

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>KENNEDY DELI RESTAURANT CORPORATION</b>	:	DECISION
	:	DTA NO. 826901
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period Ending August 9, 2013.	:	

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Petitioner, Kennedy Deli Restaurant Corporation, filed an exception to the determination of the Administrative Law Judge issued on November 5, 2015. Petitioner appeared by Mohd A. Abdalla, Vice President. The Division of Taxation appeared by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested. The six-month period for issuance of this decision began on December 31, 2015, the date that the Division of Taxation's notification that it would not file a brief was received by the Tax Appeals Tribunal.

After reviewing the entire record in the matter, the Tax Appeals Tribunal renders the following decision. Commissioner Scozzafava took no part in the consideration of this matter.

***ISSUE***

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

***FINDINGS OF FACT***

We find the following facts.

1. On April 10, 2015, petitioner, Kennedy Deli Restaurant Corporation, filed a petition with the Division of Tax Appeals in protest of a notice of determination (number L-040233543). In connection with its petition, petitioner provided a copy of the notice of determination, dated October 18, 2013. The notice advised petitioner that if it disagreed with the amount due, it could file either a request for a conciliation conference, or a petition for a Tax Appeals hearing, but that either must be filed by January 16, 2014.

2. On July 17, 2015, 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 § 2006 (4) of the Tax Law, a petition must be filed within ninety (90) days from the date a statutory notice is issued.

In this case, the Notice of Determination (Assessment No. L-040233543) was issued to petitioner on October 18, 2013. However, the petition was not filed until April 10, 2015, or five hundred thirty-nine (539) days later.”

3. The notice of intent allowed the parties 30 days to submit written comments on the proposed dismissal. At the request of the Division of Taxation (Division), the parties were granted until October 1, 2015 to submit their respective comments. The Division responded by submitting documents related to the mailing of the relevant notice of determination. Petitioner did not respond to the notice of intent.

4. On November 5, 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 notice of determination (Tax Law §§ 478 and 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

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 notice of determination (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden "by establishing the use of a standard mailing procedure for conciliation orders [or notices] 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 [or notice] in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, 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 CMC Food, Inc.*, Tax Appeals Tribunal, December 11, 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 that was 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 the 30 days of the issuance of the supplemental determination or requests an extension of time within the 30-day period. The Division will be given an opportunity to respond to any additional submission by petitioner. If the Division wishes to except to any portion of the Supervising 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  
June 30, 2016

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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