STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VARRINGTON CORPORATION	:	ORDER AND OPINION DTA No. 810048
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1984 through 1988.	:	
	:	

On April 25, 1995, 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 Varrington Corp. (Tax Appeals Tribunal, March 23, 1995). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel). Petitioner appeared by Curtis, Mallet-Prevost, Colt and Mosle (Michelle Rice, Esq., of counsel).

ORDER

Upon reading of the Notice of Motion, together with the Affirmation in Support of Motion for Reargument Before the Tax Appeals Tribunal, the memorandum in opposition submitted by petitioner and the supplemental correspondence dated May 25, 1995 submitted by the Division of Taxation and due deliberation having been had thereon,

Now on the motion of the Division of Taxation, it is,

ORDERED that the motion of the Division of Taxation be and the same hereby is denied.

OPINION

On April 25, 1995, the Division of Taxation ("Division") filed a Notice of Motion and Supporting Affirmation with the Tax Appeals Tribunal requesting an Order granting it leave to reargue, or in the alternative to renew, the proceedings before us in Matter of Varrington Corp. (supra) on the ground that our decision of March 23, 1995 was "based on an issue not raised by

the petitioner and to which the Department of Taxation was not given an opportunity to address" (Division's Notice of Motion for Reargument).

Petitioner argues, in opposition to the motion, that the point on which we based our decision was raised by petitioner from the inception of this proceeding, was specifically relied upon by the Administrative Law Judge in his determination and was specifically excepted to by petitioner.

In our March 23, 1995 decision, we concluded that the Division had improperly determined that petitioner, a foreign corporation, was doing business in the State of New York for the years 1984 through 1988 and was, therefore, subject to corporation franchise tax pursuant to Tax Law § 209(1). We concluded that the Division had relied upon the provisions of 20 NYCRR 1-3.2(a)(6)(i)(a) as the basis for the purported liability of petitioner. Finding such section to be inapplicable to the years ending prior to its effective date of July 11, 1990, we stated:

> "[s]ince the years at issue here are 1984 through 1988, the ownership portion of the regulations is not applicable to petitioner. Further, since the notices here were based solely on provisions of the regulations not in effect for the years at issue, it is clear that the Division proceeded upon a fundamentally erroneous theory" (Matter of Varrington Corp., supra).

Although the Administrative Law Judge concluded that there were other indicia that petitioner was doing business in the State of New York for the years 1984 through 1988, we did not find that the notices of deficiency at issue were premised on these bases. Citing our decision in Matter of Locy Develop. (Tax Appeals Tribunal, May 14, 1991), in Varrington we stated that:

> "'[i]f the taxpayer demonstrates that "the [Division] in stating the account has proceeded upon a principle or theory fundamentally erroneous," the assessment may be set aside (People ex rel. Charles Kohlman & Co. v. Law, 239 NY 346, 352, 146 N.E. 622, 625)'" (Matter of Varrington Corp., supra).

At the outset, it must be noted 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).

Evans v. Monaghan (supra) 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. The standard established by Evans is similar to that under Rule 2221 of the Civil Practice Law and Rules (hereinafter "CPLR") and we have been guided by case law under that section in the past (Matter of Jenkins Covington, N.Y., supra). A motion to renew must be based "upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court" (Foley v. Roche, 68 AD2d 558, 418 NYS2d 588, 594). The motion to renew should be denied if the party fails to offer a valid excuse for not submitting the additional facts upon the original application (Foley v. Roche, supra). Therefore, as we stated in Jenkins Covington, "to obtain reconsideration of a Tribunal decision, the party must show that the newly discovered facts could not have been discovered with due diligence and the party must offer a valid excuse for not submitting the facts upon the original application" (Matter of Jenkins Covington, N.Y., supra). There is no offer of newly discovered evidence by the Division in support of its motion and for this reason alone, the motion to renew must be denied.

A motion to reargue, on the other hand, is addressed to the discretion of the court and 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. Its purpose is

not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (Foley v. Roche, supra, 418 NYS2d 588, 593).

In considering whether or not we "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" in making our decision, we first note our agreement with petitioner that the issue of the prospective or retroactive applicability of the provisions of 20 NYCRR 1-3.2(a)(6)(i)(a) was raised by the parties at the hearing and was specifically considered by the Administrative Law Judge in his determination.

In petitioner's closing argument at the hearing, in response to the argument of the Division, petitioner's representative stated that:

> "Mr. Della Porta suggests that because Varrington contributed over 97 percent of the capital to the partnership it should be subject to the franchise tax. It should be noted, however, that the franchise tax regulation as it applies to these taxable years is completely silent about the taxability of a foreign corporation limited partner which has substantial interest in a limited partnership doing business in New York. Indeed, if the incorporation -- I'm sorry. -- if the regulation had intended to tax on a retroactive basis all foreign corporate limited partners with the substantial interest in a limited partnership, the regulations would have so stated. This is amply evidenced by Subsection A of the same regulation which only taxes on a prospective basis for years going forward from 1990, I believe, all foreign corporate limited partners with a one percent or more interest in a partnership doing business in New York. In short, if they had intended to tax limited partners prior to 1990, its clear they could have done so and would have done so, and in the regulation" (Tr., pp. 44-45).

In his determination, the Administrative Law Judge quoted 20 NYCRR 1-3.2(a)(6)(i)(a) (among others) at Conclusion of Law "B"; found that section specifically applicable to petitioner in Conclusion of Law "D"; discussed petitioner's argument that such section was applicable only prospectively at Conclusion of Law "E"; and concluded therein that the section was retroactively applicable to the years at issue. Petitioner, in its exception, stated that it disagreed with the conclusion of the Administrative Law Judge that "clause (a) of section 1-3.2(a)(6)(i) of the franchise tax regulations applies on a retroactive basis from the effective date of the regulations" (Petitioner's exception, Rider A).

The Division, in opposition to petitioner's exception, conceded in a footnote in its brief that this section applied only prospectively, although it misidentified the section at issue: "[t]he

Division concedes that the dollar amount of petitioner's capital contribution is not a basis for nexus under the regulations for the years at issue. (20 NYCRR 1-3.2[a][6][1][C] [sic] is prospective only)" (Division's brief, p. 3). As a result, we cannot accept the Division's position that this issue was never raised or briefed by the parties prior to the Tribunal's decision.

Secondly, we disagree with the contention of the Division that we have made an erroneous decision as a matter of law. Our decision in Matter of Varrington Corp. (supra) was reached after a thorough review of the entire record in the matter and the relevant law. The motion before us indicates no circumstances which require us to find that we "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." As a result, the motion to reargue must be denied.

Therefore, upon reading and filing the Notice of Motion and the Affirmation of James Della Porta in support thereof, the memorandum of law submitted by petitioner in opposition thereto and the letter memorandum submitted in reply thereto by the Division, and due deliberation having been had thereon,

Now, on motion of the Division of Taxation, it is

ORDERED, ADJUDGED and DECREED that the motion of the Division of Taxation be and the same hereby is denied.

DATED: Troy, New York
November 9, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner