STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CORNER QUICK STOP, INC.	:	ORDER & OPINION DTA NO. 822342
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, 2001 through February 28, 2005.	:	

Petitioner, Corner Quick Stop, Inc., filed an exception to the determination of the Administrative Law Judge issued on September 2, 2010. Petitioner appeared by Neil M. Gingold, Esq. The Division of Taxation appeared by Mark Volk, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioner's request, was heard on May 11, 2011 in Troy, New York.

The Tax Appeals Tribunal issued a decision on November 3, 2011.

Petitioner filed a motion for reargument, dated March 3, 2012, accompanied by a brief in support of its motion. The Division of Taxation filed a letter brief in opposition, dated April 4, 2012.

ORDER & OPINION

Section 3000.16 of the Tax Appeals Tribunal's (Tribunal) Rules of Practice and Procedure provides the standards governing a motion to reargue. In ***Matter of Schulkin*** (Tax Appeals Tribunal, November 20, 1997), the Tribunal explained:

> "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, 634 NYS2d 878, appeal dismissed 87 NY2d 1054, 644 NYS2d 146, lv denied 88 NY2d 809, 647 NYS2d 714; Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151; see also, Evans v. Monaghan, 306 NY 312). However, although our authority to reconsider may be limited, it is not prohibited (see, 20 NYCRR 3000.16[c] [wherein motions for reargument and orders thereon are specifically authorized]). Instead, we believe any reconsideration must be undertaken with great care and vigilance, and only in cases where a valid basis for doing so has been raised by the movant.
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> In Foley v. Roche (68 AD2d 558, 418 NYS2d 588, 593, lv denied 56 NY2d 507, 453 NYS2d 1025), the Court stated:
>
> > '[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.'"

Furthermore, a motion for reargument is not designed to afford the unsuccessful party an opportunity "to present arguments different from those originally asserted [citations omitted]" (***William P. Pahl Equip. Corp. v Kassis***, 182 AD2d 22, 27 [1992]).

This Tribunal affirmed the Administrative Law Judge's determination, after reviewing the arguments presented on exception, the record of the proceeding before the Administrative Law Judge and the determination of the Administrative Law Judge. We decided that the

Administrative Law Judge had accurately and adequately addressed the issues presented to her, and correctly applied the relevant law to the facts of this case.

On exception, we addressed and rejected petitioner's arguments that: (i) the Notices should be cancelled because the transactions were either unenforceable or rescinded; (ii) the agreements at issue should be voided under the equitable doctrine of mutual mistake because allegedly the parties misapprehended key elements of the agreements; and, (iii) the Notices should be cancelled because the transactions were rescinded by petitioner's subsequent transfer back of the assets.

Moreover, we found that Tax Law § 1141 (c) provides, in pertinent part:

> "[w]henever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale . . . notify the tax commission by registered mail of the proposed sale . . . "

Upon the timely filing of a notification of a bulk sale, the Division is obligated to inform the purchaser of the existence of a possible claim for sales and use taxes owed by the seller (20 NYCRR 537.6 [a] [3]). If the purchaser does not comply with this notice requirement, the purchaser will be held "personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferrer or assignor [subject to certain price limitations] . . ." (Tax Law § 1141 [c]).

In its motion for reargument, petitioner again advances similar arguments as presented to the Tribunal on exception, along with certain additional new arguments not previously made; however, such arguments do not indicate appropriate circumstances that would justify reconsideration of our earlier decision. In particular, petitioner now challenges whether a decision from the Tribunal consisting of only two Commissioners is valid. In this regard, we

note that the Appellate Division has previously addressed this issue and indicated that:

> "We begin by rejecting petitioner's argument that the decision of the Tribunal is a nullity because it lacked jurisdiction to hear the appeal due to a vacancy on the three-member board. Tax Law § 2004 specifically provides that '[a] majority of the Tribunal shall constitute a quorum for the purposes of exercising [its] powers and performing [its] duties, including the issuing of decisions.' Also, General Construction Law § 41 provides that whenever three or more public officers are given any power or authority, or charged with any duty to be performed jointly as a board, a majority shall constitute a quorum for the purposes of performing or exercising such power, authority or duty" (***Matter of CS Integrated, LLC v Tax Appeals Trib. of State of N.Y.*** 19 AD3d 886 [2005]).

Petitioner does not present any compelling arguments that the Tribunal overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law, and therefore does not indicate appropriate circumstances that would justify reconsideration of our earlier decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion for reargument of Corner Quick Stop, Inc. is denied.

DATED: Albany, New York
June 28, 2012

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner