STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WINCHESTER PROPERTIES, INC. T/A SIGN OF THE DOVE	:	ORDER DTA No. 814352
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1992 through November 30, 1992.	:	

Petitioner Winchester Properties, Inc., T/A Sign of the Dove, 1110 Third Avenue, New York, New York 10021-6693, filed an exception/motion to the determination of the Presiding Officer issued on June 12, 1997. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

The Division of Taxation filed an affirmation in opposition to petitioner's exception/motion.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following order. Commissioner Pinto concurs but for the reasons set forth in a separate opinion.

ISSUE

Whether petitioner's motion for a rehearing based upon the alleged misconduct of the Presiding Officer should be granted.

FINDINGS OF FACT

We find the following facts.

This matter was the subject of a small claims hearing pursuant to Tax Law § 2012. At issue therein was whether penalty and a portion of the interest imposed for petitioner's failure to timely file and pay sales tax should be abated.

A hearing was conducted on January 30, 1997 by Presiding Officer Arthur Johnson. Petitioner appeared at the hearing by Stewart Buxbaum, CPA. The Division of Taxation (hereinafter "Division") appeared by Steven U. Teitelbaum, Esq. (James Cartwright). At the close of the hearing, the Presiding Officer allowed each party time to submit a memorandum of law in support of their position. On February 18, 1997, a memorandum of law was submitted by the Division's Office of Counsel, having been prepared byBrian J. McCann, Esq., Senior Attorney. By letter to the Presiding Officer dated February 25, 1997, petitioner's legal representative submitted a letter in response to the memorandum submitted by Mr. McCann objecting that the submission of a memorandum by Mr. McCann, a person who did not participate in the hearing, without the express permission of the Presiding Officer was improper and should be disregarded. Further, petitioner's representative argued that its claim was meritorious.

On June 12, 1997, the Presiding Officer issued a determination denying the petition, concluding that it was not improper for the Division's attorney, Mr. McCann, to submit a post-hearing brief and sustaining the notices and demands for sales and use tax that had been issued to petitioner. On July 10, 1997, petitioner filed an exception to this determination with the Tax Appeals Tribunal.

The Secretary to the Tax Appeals Tribunal, by letter dated July 11, 1997, advised both petitioner and the Division that since an exception to the Tribunal cannot be taken to the determination of a Presiding Officer, the Tribunal would treat petitioner's exception as a motion pursuant to 20 NYCRR 3000.13(h) for a rehearing based on the alleged misconduct of the Presiding Officer.

ORDER

In its motion, petitioner alleges that the Presiding Officer violated petitioner's rights by allowing the Division to submit a brief prepared by an attorney who was not present at the hearing. Further, petitioner alleged that it never had an opportunity to have its own attorney

review the evidence presented at the small claims hearing or to submit a brief. Finally, petitioner argued that it had demonstrated reasonable cause for an abatement of penalty and excess interest.

We first note that pursuant to Tax Law § 2012 and 20 NYCRR 3000.13(h)(2), there is no right to a review of a small claims determination by the Division of Tax Appeals, the Tax Appeals Tribunal or any court of this State, except that the Tax Appeals Tribunal may, on motion of either party, order a rehearing upon proof or allegation of misconduct by the Presiding Officer. While an allegation of misconduct has been made by petitioner, a rehearing is not automatically granted (cf., Matter of Keeffe, Tax Appeals Tribunal, January 20, 1994, confirmed Matter of Keeffe v. Tax Appeals Tribunal, 216 AD2d 692, 627 NYS2d 851, appeal dismissed 86 NY2d 884, 635 NYS2d 949). The issue before us in this proceeding, therefore, is whether there exists sufficient grounds for us to exercise our discretion to order a rehearing. We have no jurisdiction to consider petitioner's allegation that it demonstrated reasonable cause before the Presiding Officer for an abatement of penalty and excess interest.

In Matter of Insulpane Indus. (Tax Appeals Tribunal, July 12, 1990), we concluded that the "misconduct" with which Tax Law § 2012 is concerned is the objectionable behavior of a Presiding Officer as opposed to a potential error by that individual in an analysis of the law. Pursuant to Tax Law § 2014 and 20 NYCRR 3000.2(e), the Division is to be represented in all proceedings before the Tax Appeals Tribunal, Administrative Law Judges and Presiding Officers by the chief counsel of the Division or by a representative of such chief counsel. Petitioner has provided no authority for its argument that a change in the designation of such representative "requires special written permission from the Chief Counsel." There is no requirement in either the Tax Law or our regulations which restricts the preparation and submission of a post-hearing brief on behalf of the Division to an individual who was present at the hearing. Therefore, we do not find that allowing the Division to submit a post-hearing brief prepared by its attorney was misconduct on the part of the Presiding Officer.

Further, while petitioner alleged that it never had an opportunity to have its own attorney

review the evidence presented at the small claims hearing or to submit a post-hearing brief, petitioner never requested the opportunity to do so. However, petitioner did have a legal representative at the hearing who had a full and fair opportunity to review all evidence and who submitted a post-hearing brief.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion for a rehearing of Winchester Properties, Inc., T/A Sign of the Dove is denied.

DATED: Troy, New York
November 6, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

Commissioner Pinto concurring:

I concur in the result reached by the majority in this matter but for the reasons set forth below.

Tax Law § 2012 authorizes small claims hearings at the request of the petitioner. The statute provides that the hearing be informal and that the Presiding Officer has the discretion to accept such evidence and testimony that he deems necessary or desirable for a just and equitable determination. The statute also provides that his determination would be conclusive on all parties and not subject to any review. However, a rehearing could be ordered by the Tax Appeals Tribunal if there is proof or an allegation of misconduct by the Presiding Officer. Such was the case herein.

Tax Law § 2012 underscores the wide discretion accorded the Presiding Officer in small claims proceedings and misconduct must be construed in light of this discretion. Although we have in the past defined misconduct to be objectionable behavior as opposed to potential error

in analysis (Matter of Insulpane Indus., supra), that does not dispose of the action of the Presiding Officer in the instant matter.

The small claims proceeding was intended to stress informality. The hearings are conducted in such a manner as to do "substantial justice" between the parties according to law (20 NYCRR 3000.13[f][1]). Petitioner argues that Mr. McCann's brief violated the "spirit" of the small claims hearing in that he was not a "party" to the proceedings. However, Tax Law § 2014(3) states that the Division "shall be represented in all proceedings conducted pursuant to the authority of the division of tax appeals by the chief counsel of the division of taxation or his representatives" (see also, 20 NYCRR 3000.2[e]). Clearly, Mr. McCann is a representative of the "chief counsel" albeit not the one appearing at the small claims hearing, and his participation to the extent of filing a brief on behalf of the Division cannot be said to have jeopardized the integrity of the conduct of the hearing such that the parties were not able to "offer all relevant evidence to establish their positions" (20 NYCRR 3000.13[a]). Given that petitioner responded to the Division's brief, it could have chosen to have an attorney review Mr. McCann's brief. In any event, it cannot be said that the Division was overreaching its authority or violating the spirit of small claims procedure herein.

As the majority noted, there are no provisions of law or regulations which prescribe rules with respect to the filing of briefs. However, given the broad discretion vested in the Presiding Officer to do substantial justice between the parties, his allowance of the brief prepared by a representative of the "chief counsel" did not amount to misconduct and petitioner's due process

rights were sufficiently protected by the procedures set forth in Tax Law § 2012 (Matter of Keeffe v. Tax Appeals Tribunal, 216 AD2d 692, 627 NYS2d 851, appeal dismissed 86 NY2d 884, 635 NYS2d 949).

DATED: Troy, New York
November 6, 1997

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner