

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LEONARD MORRIS : DECISION
AND JEROME C. ROSENTHAL :
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, 1972 :
through February 28, 1974. :

Petitioners, Leonard Morris and Jerome C. Rosenthal, 166 Cranburne Lane, Amherst, New York 14221 filed an exception to the order of the Administrative Law Judge issued on September 22, 1988 with respect to their 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, 1972 through February 28, 1974 (File No. 806004). Petitioners appeared by William C. Bernhardt, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioners filed a brief on exception and the Division filed a letter brief in response. Petitioners' request for oral argument was denied.

ISSUE

Whether the Tax Appeals Tribunal has jurisdiction to entertain petitioners' petition, in that petitioners have previously exhausted their administrative remedies pursuant to Article 78 of the Civil Practice Law and Rules.

FINDINGS OF FACT

We find the facts as stated in the order of the Administrative Law Judge and such facts are incorporated herein by this reference.

On April 17, 1975, the Division issued to petitioners, Leonard Morris and Jerome C. Rosenthal, separate notices of determination and demand for payment of sales and use taxes due. Petitioners timely protested these notices. A formal administrative proceeding ensued, and, on

July 9, 1984, the former State Tax Commission issued a decision holding petitioners liable for sales and use taxes arising from sales made between March 1, 1972 and May 1973.

In October 1984, petitioners timely commenced a proceeding under Article 78 of the Civil Practice Law and Rules in Supreme Court, Erie County, seeking a review of the State Tax Commission's decision insofar as it held petitioners liable for sales and use tax. Petitioners failed to comply with the court's order requiring them to post a bond for approximately \$45,000.00, representing the tax assessment, penalties and interest, as required by Tax Law section 1138(a)(4).

The Article 78 proceeding was transferred to Supreme Court, Albany County, which, upon motion of the Commissioner of Taxation and Finance, dismissed the petition for lack of subject matter jurisdiction. In affirming the decision of the court below, the Appellate Division, Third Department held that compliance with Tax Law section 1138(a)(4) is a strict condition precedent to judicial review of a tax assessment in an Article 78 proceeding.

In its order, the appellate court stated:

"This is not, however, a determination on the merits, and, upon complying with Tax Law § 1138(a)(4), petitioners may commence a new proceeding within six months (see, CPLR 205[a]; Matter of Day Surgicals v. State Tax Commn., 97 AD2d 865, 866)." (Morris v. State Tax Commr., 529 NYS2d 43, 44)

Petitioners have interpreted the quoted language as allowing them six months to file a petition with the Division of Tax Appeals, seeking a review of the decision of the State Tax Commission.

On July 25, 1988, petitioners filed a petition with the Division of Tax Appeals, seeking reversal of the State Tax Commission's determination of July 9, 1984 and nullification of the assessment dated April 17, 1975.

OPINION

The Administrative Law Judge dismissed petitioners' petition on the grounds that the Division of Tax Appeals was without administrative jurisdiction. Petitioners excepted claiming

that the State Tax Commission caused substantial prejudice due to an unreasonable delay in providing a hearing and by changing hearing officers, and that the Tax Appeals Tribunal, by nature of its administrative purpose, should therefore review the State Tax Commission's original decision.

We affirm the order of the Administrative Law Judge.

Prior to September 1, 1987, the State Tax Commission was empowered pursuant to Tax Law sections 171 and 1138(a)(1) to both conduct hearings and render decisions concerning the assessment of sales and use tax. Effective September 1, 1987, however, the Tax Appeals Tribunal replaced the State Tax Commission in this function.

In the present case, petitioners received a decision from the State Tax Commission on July 9, 1984 following a complete evidentiary hearing, and commenced a proceeding under Article 78 of the Civil Practice Law and Rules to review said decision. In that pursuant to Tax Law sections 171 and 1138(a)(1), decisions of the State Tax Commission were final and not subject to any further administrative review, petitioners only recourse for review of said decision was the commencement of the Article 78 proceeding as described above. Thus, petitioners had entirely conformed with the procedural mandates up until this point in time.

Where petitioners failed to conform with the procedural mandates was in the commencement of the proceedings in the wrong jurisdiction, and the failure to either pay the amount of tax so assessed by the Division of Taxation, or in lieu of this, to post a bond, as so required by Tax Law section 1138(a)(4). While the Appellate Division, Third Department held that conforming with Tax Law section 1138(a)(4) is a strict condition precedent to judicial review of a tax assessment in an Article 78 proceeding, section 205(a) of the Civil Practice Law and Rules provides a cure for any jurisdictionally defective proceeding by allowing a new proceeding to be commenced in court, correctly, within six months of the dismissal of the prior proceeding.

The heart of the conflict before us lies in petitioners' misinterpretation of the appellate court's decision, and a seeming misunderstanding of the enabling legislation which created the

Division of Tax Appeals and specifically precluded the Division from reviewing a final decision previously issued by the State Tax Commission. Although the Appellate Division stated that petitioners, upon complying with Tax Law section 1138(a)(4), could have commenced a new proceeding within six months of the dismissal, the enabling legislation creating the Division of Tax Appeals specifically reads:

"This act shall take effect September first, nineteen hundred eighty-seven and shall apply to all proceedings commenced in the division of tax appeals on or after such date and shall apply to all proceedings commenced prior to such date which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent this act can be made applicable." (L 1986, ch 282, § 32, emphasis supplied.)

Therefore, while petitioners may have sought judicial review of the State Tax Commission's decision through commencement of a new Article 78 proceeding and compliance with Tax Law section 1138(a)(4), Chapter 282 of the Laws of 1986 precludes further administrative review of the decision because it was a final and irrevocable administrative action. Since the Tax Appeals Tribunal lacks administrative jurisdiction to hear the issues raised in the petition, we affirm the Administrative Law Judge's dismissal of the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leonard Morris and Jerome C. Rosenthal is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Leonard Morris and Jerome C. Rosenthal is denied and the notices of determination and demand for payment of sales and use taxes due issued on April 17, 1975 are sustained.

DATED: Troy, New York
May 4, 1989

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

