

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
KIM LEO WISNIEWSKI AND	:	ORDER
TRISHA LEO VOLLARO	:	DTA NOS. 826041
	:	AND 826042
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 2009 through May 31, 2012.	:	

Petitioners, Kim Leo Wisniewski and Trisha Leo Vollaro, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2009 through May 31, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michael Hall), brought motions filed on February 18, 2015, seeking orders of dismissal or, in the alternative, summary determination in the above-referenced matters pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motions were the affidavits of Michael Hall, dated February 18, 2015 and attached exhibits. Petitioners, appearing by Richard M. Gabor, Esq., did not file responses to the Division of Taxation's motions. Accordingly, the 90-day period for the issuance of this order began on March 20, 2015, the due date for petitioners' responses. Based upon the motion papers, affidavits and exhibits submitted therewith, and all pleadings and documents submitted in connection with these matters, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed timely requests for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Kim Leo Wisniewski, a Notice of Determination number L-040026170-4, dated August 29, 2013, assessing sales and use taxes in the amount of \$115,806.30, plus penalty and interest, for a total amount due of \$206,543.05 for the period September 1, 2009 through May 31, 2012. This Notice of Determination was issued to Ms. Leo Wisniewski as an officer or responsible person of Clam Bar Restaurant, Inc. (Clam Bar Restaurant), “for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.”

2. The Division issued to petitioner, Trisha Leo Vollaro,¹ a Notice of Determination number L-040026169-4, dated August 29, 2013, assessing sales and use taxes in the amount of \$115,806.30, plus penalty and interest, for a total amount due of \$206,543.05 for the period September 1, 2009 through May 31, 2012. This Notice of Determination was issued to Ms. Leo Vollaro as an officer or responsible person of Clam Bar Restaurant, “for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.”

3. Ms. Leo Wisniewski filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice number L-040026170-4, which notice was not attached to Request. Although this Request is dated

¹ Petitioner’s name is listed as “Leovollaro-Trisha A.” on the Notice of Determination, and Trisha Leo Vollaro on the petition filed in this matter.

December 12, 2103,² the United States Postal Service (USPS) Express Mail envelope in which the Request was mailed bears the USPS metered stamp dated December 11, 2013.

The cover letter enclosed with Ms. Leo Wisniewski's Request indicates that a total of three requests for conciliation conference, i.e., a Request for Clam Bar Restaurant, a Request for Ms. Leo Wisniewski, and a Request for Ms. Leo Vollaro, were included in the USPS Express Mail envelope.

4. Ms. Leo Vollaro filed a Request with the BCMS dated as signed December 11, 2013 in protest of Notice number L-040026169, which notice was not attached to her Request.

5. On December 27, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) (CMS No. 260051) to Ms. Leo Wisniewski. The Order determined that Ms. Leo Wisniewski's protest of Notice Number L-040026170, was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on August 29, 2013, but the request was not mailed until December 11, 2013, or in excess of 90 days, the request is late filed.”

6. On the same day that the foregoing Order was issued, BCMS also issued a Conciliation Order Dismissing Request (CMS No. 260050) to Ms. Leo Vollaro that dismissed the request and denied a conciliation conference with respect to Notice of Determination, notice number L-040009317. The language employed in this Order was identical to the language used in the Order issued to Ms. Leo Wisniewski.

7. Subsequently, Ms. Leo Wisniewski filed a petition with the Division of Tax Appeals in protest of the Notice number L-040026169. The petition is dated and signed by Ms. Leo Wisniewski on December 27, 2013, and the USPS Express Mail envelope in which the petition

² Ms. Leo Wisniewski appears to have written the incorrect date on the Request.

was mailed bears the USPS metered stamp dated January 6, 2014. The envelope and petition are date stamped as received by the Division of Tax Appeals on January 10, 2014. The cover letter enclosed with this petition indicates that a total of three petitions were included in the USPS Express Mail envelope, i.e., a petition to resolve Clam Bar Restaurant's controversy (Assessment L-040009317), a petition to resolve Ms. Leo Wiesniewski's controversy (Assessment L-040026170), and a petition to resolve Trisha Leo Vollaro's controversy (Assessment L-040026169).³

8. In protest of Notice number L-040026169, Ms. Leo Vollaro filed a petition with the Division of Tax Appeals that was dated and signed by her on December 27, 2013, and received by the Division of Tax Appeals on January 10, 2014.

9. On February 18, 2015, the Division of Taxation filed three motions seeking orders of dismissal or, in the alternative, summary determination pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure (Rules). The first motion was in the matter of the petition of Clam Bar Restaurant (DTA No. 826040), the second motion was in the matter of the petition of Kim Leo Wisniewski (DTA No. 826041) and the third motion was in the matter of the petition of Trisha Leo Vollaro (DTA No. 826042). The basis for each of these motions is that the Division of Taxation lacks jurisdiction of the particular matter because the protest of the statutory notice at issue in that matter was filed more than 90 days from its date of issuance.

10. After review of the motion papers, affidavit and exhibits submitted therewith, and all pleadings and documents submitted in connection with the matter of the petition of Clam Bar

³ The Division of Tax Appeals assigned DTA No. 826040 to the matter of the petition of Clam Bar Restaurant, Inc., 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 September 1, 2009 through May 31, 2012.

Restaurant, the undersigned rendered an Order that denied the Division of Taxation's motion for summary determination, and scheduled the matter of the petition of Clam Bar Restaurant for hearing. The Order concluded that a motion for summary determination under 20 NYCRR 3000.9(b) was the proper vehicle to consider the timeliness of Clam Bar Restaurant's request for conciliation conference, because the Division of Tax Appeals had jurisdiction over the petition due to the timely filing of the petition in the matter of Clam Bar Restaurant. The Order further concluded that because the Division failed to establish that it sent the Notice of Determination (Notice number L-040009317) to Clam Bar Restaurant's former representative, Clam Bar Restaurant's Request for Conciliation Conference in protest of Notice number L-040009317 was timely filed.

CONCLUSIONS OF LAW

A. The Division brings these motions to dismiss the petitions under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, summary determination under section 3000.9(b). As the petitions in these matters were timely filed, the Division of Tax Appeals has jurisdiction over the petitions, and accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioners' requests for conciliation conference. This order will address the instant motion as such.

B. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

“Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor” (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

“The motion shall be granted if, upon all 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact” (20 NYCRR 3000.9[b][1] *see also* Tax Law § 2006[6]).

C. Tax Law § 1138(a)(3)(B) provides, in relevant part, as follows:

“The liability, pursuant to subdivision (a) of section eleven hundred thirty-three of [Article 28], of any officer, director or employee of a corporation . . . who as such officer, director, employee . . . is under a duty to act for such corporation, . . . in complying with any requirement of this article for the tax imposed, collected or required to be collected, or for the tax required to be paid or paid over to the tax commission under this article, and the amount of such tax liability (whether or not a return is filed under this article, whether or not such return when filed is incorrect or insufficient, or where the tax shown to be due on the return filed under this article has not been paid or has not been paid in full) shall be determined by the tax commission in the manner provided for in paragraphs one and two of this subdivision. Such determination shall be an assessment of the tax and liability for the tax with respect to such person unless such person, within ninety days after the giving of notice of such determination, shall apply to the division of tax appeals for a hearing. *If such determination is identical to or arises out of a previously issued determination of tax of the corporation, . . . for which such person is under a duty to act, an application filed with the division of tax appeals on behalf of the corporation, . . . shall be deemed to include any and all subsequently issued personal determinations and a separate application to the division of tax appeals for a hearing shall not be required.*” (Emphasis added.)

D. The Order rendered in the matter of Clam Bar Restaurant concluded that Clam Bar Restaurant’s Request for Conciliation Conference in protest of Notice of Determination (Notice number L-040009317) was timely and, accordingly, denied the Division’s motion for summary determination and directed that a hearing be scheduled in due course (*see* Finding of Fact 10). Since the notices of determination issued to Mesdames Leo Wisniewski and Leo Vollaro, as officers or responsible persons of Clam Bar Restaurant, arose out of the Notice of Determination (Notice number L-040009317) previously issued to Clam Bar Restaurant, the petition filed by Clam Bar Restaurant is deemed to include the notices of determination issued to Mss. Leo

Wisniewski and Leo Vollaro (*see* Tax Law § 1138[a][3][B]). The Division's motions are therefore denied.

E. The Division of Taxation's motions for summary determination are denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
June 18, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE