

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SUSHELL CORPORATION : DETERMINATION
DTA NO. 828817
for Revision of a Determination of Corporation Franchise :
Tax under Article 9-A of the Tax Law for the period :
January 1, 2014 through December 31, 2015. :

Petitioner, Sushell Corporation, filed a petition for revision of a determination of corporation franchise tax under article 9-A of the Tax Law for the period January 1, 2014 through December 31, 2015. On November 30, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the ground that the Division of Tax Appeals lacks jurisdiction over the petition. The Division of Taxation, appearing by Amanda Hiller, Esq. (Robert Tompkins, Esq., of counsel), submitted two letters dated December 7, 2018, and December 19, 2018, in support of dismissal. Petitioner, appearing by Richard M. Gabor, Esq., submitted a letter on December 28, 2018. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on December 31, 2018. After due consideration of the arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction over the petition.

FINDINGS OF FACT

1. Petitioner, Sushell Corporation, filed a petition with the Division of Tax Appeals on

July 20, 2018. The petition protests a letter dated February 7, 2018, bearing audit case identification number X757697398.

2. The petition did not identify or include a statutory notice or an assessment identification number.

3. Petitioner did not attach a copy of a conciliation order.

4. On September 7, 2018, the Division of Tax Appeals sent a letter to petitioner detailing the items missing from the petition and that failure to correct it within 30 days may result in a dismissal. Additional requests for a copy of the notice at issue or its assessment number were made by the Division of Tax Appeals to petitioner and its representative, to no avail.

5. Petitioner did not cure the deficiencies in the petition.

6. On November 30, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition (notice of intent) to petitioner and its representative. The notice of intent stated, in sum, that as the petition appeared to protest a letter and did not identify or include a statutory notice, the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

7. In response to the notice of intent, the Division of Taxation's (Division's) representative submitted a letter dated December 7, 2018, noting that the petition submitted was not in proper form, as required by 20 NYCRR 3000.3 (b) (8), as it was missing the statutory document, specifically, the notice of deficiency, refund denial notice or a conciliation order. The Division submitted a second letter dated December 19, 2018, explaining, in pertinent part, that a document containing a number starting with an X is merely a means for the Division to identify

and track a matter under audit, and is not a statutory notice. The Division emphasizes that without a statutory notice or conciliation order, the matter should be dismissed.

8. Petitioner, appearing by Richard M. Gabor, Esq., submitted a letter dated December 28, 2018, stating that adjustments were made to the petitioning corporation after an audit by New York State. Mr. Gabor explained that as petitioner is an S corporation, the adjustments did not create any additional tax to the corporation itself, rather, the adjustments created liabilities with the shareholders. Mr. Gabor assumed that the adjustments should be protested at the corporate level, as well as the shareholder level, even though a tax assessment has not been issued against petitioner.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Department of Taxation and Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry, J.]). Its power to adjudicate disputes is exclusively statutory (*id.*). The Division of Tax Appeals is authorized “[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]). Tax Law § 2008 limits the jurisdiction of the Division of Tax Appeals to matters

“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 credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.”

B. Pursuant to 20 NYCRR 3000.3 (b) (8), a petition shall contain, “for the sole purpose of establishing the timeliness of a 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.”

C. The petition in this case included a copy of a letter which is not a statutory notice. Petitioner did not include a required statutory notice or conciliation order and, therefore, fails to present a notice for which the Division of Tax Appeals has jurisdiction (*see* Tax Law § 2008). Moreover, petitioner claims, in its response to the notice of intent, that a tax assessment has not been issued against it. As petitioner failed to identify or attach a notice contemplated by Tax Law § 2008 and concedes that there is no tax assessment against it, the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition and the dismissal is warranted (*see* 20 NYCRR 3000.9 [a] [4] [I]).

D. The petition of Sushell Corporation is dismissed.

DATED: Albany, New York
March 21, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE