

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
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<b>DENNIS A. STARR</b>	:	ORDER
	:	DTA NO. 817353
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, 1995 through May 31, 1997.	:	

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Petitioner, Dennis A. Starr, 127 Seacord Road, New Rochelle, New York 10804, filed a petition 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, 1995 through May 31, 1997. Pursuant to a Stipulation for Discontinuance of Proceeding dated December 28, 2000 and January 2, 2001, the aforementioned proceeding was settled and discontinued. The Division of Tax Appeals issued an Order of Discontinuance in this matter on January 18, 2001. By petition dated and filed February 20, 2001, petitioner, appearing by his representative, Nancy Chasman, Esq., made an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), filed an affidavit in opposition on March 1, 2001, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs, the Division's affidavit in opposition, the parties' stipulation for discontinuance and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following order:

***ISSUE***

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

***FINDINGS OF FACT***

1. Petitioner, Dennis A. Starr, filed his petition in this matter with the Division of Tax Appeals on or about September 30, 1999. The petition refers to eight notice numbers (L014927470 through L014927477) and has attached thereto a conciliation order sustaining the eight statutory notices.

2. The current matter has its basis in deferred payment agreements entered into in 1994 between the Division of Taxation ("Division") and Razmataz, Inc., a corporation of which petitioner held the office of president. In September 1994 the accountant for the corporation advised the tax compliance agents of the Division that there was a problem with the application of payments being made pursuant to the deferred payment agreements. The misapplication of payments issue continued through a conciliation conference in 1995 and the issuance of a notice of determination and the filing of a petition in 1996. Finally, at a meeting in June 1997, petitioner was able to convince an attorney from the Division's Office of Counsel that the Division's computation of the application of payments was in error. In August 1997, the Division's attorney advised petitioner that the officer assessments would be canceled and that the payments relating to the deferred payment arrangement that were misapplied would be reapplied. The attorney also executed a Notice of Cancellation of Determination and Discontinuance of Proceeding relating to the officer assessments.

3. The reapplication of the misapplied payments was never done by the Division. This resulted in the issuance of the eight notices of determination for the period June 1, 1995 through May 31, 1997. Following a petition and a meeting with attorneys from the Division's Office of Counsel in December 2000, in which petitioner set forth all the problems with the misapplication of payments, a Stipulation of Discontinuance of Proceeding was entered into by the parties which, in effect, canceled the eight notices of determination. The stipulation provided "that pursuant to Tax Law § 3030 neither party is to be deemed a prevailing party . . . ." On January 18, 2001, the Division of Tax Appeals issued an Order of Discontinuance canceling the eight notices of determination. The order further stated that "[p]ursuant to the Stipulation of Discontinuance executed by the parties, petitioner has waived his rights to apply for costs and fees under Tax Law § 3030, . . . ." This order constituted the final judgment in this matter for purposes of Tax Law § 3030.

4. Upon receiving the proposed Stipulation of Discontinuance from the Office of Counsel's attorney, petitioner's representative contacted the attorney and objected to the inclusion of the clause which required petitioner to give up his rights under Tax Law § 3030. The Office of Counsel's attorney responded that it was "standard office procedure" to include such clause and also provided some information on the legal requirement that petitioner establish that the Commissioner's position at the time that the notices were issued was not substantially justified. In order to avoid continued legal expenses, petitioner agreed to the proposed Stipulation of Discontinuance.

### ***CONCLUSIONS OF LAW***

A Tax Law § 3030(a) provides, generally, as follows:

In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the *prevailing party* may be awarded a judgment or settlement for:

(1) *reasonable administrative costs* incurred in connection with such administrative proceeding within the department, and

(2) reasonable litigation costs incurred in connection with such court proceeding (Emphasis added.)

*Prevailing party* is defined for purposes of section 3030(c)(5) as follows:

(A) In general. The term “prevailing party” means any party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed. . . . (Tax Law § 3030[c][5].)

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (*see*, Tax Law § 3030[c][2][B]). This term “only includes costs incurred on or after the date of the . . . document giving rise to the taxpayer’s right to a hearing” (Tax Law § 3030[c][2][B]). Statutory references to “attorney’s fees” include “fees for the services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals” (Tax Law § 3030[c][3]).

Tax Law § 3030 became effective September 10, 1997 and applies to “any administrative or court proceeding commenced after the date this act shall have become a law” (*see*, L 1997, ch 577, § 56).

B Petitioner’s application for costs must be rejected because petitioner has failed to show that he was a “prevailing party” as that term is defined in Tax Law § 3030(c)(5). In fact, the Stipulation of Discontinuance signed by petitioner’s representative stated that “pursuant to Tax Law § 3030 neither party is to be deemed a prevailing party. . . .” As evidenced by the conversation held between the attorney for the Division and petitioner’s representative, petitioner, through his attorney, was well aware of this clause in the stipulation.

C. Petitioner asserts that he agreed to the settlement, which included the specific waiver of his right to apply for administrative costs and fees, because he could not afford additional legal expenses. According to petitioner, this decision to avoid further expenses by settling the matter constitutes economic duress which renders the stipulation of discontinuance voidable. A contract may not be avoided merely because a person was induced to enter it by reason of the pressure of business circumstances not caused by the other party (21 NY Jur 2d, Contracts, § 129). Here, petitioner made the decision to settle this matter to save additional legal costs, a decision that almost all litigants are faced with at one time or another. The opportunity to save future legal costs by agreeing to a settlement of the matter is just one of the factors to be considered when deciding whether such a settlement is advantageous. To reopen the matter on these grounds would undermine the need for finality of proceedings. The Tax Appeals Tribunal stated, in *Matter of Brahms* (Tax Appeals Tribunal, July 3, 1997, *confirmed* 256 AD2d 822, 681 NYS2d 699), that:

[w]hile 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).

Petitioner has not established any extraordinary circumstances which would warrant reopening this matter.

D. Addressing the attempt by petitioner to set aside the stipulation itself, there is insufficient evidence in the record to do so. Stipulations are generally not overturned except in the most unusual of circumstances. The Court of Appeals stated, in *Hallock v. State of New York* (64 NY2d 224, 485 NYS2d 510), that:

[s]tipulations of settlement are favored by the courts and not lightly cast aside (*see Matter of Galasso*, 35 NY2d 319, 361 NYS2d 871). . . . Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation (*Matter of Frutiger*, 29 NY2d 143, 324 NYS2d 36).

Petitioner has failed to establish any evidence of fraud, collusion, mistake or accident, and therefore the stipulation between the parties cannot be set aside.

E. Petitioner's application for costs is denied.

DATED: Troy, New York  
May 10, 2001

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE