

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MIDWEST CONVENIENCE, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and	:	DTA NO. 830780
Use Taxes under Articles 28 and 29 of the Tax Law.	:	

Petitioner, Midwest Convenience, Inc., filed a for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law.¹ On August 26, 2022, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Michael J. Hall, Esq., of counsel), submitted a letter in support of the dismissal. Petitioner, appearing by Ruben Luna, its employee, did not submit a response by September 26, 2022, which date triggered the 90-day deadline for issuance of this determination.² After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals lacks jurisdiction over the petition.

FINDINGS OF FACT

1. Petitioner, Midwest Convenience, Inc., filed a petition that was received by the

¹ The period at issue was not identified in the petition.

² The petition lists Ruben Luna as petitioner’s representative but the petition does not attach a power of attorney.

Division of Tax Appeals on November 29, 2021. The envelope containing the petition bears a USPS postal mark indicating the petition was mailed on November 22, 2021.

2. The petition does not include or identify a statutory notice or conciliation order.
3. The petition lists Rueben Luna as petitioner's representative. Mr. Luna is identified as petitioner's employee, not a corporate officer.
4. Mr. Luna signed the petition on behalf of petitioner. An executed Division of Tax Appeals power of attorney form did not accompany the petition.
5. On December 27, 2021, the Division of Tax Appeals sent a letter to petitioner requesting a copy of the notice being protested and to provide a power of attorney form.
6. Petitioner did not provide the statutory notice or a valid power of attorney.
7. On August 26, 2022, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice stated, in sum, that the petition is in improper form and the Division of Tax Appeals lacks jurisdiction.
8. In response to the notice of intent to dismiss petition, the Division of Taxation's (Division's) representative submitted a letter on September 23, 2022 stating:

“[t]he Division is in receipt of the Notice of Intent to Dismiss the petition in the above referenced matter and agrees that the petition should be dismissed because the petition submitted was not in proper form, as required by 20 NYCRR 3000.3 and Tax Law § 2008 and because the petitioner neglected to include a copy of the statutory notice or conciliation order issued to petitioner. In addition a power of attorney was not submitted pursuant to 20 NYCRR 3000.2. Therefore, the Division of Tax Appeals lacks subject matter jurisdiction in the matter (Tax Law §§ 2000 & 2008; 20 NYCRR 3000.2 & 3000.9 (a)(4); see also Matter of Vilma Bautista, Tax Appeals Tribunal, March 13, 2017), and the petition should be dismissed.”

9. Petitioner did not submit a response to the notice of intent to dismiss petition.

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 Tribunal*, 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 3003.3 (b) (8), a petition shall contain, “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.”

C. Pursuant to 20 NYCRR 3000.3 (b) (3), a petition shall contain “the date of the notice, the tax article involved, and the nature of the tax.”

D. Where the petitioner fails to correct the petition within the time prescribed, the Supervising Administrative Law Judge will issue a determination dismissing the petition (*see* 20 NYCRR 3000.3 [d]).

E. The petition in this case did not include or identify 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). Thus, as petitioner failed to attach or properly identify a notice contemplated by Tax Law § 2008, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition and dismissal is warranted (*see* 20 NYCRR 3000.3 [d]; 3000.9 [a] [4] [i]).

F. Furthermore, an individual will not be recognized as the representative of a taxpayer until a power of attorney in proper form is filed with the Division of Tax Appeals (*see* 20 NYCRR 3000.2 [c]). Pursuant to 20 NYCRR 3000.2 (a) (1), where a corporation files a petition, it may act through one of its officers or employees. Where the corporation acts through an employee, a power of attorney must be filed.

A petition must be signed by petitioner or its' representative in order to be proper (*see* 20 NYCRR 3000.3 [b] [7]). In this case, the petition was not signed by a corporate officer, as required by 20 NYCRR 3000.2 (a) (1). Rather, it was signed by Mr. Luna who has been identified as an employee. Because the petition was not accompanied by a fully executed power of attorney pursuant to 20 NYCRR 3000.2 (c), it meant that Mr. Luna lacked the authority to sign the petition on behalf of petitioner and rendered the petition in improper form. That infirmity was not corrected.

G. IT IS ORDERED, on the supervising administrative law judge's own motion, that the petition be, and it is hereby, dismissed as of this date.

DATED: Albany, New York
December 22, 2022

/s/ Herbert M. Friedman
SUPERVISING ADMINISTRATIVE LAW JUDGE