

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HILARIO TAVERAS : ORDER
DTA NO. 828051
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 September 1, 2010 through May 31, 2013. :

Petitioner, Hilario Taveras, 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 September 1, 2010 through May 31, 2013.

On March 30, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4). On April 24, 2017, the Division of Taxation, appearing by Amanda Hiller, Esq. (Adam L. Roberts, 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 May 1, 2017. After due consideration of the arguments presented, Donna M. Gardiner, 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 January 21, 2017, the Division of Tax Appeals received a petition from petitioner, Hilario Taveras, challenging Notice of Determination, assessment ID #L-041109881. The notice was not attached to the petition.

2. On January 25, 2017, 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 the amount of tax determined and contested was not indicated. Furthermore, petitioner was advised that the box indicating whether a conciliation conference was held was blank and that a copy of a conciliation order needed to be supplied.

3. On February 3, 2017, petitioner responded by stating the amount of tax that was determined and contested. Attached to the petition was a copy of the January 25, 2017 letter that he received from the Petition Intake, Review and Exception Unit as well as a copy of a cover letter dated December 30, 2016, from the Bureau of Conciliation and Mediation Services (BCMS) addressed to him indicating that a conciliation order, CMS No. 261770, was sent to petitioner and this cover letter apprised him of his appeal rights to the order and a Consent with respect to the conciliation order was provided that indicated that the subject Notice of Determination, L-041109881 was issued on April 29, 2014. However, the actual conciliation order was not provided to the Division of Tax Appeals.

4. On February 6, 2017, the Petition Intake, Review and Exception Unit sent petitioner another letter stating that a copy of the conciliation order was needed in order for the petition to be considered in proper form. A response from petitioner was requested within 20 days. Petitioner did not submit a copy of the conciliation order.

5. On March 30, 2017, 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 conciliation order 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.”

6. 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 (Rules) of the Tax Appeals Tribunal (Tribunal) except for the absence of a copy of the conciliation order. The petition identifies the protested notice of determination by assessment number, states the amount of tax in controversy, and provides information pertaining to the missing conciliation order, i.e. the cover letter indicates the conciliation order number and date issued.

7. The Division of Taxation (Division) submitted a letter that states, since the petition was not in proper form, the Division is in agreement with the proposed dismissal.

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), 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 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. Section 3000.3(d)(2) of the Rules states that the Supervising Administrative Law Judge “will issue a determination dismissing the petitioner” 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 *Kokotas*, petitioner's failure to attach a copy of the conciliation order under the circumstances here should not result in the dismissal of his petition. Petitioner identified the subject notice of determination by number, and through the BCMS cover letter, identified the number and existence of the conciliation order. Petitioner put the Division of Tax Appeals and the Division on fair notice of the substance of the controversy. Thus, a liberal construction of the pleadings creates an issue of jurisdiction based on the 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 Hilario Taveras, dated March 30, 2017, 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
July 20, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE