STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **LEONARD HABER** | : | |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1985 and 1986. | : | DECISION DTA No. 810076 and 810077 |
| In the Matter of the Petition | : | |
| of | : | |
| **LEONARD AND MARINA HABER** | : | |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1987. | : | |

Petitioners Leonard Haber and Marina Haber, c/o James Druker, 1325 Franklin Avenue, Garden City, New York 11530, filed exceptions to the determination of the Administrative Law Judge issued on September 21, 1994 and to the order of the Administrative Law Judge issued on March 30, 1995. Petitioners appeared by Kase & Druker (James O. Druker, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel)

Petitioners filed a brief in support of their exceptions, the Division of Taxation submitted a brief in opposition and petitioners filed a reply brief. Oral argument was heard on March 14, 1996, which date began the six-month period for the issuance of this decision.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

## *ISSUE*

Whether the Administrative Law Judge erred in not granting the post-hearing motion of petitioners to reopen the hearing.

## *FINDINGS OF FACT*

For the reasons stated below, we set aside the facts found by the Administrative Law Judge in his determination of September 21, 1994 and accept those facts found by the Administrative Law Judge in his order of March 30, 1995. The facts in said order are as follows:

On September 21, 1994, the Division of Tax Appeals issued a determination in the Matter of Leonard Haber et al. In this case, the Division of Taxation ("Division") made repeated attempts to review Mr. Haber's and Criticare Support Services, Inc.'s ("Criticare") records. The result of these attempts was not satisfactory to the Division.

In order to calculate the amount of tax due from Criticare, the Division accepted the gross receipts on the corporate returns which were provided. However, the Division disallowed one-half of the cost of goods sold and other deductions resulting in a revised taxable income for the corporation. Thereafter, the Division considered the additional corporate income to be unreported income to Mr. Haber. On the basis of its audit, the Division issued the notices of deficiency at issue herein. At the hearing on July 16, 1993, petitioners offered to provide the Division with an opportunity to review their documents. However, before this review occurred, all of Criticare's records were turned over to a grand jury pursuant to a subpoena. During the hearing petitioners questioned whether the notice issued to Leonard and Marina Haber was properly mailed and questioned the accuracy of the audit methodology which was used to determine the amount of tax due.

The determination held that the Notice of Deficiency issued to Leonard and Marina Haber was properly mailed. The determination also held that it was proper for the Division to disallow certain corporate expenses as unsubstantiated and, in turn, consider the additional

corporate income arising from the disallowed expenses as unreported income of petitioners. In reaching the foregoing decision, it was noted that the failure to produce auditable records warranted the decision to disallow one-half of Criticare's expenses. The one exception to the foregoing holding was with respect to the wage expense attributable to Mr. Haber's salary. The Division was directed to recalculate the asserted deficiency by allowing the corporation a deduction for the salary expenses which corresponded to the wage income reported by Mr. Haber on his personal income tax returns. Lastly, it was held that petitioners' reliance upon the Cohan rule (Cohan v. Commr., 39 F2d 540, 544) to establish entitlement to larger deductions was misplaced because petitioners had records which they declined to make available to the Division.

In support of their motion, petitioners argue that their previous counsel is presently the subject of a Federal criminal investigation by the United States Attorney's Office for the Eastern District of New York and by the Tax Division of the United States Justice Department. Petitioners maintain that the Justice Department investigation relates to the same corporations and the same time periods as are at issue herein. It is then noted that their previous representative served as petitioners' accountant and attorney during the periods in question.

Petitioners proceed to argue that their prior representative has known for a period of time that the Justice Department is seeking to use petitioners as witnesses against him. Nevertheless, the prior counsel continued to represent petitioners during the hearing process. It is argued that as part of the previous representative's strategy, he suggested that petitioners not testify on their own behalf. Petitioners submit that it was their previous counsel's primary interest to protect himself rather than petitioners. It is maintained that the transcripts of the hearing show a poorly-prepared and poorly-tried case on behalf of petitioners and that petitioner should have prevailed on the merits.

Relying upon United States v. Levy (25 F3d 146), petitioners submit that a clear conflict of interest has transpired and that in similar situations the courts have overturned criminal

convictions when less substantial conflicts have appeared.

In opposition to the motion, the Division first presented an affirmation which outlined the dates upon which various events occurred in this proceeding.

In its memorandum, the Division contends that Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, confirmed 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151) details when a matter should be reopened and that petitioners' reliance upon United States v. Levy (supra) is misplaced since that case involves a criminal defendant's Sixth Amendment right to counsel.

The Division next submits that it fails to see where there is a conflict of interest in this matter. The Division notes that no basis is presented for the assertion that petitioners' previous counsel is the subject of an investigation. It is contended that the subpoena, which was presented as the basis for petitioners' failure to produce their records, shows that it was the records of Criticare that were sought. Hence, it is reasonable to assume that petitioners, and not their prior representative, were the subject of the investigation. The Division points out that petitioners omitted any discussion of their status in any Federal investigation of Criticare or themselves. Further, petitioners have not attempted to refute their prior representative's characterization at the hearing of his role as an accountant who reviewed the work of Criticare's internal people and made himself available to answer questions.

The Division submits that the conclusion to be drawn is that petitioners have known "for quite some time" that the Justice Department was planning to use them as witnesses against their previous counsel. Therefore, petitioners continued to retain their previous counsel despite the Justice Department's plans for them. It is argued that petitioners did not make an independent inquiry or change representatives until after the exception was filed. According to the Division, petitioners did not make an effort to have other counsel become involved in this matter until the last day on which petitioners' brief in support of the exception was due.

The Division next calls attention to the decision in In Re Critical Care Support

Services (138 Bankr 378). The Division submits that the decision demonstrates three things. First, that petitioners elected to have their prior representative, along with Macco, Hackeling, Stern & Christensen, represent them in a Federal tax matter. Second, the Division notes that the moving papers lack any discussion of whether petitioners have sought or are seeking to reopen In Re Critical Care Support Services (supra) and what the disposition of such attempts may have been. Lastly, the decision demonstrates that, as early as 1992, petitioners had retained different counsel to represent them on tax matters. It is contended that this is relevant because the tax notices involved herein were issued in January 1990, demonstrating that petitioners affirmatively selected their previous counsel rather than Macco, Hackeling, Stern & Christensen, or some other representative, and continued to stay with the same representative until November 21, 1994.

The Division contends that petitioners' prior representative did the best he could given what he had to work with. It is noted that the prior counsel succeeded in demonstrating that petitioners were entitled to a partial reduction in the assessment. The Division argues that at no point did petitioners' prior counsel represent that his clients presented him with complete books and records. According to the Division, without this information it is nearly impossible to discredit the estimation technique utilized. It is then noted that petitioners' affirmation is similarly silent concerning the availability, in auditable form, of a complete set of books and records.

Lastly, the Division argues that petitioners' assertion that they should have prevailed on the merits is merely conclusory in nature. According to the Division, while petitioners have the option to change representatives, the mere fact that they chose to change representatives is no basis for reopening the matter.

In a reply brief, petitioners assert that they have demonstrated that the individual who represented them at the hearing in this matter, had a major conflict of interest with petitioners which absolutely disqualified him from representing them.

Petitioners next contend that, as in Matter of Jenkins Covington, N.Y. (supra), petitioners moved with due diligence and it is clear that the determination has not become final. Petitioners submit that their previous counsel was ineligible to represent them because of the conflict of interest.

According to petitioners, this case is similar to People v. Day (131 Misc 2d 211, 499 NYS2d 1003), which held that an attorney was absolutely disqualified from representing a defendant who would be called as a witness against that attorney at a trial of a related matter. It is noted that the court reached this holding despite the fact that the defendant chose the attorney to represent him.

Relying upon Matter of Hof (102 AD2d 591, 478 NYS2d 39), where a court disqualified an attorney for an estate on the ground of conflict of interest, petitioners submit that the principles set forth in People v. Day (supra) and United States v. Levy (supra) are identical to the standards used in civil cases.

Petitioners argue that the prejudice from the prior counsel's representation is shown by the argument in the Division's brief which maintained that petitioners' representative failed to take advantage of the opportunity to speak at length as to the manner in which Criticare conducted its affairs. The Division's brief also notes that petitioners failed to appear at the hearing. Petitioners aver that their failure to appear was on the advice of their prior representative, who was also the main witness in their absence. It is contended that prior counsel created the bookkeeping methods of Criticare, was intimately familiar therewith, and that his presentation represents a choice to place his own interest in keeping matters secret before that of petitioners, his clients, in contesting petitioners' tax liability.

In conclusion, petitioners assert that present counsel would offer the testimony of Marina Haber who would allegedly be able to demonstrate how Criticare paid its nurses, including the percentage of the fee that was paid to the nurses by Criticare. According to petitioners, Mrs. Haber's testimony is likely to result in a reduction of the tax liability in issue.

***OPINION***

Petitioners have taken exception to the determination of the Administrative Law Judge denying the relief requested in their petitions and to the order of the Administrative Law Judge denying their motion to set aside that determination and reopen the hearing in this matter. Due to our decision on the issue of whether the Administrative Law Judge erred in refusing to grant petitioners' motion, we need not consider the other issues raised on exception by petitioners.

The Administrative Law Judge treated petitioners' motion as one to reargue or to renew and he relied on our decision in Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151) in which we stated:

> "[a]s we have repeatedly held, we have no statutory authority to reconsider our decisions and in the absence of statute, our authority to reconsider our decisions is limited . . . . Because the basic standard established by Evans [Evans v. Monaghan, 306 NY 312, 118 NE2d 452] is similar to that under Rule 2221(a), we are guided by the case law under Rule 2221(a) and conclude that 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).

The standard articulated by the Court of Appeals in the case of Evans v. Monaghan (supra) is as follows:

> "[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, supra, 118 NE2d 452, 457).

In petitioners' motion, their new attorney presented his affirmation attesting that the prior representative of petitioners (Peter Newman) was the subject of a Federal criminal investigation relating to his activities with Criticare Support Services, Inc., the corporation wholly owned by petitioner Leonard Haber, for the same time period herein at issue. Peter Newman was also the accountant for Criticare. Their new attorney attested that the Justice Department was seeking to

have petitioners testify against Peter Newman. At Peter Newman's advice, petitioners refrained from attending the Division of Tax Appeals hearing while Peter Newman appeared and presented his own testimony. Petitioners sought a new hearing on the ground that the actions of petitioners' representative constituted a conflict of interest which so tainted their right to a hearing that the hearing itself must be considered a nullity and petitioners should have the opportunity for a new hearing. The Administrative Law Judge concluded that none of these facts warranted granting petitioners' motion. We disagree with the conclusion of the Administrative Law Judge.

Petitioners argued that the conflict of interest in their case was similar to that in Matter of Hof (102 AD2d 591, 478 NYS2d 39). There, the Appellate Division disqualified the attorney for an estate and stated the following:

> "[t]he critical issue here, moreover, is not the actual or probable betrayal of confidences, but the mere appearance of impropriety and conflict of interest (Code of Professional Responsibility, Canon 9). . . .
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> "The disciplinary rules and ethical considerations set down in the Code of Professional Responsibility are also pertinent. Although the provisions of the Code do not enjoy the status of statutory or decisional law, they do represent the acknowledged standards of the profession and the courts 'should not denigrate them by indifference' (Matter of Weinstock, 40 NY2d 1, 6, 386 NYS2d 1, 351 NE2d 647). Under DR 2-110(B) and DR 5-105, an attorney must withdraw from a case when it becomes apparent that he can no longer serve his client with undivided loyalty. . . .
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> "It is an undeniable maxim of the legal profession that an attorney must avoid even the appearance of impropriety (Cardinale v. Golinello, 43 NY2d 288, 401 NYS2d 191, 372 NE2d 26, supra; Rotante v. Lawrence Hosp., 46 AD2d 199, 361 NYS2d 372; Code of Professional Responsibility, Canon 9)" (Matter of Hof, supra, 478 NYS2d 39, 41-43).

The Administrative Law Judge found petitioners' reliance on Hof misplaced. He stated: "[i]t is significant that in Hof, the administratrix moved to disqualify the co-administrator's attorney before the proceeding began. Similarly, if petitioners had moved for an adjournment of the hearing before it began in order to obtain new counsel, they would have been in a much stronger position" (Order, conclusion of law "I"). While Hof and the present case are factually

distinguishable and while we agree with the Administrative Law Judge that such action by petitioners would have alleviated the problem they now face, the principles enunciated in Hof are relevant to the present situation.

The Administrative Law Judge correctly noted that, unlike criminal proceedings, there is no right to the effective assistance of counsel in proceedings before the Division of Tax Appeals (Matter of Nusco, Inc., Tax Appeals Tribunal, March 31, 1994). We disagree, however, with the Administrative Law Judge's conclusion that the standard in Matter of Jenkins Covington, N.Y. (supra) is dispositive of petitioners' motion. As the Administrative Law Judge noted, in Matter of Byram (Tax Appeals Tribunal, August 11, 1994) we held that Jenkins Covington, N.Y. is not controlling if an exception is pending before the Tax Appeals Tribunal and the matter has not been finally decided by the Division of Tax Appeals. That is the situation here.

The issue raised by petitioners in their post-hearing motion was, in essence, whether their former attorney was qualified to act as their representative before the Division of Tax Appeals in this matter because of the existence of an inherent conflict of interest. We have no jurisdiction to enforce the Code of Professional Responsibility against an attorney (Matter of R. A. F. General Partnership, Tax Appeals Tribunal, November 9, 1995). However, like the Court in Matter of Hof (supra), we must be mindful that the provisions of the Code of Professional Responsibility represent the acknowledged standards of the profession and they should not be denigrated by indifference. We find that the situation of petitioners is analogous to that of the petitioners in Matter of Coliseum Palace (Tax Appeals Tribunal, November 17, 1988). There, we stated: "[s]ince the facts here indicate that Mr. Faella was not a qualified representative, we deem it prudent and proper to consider the hearing that was held a nullity and to remand this matter for a new hearing." Here, given the totality of the circumstances surrounding petitioners and their former attorney, we believe that, as in Coliseum Palace, Peter Newman was not a qualified representative of petitioners. As a result, we reverse the determination of the Administrative Law Judge on his order and remand this matter to the Division of Tax Appeals

in order to grant petitioners a new hearing on the merits of their petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

The exception of Leonard and Marina Haber is granted to the extent that this matter is remanded to the Division of Tax Appeals for a new hearing.

DATED: Troy, New York
August 1, 1996

/s/Donald C. DeWitt
Donald C. DeWitt
President

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