

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AFTAB HUSSAIN : ORDER
 : DTA NO. 823223
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, 2001 through :
November 30, 2003. :
:

Petitioner, Aftab Hussain, 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, 2001 through November 30, 2003.

On September 30, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. Petitioner, appearing pro se, and the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) submitted responses to the Notice of Intent to Dismiss Petition by October 30, 2009, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). After due consideration of the documents and arguments submitted by the parties and the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the petition.

FINDINGS OF FACT

1. The notice in issue, notice number L-026172429, was issued to petitioner, Aftab Hussain, by the Division of Taxation (Division), which asserted additional sales and use taxes in the sum of \$ 533,339.57, plus penalty and interest, for the period June 1, 2001 through November 30, 2003.

2. Petitioner filed a petition with the Division of Tax Appeals on October 30, 2006, and the Division answered the petition on January 3, 2007. The case, assigned Division of Tax Appeals number 821396, was closed after the parties executed a Stipulation of Discontinuance of Proceeding on November 6, 2007 and a final order was entered thereon by Administrative Law Judge Dennis M. Galliher on November 15, 2007.

3. On August 28, 2009, petitioner filed a petition in the Division of Tax Appeals which purported to contest Notice of Determination, notice number L-026172429, the same notice which was the subject of the prior action. The petition states that proof has been discovered which would warrant modification of the tax due as stated in the notice L-026172429.

4. On September 30, 2009, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition which was filed on August 28, 2009. The notice stated as follows:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Since the petition filed on or about August 28, 2009 is a duplicate of the petition sent in on October 27, 2006, the Tax Appeals Tribunal lacks jurisdiction of the subject matter of the petition.

The taxpayer signed a Division of Tax Appeals Stipulation of Discontinuance of Proceeding on November 6, 2007 for Aftab Hussain, DTA# 821396, Notice/assessment # L-026172429. The stipulation states “. . . [t]his constitutes the complete agreement of the parties. There are no agreements,

promises or understandings between the parties except as expressly set forth herein.

If you are aware of any circumstance which grants the Division of Tax Appeals jurisdiction, you should advise us of that circumstance.

4. In response to the issuance of the notice of intent to dismiss petition, neither the Division of Taxation nor petitioner addressed the issue of the signed stipulation in the prior proceeding.

5. Petitioner did not challenge the propriety of the stipulation on the basis of fraud, malfeasance, or misrepresentation of a material fact.

CONCLUSIONS OF LAW

A. Pursuant to subdivision eighteenth of section 171 of the Tax Law, 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 . . ." (emphasis added).

The stipulation for discontinuance at issue was an agreement entered into by the Division pursuant to the authority of subdivision eighteenth of section 171 of the Tax Law. The Tax Appeals 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). As stated in *Matter of Felix Indus.* (Tax Appeals Tribunal, July 22, 1993), the grounds set forth in subdivision eighteenth of section 171 of the Tax Law must be considered to be the sole grounds for the stipulation for discontinuance to be annulled, modified, set aside or disregarded. As stated in *Felix*: “[e]rror by one or both of the parties is not a ground for reopening or modifying such an agreement” (*Matter of Felix Indus.*)

B. In this matter, petitioner appears to be asking to have the stipulation reopened or modified, without contending that the basis for such modification was fraud, malfeasance, or misrepresentation of a material fact. Therefore, he has not met the minimum requirements set forth in Tax Law § 171(18).

C. The petition of Aftab Hussain is hereby dismissed.

DATED:Troy, New York
January 7, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE