

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ANTHONY DICHIARA</b>	:	<b>ORDER</b>
<b>D/B/A ITALIAN PIZZA</b>	:	<b>DTA NO. 825950</b>
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period February 28, 2007	:	
through August 31, 2012.	:	

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Petitioner, Anthony DiChiara, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period February 28, 2007 through August 31, 2012.

On May 30, 2014, 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 grounds that (i) the petition did not appear to have been filed in a timely manner with respect to certain statutory notices; (ii) the petition was not in proper form for failure to include certain of the statutory notices being protested, as required and, (iii) the Division of Tax Appeals lacks subject matter jurisdiction because the petition was not filed in protest of certain notices with respect to which there is a right to a hearing. By a letter dated August 20, 2014, the 30-day period within which to respond to the Notice of Intent to Dismiss Petition was extended, upon the parties' request, to September 15, 2014. On September 10, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich) submitted a letter, together with affidavits and accompanying documents in support,

agreeing with the proposed dismissal of the petition with respect to certain of the notices. On September 12, 2014, petitioner, appearing pro se, submitted a letter in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on September 15, 2014, the date by which the parties were to file responses to the Notice of Intent to Dismiss. After due consideration of the documents and arguments submitted, and all pleadings filed, Dennis M. Galliher, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to address the matters raised in the petition filed in this matter.

***FINDINGS OF FACT***

1. On September 12, 2013, petitioner, Anthony DiChiara d/b/a Italian Pizza, filed a letter with various attachments protesting various assessments made by the Division of Taxation (Division). This letter with its attachments was treated by the Division of Tax Appeals as a petition seeking an administrative hearing to review certain notices of deficiency and notices and demands that were attached to the petition, as well as two additional notices that were listed by notice number in the petition but were not included with the petition.<sup>1</sup>

2. The petition is dated September 10, 2013 and is signed by Anthony DiChiara. The envelope in which the petition was filed, by certified mail, bears a United State Postal Service (USPS) postmark dated September 12, 2013, and is date stamped as received by the Division of

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<sup>1</sup> Included with this September 12, 2013 filing were several copies of petition forms, various notices of determination and notices and demands for payment, as described herein, and other documents all of which appear to have been previously sent by facsimile to the Division of Tax Appeals.

Tax Appeals on September 16, 2013.

3. The aforementioned notices referenced in the petition are further described as follows:

a) the five notices of determination, bearing assessment numbers L-037286262, L-037286263, L-037286264, L-037286265 and L-087286266 pertain, respectively, to the periods ended August 31, 2011, May 31, 2011, February 28, 2011, February 28, 2010 and February 28, 2007, and assess sales and use taxes in the respective amounts of \$2,284.71, \$1,000.14, \$5,359.58, \$5,250.04 and \$2,880.75, plus penalty and interest. Each of the notices is addressed to Anthony DiChiara at 1625 Midland Dr., East Meadow, NY 11554-5040, and each is dated as issued on February 2, 2012.

b) the notice of estimated determination and the notice of determination, bearing assessment numbers L-034391491 and L-033802832 pertain, respectively, to the period ended February 28, 2010 and to the periods ended May 31, 2006 through February 28, 2009. The former assesses sales and use tax in the amount of \$5,250.04, plus penalty and interest, and the latter assesses sales and use tax in the aggregate amount of \$70,301.55, plus interest. Each is addressed to petitioner at the address listed above.

c) the six notices and demands for payment, bear assessment numbers L-035621284, L-036478362, L-036860233, L-037310604, L-038281610 and L-038710836, and reflect issuance dates of April 11, 2011, August 2, 2011, November 2, 2011, February 10, 2012, July 13, 2012 and October 19, 2010, respectively. These notices assess sales and use tax in the amounts of \$5,359.58, \$1,000.14, \$2,184.71, \$1,410.50, \$1,853.86 and \$1,492.38, plus penalty and interest, and pertain, respectively, to the sales tax quarterly periods ended February 28, 2011, May 31, 2011, August 31, 2011, November 30, 2011, May 1, 2012 and August 31, 2012. These notices indicate that they were issued as the result of petitioner's failure to remit, in whole or in part, the amount of tax shown as due on the returns filed for the noted periods.

d) the two additional assessment numbers, L-037907949 and L-0326671546, were referenced in the petition and accompanying materials, but copies of the statutory notices pertaining to these assessment numbers were not included with the petition. In addition, the assessment referenced as number L-0326671546 includes ten digits as opposed to the proper nine digits as is properly set forth in such a statutory notice.

4. On May 30, 2014, the Division of Tax Appeals issued a Notice of Intent to Dismiss

Petition, which stated, in pertinent 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. 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. Additionally, § 3000.3(b)(8) of the Tax Law requires the petition to contain a copy of each statutory notice being protested.

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Two notices of determination, Assessment Nos. L-034391491 and L-033802832, were issued to petitioner on July 26, 2010 and May 13, 2010, respectively. However, the petition was not filed with the Division of Tax Appeals until September 12, 2012, or one thousand one hundred forty four (1,144) and one thousand two hundred and eighteen (1,218) days later respectively. Five notices of determination, Assessment Nos. L-037286262, L-037286263, L-037286264, L-037286265 and L-037286266, were issued to petitioner on February 2, 2012. However, the petition was not filed with the Division of Tax Appeals until September 12, 2013, or five hundred and eighty eight (588) days later.

The notices and demands include Assessment Nos. L-035621284, L-036478362, L-036860233, L-037310604, L-038281610, L-038710836 and L-032667154. Since no hearing rights exist to protest a Notice and Demand, the Division of Tax Appeals lacks jurisdiction. Therefore, the Division of Tax Appeals is without jurisdiction to consider the merits of this petition with respect to these four (sic) notices and demands.

Additional notices in the petition include Assessment Nos. L-037907949 and "L-0326671546" (sic). Petitioner did not include in the petition the required statutory notices and therefore the petition is not in proper form with respect to these two notices. Also, the second notice does not appear to have a proper nine-digit assessment number.<sup>2</sup>

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<sup>2</sup> The Notice of Intent to Dismiss Petition indicates that assessment number L-032667154 represents a Notice and Demand. The Division's response to the Notice of Intent points out that the petition did not include a copy of this document (thus the reference to only six notices and demands.) The distinction may be attributable to a typographical error by petitioner such that the assessment referenced as L-0326671546 (the ten digit reference) is the assessment referenced as L-032667154 (the nine digit reference). In any event, the record does not include a copy of any statutory notice pertaining to either of such assessment numbers.

The parties were afforded 30 days from the date of the Notice of Intent to submit written comments on the proposed dismissal. That 30-day period was extended, upon the parties' request, to September 15, 2014.

5. In response to the Notice of Intent to Dismiss Petition, the Division provided the following: (i) an affidavit, dated September 9, 2014, of Leo Gabovich, Law Clerk; (ii) an affidavit, dated September 2, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated August 3, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a copy of petitioner's 2010 Resident Income Tax Return, filed on April 18, 2011, which reports the same address for petitioner as that listed on the notices of determination at issue herein; and (v) the 59 page "Certified Record for Presort Mail - Assessments Receivable" (CMR) for February 2, 2012, together with copies of the notices of determination referenced in Finding of Fact 3(a).

### **The Notices of Determination**

6. According to the affidavit of Ms. Nagengast, the process by which the Division generates and subsequently issues ~~statutory~~ notices, such as the notices of determination at issue herein and other such notices, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). Ms. Nagengast attests to her use of and familiarity with the Division's CARTS system.

7. The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice

appears on a separate one page "Mailing Cover Sheet" generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

8. The CARTS generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading entitled "Reference No.", and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar headings list appropriate postage and fee amounts. Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

9. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed.

Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

10. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet shows through the windows. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York area for mailing. A USPS employee then affixes his or her initials or signature and/or a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on

the following day after its initial delivery and is then delivered back to the Division for storage and retention in the regular course of its business.

11. A piece of mail may be “pulled” from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of items being mailed, so as to allow for correction or issuance at another time. When a piece of mail is pulled, a line is placed through the entry on the CMR for that piece of mail and the preprinted total number of pieces of mail listed on the last page of the CMR is manually adjusted to reflect the actual number of pieces being mailed after any items have been pulled.

12. The CMR for the batch of notices to be issued on February 2, 2012, includes the five notices of determination addressed to petitioner herein and bearing the assessment numbers set forth in Finding of Fact 3(a). The CMR consists of 59 cut sheet pages, including page 37, which is the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time “run” listing of “20120261700” (*see* Finding of Fact 9). Appearing in the upper right corner of the first and last pages of the CMR (i.e., pages 1 and 59), is the handwritten date “2/2/12” reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each page of the CMR includes a USPS postmark dated February 2, 2012. All pages of the CMR include 11 entries, with the exception of page 14, where one of the original eleven entries is crossed out, and page 59, the last page of the CMR, which contains no entries.

