

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| FELIX INDUSTRIES, INC. | : | DECISION |
| | : | DTA No. 809987 |
| for Redetermination of a Deficiency or for Refund of | : | |
| Corporation Franchise Tax under Article 9-A of the Tax | : | |
| Law for the Fiscal Years Ending June 30, 1986 through | : | |
| June 30, 1988. | : | |

The Division of Taxation filed an exception to the order of the Administrative Law Judge, issued on July 16, 1992, denying the Division of Taxation's motion for an order vacating a Stipulation for Discontinuance of Proceeding. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel). Petitioner Felix Industries, Inc. did not appear.¹

The Division of Taxation filed a brief and a supplemental brief. The supplemental brief was filed on February 1, 1993 which began the six-month time period for the issuance of this decision. The Division of Taxation's request for oral argument was denied.

Commissioner Jones delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUE

Whether a Stipulation for Discontinuance of Proceeding can be vacated because the Division of Taxation alleges it erred in preparing the stipulation.

¹Petitioner did not respond to the Division of Taxation's motion before the Administrative Law Judge and has not responded to the Division of Taxation's exception to the order of the Administrative Law Judge. Petitioner's representative for its petition was Paul J. Staffaroni.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Felix Industries, Inc. ("Felix") filed a timely petition for redetermination of a deficiency of corporation franchise tax for the fiscal years ending June 30, 1986 through June 30, 1988. Attached to the petition were copies of six notices of deficiency. Notice numbers corresponding to those shown on the notices of deficiency were listed on page three of the petition. Also attached to the petition was a Conciliation Order dated June 21, 1991 sustaining the statutory notices and listing six notice numbers, corresponding to the attached notices of deficiency. The notice numbers appearing on the described documents were: C900426500F, C900426502F, C900426504F, C900426501S, C900426503S, C900426505S.

The petition identified one error of the Commissioner of Taxation and Finance: "The Commissioner of Taxation and Finance erred by disallowing the carryforward of the June 30, 1983 net operating loss."

With a letter dated January 17, 1992, the Division of Taxation (the "Division") forwarded to the Calendar Clerk of the Division of Tax Appeals (the "DTA") an executed Stipulation for Discontinuance of Proceeding in the Matter of Felix Industries, Inc., DTA number 809987 (hereinafter the "Stipulation"). The Stipulation listed the six notice of deficiency numbers shown on the petition and showed the years at issue to be July 1, 1985 through June 30, 1988. As pertinent, the Stipulation states:

"[t]he above-entitled proceeding having been resolved, it is hereby stipulated and agreed by and between the parties herein that such proceeding be and the same is discontinued, with prejudice, and that the deficiency/determination or refund is recomputed as follows:

| | |
|--------------------------------------|-----------------------|
| Deficiency/determination or (refund) | <u>\$4,519</u> |
| Interest | <u>to be computed</u> |
| Penalty | <u>0</u> " |

The Stipulation was signed by the Division's representative, James Della Porta, and the taxpayer's representative, Paul J. Staffaroni, on December 31, 1991 and January 13, 1992,

respectively. In the cover letter to the DTA Calendar Clerk, the Division's representative stated: "We are marking this matter on our records as a closed case."

Pursuant to State Administrative Procedure Act § 306(4), official notice is taken of the following fact. The records of the DTA show that this case was closed by the DTA on January 17, 1992.

In an affirmation dated May 13, 1992, Mr. Della Porta states that the Stipulation is erroneous and does not reflect the actual tax due for the years listed in the Stipulation. The description of events leading up to and following the execution of the Stipulation, as contained in the affirmation, are summarized below.

On or about November 1, 1991, Mr. Della Porta forwarded the Law Bureau's file on Felix Industries, Inc. to the District Office Audit Bureau ("DOAB") and asked if DOAB had an interest in settling the case.

On December 24, 1991, Mr. Della Porta received a memorandum from Terry O'Neil, an auditor in DOAB, stating that he agreed (apparently with the petitioner) that the net operating loss incurred for June 30, 1983 was calculated improperly by the Division. Mr. O'Neil completed a revised net operating loss schedule, resulting in a reduction of tax due for 1987, from \$20,379.00 to \$4,519.00.

Upon receipt of Mr. O'Neil's memorandum, Mr. Della Porta prepared the Stipulation as described above, signed it and forwarded it to Mr. Staffaroni. Mr. Staffaroni signed the Stipulation and returned it to Mr. Della Porta, who then filed it with the DTA.

