

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CMC FOOD, INC.</b>	:	DECISION
	:	DTA NO. 826094
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, 2006 through	:	
May 31, 2010.	:	

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Petitioner, CMC Food, Inc., filed an exception to the determination of the Administrative Law Judge issued on January 22, 2015. Petitioner appeared by Naveen Shah, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period began on June 12, 2015, the date that petitioner's reply brief was received.

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

***ISSUE***

Whether the petition should be dismissed because it was not timely filed following the issuance of a conciliation order.

***FINDINGS OF FACT***

We find the following facts.

1. On February 5, 2014, petitioner, CMC Food, Inc., filed a petition with the Division of Tax Appeals in protest of notice number L037773794. In connection with its petition, petitioner provided a conciliation order dated March 29, 2013. The conciliation order bears the same notice number as that listed on the petition, as well as CMS number 256572.

2. On September 12, 2014, the Supervising Administrative Law Judge issued to petitioner a notice of intent to dismiss petition (notice of intent) that states, in relevant part:

“Pursuant to Tax Law § 170 (3-a) (e), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a BCMS [Bureau of Conciliation and Mediation Services] conciliation order.

In this case, the conciliation order, CMS No. 256572, was issued to petitioner on March 29, 2013. However, the petition in this matter was not filed with the Division of Tax Appeals until February 5, 2014, or three hundred and thirteen (313) days later.”

2. The notice of intent allowed the parties 30 days to submit written comments on the proposed dismissal. The Division of Taxation (Division) responded by submitting proof of mailing of the relevant conciliation order. Petitioner did not respond to the notice of intent.

4. On January 22, 2015, the Supervising Administrative Law Judge issued a determination dismissing the petition filed in this matter. The determination repeated the language in the notice of intent quoted above (*see* finding of fact 2).

***OPINION***

The Supervising Administrative Law Judge’s determination was issued following the Division of Tax Appeals’ issuance to petitioner of a notice of intent pursuant to 20 NYCRR

3000.9 (a) (4). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Such a motion “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

With certain exceptions not relevant herein, there is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c] [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see e.g. Matter of Garcia*, Tax Appeals Tribunal, December 3, 2015).

Where, as here, the timeliness of a taxpayer’s petition is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of issuance of the relevant conciliation order (*see Matter of Castillo*, Tax Appeals Tribunal, November 12, 2015). The Division may meet its burden “by establishing the use of a standard mailing procedure for conciliation orders by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order in this case” (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

In this case, the determination contains no findings of fact or conclusions of law to indicate that the Division met its burden to prove mailing. The determination thus fails to address this issue. Accordingly, we remand this matter to the Supervising Administrative Law Judge for a supplemental determination (*see Matter of Kane*, Tax Appeals Tribunal, January 29, 2015).

The supplemental determination shall be rendered as expeditiously as possible and shall be based upon the factual record already made.

We will retain jurisdiction over this matter based on the exception timely filed by petitioner. After the Supervising Administrative Law Judge issues his supplemental determination, petitioner will be allowed to add to its existing exception and briefs, provided it does so within 30 days of the issuance of the supplemental determination or request an extension of time within the 30-day period. The Division will given an opportunity to respond to any additional submission by petitioner. If the Division wishes to except to any portion of the Administrative Law Judge's supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Supervising Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision.

DATED: Albany, New York  
December 11, 2015

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
Commissioner