

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROCKWELLS RESTAURANT CORP. : ORDER
for Revision of a Determination or for Refund of : DTA NO. 820747
Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 2004 :
through February 28, 2005. :

Petitioner, Rockwells Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed a petition 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 December 1, 2004 through February 28, 2005.

On October 14, 2005, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The Notice advised that each party was afforded a period of 30 days, or until November 13, 2005, within which to file written responses to the Notice. November 13, 2005 was a Sunday, and thus the date by which responses were due was Monday, November 14, 2005, which date commenced the 90-day period for issuance of this Order (20 NYCRR 3005.5[d]; 3009.9[a][4]). On October 24, 2005 the Division of Taxation, by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), submitted a letter in support of dismissal. On November 14, 2005 petitioner, appearing by its president, Stephen Robins, submitted a letter in opposition to dismissal. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an administrative hearing with respect to a certain Notice and Demand for Payment of Tax Due issued by the Division of Taxation against it on July 8, 2005.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Rockwells Restaurant Corp, a Notice and Demand for Payment of Tax Due (Assessment ID Number L-025724079-4) seeking payment of sales and use tax due for the sales tax quarterly period ended February 28, 2005. This Notice and Demand is dated July 8, 2005 and states, as the reason for its issuance, that “[y]our check, for payment of the amount due on your return, was returned to us as unpaid.” Petitioner does not challenge the date of issuance of the Notice and, in fact, admits receipt thereof. Similarly, petitioner does not challenge the Division’s claim that the tax due per its return for the period at issue was not paid.¹

2. In response to the Notice and Demand, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). By a letter dated August 5, 2005, BCMS denied the request for a conference, advising petitioner as follows:

The Tax Law provides that a conciliation conference may be requested when the Department issues a notice which gives rise to formal protest rights. In most cases, it is the issuance of a Notice of Deficiency or Notice of Determination, or the denial of a refund which may be protested. In this case, the Notice and Demand which you received is not such a notice and your request cannot be accepted.

¹ A Consolidated Statement of Tax Liabilities dated September 27, 2005 and issued to petitioner by the Division reveals that the amount assessed for the quarterly period in question consisted of tax in the amount of \$34,352.83, plus penalty and interest.

On October 4, 2005, petitioner challenged this denial by filing a petition with the Division of Tax Appeals seeking a hearing on the merits of the assessment.

3. On October 14, 2005, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. This Notice, as well as an accompanying letter, advised petitioner as follows:

Pursuant to § 173-a of the Tax Law, any notice and demand issued to a taxpayer without the issuance of a notice of determination or a notice of deficiency because of a mathematical or clerical error on a return or for failure to timely pay the tax due shown on a return shall not give that taxpayer a right to a hearing in the Division of Tax Appeals. The only option for such a taxpayer, is to pay the tax, apply for a refund and then petition for a hearing if the refund claim is denied.

Each of the parties to this matter was afforded a period of 30 days to submit written comments with regard to the proposed dismissal of the petition.

4. On October 24, 2005, the Division submitted a letter in agreement with the proposed dismissal as proper pursuant to Tax Law § 173-a.

5. On November 14, 2005, petitioner submitted a letter in opposition to dismissal which provided as follows:

The taxpayer's failure to timely pay the tax due shown on its return was a result of actions by representatives and employees of the Department of Taxation and Finance taken prior to December 1, 2004. Although the Notice and Demand under protest was issued on July 8, 2005 the actions and misconduct by representatives and employees of the Department of Taxation and Finance causing the taxpayer's failure to timely pay the tax due on its return was prior to the enactment amending the Tax Law Chapter 60 of the laws of 2004 therefore the taxpayer is entitled to a hearing.

Petitioner did not further specify the alleged "actions" and "misconduct," or how the same caused petitioner's failure to timely pay the tax due on its return.

CONCLUSIONS OF LAW

A. Tax Law § 2006 sets forth the functions, powers and duties of the Tax Appeals Tribunal including, in relevant part at subsection four thereof, as follows:

To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter.* (Emphasis added.)

B. Tax Law § 173-a (as added by L 2004, ch 60, eff August 20, 2004, and applying to notices and demands and notices of additional tax due issued on or after December 1, 2004) amended the Tax Law to specifically state that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, *inter alia*, a notice and demand issued (without the issuance of a notice of deficiency or a notice of determination) as the result of a mathematical error on a return or for failure to timely pay the tax due as shown on a return.

C. The Notice and Demand in this matter, based on petitioner's undisputed nonpayment of the amount of tax shown due on its return for the period in question, was issued against petitioner on July 8, 2005. Tax Law § 173-a applies to notices and demands for payment issued on or after December 1, 2004. Accordingly, such provision serves, as a matter of law, to preclude petitioner from obtaining a hearing with respect to the subject Notice and Demand which was issued after December 1, 2004. Petitioner's allegations that actions and misconduct by Division employees caused the nonpayment of tax are neither specific nor substantiated. More importantly, there is no provision in Tax Law § 173-a, nor has petitioner pointed to any other provision in the Tax Law, pursuant to which such allegations, even if substantiated, could override the specific legislative denial of the right to a hearing on the merits of the subject assessment properly set forth on a notice and demand.

D. The petition of Rockwells Restaurant Corp. is hereby dismissed.²

DATED: Troy, New York
January 26, 2006

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

² Petitioner may not be entirely without recourse in this matter. That is, petitioner may pay the disputed tax sought by the Division via the Notice and Demand and thereafter file a claim for refund. Upon denial of such claim for refund, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.