STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STEPHEN AND NANCI FISHER	:	ORDER DTA NO. 806534
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1977 and 1984.	:	

Petitioners Stephen and Nanci Fisher, 2040 Polk Street, Apt. #275, San Francisco, California 94109, filed an exception to the determination of the Administrative Law Judge issued on October 22, 1998.

Subsequently, by letter dated October 29, 1999, petitioners made a motion to the Tax Appeals Tribunal (hereinafter the "Tribunal") to reopen the record in order to introduce newly discovered evidence.

Petitioner Stephen Fisher appeared *pro se* and on behalf of Nanci Fisher. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Michael J. Glannon, Esq., of counsel). By letter dated December 10, 1999, the Division of Taxation (hereinafter the "Division") filed a letter in opposition to the motion.

The Tax Appeals Tribunal delivers the following order on the motion to reopen this matter.

FINDINGS OF FACT

We find the following facts.

A determination was issued in this matter on October 22, 1998 by Administrative Law Judge Dennis M. Galliher. Petitioners filed an exception with the Tribunal on or about March 29, 1999. Petitioners' motion was submitted on October 29, 1999.

Petitioners' motion requests that the hearing record in this case be reopened for the purpose of introducing two pieces of what petitioners' allege to constitute new evidence:

1) a pending federal court action in California entitled ***Fisher v. Urbach, Hand & Devinsky*** (Case # 96-2034); and

2) a claim that the Division wrongfully submitted new evidence into the record during the administrative hearing in this matter moments before the conclusion of the hearing.

Petitioners did not bring this motion at any time prior to October 29, 1999, or make such motion to the Administrative Law Judge who was responsible for the determination of this matter.

ORDER

The regulation of the Tribunal at 20 NYCRR 3000.16 provides for motions to reopen the record or for reargument, and states, in pertinent part, that:

> (a) Determinations. An administrative law judge may, upon motion of a party, 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
> >
> > (2) fraud, misrepresentation, or other misconduct of an opposing party.

> (b) Procedure. 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 thirty days after the determination has been served. A timely motion to reopen or reargue shall not extend the time limit for taking an exception to such determination; however, upon application for an extension of time to file an exception pursuant to section 3000.20 of this Part, "good cause" shall be deemed to include the timely filing of a motion to reopen the record or reargue. 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.

Petitioners' motion to reopen is denied. Our rules of practice anticipate that a motion to reopen will be made to the Administrative Law Judge who rendered the determination in this matter (20 NYCRR 3000.16[b]). The determination of the Administrative Law Judge was issued on October 22, 1998. Petitioners did not make this motion until October 29, 1999. Thus, the motion was made far more than 30 days after the issuance of the determination by the Administrative Law Judge and after an exception to that determination had been filed with the Tribunal. Our regulations generally seek to eliminate the power to grant a motion to reopen after the filing of an exception with the Tribunal (20 NYCRR 3000.16[b]).

Furthermore, petitioners' motion, even if timely filed with the Administrative Law Judge, presented no facts that would constitute a basis for reopening the record. Our authority is limited due to the long-established principle, articulated by the Court of Appeals in the case of ***Evans v. Monaghan*** (306 NY 312, 118 NE2d 452, 457), which states that:

> [t]he rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction, applies as well to the decisions of special and subordinate tribunals as to decisions of courts exercising general judicial powers [citations omitted]. Security of person and property requires that determinations in the

> field of administrative law should be given as much finality as is reasonably possible.

Evans establishes that it is appropriate to reopen an administrative hearing where one party offers important, newly discovered evidence which due diligence would not have uncovered in time to be used at the previous hearing (***Evans v. Monaghan, supra***).

Section 3000.16 of the Tribunal's Rules of Practice and Procedure, which is patterned after Civil Practice Law and Rules ("CPLR") 5015, sets forth as one of the grounds to grant such motion "newly discovered evidence." The Appellate Division in ***Matter of Commercial Structures v. City of Syracuse*** (97 AD2d 965, 468 NYS2d 957) specifically addressed what constitutes newly discovered evidence (when in that case it was unclear whether such evidence existed at the time of the judgment). The Court stated:

> [t]he newly-discovered evidence provision of CPLR 5015 is derived from rule 60(b)(2) of the Federal Rules of Civil Procedure [citations omitted]. The Federal Rule permits reopening a judgment only upon the discovery of *evidence which was "in existence* and hidden at the time of the judgment" [citations omitted]. In our view, the New York rule was intended to be similarly applied. Only evidence which was in existence but undiscoverable with due diligence at the time of judgment may be characterized as newly-discovered evidence (***Matter of Commercial Structures v. City of Syracuse, supra***, 468 NYS2d, at 958, emphasis added).

In this case, the material sought to be submitted at this time does not constitute "newly discovered evidence" in accordance with the regulation and case law.

Upon reading the motion filed by petitioners on October 29, 1999 and the letter in opposition filed by the Division of Taxation on December 10, 1999, and due deliberation having been had thereon, it is

ORDERED that said motion be and the same is hereby denied. The Secretary to the Tribunal is directed to transmit this matter for a decision on the merits of the case.

DATED: Troy, New York

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Donald C. DeWitt
President

_____
Carroll R. Jenkins
Commissioner

_____
Joseph W. Pinto, Jr.
Commissioner