STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHELLE MCQUAY D/B/A NEW ORLEANS LA WATERFRONT BBQ	:	ORDER & OPINION DTA NO. 823719
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, 2004 through November 30, 2007.	:	

Petitioner, Michelle McQuay d/b/a New Orleans LA Waterfront BBQ, filed a motion for a rehearing with respect to the determination of the Presiding Officer issued on November 15, 2012. Petitioner appeared by John P. Bartolomei & Associates (John P. Bartolomei, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

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

ISSUE

Whether petitioner's motion for a rehearing should be granted.

FINDINGS OF FACT

We find the following facts.

This matter was the subject of a small claims hearing pursuant to Tax Law § 2012. The petition raised issues regarding sales and use taxes computed by the Division of Taxation ("Division"), alleging that the Division improperly determined that petitioner failed to maintain

proper records or, in the alternative, that the Division used an improper audit methodology.

A hearing was held on June 28, 2012 by Presiding Officer Barbara J. Russo, Esq. Petitioner appeared at the hearing by John P. Bartolomei & Associates (John P. Bartolomei, Esq., of counsel). The Division appeared by Amanda Hiller, Esq. (Charles W. Swink, Jr. and Tammy Reding).

On November 15, 2012, the Presiding Officer issued a determination denying the petition on the grounds that petitioner failed to produce complete and accurate records and that she failed to demonstrate that the audit methodology was unreasonably inaccurate or erroneous.

By letter dated December 14, 2012, petitioner filed a motion for rehearing pursuant to 20 NYCRR 3000.13 (h) (2). A document, which claimed to be an affirmation but lacked a jurat, accompanied the motion.

On January 17, 2013, petitioner filed a brief in support of her motion for a rehearing. In this document, petitioner alleges that the Presiding Officer engaged in misconduct by declining to accept ten boxes of evidence. Petitioner alleges that her witness provided a foundation for the boxes' contents, and, despite this fact, the Presiding Officer stated that it would not be necessary to receive the ten boxes into evidence. Petitioner also alleges that the Presiding Officer attempted to "cover up" her misconduct by not having a transcript of the hearing prepared. It is also petitioner's contention that the Presiding Officer engaged in misconduct by giving little weight to certain evidence in the record. In addition to these allegations, petitioner also argues that the Presiding Officer substantively erred in her legal analysis.

By an affirmation, dated March 20, 2013, the Division opposed petitioner's motion for rehearing. The Division notes that petitioner must come forward with clear and convincing proof

of the Presiding Officer's misconduct. The Division argues that petitioner's allegations of misconduct are misrepresentations because they have no basis in fact. It contends that there is no evidence that the Presiding Officer declined to accept ten boxes of evidence because petitioner made no such offer at the hearing. Further, the Division submits that petitioner also misrepresented that her witness testified to the authenticity of the ten boxes because such testimony was, in fact, not provided at the hearing. As such, the Division contends that the motion should be denied because the misconduct allegations lack any substance and are based entirely upon misrepresentations.

OPINION

Tax Law § 2012 provides taxpayers with the option to have their petitions heard by a Presiding Officer in the Division of Tax Appeals Small Claims Unit. As relevant herein, this statute provides:

> "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 in this state. However, the tax appeals tribunal may order a rehearing upon proof or allegation of misconduct by the presiding officer of the small claims proceeding" (Tax Law § 2012).

The relevant Tribunal regulations provide the following:

> "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 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" (20 NYCRR 3000.13 [h] [2]).

Pursuant to the foregoing regulation, petitioner makes the instant motion to reargue her claim, based upon an allegation of misconduct by the Presiding Officer in this matter.

An allegation of misconduct is a serious contention. This Tribunal has held that

"misconduct" on the part of the Presiding Officer is akin to judicial misconduct (***Matter of Insulpane Indus.***, Tax Appeals Tribunal, July 12, 1990). Rather than potential error (***see e.g. Matter of Gaffin***, Tax Appeals Tribunal, June 22, 2000), the conduct of the Presiding Officer must be objectionable so as to prevent "a just and equitable determination" (Tax Law § 2012; ***see Matter of Mertens***, 56 AD2d 456 [1977]). The party alleging misconduct must come forward with proof of the misconduct by the Presiding Officer (***Matter of Keeffe***, Tax Appeals Tribunal January 20, 1994). In light of the severity of the claim, mere allegations will be wholly insufficient to substantiate a motion.

We find that petitioner failed to present any evidence to support her motion. Initially, we note that it is not "misconduct" for a small claims hearing not to be stenographically reported. This Tribunal's regulations provide the following:

> "The small claims hearing will be stenographically reported or otherwise recorded, but a transcript thereof need not be made unless the presiding officer otherwise directs" (20 NYCRR 3000.13 [f] [3]).

Consistent with this regulation, the Presiding Officer created an audio recording of this matter. This recording indicates that, at the start of the hearing, the Presiding Officer informed the parties that no transcript would be made, and that only an audio recording would be available. Despite this warning and the relevant regulation, petitioner submits that the Presiding Officer "covered up" misconduct by not ordering a transcript. Accordingly, we find that the creation of the audio recording, consistent with our regulations, discredits this claim.

Our review of the audio recording indicates that petitioner's remaining claims of misconduct lack any support in the record. At no point during the hearing were ten boxes either or offered into evidence or authenticated by any witness. Rather, the audio recording lacks any

mention of ten boxes of evidence. Contrary to petitioner's assertions, petitioner's witness, Mr. Chatwin, did not reference ten boxes, much less verify the contents of ten boxes. Further, towards the end of the hearing, after reviewing all of the items accepted into evidence, which did not include ten boxes, the Presiding Officer asked petitioner's representative if he wished to offer any additional evidence. Petitioner's representative answered, "No." It appears, from our review of the recording, that the alleged offer and testimony regarding ten boxes are either fabrications or misrepresentations of what transpired at the hearing. As such, we must deny petitioner's motion because her claims of misconduct are fabrications that lack any evidentiary support.

We find that it is proper to impose frivolous petition penalties in this matter. The relevant regulation provides the following:

> "If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion or on the motion of office of counsel, impose a penalty against such petitioner of not more than $500" (20 NYCRR 3000.21).

Herein, petitioner's position is frivolous because her arguments are based solely upon misrepresentations of events at the hearing. The audio recording of the hearing indicates that the alleged offer and alleged testimony were nothing but fabrications. A motion based upon specious misrepresentations of material facts is, by definition, frivolous. Further, petitioner's contention that the absence of a transcript constitutes misconduct displays ignorance of the regulations governing small claims hearings (***see e.g. Matter of Michael A. Goldstein A No. 1 Trust***, Tax Appeals Tribunal, October 11, 2011, ***affd on other grounds*** 101 AD3d 1496 [2012]). As such, we impose a frivolous petition penalty of $500.00.

It is ORDERED that the motion for a rehearing in the Matter of Michelle McQuay d/b/a New Orleans LA Waterfront BBQ is hereby denied.

It is ORDERED that a penalty of $500.00 is imposed against petitioner, Michelle McQuay d/b/a New Orleans LA Waterfront BBQ, for maintaining a frivolous position in a proceeding.

DATED: Albany, New York
June 13, 2013

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

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