STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
E. JOHN LOWNES, III	:	ORDER AND OPINION DTA No. 810962
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1971.	:	

On February 18, 1994, the Division of Taxation made a motion to this Tribunal to stay its decision in this matter pending a final outcome in the State court action entitled E. John Lownes, III v. New York State Department of Taxation and Finance.

ORDER

Upon reading the Notice of Motion signed by Kenneth J. Schultz and the affidavit of Kenneth J. Schultz, sworn to on the 13th day of January 1994, in support of the motion, the affidavit of Robert D. Plattner, sworn to on the 31st day of January, 1994, in opposition to the motion, and the letter dated February 9, 1994 from Kenneth J. Schultz in response to the affidavit in opposition, and due deliberation having been had thereon,

NOW, on the motion of Kenneth J. Schultz, attorney for the Division of Taxation, it is,

ORDERED that said motion be and the same is hereby denied.

OPINION

When this case was before the Administrative Law Judge, the Division of Taxation (hereinafter the "Division") requested that the Administrative Law Judge stay the proceeding based on the pending court proceeding. The Administrative Law Judge denied the request because the Division had not demonstrated good cause to grant a stay. The Administrative Law Judge concluded that the doctrine of exhaustion of administrative remedies applied to this case, quoting Watergate II Apts. v. Buffalo Sewer Auth. (46 NY2d 52, 412 NYS2d 821, 824) for the

principle that "[i]t is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." Contrary to the Division's assertion that Matter of MacLean v. Procaccino (53 AD2d 965, 386 NYS2d 111) was one of many cases where the courts decided the application of section 681(a) of the Tax Law, the Administrative Law Judge stated that she could find no cases involving section 681(a) that were not Article 78 reviews of an agency determination. The Administrative Law Judge stated that "[c]ontrary to the Division's views, the case law indicates that the more orderly and appropriate procedure fostering judicial economy would be for the parties to exhaust administrative remedies before judicial review [citations omitted]" (Determination, conclusion of law "B"). The Administrative Law Judge also found that the Division had not demonstrated that this proceeding should be stayed based on exceptions to the exhaustion rule, i.e., petitioner had not claimed that the Division's action was unconstitutional or wholly beyond the Division's grant of power and the Division had not argued that it would be irreparably injured by this proceeding or that this proceeding was futile.

The Division filed an exception to the Administrative Law Judge's determination in which the Division asserts, inter alia, that the Administrative Law Judge erred by not granting a stay of the proceedings. At the same time, the Division filed this motion.

We deny the Division's motion for a stay of this exception proceeding.

In support of its motion the Division has not challenged the Administrative Law Judge's conclusions that the exhaustion of administrative remedies doctrine applies to this case and that this case does not fit into one of the exceptions to this doctrine. Accordingly, we deny the request for the stay for the reasons stated by the Administrative Law Judge in her denial of the request for the stay.

In support of its motion, the Division states that: "considerable litigation activity has taken place in the court proceeding, and the matter is awaiting Judge Spain's decision" (Division's affidavit in support, ¶ 4); it is not known when Judge Spain will issue his decision;

and "unless the Tribunal stays action on the Division's Exception, (1) the Division of Taxation will be required to continue litigating the same issue in its defense of both the administrative action and Petitioner's court action and (2) because the Division of Taxation lacks the statutory authority to obtain judicial review of Tax Appeals Tribunal decisions, it faces the potential of being bound by a Tribunal decision affirming the ALJ determination before the Supreme Court has ruled on the very issues ruled on by the ALJ" (Division's affidavit in support, ¶ 6).

It is undisputed that "the pending action in Supreme Court was put 'on hold' by the parties for over six months in anticipation of a Division of Tax Appeals hearing in this matter and a subsequent determination by the Division of Tax Appeals regarding the timeliness of the petition filed and the validity of the Division's Notice of Deficiency" (Petitioner's affidavit in opposition to the motion, p. 4). Shortly before the hearing (Tr., p. 6), the Division informed petitioner that it changed its position and would prefer to try the case in the Supreme Court. At the hearing, the Division sought and was granted permission to amend its answer to reflect this change of position. The Division acknowledged and explained this change as follows: "[w]e had put a related court proceeding on hold with the consent of [petitioner's representative], but after further research, we felt that the posture of this case is such that it belongs in court" (Tr., p. 6).

The fact that the Division will have to litigate this issue in two forums results from the Division's decision to reverse its position and to actively pursue the court proceeding. This litigation strategy was premised, at least in part, on the Division's inability, pursuant to section 2016 of the Tax Law, to obtain judicial review of our decisions. Litigation strategies and a preference for one forum over another do not provide a basis to deviate from the exhaustion of remedies doctrine (cf., GTE Spacenet Corp. v. New York State Dept. of Taxation & Fin., ___ AD2d ___ [Feb. 24, 1994] [where the Division argued that a taxpayer was required to exhaust administrative remedies, but the court found, citing Xerox Corp. v. Department of Taxation & Fin., 140 AD2d 945, 529 NYS2d 623, lv denied 72 NY2d 809, 534 NYS2d 666,

that the case was within an exception to the rule because the taxpayer claimed that the tax statute was totally inapplicable to it]).

Accordingly, it is ordered that the motion of the Division of Taxation for a stay of the exception proceedings is denied, and the Secretary to the Tribunal is directed to proceed with all other proceedings in the Matter of E. John Lownes, III.

DATED: Troy, New York
April 7, 1994

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

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