

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EUPHORIA PALACE, INC.	:	DETERMINATION
	:	DTA NO. 827006
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 March 1, 2013 through August 31, 2013.	:	

Petitioner, Euphoria Palace, Inc., 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 March 1, 2013 through August 31, 2013.¹

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated July 17, 2015, 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 August 17, 2015,² within which to file written responses to the notice, which date commenced the 90-day period for issuance of this determination (20 NYCRR 3000.5 [d]; 3000.9 [a] [4]). On August 7, 2015, the Division of Taxation, by its representative, Amanda Hiller, Esq., (Leo Gabovich) submitted a letter in support of dismissal. Petitioner, by its representative, Julius Toonkel, Esq., filed a motion in opposition to dismissal on August 11, 2015. After due

¹ The petition initially also protested withholding tax assessment ID No. L-041074218-4. However, petitioner's representative notified the Division of Tax Appeals on or about June 23, 2015, that this assessment was no longer being protested, and therefore, it will not be discussed herein.

² Although 30 days resulted in a response due date of August 16, 2015, since this date falls on a Sunday, the subsequent day, Monday, August 17, 2015, becomes the statutory deadline (General Construction Law § 20; Tax Law § 1147 [a] [3]).

consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

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, dated July 2, 2013 and October 1, 2013.

FINDINGS OF FACT

1. On June 2, 2015, petitioner, Euphoria Palace, Inc., by its representative, Julius Toonkel, Esq., filed a petition with the Division of Tax Appeals, protesting assessments L-039590036-5 and L-040153770-8.

2. On June 10, 2015 and June 15, 2015, the Petition Intake Unit of the Division of Tax Appeals informed Mr. Toonkel by phone that the petition could not be processed further until it was completed and additional documentation was provided. The telephone log notes stated, in part, that a copy of the required statutory notices should be attached to the petition and that they should be forwarded to the Petition Intake Unit.

3. In response to a request by petitioner's representative for the Division of Taxation (Division) to provide copies of the notices at issue in this case to the Division of Tax Appeals, the Petition Intake Unit received the notices by facsimile on June 15, 2015.

4. The notices provided were both notices and demands for payments of tax due, representing assessments L-039590336-5, for tax due in the amount of \$17,452.95 plus penalty and interest, and L-040153770-8, for tax due in the amount of \$19,050.19 plus penalty and interest. The notices were issued following a review by the Division of petitioner's sales and use

tax returns, which determined that petitioner had failed to make any payment of the sales and use taxes shown to be due on the returns filed.

5. On July 17, 2015, 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 § 173-a (3) (c) of the Tax Law, the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition that is filed in protest of a Notice and Demand for Payment of Tax Due.

In this case, the petitioner filed a petition in protest of two Notices and Demands for Payment of Tax Due (Assessment Nos. L-040153770 and L-039590336). The Division of Tax Appeals lack [sic] jurisdiction to consider the merits of the petition. Therefore, no hearing rights exist to protest the Notices and Demands.”

6. The motion in opposition filed by petitioner’s representative states as the basis for the motion the fact that the Division has never served petitioner with a Notice of Determination. In addition, the motion states that the petition should not be dismissed since it is related to another pending petition of Arkady Fuzaylov (DTA No. 827005). Additionally, petitioner argues that it should be able to proceed with the adjudication of this matter without prepayment of tax due since the Division has abused its discretion by claiming excessive penalties and interest without sending the notices to petitioner, thus violating its due process rights.

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. Lastly, 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. Concerning petitioner's assertion that its petition should not be dismissed on the basis that it was never provided the notice of determination in this case, there is no evidence nor any reference that the Division issued a notice of determination at any time. Rather, the only notices offered as having been issued to petitioner were the notices and demands previously described, dated July 2, 2013 and October 1, 2013. In fact, it is virtually impossible that notices of determination were issued in this case given the fact that the due dates for the sales and use tax returns for the periods ended May 31, 2013 and August 31, 2013, were June 20, 2013 and September 20, 2013 (Tax Law § 1136 [b]), respectively, less than two weeks from the issuance dates of the notices and demands. Accordingly, petitioner's argument that it never received the notice of determination as a basis for not dismissing the petition is rejected, and the argument that petitioner's due process rights have been violated is completely unsupported.

D. 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 or about July 2, 2013 and October 1, 2013, as previously stated. 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).

E. The petition of Euphoria Palace, Inc. is hereby dismissed.

DATED: Albany, New York
November 12, 2015

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE