

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CATERIA CORPORATION</b>	:	<b>ORDER</b>
	:	<b>DTA NO. 823700</b>
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods June 1, 2008 through November 30,	:	
2008 and March 1, 2009 through May 31, 2009.	:	

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Petitioner, Cateria Corporation, 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 periods June 1, 2008 through November 30, 2008 and March 1, 2009 through May 31, 2009.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated September 30, 2010, on the ground that the Division of Tax Appeals lacks jurisdiction over this matter. The notice advised that each party was afforded a period of 30 days, or until October 30, 2010, within which to file written responses to the notice, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). On October 5, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq., (John E. Matthews, Esq., of counsel) submitted a letter in support of dismissal. Petitioner, by its representative, Norman A. Kaplan, Esq., filed a letter in opposition to dismissal on October 29, 2010. After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner is entitled to an administrative hearing with respect to certain notices and demands for payment of tax due issued by the Division of Taxation on May 4, 2009, May 8, 2009 and September 28, 2009.

***FINDINGS OF FACT***

1. On June 21, 2010, petitioner, Cateria Corporation, by its representative, Norman A. Kaplan, Esq., filed a petition with the Division of Tax Appeals.
2. On July 6, 2010, the Petition Intake Unit of the Division of Tax Appeals informed Mr. Kaplan by letter that the petition could not be processed further until it was completed and additional documentation was provided. The letter stated, in part, that a copy of the required statutory notice should be attached to the petition and that, if the taxpayer was issued a notice of determination or conciliation order, it should be forwarded to the Petition Intake Unit. Petitioner was given 30 days to provide the required statutory document.
3. On August 11, 2010, petitioner filed an amended petition, which did not include the required statutory notice.
4. On August 11, 2010, the Petition Intake Unit advised Mr. Kaplan by letter that no supporting statutory document was filed with the amended petition, and therefore the petition remained invalid and could not be processed further. The letter further advised Mr. Kaplan that unless he responded by August 25, 2010, dismissal proceedings would commence.
5. On August 23, 2010, petitioner refiled the amended petition. Attached to the amended petition were three notices and demands for payment of tax due for the periods June 1, 2008 through August 31, 2008, dated May 4, 2009; September 1, 2008 through November 30, 2008, dated May 8, 2009; and March 1, 2009 through May 31, 2009, dated September 28, 2009. The

notices were issued following a review by the Division of Taxation (Division) of petitioner's sales and use tax returns for mathematical accuracy, reported computation of tax by locality, timely filing and full payment of the amounts due. The review determined that petitioner had failed to make full payment of the sales and use taxes shown to be due on the returns filed.

6. On September 30, 2010, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The notice of intent provided, in relevant part, as follows:

Pursuant to § 2000 of the Tax Law, the administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due, a tax deficiency, a denial of a refund or credit [*sic*] application for a license, permit or registration or any other notice which gives a person the right to a hearing under this chapter.

Since the petition filed on August 11, 2010 did not contain a statutory notice or any other notice which gives a person the right to a hearing, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition.

### ***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), applying to notices and demands issued on or after December 1, 2004, amended the Tax Law to provide that the amount of tax which a return shows to be due shall be deemed to be finally determined to be due not later than on the date of the filing of such return and is to be paid upon the issuance of a notice and demand (Tax Law § 173-a[3][a]). The commissioner is authorized under Tax Law §

173-a(3)(b) to issue a notice and demand to the person liable for the amount of any tax, penalty and interest due. Finally, Tax Law § 173-a(3)(c) specifically states that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, inter alia, the issuance of a notice and demand.

C. The notices and demands in this matter, based upon petitioner's failure to pay the sales and use tax indicated to be due on its filed returns, were issued against petitioner on May 4, 2009, May 8, 2009 and September 28, 2009. Accordingly, Tax Law § 173-a serves, as a matter of law, to preclude petitioner from obtaining a hearing with respect to the subject notices and demands, which were issued after December 1, 2004 (*Matter of Held*, Tax Appeals Tribunal, February 22, 2007).

D. The petition of Cateria Corporation is hereby dismissed.

DATED: Troy, New York  
January 6, 2011

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE