

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>TAVERAS SISTER, INC.</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 828050</b>
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.	:	

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Petitioner, Taveras Sister, Inc., 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 2, 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 March 24, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Adam L. Roberts, Esq., of counsel), filed a letter in support of dismissal. On March 23, 2017, petitioner, by its president, Hilario Taveras, filed a letter in opposition to dismissal. Pursuant to 20 NYCRR 3000.9(a)(4), the 90-day period for issuance of this determination began on April 2, 2017. After due consideration of the parties's responses to the notice of intent to dismiss petition, and upon all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

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, Herbert M. Friedman, Jr., 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 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

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<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.

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 then-Supervising Administrative Law Judge Daniel J. Ranalli, 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 Judge Ranalli, 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.

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

A. This matter proceeds by way of a notice of intent to dismiss petition, upon the basis that the same has been finally decided by the August 6, 2015 determination of the administrative law judge. In *Matter of Victory Bagel Time, Inc.*, (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, and this matter shall proceed under that standard.

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. In this case, the August 6, 2015 determination of the administrative law judge dismissed the initial petition in this matter upon the conclusion that petitioner had not timely challenged the June 6, 2014 conciliation order sustaining the underlying assessment against petitioner (Assessment No. L-040522237-1). Tax Law § 2010(4) provides that:

“[a] determination issued by an administrative law judge shall finally decide the matters in controversy unless any party to the hearing takes exception by timely requesting a review by the tax appeals tribunal as provided for in section two thousand six of this article” (*see also* 20 NYCRR 3000.15[e][2]).

D. Since no exception to the August 6, 2015 determination of the administrative law judge was filed, this matter has been finally decided in favor of the Division. Consequently, the Division of Tax Appeals has no jurisdiction to consider the merits of a second petition filed in protest of the same assessment, is precluded from hearing the merits of the case, and the petition is properly subject to dismissal (20 NYCRR 3000.9[a][4]; *see Matter of Kyte*, Tax Appeals Tribunal, February 4, 2011).

E. The petition of Taveras Sister, Inc. is hereby dismissed.

DATED: Albany, New York  
June 22, 2017

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE