

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
GREGORIO MARIN : DECISION
for Revision of a Determination or for Refund of : DTA NO. 826378
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law. :

Petitioner, Gregorio Marin, filed an exception to the determination of the Administrative Law Judge issued on October 30, 2014. Petitioner appeared by Ballon, Stoll, Bader & Nadler, P.C. (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard in New York, New York on June 11, 2015, which date began the six-month period for issuance of this decision.

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

ISSUE

Whether the Administrative Law Judge properly dismissed the petition herein for lack of subject matter jurisdiction based on petitioner's failure to provide a copy of the relevant statutory notice as directed pursuant to a notice of intent to dismiss petition.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 1 and 3. We have also added an additional finding of fact, numbered 5 herein. We have made these changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact appear below.

1. On June 23, 2014, the Division of Tax Appeals received a petition from petitioner, Gregorio Marin. The petition indicates that a conciliation conference was not requested. Attached to the petition is a tax compliance levy relating to warrant ID E-035508670-2 in the amount of \$555,208.96 issued to Wells Fargo Bank, N. A., as garnishee. The levy lists petitioner as the judgment debtor individually and as responsible person of Constantinos 26, Inc. The petition did not include a copy of any underlying notice of determination or any other written notice advising petitioner of a tax deficiency or determination of tax due. Among four separately numbered paragraphs alleging errors and asserting facts, the petition states: "The appropriate and required Notice was not served on the taxpayer in accordance with Tax Law Section 1147 and is therefore invalid and void."

2. On July 8, 2014, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals contacted petitioner's representative, Norman Berkowitz, advising him that the petition was not complete in that it did not include a copy of the statutory notice at issue in this matter. Mr. Berkowitz was instructed to obtain a copy of the underlying statutory notice from the Division of Taxation (Division). Mr. Berkowitz refused to contact the Division to obtain such notice.

3. On July 29, 2014, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition to petitioner which provided, in part:

“In conformity with the Tax Appeals Tribunal Rules of Practice and Procedure, § 3000.3 (b) (8), the petition shall contain a copy of the order of conciliation issued or other statutory notice being protested. Petitioner did not include the required statutory notice and therefore the petition is not in proper form.

Pursuant to § 3000.3 (d) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner has thirty (30) days within which to file a corrected petition. In addition, pursuant to § 3000.9 (a) (4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.”

4. On August 7, 2014, petitioner’s representative submitted a response to the notice of intent to dismiss petition. The response states that petitioner claims to have never received a statutory notice from the Division and first became aware of the assessment when he received a tax compliance levy. The response further states that it would be unfair and unreasonable to require petitioner to produce a copy of a notice he claims he never received. Instead, petitioner asserts that it is incumbent upon the Division to come forward with evidence that it properly issued the appropriate notice to him.

5. Except for petitioner’s failure to provide a copy of a statutory notice, the petition in the present matter generally meets the requirements for the form of a petition set forth in section 3000.3 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) (20 NYCRR 3000.3 [b]). As relevant to the proposed dismissal, the petition identifies the protested assessments by warrant identification number; states the amount of tax in controversy; and alleges that notice of such assessment was not served upon him as required under the Tax Law.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that petitioner's failure to correct the petition to include a copy of the statutory notice after having been given an opportunity to do so left the Division of Tax Appeals without jurisdiction to hear and determine this matter.

The Administrative Law Judge also noted that the tax compliance levy that was included with the petition was not a notice that gives rise to a hearing in the Division of Tax Appeals.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that his failure to provide a copy of the relevant notice of determination should not result in the dismissal of his petition. Petitioner asserts that he never received the subject notice and that he should not be required to obtain a copy from the Division in order to attach it to his petition. Petitioner notes that, according to the Rules, "the sole purpose" of providing a copy of the notice with the petition is to "establish . . . the timeliness of the petition" (20 NYCRR 3000.3 [b] [8]). As petitioner concedes that the petition was filed after the time provided for in the notice, the "sole purpose" of his providing a copy of the notice has been met. Petitioner argues that, under such circumstances, this matter should be treated as a timeliness case, wherein the Division has the burden to prove proper issuance of the notice.

The Division contends that petitioner's failure to correct his petition as directed by the Supervising Administrative Law Judge in the notice of intent to dismiss properly resulted in the dismissal of the petition pursuant to the Rules. The Division asserts that petitioner is responsible to provide a copy of the notice previously mailed to him. The Division further notes that the tax compliance levy that was included with the petition was not a notice that gives rise to a hearing in the Division of Tax Appeals.

OPINION

A proceeding in the Division of Tax Appeals is commenced by filing a petition “protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund . . . or any other notice which gives a person the right to a hearing” (Tax Law § 2008 [1]), pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law § 2006 [4]).

Among other requirements pertaining to the form of a petition, the Rules provide that “for the sole purpose of establishing the timeliness of the petition, a legible copy of the order of the conciliation conferee if issued; if no such order was previously issued, a legible copy of any other statutory notice being protested [must be provided]” (20 NYCRR 3000.3 [b] [8]).

When a petition is not in proper form, and the petitioner fails to provide a corrected petition as directed and within the time allowed, the Rules state that the Supervising Administrative Law Judge “will issue a determination dismissing the petition” (20 NYCRR 3000.3 [d] [2]).

The authority of the Supervising Administrative Law Judge to dismiss a petition under 20 NYCRR 3000.3 (d) (2) is to be exercised with discretion and guided by the duty of the Division of Tax Appeals to provide a hearing process that ensures elements of due process (*see* Tax Law § 2000) (*see Matter of Leslie*, Tax Appeals Tribunal, April 22, 2015). The Supervising Administrative Law Judge’s discretionary authority to dismiss a petition under 20 NYCRR 3000.3 (d) (2) should also be guided by the requirement that all pleadings fulfill their purpose of providing “the parties and the Division of Tax Appeals fair notice of the matters in controversy and the basis for the parties’ respective positions,” while also “liberally” construing such pleadings “so as to do substantial justice” (20 NYCRR 3000.4 [a]).

As noted, petitioner did not provide a copy of any notice of determination or any other statutory notice giving a right to a hearing in the Division of Tax Appeals.¹ On the basis of this failure to conform the petition to the requirement set forth in 20 NYCRR 3000.3 (b) (8), and pursuant to his authority under 20 NYCRR 3000.3 (d) (2), the Supervising Administrative Law Judge issued the notice of intent to dismiss and the Administrative Law Judge issued the determination dismissing the petition.

Under the circumstances herein, we agree with petitioner that his failure to comply with 20 NYCRR 3000.3 (b) (8) should not result in the dismissal of his petition pursuant to 20 NYCRR 3000.3 (d) (2). In our view, the failure to provide a copy of a statutory notice, together with the express claim that no such notice was received, does not establish a lack of jurisdiction, but rather raises an issue of jurisdiction (*cf. Matter of Francis*, Tax Appeals Tribunal, June 18, 2009 and *Matter of Scott*, Tax Appeals Tribunal, May 29, 2008 [petitions dismissed for failure to provide the statutory notice where there was no express claim that such notice was not received]). As noted, under the Rules, the sole purpose of the requirement that a copy of the statutory notice be provided is to establish the timeliness of the petition (20 NYCRR 3000.3 [b] [8]). Logically, then, pursuant to this regulation, the failure to provide a notice means that timeliness of the subject petition has not been established. Moreover, under well established case law, when the timeliness of a petition is at issue, the Division must prove mailing (*see e.g. Matter of Novar TV and Air Conditioning Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991). Presumably, a copy of the subject notice(s) will be included in the Division's proof on the timeliness issue and such document(s), together with other evidence provided by the Division,

¹ It is undisputed that the tax compliance levy attached to the petition is not a document that provides hearing rights in the Division of Tax Appeals (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998).

will enable the Administrative Law Judge to resolve that jurisdictional issue.

We thus conclude that the dismissal of the petition was inappropriate under the instant circumstances and we remand this matter to the Supervising Administrative Law Judge for the issuance of a notice of intent to dismiss on the ground that the petition does not appear to have been timely filed.²

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gregorio Marin is granted to the extent indicated in paragraphs 2 and 3 below;
2. The determination of the Administrative Law Judge is reversed to the extent that a lack of subject matter jurisdiction has not been established;
3. The notice of intent to dismiss petition is withdrawn; and
4. This matter is remanded to the Supervising Administrative Law Judge for further proceedings consistent herewith.

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

² We recognize the possibility that, given their absence from the record, the notice(s) that led to the issuance of the tax warrant may not, in fact, be notice(s) that provide a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a). Obviously, if that were the case, we would expect the Division to so advise the Supervising Administrative Law Judge in response to the notice of intent to dismiss.