After closing the case, Mr. Della Porta sent a closing memorandum and the Law Bureau file to the Division's Audit Evaluation Unit. Upon review of the file, the Division's Policy and Compliance Unit concluded that the correct amount of tax due from Felix for all the years covered by the Stipulation is \$17,903.00. The difference between the amount shown on the Stipulation and the amount actually due is attributable to an error made by the attorney in preparing the Stipulation. The recalculation of the net operating loss affected the tax year ended

June 30, 1987 only. The tax asserted on the notices of deficiency issued for the years ended June 30, 1986 and June 30, 1988 were not affected by Mr. O'Neil's calculation. The Division's attorney states that he made the error because "[he] did not realize that the petition filed by the corporation with DTA technically included other deficiency notices and other tax years for which petitioner has no apparent objection."

By letter dated February 24, 1992, the Division's attorney informed Mr. Staffaroni of the error in the Stipulation and requested that he execute a revised stipulation showing tax due of \$17,903.00. Enclosed with the letter were workpapers detailing the computation of the adjusted amount. In a telephone conversation on March 9, 1992, Mr. Staffaroni informed Mr. Della Porta that he believed the original Stipulation was correct. As a result of that conversation, Mr. Della Porta sent Mr. Staffaroni a second letter, dated March 19, 1992, restating the Division's position and requesting that Mr. Staffaroni provide the Division with workpapers detailing the position of Felix, with regard to the proper amount of tax due. Mr. Staffaroni returned the Division's letter with a handwritten notation on it which said "James / Pls call me to discuss / Paul / 914-934-2400". Further discussions and letters from the Division to Mr. Staffaroni failed to produce any written statement from Mr. Staffaroni with regard to the recalculation of tax.

The notices of deficiency issued to Felix for the period July 1, 1985 through June 30, 1986, resulted from a field audit. The only objection to the audit results noted in the field audit report was the treatment of the net operating loss.

In his affirmation in support of the motion, Mr. Della Porta states:

"[t]he Stipulation should be vacated because it does not actually reflect the tax due in this matter. The Division has acted promptly to notify petitioner of this error. If the filed Stipulation is not vacated, petitioner will received [sic] an unjust windfall, cancellation of tax legally due. Petitioner will not be prejudiced by the correction of the error."

OPINION

The Administrative Law Judge found the Stipulation of Discontinuance of Proceeding executed by the Division and petitioner to be a written agreement under Tax Law § 171(18),

which, pursuant to that section, could be vacated only for fraud, malfeasance or misrepresentation of a material fact. Since the Division did not allege the existence of any of these grounds, the Administrative Law Judge determined that the Division had failed to state a ground upon which the Stipulation could be vacated and denied the Division's motion.

On exception, the Division asserts that the Administrative Law Judge erred in characterizing the Stipulation as a written agreement under Tax Law § 171(18), or alternatively, that if it is such a written agreement, it is not binding because the attorney for the Division was not authorized to sign it. The Division asserts further that a filed Stipulation for Discontinuance of Proceeding form may be vacated or modified if it is executed in error, citing Matter of D & C Glass Corp. (Tax Appeals Tribunal, June 11, 1992), and that since the Division made an error in calculating the amount of tax due stated on the form, the Division's motion to vacate or modify the Stipulation should be granted.

Petitioner has not responded to the Division's exception.

We affirm the order of the Administrative Law Judge.

We agree with the Administrative Law Judge that the Stipulation at issue is a written agreement under Tax Law § 171(18). Section 171(18) of the Tax Law states that the Commissioner of Taxation and Finance shall:

"Eighteenth. Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded. As used in this paragraph the term 'person' includes an individual, trust, estate, partnership and corporation."

The Division argues that this Stipulation is not the type of agreement covered by Tax Law § 171(18) because the "Stipulation of Discontinuance form is used when it is established that

the tax due is less than asserted in a tax notice" (Division's supplemental brief, January 29, 1993, p. 2). The Division's argument seems to be that Tax Law § 171(18) only concerns agreements related to the compromise of a taxpayer's liability. No authority or factual foundation for this proposition is cited and we can find none.

The Stipulation here meets the description of an agreement governed by Tax Law § 171(18): it is a written agreement between petitioner and the Division (executed by both parties) which relates to petitioner's tax liability. The statute contains no other limitations as to the type of agreement or its subject matter. In fact, the view that Tax Law § 171(18) applies only when the tax liability is being compromised, as the Division seems to imply, is belied by Tax Law § 171(18-a) which is specifically concerned with the compromise of civil tax liability.

That the agreement has been entered into on a form adopted by the DTA does not make it any less an agreement controlled by Tax Law § 171(18).² This form (and the other forms

²As we discussed in Matter of D & C Glass (supra):

"[t]he Tribunal has adopted three forms to allow parties to notify the DTA of the decision to discontinue a proceeding. The forms are:

"Form TA-30.1 (9/87), Notice of Withdrawal of Petition and Discontinuance of Proceeding, which provides 'that the . . . petitioner hereby withdraws the petition . . . and discontinues the . . . proceeding, with prejudice as of this date.' The form must be signed and dated by the taxpayer or the taxpayer's authorized representative.

"Form TA-34 (4/90), Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding, which provides 'that the Division of Taxation, after review of the . . . matter, hereby agrees to cancel the deficiency/determination and/or grant the refund claimed, as of this date.' The form must be signed and dated by the representative of the Division.

"Form TA-30.2 (9/87), Stipulation for Discontinuance of Proceeding, which provides that the proceeding 'having been resolved, it is hereby stipulated and agreed by and between the parties that such proceeding . . . is discontinued, with prejudice, and that the deficiency/determination . . . is recomputed as follows' The form is to be signed and dated by the taxpayer or the taxpayer's representative and the representative of the Division."

referred to in footnote "2") provides the parties with the means to inform the DTA of certain actions the parties have taken with regard to a proceeding. The forms do not confer authority on the parties to take the action represented by the forms; that authority must be found elsewhere. In this case, the statutory authority to enter into an agreement to settle the action, as represented on the form, is grounded in section 171(18). We also point out that the Division's reliance on our decision in D & C Glass as support for its argument that a Stipulation of Discontinuance of Proceeding can be vacated if issued in error is misplaced. The discontinuance form which was the subject of that case was a unilateral document signed only by the Division, notifying the DTA that the Division was withdrawing the Notice of Determination and that the proceeding was discontinued. It was not, therefore, an "agreement" between the parties as to the taxpayer's liability as described in Tax Law § 171(18).

The Division asserts that even if the Stipulation was an agreement under Tax Law § 171(18), it is not "binding on the Division and Commissioner because it was not executed by an authorized person" (Division's supplemental brief, January 29, 1993, p. 3). In support of this position, the Division attached to its brief a document dated May 1, 1991, signed by the Commissioner of Taxation and Finance, James W. Wetzler, which reads as follows:

"[p]ursuant to the provisions of sections 170 and 175 of the Tax Law, I hereby authorize and designate the Deputy Commissioner of the Office of Tax Operations (and in case of any absence of such person from his office, inability to act or a vacancy in such office, the Acting Deputy Commissioner for Tax Operations) to execute on behalf of the Commissioner of Taxation and Finance written agreements entered into pursuant to the authority of subdivision eighteenth of section 171 of the Tax Law and other documents which are required to carry out the performance of the duties of the Commissioner of Taxation and Finance in connection therewith and to affix the seal of the Commissioner of Taxation and Finance to certify such papers."

Also attached is a letter from the Secretary to the Commissioner of Taxation and Finance, Karen McCarthy-Townsend, to the Secretary of State, Gail S. Shaffer, stating that the document

is being submitted pursuant to Section 9 of the Public Officers Law.³

Public Officers Law § 9 concerns the appointment of deputies by the principal officer of the agency. It requires the principal officer to designate a deputy to act in his or her absence, and contains rules relating to who will act if the principal officer has failed to make a designation. Nothing in this section even remotely supports the Division's position that based on this delegation, only the Deputy Commissioner of the Office of Tax Operations can enter into an agreement with a taxpayer. It is clear that the delegation attached to the Division's brief identifies the individual who will act for the Commissioner in his absence, as required by Public Officers Law § 9; it certainly does not establish that under all circumstances, this Deputy Commissioner is the only person who may act on behalf of the Commissioner in carrying out the duties of the Department. In short, the Division has not shown that its representative lacked the authority to execute the Stipulation.

We also agree with the Administrative Law Judge that the Division has failed to state grounds which would permit the Stipulation to be vacated or modified. Tax Law § 171(18) states that an agreement under this section is final and conclusive and that no "officer, employee, or agent of this state" shall reopen such an agreement as to the matters agreed to unless there is a showing of fraud, malfeasance or misrepresentation of a material fact. Error by one or both of the parties is not a ground for reopening or modifying such an agreement. The Division has not alleged the existence of fraud, malfeasance or misrepresentation of material fact here. Rather, the Division has asserted that the Stipulation should be reopened because the Division executed the agreement in error.

Therefore, since we have determined that the Stipulation of Discontinuance of Proceeding executed by petitioner (by its representative) and the Division (by an attorney of the Law Bureau) is an agreement under Tax Law § 171(18), this section prohibits us from reopening or

³We take judicial notice of these documents pursuant to CPLR 4511(a) and (b).

modifying it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The Division of Taxation's motion for an order vacating a Stipulation for Discontinuance of Proceeding is denied.

DATED: Troy, New York
July 22, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner