

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SODEXHO USA, INC. :

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 :
February 29, 2000. :

In the Matter of the Petition :

of :

SODEXHO OPERATIONS, LLC :

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 December 1, 1999 through :
November 30, 2002. :

In the Matter of the Petition :

of :

SODEXHO MANAGEMENT, INC. :

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 September 1, 1999 through :
November 30, 2002. :

ORDER
DTA Nos. 820020,
820021, 820022,
820023 and 820024

On January 10, 2008, petitioners, Sodexho USA, Inc., Sodexho Operations, LLC, and
Sodexho Management, Inc. (collectively, “Sodexho” or “petitioners”), made a motion to the Tax

Appeals Tribunal (hereinafter the “Tribunal”) for reargument of the Tribunal’s decision in this matter dated November 21, 2007. Petitioner appeared by McDermott, Will & Emery LLC (Arthur R. Rosen, Esq. and Karen S. Dean, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

NOW, upon reading the petitioners’ affirmation dated January 7, 2007 in support of its Motion to Reargue and the Division of Taxation’s (“Division”) brief dated February 6, 2008 in opposition to the motion, and due deliberation having been had thereon, the Tax Appeals Tribunal renders the following Order.

FINDINGS OF FACT¹

In Matter of ***Sodexho USA, Inc., et al***, (Tax Appeals Tribunal, November 21, 2007), after a thorough review of the arguments presented on exception and the record of the proceeding before the Administrative Law Judge, the Tribunal affirmed in part and reversed in part, the determination of the Administrative Law Judge.

Petitioners contested the notices of determination asserting sales and use tax and denials of refund claims of sales and use tax, with respect to their purchases of non-food items made pursuant to food management contracts and facilities management contracts with tax exempt clients (sometimes, ***infra***, Lenox Hill and Burke).

The parties stipulated that the issues presented for resolution by the Administrative Law Judge were whether petitioners’ purchases of non-food items for their tax exempt clients were exempt from sales and use tax because: a) the purchases were made by petitioners as agents for

¹Petitioners have requested various changes to the findings, and have submitted proposed findings of fact. With the exception of finding of fact "52," we have rejected petitioners’ requested findings since they are variously unsupported by the record or argumentative.

the tax exempt clients or b) petitioners purchased the items for resale to their tax exempt clients or c) the Division is estopped from assessing sales and use tax on petitioners' purchases of non-food items.

The Administrative Law Judge found that petitioners were hired in order to relieve the management of their tax exempt clients of the responsibility of running the environmental and food service operations. The Administrative Law Judge held that the record did not support the conclusion that petitioners were acting as mere agents of the tax exempt institutions. The determination of the Administrative Law Judge viewed any references to a principal-agent relationship in the contracts as less significant than the degree of control and discretion petitioners exercised in carrying out those contracts.

The Administrative Law Judge rejected Sodexho's claim that its purchases of the non-food items were made for resale to its tax exempt clients. The Administrative Law Judge found that petitioners did not purchase non-food items to resell them, but rather purchased the items in furtherance of carrying out their management service contracts to their tax exempt clients.

The issue of estoppel was based on an exchange of letters dated November 11, 1992 from petitioners' predecessor ("MMS"), and the Division's letter in response dated April 30, 1993. According to the letter from MMS, it proposed to make purchases of food and non-food supplies, *inter alia*, for resale to a client, a tax exempt hospital, as part of a contract to provide meals and cafeteria facilities for the hospital. It asked the Division how it should treat such purchases for tax purposes. The Division responded that, based on the facts in MMS's letter, its purchases were for resale and not subject to sales and use tax. Sodexho claimed that the tax treatment of its purchases in the instant matter is based on the Division's letter to MMS and the Division is estopped from

asserting the tax in dispute here. Petitioners argued that the material facts here are substantially the same as those in the MMS letter and they should not be required to pay sales tax on their purchases of the non-food items. The Administrative Law Judge agreed with petitioners and granted estoppel. Both the Division and petitioners filed an exception to the determination of the Administrative Law Judge.

Petitioners' exception to the determination argued that the Administrative Law Judge erroneously held that their purchases were not eligible for sales and use tax exemption on the basis of agency or as purchases made for resale. Petitioners also argued that the Administrative Law Judge erred in rejecting certain of their proposed findings of fact as argumentative. On the issue of estoppel, petitioners urged that we affirm the Administrative Law Judge.

We affirmed the Administrative Law Judge's conclusion that petitioners were not acting solely as agents for the tax exempt entities. We also affirmed the Administrative Law Judge's conclusion that petitioners were not making purchases of the non-food items for purposes of resale. However, we reversed the Administrative Law Judge on the issue of estoppel. We concluded that the doctrine of estoppel does not apply against the Division under these facts and, as such, we reversed the Administrative Law Judge on this issue.

Petitioners now bring this motion for reargument.

ARGUMENTS ON THE MOTION TO REARGUE

Petitioners continue to allege that their purchases were for resale, that relevant portions of the letter from MMS dated November 11, 1992 and the Division's reply letter dated April 30, 1993 were not included in the findings of fact, that the Tribunal should have adopted their proposed findings of fact, that the Tribunal misapprehended or ignored relevant facts on the estoppel

grounds and reached incorrect conclusions. Petitioners also continue to argue that they were agents of their tax exempt clients.

The Division's affirmation in response to the motion urges that the Tribunal correctly examined and relied on the relevant evidence in determining that petitioners were not purchasing for resale, in determining that Sodexho was not acting as an agent for its tax exempt clients, and in concluding that the facts here did not justify granting estoppel against the Division.

The Division argues that Sodexho has not demonstrated that the Tribunal has misapprehended or overlooked relevant facts, but is simply reasserting unsuccessful arguments made earlier.

OPINION

A motion to reargue is based on no new proof, seeking only to convince the court that it was wrong and ought to change its mind (Siegel, NY Prac § 254, at 383 [2d ed]). There is no statutory authority for this Tribunal to reconsider its decisions and, therefore, our authority to do so as a quasi-judicial body is limited (*Matter of Trieu*, Tax Appeals Tribunal, June 2, 1994, **confirmed** *Matter of Trieu v. Tax Appeals Tribunal*, 222 AD2d 743 [1995], **appeal dismissed** 87 NY2d 1054 [1996], *Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal*, 195 AD2d 625 [1993], **lv denied** 82 NY2d 664 [1994]).

A motion to reargue is intended to affect a prior order or decision.

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (*Foley v. Roche*, 68 AD2d 558 [1979], **lv denied** 56 NY2d 507 [1982]).

Petitioners' motion does not demonstrate that the Tribunal misapprehended or overlooked relevant facts, but is merely reasserting arguments made earlier. The fact that the Tribunal disagreed with the positions taken by petitioners in this case does not mean that it ignored or misapprehended the facts.

Our decision in *Matter of Sodexho, USA, Inc., Sodexho Operations, LLC* and *Sodexho Management, Inc.* was reached after a thorough review of the entire record in the matter and the relevant law. The motion before us indicates no circumstances that would allow us to reconsider this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion for reargument of Sodexho, USA, Inc., Sodexho Operations, LLC and Sodexho Management, Inc. is hereby denied.

DATED: Troy, New York
March 18, 2008

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

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

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