STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WERNER GLASS & MIRROR, INC.	:	ORDER DTA NO. 819893
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 March 1, 1998 through November 30, 2000.	:	

Petitioner Werner Glass & Mirror, Inc., 405 Lake Avenue, St. James, New York 11780, filed a motion for a rehearing with respect to the determination of the Presiding Officer issued on December 8, 2005. Petitioner appeared by Randy Bruce Blaustein, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Andrew S. Haber, Esq., of counsel).

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following order.

ISSUE

Whether petitioner's motion for a rehearing 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. The petition raises issues regarding sales and use taxes computed by the Division of Taxation (hereinafter the "Division") including whether certain installations made by petitioner qualified as capital improvements, whether certain sales made to registered vendors who were not

contractors were entitled to be treated as nontaxable sales for resale, whether certain sales made to contractors during the audit should have been treated as nontaxable and certain issues regarding the Division's audit methodology employed in this case with respect to under reported gross sales and undocumented nontaxable sales as well as use tax calculated on purchases incorporated into capital improvements.

A hearing was conducted on August 27, 2004 and continued to conclusion on January 18, 2005 by Presiding Officer James Hoefer. Petitioner appeared at the hearing by Golub, LaCapra, Wilson & DeTiberiis, LLP (Joseph LaCapra, CPA). The Division appeared by Christopher C. O'Brien, Esq. (Robert DeFilippis and Joseph Miller).

On December 8, 2005, the Presiding Officer issued a determination granting the petition to the extent that petitioner was allowed to treat sales to registered vendors as nontaxable sales for resale where petitioner submitted a properly completed resale certificate, was allowed a minor adjustment to the calculation of purchases subject to use tax and was entitled to a waiver of penalties and the reduction of interest to the minimum rates after establishing reasonable cause, but in all other respects, the Presiding Officer denied the petition and sustained the Notice of Determination issued to petitioner as modified consistent with his determination.

By letter dated December 13, 2005, petitioner raised an objection to the determination of the Presiding Officer. Specifically, petitioner claims that the Presiding Officer made an error that it requests be corrected and asks that a revised determination be issued.

On December 21, 2005, the Secretary to the Tax Appeals Tribunal informed the parties that the letter was deemed a motion for rehearing pursuant to 20 NYCRR 3000.13(h)(2). On January 11, 2006, the Division responded to the motion arguing that a small claims

determination can only be reopened and reheard in a case where there is an allegation of misconduct on the part of the Presiding Officer. The Division asserts that the facts of this case do not demonstrate any misconduct conducted at the small claims level and, as such, urges this Tribunal to deny the motion.

ORDER

In its letter, petitioner respectfully requests that, in the interest of justice, an error contained in the determination be corrected and that a revised determination be issued. The alleged error by the Presiding Officer was his statement in footnote 1 to paragraph 12 contained in the findings of fact that determined that William O. Werner, Sr. conceded at the hearing that he was personally liable for payment of any taxes due from petitioner. Furthermore, in the footnote, it was noted that petitioner's new representative, in the final brief, had raised the issue concerning Mr. Werner's personal liability. However, the Presiding Officer determined that this issue was necessarily decided by the concession made by Mr. Werner at the hearing. It is this concession which petitioner alleges is at the heart of the error.

Petitioner argues that in his review of the tape recording of the proceedings, it is clear that Mr. Werner made no such concession. Moreover, petitioner maintains that the Presiding Officer failed to review the issue raised in the final brief addressing Mr. Werner's status as a responsible person based upon his incorrect recollection of Mr. Werner's testimony at the August 27, 2004 hearing. Petitioner states that "[t]here was a significant breach of the Presiding Officer's duty to render a just Determination based on the record before him" (Petitioner's letter, p. 2).

We begin by noting that 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, pursuant to 20 NYCRR 3000.13(h)(2), a motion may be made by either party requesting a rehearing upon proof or allegation of misconduct by the Presiding Officer.

As we held in ***Matter of Insulpane Indus.*** (Tax Appeals Tribunal, July 12, 1990), the *misconduct* which Tax Law § 2012 addresses is the objectionable behavior of a Presiding Officer as opposed to a potential error by the individual in an analysis of the facts and law (***see also***, ***Matter of Gaffin***, Tax Appeals Tribunal, June 22, 2000 [wherein we held that allegation of error in the facts did not result in a finding of misconduct]). Therefore, in the absence of any allegation or proof that the Presiding Officer's conduct was in any way objectionable, we deny petitioner's request for a rehearing of this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion for a rehearing of Werner Glass & Mirror, Inc. is denied.

DATED: Troy, New York
April 6, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/Robert J. McDermott
Robert J. McDermott
Commissioner