13. In this case, certified control numbers “7104 1002 9730 0989 7836,” “7104 1002 9730 0989 7843,” “7104 1002 9730 0989 7850,” “7104 1002 9730 0989 7867” and “7104 1002 9730 0989 7874” were assigned to the notices of determination bearing assessment numbers L-037286262, L-037286263, L-037286264, L-037286265 and L-037286266, and were to be mailed to petitioner at 1625 Midland Dr., East Meadow, NY 11554-5040. This same information appears at Page 37 of the CMR to indicate that the notices of determination bearing such certified control numbers and reference numbers were mailed to petitioner at such address.<sup>3</sup>

14. Appearing on Page 59 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 638, as well as the postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office.” Appearing to the immediate right of this heading is the handwritten and circled number 637, above which the preprinted number 638 has been manually canceled. Appearing at the bottom right corner of page 59 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas.” The area immediately below and to the right of this stamped instruction reflects the initials of the postal clerk and the aforementioned USPS postmark dated February 2, 2012. In fact, these same initials and USPS postmark appear on each page of the CMR. Thus, page 59 of the CMR indicates that a total of 637 pieces of mail were delivered into the custody of the USPS on February 2, 2012.

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<sup>3</sup> The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

15. As noted, a piece of mail may be pulled from a mailing for any number of reasons (*see* Finding of Fact 11). Review of the CMR in this case reveals that one piece of mail, assigned certified control number 7104 1002 9730 0989 5320 was pulled, and a line is drawn through the information for that piece of mail as appearing on page 14 of the CMR. There is no such line on or near the listing information for the pieces of mail relating to petitioner. As described, the preprinted number 638 reflecting the Total Pieces and Amounts listed on page 59 of the CMR, has been crossed out and the handwritten number 637 has been inserted after the preprinted listing for Total Pieces Received at Post Office.” This change is consistent with the removal or “pulling” of one piece of mail from the 638 items to be mailed on February 2, 2012.

16. The facts set forth above as Findings of Fact 6 through 15 were established through the affidavits of Mary Ellen Nagengast, a Division employee and Director of its MAPS bureau, and Bruce Peltier, a Division employee and Supervisor in the Division’s mail room (*see* Finding of Fact 5), together with the documents submitted therewith. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those notices of determination at issue herein as well as their subsequent issuance by mailing via delivery to the USPS.

17. In addition to the foregoing five notices of determination, a Notice of Estimated Determination bearing assessment number L-034391491 and a Notice of Determination bearing assessment number L-03302832, were included as protested and at issue in the petition filed herein (*see* Finding of Fact 3[b]). The Division admits by its representative’s affidavit that it

does not have sufficient documentation at this time to submit on the alleged failure by petitioner to file a timely protest with respect to these two notices.

### **The Notices and Demands**

18. In response to the issuance of the Notice of Intent to Dismiss Petition and with regard to the notices and demands described in Finding of Fact 3(c), the Division submitted copies of six notices and demands for payment, bearing assessment numbers L-035621284, L-036478362, L-036860233, L-037310604, L-038281610 and L-038710836, dated April 11, 2011, August 2, 2011, November 2, 2011, February 10, 2012, July 13, 2012, and October 19, 2012, respectively. These notices indicate that they were issued as the result of petitioner's failure to remit, in whole or in part, the amount of tax shown as due on the returns filed for the noted periods.

### **The "Additional" Assessments**

19. The two additional assessment numbers, L-037907949 and L-032667154, were referenced in the petition and accompanying materials. However, copies of the statutory notices pertaining to these assessment numbers were not included with the petition. In addition, and as noted, the assessment referenced as numbered L-0326671546 includes ten digits as opposed to the proper nine digits set forth in such a statutory notice.

### ***SUMMARY OF THE PARTIES' POSITIONS***

20. The Division maintains it has established that the five notices of determination described in Finding of Fact 3(a) were properly mailed to petitioner on February 2, 2012, and that the petition as concerning these five notices was filed more than 90 days after such date. Consequently, the Division asserts that the petition was not timely filed with respect to such five notices and that the Division of Tax Appeals lacks jurisdiction to review the merits of such

notices. In contrast, the Division admits that it lacks sufficient documentation to establish the alleged untimeliness of the two notices of determination described in Finding of Fact 3(b).

21. The Division further asserts that the six notices and demands described in Finding of fact 3(c) are specifically excluded from the types of notices carrying with them the right to a prepayment hearing before the Division of Tax Appeals, and thus seeks dismissal of the petition with respect thereto.

22. Finally, the Division seeks dismissal of the two additional assessments described in Finding of Fact 3(d) based upon petitioner's failure to have included a copy of the notices relating to these assessment numbers.

23. Petitioner argues that the assessments are the result of an "unfair audit," and that payments were made but were not properly credited.

### ***CONCLUSIONS OF LAW***

#### ***The Notices of Determination***

A. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2012) the Tribunal held that the standard to employ for reviewing a Notice of Intent To Dismiss Petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

C. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law

§ 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see, e.g., Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, there is no claim or evidence that petitioner filed a request for a conciliation conference with BCMS. Thus, the first question presented is whether the petition herein was filed within 90 days after the issuance of the notices of determination.

D. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the underlying statutory notices by mailing the same, via certified or registered mail, to petitioner’s last known address (Tax Law § 1138[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November

25, 1992). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. Here, the Division has offered proof sufficient to establish the mailing of the five statutory notices of determination described in Finding of Fact 3(a) to petitioner's last known address on February 2, 2012 (*see* Findings of Fact 12 - 15). The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's 2010 Resident Income Tax Return, which satisfies the "last known address" requirement. The notices were thus properly mailed to petitioner on February 2, 2012, and it was incumbent upon petitioner to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter.

F. The foregoing five notices of determination were, as set forth above, properly mailed to petitioner on February 2, 2012. However, the petition in this matter was not filed until September 12, 2013, or some 588 days thereafter. The petition was thus not timely filed and as a consequence, the Division of Tax Appeals is without jurisdiction to provide a hearing to address

the substantive merits of these notices. Accordingly, the Notice of Intent to Dismiss Petition is sustained as to these five notices of determination and the petition is dismissed with respect thereto.

G. With respect to the notices of determination described at Finding of Fact 3(b), the Division admitted that it is unable at this time to provide proof of proper mailing of the same (*see* Finding of Fact 17). Accordingly, it cannot be concluded that the petition herein is untimely with regard to these two assessments. Since the Division has presented no evidence with respect to the mailing of these notices and is unable to do so at this time, it has not met its burden to show that the petition was untimely filed with respect thereto. Consequently, the Notice of Intent to Dismiss Petition is properly rescinded as to the Notice of Estimated Determination dated February 28, 2010 and the Notice of Determination dated February 28, 2007, without prejudice to the filing of any future motion concerning such notices. The Division of Taxation shall have 75 days from the date of this order to file its answer in this matter with respect to such notices.

#### *The Notices and Demands*

H. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326 [1991]). Therefore, in the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

I. In this matter, the petition, in part, challenges six notices and demands numbered L-035621284, L-036478362, L-036860233, L-037310604, L-038281610 and L-038710836, dated

April 11, 2011, August 2, 2011, November 2, 2011, February 10, 2012, July 13, 2012, and October 19, 2012, respectively (*see* Finding of Fact 3[c]). Upon review, it is concluded that this proceeding must be dismissed with respect to these notices and demands because the Division of Tax Appeals lacks jurisdiction to review the documents. The Tax Appeals Tribunal is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006[4]). In this instance, the right to a hearing is specifically denied. Tax Law § 173-a(3)(c) provides that a notice and demand “shall not be construed as a notice which gives a person the right to a hearing.” Accordingly, the Division of Tax Appeals is without authority to proceed (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010) with respect to these six notices and demands and the Notice of Intent to Dismiss Petition is properly sustained with regard thereto.<sup>4</sup>

### ***The “Additional” Assessments***

J. A proceeding in the Division of Tax Appeals is commenced by filing a petition challenging a statutory notice pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law §§ 2000, 2006[4]; 20 NYCRR 3000.1[k]). The rules of the Tax Appeals Tribunal for the Division of Tax Appeals require that a legible copy of the statutory notice being protested must be attached to a petition for purposes of determining whether the petition is timely filed (20 NYCRR 3000.3[b][8]).

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<sup>4</sup> The provision of Tax Law § 173-a(3)(c) stating that a notice and demand shall not be construed as a notice which gives a person the right to a hearing was enacted by Chapter 60 of the Laws of 2004 and applies to notices issued on or after December 1, 2004 (L 2004, ch 60, pt F, § 8). All of the notices and demands in this case fall after this date.

K. In this case, the statutory notices pertaining to the additional assessments were not attached to the petition. Petitioner was notified that the petition was incomplete in this respect, and was afforded the opportunity to provide such notices. Petitioner did not provide the requested copies so as to enable the Division of Tax Appeals to determine the timeliness of the petition. Consequently, the Division of Tax Appeals is without jurisdiction with respect to the two additional assessments referenced at Finding of Fact 3(d) and the Notice of Intent to Dismiss is properly sustained with regard thereto (*see Matter of Edmond Francis*, Tax Appeals Tribunal, June 18, 2009; *Matter of Diop*, Tax Appeals Tribunal, August 21, 2014).

L. The Notice of Intent to Dismiss Petition is sustained and petition of Anthony DiChiara d/b/a Italian Pizza is dismissed to the extent indicated in Conclusions of Law F, I and K; the Notice of Intent to Dismiss Petition is rescinded to the extent indicated in Conclusion of Law G, and the Division of Taxation shall have 75 days from the date of this order to file its answer to the petition in this matter in accordance with the foregoing.

DATED: Albany, New York  
December 18, 2014

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE