

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition

of

Doros Restaurant, Inc.

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DETERMINATION

TAT(H) 13-3(GC)

Hauben, C.A.L.J.:

On February 4, 2013, the Administrative Law Judge Division of the Tax Appeals Tribunal (Tribunal) received a Petition from Petitioner, Doros Restaurant, Inc., which requested redetermination of penalties and interest asserted with respected to Petitioner's liability for New York City (City) General Corporation Tax (GCT) for the period January 1, 2011 through December 31, 2011. Attached to the Petition was a Notice of Tax Due issued by the Commissioner of Finance (Respondent or Commissioner) dated October 10, 2012. Petitioner did not submit a statutory notice, such as a Notice of Determination.

On February 8, 2012, the Tribunal issued to Petitioner and Respondent a Notice to Correct Petition, which advised Petitioner that the Petition could not be acknowledged because it was not in proper form, and among other things requested that Petitioner or Respondent submit the statutory notice issued to Petitioner, if any.

By letter dated March 8, 2013, Frances J. Henn, Esq., Senior Counsel of the City's Law Department advised the Tribunal that "no statutory notice has been sent to petitioner. Instead, the Commissioner issued a Notice and Demand for late filing penalties and interest."

On March 28, 2013, the Tribunal issued a Notice of Intent to Dismiss the Petition which advised the parties that since no statutory notice had been issued by Respondent that the Tribunal lacked jurisdiction to review the petition and the petition would be dismissed for lack of jurisdiction unless a written objection was received by the Tribunal within thirty days.

By letter dated April 1, 2013, Petitioner's representative, Milton J. Pirsos, CPA, requested that the Petition be kept on file until Petitioner received a notice of determination from the City. Subsequently, a telephone conference was held with the undersigned, Ms. Henn and Mr. Pirsos, during which Ms. Henn explained that Respondent would not be issuing a notice of determination because there was no dispute regarding Petitioner's GCT liability. Rather, Respondent issued the Notice of Tax Due because it was seeking late filing penalties and interest only. The parties agreed to discuss resolving the matter and advise the Tribunal by June 14, 2013 whether the matter would be resolved informally.

By letter dated June 17, 2013, Ms. Henn informed the Tribunal and Petitioner "the Commissioner of Finance will not adjust the penalties and interest asserted in the Notice and Demand. Since the Notice and Demand is not a petitionable notice, the Tribunal does not have subject matter jurisdiction and the petition should be dismissed."

By letter dated June 20, 2013, Petitioner opposed the Notice of Intent to Dismiss and contended that "Petitioner is entitled to a pre-payment hearing pursuant to Tax Law § 2006(4). . . ." Petitioner cited *Matter of Donal A. Myers*, 201 AD2d 185 [3rd Dept 1994] in support of its position.

The issuance of a statutory notice by Respondent is a jurisdiction prerequisite to a hearing at the Tribunal. Where penalties and interest are related to a deficiency in tax, Respondent issues a notice of determination pursuant to Administrative Code § 11-672. The taxpayer may then file a petition protesting the notice of determination pursuant to Administrative Code § 11-680.2. Where penalties and interest are not related to a deficiency in tax, the Commissioner may proceed by issuing a notice and demand for penalties and interest pursuant to Administrative Code §§ 11-676 and 11-683.2.

In *Meyers*, which concerned New York State tax, the Appellate Division found that Tax Law Article 22 "did not give petitioners a right to a prepayment hearing," *Meyers*, 201 AD2d at 188. However, the Court found that under Tax Law § 2006, the State Tax Appeals Tribunal must "provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to a hearing is specifically provided for, modified or denied by another provision of this chapter." [Tax Law § 2006(4)] The Court found no other provision that "provided for, modified or denied a hearing." Accordingly, the petitioner in *Meyers* was entitled to a prepayment hearing at the State Tax Appeals Tribunal.

There is no provision in the City Charter or Administrative Code similar to Tax Law § 2006(4). Under the City Charter, the Tribunal has "jurisdiction to hear and determine cases initiated by the filing of petitions protesting notices issued by the commissioner of finance, which give a person a right to a hearing" [City Charter § 168.a.] Neither the City Charter nor the Administrative Code authorizes the filing of a petition to protest a notice and demand. (*Matter of Hillary David Corp.*, [City Tax

Appeals Tribunal, January 9, 2002])). The Tribunal lacks jurisdiction to review the Petition in this matter.

ACCORDINGLY, IT IS CONCLUDED THAT as the Commissioner of Finance has not issued a statutory notice to Petitioner, the Tribunal lacks jurisdiction to review the Petition protesting penalties and interest asserted in the Notice of Tax Due issued by Respondent on October 10, 2012 and the Petition of Doros Restaurant, Inc. is dismissed.

Dated: New York, New York
June 28, 2013

Warren P. Hauben
Chief Administrative Law Judge