STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAY PRESUTTI	:	DECISION DTA NO. 822069
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, 2003 through February 28, 2005.	:	

Petitioner, Jay Presutti, filed an exception to the order of the Administrative Law Judge issued on October 28, 2010. Petitioner appeared by DeGraff, Foy & Kunz, LLP (Aaron F. Carbone, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on May 11, 2011 in Troy, New York.

After reviewing the entire record in the matter, the Tax Appeals Tribunal renders the following decision. President Tully took no part in the consideration of this matter.

ISSUES

I. Whether adequate grounds exist to vacate the Withdrawal of Petition and Discontinuance of Proceeding executed by petitioner.

II. Whether a frivolous petition penalty should be imposed under the authority of 20 NYCRR 3000.21.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "5," and "8," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On February 5, 2007, the Division of Taxation (Division) issued Notices of Determination for the period March 1, 2003 through February 28, 2005. The Notices were addressed to Jay Presutti at 73 Goldin Blvd, Walden, NY 12586.

We have modified finding of fact "2" of the Administrative Law Judge's order to read as follows:

> On January 11, 2008, petitioner, Jay Presutti, executed a Power of Attorney (POA) form TA-15, appointing both Mark A. Krohn, Esq. and Stewart Rosenwasser, Esq., as his legal representatives. The POA form TA-15 stated: "I, the taxpayer named above, appoint the person named above as my true and lawful attorney, to appear and represent me before the Division . . . ." The POA form TA-15 was signed by petitioner, both representatives and a notary, Linda Rodriguez. The form did not indicate that the representatives must act jointly in their representation of petitioner. Annexed to the POA form TA-15 were the provisions of 20 NYCRR 3000.2 and 20 NYCRR former 2390.5.[1]

Petitioner filed a petition, dated January 11, 2008, with the Division of Tax Appeals (DTA) regarding the Notices at issue. The petition indicated that both Mr. Krohn and Mr. Rosenwasser were his representatives.

At some point following the filing of the petition and before the execution of the withdrawal, the Division's representative and petitioner's representative spoke about petitioner's tax issue. Petitioner provided two pages of handwritten notes, neither of which provide verification as to their date of creation or creator. The documents contain miscellaneous names,

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[1] We have modified this fact to more accurately reflect the record.

phone numbers, open-ended notes pertaining to petitioner's tax issue and dates of apparent pre-hearing conversations with Administrative Law Judge Frank Barry and Michael B. Infantino, the Division's attorney. Petitioner alleges that during these settlement discussions, Mr. Infantino held himself out to have influence over the offer-in-compromise board. Petitioner's provided notes do not document any statements pertaining to the Division influencing the offer-in-compromise board.

We have modified finding of fact "5" of the Administrative Law Judge's order to read as follows:

> On July 21, 2008, petitioner executed a Notice of Withdrawal of Petition and Discontinuance of Proceeding (Notice of Withdrawal) stating: "the above-named petitioner hereby withdraws the petition for redetermination of a . . . revision of a determination . . . and discontinues the above-entitled proceeding, with prejudice, as of this date." The document is signed by Mark A. Krohn, Esq. The document was received by the DTA on July 24, 2008.[2]

On September 24, 2008, Mr. Krohn sent a letter to the DTA requesting to be relieved from the filed Notice of Withdrawal, "based upon a mistaken belief that . . . [a] key witness was not going to be available to testify and upon other misinformation."

On October 9, 2008, Chief Administrative Law Judge Andrew Marchese denied this request, and stated, "[i]f you wish to pursue this matter, you should file a motion to reopen with the Administrative Law Judge to whom your case was assigned."

We have modified finding of fact "8" of the Administrative Law Judge's order to read as follows:

> The Division submitted a copy of the POA form instructions for Form POA-1 that were applicable at the time petitioner executed his POA and instructions for Form

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[2] We have modified this fact to more accurately reflect the record.

POA-1-IND that are currently applicable.[3]

On December 1, 2009, following a request by petitioner for an offer-in-compromise, the Division sent petitioner a letter denying the request because the Division determined that petitioner did not meet the two requirements necessary to be allowed such a compromise.

On July 2, 2010, petitioner filed the instant Notice of Motion to Reopen concerning the original petition filed January 11, 2008.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that although the Rules of Practice and Procedure of the Tax Appeals Tribunal do not provide a procedure for withdrawing a withdrawal of petition or moving to vacate such a withdrawal, a motion to reopen the record (20 NYCRR 3000.16) and a motion to vacate a stipulation (Tax Law § 171[18]) offer guidance on these matters. In both instances, the burden is on the moving party to demonstrate fraud, misrepresentation, malfeasance or other conduct of an opposing party that brought about a result adverse to the moving party. The Administrative Law Judge further noted that pursuant to 20 NYCRR 3000.16, a motion to reopen the record or for reargument, with or without a new hearing, shall be made to the Administrative Law Judge who rendered the determination within 30 days after the determination has been served. The Administrative Law Judge found that petitioner failed to file this motion until nearly one year and nine months later.

The Administrative Law Judge rejected petitioner's argument that the Notice of Withdrawal is invalid because he had two appointed representatives and only one of them executed the notice, reasoning that Section 3000.2 of the Rules of Practice and Procedure does

[3] We have modified this fact to more accurately reflect the record.

not specifically detail a requirement for multiple representatives to act jointly. The Administrative Law Judge determined that petitioner presented no evidence to show a clear indication that Mr. Krohn and Mr. Rosenwasser were to act jointly and found that the POA form submitted reveals no such indication. As such, the Administrative Law Judge concluded that Mr. Krohn acted within his authority when he executed the subject notice.

The Administrative Law Judge also rejected petitioner's argument that the Division's attorney, Michael B. Infantino, misrepresented himself throughout the prehearing stage and that petitioner relied upon these misrepresentations to his detriment. The Administrative Law Judge noted that such claim can only be sustained if there is a showing of fraud, misrepresentation or malfeasance. The Administrative Law Judge found that petitioner offered insufficient evidence to support a claim, which must be strictly construed, noting that petitioner provided only empty assertions and two pages of inconclusive and nondescriptive notes to support his claim.

The Administrative Law Judge denied the Division's request for a penalty against petitioner, finding that although insufficient evidence was provided to permit the motion, petitioner's arguments are not deemed frivolous, specifically under 20 NYCRR 3000.21.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Notice of Withdrawal is invalid because only one of petitioner's representatives signed it, and, according to petitioner, both of petitioner's representatives were required to act jointly pursuant to the General Obligations Law. Petitioner further argues that the Division's attorney represented to petitioner that he could urge the Offer in Compromise Board to accept an offer by petitioner. Petitioner contends that he relied on the alleged representation in withdrawing his petition, and that subsequently his offer was rejected. Petitioner further asserts

that his underlying case is meritorious, and as such, the matter should be reopened in the interest of justice.

The Division argues that the order of the Administrative Law Judge should be affirmed. The Division asserts that petitioner has failed to meet his burden of proving fraud, misrepresentation, malfeasance or other conduct of an opposing party that brought about a result adverse to the moving party. The Division further asserts that because petitioner's motion was brought nearly two years after the filing of the Notice of Withdrawal, petitioner's motion is untimely and was properly denied.

The Division also argues that the Notice of Withdrawal, signed by Mr. Krohn, was valid, in that the power of attorney form executed by petitioner and his representatives does not specifically limit or otherwise inform the Division or the DTA of any purported restrictions on Mr. Krohn's authority. The Division cites the Tribunal's decision in ***Matter of Top Shelf Deli***, stating that "a power of attorney endows the agent with the same powers as those held by the principal . . . unless the power given is specifically limited" (***Matter of Top Shelf Deli***, Tax Appeals Tribunal, February 6, 1992), and asserts that petitioner placed no such limitation on Mr. Krohn. The Division contends that neither the Division nor the DTA was ever advised that Mr. Rosenwasser was a necessary participant, and that Mr. Krohn's authority to act alone is evidenced by his actions both before and after his execution of the Notice of Withdrawal.

The Division further asserts that the affidavit of Mr. Krohn, which was submitted with petitioner's brief on exception, is late and should not be considered in the Tribunal's decision. The Division also requests that a penalty be imposed against petitioner for bringing a frivolous motion.

OPINION

We addressed a similar issue to the one presented here in ***Matter of D & C Glass Corp.*** (Tax Appeals Tribunal, June 11, 1992). In that case, the Division sought to vacate a Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding (Notice of Cancellation) executed by the Division's attorney. We affirmed the determination of the Administrative Law Judge that the case was closed when the Division filed the properly executed Notice of Cancellation with the DTA, and that the proper procedure to be followed by the Division in that case was to file a motion with the Supervising Administrative Law Judge to reopen the case (***Matter of D & C Glass Corp.***, ***supra***). We noted that adoption of the Notice of Cancellation by the Tribunal relates to proceedings before the DTA and is clearly within the authority of the Tribunal (Tax Law § 2006[14] and [15]), and observed that:

> 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.
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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.
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> 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 (***Id.***).

We further noted that since a Notice of Cancellation 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 (***Id.***).

We found that since the case was closed when the Division filed the Notice of Cancellation with the DTA, the proper procedure for the Division to have followed was to file a motion to reopen the case (***Id.***). The same reasoning applies where a Notice of Withdrawal is filed with the DTA.

Motions to reopen the record are governed by the Tribunal's Rules of Practice and Procedure, which require that such motion shall be made to the administrative law judge within thirty days after the determination has been served (20 NYCRR 3000.16[b]). While no determination has been served where a matter is concluded by a Notice of Cancellation or Notice of Withdrawal, we noted that both types of notices are clear on their face that the action to cancel is "as of this date," i.e., the date signed (***Matter of D & C Glass Corp.***, ***supra***). Such notice, as we concluded in ***Matter of D & C Glass Corp.***, ***supra***, is filed with the DTA when received by the DTA, and thus the matter is discontinued as of that date. As such, the thirty day time limit to file a motion to reopen where a Notice of Cancellation or Notice of Withdrawal is filed begins running on the date such notice is filed with the DTA.

Here, the Notice of Withdrawal was filed on July 24, 2008. Petitioner's motion to reopen was filed on July 2, 2010. Petitioner did not file his motion until nearly two years after the Notice of Withdrawal was filed with the DTA. Accordingly, petitioner's motion must be rejected as untimely.

Furthermore, we agree with the Administrative Law Judge's determination that petitioner has failed to meet his burden of proving fraud, misrepresentation, malfeasance or other misconduct of the opposing party, which must be proven to sustain the motion. A review of the record shows that petitioner's allegations of misconduct on the part of the Division's attorney are baseless.

Addressing petitioner's argument that the Notice of Withdrawal was invalid because both of petitioner's appointed representatives were required to sign it, we find petitioner's reliance on the General Obligations Law to be misplaced. Petitioner misstates the provisions of General Obligations Law (former) § 5-1501 as requiring "that if multiple representatives are enumerated in a Power of Attorney, the representatives are required to act jointly to bind the principal unless the Power of Attorney expressly provides for the independent actions of representatives" (petitioner's Brief on Exception, p. 5). Contrary to petitioner's assertion, (former) Section 5-1501 of the General Obligations Law does not place such a requirement on all power of attorney forms that may be used. Rather, that section sets forth an example of a "durable general power of attorney New York statutory short form" and a "nondurable general power of attorney New York statutory short form" (General Obligations Law [former] § 5-1501). While it is true that the sample forms contain a section in which the principal can check a box when more than one agent is designated to indicate whether each agent may separately act or all agents must act together, and states within the sample form that "[i]f neither blank space is initialed, the agents will be required to act together," (former) Section 5-1501 also explicitly states that "[n]o provision of this article shall be construed to bar the use of any other or different form of power of attorney desired by the parties concerned" and makes no requirement that such different form contain a similar provision regarding joint representation (***see*** General Obligations Law [former] § 5-1501).

A power of attorney is a written authorization for an agent to perform specified acts on behalf of his principal, which acts, when performed, have a binding effect upon the principal. It is an instrument by which the authority of one person to act in the place and stead of another as attorney-in-fact is set forth. It is a mere contract of agency, that is, an authorization by a principal for the accomplishment on his behalf of a particular purpose or the performance of a particular

act (***see*** 2 NY Jur 2d, Agency, § 62). The power of attorney form at issue here was the DTA's former form (TA-15 [3/00]). As noted by petitioner, annexed to that form were the provisions of 20 NYCRR 3000.2, as well as 20 NYCRR former 2390.5. As stated in 20 NYCRR 3000.2(a)(2), a taxpayer may be represented before the Tribunal if authorized by a proper power of attorney. Section 3000.2 of the Rules of Practice and Procedure does not contain a requirement for multiple representatives to act jointly. Moreover, former section 2390.5 of the Division's regulations states that the power of attorney shall include the names and addresses of all attorneys or agents whom the taxpayer has appointed to represent him, but only one attorney or agent may be designated to receive copies of communications and notices. Such provision indicates that multiple representatives are not required to act jointly, and in fact, only one will receive communications and notices.[4] Given the facts and circumstances of this matter, and from the evidence in the record, it is clear that petitioner entrusted full authority to Mr. Krohn to represent him in this proceeding, without the joint participation of Mr. Rosenwasser. Indeed, subsequent to executing the Notice of Withdrawal, Mr. Krohn, individually, sent a letter to the DTA requesting to be relieved from the filed Notice of Withdrawal, claiming not that he lacked authority, but instead "based upon a mistaken belief that . . . [a] key witness was not going to be available to testify and upon other misinformation." We agree with the Administrative Law Judge's conclusion that petitioner has presented no evidence to show a clear indication that Mr. Krohn and Mr. Rosenwasser were to act jointly. As such, we find that Mr. Krohn acted within his authority when he executed the subject notice.

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[4] We note that the Administrative Law Judge found that both prior POA form POA-1 and current POA form POA-1-IND state, "[a]ll representatives appointed will be deemed to be acting severally, unless [this form] clearly indicates that all representatives are required to act jointly." Although petitioner used power of attorney form TA-15 rather than form POA-1, the instructions for form POA-1 were in effect at the time the power of attorney form at issue was executed, and these instructions contain the same statement that representatives will be deemed to be acting severally, unless the form clearly indicates that all representatives are required to act jointly.

Regarding the Division's request that a penalty be imposed against petitioner for filing a frivolous motion, we note that section 3000.21 of the Tax Appeals Tribunal Rules of Practice and Procedure provides for a penalty of not more than $500.00 if a petitioner commences or maintains a proceeding primarily for delay, or if petitioner's position in a proceeding is frivolous. That section enumerates examples of frivolous positions, including:

> (a) that wages are not taxable as income;
> (b) that petitioner is not liable for income tax because petitioner has not exercised any privileges of government;
> (c) that the income tax system is based on voluntary compliance and petitioner therefore need not file a return;
> (d) that Federal Reserve Notes are not "legal tender" or "dollars," and petitioner therefore cannot measure his or her income; and
> (e) that only states can be billed and taxed directly.

While this list of examples is not exhaustive, we find that petitioner's motion, although lacking merit, is not similar to the examples listed. As such, the Division's request for a penalty against petitioner is denied.

Lastly, we address petitioner's submission of an affidavit from Mark A. Krohn, Esq., dated December 23, 2010, included with petitioner's brief on exception. No affidavit from Mr. Krohn was included when petitioner initially filed this motion. This Tribunal has made it clear that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons, we must follow our policy of not allowing the submission of evidence after the closing of the record (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991; ***Matter of Oggi Rest.***, Tax Appeals Tribunal November 30, 1990; ***Matter of Morgan Guaranty Trust Co. of New York***, Tax Appeals Tribunal, May 10, 1990; ***Matter of International***

Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; ***Matter of Ronnie's Suburban Inn***, Tax Appeals Tribunal, May 11, 1989; ***Matter of Modern Refractories***, Tax Appeals Tribunal, December 15, 1988). Because the affidavit was not submitted when petitioner initially brought this motion, and was not submitted until petitioner filed his brief on exception, the affidavit is rejected and has not been taken into consideration in rendering this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jay Presutti is denied;

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

3. The petition of Jay Presutti is denied; and

4. The Notices of Deficiency dated February 5, 2007 are sustained.

DATED:Troy, New York
June 23, 2011

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner