

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
EDMOND FRANCIS : DECISION
 : DTA NO. 822228
for Redetermination of a Deficiency/Revision of a :
Determination or for Refund of Sales and Use Tax :
under Article(s) 28 & 29 of the Tax Law for the :
Periods June 1, 1986 - August 31, 1986 and :
December 1, 1986 - August 31, 1987. :

Petitioner, Edmond Francis, filed an exception to the order of the Administrative Law Judge dismissing the petition issued on September 15, 2008. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief and oral argument was not requested.

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

ISSUE

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

FINDINGS OF FACT

We find the following facts.

The petition in this matter appears to challenge assessment numbers L006595296, L006595297, L006595298, and L006595299. It also appears that there were no statutory documents attached to the petition that would allow for the right to a hearing.

On April 16, May 11, and May 12, 2008, in phone conversations with petitioner, the Office of Petition Intake of the Division of Tax Appeals advised petitioner that the petition submitted was incomplete in that it did not contain the statutory notice that gives a taxpayer the right to a hearing. Petitioner was instructed to call the Sales Tax Unit of the New York State Department of Taxation and Finance to request copies of the notices. If copies could not be provided, then petitioner was to ask the Sales Tax Unit to put that in writing and send it to the Division of Tax Appeals. The statutory documents were not received. On July 15, 2008, a Notice of Intent to Dismiss Petition was sent to petitioner giving him 30 days to respond with the necessary document. Petitioner did not respond to this notice.

On September 15, 2008, Administrative Law Judge Daniel J. Ranalli issued an Order Dismissing Petition for lack of jurisdiction. This exception followed.

OPINION

We affirm the order of the Administrative Law Judge.

The Tax Law provides with regard to sales and use taxes that:

After ninety days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing (Tax Law § 1138[a]).

In the alternative, a taxpayer may also, within the same 90 day period, file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) (*see*, Tax Law §§ 170[3-a], 2006[4]; 20 NYCRR 4000.3[c]). If a taxpayer first elects to file a request for conciliation with BCMS, the conciliation orders are binding upon the Department and the taxpayer unless a petition is filed with the Division of Tax Appeals within 90 days after the conciliation order is issued (*see*, Tax Law § 170[3-a][e], NYCRR 4000.3[c], 4000.6[b]).

A proceeding in the Division of Tax Appeals is commenced by filing a petition challenging a statutory notice pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law §§ 2000, 2006[4]; 20 NYCRR 3000.1[k]). The rules of the Tax Appeals Tribunal for the Division of Tax Appeals require that where a conciliation order has been issued, it must be attached to a petition for purposes of determining whether the petition is timely filed (20 NYCRR 3000.3[b][8]).

In this case, there was no statutory notice attached to the petition. Petitioner was notified that the petition was incomplete in that there was no statutory notice attached to the petition, and he was given 30 additional days to provide it. Petitioner did not provide the requested copy that would enable the Division of Tax Appeals to determine the timeliness of the petition. Consequently, the Division of Tax Appeals is without jurisdiction to hear and determine this matter.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Edmond Francis is dismissed;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Edmond Francis is dismissed with prejudice.

DATED: Troy, New York
June 18, 2009

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner