STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AUTO PARTS CENTER, INC.	:	DECISION DTA NO. 815329
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1989 through February 29, 1992.	:	

Petitioner Auto Parts Center, Inc., 246-06 51st Avenue, Douglastown, New York 11363, filed an exception to the order of the Administrative Law Judge issued on October 31, 2002. Petitioner appeared by David L. Silverman, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the determination issued in this proceeding should be vacated on the ground of newly discovered evidence and the matter remanded for a hearing on the merits.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

A determination dated July 23, 1998 was issued to petitioner by the Division of Tax Appeals, which denied its petition and sustained a Notice of Determination dated March 1, 1993, as modified by a conciliation order dated August 9, 1996. On July 23, 1998, a copy of this determination was sent by certified mail to petitioner, Auto Parts Center, Inc., at the same street address in Douglaston, New York as shown above and to its former representative, Alfred J. Parisi, Esq. The determination sent by certified mail to Mr. Parisi was returned as unclaimed to the Division of Tax Appeals, which resent it to him by regular mail on August 24, 1998.

The determination was based upon a review of an administrative record created by the parties pursuant to 20 NYCRR 3000.12, which authorizes the submission of evidence relevant to the issues in a controversy without the need for appearance at a hearing if the parties so consent. Petitioner's authorized representative, Alfred J. Parisi, and the representative of the Division of Taxation ("Division"), Robert Tompkins, Esq., executed a waiver of hearing and agreed to submit the matter for determination based upon documents. Pursuant to the Administrative Law Judge's letter dated September 19, 1997, the following schedule was established for the submission of documents: filing of documents by the Division, October 17, 1997; filing of documents and a brief by petitioner, November 21, 1997; filing of the Division's brief, December 19, 1997; and filing of petitioner's reply brief, January 2, 1998. Pursuant to this schedule, the Division filed its documents, petitioner filed its brief and documents and the

Division filed its brief. No reply brief was filed on behalf of petitioner. The Administrative Law Judge's letter dated September 19, 1997 noted that, "The record will be closed to further evidence as of November 21, 1997, i.e., the date of petitioner's submission of documents and initial brief."

On May 11, 1998, petitioner's former representative, Alfred J. Parisi, was disbarred by a decision of the Supreme Court, Appellate Division, as a result of his multiple acts of conversion of funds deposited in his Interest on Lawyer Account. Approximately six months earlier, on December 19, 1997,[1] Mr. Parisi had been suspended from the practice of law by the Supreme Court, Appellate Division, "based upon his persistent failure to comply with the demands of the Grievance Committee in connection with a pending investigation" concerning a complaint filed on behalf of the United States Small Business Administration "alleging the conversion of funds entrusted to him as fiduciary." Furthermore, on November 8, 1999, more than a year after attorney Parisi's disbarment, the Supreme Court, Appellate Division, imposed a fine of $1,000.00 against him for "acts of contempt" consisting of his "appearing at real estate closing as attorney for seller, and preparing escrow agreement, after suspension was entered . . . ."

We find the following additional finding of fact.

> On or about June 14, 2002, a notice of motion to reopen the record with supporting affirmation and affidavits was filed with the Division of Tax Appeals by petitioner. On August 23, 2002, an affirmation in opposition to petitioner's motion was filed by the Division.

[1] Mr. Parisi was served with the order of suspension on December 29, 1997 according to petitioner's Exhibit "5" included in its motion papers.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner's motion was, in substance, a motion to vacate a determination issued more than four years prior. The Administrative Law Judge rejected petitioner's argument that because an Administrative Law Judge has the authority to order a continuance, an extension of time or an adjournment for good cause, such authority encompassed the relief sought by petitioner.

The Administrative Law Judge reviewed the grounds for obtaining an order vacating a determination pursuant to section 3000.16 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et seq.). The Administrative Law Judge noted that petitioner's motion was not based on any of these grounds but rather on its contention that its former representative was not authorized to practice law at the time he was representing petitioner. The Administrative Law Judge concluded that even if proven, this was not a ground on which to vacate the determination. The Administrative Law Judge also noted that a motion to reopen the record must be made within 30 days after the determination has been served. In this case, the determination was issued four years prior to the motion.

The Administrative Law Judge noted that petitioner's former representative was authorized to practice law at the time the hearing was waived and on the date set by the Administrative Law Judge for petitioner's submission of its evidence. The Administrative Law Judge pointed out that an attorney is not the only category of individual authorized to represent taxpayers before the Division of Tax Appeals nor is a taxpayer required to have an attorney representative in the Division of Tax Appeals.

Additionally, the Administrative Law Judge found that even if petitioner had made the legal arguments delineated in its motion papers regarding the merits of its case in the course of the submission process, the Tax Appeals Tribunal (hereinafter the "Tribunal") had already rejected such arguments in ***Matter of Y & G, Inc.*** (Tax Appeals Tribunal, February 4, 1999), which was a companion case to the matter at hand.

The Administrative Law Judge observed that petitioner's petition was denied as a result of its failure to provide evidence of compliance with the exemption from sales tax under Tax Law § 1117 concerning the sales of cars to nonresidents. The Administrative Law Judge noted that petitioner did not include any documentation in its motion papers for the car sales found taxable by the Division.

Although the Division canceled penalties subsequent to the issuance of the July 23, 1998 determination, the Administrative Law Judge found that this showed that the Division had been fair in its dealing with petitioner, not that the Division agreed that petitioner had been improperly represented.

ARGUMENTS ON EXCEPTION

Petitioner argues that its former representative did not adequately protect petitioner's interests, was not authorized to practice law at crucial points during the proceeding and appears to have ignored petitioner's case. Petitioner maintains that it was denied the right to be adequately represented. Petitioner asserts that his representative submitted no evidence on his behalf, waived a hearing and was later disbarred and jailed for converting a client's funds. Petitioner claims that it was unaware that a determination had been rendered by the

Administrative Law Judge and, as its representative had possession of the entire file, petitioner never knew that it had only 30 days in which to seek review of an adverse determination.

Petitioner notes that in ***New York State Socy. of Enrolled Agents v. New York State Div. of Tax Appeals*** (161 AD2d 1, 559 NYS2d 906), it was found that ensuring adequate and effective retained representation for taxpayers was an important public purpose. Petitioner argues that since the Division found reasonable cause to cancel penalties subsequent to the determination, the Division must have concluded that petitioner was not adequately represented and the Division should be estopped from disputing this claim.

Petitioner asserts that a remand is appropriate under ***Matter of Jenkins Covington, N.Y., Inc.*** (Tax Appeals Tribunal, November 21, 1991, ***confirmed Matter of Jenkins Covington, N.Y., Inc. v. Tax Appeals Tribunal***, 195 AD2d 625, 600 NYS2d 281, ***lv denied*** 82 NY2d 664, 610 NYS2d 151) where unqualified representation has been shown. Petitioner cites ***Colton v. Oshrin*** (155 Misc. 383, 278 NYS 146) for the proposition that proceedings participated in by a person not authorized to practice as an attorney are void. Petitioner believes that the prudent and proper course would be to remand this matter for a hearing.

Further, petitioner alleges that its motion to reopen is not time barred. Petitioner maintains that the 30-day period for a motion to reopen is not jurisdictional and, pursuant to the Tribunal's Rules of Practice and Procedure, the period may be extended for good cause shown. According to petitioner, if the time to file an exception can be extended for good cause, the time within which to request a remand should be similarly extended. Petitioner argues that in ***Jenkins Covington***, the Tribunal recognized that it had limited authority to reconsider past decisions and that the discovery of new evidence could warrant a decision to vacate.

Petitioner maintains that it has demonstrated compliance with Tax Law § 1117 and, in the alternative, petitioner has demonstrated that certain transactions were exempt pursuant to that section. Petitioner alleged in its motion that a certain number of the cars used in the test period audit were delivered out of the country, as well as that salvage automobiles were incapable of being driven. This evidence, asserts petitioner, strongly suggests compliance by petitioner with Tax Law § 1117 and that the sales of such automobiles are not subject to taxation. As such evidence was never presented by petitioner's former representative, it should be considered as newly discovered evidence.

Petitioner also argues that the determination of the issues in ***Y & G*** should not preclude petitioner's position herein. Petitioner believes that it is not bound by the legal arguments raised in that case and that petitioner should be entitled to make its own arguments and present its own evidence.

The Division, in opposition, argues that petitioner's motion to reopen the record was made more than 30 days after the determination and is untimely. The Division maintains that the extension of time provided by 20 NYCRR 3000.23(b) is inapplicable to extend petitioner's time to file its motion. Rather, that section only affects time limits within a proceeding, not long after the proceeding has become final. In this case, once the time for filing an exception passed, the determination became final.

The Division disputes petitioner's claim that it has newly discovered evidence. The Division believes that the papers submitted in support of the motion do not contain new evidence nor was such evidence newly discovered as it was in the possession of petitioner throughout the proceeding. Furthermore, the Division asserts that even if such evidence was accepted, it would

not produce a different result in this case based on the holding in ***Y & G***, involving the same issues and the same principals of the corporation as in the present proceeding. In both cases, the Division maintains, petitioners failed to show entitlement to an exemption pursuant to Tax Law § 1117.

The Division argues that petitioner's representative was authorized to practice law during the time he represented petitioner and submitted its evidence and brief. Further, petitioner was advised of the determination of its case and of its right to file a Notice of Exception. The Division notes that petitioner gives no indication that it ever tried to contact its representative or explain why it did not file an exception for nearly four years after the determination was issued. The Division asserts that petitioner was not denied due process of law as ineffective counsel is not a ground for a new hearing (***see***, ***Matter of Nusco, Inc.***, Tax Appeals Tribunal, March 31, 1994). The Division notes that in ***Matter of Jenkins Covington, N.Y., Inc. (supra)***, the taxpayers requested a new hearing because their "representative" was neither an attorney, CPA or otherwise authorized to represent them before the Division. The Tribunal held that there was no statutory authority for it to reopen the hearing once the matter had been finally determined and a mere assertion that new evidence existed did not meet petitioner's burden of proof to reopen a matter. The Division argues that, here, petitioner has not presented any new evidence that was not available during the proceeding. Nor, argues the Division, is petitioner entitled to a remand, since failure of proof does not constitute circumstances allowing that relief.

OPINION

Section 3000.16 of the Tribunal's Rules of Practice and Procedure 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.

The determination of the Administrative Law Judge in this matter was issued on July 23, 1998. Petitioner did not make its motion until June 14, 2002. Thus, the motion was made more than 30 days after the issuance of the determination and, as such, is untimely.

Even if it had been timely filed with the Administrative Law Judge, the motion presented no facts which would constitute a basis for reopening the record. Our authority is limited by the principle articulated in ***Evans v. Monaghan*** (306 NY 312, 118 NE2d 452, 457), which stated 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. . . . 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***).

The regulation of the Tribunal at 20 NYCRR 3000.16, 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" [citation 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).

Petitioner argues that its "newly discovered evidence" consists of the fact that its former representative was incompetent to represent petitioner for at least part of the time preceding the issuance of a determination by the Administrative Law Judge. Further, petitioner argues that given the legal and professional difficulties faced by petitioner's former representative, such efforts as were made by him were inadequate.

Section 2014(1) of the Tax Law limits a taxpayer's choice of representatives in a proceeding in the Division of Tax Appeals as follows:

> Appearances in proceedings conducted by an administrative law judge or before the tax appeals tribunal may be by the petitioner or the petitioner's spouse, by an attorney admitted to practice in the courts of record of this state, by a certified public accountant licensed in this state, by an enrolled agent enrolled to practice before the internal revenue service or by a public accountant licensed in this state. The tribunal may allow any attorney, certified public accountant, or licensed public accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a petitioner in proceedings before the tribunal for a particular matter. In addition, the tax appeals tribunal may promulgate rules and regulations to permit a corporation to be represented by one of its officers or employees.

As petitioner notes, it has been judicially determined that the legislative intent of Tax Law § 2014 is to achieve the effective representation of taxpayers by competent professionals (***see***, ***New York State Socy. of Enrolled Agents v. New York State Div. of Tax Appeals, supra***). Relying on this, we held in ***Matter of Coliseum Palace*** that where an unqualified representative appeared on behalf of a taxpayer at the hearing, and where this fact was raised on exception, the prudent and proper course was to remand the matter for a new hearing (***Matter of Coliseum Palace***, Tax Appeals Tribunal, November 17, 1988). Similarly, in ***Matter of Haber*** (Tax Appeals Tribunal, August 1, 1996) we found petitioner's representative to be unqualified and we remanded the matter for a new hearing. In both cases, an exception was pending and the matter had not been finally concluded before the Division of Tax Appeals.

In ***Matter of Jenkins Covington, N.Y., Inc. (supra)***, we recognized that petitioner's case had been handled by an unqualified representative. However, we denied petitioner's request for a new hearing because this issue had not been raised either in a timely filed motion

to the Administrative Law Judge nor in a timely filed exception to the Tribunal. Instead, the petitioner in ***Jenkins Covington*** raised this issue long after we issued our decision and the matter was finally and irrevocably decided (***see also***, ***Matter of Byram***, Tax Appeals Tribunal, August 11, 1994 [wherein we concluded that where the matter was not finally decided by the Division of Tax Appeals, the Tribunal had more discretion to reopen the record for newly discovered evidence than in ***Jenkins Covington***]).

That is the situation facing petitioner herein. Petitioner was notified by certified mail on July 23, 1998 of the determination of the Administrative Law Judge and that it had a right to file an exception to that determination within 30 days. Not having done so, the determination became final and irrevocable. As petitioner did not raise the issue of its representative's qualifications before us in a timely manner, we find that we have no authority now to address it.

Our decision is not affected by petitioner's allegations that it was denied effective assistance of counsel as we have held that the lack of effective representation at a hearing is not a basis on which to grant a new hearing (***see***, ***Matter of Nusco, Inc., supra***). Therefore, the failure of petitioner's former representative to submit evidence does not transform such evidence into "newly discovered evidence."

As a result of our decision, we need not consider the remaining issues raised by petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Auto Parts Center, Inc. is denied;

2. The order of the Administrative Law Judge is affirmed; and

3. The petition of Auto Parts Center, Inc. is denied.

DATED: Troy, New York
July 24, 2003

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

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner