

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>TAVERAS SISTER, INC.</b>	:	DECISION
	:	DTA NO. 828050
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, Taveras Sister, Inc., filed an exception to the determination of the Administrative Law Judge issued on June 22, 2017. Petitioner appeared by its president, Hilario Taveras. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Both parties also submitted supplemental written arguments regarding the consideration of additional evidence on exception. Oral argument was not requested. The six-month period for the issuance of this decision began on September 21, 2017, the date that the last written arguments regarding the consideration of additional evidence on exception was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

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

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. Those findings of fact are set forth below.

1. On January 21, 2017, petitioner, Taveras Sister, Inc., filed a petition with the Division of Tax Appeals.<sup>1</sup>

2. On March 2, 2017, the Supervising Administrative Law Judge of the Division of Tax Appeals, responded to the petition by issuing to petitioner and to the Division of Taxation (Division), a notice of intent to dismiss petition (notice of intent). The notice of intent provides, in relevant part, as follows:

“Pursuant to Tax Law § 2010(4), a determination issued by an Administrative Law Judge shall finally decide matters in controversy before the Division of Tax Appeals unless one of the parties takes exception by timely requesting review of the matter before the Tax Appeals Tribunal (*see* Tax Law § 2016). The right to such hearing, together with the option to timely take exception to the Tax Appeals Tribunal, is the exclusive remedy available for review of a tax liability imposed under Articles 28 and 29 of the Tax Law (*see* Tax Law § 1138[a][4]).

The instant petition was filed on January 21, 2017 in protest of Notice and Demand, Assessment No. L-040522237-1, dated September 29, 2014. With respect to the tax assessed by this Notice and Demand, a Determination has previously been issued by the Division of Tax Appeals. On August 6, 2015, the Division of Tax Appeals issued a Determination sustaining the conciliation order then under protest, CMS. No. 260386, with respect to the tax assessed under Articles 28 and 29 for the period September 1, 2010 Through May 31, 2013 (*see Matter of Taveras Sisters* [sic], *Inc.*, Division of Tax Appeals, August 6, 2015). Therefore, a determination has already been issued with respect to the tax assessed by this Notice and Demand, and, as a result, the Division of Tax Appeals is

---

<sup>1</sup> The petition, as captioned, lists Taveras Sister, Inc./Hilario Taveras, and lists two assessment ID numbers: L-040522237-1 and L-041109881-1. This matter pertains only to petitioner Taveras Sister, Inc., and assessment ID number L-040522237-1, and has been assigned DTA No. 828050. The other listed petitioner, Hilario Taveras, signed the petition as the corporate petitioner’s president. Since assessment ID number L-041109881-1 appears to apply to Hilario Taveras, individually, the petition has been separated into two matters. The matter regarding Hilario Taveras has been assigned DTA No. 828051, and is proceeding as a separate matter before the Division of Tax Appeals.

without jurisdiction to consider the merits of a second petition filed in protest of the same assessment.”

Under the notice of intent, the parties were afforded a period of 30 days within which to provide written comments on the proposed dismissal of the petition.

3. In response to the notice of intent, the Division submitted a letter, dated March 24, 2017, confirming the issuance of a conciliation order (CMS No. 260386), dated June 6, 2014, sustaining statutory notice number L-040522237. The letter further confirmed the subsequent issuance of a determination (DTA No. 826574), dated August 6, 2015, by the former Supervising Administrative Law Judge, dismissing a petition filed by Taveras Sisters (sic), Inc., challenging that conciliation order. The dismissal was made upon the basis that the petition was filed some 137 days after issuance of the conciliation order, and hence was properly subject to dismissal as not timely filed with the Division of Tax Appeals.

4. There is no claim or evidence that petitioner filed with the Tax Appeals Tribunal any exception to the determination issued by the former Supervising Administrative Law Judge within the time period for doing so.

5. Petitioner responded to the notice of intent by a letter dated March 23, 2017, seeking to have the matter reviewed again upon the basis that amount of the assessment is “too high,” and that its enforcement will result in the petitioner entering into bankruptcy.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began the determination by noting that this matter was subject to a notice of intent to dismiss petition. The Administrative Law Judge explained that the basis for the notice of intent to dismiss was the matter’s adjudication in a prior proceeding (*see Matter of Taveras Sister, Inc.*, Division of Tax Appeals, August 6, 2015).

The Administrative Law Judge then observed that the standard of review for a notice of intent to dismiss petition is the same as that used in reviewing a motion for summary determination. According to the Administrative Law Judge, such a motion 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.

The Administrative Law Judge next found that the August 6, 2015 determination of the former Supervising Administrative Law Judge dismissed petitioner's protest of the June 6, 2014 conciliation order sustaining the underlying assessment against petitioner. The Administrative Law Judge found no evidence of petitioner's subsequent filing of an exception to the August 6, 2015 determination. The Administrative Law Judge concluded that the instant matter had been finally decided in favor of the Division and thus the Division of Tax Appeals has no jurisdiction to consider the merits of a second petition filed in protest of the same assessment.

The Administrative Law Judge concluded that the petition in this matter was thus properly subject to dismissal and dismissed the same.

#### ***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner argues that the Administrative Law Judge incorrectly concluded that there was no evidence of an exception filed with the Tax Appeals Tribunal following the determination issued by the former Supervising Administrative Law Judge on August 6, 2015. Petitioner urges us to consider its protest of the proposed assessment in light of evidence submitted for the first time on exception to show that the statutory notice was not sent to its last known address.

The Division argues that the determination of the Administrative Law Judge should be affirmed without modification and petitioner's exception should be dismissed as this matter has been finally decided in a prior proceeding. In addition, the Division argues that we should not consider petitioner's newly submitted evidence as it was not part of the record in the proceeding below. Furthermore, the Division urges us to deny petitioner's exception as it merely disagrees with the Administrative Law Judge's determination without offering a legal basis to its petition.

### ***OPINION***

We begin our decision in this matter by reviewing the standard applied by the Administrative Law Judge in reviewing a notice of intent to dismiss petition. We concur with the Administrative Law Judge that the appropriate standard of review for a notice of intent to dismiss a petition is the same as that used in reviewing a motion for summary determination (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). A motion for summary determination may be granted if the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and 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]).

We also agree with the Administrative Law Judge that a determination by an administrative law judge finally decides the matters in controversy unless a party to the proceeding timely files a request for review by the Tax Appeals Tribunal (Tax Law § 2010 [4]; 20 NYCRR 3000.15 [e] [2]).

In this case, despite petitioner's assertions to the contrary, we find no evidence in the record showing that an exception seeking review of the determination issued on August 6, 2015

was timely filed with this Tribunal. We agree with the Administrative Law Judge that because the instant matter had been finally decided by a prior determination, the Division of Tax Appeals has no jurisdiction to consider the merits of a second petition filed in protest of the same assessment (*see Matter of Kyte*, Tax Appeals Tribunal, October 9, 2014; 20 NYCRR 3000.9 [a] [4]).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Taveras Sister, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Taveras Sister, Inc. is dismissed.

DATED: Albany, New York  
March 20, 2018

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner