

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JAMES M. CARTWRIGHT : DECISION
DTA # 823018

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 June 13, 2008.
:

Petitioner, James M. Cartwright, filed an exception to the order of the Assistant Chief Administrative Law Judge issued on June 10, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner did not file a brief in support. The Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a letter in lieu of a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner's motion to reopen the record and for reargument of a small claims hearing should be granted.

FINDING OF FACTS

We find the facts as determined by the Assistant Chief Administrative Law Judge. These facts are set forth below.

This matter was the subject of a small claims hearing pursuant to Tax Law § 2012. At

issue therein was whether the Division of Taxation (Division) properly denied petitioner's claim for a refund of use tax paid on a motor vehicle he purchased outside of New York State.

A small claims hearing was conducted on December 16, 2009 by Presiding Officer Barbara J. Russo. Petitioner appeared *pro se*. The Division appeared by Daniel Smirlock, Esq. (Anthony Militana). Each party elected to file a post-hearing brief. The Division requested and was granted a three-week extension to file its reply brief.

On April 1, 2010, the Presiding Officer issued a determination denying the petition.

On April 12, 2010, petitioner filed a motion "to reopen the record for reargue [*sic*] of DTA #823018" pursuant to section 3000.16 of the Tax Appeals Tribunal's Rules and Regulations. In support of his motion, petitioner complains that the Division was granted additional time to submit its post-hearing arguments. Petitioner further argues that he previously submitted similar refund claims, which were paid, and further contends that neither the Division nor the Presiding Officer's determination addressed petitioner's receipt for sales tax paid. Petitioner requests a review of the record and determination.

THE ORDER OF THE ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

The Assistant Chief Administrative Law Judge determined that petitioner has not brought a motion before the Tribunal pursuant to 20 NYCRR 3000.13(c)(3) alleging misconduct by the presiding officer. Rather, petitioner seeks to reopen the record and for reargument pursuant to 20 NYCRR 3000.16. The Assistant Chief Administrative Law Judge concluded that pursuant to 20 NYCRR 3000.13(c)(3), motion practice, including motions to reopen the record and for reargument, is not applicable to small claims proceedings. As such, the Assistant Chief Administrative Law Judge determined that the Division of Tax Appeals lacks jurisdiction to

grant petitioner's motion.

ARGUMENTS OF EXCEPTION

On exception, petitioner raises the same argument as he did below.

OPINION

We affirm the order of the Assistant Chief Administrative Law Judge.

The exception in this matter was filed to appeal a determination of a Presiding Officer.

Tax Law § 2012 provides with respect to a determination of a Presiding Officer, in relevant part, as follows:

The final determination of the presiding officer in the small claims unit shall be conclusive upon all parties and shall not be subject to review by any other unit in the division of tax appeals, by the tax appeals tribunal or by any court of the state.

20 NYCRR 3000.13(h)(2) provides, in part, as follows:

Effect of determination. The final determination of the presiding officer shall be conclusive upon all parties and shall not be subject to review by any other unit in the in the Division of Tax Appeals or by the tribunal. However, on the motion of either party, the tribunal may order a rehearing upon proof or allegation of misconduct by the presiding officer.

The review of a determination of a Presiding Officer is limited by section 2012 of the Tax Law to those instances where there are allegations or proof of misconduct against the Presiding Officer. In the instant case, petitioner did not direct a charge of misconduct at the Presiding Officer. Rather, petitioner seeks to reopen the record and for reargument pursuant to 20 NYCRR 3000.16.

The Rules of Practice and Procedure of the Tax Appeals Tribunal make a provision for a motion to reopen the record upon the grounds, *inter alia*, of:

newly discovered evidence which, if introduced into the record, would probably

have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding . . . (20 NYCRR 3000.16[a][1]).

Pursuant to 20 NYCRR 3000.13(c)(3), motions to reopen the record and for reargument, are not applicable to small claims proceedings (*see Matter of Keeffe*, Tax Appeals Tribunal, January 20, 1994, *confirmed Matter of Keeffe v. Tax Appeals Tribunal*, 216 AD2d 692 [1995], *appeal dismissed* 86 NY2d 884 [1995]).

Therefore, exceptions to determinations of Presiding Officers are precluded by Tax Law § 2012 and 20 NYCRR 3000.13(h)(2) and the Tribunal lacks jurisdiction to grant petitioner's motion to reopen the record and for reargument.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James M. Cartwright is denied;
2. The order of the Assistant Chief Administrative Law Judge is affirmed; and
3. Petitioner's motion to reopen and redetermine the determination of the small claims

Presiding Officer is denied.

DATED:Troy, New York
February 24, 2011

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

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

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