

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ALEXANDER COZIER** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 822587  
Cigarette Tax under Article 20 of the Tax Law for :  
the Year 2008. :

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Petitioner, Alexander Cozier, filed an exception to the order of the Administrative Law Judge dismissing the petition issued on April 9, 2009. Petitioner appeared by Alfred S. Cooper, Sr., Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether petitioner timely filed a petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

We find the following facts.

The petition in this matter appears to challenge a Notice of Determination dated October 8, 2008 (L-030066175-5) asserting tax in the amount of \$179,250.00 for tax year 2008.

On November 20, 2008, a letter was sent by the Petition Intake Unit in the Division of Tax Appeals ("Petition Intake Unit") to petitioner's representative, Alfred S. Cooper, Sr., Esq.,

advising him that the petition was not complete in that it did not include a copy of the Notice of Determination.

On December 9, 2008, the Petition Intake Unit received a copy of the Notice of Determination, along with a copy of the Notice and Demand for Payment dated September 8, 2008, provided by petitioner.

After reviewing the petition and other documents submitted, the Petition Intake Unit determined that the petition appeared to have been filed late and notified petitioner by issuing a Notice of Intent to Dismiss Petition dated December 26, 2008. In support of the proposed dismissal, the Division of Taxation "Division" provided proof of mailing of the Notice of Determination on May 19, 2008. Petitioner, in response, submitted an affidavit attesting that he has continuously resided at the address to which the Notice of Determination was mailed, but maintained that he never received it.

On April 9, 2009, Administrative Law Judge Catherine M. Bennett issued an Order Dismissing Petition for lack of jurisdiction. This exception followed.

### ***OPINION***

The Tax Law provides with regard to cigarette tax that:

Any determination [of tax due on cigarettes and tobacco products] made pursuant to this section shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing (Tax Law § 478).

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 a conciliation conference with BCMS, the conciliation order is 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]; 20 NYCRR 4000.3[c], 400.6[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 (*see*, Tax Law §§ 2000, 2006[4]; 20 NYCRR 3000.1[k]). The Rules of Practice and Procedure of the Tax Appeals Tribunal require that where a statutory notice has been issued, it must be attached to a petition for purposes of determining whether the petition is timely filed (*see*, 20 NYCRR 3000.3[b][8]).

In this case, the Notice of Determination was not attached to the petition. Petitioner was notified that the petition was defective in that it did not include a copy of the Notice of Determination as required by section 3000.3(b)(8) of the Tribunal's regulation, and he was given an additional 30 days to provide it. Petitioner provided a copy of the Notice of Determination within that 30 day period. Upon further review of the petition, it was determined that it was filed on October 25, 2008, which date was 159 days after the issuance of the Notice of Determination dated May 19, 2008. 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 Alexander Cozier is dismissed;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Alexander Cozier is dismissed with prejudice.

DATED: Troy, New York  
December 17, 2009

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

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