

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ANTHONY MARTELLA** : **DECISION**  
**OFFICER OF CAPTAIN TONY'S PIZZA** :  
**& PASTA EMPORIUM, INC.** :  
for Redetermination of a Deficiency/Revision :  
of a Determination or for Refund of Sales :  
and Use Tax under Article(s) 28 and 29 of the :  
Tax Law for the Period 6/1/83-8/31/86. :  
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Petitioner, Anthony Martella, Officer of Captain Tony's Pizza and Pasta Emporium, Inc., 2805 West Henrietta Road, Rochester, New York 14623, filed an exception to the order of the Administrative Law Judge issued on February 2, 1989 which dismissed the petition filed by the petitioner on or about September 28, 1988 on the grounds that it was not in the form required by section 3000.3 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.3) (File No. 806146). Petitioner appeared by David Manioci, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Administrative Law Judge properly dismissed petitioner's petition on the grounds that it was not in the form required by the Rules of Practice and Procedure of the Tax Appeals Tribunal.

***FINDINGS OF FACT***

We find the following facts.

The Division issued to petitioner a notice of determination for sales and use tax dated July 30, 1987 in the amount of \$51,795.85 tax due, \$12,937.91 penalty due and \$18,799.79 interest due.

On September 30, 1988 the Division of Tax Appeals received a petition from petitioner. By letter dated October 25, 1988 the Division of Tax Appeals acknowledged receipt of petitioner's petition to petitioner's representative but indicated that:

" . . . the petition is not in proper form. So that this matter can be further processed, we need the following:

"If a conciliation order was issued or a conciliation conference discontinued, please submit copies of either the order or the discontinuance.

"Complete and return the enclosed power of attorney in accordance with the procedural regulations explained on the back.

"In accordance with 20 NYCRR 3000.3(d)(1), you are allowed an additional thirty days from the date of this letter to submit this information. If you fail to submit this information an administrative law judge will review the petition for possible dismissal."

On January 4, 1989 a second letter was sent to Mr. Manioci, the representative of the petitioner, indicating that the Division had not received a reply to its October 25, 1988 letter, a copy of which was enclosed. The January 4, 1989 letter further provided as follows:

"Please respond within 5 days. If you fail to submit this information, I will have no alternative but to refer this matter to an Administrative Law Judge for further review and possible dismissal."

Both the October 25th and January 4th letters contained the following sentence:

"To insure proper processing of your response, please, when replying, use the envelope provided and refer to the 'DTA number' stated above."

Both letters were addressed to David Manioci, Compuchek Corporation, 1425 Mt. Read Boulevard, Rochester, New York 14606.

On February 2, 1989 the Administrative Law Judge issued an Order Dismissing Petition (DTA No. 806146) which stated as follows:

"The petition filed by petitioner(s) on or about September 28, 1988 not being in the form required by section 3000.3 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.3); and

"The Division of Tax Appeals having requested petitioner(s) to file a corrected petition by letter(s) dated October 25, 1988 and January 4, 1989; and

"No response having been received from petitioner(s) as of this date; therefore,

"IT IS ORDERED, on the supervising administrative law judge's own motion, that the petition be, and it is hereby, dismissed."

The order was mailed to the petitioner at the following address: Anthony Martella, Officer of Captain Tony's Pizza & Pasta Emporium, Inc., 2805 West Henrietta Road, Rochester, NY 14623. A copy was also mailed to Mr. Manioci addressed as follows: David Manioci, Compucheck Corporation, 1425 Mt. Read Boulevard, Rochester, New York 14606.

On February 21, 1989 the Tax Appeals Tribunal received a Notice of Exception to the Administrative Law Judge's determination and a letter from the petitioner's representative, Mr. Manioci, dated February 9, 1989 addressed to State of New York, Division of Tax Appeals, Albany, New York 12227, which stated in part: "Please be advised that I did not receive your (2) previous letters regarding this matter."

On March 3, 1989 the Tax Appeals Tribunal, in a letter to Mr. Manioci, acknowledged receipt of the exception for purposes of timeliness but indicated that the exception was being returned so that it could be signed by the petitioner or his authorized representative.

On March 8, 1989 the exception was returned signed by Mr. Manioci, the petitioner's representative.

The exception does not address the Administrative Law Judge's order concerning the form of the petition nor does it supply the information requested by the October 25, 1988 and January 4, 1989 letters from the Division of Tax Appeals.

### ***OPINION***

The Laws of 1986, Chapter 282, enacted a new two-part system for the resolution of disputes between taxpayers and the Division of Taxation. The new law took effect on September 1, 1987 and provides taxpayers with the option of first requesting a conciliation conference under

the auspices of the Bureau of Conciliation and Mediation which is responsible for providing the conferences and issuing conciliation orders (Tax Law § 170[3-a]; 20 NYCRR 4000.1[c]).

Conciliation orders are binding upon "the department [of Taxation] and the person who requested the [conciliation] conference," unless such person petitions the Division of Tax Appeals for a hearing "within 90 days after the conciliation order is issued" (Tax Law § 170[3-a][e]; 20 NYCRR 4000.6[b]). The responsibility for the administration of the hearing process for the resolution of such disputes lies with the Division of Tax Appeals which is operated and administered by the Tax Appeals Tribunal (Tax Law § 2002).

The requisite forms necessary to reflect and implement the new procedures were created by the Division and the Tax Appeals Tribunal. In particular the form for the petition to request a hearing before the Division of Tax Appeals (form TA-10 [9/87]) reflects the conciliation procedure and on page 3 asks the petitioner if a conciliation conference was or was not requested. If a conference was held, the form requests that the date upon which the conciliation order was issued be indicated and a legible copy of the conciliation order be attached. The Tribunal's Rules of Practice and Procedure require that this information accompany the petition (20 NYCRR 3000.3; 3000.0[k]).

The purpose for requiring this information is to allow the Division of Tax Appeals to properly determine if the petition has been timely filed.

In the instant case the Division issued the Notice of Determination on July 30, 1987. The petitioner filed his petition on or about September 28, 1988. On the face of it, it would appear that the petition was not filed within 90 days after the issuance of the notice as required by Tax Law section 1138(a)(1) and is therefore untimely. Petitioner used a petition created by the former State Tax Commission which predated the new procedure and included no reference to the conciliation procedure. The correspondence of October 25, 1988 and January 4, 1989 to petitioner's representative was aimed at obtaining information necessary to allow the Division of Tax Appeals to process and review petitions for hearing in connection with the Division's overall responsibility to administer the hearing process. The failure of the petitioner to submit the

petition in proper form and to provide the requested information to the Administrative Law Judge precluded the Administrative Law Judge from determining the timeliness of the petition and whether Mr. Manioci was petitioner's authorized representative.

The exception filed by the petitioner does not include the requested information; however, it states that the letters of October 25, 1988 and January 4, 1989 were not received. This assertion coupled with the fact that the Order Dismissing Petition did not state what information was missing from the petition raises the possibility that petitioner's representative has never received a request for the missing information.

Accordingly, we remand this matter to the Supervising Administrative Law Judge to receive evidence from the parties on the timeliness of the petition, in particular, if a conciliation order was issued, the date of such order, and to receive a copy of a properly completed power of attorney appointing Mr. Manioci as petitioner's representative.

DATED: Troy, New York  
September 14, 1989

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner