STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
INSULPANE INDUSTRIES, INC. AND C. SQUILLANTE, E. CASALE, E. SMITH AND R. WAXTEL, AS OFFICERS	:	DECISION
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, 1983 through August 31, 1986.	:	

Petitioners, Insulpane Industries, Inc. and C. Squillante, E. Casale, E. Smith and R. Waxtel, as officers, 335 Temple Hill, New Windsor, New York 12550 filed an exception to the order of the Administrative Law Judge issued on October 26, 1989 dismissing a motion to set aside a small claims determination issued on March 16, 1989 that dismissed their petitions for redetermination of a deficiency/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, 1983 through August 31, 1986 (File No. 805871). Petitioners appeared by Frederick E. Maute, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Susan Hutchinson, Esq., of counsel).

Petitioners and the Division submitted a brief on exception. Oral argument was held on March 14, 1990 at the request of petitioners.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the petitions were properly heard by a Presiding Officer of the small claims unit.

FINDINGS OF FACT

We find the facts as stated in the order of the Administrative Law Judge and such facts are stated below. We find additional facts as noted below.

Notices of determination and demand for payment of sales and use taxes due were issued to Insulpane Industries, Inc. and to the four officers of the corporation as named in the caption above. After a conciliation conference, the additional tax assessed was reduced from $759,741.18 to $233,461.00. Petitioners' representative executed a consent wherein heagreed to the revised tax due but disagreed with the imposition of penalties and statutory interest.

The petition dated July 14, 1988 filed on behalf of the petitioners[1] sought review of "the penalty only." A small claims election, that petitioners wished to have the proceedings conducted in the Small Claims Unit, was also made.

The small claims determination issued March 16, 1989 by the Presiding Officer, James Hoefer, sustained the imposition of penalties and statutory interest.

None of the petitioners at any time prior to the conclusion of the small claims proceeding sought to discontinue the proceeding or made any request that these matters be transferred to a proceeding before an Administrative Law Judge. It should also be noted that the Presiding Officer at the small claims hearing clearly stated that petitioners had the right to discontinue the small claims proceeding and have the matters transferred to an Administrative Law Judge at any time prior to the conclusion of the hearing. He also explicitly noted that his determination would be final and conclusive with neither party having a right to further review.

---

[1]In the space for the entry of the name(s) of the petitioner(s) on the petition, only Insulpane Industries, Inc. was shown. However, the ten notice numbers, two for each of the corporate officers and the corporation itself, were shown on the petition in the space for the entry of the notice/assessment numbers being challenged. Further, at the proceeding in the small claims unit, the Presiding Officer explicitly stated that the petition was construed to represent all of the corporate officers as well as the corporation in light of the fact that all of the notices of determination were so referenced in the petition. No objection was raised to this construction of the petition.

A review of the tape recording made of the small claims hearing shows that the Presiding Officer conducted the proceeding in an objective, patient and tactful manner. The auditor who conducted the audit at issue testified under oath and was subject to cross-examination by petitioners' representative. In addition, through pertinent, fair and comprehensible questioning, the Presiding Officer effectively completed the examination of the auditor. Petitioners were given the opportunity to offer evidence and witnesses in their behalf, and petitioners' representative was also permitted to make a closing argument on the facts and law.

We find, in addition to the facts found by the Administrative Law Judge, that petitioners, by a motion dated July 31, 1989, sought an order setting aside the small claims determination on the ground that the small claims unit did not have jurisdiction over the matter and for a rehearing based on a finding of "misconduct" on the part of the Presiding Officer in the small claims hearing on the same ground, i.e., the amount in controversy was in excess of the monetary limits for small claims.

OPINION

Tax Law § 2012 limits the review of the final determination of a Presiding Officer in the small claims unit by providing that "The final determination of the presiding officer in the small claims unit shall be conclusive upon all parties and shall not be subject to review by any other unit in the division of tax appeals or by any court of the state. However, the tax appeals tribunal may order a rehearing upon proof or allegation of misconduct by the presiding officer of the small claims proceeding." (See also, 20 NYCRR 3000.9[h][2].) The motion by petitioners alleging misconduct on behalf of the Presiding Officer was referred by the Supervising Administrative Law Judge to an Administrative Law Judge for review.

The order issued by the Administrative Law Judge determined that there was no evidence in the record to support a finding of misconduct on the part of the small claims hearing Presiding Officer. Further, it was concluded that the small claims unit had jurisdiction of the subject matter of the controversy because the amount of tax in controversy was zero, as penalty and interest are not included in the calculation of the amount in controversy for jurisdictional

purposes. As a result, petitioners' motion to set aside the small claims determination was denied.

On exception, petitioners argue that the order was in error because the small claims unit did not have jurisdiction of the subject matter in question. Petitioners contend that the sales tax amount is still in controversy and that penalty only cannot be contested independently, but is part of the tax and calculated thereon and that an amount in excess of $20,000.00 per year divests the small claims unit of jurisdiction. Petitioners assert that there was misconduct on the part of the small claims hearing officer in that he failed to establish proper jurisdiction over the case and that he conducted a hearing of a matter not within the jurisdiction of the small claims unit.

In response, the Division argues that the small claims unit did in fact have jurisdiction of the subject matter in question. Specifically, the Division points to the language of Tax Law § 2012 as support for the proposition that penalty and interest are not to be included in the calculation of the amount in controversy for small claims jurisdictional purposes. Further, the Division asserts that there was no misconduct on the part of the small claims hearing officer and that petitioners' allegation that the small claims hearing officer's behavior amounted to misconduct is a mere conclusory statement with no basis in fact. Lastly, the Division maintains that petitioners' motion is an improper attempt to obtain review of a small claim determination which was properly rendered.

We affirm the order of the Administrative Law Judge.

Tax Law § 2012 provides the authority for the establishment of a Small Claims Unit in the Division of Tax Appeals and authorizes the Tribunal to prescribe by regulation the maximum amount that can be in controversy in a small claims proceeding. Tax Law § 2012 in effect sets a "floor" for the maximum amount of tax in controversy and permits the Tribunal to set a maximum amount above such floor. As relevant to the sales tax case here, the floor is $20,000.00 excluding penalty and interest. As a result, the placement of this case in the small claims unit does not violate the language of Tax Law § 2012 and the issue before us cannot be

determined under this statute. Rather, it is the Tribunal's regulations which define the parameters of the small claims proceedings and which must be examined in order to resolve the present case.

20 NYCRR 3000.9(b) provides, in pertinent part, that:

> "Controversies which may be heard by the small claims unit are restricted in amount to $10,000 (not including penalty and interest) for any 12-month period in question. However, with respect to cases arising out of sales and compensating use taxes pursuant to articles 28 and 29 of the Tax Law, the amount in controversy may not exceed $20,000 (not including penalty and interest) for each 12-month period." (Emphasis added.)

We deal first with whether the amount of tax asserted by the Division which has been agreed to by the petitioner is "an amount in controversy" for jurisdictional purposes. We conclude that in ascertaining an amount in controversy the portion of an assessed deficiency which has been agreed to by the parties prior to the proceeding at issue will not be included in the calculation since the settled upon amount is no longer in dispute (see, Kallich v. Commr., 89 TC 676). Rather, only that portion of the assessment which is still at issue between the parties at the time proceedings are commenced in the small claims unit is to be included in the calculation of the amount in controversy (see, Kallich v. Commr., supra). As a result, the amount of tax which was agreed upon by petitioners and the Division in the present case prior to the small claims proceeding will not be included in the amount in controversy computation. Since the whole underlying tax liability has been agreed to, what remains to be determined is whether penalty and interest may be included in the amount in controversy for determining the jurisdiction of small claims proceedings.

Petitioners assert that the amount of penalty and interest which may be considered in a small claims proceeding is limited. Petitioners would have us interpret 20 NYCRR 3000.9(b) as meaning that penalty and interest are generally excluded from the amount in controversy except when the amount of penalty and interest exceeds the monetary cap for the amount in controversy. Petitioners' argument here boils down to the assertion that the monetary cap of $20,000.00 should serve the dual role of limiting the amount of tax in controversy and serving

as a cap on the amount of penalty and interest which may be considered in a small claims proceeding. We find no basis for this position. The language of the regulation is clear and unequivocal in excluding penalty and interest from the jurisdictional calculation. Petitioners' argument that their position is supported by reference to small claims proceedings as administered by the United States Tax Court and provided for in the Internal Revenue Code is not persuasive. In particular, petitioners refer to the Internal Revenue Code requirement of a strict monetary limit for small claims proceedings, which includes additions to tax and penalties, as support for their claim that penalty and interest should be included in the New York State calculation (see, IRC § 7463[e]). Petitioners, however, fail to appreciate the significant difference between the language of the state and federal rules. Tax Law § 2012 and 20 NYCRR 3000.9(b) are clearly different from IRC § 7463(e), their federal counterpart, as the New York law specifically excludes penalty and interest from its calculation while the federal law purposely includes additions to tax and penalties.

Rather than supporting petitioners' position, a comparison of IRC § 7463(e) with Tax Law § 2012 and 20 NYCRR 3000.9(b) indicates that the penalty and interest provisions of the latter were not intended to have a monetary cap. The difference between the state and federal rules serves to emphasize the separate treatment which New York chose to implement with regard to penalty and interest. The decision to exclude interest and penalty by New York is a clear indication that New York did not intend to follow federal procedure in this respect. Since this is the case, it follows that New York also did not intend to put a cap on interest and penalty in a similar manner as that which is done federally.

As a result we conclude that in determining the jurisdiction of the small claims unit only the amount of tax is used to ascertain the "amount in controversy." The amount of tax may be zero up to the maximum set by 20 NYCRR 3000.9(b). The amount of penalty and interest has no bearing on the jurisdiction of the small claims unit as it is not included in calculating the "amount in controversy," and may therefore be of any amount.

We conclude therefore that the amount in controversy in the case at hand was zero for purposes of the small claims hearing as the underlying tax liability which had been assessed was agreed upon by the parties prior to the small claims proceeding and the remaining penalty and interest is not to be included in the calculation of the amount in controversy. Accordingly, the case was within the monetary limits imposed upon the small claims hearing unit. Thus, we conclude that the small claims unit properly exercised its jurisdiction over the case at hand.

The last issue which we will address is petitioners' contention that certain actions of the small claims hearing officer constituted misconduct such that the case should be remanded for a new hearing. Tax Law § 2012 provides, in pertinent part, that:

> "The final determination of the presiding officer in the small claims unit shall be conclusive upon all parties and shall not be subject to review by any other unit in the division of tax appeals, by the tax appeals tribunal or by any court of the state. However, the tax appeals tribunal may order a rehearing upon proof or allegation of misconduct by the presiding officer of the small claims proceeding" (see, 20 NYCRR 3000.9[h][2]).

In particular, petitioners argue that it was "misconduct" for the hearing officer to hear a matter without establishing the amount in controversy or by having a hearing where the amount in controversy was in excess of the jurisdictional limitation. We find this allegation to be wholly unsupported. First, as noted above, the matter before the small claims hearing officer was properly before him as the jurisdictional amount in controversy was zero. Second, petitioners' claim of misconduct is merely a conclusory statement. "Misconduct" refers to the objectionable behavior of a judge as opposed to a potential error by a judge in an analysis of the law (see, Matter of Mertens, 56 AD2d 456, 392 NYS2d 860). In the present case we find the behavior of the small claims hearing officer to have been wholly proper as indicated by the Administrative Law Judge in the order below. In addition, we find no error in the manner in which the small claims hearing officer conducted the proceedings before him.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Insulpane Industries, Inc. and C. Squillante, E. Casale, E. Smith and R. Waxtel, as officers, is denied;

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

3. The motion of Insulpane Industries, Inc. and C. Squillante, E. Casale, E. Smith and R. Waxtel, as officers, is denied.

DATED: Troy, New York
July 12, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner