STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
D & C GLASS CORP. **AND** **DENNIS ALLEYNE, AS OFFICER**	:	DECISION DTA No. 808344
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 September 1, 1985 through February 29, 1988.	:	

The Division of Taxation filed an exception to the order of the Administrative Law Judge issued on August 29, 1991 which granted petitioners' motion for summary determination. By his order, the Administrative Law Judge granted the petition of petitioners D & C Glass Corp. and Dennis Alleyne, as officer, 124 Brighton 11th Street, Brooklyn, New York 11235 and cancelled the notices of determination issued to petitioners for sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through February 29, 1988.

The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel). Petitioners appeared by Isaac Sternheim, C.P.A. Both the Division of Taxation and petitioners filed briefs on exception. Oral argument was heard on January 17, 1992; petitioners chose not to appear.

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

ISSUE

Whether petitioners' motion for summary determination should have been granted.

FINDINGS OF FACT

We find the following facts. These findings of fact do not contradict the facts found by the Administrative Law Judge. However, they have been rewritten to present the events in

chronological order, to include additional facts from the record before the Administrative Law Judge, and to include events that occurred after the order of the Administrative Law Judge was issued. In addition, we have added a footnote describing the various forms adopted by the Tax Appeals Tribunal (hereinafter the "Tribunal")concerning discontinuance of actions before the Division of Tax Appeals (hereinafter the "DTA").

Petitioners D & C Glass Corp. and Dennis Alleyne, as officer, filed a petition contesting the notices of determination issued to petitioners assessing sales and use taxes and penalties. This petition was received by the DTA on June 25, 1990 and assigned DTA number 808344. An answer was not filed by the Division of Taxation (hereinafter the "Division").

The Division sent a letter dated April 17, 1991 to Daniel J. Ranalli, Assistant Chief Administrative Law Judge of the DTA, from William F. Collins, Deputy Commissioner and Counsel, Department of Taxation and Finance by Andrew Haber, Senior Attorney. Carbon copies were sent to Janet Snay, DTA Calendar Clerk, and Isaac Sternheim & Co. The letter was stamped received by the DTA on April 19, 1991. The letter referenced petitioners and the DTA number assigned to their petition and stated:

> "The Division of Taxation has reviewed the determination in this matter and has decided to cancel the determination. Attached is a Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding closing out this matter before the Division of Tax Appeals.
>
> "We are marking this matter as closed on our records."

Attached to the letter was a DTA form (TA-34) entitled "Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding" (hereinafter the "Notice of Cancellation"), signed by Andrew Haber and dated April 17, 1991.[1] Petitioners' names, the

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[1]The Tribunal has adopted three forms to allow parties to notify the DTA of the decision to discontinue a proceeding. The forms are:

> Form TA-30.1 (9/87), Notice of Withdrawal of Petition and Discontinuance of Proceeding, which provides "that the . . . petitioner hereby withdraws the petition . . . and discontinues the . . . proceeding, with prejudice as of this date." The form must be signed and dated by the taxpayer or the taxpayer's authorized representative.

DTA number, the tax, and audit period were listed in the caption. The preprinted language in the body of the Notice of Cancellation stated:

> "Please take notice that the Division of Taxation, after review of the above-captioned matter, hereby agrees to cancel the deficiency/determination . . . as of this date" (emphasis added).

On April 19, 1991, at approximately 4:47 P.M., a letter was faxed to Mr. Ranalli from Michael Alexander, Director of Litigation for the Division's Law Bureau. The letter referenced petitioners, the DTA number and the tax period; there were no carbon copies noted on the letter. The body of the letter stated:

> "This is to confirm our telephone conversation of same date [April 19, 1991] that the letter of April 17, 1991 from Andrew Haber of my staff regarding the notice of cancellation and discontinuance of the above proceeding was sent in error and is hereby retracted.
>
> "The representative for the taxpayer who [sic] will also be advised of this error to avoid any prejudice it may create."

On April 25, 1991, the Division received a letter dated April 22, 1991, from Isaac Sternheim, petitioners' representative, addressed to Mr. Ranalli with carbon copies to Michael Alexander and Andrew S. Haber which stated that attached was the "Petitioner's [sic] Motion for Summary Determination" and "pertinent documentation." Attached to the letter was a one page document entitled "Motion for Summary Determination" which stated:

> "The petitioner requests that the determination in this matter be cancelled. Attached is a copy of the Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding signed by

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Form TA-34 (4/90), Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding, which provides "that the Division of Taxation, after review of the . . . matter, hereby agrees to cancel the deficiency/determination and/or grant the refund claimed, as of this date." The form must be signed and dated by the representative of the Division.

Form TA-30.2 (9/87), Stipulation for Discontinuance of Proceeding, which provides that the proceeding "having been resolved, it is hereby stipulated and agreed by and between the parties that such proceeding . . . is discontinued, with prejudice, and that the deficiency/determination . . . is recomputed as follows . . . ." The form is to be signed and dated by the taxpayer or the taxpayer's representative and the representative of the Division.

> Andrew S. Haber, Senior Attorney for the Department of Taxation & Finance. Also attached is a letter from Mr. Haber to Daniel J. Ranalli, Administrative Law Judge, in which Mr. Haber states that the matter is closed."

This document was dated April 22, 1991 and was signed by Mr. Sternheim. Also attached was a copy of the Haber letter of April 17, 1991 and the Notice of Cancellation.

Mr. Ranalli granted the Law Bureau an extension to May 31, 1991 to submit answering papers to petitioners' motion. On June 12, 1991, the Division received a letter dated May 31, 1991 from Robert J. Jarvis, Senior Attorney in the Law Bureau, and an "Affirmation in Opposition to Petitioners' Motion for Summary Determination" signed by Mr. Jarvis, with attached exhibits.

The contents of the affirmation in opposition are summarized below:

1. Mr. Haber, the Law Bureau attorney previously assigned to the case, had attempted for several months to obtain copies of the documents needed for presenting the matter at a formal hearing. Attached to the affirmation as an example of these attempts was a copy of a memorandum dated November 20, 1990 from Andrew S. Haber to David Jos requesting the "complete audit file" (Affirmation in Opposition, Exhibit "A").

2. On April 17, 1991, Mr. Haber wrote a memorandum to David Jablonski, Program Manager of the Policy and Compliance Section of the Division, stating that:

> "I am enclosing the Litigation file for the above referenced matter. I am forced to close this matter since neither Mr. Jos of the Metropolitan District Office nor your office was able to provide me with an adequate file to try this case. In response to my memo of 11/20/90, Mr. Jos in his memo of 12/3/90 states that the district office file was probably lost in the move to Hanson Place and [sic] would try to get DOAB Sales to obtain the Albany file which was never provided [sic]. Your office has not provided an adequate file.
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> "This case is a test period audit that [sic] taxpayer challenges the audit method and without an audit report this case cannot be tried" (Affirmation in Opposition, Exhibit "B").

3. Mr. Haber mailed the April 17th letter and the Notice of Cancellation to the DTA on April 17, 1991.

4. "Immediately thereafter it came to the attention of the Law Bureau that the audit file

containing the requested documents was available after all" (Affirmation in Opposition, ¶ "6").

5. On April 19, 1991, Mr. Alexander telephoned Mr. Ranalli to advise him that Mr. Haber's letter of April 17 "had been sent in error, and the discontinuance of proceeding form which accompanied Mr. Haber's letter was being retracted" (Affirmation in Opposition, ¶ "7").

6. A copy of the April 19th letter to Mr. Ranalli confirming the telephone conversation was faxed to Mr. Sternheim on April 22, 1991.

On August 29, 1991, an order granting petitioners' motion for summary determination and cancelling the notices of determination was issued by Administrative Law Judge Frank W. Barrie.

On September 26, 1991, Administrative Law Judge Barrie received a letter dated September 25, 199l from James Della Porta, Associate Attorney in the Law Bureau, transmitting a "Notice of Motion for Reargument/or in the Alternative Renewal" and an affidavit in support. The letter stated that:

> "The motion to reargue is made on the grounds that the order in question does not address a crucial procedural point - the fact that Mr. Haber's letter of April 17 was received by the Division of Tax Appeals (DTA) after Mr. Alexander informed Daniel Ranalli of your office by phone and in writing that Mr. Haber's letter of April 17 was to be disregarded. The Division contends the key dates to be considered are when DTA received the pertinent communications, not the date of mailing. If the date of receipt is controlling, as your order infers, Mr. Alexander's annulment of Mr. Haber's actions must be given effect. Thus, Mr. Haber's letter had no legal effect because it was superseded by Mr. Alexander's communications with Mr. Ranalli before the letter was received by DTA.
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> "Since the facts underlying the chronology of events are in the possession of DTA, there should be no need for the submission of additional proof. However, if you can not take cognizance of the dates of the relevant communications, the Division requests that it be allowed to submit evidence as to these points."

By letter dated September 30, 1991, with a carbon copy to Mr. Sternheim, Administrative Law Judge Barrie advised Mr. Della Porta that pursuant to State Administrative Procedure Act § 306(4), he was taking official notice of the attached affirmation of Mr. Ranalli dated September 30, 1991. Mr. Ranalli's affirmation stated that the April 17th letter from Mr. Haber and the Notice of Cancellation were received by the DTA "in the late morning's mail on April 19, 1991." The affirmation also stated that:

> "In the late afternoon of April 19, 1991, Michael Alexander, Director of Litigation for the Law Bureau, telephoned me to advise that the discontinuance of proceeding form submitted by Mr. Haber was being retracted."

By letter dated October 1, 1991, from Mr. Della Porta, the Division withdrew its Motion to Reargue or Renew.

Opinion

The Division argued before the Administrative Law Judge that petitioners' motion should be denied for several reasons. First, the Division asserted that it was entitled to retract the Notice of Cancellation since the actions taken by it were unilateral; no exchange of consideration with petitioners was involved. Second, the Division asserted that the notice could be retracted because it was issued on the erroneous assumption that the documents needed to present the case at hearing were not available. Third, the Division argued that Mr. Alexander had the authority to countermand the actions taken by Mr. Haber, and that he did, in fact, effectuate a retraction of the actions taken by Mr. Haber. Fourth, the Division argued that it should not be estopped from asserting the tax due against petitioners because petitioners have not alleged that the Division's actions have had an adverse effect on them; and, further, if petitioners had argued that the doctrine of equitable estoppel should be applied, this would create an issue of fact requiring a hearing. Finally, the Division argued that the motion should be denied because petitioners' motion papers were fatally defective in that they failed to include a supporting affidavit and copies of the pleadings.

As previously described in the findings of fact, petitioners' motion for summary determination merely stated that the determinations should be cancelled based upon the letter and Notice of Cancellation issued by Mr. Haber, and attached copies of those documents.

The Administrative Law Judge held that petitioners' motion papers adequately described the relief sought by petitioners and the basis for their request, and that the motion should not be denied on technical grounds, noting that petitioners were not represented by an attorney. The Administrative Law Judge found that the issue was whether the Division should be allowed to reopen a matter that had been discontinued by its attorney, Mr. Haber. The Administrative Law

Judge rejected the Division's assertion that the notice had been issued "in error," finding that Mr. Haber properly issued the Notice of Cancellation because of his inability to obtain the documents necessary to present the Division's case at hearing. The Administrative Law Judge noted that the Division did not allege that Mr. Haber did not have the authority to issue the notice. The Administrative Law Judge concluded that, having properly issued the Notice of Cancellation in the first instance, the Division did not demonstrate sufficient grounds for an order from the DTA cancelling the notice. The Administrative Law Judge granted petitioner's motion for summary judgment.

On exception, the Division reiterates the arguments it made to the Administrative Law Judge. Additionally, the Division asserts that:

> "(5) The mere execution of a Notice of Cancellation is not binding on the Division.
> (6) Michael Alexander, the head of the litigation section, annulled the Notice of Cancellation signed by Mr. Haber in regard to the captioned matter by notifying DTA that the notice, was being rescinded and, thus, was to be disregarded.
> (7) The Division properly rescinded the Notice of Cancellation before it became legally effective; therefore, the notice is void and without legal effect.
> (8) The Division has authority to rescind, disavow or annul a decision made by an employee if no prejudice occurs.
> (9) Since petitioner has not been prejudiced by the Division's actions, the Division is not estopped from annulling the Notice of Cancellation" (Division's Exception, Proposed Conclusions of Law "5" - "9").

The Division argues that there "is no simple rule as to when a DTA hearing matter is irrevocably concluded" (Division's brief on exception, p. 16). More specifically, the Division asserts that:

> "there is no statute, regulation or policy statement which addresses the consequences of filing a Notice of Cancellation. Indeed, there appears to be no case law directly on point as to the substantive issue in this matter. This lack of definitive rules suggests that a determination as to when a tax notice is irrevocably cancelled depends on the circumstances. The Division's position is that under the unusual facts of this case, there is no basis in law or equity to grant the motion filed in this matter merely based on the filing of a cancellation notice" (Division's brief on exception, p. 16, emphasis added).

The Division asserts that "a court has authority to vacate or disregard a stipulation if to accept it

would be unjust or if the evidence contrary to the stipulation is substantial (citations omitted)" (Division's brief on exception, p. 18).

In response, petitioners assert in their memorandum in support of the Administrative Law Judge's determination that when Mr. Sternheim received the Notice of Cancellation and was informed that an attempt was being made to retract the notice, Mr. Sternheim contacted Mr. Ranalli to inquire concerning the proper procedure to follow to prevent the matter from being reopened. "Mr. Ranalli told petitioner's [sic] representative to 'send to the Tax Appeals Bureau a short letter requesting Summary Determination and attach a copy of the Notice and set a return date'" (Petitioners' memorandum on exception). Petitioners assert that the form and substance of their motion for summary determination was based on the advice their representative received from the DTA and that, in any case, the relief they were requesting and the reasons for that request were clear from the papers they submitted.

We affirm the determination of the Administrative Law Judge that the case was closed when the Division filed the properly executed Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding (Form TA-34) with the DTA; that the proper procedure to be followed by the Division in this case was to file a motion with the Supervising Administrative Law Judge to reopen the case; that the Administrative Law Judge properly treated the Division's letter of April 19, 1991, and the papers submitted in response to the motion for summary determination, as a motion to reopen the case; and, that under the facts and circumstances of this case, the case should not be reopened.

We deal first with the Division's assertion that the lack of statutory or regulatory statement concerning the "consequences" of filing a Notice of Cancellation creates uncertainty as to when a tax deficiency has been cancelled. We disagree with the Division's assertion that the "consequences" of filing a Notice of Cancellation depend on the circumstances.

First, adoption of the Notice of Cancellation of Deficiency/ Determination and Discontinuance of Proceeding (TA-34) by the Tribunal relates to proceedings before the DTA

and is clearly within the authority of the Tribunal (Tax Law § 2006[14] and [15]).[2] Second, we find no doubt as to the "consequences" of filing the Notice of Cancellation. The Notice of Cancellation states clearly that "the Division of Taxation, after review of the above-captioned matter, hereby agrees to cancel the deficiency/determination and/or grant the refund claimed, as of this date," i.e., the date upon which it is signed (emphasis added).[3] Since it is a DTA form, it is clear that: it must be filed with the DTA to be effective; that the notice is filed when it is received by the DTA; that once received, the notice is effective; and that once effective, it cannot be withdrawn except upon an order of the DTA. Our rationale on this last point is consistent with the case law in a similar situation, i.e., the ability of a party to withdraw a motion once it is filed with the court. In such cases, the motion may be withdrawn only upon an order of the court (see, Oshrin v. Celanese Corp. of Am., 37 NYS2d 548, affd 265 App Div 923, 39 NYS2d 984, affd 291 NY 170; see also, Robinson v. Worthington, 544 F Supp. 956 [where the court, in the absence of Federal rules concerning a party's ability to withdraw a motion once filed with the court, relied on Wallace v. Ford, 44 Misc 2d 313, 253 NYS2d 608; Heaberkorn v. Macrae, 36 Misc 2d 1072, 233 NYS2d 793; and Leader v. Leader, 8 Misc 2d 1015, 166 NYS2d 784 for guidance in reaching the same result we reach here]).

We deal next with the procedural aspects of this case.

There is no dispute that a Notice of Cancellation was issued by the Division and filed with the DTA. As the notice was received by the DTA on the morning of April 19, 1991, it was filed and became effective at that time.[4] Since the case was closed when the Division filed the

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[2]As indicated in the findings of fact, the Tribunal has adopted three different forms, i.e., TA-30.1 (9/87), TA-30.2 (9/87) and TA-34 (9/90), that provide procedures whereby the Division and petitioners can cancel a proceeding before the DTA. The Division cancelled 187 proceedings using form TA-34 in calendar year 1991.

[3]The Division does not dispute that this form can be used to cancel a notice of deficiency or determination (Division's brief on exception, p. 16).

[4]We cannot reconcile the Division's request in its exception that we find that the Notice of Cancellation was rescinded "before it became legally effective" with the complete lack of a discussion in its brief of what is meant by "legally effective." The Division has not explained why the Notice of Cancellation was not final when filed with the DTA on the morning of April 19, 1991. At no time has the Division asserted that the Notice of Cancellation in

Notice of Cancellation with the DTA, we agree with the Administrative Law Judge that the proper procedure for the Division to have followed was to file a motion to reopen the case. While the regulations of the DTA do not specifically provide for a "motion to reopen" a matter, the Tribunal has indicated that it has the authority to consider such requests (see, Matter of John Grace & Co., Tax Appeals Tribunal, September 13, 1990 [motion to vacate Tax Appeals Tribunal's decision and remand to Administrative Law Judge for further factual findings denied]; Matter of Capital Coin Co., Tax Appeals Tribunal, August 23, 1989 [petitioner's motion to reargue denied]; Matter of Goldome Capital Invs., Tax Appeals Tribunal, November 3, 1988, [Division's motion to reargue denied]; see also, Matter of Westbury Smoke Stax, Ltd. v. New York State Tax Commn., 142 AD2d 878, 531 NYS2d 65, lv denied 73 NY2d 706, 539 NYS2d 299 [petitioner's execution of a document entitled "Withdrawal of Petition and Discontinuance of Case" resulted in the withdrawal of its petition for redetermination of an assessment and a final determination by consent which petitioner could not retract because petitioner's interpretation of the terms of settlement differed from the Commission's]).

Under the facts and circumstances of this case, we also agree with the Administrative Law Judge's decision to treat the Division's letter dated April 19, 1991, and the papers submitted in response to the motion for summary determination, as a motion by the Division to reopen a discontinued proceeding. To conclude otherwise would be to impose a measure of formality on this proceeding not justified by the facts and circumstances of the case.

We also agree with the Administrative Law Judge's disposition of the Division's assertion that petitioner's motion for summary determination should have been denied because it did not conform to our rules on motion practice (see, 20 NYCRR 3000.5). We agree with the Division that the application of our rules should not depend on whether the petitioner's representative is an attorney or a C.P.A. Persons who practice before the DTA, particularly those whom the statute designates as authorized to practice without the permission of the Tribunal (Tax Law §

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and of itself did not serve to cancel the notices and discontinue the proceedings, or described what other action is required before a Notice of Cancellation becomes final.

2014), are charged with knowledge of our rules and other applicable aspects of civil practice, and are expected to comply with them. Representatives not familiar with legal procedures which are applicable to our proceedings should take steps to become familiar with such procedures. We note that motions for summary determination are specifically discussed in our rules (20 NYCRR 3000.5[c]).

Nevertheless, we find that the motion papers in this case were not fatally defective. The DTA is charged with providing a just system for the resolution of tax controversies (Tax Law § 2000). While this system is intended to avoid "undue formality and complexity" (20 NYCRR 3000.0[a]), some formality is required in order properly and efficiently to transact the mission of the DTA. For this reason we have promulgated rules describing the practice and procedures to be followed when appearing before the DTA. In general, these rules should be liberally applied in order to accomplish our statutory responsibilities (20 NYCRR 3000.0[c]). In this case, the papers submitted by petitioners adequately apprised the other side and the Administrative Law Judge of the relief requested and the basis for that request.

We turn next to whether sufficient grounds exist for the DTA to permit the Division to withdraw the filed Notice of Cancellation. Initially, we note that there is no issue as to the authority of Mr. Haber to issue the notice. The Division does not assert that Mr. Haber did not have the authority to issue the Notice of Cancellation.[5] Nor does the record here indicate that Mr. Haber acted in an unauthorized manner.

We agree with the Administrative Law Judge that the Notice of Cancellation could be withdrawn if issued "in error," but that this Notice of Cancellation was not issued in error because it was based on Mr. Haber's documented inability to obtain the documents needed to

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[5]The Division, in its exception, requests that we make a factual finding that Mr. Alexander, as Mr. Haber's superior, had the authority to countermand any decisions taken by Mr. Haber; however, we cannot see how this is relevant to the issue at hand unless the Division is now asserting that the Notice of Cancellation issued by Mr. Haber was not final unless authorized by Mr. Alexander. This would not appear to be the Division's position. It does not appear in the affirmation in opposition to the motion, where, if asserted, it might have constituted an issue of fact requiring a hearing. The Division's brief on exception would appear to take the view that the Notice of Cancellation is final when "filed" as discussed above and in footnote "4."

present the case at a hearing before an Administrative Law Judge. In fact, the Division does not argue that Mr. Haber issued the Notice of Cancellation "in error." In its affirmation in opposition to the motion for summary determination, the Division explains why Mr. Haber issued the Notice of Cancellation; Mr. Haber had made numerous unsuccessful attempts over a period of several months to locate documents required for the Division to explain the basis of the audit at the hearing. The Division's explanation makes it very clear that Mr. Haber's action to cancel the notices of determination, because the documents could not be located, was a considered one and justified by the information available to Mr. Haber at the time the Notice of Cancellation was issued by him.

Therefore, since the Notice of Cancellation was issued by an authorized individual based upon the concededly proper reason that the documents necessary to present the case at hearing were not available, we conclude that it was not issued in error, and cannot be withdrawn merely because the Division has now apparently found the documents, or otherwise changed its mind concerning the wisdom of cancelling these notices of determination. While there may be extraordinary circumstances in which it would be appropriate to reopen a closed matter, this Tribunal has consistently held that the necessity for finality to proceedings before the DTA requires a strict view of attempts by either petitioners or the Division to reopen or to reargue matters which have been closed (see, Matter of John Grace & Co., supra; Matter of Capital Coin Co., supra; Matter of Goldome Capital Invs., supra). The appropriate extraordinary circumstances have not been presented here.

We also find no merit to the Division's assertion that the notice could be withdrawn because it was a unilateral document, i.e., petitioners did not execute it or give consideration for it, and petitioners were not prejudiced since the attempt to withdraw the notice occurred so soon after it was filed. As noted, the Notice of Cancellation allows the Division to unilaterally cancel the notice of determination or deficiency and to discontinue a proceeding upon the Division's review of the case. Similarly, form TA-30.1 allows a taxpayer to withdraw a petition and, thus, discontinue a proceeding upon its review of the case. The point is, that in both cases, the

decision to discontinue the proceeding rests with the party, i.e., is unilateral in nature, and does not contemplate a "quid pro quo" (cf., form TA-30.2 [where the parties mutually agree to settle a case and stipulate and agree to discontinue the action]). The notices are clear on their face that the action to cancel is "as of this date," i.e., the date signed. The notice, as we have already concluded, is filed with the DTA when received by the DTA. The result of the Division's reasoning that such notices could be unilaterally withdraw is to create needless uncertainty with regard to the decision by it or a taxpayer to elect to discontinue a proceeding. We find no basis to justify this result.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of D & C Glass Corp. and Dennis Alleyne, as officer, is granted; and

4. The notices of determination issued to petitioners D & C Glass Corp. and Dennis Alleyne, as officer, are cancelled.

DATED: Troy, New York
June 11, 1992

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

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