

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MADDIPOTI J. CHOUDRY : ORDER
for Revision of a Determination or for Refund of : DTA NO. 827671
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period Ended December 31, :
2012. :
:

Petitioner, Maddipoti J. Choudry, 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 ended December 31, 2012.

On August 12, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 2, 2016, the Division of Taxation by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel) submitted a letter in support of the proposed dismissal. Petitioner, appearing pro se, did not submit a response. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on September 12, 2016. After due consideration of the arguments submitted by the parties, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the petition should be dismissed for lack of subject matter jurisdiction.

FINDINGS OF FACT

1. On June 9, 2016, the Division of Tax Appeals received a petition from petitioner, Maddipoti J. Choudry, challenging Notice of Determination number L-043439753-2, dated July 30, 2015. Attached to the petition was a copy of the subject notice. The petition also indicates that a conciliation conference was requested and held on November 3, 2015. Attached to the petition was a cover letter to petitioner dated November 20, 2015 from the Bureau of Conciliation and Mediation Services (BCMS) referencing an enclosed conciliation default order for CMS number 267607. The default order itself was not included with the petition.

2. On June 22, 2016, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals sent a letter to petitioner, advising him that the petition was not complete in that it did not include a copy of the conciliation order at issue in this matter.

3. On August 12, 2016, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition to petitioner that provided, in part:

“In conformity with § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the order of conciliation issued or statutory notice being protested. Petitioner did not include the required conciliation order and therefore the petition does not appear to have been timely filed.

Pursuant to § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner has thirty (30) days within which to file a corrected petition. In addition, pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.”

4. The petition in the instant case meets the requirements for the form of a petition set forth in section 3000.3(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal except for the absence of a copy of the conciliation default order. The petition identifies the protested Notice of Determination by assessment number, attaches the same, states the amount of

tax in controversy, and provides information pertaining to the missing conciliation default order.

5. The Division of Taxation (Division) solely submitted a one-page letter in support of dismissal of the petition, stating, in pertinent part:

“[a]s the petition submitted was not in proper form, as required by § 3000.3(b)(5) and (8) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the Division is in agreement with the proposed dismissal.”

6. The Division did not offer any proof of mailing of the Notice of Determination or conciliation default order at issue.

CONCLUSIONS OF LAW

A. A proceeding in the Division of Tax Appeals is commenced by filing a petition “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 any other notice which gives a person the right to a hearing” (Tax Law § 2008[1]), pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law § 2006[4]).

B. Among other requirements pertaining to the form of a petition, the Rules of Practice and Procedure provide that “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 [must be provided]” (20 NYCRR 3000.3[b][8]).

C. 20 NYCRR 3000.3(d)(2) states that the Supervising Administrative Law Judge “will issue a determination dismissing the petition” when a petition is not in proper form. The Tribunal has emphasized, however, that “the authority of the Supervising Administrative Law Judge to dismiss a petition under 20 NYCRR 3000.3(d)(2) is to be exercised with discretion and guided by the duty of the Division of Tax Appeals to provide a hearing process that ensures

elements of due process” (*Matter of Kokotas*, Tax Appeals Tribunal, December 11, 2015, citing Tax Law § 2000; *Matter of Leslie*, Tax Appeals Tribunal, April 22, 2015).

“The Supervising Administrative Law Judge’s discretionary authority to dismiss a petition under 20 NYCRR 3000.3 (d) (2) should also be guided by the requirement that all pleadings fulfill their purpose of providing ‘the parties and the Division of Tax Appeals fair notice of the matters in controversy and the basis for the parties’ respective positions,’ while also ‘liberally’ construing such pleadings ‘so as to do substantial justice’” (*Matter of Kokotas*, citing 20 NYCRR 3000.4 [a]).

D. In *Matter of Kokotas*, the Tribunal noted that “under the Rules, the sole purpose of the requirement that a copy of the statutory notice be provided is to establish the timeliness of the petition (20 NYCRR 3000.3[b][8]). Logically, then, pursuant to this regulation, the failure to provide a notice means that timeliness of the subject petition has not been established.” The Tribunal then pointed out that the Division must prove mailing when the timeliness of a petition is at issue (*see e.g. Matter of Novar TV and Air Conditioning Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991).

E. In light of the Tribunal’s holding in *Matter of Kokotas*, petitioner’s failure to attach a copy of the default conciliation order under the circumstances here should not result in the dismissal of his petition. Petitioner identified the subject Notice of Determination by number, attached a copy to the petition, and through the BCMS cover letter, identified the number and existence of the default order. He put the Division of Tax Appeals and the Division on fair notice of the substance of the controversy. Thus, according to *Matter of Kokotas*, a liberal construction of the pleadings creates an issue of jurisdiction based on timeliness and it was incumbent upon the Division to prove mailing. Instead, no evidence to that effect was offered. As a result, a lack of subject matter jurisdiction has not been established.

F. The Notice of Intent to Dismiss Petition issued to Maddipoti J. Choudry dated August

12, 2016 is withdrawn and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
December 01, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE