

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

JASON J. DENTON :

DETERMINATION
DTA NO. 829762

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the
Tax Periods December 1, 2012 through February 28, 2013.
:

Petitioner, Jason J. Denton, filed a petition for revision of determinations or for refund of sales and use tax under articles 28 and 29 of the Tax Law for the periods December 1, 2012 through February 28, 2013.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated June 7, 2021, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition as the claim appeared to have been previously decided. The parties were given, upon extension, until August 23, 2021 to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Eric Gee, Esq., of counsel) submitted a letter dated June 22, 2021, and supporting documents in support of dismissal. Petitioner, appearing by Isaac Sternheim & Co. (Isaac Sternheim, CPA), did not submit a response by August 23, 2021, which date triggered the 90-day deadline for issuance of this determination. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition.

FINDINGS OF FACT

1. On September 27, 2019, the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 314446, to petitioner dismissing request for notice number L-040034320 for the tax periods December 1, 2012 through February 28, 2013.
2. Petitioner filed a petition that was received by the Division of Tax Appeals on December 6, 2019. The envelope in which the petition was mailed bears a USPS postal mark indicating the petition was mailed on November 26, 2019.
3. The petition challenged notice number L-040034320 and the conciliation order, CMS number 314446.
4. The petition did not challenge or contain any other statutory notices or conciliation orders.
5. On June 18, 2020, Administrative Law Judge James P. Connolly issued a determination denying a previous petition challenging notice number L-040034320 and sustaining the notice. That petition had been filed on October 11, 2019 and was given DTA number 829616. An exception was not filed by petitioner.
6. On June 7, 2021, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice of intent) to petitioner, on the basis that assessment number L-040034320 appeared to be the subject of a previous matter before the Division of Tax Appeals, DTA number 829616.

7. In response to the notice of intent to dismiss petition, the Division of Taxation's representative submitted a letter on June 22, 2021 stating:

“[t]he Division is in receipt of the Notice of Intent to Dismiss the petition in the above referenced matter. On July 18, 2020, the Division of Tax Appeals issued a Determination, DTA No. 829616, sustaining Assessment No. L040034320 (Conciliation Order, dated September 27, 2019; CMS No. 000314446). Attached are copies of the Determination and Conciliation Order. is a copy of the Stipulation for Discontinuance. Therefore, the Division of Tax Appeals lacks jurisdiction over the merits and the Division is in agreement with the proposed dismissal.”

8. The petitioner did not submit a response to the notice of intent to dismiss the petition.

CONCLUSIONS OF LAW

A. This matter proceeds on a notice of intent to dismiss petition under 20 NYCRR 3000.9 (a) (4), upon the basis that assessment number L-040034320 was the subject of a previous matter before the Division of Tax Appeals. In *Matter of Victory Bagel Time, Inc.*, (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals 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.

B. A motion for summary determination shall be granted: “if, upon all 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. 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 also* 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 under articles 28 and 29 of the Tax Law (*see* Tax Law § 1138[a][4]).

D. In this case, the June 18, 2020 determination of Administrative Law Judge James P. Connolly sustained notice number L-040034320 and no exception was taken by petitioner.

E. Accordingly, since the petition filed on November 26, 2019 seeks to challenge the same statutory notice as in DTA number 829616, the Division of Tax Appeals lacks jurisdiction of the subject matter and the petition must be dismissed (*see Matter of Yim*, Tax Appeals Tribunal, October 7, 2021).

F. The petition of Jason J. Denton is dismissed.

DATED: Albany, New York
November 18, 2021

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