

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>5 HELIOS NOVELTY ONLINE LLC</b>	:	DECISION
		DTA NO. 822814
for Revision of a Determination or for Refund of	:	
Corporation Tax under Article 9-A of the Tax Law for the	:	
Period January 1, 2003 through December 31, 2006.	:	

---

Petitioner, 5 Helios Novelty Online LLC, filed an exception to the order of the Administrative Law Judge issued on April 16, 2009. Petitioner appeared by its President, Alvin Rivera. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner did not file a brief. The Division of Taxation did not file a brief in opposition. 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 filed in this matter on January 13, 2009 appears to challenge four assessments (L-029184912-7; L-029184913-6; L-029184914-5; L-029184915-4) asserting tax due from

petitioner in the amount of \$3,200.00 plus penalty and interest for the period January 1, 2003 through December 31, 2006.

On January 29, 2009, a letter was sent by the Petition Intake Unit of the Division of Tax Appeals to petitioner, advising it that the petition was not complete in that it did not include a copy of the statutory notice that was being protested, as required by the Rules of Practice and Procedure of the Tax Appeals Tribunal. The letter advised petitioner that it had 30 days within which to provide a copy of the statutory notice. Petitioner did not respond.

On March 6, 2009, a Notice of Intent to Dismiss Petition was sent to petitioner giving it 30 days to submit written comments with regard to the proposed dismissal. Petitioner did not respond to this Notice.

On April 16, 2009, 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 corporate tax that:

After ninety days from the mailing of a notice of deficiency, 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 § 1081[b]).

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], 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 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 (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 not in proper format, in that it did not include a copy of a statutory notice as required by section 3000.3(b)(8) of the Tribunal's regulations, and it was given 30 additional days to provide it. Petitioner did not provide the requested statutory notice 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 5 Helios Novelty Online LLC is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The petition of 5 Helios Novelty Online LLC is dismissed with prejudice.

DATED: Troy, New York  
November 25, 2009

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

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