STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JON AND SUSAN NAGEL	:	ORDER DTA NO. 823705
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2003 and 2004.	:	

Petitioners, Jon and Susan Nagel, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2003 and 2004.

On October 29, 2010, petitioners, appearing pro se, filed a motion seeking summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). The Division of Taxation responded to the motion by an affirmation in opposition, dated November 30, 2010 and stamped as received by the Division of Tax Appeals on December 1, 2010. By an Order dated February 24, 2011, petitioners' motion for summary determination was denied. On March 14, 2011, petitioners filed a motion for reconsideration or for renewal of their motion for summary determination, including an affidavit in support made by Jon Nagel. By a letter dated April 8, 2011 and stamped as received by the Division of Tax Appeals on April 11, 2011, the Division of Taxation, appearing by Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel), responded in opposition to petitioners' motion for reconsideration or for renewal. On April 12, 2011, the Division of Tax Appeals received by facsimile transmission from the Division of Taxation a cover letter and a one-page document purporting to be a "Mail Record" in support of the

Division's mailing of its response in opposition to petitioner's October 29, 2011 motion for summary determination. On April 22, 2011, a reply affidavit made by Jon Nagel was submitted by petitioners in further support of their motion for reconsideration or renewal. On April 29, 2011, an affidavit made by Jon Nagel was submitted in response to the Division of Taxation's April 8, 2011 and April 12, 2011 submissions in opposition to the motion for reconsideration or renewal. After due consideration of the foregoing submissions with respect to the motion for reconsideration or renewal, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether the order dated February 24, 2011 denying petitioners' motion seeking summary determination and cancellation of the February 23, 2007 and March 19, 2007 notices of deficiency underlying and at issue in this matter should be reversed upon reconsideration, thus leading to a renewal of petitioners' motion for summary determination and resulting in the cancellation of such notices of deficiency.

FINDINGS OF FACT[1]

1. The Division of Taxation (Division) issued notices of deficiency dated February 23, 2007 (Assessment ID No. L-028282493-5 pertaining to the year 2003) and March 19, 2007 (Assessment ID No. L-027101255-2 pertaining to the year 2004), asserting additional New York State and New York City personal income taxes due from petitioners, Jon A. Nagel and Susan E. Nagel, in the respective (aggregate) amounts of $24,747.45 (for 2003) and $8,630.83 (for 2004), plus interest.

[1] The Findings of Fact set forth in the order dated February 24, 2011 are hereby specifically adopted by reference in this order.

2. Petitioners challenged these notices by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held on March 12, 2009 and, in turn, two conciliation orders, each dated March 26, 2010, were issued to petitioners with respect to the two notices of deficiency, as follows:

> a) with respect to Assessment ID No. L-028282493-5 (pertaining to 2003), Conciliation Order CMS No. 219542 reduced the (aggregate) amount of tax asserted via the Notice of Deficiency from $24,747.45 to $18,588.00, plus interest.[2]
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> b) with respect to Assessment ID No. L-027101255-2 (pertaining to 2004), Conciliation Order CMS No. 219813 sustained the amount of tax asserted via the Notice of Deficiency.

3. On June 21, 2010, petitioners continued their challenge by filing a petition with the Division of Tax Appeals. In addition to challenging the amount of tax asserted by the notices of deficiency (as reduced for 2003 by the Conciliation Order pertaining to that year), petitioners asserted that there were certain irregularities in the conciliation conference proceedings that should result in cancellation of the notices. In particular, petitioners maintained that because the conciliation conferee who conducted the conference did not write the conciliation orders that were issued, petitioners were "precluded" from having a conciliation conference. In this regard, petitioners maintained the conciliation orders, issued by the conferee's supervisor, did not accurately represent what transpired during the conference. Specifically, petitioners asserted that the conciliation conferee left petitioners with the "distinct impression" that the conciliation conferee would contact petitioners "if there was any additional point of taxation that was not

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[2] The premise upon which the noted reduction was made (allowance of a capital loss claimed on petitioners' tax return for 2003) is referenced in correspondence from the conferee's supervisor to petitioners dated February 9, 2010 and February 19, 2010, respectively

resolved in favor of [petitioners]," and that absent such contact all issues had been resolved to the conferee's satisfaction in petitioners' favor. Since the conferee did not contact petitioners subsequent to the March 12, 2009 conference, petitioners claim to have anticipated the issuance of conciliation orders cancelling the notices of deficiency. However, the conciliation orders issued to petitioners sustaining the notices of deficiency (except to the extent of the reduction pertaining to the 2003 notice [***see*** Finding of Fact 2(a)]) clearly did not match petitioners' distinct impression or their expectation of resolution of the matters by cancellation of the notices of deficiency.

4. On this motion for reconsideration and renewal, petitioners renew the arguments set forth in their original motion for summary determination and allege other errors, as follows:

> (a) petitioners allege that the conciliation orders, as drafted by the conciliation conferee's supervisor (due to the retirement of the conciliation conferee who conducted the conference) and issued to petitioners approximately one year after the conciliation conference, mis-characterize what transpired at the conference and do not reflect the conciliation conferee's conclusion that the notices would be cancelled.
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> (b) petitioners further allege that the February 24, 2011 Order issued in this matter is erroneous as a matter of law in its conclusion that the Division of Tax Appeals has no authority to delve into or over-ride the conciliation orders as issued in this matter and mandate cancellation of the notices in question upon the allegation that petitioners understood the conciliation conferee to have agreed with their position and that such understanding would follow and be set forth in the form of conciliation orders cancelling the notices.
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> (c) petitioners also maintain that the Division did not serve its November 30, 2011 affirmation in opposition to the motion for summary determination upon them at any point, thus depriving petitioners of an opportunity to consider such opposition and offer a reply thereto.

5. In response to the foregoing, the Division relies upon the arguments set forth in its November 30, 2010 affirmation in opposition. The Division argues that the February 24, 2010

order properly denied petitioners' motion for the reasons set forth therein, and notes that petitioners have not raised any issues that were not presented, considered and disposed of in that order, save for that concerning the Division's alleged failure to have provided petitioners with a copy of the Division's November 30, 2010 affirmation in opposition (***see*** Finding of Fact 4[c]).

6. With respect to the allegation that a copy of the Division's affirmation in opposition was not provided to petitioners, the Division notes, citing 20 NYCRR 3000.5(b), that the filing of a reply to a response in opposition to a motion is not permitted as matter of right. In addition, the Division submitted, by facsimile dated April 12, 2011, a one-page document described as a "Mail Record," purportedly establishing that the Division's November 30, 2010 affirmation in opposition was in fact mailed to petitioners and to the Division of Tax Appeals by certified mail. This document, identified as PS Form 3877, reflects in columnar format the Article Number (certified mail number), the name and address of the person or entity to whom the article represented by the Article Number is addressed, and postage and fee amounts. The lower portion of the form includes boxes containing the headings "Total Number of Pieces List by Sender," "Total Number of Pieces Received at Post Office," and "Postmaster, Per (Name of receiving employee)." The first such box on the subject form reflects the typewritten entry "(2) 11/30/10" followed by the handwritten numeral "2," the second such box reflects the handwritten numeral "2," and the third such box reflects an indecipherable handwritten mark presumably indicating the name or initials of the receiving postal employee. This form is not otherwise dated, nor is it accompanied by an affidavit or other documentation explaining its use or purpose. Rather, its submission included a cover letter dated April 12, 2011 stating

> As a follow up to my letter of April 8, 2011, it has come to my attention that the Mail Record attachment may not have been forwarded with the

letter. Please accept this attachment and consider it with the Division's letter as described therein.

7. In response, and by reference to the United States Postal Service (USPS) Track and Confirm service[3] and the Article Number (i.e., certified mail number), petitioner notes that:

(a) the Division's "Mail Record," identified by certified number 7006 0810 0000 1120 4451 and received by facsimile transmission at the Division of Tax Appeals on April 12, 2011, was not mailed to petitioners until April 27, 2011 and was received by them on April 28, 2011. Since this date of mailing falls after the April 12, 2011 date of the facsimile transmission of the "Mail Record" to the Division of Tax Appeals, and also after the April 22, 2011 filing of petitioners' reply affidavit in further support of the subject motion for reconsideration and renewal, petitioners refer to the facsimile transmission as the "ex parte communication."

(b) the Division's November 30, 2010 affirmation in opposition to petitioners' October 29, 2010 motion, identified on the Division's "Mail Record" by certified number 7006 0810 0000 1119 2444 and addressed to the Division of Tax Appeals, was delivered to the Division of Tax Appeals on December 1, 2010, a result consistent with the receipt stamp of the Division of Tax Appeals appearing on the face of such document.

(c) the copy of the Division's November 30, 2010 affirmation in opposition to petitioners' October 29, 2010 motion, identified on the Division's "Mail Record" by certified number 7006 0810 0000 1119 2437 and addressed to petitioners, results in the advice "There is no record of this item . . ." a result consistent with petitioners' claim that the Division's November 30, 2010 response to the motion was not provided to petitioners.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal's Rules of Practice and Procedure provide for a motion to reopen the record or for reargument to be made to the administrative law judge who rendered a determination within 30 days after that determination has been served (20 NYCRR 3000.16[b]). Pursuant to 20 NYCRR 3000.16(a), an administrative law judge may, upon motion of a party,

[3] ***See*** http://www.usps.com/shipping/trackandconfirm.htm

issue an order vacating a determination rendered by such administrative law judge upon the grounds of:

> (1) newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or
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> (2) fraud, misrepresentation, or other misconduct of an opposing party.

B. Petitioners' motion for reconsideration or renewal, essentially a motion to reopen the record or for reargument, was filed March 14, 2011 and seeks reconsideration of the order dated February 24, 2011 denying petitioners' October 29, 2010 motion for summary determination. Since the subject motion was filed within 30 days after the February 24, 2011 date of service of the order, it is timely and will be considered.

C. A strict standard is appropriate to be applied when reviewing a motion for reconsideration, and "reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked–matters, in other words, that might reasonably be expected to alter the conclusion reached by the court" (***Shrader v. CSX Transp.,*** 70 F3d, 255, 257 [2d Cir 1995]). Reconsideration is not appropriate "where the moving party seeks solely to relitigate an issue already decided" (***id.***). "A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (***Foley v. Roche***, 68 AD2d 558, 567, 418 NYS2d 588, 593 [1979], ***lv denied*** 56 NY2d 507, 453 NYS2d 1025 [1982]).

D. Petitioners raise three bases for reconsideration. The first two such bases, as set forth at Finding of Fact 4(a) and (b), center on petitioners' dissatisfaction with the outcome of the conciliation conference process (Finding of Fact 4[a]) and their view that the Division of Tax

Appeals has the authority to impose the remedy of cancellation of the notices based upon the allegation that such result was envisioned by the participants, including the conciliation conferee, present at the conciliation conference (Finding of Fact 4[b]). These two bases and allegations were raised in petitioners' October 29, 2010 motion for summary determination and were directly considered and rejected in the February 24, 2011 order denying that motion. As specifically noted in that order:

> [t]he conciliation conference is not an "adjudicatory proceeding" as defined in Article 3 of the State Administrative Procedure Act (SAPA). Specifically, the conciliation conference process does not comply with record requirements for adjudicatory proceedings under SAPA § 302 (conciliation conferences are neither electronically nor stenographically recorded) and conciliation orders do not comply with requirements for decisions, determinations, and orders under SAPA § 307 (conciliation orders contain neither findings of fact nor conclusions of law). The conciliation conference process is, in essence, a settlement forum (***see*** 20 NYCRR 4000.5[c][1][I]), and discussions and proposed adjustments made at conciliation conferences are in the nature of settlement negotiations and may not be considered as precedent or be given any force or effect in any subsequent administrative proceeding (Tax Law § 170[3-a][f]; ***see Matter of Petak v. Tax Appeals Tribunal,*** 217 AD2d 807 [1995]; ***Matter of Sandrich, Inc.***, Tax Appeals Tribunal, April 15, 1993).
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> [t]here is no authority for an administrative law judge to pass on petitioners' claims with regard to what transpired at the conciliation conference, or to consider the validity of the claim that all matters in issue had been resolved in petitioners' favor. The result of the Division's examination of information, including the documents and explanations allegedly furnished by petitioners during the course of the conciliation conference, appears to have fallen short of being acceptable to the Division to resolve the matters and thus short of the result desired by petitioners. The very issuance of the two conciliation orders, notwithstanding that the same were not issued by the conciliation conferee who conducted the conciliation conference and notwithstanding petitioners' allegation of their distinct impression that all matters had been resolved in their favor, makes clear the Division's position that such matters have not been so resolved.

E. The third basis for the subject motion concerns petitioners' receipt (or nonreceipt) of the Division's November 30, 2010 affirmation in opposition to the October 29, 2010 motion for

summary determination. On this score, 20 NYCRR 3000.5(b) provides that "[u]nless a different time period is otherwise prescribed by this Part or by direction of the administrative law judge, the adverse party shall have 30 days after the date of service of the motion to file a response and to serve a copy on the moving party." There is no proof establishing that the Division's November 30, 2010 affirmation in opposition was mailed or otherwise served upon petitioners, and the evidence available indicates that it was not.[4] At the same time, however, the December 1, 2010 receipt stamp of the Division of Tax Appeals establishes that the Division's affirmation in opposition to the motion was, in fact, filed with the Division of Tax Appeals in a timely manner (***see*** Finding of Fact 6[b]), and that petitioners' motion for summary determination was clearly not unopposed.

F. Petitioners state that service of the Division's affirmation in opposition would have allowed them an "opportunity to consider any and all arguments set forth in such opposition papers to offer the Court [our] further thinking on [our] proposed Motion and to specifically clarify any points upon which such opposition papers might mislead and/or confuse the Court in regard to [our] Motion and its underlying facts." However, 20 NYCRR3000.5(b) provides that "[r]eplies to responses [to motions] will not be entertained except with permission of the administrative law judge . . . ." Thus, the proponent of a motion, here petitioners, is not entitled to file a reply, as of right, to their opponents' opposition to that motion. Ultimately, and without sanctioning the Division's apparent failure to mail (or establish the mailing of) a copy of the affirmation in opposition to petitioners, the relief requested in petitioners' October 29, 2010 motion, and requested herein by renewal of that motion, may not, as a matter of law, be granted.

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[4] The Division's "Mail Record," without further explanatory support, provides no basis to prove that the affirmation in opposition was mailed to petitioners, a conclusion supported by petitioners' submission of the USPS Track and Confirm service which shows "no record," based upon the certified number allegedly assigned in connection with the mailing of the affirmation in opposition to petitioners (***see*** Finding of Fact 6[c]).

That is, petitioners seek cancellation of the notices of deficiency upon the basis that this was their understanding or impression of the result of their conciliation conference. In contrast, the issuance of the conciliation orders sustaining the notices bears out that this was not the case, at least from the Division's perspective. As the cited cases clearly establish, the Division of Tax Appeals has no authority to delve into the settlement negotiations and proposals made in the course of the conciliation process, or to impose settlements (including cancellation of assessments) where such proposals, even though expected, do not ultimately come to fruition. (***Matter of Sandrich, Inc.***, Tax Appeals Tribunal, April 15, 1993).[5]

G. Petitioners' motion for reconsideration or for renewal offers no legal or factual basis that establishes that their motion was incorrectly decided by the order issued February 24, 2011 and should be revisited, nor any other premise upon which to disturb the conclusions reached in that order. Whether the presentation of additional documents or other evidence might overcome the Division's conclusions regarding the tax issues presented for the years in issue and support further adjustment or cancellation of part or all of the notices remains a factual dispute to be resolved at hearing. From all the evidence and arguments submitted on this motion and on the October 29, 2010 motion, it remains clear that there are material and triable questions of fact at issue, and summary determination will not be granted.

[5] This same result would follow even if the Division had offered no response to petitioners' October 29, 2010 motion since, as a matter of law, the Division of Tax Appeals lacks authority to grant the relief requested by petitioners' motion.

H. Petitioners' motion for reconsideration or renewal is denied, and this matter shall proceed to a hearing on the merits, as currently scheduled, on September 16, 2011.

DATED:Troy, New York
July 14, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE