

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN A. AND FRANCES R. KEEFFE	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA No. 809536
New York State Personal Income Tax under Article 22 of	:	
the Tax Law for the Year 1974.	:	

Petitioners John A. and Frances R. Keeffe, 2 Longview Drive, Eastchester, New York 10709, filed an exception to the order of the Administrative Law Judge issued on July 1, 1993. Petitioners appeared *pro se* by John A. Keeffe, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in response and petitioners replied to the response. Petitioners' reply was received on August 27, 1993 and began the six-month time period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Administrative Law Judge properly denied petitioners' motion to reopen the small claims hearing.

FINDINGS OF FACT

We find the following facts.

On June 24, 1992, a small claims hearing was conducted at the New York City offices of the Division of Tax Appeals before Presiding Officer Allen Caplowaith. Petitioners appeared by Frank F. Rocco, C.P.A. The Division of Taxation (hereinafter the "Division") appeared by William F. Collins, Esq. (Nicholas Massi).

The issue addressed at hearing involved the computation of petitioners' 1974 New York

State personal income tax liability in light of alleged recomputations of petitioners' 1974 Federal personal income tax liability. A review of the tape recording of the hearing indicates the Division's representative took the position that the computation of petitioners' New York tax was appropriate and that petitioners had failed to prove that they were entitled to any reduction of their New York tax liability other than that already conceded by the Division. The Division's representative introduced into evidence a copy of a request to the Internal Revenue Service from the Division dated August 16, 1990 for information regarding petitioners' 1974 Federal tax liability, and a cover letter from the Internal Revenue Service to the Division dated October 29, 1990 transmitting a transcript of accounts for petitioners' 1974 Federal tax liability, which indicated Federal adjusted gross income of \$47,114.00 and taxable income of \$18,346.00 and indicating that other requested information (i.e., return or examination changes) were not available at that time. The transcript as introduced into evidence contains only the first page of a multipage transcript of accounts. The last line of the transcript indicates that the transcript is "continued on next page." Petitioners' representative did not object to the introduction into the record of these documents. Instead, petitioners' representative stated that the Internal Revenue Service had audited petitioners, that petitioners had filed an amended Federal return and that the Internal Revenue Service had decided to resolve the question of petitioners' Federal tax liability by simply letting the statute of limitations expire. The representative argued that because they had shown that the question of Federal liability had been so resolved, petitioners had met their burden of proof that they owed no additional amount of New York tax.

It is noted that a complete copy of the transcript submitted as part of the instant motion indicates that the Internal Revenue Service took no action with respect to petitioners' 1974 Federal tax liability and instead allowed the statute of limitations to run out. It is also noted that petitioners introduced into the record at hearing copies of their amended Federal return indicating Federal adjusted gross income of \$27,568.00 and taxable income of "NONE".

On October 1, 1992, the Presiding Officer issued a determination denying the petition and

sustaining the asserted New York tax liability. This determination was based upon a finding by the Presiding Officer that petitioners had failed to sustain their burden of proof that their Federal tax liability (as reported on the transcript of accounts) had been reduced by the Internal Revenue Service. The instant motion ensued.

Petitioners now seek to have their hearing reopened due to the fact that the Division introduced into the record only a portion of the Internal Revenue Service transcript and thereby misled the Presiding Officer, causing him to improperly decide the case. They also seek to have the matter redetermined with a finding that petitioners have met their burden of proof to show that they have no additional tax liability for the 1974 tax year.

The Division argues that a motion to reopen a small claims proceeding must be made directly to the Tax Appeals Tribunal and that an Administrative Law Judge has no authority to hear the matter. The Division also argues that there exists no grounds for the reopening of this small claims matter because there is no proof of misconduct on the part of the Presiding Officer.

OPINION

The Chief Administrative Law Judge concluded that the only statutory ground for obtaining appellate review of a small claims determination is set forth in section 2012 of the Tax Law and is limited to proof of, or at least an allegation of, misconduct on the part of the Presiding Officer. Because petitioners had not established, nor alleged, any misconduct by the Presiding Officer, the Chief Administrative Law Judge determined that petitioners were not entitled to any relief from the small claims determination. The Chief Administrative Law Judge noted that the alleged misconduct of the Division's representative was not a statutory ground for reversing the Presiding Officer and that, in any event, the Chief Administrative Law Judge did not agree with petitioners' characterization of the Division's conduct. The Chief Administrative Law Judge also concluded that petitioners could not make a motion to reopen the hearing because such a motion is prohibited in a small claims proceeding by 20 NYCRR 3000.9(c)(3).

On exception, petitioners renew their contention that the Division's representative deliberately misrepresented the status of petitioners' 1974 Federal tax liability to the Presiding

Officer and deliberately tampered with proof in the Division's possession. Petitioners then state that the Chief Administrative Law Judge's decision, "exempting the Service from the Constitutional requirements of fairness and honesty applicable to all enforcement personnel in every other agency of the State and Federal Governments, exceeds the authority of the Administrative Judge, and any Tribunal" (Petitioners' brief on exception, p. 5). Petitioners also now state on exception that:

"[a]lthough Petitioners gave the Hearing Officer the benefit of the doubt and made no allegations of deliberate wrongdoing on his part, it becomes apparent that in upholding the Tax Department's refusal to give Petitioners access to the records in its possession which confirmed Petitioners' position, and in maintaining the Tax Departments' 'confidentiality,' the Hearing Officer may indeed be guilty of misconduct and guilty of abetting the Tax Department's representative in denying due process to the Petitioners" (Petitioners' brief on exception, pp. 3-4).

Petitioners assert that the Presiding Officer upheld the Division's refusal to make the entire Internal Revenue Service document available in a discussion that occurred off of the record.

In response, the Division states that the Chief Administrative Law Judge lacked the statutory authority to create a motion practice in small claims proceedings and that the Tribunal should dismiss petitioners' exception as unavailable pursuant to law and regulation. The Division further states that "[a]s there is no statutory authority for the manner in which Mr. Keeffe has been allowed to proceed, the Law Bureau does not wish to continue to be a party to this small claims 'procedurefest'" (Division's letter on exception, p. 2). Nonetheless, the Division notes petitioners' turnabout on the conduct of the Presiding Officer, pointing out that at the oral argument on the motion Mr. Keeffe stated "'[w]e have absolutely no complaint with the Hearing Officer' (T11)" (Division's letter on exception, p. 2).

First, we address the Division's claim that we have allowed petitioner to engage in an unauthorized "procedurefest." Our Rules of Practice and Procedure specifically provide that "on the motion of either party, the tribunal may order a rehearing upon proof or allegation of misconduct by the presiding officer" (20 NYCRR 3000.9[h][2], emphasis added). Neither the regulations nor section 2012 of the Tax Law specify to what person or persons this motion shall

be made. The procedure followed here and in Matter of Insulpane Indus. (Tax Appeals Tribunal, July 12, 1990) (i.e., the Chief Administrative Law Judge reviews the motion and issues an order), follows that of section 2006(5) and (6) of the Tax Law which authorizes motions to the Tribunal to dismiss a petition or for summary determination and provide that an administrative law judge shall review the motion and issue a determination. We reviewed the exception filed by petitioners pursuant to section 2006(7) of the Tax Law. Thus, we conclude that the entire procedure in this matter was appropriate and was not an unauthorized "procedurefest."

Turning to the merits of the case, we agree with the Chief Administrative Law Judge that our ability to review a determination of a presiding officer is limited by section 2012 of the Tax Law to those instances where there are allegations or proof of misconduct against the Presiding Officer. In the instant case, petitioners did not even direct a charge of misconduct at the Presiding Officer until they filed their exception to the Chief Administrative Law Judge's order and, as the Division notes, the accusations made by petitioners in their brief and exception are totally at odds with their statement at the oral argument on the motion. The credibility of petitioners' claim that the Presiding Officer made an off-the-record ruling to deny petitioners access to the complete Internal Revenue Service transcript of their 1974 account on the grounds of confidentiality is further impaired by the fact that petitioners never voiced an objection on the record to the Presiding Officer's admission of the incomplete document, nor to the Presiding Officer's alleged refusal to allow petitioners access to the entire document. As a result, we conclude that petitioners' allegations with respect to the Presiding Officer are incredible and were advanced on exception in response to the Chief Administrative Law Judge's order in an effort to fit this case within section 2012. Because we find the accusation incredible, we will not address the question of whether, if true, the alleged acts would constitute misconduct within the meaning of section 2012 of the Tax Law.

Finally, we point out that section 2012 empowered petitioners to discontinue the small claims proceeding, by written notice to the Secretary of the Tribunal, at any point prior to the

conclusion of the small claims hearing and to transfer the case to an administrative law judge. Petitioners' unofficial transcript of the hearing tape acknowledges that the Presiding Officer informed them of this right (Attachment to petitioners' brief on exception, p. 1). Thus, if petitioners were truly dissatisfied with any aspect of their proceeding, including the refusal of the Division's representative to provide the complete Internal Revenue Service document or the Presiding Officer's alleged concurrence with the Division's refusal, they could have opted out of the proceeding at any point prior to the conclusion of the hearing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners John A. and Frances R. Keeffe is denied;
2. The order of the Chief Administrative Law Judge is affirmed; and
3. Petitioners' motion to reopen and redetermine the determination of the small claims

Presiding Officer is denied.

DATED: Troy, New York
January 20, 1994

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

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