STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN G. AVILDSEN	:	ORDER AND OPINION DTA No. 809722
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the New York City Administrative Code for the Years 1986 and 1987.	:	

On June 16, 1994, the Division of Taxation filed a motion with the Tax Appeals Tribunal for leave to reargue, or in the alternative to renew, the proceedings in Matter of Avildsen (Tax Appeals Tribunal, May 19, 1994). The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel). Petitioner appeared by Whitman, Breed, Abbott and Morgan (Edward H. Hein, Esq., of counsel).

ORDER

Upon reading the Notice of Motion and Motion for Leave to Renew/Reargue filed by the Division of Taxation and the memorandum of law submitted by petitioner in response to the motion and due deliberation having been had thereon,

Now on the motion of the Division of Taxation it is

ORDERED that said motion be and the same is hereby denied.

OPINION

In Matter of Avildsen (supra), we concluded that the Administrative Law Judge erred in holding that credible testimony was insufficient as a matter of law to establish that petitioner did not spend more than 183 days in New York City during each of the years in issue. We rejected the Administrative Law Judge's conclusion that corroborating documentary evidence was required as a matter of law in order for petitioner to prevail. We found no statutory, nor regulatory authority for such a corroboration requirement. Further, we held that if the Division

of Taxation ("Division") had a regulation that required records to corroborate credible testimony at a Division of Tax Appeals hearing such a regulation would be beyond the authority of the Commissioner of Taxation because it is the Tax Appeals Tribunal who has the authority to prescribe the rules for the hearing process.

Our review of the present motion takes place under the principle that:

> "we have no statutory authority to reconsider our decisions and in the absence of statute, our authority to reconsider our decisions is limited (Matter of Fisher, Tax Appeals Tribunal, July 19, 1990; Matter of Capitol Coin, Tax Appeals Tribunal, August 23, 1989; Matter of Goldome Capital Inv., Tax Appeals Tribunal, November 3, 1988). Our authority is limited, due to the long established principle, as articulated by the Court of Appeals in the case of Evans v. Monaghan, 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 v. Monaghan, 306 NY 312, 118 NE2d 452, 457)" (Matter of Jenkins Covington, N.Y., Tax Appeals Tribunal, November 21, 1991, affd 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151).
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> In the face of this well established rule of the finality of administrative decisions in general, and ours in particular, the Division first argues that its motion should be granted because our decision failed to address the relevance of two sections of Article 22 of the Tax Law -- sections 658(a) and 697(a) and (b). These sections provide as follows:
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> "(a) General. The tax commission may prescribe regulations as to the keeping of records, the content and form of returns and statements, and the filing of copies of federal income tax returns and determinations. The tax commission may require any person, by regulation or notice served upon such person, to make such returns, render such statements, or keep such records, as the tax commission may deem sufficient to show whether or not such person is liable under this article for tax or for collection of tax. The tax commission shall provide a space on the form of returns wherein the taxpayer shall indicate the school district in which the taxpayer is a resident" (Tax Law § 658[a], emphasis added).
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> "(a) General.--The tax commission shall administer and enforce the tax imposed by this article and it is authorized to make such rules and regulations, and to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article . . . .

"(b) Examination of books and witnesses.--(1) The tax commission for the purpose of ascertaining the correctness of any return, or for the purpose of making an estimate to taxable income of any person, shall have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return . . . . (Tax Law § 697[a][b], emphasis added).

The Division contends that:

> "[s]ections 658 and 697 of Article 22 provide broad, discretionary power concerning the manner in which the Commissioner fulfills his statutory mandate to 'administer and enforce' Article 22, and represent the 'legislative direction' which the Tribunal concluded was lacking" (Division's motion, p. 3).

We did not address these sections in our decision because the Division did not cite, nor in anyway rely on them, in its opposition to petitioner's exception. As the Division cited only section 171 of the Tax Law, this is the only statutory section we addressed. We know of no authority to make an exception to the rule of administrative finality to allow either party to raise legal arguments that could have been raised, but were not, during the consideration of the matter.

Further, as petitioner notes, although the Division is citing additional sections as authority, its arguments under section 658 and 697 do not differ from its arguments under Tax Law § 171. In our decision in Avildsen, we acknowledged that the Division had the authority to promulgate a record keeping regulation like that at issue.[1] The sections cited by the Division in this motion further amplify the Division's authority to make record keeping regulations.

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[1]20 NYCRR Appendix 20, § 1-2(c) provides that:

> "Rules for days within and without the City.--In counting the number of days spent within and without this City, presence within the City for any part of a calendar day constitutes a day spent within the City except that such presence within the City may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside of the City, or while traveling by motor, plane or train through the City to a destination outside the City. Any person domiciled outside the City who maintains a permanent place of abode within the City during any taxable year and claims to be a nonresident must keep and have available for examination by the Finance Administrator adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the City."

However, what is at issue in this case is not the Division's authority to promulgate a record keeping regulation. Instead, the Division is asserting that it has the authority to define the type of proof necessary for a taxpayer to prevail at a Division of Tax Appeals hearing. In Avildsen, we concluded that the Division had not promulgated such a regulation but if it did, the regulation would be beyond the authority of the Division because we are empowered under section 2004 of the Tax Law to prescribe the rules of the hearing process.[2] The Division still has not directed our attention to legislative authority that authorizes the Division to prescribe the type of proof that a taxpayer must provide at hearing.

To construe, as the Division does, the power to require taxpayers to keep records to mean that the taxpayers must produce these records at a Division of Tax Appeals hearing in order to prevail would render the hearing process meaningless and the independence of the Division of Tax Appeals an illusion. Under such a system, in most instances, the only question at a hearing would be whether the taxpayer had kept the records required by the Division. If not, it would be irrelevant what the evidence offered by the taxpayer did establish: the assessment would be sustained because the records required by the Division had not been maintained and produced. Our role would be limited to that of arbiter over whether the Division's record keeping regulations had been satisfied, with no power to weigh the other evidence offered by the taxpayer. Such a role is inconsistent with our creation as an independent Division "responsible for providing the public with a just system for resolving controversies" with the Division.

The Division has not cited any court opinion to support its interpretation of the impact of its power to make record keeping regulations. Our research indicates authority only to the contrary. Most directly on point is Matter of Riluc Co. v. Tax Appeals Tribunal (169 AD2d 988, 565 NYS2d 265) which involved 20 NYCRR 493.3 and its requirement, among others,

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[2]As petitioner points out, the Division did propose a regulation dealing with the admissibility of business records at hearings. "In withdrawing such proposal the Department of Taxation and Finance noted that Counsel to the Tribunal had objected on the ground that 'the Division of Taxation lacks the authority to promulgate an evidentiary rule binding on the Division of Tax Appeals (DTA)' and further stated: '. . . the Division agrees that it lacks the authority to promulgate rules of practice binding on DTA.' NYS Register November 24, 1993, p. 32" (Petitioner's memorandum in opposition to the Division's motion, pp. 10-11).

that fuel invoices separately state the taxes charged in order for the purchaser to obtain a credit against the fuel use tax imposed by Article 21 of the Tax Law. We sustained the Division's denial of the credit on the basis that the invoices offered by petitioner did not comply with the regulation. Most importantly, the invoices did not separately state the taxes charged (Matter of Riluc Co., Tax Appeals Tribunal, April 27, 1989). The Court held that the regulation was applicable and that the invoices did not comply with the regulation. However, the Court concluded that because the amount of tax paid was easily ascertainable from the information that was supplied, our denial of the credit based on the taxpayer's failure to comply with the Division's regulation was the "mindless elevation of form over substance" and could not "be considered anything other than an arbitrary and capricious exercise of power" (Matter of Riluc Co. v. Tax Appeals Tribunal, supra, 565 NYS2d 265, 267). Clearly, the Court did not view the record keeping regulation as prescribing the proof required of the taxpayer in order to prevail.

Matter of Mobley v. Tax Appeals Tribunal (177 AD2d 797, 576 NYS2d 412, appeal dismissed 79 NY2d 978, 583 NYS2d 195) is also contrary to the Division's position. In Mobley, a sales tax case, the Court found that the petitioner was required by law to maintain records of its purchases and sales and that in the absence of such records the Division was justified in resorting to external indices to estimate tax. Notwithstanding the record keeping requirement imposed by law, the Court held that the petitioner established through testimonial evidence, uncorroborated by documentary evidence, that the amount of tax assessed was erroneous. The Court overruled our decision on this point (Matter of Yel-Bom's Serv. Ctr., Tax Appeals Tribunal, May 10, 1990, revd sub nom Matter of Mobley v. Tax Appeals Tribunal, supra). If the requirement to keep records meant that only the required records could satisfy the taxpayer's burden of proof, we think that the Court could not have reached the conclusion it reached in Mobley.

As another ground for reconsideration, the Division argues that in Avildsen we did not address our decision in Matter of Fusco (Tax Appeals Tribunal, March 23, 1989). Again, we did not address Fusco because the Division did not raise it in its opposition to petitioner's

exception. The Division closes this part of its argument with the thought that because "the Tribunal addressed neither Tax Law §§ 658 and 697 nor Matter of Fusco in its decision in Avildsen, the motion to renew should be granted and the matter reconsidered because these items constitute 'new or additional proof not used the first time around' (Siegel, New York Practice, § 254, [West 1978])" (Division's motion, p. 11). We think that legal arguments are not "proof" and, as stated above, final agency decisions cannot be reopened based on additional legal arguments the parties wish to advance. Even if legal arguments were "proof," the quote from Siegel continues "[t]he new proof need not necessarily be newly discovered [footnote omitted], but the motion probably stands a better chance if it is and if there is good reason why this additional proof was not discovered till now" (Siegel, § 254 [West 1978]). The Division has offered no reason why it did not discover these statutes and case until now.

Next, the Division argues that because "the Tribunal has not addressed the effect sections 658 and 697 have on its decision in Avildsen, yet concluded that Feldman [Tax Appeals Tribunal, December 15, 1988] was in error and overruled, Feldman continues to be valid precedent in light of the rationale set forth by the Tribunal in Fusco" (Division's motion, p. 12). In Avildsen, we explicitly overruled Feldman to the extent it was inconsistent with our conclusion in Avildsen. We do not understand how our failure to address the statutes and cases not cited by the Division when arguing Avildsen could revitalize Feldman. If as the Division contends, Fusco was decided on the same basis as Feldman, the result would be that Fusco was overruled to the extent it was inconsistent with Avildsen.

As its next ground, the Division states that the audit guideline mentioned in our decision in Avildsen was not in effect during the years at issue and, therefore, was irrelevant. In any event, the Division contends that an audit guideline could not supersede a regulation.

The Division misunderstands the reference to the audit guideline in Avildsen. The audit guideline allowed auditors to accept taxpayers' statements, without necessarily requiring documents, to decide residency issues. We did not rely on this guideline as authority for our

disposition of the issue; therefore, whether or not it was in effect or superseded the regulation is irrelevant. We referred to it to point out that the Division was taking inconsistent positions, i.e., the Division was contending that the regulation required a taxpayer to produce records in order to prevail in a hearing but that such records were not required to prevail at the audit. This inconsistency is especially noteworthy because through it the Division sought to grant itself discretion to weigh the evidence of each taxpayer's case but would limit our power to do so.

Next, the Division contends that we introduced a "new" definition of credibility (involving competency as well as veracity) in Avildsen and that the case should be remanded to the Administrative Law Judge for redetermination based on this "new" definition.

As petitioner points out, we did not create a new definition of credibility in Avildsen, we simply quoted a hornbook definition (Fisch, New York Evidence, § 446 [2d ed 1977]). We quoted this hornbook definition to dispute the definition offered, without authority, by the Division that credible meant truthful in appearance rather than truthful in fact (Division's letter on exception).

Even if we had created the definition of "credible" set forth in Avildsen, we did not introduce it for the first time in Avildsen. In Matter of 1605 Bookcenter (Tax Appeals Tribunal, July 25, 1991, affd 188 AD2d 694, 590 NYS2d 591, affd 83 NY2d 240, 609 NYS2d 144), the Division asserted that the Administrative Law Judge erred in relying on testimony, uncorroborated by documents, to allocate taxable and nontaxable receipts. We affirmed the Administrative Law Judge's determination on this issue stating that "the Administrative Law Judge obviously found the testimony of [the witness] credible, i.e., that the testimony was competent and truthful" (Matter of 1605 Bookcenter, supra).

Next, the Division argues we erred in concluding that petitioner offered a valid reason for refusing to make his diaries available. The Division contends that section 697(e) of the Tax Law, section 87 of the Public Officers Law, and our policy to bar public access to the hearings would have protected the secrecy of petitioner's documents.

The issue presented to us in Avildsen was simply a legal one: whether the Administrative Law Judge erred in concluding that credible testimony alone was not sufficient for petitioner to sustain his burden of proof. We listed the fact that petitioner offered a rational justification for not offering the diaries as one of the many factors that we assumed resulted in the Administrative Law Judge's finding that the testimony was credible. We made this list to counter the Division's claim that our decision would lead to the cancellation of all future statutory resident assessments. However, in Avildsen, we were not asked to, and did not, address the question of whether the Administrative Law Judge erred in finding the testimony credible. Therefore, the validity of petitioner's justification for not producing the records was not central to our decision.

In Avildsen, we also responded to the Division's contention that it would be powerless to respond to a taxpayer's uncorroborated statements with the observation that the Division could, among other things, use its subpoena power to obtain relevant documents. We relied on Matter of Capital Dist. Better TV v. Tax Appeals Tribunal (200 AD2d 911, 606 NYS2d 930, lv denied 83 NY2d 758, 615 NYS2d 875) for our statement. In this motion, the Division argues that Capital Dist. Better TV is only "tentative authority" because at the time of the motion the party's opportunity to seek leave to appeal had not yet concluded. Whatever "tentative authority" may mean, the Division's leave to appeal was denied after the Division filed its motion; therefore, Capital District Better TV is no longer "tentative authority." The Division also argues that a subpoena is inappropriate because petitioner had the burden of proof and because petitioner was required by law and regulation to keep and make available records. To the first point, we respond that the petitioner in Capital District Better TV also bore the burden of proof. With respect to the second point, we do not see what bearing it has on whether the Division should issue a subpoena when a taxpayer has failed to produce records.

The Division concludes its arguments by stating that we have authority to reconsider Avildsen under People ex rel. Finnegan v. McBride (226 NY 252, 259) and Matter of Drew v.

State Liq. Auth. (2 AD2d 75, 153 NYS2d 444, affd 2 NY2d 624, 162 NYS2d 23) on the grounds of "irregularity in vital matters." The irregularities in vital matters listed by the Division are: "(i) the applicability of Tax Law §§ 658 and 697; (ii) the reconciliation of Fusco, Feldman, and Avildsen; (iii) the introduction of a new definition of 'credibility'; and (iv) the reasonableness of petitioner's refusal to make his diaries available for examination in light of the available safeguards" (Division's motion, p. 19). Assuming that the "irregularity in vital matters" standard is applicable to a quasi-judicial proceeding,[3] we have examined each of the grounds specified by the Division and find that they are neither irregularities, nor vital matters. Therefore, we conclude that there is no basis for us to reconsider our decision in Avildsen.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion of the Division of Taxation is denied.

DATED: Troy, New York
January 26, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

[3]Evans v. Monaghan (supra) suggests that the standard that applies in a quasi-judicial proceeding is even more strict than that applicable to a purely administrative action.