

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
TOP CHOICE JAMAICA RESTAURANT, LLC	:	DETERMINATION
	:	DTA NO. 829368
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 March 1, 2012 through November	:	
30, 2014.	:	

Petitioner, Top Choice Jamaica Restaurant, LLC, 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 for the period March 1, 2012 through November 30, 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), filed a motion on March 2, 2021, seeking dismissal of the petition pursuant to Tax Law § 2006 (5) and sections 3000.5 and 3000.9 (a) (1) (ii), or for summary determination in its favor pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal upon the grounds that the Division of Tax Appeals does not have jurisdiction of the subject matter of the petition, that there are no material issues of fact, and that the petition does not state a cause upon which relief may be granted. Accompanying the motion was an affirmation of Mary R. Humphrey, Esq., and annexed exhibits. Petitioner, appearing by Recordo Smith, managing member, did not respond to the motion by April 1, 2021, which date commenced the 90-day period to issue this determination. Based upon the motion papers and documents submitted, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition in this matter is properly subject to dismissal.

FINDINGS OF FACT

1. On May 2, 2019, petitioner, Top Choice Jamaica Restaurant, LLC, filed a petition with the Division of Tax Appeals protesting a notice of determination issued to it, assessment number L-042877682. Specifically, petitioner states that there was a miscalculation of interest. A copy of the notice of determination was not attached to the petition, but rather, a page entitled consolidated statement of tax liabilities was attached. This statement is undated, and it appears to be only the first page to the consolidated statement of tax liabilities. The one page attached to the petition bears two separate assessments on it, including the sales and use tax assessment referenced above. There is a circle around the tax amount listed for assessment number L-042877682 in the amount of \$13,643.40 and a circle around an amount of interest of \$5,595.28.

2. On December 11, 2019, the Division of Taxation (Division) filed its answer. It stated that a notice of determination was issued to petitioner, dated May 12, 2015, assessing sales tax in the amount of \$13,643.40, plus interest and penalty, for the period March 1, 2012 through November 30, 2014.

3. The Division stated that petitioner executed a Withdrawal of Protest, signed by petitioner and the Division, on October 16, 2015 and October 20, 2015 respectively, agreeing to settle this matter for the tax assessed of \$13,643.40. However, the Division agreed to waive the penalty and it recalculated interest in the amount of \$2,490.64, if paid by September 30, 2015. Moreover, the Division states that the assessment has been paid in full.

4. In support of dismissal, the Division submitted, among other documents, the following: (i) an affirmation, dated March 1, 2021, of Mary R. Humphrey, Esq.; (ii) a copy of an inquiry

made on March 1, 2021, by the Division of its Case and Resource Tracking System (CARTS) for the assessment at issue that indicates the assessment has been paid in full; and (iii) a copy of the Withdrawal of Protest, form DTF-941.

5. Petitioner did not respond to the motion.

CONCLUSIONS OF LAW

A. The Division has moved for dismissal of the petition pursuant to Tax Law § 2006 (5) and 20 NYCRR 3000.5 and 3000.9 (a) (1) (ii), upon the basis that the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition. The standard of review on a motion to dismiss is the same as that for a summary determination motion (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). A motion for summary determination is properly granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure (Rules) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial

is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] citing *Zuckerman*).

C. Petitioner did not respond to the Division’s motion. Thus, no evidence was presented to contest the facts alleged. Therefore, the facts are deemed admitted (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]).

D. Tax Law §§ 2000 and 2006 (4) state that the Tax Appeals Tribunal (Tribunal) is authorized to provide a hearing as a matter of right “unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter.” The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (*see Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [1991]). In the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*see Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

E. In order for the Division of Tax Appeals to have jurisdiction to address the substantive matters raised in a petition, the petitioner must show the issuance of a statutory document giving rise to the right to a hearing before the Division of Tax Appeals. In this regard, Tax Law § 2008 (1) provides:

“All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a notice of determination of tax due, a denial of a refund or credit application . . . or any

other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.”

F. The Tribunal’s Rules, at 20 NYCRR 3000.1, define the term “statutory notice” as follows:

“(k) **Statutory notice.** The term ‘statutory notice’ means any written notice of the commissioner of taxation and finance which advises a person of a tax deficiency, determination of tax due, assessment, or denial of a refund, credit or reimbursement application, or of cancellation, revocation, suspension or denial of an application for a license, permit or registration, or of the denial or revocation of an exempt status, or any other notice which gives the person a right to a hearing in the division of tax appeals” (emphasis supplied).

G. As set forth in the facts, petitioner attached one page of a consolidated statement of tax liabilities that included the sales tax assessment L-042877682. As decided in *Matter of Mostovoi* (Tax Appeals Tribunal, May 23, 2019), a consolidated statement of tax liabilities does not qualify as a statutory notice because such statement reports a taxpayer’s past-due tax liabilities and it does not confer jurisdiction to consider the substantive merits of a taxpayer’s protest. Additionally, as noted by the Division, this assessment was the subject of a Withdrawal of Protest and subsequently paid in full. Accordingly, there does not exist any statutory notice giving rise to any protest before the Division of Tax Appeals and, thus, there is no jurisdiction to entertain the petition.

H. The petition of Top Choice Jamaica Restaurant, LLC is dismissed.

DATED: Albany, New York
June 24, 2021

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE