STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

MICHAEL A. GOLDSTEIN A NO. 1 TRUST

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1995, 1996 and 1997.

In the Matter of the Petition

of

MICHAEL A. GOLDSTEIN "I" NO. 2 TRUST

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1995, 1996 and 1997.

In the Matter of the Petition

of

MICHAEL A. GOLDSTEIN - BORIS GOLDSTEIN NO. 3 TRUST

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1995, 1996 and 1997.

ORDER & OPINION
DTA Nos. 822579, 822666 and 822681

Petitioners, Michael A. Goldstein A No. 1 Trust, Michael A. Goldstein "I" No. 2 Trust, and Michael A. Goldstein - Boris Goldstein No. 3 Trust, filed an exception to the determination of the Administrative Law Judge issued on April 15, 2010. Petitioners appeared by Samson Management, LLC (Ray Cruz, Esq., CPA). The Division of Taxation appeared by Mark Volk, Esq. (Robert Tompkins, Esq., of counsel). Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioners' request, was held on January 19, 2011 in New York, New York. The Tax Appeals Tribunal issued a decision on June 29, 2011.

Petitioners filed a motion for reargument dated September 22, 2011, accompanied by a memorandum of law in support. The Division of Taxation filed a letter in opposition dated September 30, 2011.

ORDER & OPINION

We reject petitioners' motion for reargument.

Section 3000.16 of the Tax Appeals Tribunal's (Tribunal) Rules of Practice and Procedure provides the standards governing a motion to reargue. The standard applied to motions to reargue, as stated in ***Matter of Schulkin*** (Tax Appeals Tribunal, November 20, 1997), is as follows:

> 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.

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.

Petitioners assert that this Tribunal misapplied principles of law in our June 29, 2011 decision. Petitioners allege that Tax Law § 688(a)(former [3]) is not clear on its face, and that this Tribunal should have imputed terms from surrounding statutes to ascertain its meaning.

We find that petitioners' motion for reargument lacks any discernable merit. In reviewing petitioners' motion, we find that petitioners present exactly the same arguments as those previously presented before this Tribunal. Petitioners ignored the standards for reargument and have wholly failed to provide any argument that would merit the reconsideration of our decision in this matter (***see e.g. Matter of Stuckless***, Tax Appeals Tribunal, December 15, 2005; ***Matter of Schulkin***, ***supra***). Upon reviewing the entire record, we conclude that our June 29, 2011 decision was based upon a proper application of the Tax Law. As provided therein, Tax Law § 688(a)(former [3]) permits payment of interest only from the date when the amended return was filed. We again find no ambiguity that would permit looking beyond the literal words of the statute, as requested by petitioners (McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 94; ***People v. Munoz***, 207 AD2d 418 [1994], ***lv denied*** 84 NY2d 938 [1994]). As such, we reject

petitioners' motion for reargument because petitioners failed to show any basis for reconsidering our June 29, 2011 decision.

We further find it appropriate to impose the frivolous petition penalty on petitioners for the filing of this motion. Tax Law § 2018 provides,

> If any petitioner commences or maintains a proceeding in the division of tax appeals primarily for delay, or if the petitioner's position in such proceeding is frivolous, then the tax appeals tribunal may impose a penalty against such petitioner of not more than five hundred dollars.

As germane herein, we construe the term frivolous to mean: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful" (Blacks Law Dictionary 739 [9th Ed. 2009]).

We find that petitioners' proffer of only hypothetical scenarios as their primary support for reargument rises to the level of frivolous under Tax Law § 2018. As noted above, petitioners wholly disregarded the standards for a motion to reargue by providing no basis for the allegation that this Tribunal misapplied a controlling principle of law (***Foley v. Roche, supra***). While this Tribunal has previously addressed similarly deficient motions (***see e.g. Matter of Riad***, Tax Appeals Tribunal, March 18, 2004), this is the first time that we have been presented with a proceeding where a party has moved to reargue and offered no legal support outside of conjured hypothetical scenarios.

We find little difference between the taxpayer protest line of argument (***see e.g. Gilmartin v. Tax Appeals Trib.***, 31 AD3d 1008 [2006]), and arguments supported only by a party's imagination, such as those presented by petitioners. We hold that it is inappropriate for a party to bring a motion to reargue that lacks any legal or factual support outside of its own conjecture. Arguments based solely upon hypothetical facts merit no respect on motion to reargue because the movant must establish how this Tribunal misapprehended facts or misapplied the law in its

particular case. We find it inappropriate to proffer imagined fact patterns to meet this burden. We also note that the complete lack of merit and timing of the motion's filing suggests that petitioners commenced this proceeding as a dilatory tactic, which is also sanctionable under Tax Law § 2018 (***see e.g. Matter of Hirschfeld***, Tax Appeals Tribunal, April 5, 2007).

Given the foregoing, we find that frivolous petition penalties are appropriate. Petitioners' motion to reargue lacks any legal merit and is based solely upon theoretical constructs. At best, the motion may be construed as frivolous; however, at its worst, it is a deliberate attempt by petitioners to frustrate the adjudication process and delay the matter. Neither is acceptable in this forum. Accordingly, we impose the maximum penalty of $500.00 pursuant to Tax Law § 2018 on each petitioner in this matter for commencing a frivolous proceeding.

ORDERED that the motion for reargument by petitioners, Michael A. Goldstein A No. 1 Trust, Michael A. Goldstein "I" No. 2 Trust, and Michael A. Goldstein - Boris Goldstein No. 3 Trust, is hereby denied.

ORDERED that a penalty of $500.00 is imposed against each petitioner, Michael A. Goldstein A No. 1 Trust, Michael A. Goldstein "I" No. 2 Trust, and Michael A. Goldstein - Boris Goldstein No. 3 Trust, for commencing a frivolous proceeding.

DATED: Troy, New York
October 11, 2011

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

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