

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GREGORIO MARIN : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 826378
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law. :

Petitioner, Gregorio Marin, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law.

On July 29, 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 August 7, 2014, petitioner, appearing by Ballon, Stoll, Bader & Nadler, PC (Norman R. Berkowitz, Esq., of counsel) submitted a letter in opposition to dismissal. On August 14, 2014, the Division of Taxation by Amanda Hiller, Esq. (Leo Gabovich, Law Clerk) submitted a letter agreeing with the proposed dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on August 14, 2014. After due consideration of the arguments submitted by the parties, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction to entertain the petition.

FINDINGS OF FACT

1. On June 23, 2014, the Division of Tax Appeals received a petition from petitioner, Gregorio Marin. The petition indicates that a conciliation conference was not requested. Attached to the petition is a Tax Compliance Levy relating to Warrant ID E-035508670-2 in the amount of \$555,208.96 issued to Wells Fargo Bank, N. A., as garnishee. The levy lists petitioner as the judgment debtor individually and as responsible person of Constantinos 26, Inc. The petition did not include a copy of any underlying notice of determination or any other written notice advising petitioner of a tax deficiency or determination of tax due.

2. On July 8, 2014, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals contacted petitioner's representative, Norman Berkowitz, advising him that the petition was not complete in that it did not include a copy of the statutory notice at issue in this matter. Mr. Berkowitz was instructed to obtain copies of the underlying statutory notice from the Division of Taxation (Division). Mr. Berkowitz refused to contact the Division to obtain such notices.

3. On July 29, 2014, a Notice of Intent to Dismiss Petition was sent to petitioner giving him an additional 30 days to respond with the necessary statutory notice.

4. On August 7, 2014, Mr. Berkowitz submitted a response to the Notice of Intent to Dismiss Petition. The response stated that petitioner claims to have never received a statutory notice from the Division and first became aware of the assessment when he received a Tax Compliance Levy. Petitioner further states that it would be unfair and unreasonable to require him to produce a copy of a notice he claims he never received. Instead, petitioner asserts that it is incumbent upon the Division to come forward with evidence that it properly issued the appropriate notice to him.

CONCLUSIONS OF LAW

A. A proceeding in the Division of Tax Appeals is commenced by filing a petition “protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund . . . or any other notice which gives a person the right to a hearing” (Tax Law § 2008[1]), pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law § 2006[4]). The Tax Appeals Tribunal’s Rules of Practice and Procedure require a legible copy of the statutory notice being protested to be attached to a petition for purposes of determining whether the petition is timely filed (20 NYCRR 3000.3[b][8]).

B. In the instant matter, a notice of determination was not attached to the petition nor was any other written notice giving rise to the right to a hearing attached. The only notice attached to the petition is a tax compliance levy, a document that does not give rise to a right to a hearing in the Division of Tax Appeals (*Matter of Club Marakesh v. Division of Tax Appeals*, Sup Ct., Albany Co., Nov 7, 1990, Keniry J.).

C. 20 NYCRR 3000.3(d) provides as follows:

Failure to correct. (1) Where the petition filed by a petitioner is not in the form required by this section, the supervising administrative law judge shall promptly return it to the petitioner together with a statement indicating the requirements with which the petition does not comply, and extend to the petitioner an additional 30 days within which to file a corrected petition with the supervising administrative law judge. The supervising administrative law judge shall then forward the corrected petition to the office of counsel pursuant to subdivision (c) of this section. For purposes of the time limitations, a corrected petition is deemed to have been filed at the time the original petition was filed.

(2) Where the petitioner fails to serve a corrected petition within the time prescribed in paragraph (1) of this subdivision, the supervising administrative law judge will issue a determination dismissing the petition.

D. Petitioner's failure to correct the petition to include copies of the statutory notice with the petition after having been given ample opportunity to do so, leaves the Division of Tax Appeals without jurisdiction to hear and determine this matter (20 NYCRR 3000.3(b)(8), (d)(2); *Matter of Scott*, Tax Appeals Tribunal, May 29, 2008; *Matter of Francis*, Tax Appeals Tribunal, June 18, 2009).

E. The petition of Gregorio Marin is hereby dismissed.

DATED: Albany, New York
October 30, 2014

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE