STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CRAIG A. OLSHEIM	:	ORDER AND OPINION DTA NO. 824218
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2005.	:	

Petitioner, Craig A. Olsheim, filed an exception to the determination of the Administrative Law Judge issued on May 9, 2013. Petitioner appeared by Richards & Richards, P.C. (Gary Richards, CPA). The Division of Taxation appeared by Amanda Hiller (Marvis A. Warren, Esq., of counsel). Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument was not requested. The Tax Appeals Tribunal issued a decision on April 10, 2014.

The Division of Taxation filed a Notice of Motion for Reargument on June 30, 2014, together with its supporting affirmation and supporting letter brief in lieu of a formal brief. Petitioner made no submission in response to the Division of Taxation's motion.

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

ORDER AND OPINION

The Division of Taxation (Division) is requesting that this Tribunal reconsider certain statements made in its previous decision in this matter dated April 10, 2014. At issue in the previous decision, was petitioner's attempt as a nonresident taxpayer to allocate to New York the loss from the dissolution of his interest in a partnership.[1] As relevant to the Division's request, we held in the previous decision, that an interest in a partnership is intangible personal property (Partnership Law § 52; ***Matter of Finkelstein***, 40 Misc 2d 910, 914 [1963], ***citing Blodgett v Silberman***, 277 US 1 [1928]). We then explained that gains and losses from intangible personal property are allocable to New York only to the extent that the intangible property itself is employed in a "business, trade, profession or occupation carried on in this state" (Tax Law § 631 [b] [2]; 20 NYCRR 132.5 [a]). The Division asserts that this Tribunal misstated the law when we then went on to inquire as to whether the partnership, not the partnership interest, was employed in a "business, trade, profession, or occupation carried on in this state" (Tax Law § 631 [b] [2]).

The purpose of a motion to reargue is "to convince the court that it was wrong and ought to change its mind" (Siegel, NY Prac § 254, at 449 [5th ed]). While this Tribunal may invoke its discretion to entertain and possibly grant such motions, our authority as a quasi-judicial body to do so is limited (20 NYCRR 3000.16 [c]; ***Matter of Trieu***, Tax Appeals Tribunal, June 2, 1994, ***confirmed Matter of Xuong Trieu v Tax Appeals Trib. of State of N.Y.***, 222 AD2d 743 [1995], ***appeal dismissed*** 87 NY2d 1054 [1996], ***lv denied*** 88 NY2d 809 [1996]; ***Matter of Jenkins Covington, N.Y. v Tax Appeals Trib.***, 195 AD2d 625 [1993], ***lv denied*** 82 NY2d 664 [1994]; ***see***

[1] The Findings of Fact as set forth in the decision dated April 10, 2014 are fully adopted herein and will not be repeated here.

also Matter of Evans v Monaghan, 306 NY 312 [1954]). Therefore, any reconsideration of our previous decision must be for compelling reasons. That is particularly true where, as here, the requested reconsideration will not change the ultimate outcome of the case.

The Division urges us to grant its motion in order to avoid confusion and provide taxpayers with clear guidance on this issue in the future, even though the ultimate result of the case will not change. We agree that under these circumstances, a misstatement of law should be corrected when brought to our attention in order to avoid confusion on an important issue and to provide both taxpayers and the Division with clear guidance (***see Matter of Schulkin***, Tax Appeals Tribunal, November 20, 1997 [where motion for reargument made by Division of the Lottery was granted to the extent that this Tribunal reversed so much of its prior decision that held the Division of Tax Appeals had jurisdiction to hear lottery license revocation hearings even though the granting of the motion did not effect the ultimate outcome of the case]).

In the previous decision, we first explained that gains and losses from intangible personal property are allocable to New York only to the extent that the intangible property itself is employed in a "business, trade, profession or occupation carried on in this state" (Tax Law § 631 [b] [2]). We then went on to inquire into whether the partnership, rather than the partnership interest, was employed in a "business, trade, profession or occupation carried on in this state," which was an obvious misstatement. It is clear from the face of the statute that the inquiry pertains to the partnership interest.

That being said, such inquiry is not possible in the instant matter, as petitioner failed to introduce any evidence regarding how his interest in the partnership was employed in New York,

thus leaving us with the same result.[2] Petitioner simply failed to overcome the statutory presumption that the notice is correct (Tax Law § 689 [e]).

Finally, the Division also requests that this Tribunal reconsider that part of its decision stating that "petitioner correctly asserts that current Tax Law § 631 (b) (1) (A) (1) would have permitted petitioner to deduct the capital loss from Fifth Avenue." This portion of the decision is hereby stricken, in that it is not necessary or helpful to the resolution of the issue and is therefore pure dicta.

Accordingly, it is hereby ordered that the Motion for Reargument of the Division of Taxation is granted and the decision of the Tax Appeals Tribunal in ***Matter of Olsheim (supra)*** is modified consistent with the terms of this order and opinion, and an amended decision in this matter shall be issued on this date.

DATED: Albany, New York
November 13, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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

[2] The record created in this matter is bereft of any testimonial or direct documentary evidence. There is no testimony as the matter was submitted on the papers, and petitioner submitted no documentary evidence. The evidence submitted by the Division consisted of jurisdictional documents together with a Field Audit Report, Tax Field Audit Record, some correspondence and petitioner's 2005 federal and New York State income tax returns.