

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ROCKWELL'S RESTAURANT CORP. :

ORDER
DTA NO. 819581

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, 2002 through August 31, 2002. :

Petitioner Rockwell's Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed a motion for a rehearing by an Administrative Law Judge or to set aside the determination of the Presiding Officer issued on July 14, 2005. Petitioner appeared by its president, Stephen Robins. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel).

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

ISSUE

Whether petitioner's motion for a rehearing should be granted.

FINDINGS OF FACT

We find the following facts.

This matter was the subject of a small claims determination pursuant to Tax Law § 2012. At issue therein was whether petitioner had established a basis for the cancellation of penalties

and interest imposed on a statutory Notice and Demand pertaining to the sales tax quarterly period ended August 31, 2002.

The matter was submitted for a determination based on documents and briefs to be filed by the parties on or before April 29, 2005. On July 14, 2005, the Presiding Officer issued a determination denying the petition and sustaining the Notice and Demand issued to petitioner for the sales tax quarterly period ended August 31, 2002.

On August 15, 2005, petitioner filed a motion for a rehearing by an Administrative Law Judge or to set aside the small claims determination and grant the relief sought in the petition. In its motion, petitioner asserts that the matter was not properly the subject of a small claims determination because the amount of tax in controversy exceeded the small claims jurisdictional limit; that the Office of Counsel failed to submit a brief in accordance with the briefing schedule established by the Presiding Officer, which was tantamount to a default in appearing in the proceeding, and this should have caused a default determination to be entered in favor of petitioner; and that due to the Office of Counsel's failure to submit a brief, the determination was rendered more than three months after the date provided for a determination by the Tax Appeals Tribunal's Rules of Practice and Procedure.

The Division, responding to petitioner's motion by letter dated September 2, 2005, requested that the determination of the Presiding Officer be affirmed and that petitioner's motion be denied.

OPINION

Section 2012 of the Tax Law provides, in part, as follows:

[t]he 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.

20 NYCRR 3000.13(h)(2) provides, in part, as follows:

Effect of determination. The final determination of the presiding officer 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 the tribunal. However, on the motion of either party, the tribunal may order a rehearing upon proof or allegation of misconduct by the presiding officer.

Therefore, the Tax Appeals Tribunal has no authority to review the determination of the Presiding Officer and, unless petitioner's motion is premised on either proof or allegation of misconduct by the Presiding Officer, the Tax Appeals Tribunal has no authority to order a rehearing.

As we held in *Matter of Insulpane Indus.* (Tax Appeals Tribunal, July 12, 1990), the *misconduct* which Tax Law § 2012 addresses is the objectionable behavior of a Presiding Officer as opposed to a potential error by that individual in an analysis of the law. In petitioner's motion, we find neither an allegation of objectionable behavior nor proof thereof.

Dealing with each of petitioner's claims, a small claims proceeding involving sales tax is jurisdictionally restricted to an amount in controversy not to exceed \$40,000.00 for a 12-month period, not including penalty and interest. While the tax asserted due in the Notice of Demand at issue in this proceeding exceeded \$40,000.00 for the particular quarter, the tax itself was not in controversy. Rather, petitioner challenged only the penalty and interest asserted against him.

The amount in controversy was within the jurisdictional limits and it was not misconduct for the Presiding Officer to hear this matter as a small claims proceeding.

Petitioner's remaining assertions involve the failure of the Office of Counsel to file a brief. The Presiding Officer properly established a briefing schedule for both parties and, although the Office of Counsel did not file a brief in support of its position, it was not required to do so. We note, however, that petitioner filed a reply brief on April 29, 2005, as per the schedule established by the Presiding Officer, and the Presiding Officer's determination was issued within three months of that reply brief, well within the time frame established by 20 NYCRR 3000.13(h) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Therefore, in the absence of any allegation or proof that the Presiding Officer's conduct was in any way objectionable, we deny petitioner's request for a rehearing of this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

The motion of petitioner Rockwell's Restaurant Corp. is hereby denied.

DATED: Troy, New York
December 1, 2005

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner