STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAY PRESUTTI	:	ORDER DTA NO. 822069
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 March 1, 2003 through February 28, 2005.	:	

Petitioner, Jay Presutti, 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 March 1, 2003 through February 28, 2005. On July 21, 2008, a Notice of Withdrawal of Petition and Discontinuance of Proceeding, executed by petitioner, was filed with the Division of Tax Appeals.

On July 2, 2010, petitioner requested that the Division of Tax Appeals vacate the withdrawal of petition and reinstate the proceeding. The Division of Taxation filed an affirmation in opposition to petitioner's request on July 29, 2010, along with a request to impose a penalty for a frivolous petition pursuant to 20 NYCRR 3000.21. Petitioner appeared by Aaron F. Carbone, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel). Following the denial of petitioner's request to file a reply to the Division's response, pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on August 4, 2010. After due consideration of the documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following order.

ISSUES

I. Whether adequate grounds exist to vacate the Withdrawal of Petition and Discontinuance of Proceeding executed by petitioner.

II. Whether a frivolous petition penalty should be imposed under the authority of 20 NYCRR 3000.21.

FINDINGS OF FACTS

1. On February 5, 2007, the Division of Taxation (Division) issued notices of determination for the period March 1, 2003 through February 28, 2005. The notices were addressed to Jay Presutti at 73 Goldin Blvd, Walden, NY 12586.

2. On January 11, 2008, petitioner, Jay Presutti, executed a Power of Attorney (POA) form, appointing both Mark A. Krohn, Esq., and Stewart Rosenwasser, Esq., as his legal representatives. The POA stated: "I, the taxpayer named above, appoint the person named above as my true and lawful attorney, to appear and represent me before the Division . . . ." The POA was signed by petitioner, both representatives and a notary, Linda Rodriguez. The form did not indicate that the representatives must act jointly in their representation of petitioner.

3. Petitioner filed a petition, dated January 11, 2008, with the Division of Tax Appeals regarding the notices at issue. The petition indicated that both Mr. Krohn and Mr. Rosenwasser were his representatives.

4. At some point following the filing of the petition and before the execution of the withdrawal, the Division's representative and petitioner's representative spoke about petitioner's tax issue. Petitioner provided two pages of handwritten notes, neither of which provide verification as to their date of creation or creator. The documents contain miscellaneous names,

phone numbers, open-ended notes pertaining to petitioner's tax issue and dates of apparent pre-hearing conversations with Administrative Law Judge Frank Barry and Michael Infantino, the Division's attorney. Petitioner alleges that during these settlement discussions, Mr. Infantino held himself out to have influence over the offer-in-compromise board. Petitioner's provided notes do not document any statements pertaining to the Division influencing the offer-in-compromise board.

5. On July 21, 2008, petitioner executed a Notice of Withdrawal of Petition and Discontinuance of Proceeding stating: "the above-named petitioner hereby withdraws the petition for redetermination of a . . . revision of a determination . . . and discontinues the above-entitled proceeding, with prejudice, as of this date." The document is signed by Mark A. Krohn, Esq.

6. On September 24, 2008, Mr. Krohn sent a letter to the Division of Tax Appeals requesting to be relieved from the filed Notice of Withdrawal, "based upon a mistaken belief that . . . [a] key witness was not going to be available to testify and upon other misinformation."

7. On October 9, 2008, Chief Administrative Law Judge Andrew Marchese denied this request, and stated, "[i]f you wish to pursue this matter, you should file a motion to reopen with the administrative law judge to whom your case was assigned."

8. The Division submitted a copy of the POA form instructions that were applicable at the time petitioner executed his POA and instructions that are currently applicable.

9. On December 1, 2009, following a request by petitioner for an offer-in-compromise, the Division sent petitioner a letter denying the request because the Division determined that petitioner did not meet the two requirements necessary to be allowed such a compromise.

10. On July 2, 2010, petitioner filed the instant Notice of Motion to Reopen concerning the original petition filed January 11, 2008.

CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal do not provide a procedure for withdrawing a withdrawal of petition or moving to vacate such a withdrawal. However, there are two similar proceedings that offer guidance on these matters: a motion to reopen the record (20 NYCRR 3000.16) and a motion to vacate a stipulation (Tax Law § 171[18]). In both instances, the burden is on the moving party to demonstrate fraud, misrepresentation, malfeasance or other conduct of an opposing party which brought about a result adverse to the moving party.

B. While there may be extraordinary circumstances in which it would be appropriate to reopen a closed matter the Tribunal has consistently held that the necessity for finality to proceedings before the Division of Tax Appeals 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 Inc.***, Tax Appeals Tribunal, June 11, 1992).

C. As stated in 20 NYCRR 3000.16, a motion to reopen the record or for reargument, with or without a new hearing, shall be made to the administrative law judge who rendered the determination within 30 days after the determination has been served.

D. As stated in 20 NYCRR 3000.2(a)(2), a taxpayer may be represented before the tribunal if authorized by a proper power of attorney. Section 3000.2 of the Rules of Practice and Procedure does not specifically detail a requirement for multiple representatives to act jointly. Both prior POA form POA-1 and current POA form POA-1-IND state, in bold in part on POA-1-

IND and in bold in its entirety on POA-1, "[a]ll representatives appointed will be deemed to be acting severally, unless [this form] clearly indicates that all representatives are required to act jointly."

E. Here, petitioner alleges the Division's attorney, Michael Infantino, misrepresented himself throughout the prehearing stage and that petitioner relied upon these misrepresentations to his detriment. However, petitioner offers insufficient evidence to support a claim, which must be strictly construed. Petitioner provides only empty assertions and two pages of inconclusive and nondescriptive notes to support his claim, which can only be sustained if there is a showing of fraud, misrepresentation or malfeasance. The notes provided by petitioner only describe typical statements that would be made in the prehearing stages between the Division and a petitioner. Nothing written on the two pages of notes details any sort of inappropriate promises or misrepresentations by the Division.

F. Additionally, as stated in 20 NYCRR 3000.16, and pursuant to Chief Judge Marchese's letter denying petitioner's request, petitioner had 30 days to file a motion to reopen. Petitioner chose to not file this motion until nearly one year and nine months later.

G. Petitioner argues that the Notice of Withdrawal of Petition and Discontinuance of Proceeding is invalid because he had two appointed representatives and only one of them executed the notice. Petitioner's argument is without merit. The applicable POA form signed by petitioner and both of his appointed representatives clearly stated that they are authorized to act severally, unless the form "clearly" indicates that they are required to act jointly. Here, petitioner presents no evidence to show a clear indication that Mr. Krohn and Mr. Rosenwasser were to act

jointly. A brief review of the POA form submitted reveals no such indication. Mr. Krohn acted within his authority when he executed the subject notice.

H. 20 NYCRR 3000.21 states "[i]f a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may . . . impose a penalty against such petitioner of not more than $500."

I. The Division's request for a penalty against petitioner is denied because although insufficient evidence was provided to permit this motion, petitioner's arguments are not deemed frivolous specifically under 20 NYCRR 3000.21.

J. The motion of Jay Presutti for an order vacating the Notice of Withdrawal of Petition and Discontinuance of Proceeding is denied with prejudice, and the request of the Division for the imposition of a penalty of $500 against the petitioner is denied.

DATED: Troy, New York
October 28, 2010

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE