

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**8<sup>th</sup> AVENUE GOURMET & GROCERY INC.** : **ORDER**  
 : **DTA NO. 825372**  
for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Periods June 1, 1999 through February 29, 2000, :  
September 1, 2000 through August 31, 2001 and :  
September 1, 2004 through November 30, 2004. :

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Petitioner, 8<sup>th</sup> Avenue Gourmet & Grocery Inc., 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 periods June 1, 1999 through February 29, 2000, September 1, 2000 through August 31, 2001 and September 1, 2004 through November 30, 2004.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated September 16, 2013, seeking an order dismissing the petition pursuant to section 3000.9(a)(ii) of the Tax Appeals Tribunal's Rules of Practice and Procedure, or in the alternative, for summary determination in favor of the Division of Taxation pursuant to section 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioner filed a response to the motion. Accordingly, the 90-day period for the issuance of this determination commenced on October 17, 2013. After due consideration of the affidavit and documents presented by the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following order.

**ISSUES**

I. Whether the Division of Taxation’s motion to dismiss should be granted as to nine notices and demands for payment or notices of estimated determination.

III. Whether the Division of Taxation’s motion for summary determination as to the nine notices in issue should be granted.

**FINDINGS OF FACT**

1. The petition as originally filed challenged the following 15 notices: L-018250842-9, L-018345239-7, L-020550108-1, L-018115306-3, L-023232084-5, L-025006450-5, L-019374979-8, L-019920740-7, L-020313194-9, L-023403237-5, L-023426122-3, L-023426123-2, L-014551387-2, L-023403236-6, and L-023426121-4. The Division of Taxation (Division) made a motion for dismissal or in the alternative summary determination concerning the last six notices listed (L-023403237-5, L-023426122-3, L-023426123-2, L-014551387-2, L-023403236-6, and L-023426121-4), and an order determining their disposition was issued on October 24, 2013, by the Division of Tax Appeals. DTA No. 825372 has been created to address the remaining nine notices (L-018115306-3, L-018250842-9, L-018345239-7, L-020550108-1, L-023232084-5, L-025006450-5, L-019374979-8, L-019920740-7, L-020313194-9), and this order addresses only the motion concerning eight of those notices and the disposition of the ninth notice.

2. The following table sets forth the notices in issue:

<b>Period</b>	<b>Assessment No.</b>	<b>Type of Notice</b>	<b>Date of Notice</b>	<b>Reason for issuance of notice</b>	<b>Tax Assessed</b>
6/1/99-8/31/99	L-018115306-3	Notice and Demand	10/24/00	Late filed return, partial payment	\$1,718.22
9/1/99-11/30/99	L-018250842-9	Notice and Demand	3/6/01	Late filed return, no remittance	\$1,824.51

12/1/99-2/29/00	L-018345239-7	Notice and Demand	3/6/01	Late filed return, no remittance	\$1,674.05
9/1/00-11/30/00	L-019374979-8	Notice of Estimated Determination	5/7/01	Failure to file return	\$1,824.50
12/1/00-2/28/01	L-019920740-7	Notice of Estimated Determination	8/6/01	Failure to file return	\$1,674.04
3/1/01-5/31/01	L-020313194-9	Notice of Estimated Determination	12/3/01	Failure to file return	\$750.00
6/1/01-8/31/01	L-020550108-1	Notice of Estimated Determination	1/29/02	Failure to file return	\$750.00
9/1/04-11/30/04	L-025006450-5	Notice and Demand	2/4/05	Late filed return, full remittance	\$50.00 (penalty only)

3. The Division explained in its motion that where a return was timely filed with no payment or partial payment, a notice and demand was issued for the balance due, i.e., the tax was self assessed. Where a return was not timely filed, the Division issued an estimated notice of determination, and when the return was subsequently filed, the Division converted that notice into a notice and demand, and the tax due was adjusted to reflect the amount reported on the late-filed return.<sup>1</sup>

4. The ninth assessment, L-023232084-5 was cancelled by the Division. This notice was also an assessment of sales and use taxes and covered 12 consecutive quarters for the period December 1, 1998 through November 30, 2000.

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<sup>1</sup> The Division noted that in some cases the tax due was not adjusted, but in each of those situations the failure to adjust was in the taxpayer's favor.

***SUMMARY OF THE PARTIES' POSITIONS***

5. Petitioner maintains that since the assessment that was cancelled by the Division, L-023232084-5, included the quarters ending August 31, 1999, November 30, 1999, February 29, 2000 and November 30, 2000, for which separate assessments were issued, the separate assessments (shown in the table above) for these periods should also be cancelled.

Petitioner also believes there is an unexplained discrepancy concerning the assessments representing the quarters ending November 20, 2000 and February 28, 2001, since returns have never been filed for these quarters.

6. The Division asserts a motion to dismiss the eight notices; however, it does not state a basis for the motion. The Division, in the alternative, argues that summary determination as a matter of law should be granted in favor of the Division as to all eight notices, since there are no questions of fact that mandate a hearing.

***CONCLUSIONS OF LAW***

A. The Division of Taxation has made a motion to dismiss, and alternatively, a motion for summary determination, as to the eight notices in issue herein. A motion to dismiss the petition may be granted, as pertinent in this matter, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9[a][ii]). A motion for summary determination may be 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. Tax Law § 2006 sets forth the functions, powers and duties of the Tax Appeals Tribunal including, in relevant part at subsection four thereof, as follows:

To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter* (emphasis added).

C. Tax Law § 173-a (as added by L 2004, ch 60, eff August 20, 2004, and applying to notices and demands and notices of additional tax due issued on or after December 1, 2004) amended the Tax Law to specifically state that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, inter alia, a notice and demand issued (without the issuance of a notice of deficiency or a notice of determination) as the result of a mathematical error on a return or for failure to timely pay the tax due as shown on a return. The notice and demand issued for assessment L-025006450-5, dated February 4, 2005, was issued to petitioner upon its late-filed return, though a full remittance of tax was made. Since Tax Law § 173-a applies to notices and demands for payment issued on or after December 1, 2004, such provision serves, as a matter of law, to preclude petitioner from obtaining a hearing with respect to the notice and demand issued February 4, 2005 (assessment L-025006450-5). Accordingly, the Division's motion to dismiss for lack of subject matter jurisdiction is granted as to assessment L-025006450-5.<sup>2</sup>

However, concerning the first seven notices listed in the table located in Finding of Fact 2 (L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9, and L-020550108-1), all of the notices and demands and notices of estimated

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<sup>2</sup> Petitioner may not be entirely without recourse in this matter. Petitioner may pay the disputed tax sought by the Division via the notice and demand and thereafter file a claim for refund. Upon denial of such claim for refund, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.

determinations were issued prior to December 1, 2004, when there was no statutory authority governing issuance of notices and demands, particularly their right to a hearing (*see Matter of Meyers v. Tax Appeals Tribunal*, 201 AD2d 185, 615 NYS2d 90 [1994], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). Accordingly, the Division's motion to dismiss based on a lack of subject matter jurisdiction as to these seven notices is denied.

D. The Division also made a motion for summary determination as to the eight notices set forth in Finding of Fact 2, as an alternative argument, on the basis that a determination can be made in favor of the Division as a matter of law, and that no material and triable issue of fact remains. The disposition of assessment L-025006450-5 makes it unnecessary to address the motion for summary determination as to this notice. However, concerning the remaining seven notices, there are material and triable issues of fact concerning the four quarters that fall within the assessment that was cancelled (L-023232084-5), and whether they remain due and owing. In addition, petitioner has raised a question concerning an unexplained discrepancy in the assessments representing the quarters ending November 20, 2000 and February 28, 2001 that must also be addressed. Accordingly, the Division's motion for summary determination is denied, and the matter will be scheduled for a hearing on the merits of these seven notices (notices and demands and notices of estimated determination).

E. The Division's motion to dismiss with respect to assessment L-025006450-5 is granted; the Division's motion to dismiss with respect to assessments L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9, and L-020550108-1 is denied; and the Division's motion for summary determination as to assessments L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9, and L-020550108-1 is denied, and a hearing will be scheduled before the Division

of Tax Appeals in due course on these seven assessments.

DATED: Albany, New York  
January 16, 2014

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE