

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GROTTO D'ORO BAY CORP. : ORDER
 : DTA# 816776
for Redetermination of a Deficiency, Revision of a :
Determination or for Refund of Corporation Franchise :
Tax, Personal Income Tax, and Sales and Use Taxes under :
Articles 9-A, 22, 28 and 29 of the Tax Law for the Period :
December 1, 1993 through December 15, 1997. :

Petitioner, Grotto D'Oro Bay Corp., c/o Joseph Faga, 1718 East 36th Street, Brooklyn, New York 11234, filed a petition for redetermination of a deficiency, revision of a determination or for refund of corporation franchise, personal income, and sales and use taxes under Articles 9-A, 22, 28 and 29 of the Tax Law for the period December 1, 1993 through December 15, 1997.

Procedural Background

By previous Order of this administrative law judge (*Matter of Grotto D'Oro Bay Corp.*, Division of Tax Appeals, September 16, 1999), the petition as originally filed in this matter was found to be invalid and petitioner was allowed 30 days from the issuance of the order to file a corrected petition, signed by a person having authority to do so on behalf of the corporate petitioner. No corrected petition was received, and a second order was issued dismissing the petition pursuant to 20 NYCRR 3000.3(d) (*Matter of Grotto D'Oro Bay Corp.*, Division of Tax Appeals, November 12, 1999).

On November 22, 1999, petitioner served and filed a notice of motion requesting the following relief:

- 1) To resettle the Order of this Court made the 16th day of September, 1999, to provide that a corrected Petition may be filed within ninety (90) days of the issuance of the original Order or in the alternative, granting the Plaintiff thirty (30) days from the date of the Resettled Order; and
- 2) Upon the granting of the relief requested to renew and reargue, the determination made by this Honorable Court dated November 12, 1999, which should be rendered *moot*; and

3) For such other and further relief as to the Court may seem just and proper in the premises.

A letter dated November 24, 1999 was sent to petitioner by this Administrative Law Judge which in relevant part provided:

The filing of your motion does not extend the time available to you to file an exception with the Tax Appeals Tribunal regarding my order of November 12, 1999. However, should you timely file a request for an extension of time to file an exception, the filing of the motion does constitute good cause for the granting of an extension (20 NYCRR 3000.16[b]).

A copy of a cover letter from petitioner's representative, dated December 6, 1999 and addressed to the Secretary to the Tax Appeals Tribunal, was received by the Division of Tax Appeals on December 8, 1999 together with a copy of a Notice of Exception to Administrative Law Judge's Determination. No copy of a request for an extension of time to file an exception was received by the Division of Tax Appeals.

Current Motion

Together with its notice of motion, petitioner submitted an affirmation of petitioner's representative which recounted that the September 16, 1999 order allowed petitioner to file a corrected petition within 30 days, and in paragraph seven provided:

I do not know whether the Order reached by [sic] desk or simply went into the file or whether I misread the Order, it is approximately nine (9) pages in length. On or about November 15, 1999, the Plaintiff received the Order dated November 12, 1999, which received counsel's attention, the inadvertent oversight in refiling.

The affirmation further explained in paragraph eight that the purpose of the motion was to "cure our default in complying with the thirty (30) day provision." Also submitted with the notice of motion was a petition signed by Joseph Faga, a person authorized to sign the petition on behalf of the corporate petitioner, and dated November 22, 1999.

Petitioner states that the failure to file a corrected petition within the time allowed was inadvertent and that its failure to comply with the September 16, 1999 order was not intentional. Petitioner argues that these circumstances amount to law office failure which, in judicial

proceedings, would result in remedial action being taken by the court and that Division of Tax Appeals proceedings should not be more restrictive than court proceedings.

The Division of Taxation (“Division”) submitted a response in the form of an affirmation in opposition signed by the Division’s representative. The Division points out that the legal basis for petitioner’s motion is not clear. If it is a motion to reopen or reargue, the Division urges that the motion be denied because petitioner filed an exception and 20 NYCRR 3000.16 governing motions to reopen or reargue provides that once an exception is filed such a motion cannot be granted. The Division also notes that petitioner has alleged none of the grounds necessary for a motion to reopen or reargue and the proper course for petitioner to pursue is an exception with the Tax Appeals Tribunal. If it is an application to resettle an order, the Division first notes that such a remedy is not provided for in the Rules of Practice and Procedure of the Tax Appeals Tribunal, and furthermore, the purpose of such a motion is to request the court to correct an error that the court made, and petitioner has not alleged that any errors were made in the order dated November 12, 1999. Finally, the Division argues that if petitioner’s motion is considered to be a motion to vacate a default, there must be a reasonable excuse for such a default and petitioner must show that it has a meritorious case. The Division argues that petitioner in this case has done neither.

Opinion

I agree with the Division that the legal basis of petitioner’s motion is not clear from the documents submitted by petitioner. Therefore, I will discuss each of the various theories mentioned by petitioner, starting with a motion to reopen or reargue.

20 NYCRR 3000.16(a) allows an administrative law judge to vacate one of his or her own determinations on the motion of a party due to newly discovered evidence or based on some misconduct of the other party.¹ Petitioner has not alleged discovery of any new evidence or any

¹The document at issue in this motion (i.e., the order issued on November 12, 1999) was an order and not a determination. While 20 NYCRR 3000.16 does not specifically allow for motions to reopen or reargue orders, since the November 12, 1999 order finally decided all of the issues in the petition by dismissing the petition, I see no reason not to provide the protections of the provisions of 20 NYCRR 3000.16 to the parties in this case.

misconduct on the part of the Division. Since petitioner has not asserted any grounds that would allow for reopening the record or for an opportunity to reargue, petitioner's motion must be denied.

Furthermore, when petitioner originally filed its motion, petitioner's representative was informed in writing of the need to file a request for an extension of time to file an exception with the Tax Appeals Tribunal should petitioner wish to preserve its rights to file an exception to the November 22, 1999 order. Instead petitioner chose to file an exception with the Tax Appeals Tribunal. 20 NYCRR 3000.16(b), regarding motions to reopen or for reargument, provides in relevant part that: "An administrative law judge shall have no power to grant a motion made pursuant to this section after the filing of an exception with the tax appeals tribunal." The exception having been filed, I have no authority to grant petitioner's motion to reopen or for reargument and petitioner's motion must be denied pursuant to 20 NYCRR 3000.16(b).

Petitioner also asks to resettle the order issued on November 12, 1999. There is no provision in the Rules of Practice and Procedure of the Tax Appeals Tribunal that provides for such relief. However, any motion may be made in proceedings before the Division of Tax Appeals and an administrative law judge "shall be guided but not bound by the CPLR" in determining the outcome of any such motion (20 NYCRR 3000.5[a]). The purpose of a motion to resettle an order is to correct an error or omission so that the order accurately reflects the judgment of the court. It is "a procedure designed solely to correct errors or omissions as to form, or for clarification. It may not be used to effect a substantive change in or to amplify the prior decision of the court." (*Foley v. Roche*, 68 AD2d 558, 566, 418 NYS2d 588, 593.) Petitioner has not asserted that any errors or omissions were made by the Division of Tax Appeals. Neither has petitioner asserted that the November 12, 1999 order requires clarification. Rather, petitioner argues that due to its error in complying with the September 16, 1999 order, the November 12, 1999 order should be substantively changed to allow for the filing of its corrected petition. This is not a legal basis for a motion to resettle an order. Therefore, petitioner's motion to resettle the order must be denied.

Petitioner's motion could also be viewed as a motion to vacate a default based on the failure to file the corrected petition within the time limitations. In order to prevail on a motion to vacate a default determination, petitioner was required to "show[] an excuse for the default and a meritorious case" (20 NYCRR 3000.15[b][3]). As an excuse for the default petitioner has offered the theory of law office failure (*see*, CPLR 2005). The facts underlying petitioner's argument must show that this particular law office failure amounts to a reasonable excuse for the default (*see, Achampong v. Weiget*, 240 AD2d 247, 658 NYS2d 606, *Oversby v. Linde Division of Union Carbide Corp.*, 121 AD2d 373, 503 NYS2d 85; *American Sigol Corp. v. Zicherman*, 166 AD2d 628, 561 NYS2d 55). There are no facts in this matter regarding the law office failure. Petitioner's representative, in his affirmation, does not provide a definitive reason for the failure to file a timely corrected petition. Rather, he states that he is not sure whether the November 12, 1999 order ever reached his desk (i.e., maybe it was simply put in the file and not given to him), or it did reach his desk and he simply misread the order. Petitioner has failed to specifically identify what the law office failure was that caused the failure to file a timely corrected petition, or any particular details regarding the circumstances surrounding the law office failure. Not knowing what the office failure was, I am not able to determine whether it constituted a reasonable excuse for petitioner's default. (*see, Achampong v. Weiget, supra; American Sigol Corp. v. Zicherman, supra*). Petitioner's motion to vacate a default judgment must be denied.

Furthermore, petitioner did not submit any evidence from someone with personal knowledge of the underlying facts of the case in an attempt to show that petitioner's case has merit. Therefore, on this basis also petitioner's motion to vacate a default must be denied (*see, 20 NYCRR 3000.15[b][3]; Oversby v. Linde Division of Union Carbide Corp., supra; Kel Management Corp. v. Rogers & Wells*, 121 AD2d 373, 503 NYS2d 85).

THEREFORE, it is

ORDERED, ADJUDGED and DECREED, that petitioner's motion filed on November ,
1999 is denied.

DATED: Troy, New York
January 06, 2000

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE