

STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|--|---|----------------|
| In the Matter of the Petition | : | |
| of | : | |
| MOHAMMAD JAVED | : | ORDER |
| | : | DTA NO. 823219 |
| 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, 2005 through February 28, 2007. | : | |

Petitioner, Mohammad Javed, filed a petition 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, 2005 through February 28, 2007.

Petitioner, appearing pro se, filed papers requesting a review of an Order of Discontinuance on September 22, 2010.¹ The Division of Taxation, appearing by Daniel Smirlock, Esq. (Anita K. Luckina, Esq., of counsel), timely filed an affirmation in opposition with attached exhibits on November 3, 2010.² Petitioner filed a response to the reply, consisting of a statement with attached exhibits, on November 15, 2010.³ Accordingly, the 90-day period

¹ A Division of Tax Appeals letter dated October 4, 2010 transmitting a copy of petitioner's papers to the Division of Taxation referred to petitioner's request as a motion to reopen the record. The Division of Taxation's opposition papers indicate an understanding that petitioner's request for review was deemed to be a motion to reopen the record pursuant to section 3000.16 of the Rules of Practice and Procedure (20 NYCRR 3000.16).

² Because petitioner did not provide the Division of Taxation with a copy of his motion papers, the Division was granted until November 4, 2010 to respond.

³ By letter dated November 18, 2010, the Division of Taxation objected to any consideration of petitioner's response because it was filed without permission as required under the Rules of Practice and Procedure (*see* 20 NYCRR 3000.5[b]). Considering the absence of any prejudice to the Division, however, and considering that the Rules are to be liberally construed (*see* 20 NYCRR 3000.0[c]), the objection is rejected.

for the issuance of this determination began on November 17, 2010. After due consideration of the entire record, Timothy Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether a Stipulation for Discontinuance of Proceeding should be vacated.

FINDINGS OF FACT

1. On August 7, 2008, following an audit of 492 Fast Food, Inc., the Division of Taxation issued a Notice of Determination (Assessment ID No. L-030504128) to petitioner as a responsible officer of that corporation. The notice asserted \$43,308.61 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 2005 through February 28, 2007.
2. Petitioner timely filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the August 7, 2008 Notice of Determination.
3. On July 17, 2009, BCMS issued a Conciliation Order sustaining the August 7, 2008 notice.
4. Petitioner then filed a petition with the Division of Tax Appeals seeking a revision of the subject determination.
5. On October 28, 2009, the Division of Taxation timely filed its answer in this matter.
6. On April 1, 2010, petitioner filed a power of attorney authorizing Ali R. Nassiripour, Esq., an attorney at law licensed to practice in New York State, to represent him in this matter. The power of attorney, filed on form POA-1-IND, has been properly completed and expressly indicates that Mr. Nassiripour was authorized to represent petitioner in connection with the subject Notice of Determination.

7. This matter was scheduled for a hearing in the Division of Tax Appeals on August 17, 2010. The Division of Tax Appeals issued a Notice of Hearing to the parties on July 12, 2010.

8. On August 16, 2010, petitioner and the Division of Taxation, by their respective representatives, executed a Stipulation for Discontinuance of Proceeding by which the parties stipulated and agreed that the pending proceeding in the Division of Tax Appeals was resolved and discontinued with prejudice. The stipulation further provided that the determination of tax due in this matter was recomputed to \$27,000.00, plus statutory interest, and that penalty was cancelled.

9. On August 26, 2010, the administrative law judge assigned to this matter issued an Order of Discontinuance finally determining this matter, with prejudice, in the Division of Tax Appeals in accordance with the terms of the Stipulation for Discontinuance of Proceeding. The Order of Discontinuance is, by its terms, “the final judgment in this matter for purposes of Tax Law § 3030 [awarding of costs and certain fees].”

10. In his motion papers petitioner argues that he was not a responsible officer of 492 Fast Food, Inc. Petitioner also asserts that he did not have the authority or consent of the president of the corporation to negotiate a settlement. Petitioner further contends that the audit method was unreasonable and that the results were erroneous. Attached to petitioner’s response are documents, designated by petitioner as “new evidence,” that are related to the responsible officer and audit issues.

CONCLUSIONS OF LAW

A. Preliminarily, it is observed that petitioner’s request for a review of the Order of Discontinuance dated August 26, 2010 is not properly considered as a motion to reopen the record pursuant to section 3000.16 of the Rules of Practice and Procedure (20 NYCRR 3000.16).

That section provides that a party may move, within 30 days after the issuance of a determination, for an order vacating such determination on the grounds of either newly discovered evidence or fraud, misrepresentation or misconduct by an opposing party.

Accordingly, section 3000.16 is applicable only where an administrative law judge determination has been issued following either a hearing or a submission. Section 3000.16 thus does not apply where, as here, a matter is settled by the parties pursuant to a stipulation.

B. The Tax Appeals Tribunal has held, however, that the Division of Tax Appeals has the authority to consider a motion to vacate a stipulation for discontinuance of proceeding (*see e.g. Matter of Felix Industries*, Tax Appeals Tribunal, July 22, 1993). Here, petitioner's request effectively seeks such a vacatur.

C. Tax Law § 171(18) authorizes the Division of Taxation to enter into a Stipulation for Discontinuance of Proceeding such as the one at issue, as it provides that the Commissioner of Taxation and Finance shall:

Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, *which agreement shall be final and conclusive*, and *except upon a showing of fraud, malfeasance, or misrepresentation of a material fact*: (a) the case shall not be reopened as to matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded. As used in this paragraph the term "person" includes an individual, trust, estate, partnership and corporation. (Emphasis added.)

D. Consistent with the language of Tax Law § 171(18), the Tribunal has held that fraud, malfeasance or misrepresentation of a material fact are the sole grounds for vacating stipulations of discontinuance (*see Matter of Brahms*, Tax Appeals Tribunal, July 3, 1997; *Matter of Mullin*,

Tax Appeals Tribunal, June 9, 1994). This standard is similar to that employed by the courts with respect to stipulations of settlement in civil litigation (*see Hallock v. State of New York*, 64 NY2d 224, 485 NYS2d 510 [1984]).

E. In this case, petitioner has made no claim, much less offered proof, that the Division of Taxation committed fraud, malfeasance, or misrepresentation of a material fact with regard to the Stipulation for Discontinuance. Moreover, it is observed that the stipulation has been properly completed and expressly provides for discontinuance of the proceeding with prejudice. Additionally, the power of attorney appointing Mr. Nassiripour appears to have been properly executed and completed and there is no allegation that the power is somehow invalid. Petitioner's representative thus had the authority to enter into the Stipulation for Discontinuance on petitioner's behalf. Accordingly, the stipulation may not be vacated and petitioner's motion must be denied.

F. Having concluded that the stipulation may not be vacated, it follows that the factual allegations in petitioner's motion papers, even if based on newly discovered evidence, may not be considered herein. Also, petitioner's claim that he did not have the authority or consent of the president of the corporation to negotiate a settlement is irrelevant, for the liability at issue was asserted against petitioner personally.

G. The motion of Mohammad Javed is denied.

DATED: Troy, New York
January 27, 2011

/s/ Timothy Alston

ADMINISTRATIVE LAW JUDGE