

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MOHAMMAD JAVED	:	DECISION
	:	DTA NO. 823219
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 1, 2005 through February 28, 2007.	:	

Petitioner, Mohammad Javed, filed an exception to the order of the Administrative Law Judge issued on January 27, 2011. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark Volk, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUE

Whether a Stipulation for Discontinuance of Proceeding should be vacated.

FINDINGS OF FACT

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

On August 7, 2008, following an audit of 492 Fast Food, Inc., the Division of Taxation issued a Notice of Determination (Assessment ID No. L-030504128) to petitioner as a

responsible officer of that corporation. The notice asserted \$43,308.61 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 2005 through February 28, 2007.

Petitioner timely filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the August 7, 2008 Notice of Determination.

On July 17, 2009, BCMS issued a Conciliation Order sustaining the August 7, 2008 notice.

Petitioner then filed a petition with the Division of Tax Appeals seeking a revision of the subject determination.

On October 28, 2009, the Division of Taxation timely filed its answer in this matter.

On April 1, 2010, petitioner filed a power of attorney authorizing Ali R. Nassiripour, Esq., an attorney at law licensed to practice in New York State, to represent him in this matter. The power of attorney, filed on form POA-1-IND, has been properly completed and expressly indicates that Mr. Nassiripour was authorized to represent petitioner in connection with the subject Notice of Determination.

This matter was scheduled for a hearing in the Division of Tax Appeals on August 17, 2010. The Division of Tax Appeals issued a Notice of Hearing to the parties on July 12, 2010.

On August 16, 2010, petitioner and the Division of Taxation, by their respective representatives, executed a Stipulation for Discontinuance of Proceeding by which the parties stipulated and agreed that the pending proceeding in the Division of Tax Appeals was resolved and discontinued with prejudice. The stipulation further provided that the determination of tax due in this matter was recomputed to \$27,000.00, plus statutory interest, and that penalty was cancelled.

On August 26, 2010, the Administrative Law Judge assigned to this matter issued an Order of Discontinuance finally determining this matter, with prejudice, in the Division of Tax Appeals in accordance with the terms of the Stipulation for Discontinuance of Proceeding. The Order of Discontinuance is, by its terms, “the final judgment in this matter for purposes of Tax Law § 3030 [awarding of costs and certain fees].”

In his motion papers, petitioner argues that he was not a responsible officer of 492 Fast Food, Inc. Petitioner also asserts that he did not have the authority or consent of the president of the corporation to negotiate a settlement. Petitioner further contends that the audit method was unreasonable and that the results were erroneous. Attached to petitioner’s response are documents, designated by petitioner as “new evidence,” which are related to the responsible officer and audit issues.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that petitioner’s request for a review of the Order of Discontinuance is not properly considered as a motion to reopen the record pursuant to 20 NYCRR 3000.16. The Administrative Law Judge determined that section 3000.16 is applicable only where an Administrative Law Judge determination has been issued following either a hearing or submission and, thus, does not apply in this case, as the matter was settled by the parties pursuant to a stipulation. However, the Administrative Law Judge concluded that the Division of Tax Appeals does have the authority to consider a motion to vacate a stipulation for discontinuance of proceeding.

The Administrative Law Judge reviewed the record and found that petitioner failed to show the requisite fraud, malfeasance or misrepresentation of a material fact by the Division with regard to the stipulation of discontinuance. As such, the Administrative Law Judge determined

that under Tax Law § 171(18), the stipulation of discontinuance cannot be vacated. Accordingly, the Administrative Law Judge denied petitioner's motion.

ARGUMENTS ON EXCEPTION

On exception, petitioner raises the same arguments as those raised before the Administrative Law Judge. Specifically, petitioner argues that procedurally, entering into a Stipulation of Discontinuance was appropriate; however the whole background of the case was not known to petitioner's authorized representative at the time of entering into the Stipulation of Discontinuance on petitioner's behalf. As such, petitioner argues that the execution of the Stipulation has no relevance with regard to petitioner's status. Therefore, according to petitioner, the record should be reopened.

The Division argues that petitioner's position on exception was considered and dismissed by the Administrative Law Judge as being without factual support and legal basis. The Division requests that the exception be denied and the determination sustained in full.

OPINION

We affirm the determination of the Administrative Law Judge.

Tax Law § 171(18) provides that the Commissioner of Taxation and Finance shall:

Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded. As used in this paragraph the term "person" includes an individual, trust, estate, partnership and corporation.

This Tribunal has held that while it may be appropriate to reopen a closed matter in extraordinary circumstances, the need for finality of proceedings requires “a strict view of attempts by either petitioners or the Division to reopen or to reargue matters which have been closed” (*Matter of D & C Glass Corp.*, Tax Appeals Tribunal, June 11, 1992).

To meet the burden of proof, petitioner must prove the requirements for reopening the Stipulation of Discontinuance, specifically that the written agreement was induced by fraud, malfeasance, or misrepresentation by the Division (*see Matter of Brahms*, Tax Appeals Tribunal, July 3, 1997, *affirmed* 256 AD2d 822 [1998]; *see also Matter of Rally Oil*, Tax Appeals Tribunal, January 17, 1991; *c.f. Matter of D & C Glass Corp., supra*). Petitioner alleges that newly discovered evidence and the lack of background details by an authorized attorney provides grounds for reopening the subject Stipulation of Discontinuance with the Division, but has failed to satisfy the requirements of Tax Law § 171(18).

Petitioner adduced no evidence proving fraud, malfeasance, or misrepresentation of material fact against the Division in opposition to the motion. In fact, on exception, petitioner states that entering into a Stipulation of Discontinuance was appropriate (Exception, ¶ 7). We agree with the Administrative Law Judge that petitioner has not satisfied his burden to demonstrate that the Division has committed fraud, malfeasance, or misrepresentation of a material fact and, as a result, there is no reason to vacate or modify the Stipulation of Discontinuance of Proceeding executed by petitioner through his duly authorized representative in this proceeding.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mohammad Javed is denied;
2. The order of the Administrative Law Judge is affirmed; and

3. The motion of Mohammad Javed is denied.

DATED:Troy, New York
October 6, 2011

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

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