment number.¹

3. By Order dated December 18, 2014, the petition was dismissed as to the five notices of determination, the six notices and demands for payment, and the two additional assessment numbers specified above at Finding of Fact 1 (a), (c) and (d). However, the Notice of Intent to Dismiss was rescinded as to the Notice of Estimated Determination and the Notice of Determination specified above at Finding of Fact 1 (b).

4. A hearing as to the two remaining notices was held on September 16, 2015. After the hearing, the parties reached a settlement resolving the foregoing two notices.

5. An executed Stipulation for Discontinuance of Proceeding with respect to the two notices specified above at Finding of Fact 1 (b) was filed with the Division of Tax Appeals on December 15, 2015.

CONCLUSIONS OF LAW

A. In view of the foregoing, the December 18, 2014 Order dismissing the petition as to the notices of determination, the notices and demands for payment, and the two additional assessments referenced (only) by number, as described in Finding of Fact 1 (a), (c) and (d), is now final and petitioner may take an exception within the time permitted by statute (Tax Law § 2006[7]; 20 NYCRR 3000.17[a][1]).

¹ The Notice of Intent to Dismiss Petition indicates that assessment number L-032667154 represents a Notice and Demand. The Division’s response to the Notice of Intent points out that the petition did not include a copy of this document (thus the reference to only six notices and demands.) The distinction may be attributable to a typographical error by petitioner such that the assessment referenced as L-0326671546 (the ten digit reference) is the assessment referenced as L-032667154 (the nine digit reference). In any event, the record does not include a copy of any statutory notice pertaining to either of such assessment numbers.

B. It is determined that the December 18, 2014 Order and the December 15, 2015 Stipulation for Discontinuance of Proceeding, read together, constitute the final determination pursuant to Tax Law § 3030(c)(5)(C) with respect to the two remaining notices described in Finding of Fact 1 (b).

C. The Stipulation for Discontinuance of Proceeding with respect to the foregoing two notices was executed with prejudice, rendering such notices fixed and final and discontinuing the matter before the Division of Tax Appeals (*see Matter of Felix Industries*, Tax Appeals Tribunal, July 22, 1993).

D. The petition of Anthony DiChiara d/b/a Italian Pizza is hereby denied, the notices of determination, notices and demands for payment and the two additional assessments referenced in Finding of Fact 1 (a), (c) and (d) are sustained, and any exception may be taken only with respect to such notices of determination, notices and demands for payment and two additional assessments.

DATED: Albany, New York
June 23, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE