STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
YOUNGSTOWN YACHT CLUB, INC.	:	ORDER DTA No.813503
for Redetermination of a Deficiency/Revision of a Determination or for Refund under Articles 28 and 29 of the Tax Law for the period June 1, 1987 through August 31, 1993.	:	

Petitioner Youngstown Yacht Club, Inc., Water Street, Youngstown, New York 14174, filed an exception to the determination of the Administrative Law Judge issued on August 15, 1996.

Subsequently, at oral argument before the Tax Appeals Tribunal, on June 12, 1997, petitioner made a motion to the Tribunal pursuant to regulation 20 NYCRR 3000.5, to reopen the record in the hearing held before the Administrative Law Judge. Petitioner's written motion and documents in support were submitted on June 25, 1997. This motion, if granted, would permit petitioner to submit additional evidence in support of its case.

Petitioner appeared by Hodgson, Russ, Andrews, Woods and Goodyear (Christopher L. Doyle, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel). Petitioner and the Division of Taxation filed a Letter Memorandum in Support and an Affirmation in Opposition, respectively, 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 August 15, 1996 by Administrative Law Judge Marilyn Mann Faulkner. Petitioner, by its representative, filed an exception with the Tax Appeals Tribunal (hereinafter "Tribunal") on or about September 16, 1996. Oral argument was

granted to petitioner in this case, and was heard by the Tribunal on June 12, 1997. At the oral argument, petitioner's representative made the motion to reopen which is the subject of this order. Petitioner's written motion was submitted on June 25, 1997.

Petitioner's motion is supported by the affidavit of Christopher L. Doyle, Esq., petitioner's counsel. Mr. Doyle's affidavit requests an order which would serve to reopen the hearing record for the purpose of introducing copies of three documents which were not in existence at the time the hearing record was closed on March 1, 1996:

1) a letter dated July 1, 1996 from Senators Bruno, Johnson and Hoblock to Governor Pataki;

2) a letter dated September 24, 1996 from Governor Pataki to Senator Hoblock; and

3) Technical Services Bureau Memorandum TSB-M-96(16)S.

Mr. Doyle's affidavit states that in the petition of this matter before the Division of Tax Appeals, petitioner requested that the issue of whether certain payments received by petitioner from its members were "dues" within the meaning of the Tax Law be addressed. Both petitioner and the Division of Taxation (hereinafter "Division") agreed to have this matter determined upon the submission of documents. As a part of such submission, the parties stipulated to the fact that petitioner is a "social or athletic club" within the meaning of the relevant statutory provisions. In its brief filed with the Division of Tax Appeals, petitioner argued that certain payments received from its members were not "dues" pursuant to the Tax Law. The Division contends that, according to its interpretation, Federal case law supports the conclusion that the fees at issue are "dues" and, thus, the Division should prevail. The Division argued that it was the "legislative and judicial policy of this State to administer local taxing statutes in a manner consistent with Federal tax laws on which they are patterned" (Division's hearing brief, p. 12). The Administrative Law Judge ruled against petitioner on the merits of the case, relying in part on the Federal authority cited.

The July 1, 1996 letters which petitioner seeks to introduce into evidence from Senators Bruno, Johnson and Hoblock to Governor Pataki set forth their position regarding sales and use

tax on sportsman club dues, suggesting it was not the intent of the Legislature to subject these clubs to sales tax. The September 24, 1996 correspondence sought to be introduced consisted of Governor Pataki's response to Senator Hoblock's July 1, 1996 letter. Governor Pataki indicates by such correspondence that the Division will not seek sales tax on dues and initiation fees paid by members of sportsmen clubs. The third document sought to be introduced into evidence is a Technical Services Bureau Memorandum, TSB-M-96(16)S dated December 23, 1996. It is entitled "Dues and Initiation Fees Paid to Rod or Gun Clubs No Longer Subject to Sales Tax." The memorandum speaks to the revision of the Division's policy imposing sales taxes on members' dues and initiation fees of rod and gun clubs.

Petitioner did not bring this motion at any time prior to June 12, 1997, 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:
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> > "(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."

Petitioner suggests that in accordance with the Tribunal's Rules of Practice and Procedure, the information that petitioner seeks to have introduced into the hearing record probably would have produced a different result had it been made a part of the record. Petitioner relies upon the documents to support its argument that it was the intent of the Legislature to diverge from interpretations of certain former Federal provisions relating to dues, which petitioner suggests would have had a significant bearing on how the Administrative Law Judge interpreted the Tax Law provision in issue. Further, petitioner states that these documents could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, since the date of the earliest document is four months after the record was closed.

The Division maintains that petitioner's motion to reopen seeks the introduction of evidence which is not material or relevant, and which did not exist at the time of the submission of documents to the Administrative Law Judge. The Division argues that the issue addressed in the proffered documents, i.e., whether a particular type of organization is considered to be a social or athletic club, is not in issue in the present matter, where such status has been stipulated to by the parties. The Division further notes that the Technical Services Memorandum by its terms applies prospectively, and cannot have an effect on the present matter concerning the period June 1, 1987 through August 31, 1993. Finally, the Division maintains that it is the policy of New York State to follow Federal laws after which New York's laws are patterned, and the determination of the Administrative Law Judge is not inconsistent with such policy. Nor do any of the proffered documents influence such policy, since the Division is not precluded from adopting a policy that is not consistent with Federal interpretations.

We conclude that petitioner's motion to reopen should be 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 August 15, 1996. Petitioner did not make this motion until June 12, 1997 orally, and in written form, on June 27, 1997. In either case, 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, petitioner's motion papers, 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 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, although the evidence is new to this matter, it does not constitute "newly discovered" in accordance with the regulation and case law since none of the documents existed at any time prior to the closing of the record by the Administrative Law Judge on March 1, 1996, a fact which is not disputed by the parties. The language of the regulation which permits the motion clearly anticipates that the evidence must exist at the time the record is created, but was merely not offered at that time, despite due diligence. Such interpretation is confirmed by the Court in ***Commercial Structures***. Clearly, the three documents petitioner seeks to introduce did not exist when the record was created and, therefore, could not have been discovered with any exercise of diligence in time to be offered into the record of the proceeding (20 NYCRR 3000.16[a]; ***Matter of Commercial Structures v. City of Syracuse, supra***). Further, in the interests of judicial economy and fairness, the hearing process must have some definition and finality (***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

Upon reading the motion and the accompanying affidavit filed by petitioner on June 25, 1997 and the affirmation in opposition filed by the Division of Taxation on July 22, 1997, 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
October 16, 1997

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner