STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KAREN E. MORTH	:	DECISION DTA NO. 828808
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2014.	:	

Petitioner, Karen E. Morth, filed an exception to the order of discontinuance of the Supervising Administrative Law Judge issued on January 16, 2019. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer Hink-Brennan, Esq., of counsel).

On February 28, 2019, the Tax Appeals Tribunal issued a notice of intent to dismiss exception on the ground that it lacks jurisdiction to consider petitioner's exception to the order of discontinuance. The parties were granted until April 4, 2019 to respond to the notice of intent to dismiss exception. Petitioner and the Division of Taxation filed letter briefs in response. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on April 8, 2019, the date petitioner's response was received.

ISSUE

Whether the Tax Appeals Tribunal has jurisdiction to consider petitioner's exception and, if so, whether the order of discontinuance may be vacated.

FINDINGS OF FACT

We find the following facts.

1. On July 13, 2018, petitioner, Karen E. Morth, filed a petition with the Division of Tax Appeals "for appeal of assessment of penalty for 'Late filing penalty' for tax year 2014." Petitioner checked the box indicating that she was petitioning for a redetermination of a deficiency or revision of a determination. Petitioner did not check the box indicating that she was petitioning for a refund. Petitioner indicated that the amount contested was "$100.00 penalty for late filing." Petitioner did not set forth the amount contested in parenthesis as the instructions on the petition form indicate should be done if "the controversy involves a refund." The petition referenced, and attached thereto, a notice and demand for payment of tax due, issued by the Division of Taxation (Division), dated November 10, 2015, regarding assessment L-043923762, listing a balance due for the filing period ended December 31, 2014, which was comprised of tax due, interest assessed and a penalty in the amount of $107.56 for late payment. Also attached was: (1) a copy of a payment document dated March 25, 2016 indicating that petitioner had thereby made a $120.00 payment; (2) a copy of letter from petitioner to the Division stating that she would like to formally appeal the penalty assessed and that payment had been made separately; and (3) a copy of a response to taxpayer inquiry regarding assessment L-043923762 wherein the Division indicated that no tax was due, denied petitioner's request for a refund and informed her she had two years from the date of the notice to either file a request for conciliation conference with the Division, or a petition with the Division of Tax Appeals.

2. On September 26, 2018, the Division filed its answer to the petition. The answer indicated that the notice and demand was properly issued and did not provide petitioner with any protest rights. The answer did not address the denial of refund letter indicating that no tax was owed and specifically setting forth petitioner's protest rights, nor did it request that the denial of

the refund be sustained.

3. On December 4, 2018, the Division of Tax Appeals received a stipulation of discontinuance of proceeding, filed by the Division, executed by petitioner on November 26, 2018, and the Division on November 29, 2018. The stipulation lists the amount of the recomputed deficiency as $217.00 plus "applicable statutory interest," and zero penalty. The stipulation form states that "[I]t is understood that all refund claims are subject to the approval of the Comptroller. Accordingly this Stipulation of Discontinuance is conditioned upon the granting of such approval and the payment of the refund." This stipulation was submitted with a letter dated December 4, 2018 from the Division's attorney, which indicated that "[t]he Division of Taxation will be marking this case as closed in its records."

4. The stipulation of discontinuance contains no indication that petitioner is due a refund.[1]

5. By letter dated December 12, 2018, petitioner responded to the Division's letter of December 4, 2018, by objecting to her case being closed in the Division of Tax Appeals, as she had "not yet received the refund of the penalty with statutory interest, or notice that the Comptroller has approved the payment of the refund, as stated on the Stipulation . . . ." Petitioner also requested a copy of any "rules, guidelines and/or internal procedures governing stipulations for discontinuance."

6. On December 28, 2018, the Supervising Administrative Law Judge sent a letter to petitioner acknowledging that he had received her letter of December 12, 2018, as well as the signed stipulation of discontinuance on December 10, 2018. He also advised that a "closing

[1] The stipulation for discontinuance form provides a space to fill in the amount of "Deficiency/Determination or (refund) as recomputed." Thus, if petitioner were due a refund, the amount of the refund would have been contained in parentheses. The $217.00 listed on the form executed by the parties in this matter is not contained in parentheses and accordingly reflects a tax deficiency, not a refund.

order will be issued shortly, ordering the terms of the stipulation and closing the matter before this agency." He further advised that "[a]ny questions regarding collection should be directed to the Department of Taxation and Finance."

7. On January 16, 2019, the Supervising Administrative Law Judge issued an order of discontinuance in this matter. The order acknowledged that the parties had jointly executed a stipulation agreeing to settle and discontinue the matter in accordance with its provisions and had moved for an order finally determining the matter in accordance with its terms; ordered that the assessment be recomputed to be the tax listed on the stipulation, plus statutory interest; and further ordered that the proceeding be discontinued with prejudice.

8. At no time after her December 12, 2018 letter objecting to the stipulation of discontinuance did petitioner receive any communication from the Division or the Division of Tax Appeals addressing petitioner's assertion that a refund was due to her under the terms of the stipulation of discontinuance or her objection to the case being closed prior to her receiving such refund.

9. On February 15, 2019, petitioner filed an exception with the Tax Appeals Tribunal. On February 28, 2019, the Tribunal issued a notice of intent to dismiss exception on the ground that it lacks jurisdiction to consider petitioner's exception to the order of discontinuance. The notice of intent stated that "[A]s the only issue that petitioner challenged in her petition, i.e., the imposition of penalty, has been finally addressed in the stipulation of discontinuance and the matter discontinued with prejudice pursuant to an order of discontinuance, the Division of Tax Appeals has no further jurisdiction over this matter and the Tax Appeals Tribunal has no jurisdiction to consider the exception filed on February 15, 2019."

SUMMARY OF RESPONSES TO NOTICE OF INTENT

Petitioner asserts that the language of the stipulation of discontinuance indicates that her case should not have been closed prior to the Comptroller having approved the refund of the $100.00 penalty, with statutory interest, and her actually having received the refund. Petitioner argues that, contrary to the assertion in the notice of intent to dismiss exception that the only issue raised in the petition was the imposition of penalty, petitioner also requested a refund and until that refund is granted, her case should not be dismissed. Additionally, petitioner argues that until all the conditions of the stipulation of discontinuance are met, such stipulation is not fully executed and, accordingly, the stipulation of discontinuance did not constitute a written agreement under Tax Law § 171 (eighteenth).

The Division asserts that the order of discontinuance, based upon the stipulation of discontinuance executed by both parties, resolved the issue of penalty and therefore removed the matter from the jurisdiction of the Division of Tax Appeals.

OPINION

The crux of petitioner's exception is that the stipulation of discontinuance is conditioned on the Comptroller approving, and her receiving, a refund of the penalty that she paid with regard to assessment L-043923762, and that, therefore, her case before the Division of Tax Appeals should not be closed prior to her receiving the refund. We agree with petitioner that if a stipulation of discontinuance provides for a refund, such stipulation appears, by its own terms, to be conditioned upon the petitioner's receipt of that refund. We also note that the issue of what remedy is available to a petitioner where such a refund is not granted after the case is closed by an order of discontinuance that is based upon a stipulation providing for a refund, would present

a case of first impression in this forum. That is not, however, the case currently before this Tribunal.

We do not reach petitioner's arguments in this case because the stipulation of discontinuance executed by the parties does not provide for a refund. Contrary to petitioner's assertions, the stipulation of discontinuance indicates that the matter has been resolved by an agreement to a tax deficiency of $217.00 plus applicable statutory interest, and that no penalty is due. There is no indication of any refund being granted. Therefore, petitioner's argument that the order of discontinuance should not have been issued until she received a refund is simply not applicable to the facts contained in the record.

Petitioner's argument is, however, relevant to a request that the Division of Tax Appeals vacate the stipulation of discontinuance, and the authority to consider such a request does exist (***see Matter of Felix Indus.***, Tax Appeals Tribunal, July 22, 1993; ***Matter of D & C Glass Corp.***, Tax Appeals Tribunal, June 11, 1992). Therefore, we will consider petitioner's exception to be a request to vacate the stipulation of discontinuance. Accordingly, the notice of intent to dismiss exception issued by this Tribunal is withdrawn and we find that this Tribunal has jurisdiction over the exception.

The stipulation of discontinuance was prepared on Division of Tax Appeals form TA-115, one of several forms adopted by the Tax Appeals Tribunal to allow parties to notify the Division of Tax Appeals of a decision to discontinue a proceeding. The stipulation of discontinuance has previously been found to be a written agreement under Tax Law § 171 (eighteenth) (***see Matter of Felix Indus.***; ***see also Matter of D & C Glass Corp.***). Petitioner's argument that this particular stipulation of discontinuance is not a written agreement under Tax Law § 171

(eighteenth) is premised upon the conclusion that the stipulation was not fully executed because petitioner did not receive her refund. Petitioner's argument fails as we have found that the stipulation did not provide for a refund.

Tax Law § 171 (eighteenth), provides as follows:

> "The commissioner of taxation and finance shall:
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> * * *
>
> Eighteenth. 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 grounds set forth in Tax Law § 171 (eighteenth), i.e., "fraud, malfeasance, or misrepresentation of a material fact," are the sole grounds for stipulations to "be annulled, modified, set aside or disregarded" (***see Matter of Mullin***, Tax Appeals Tribunal, June 9, 1994; ***Matter of Felix Indus.***). Petitioner has not alleged, much less proven, that any of these grounds exist.

While petitioner has not alleged any misrepresentations on the part of the Division, the Tribunal does acknowledge that the record contains numerous examples of disconnects between and among the parties and the Division of Tax Appeals. The most troubling example being that the refund denial letter issued by the Division to petitioner indicates that no tax was due on assessment L-043923762, while the stipulation of discontinuance indicates that there is a $217.00 deficiency regarding the same assessment. However, there is nothing in the record to indicate

that these disconnects are anything more than miscommunications, which may still be resolved between the parties after a review of the appropriate documents.

Petitioner has not satisfied her heavy burden of proving fraud, malfeasance, or misrepresentation of a material fact; therefore, grounds for vacating the subject stipulation do not exist.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Karen E. Morth is denied;

2. The order of the Administrative Law Judge is affirmed; and

3. Petitioner's request to vacate a stipulation for discontinuance of proceeding is denied.

DATED: Albany, New York
October 8, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner