

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROGER FRENETTE</b>	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 816715
Personal Income Tax under Article 22 of the Tax Law	:	
for the Period April 1994 through June 1995.	:	

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Petitioner Roger Frenette, 4 Darien Place, East Northport, New York 11731, filed an exception to the determination of the Administrative Law Judge issued on June 22, 2000.

Subsequently, by Notice of Motion, dated October 23, 2000, petitioner moved to have the record reopened and additional documents added to the record. The motion was supported by the affirmation of Stephen P. Silberling, Esq. In response to the motion and underlying affirmation, the Division of Taxation submitted a letter, dated November 27, 2000, in opposition to the motion.

Petitioner appeared by Silberling & Silberling (Stephen P. Silberling, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

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 June 22, 2000 by Administrative Law Judge Roberta Moseley Nero. Petitioner filed an exception with the Tribunal on or about July 19, 2000. Petitioner filed his motion to reopen the record on or about October 23, 2000. Petitioner's motion was supported by the affirmation of Stephen P. Silberling, Esq., petitioner's counsel. The affirmation requests an order which would reopen the record for the purpose of introducing two newspaper articles from the periodical *Newsday*, dated August 31, 2000 and September 1, 2000, respectively, neither of which was in existence at the time the hearing record was closed on August 5, 1999.

The issue before the Administrative Law Judge was whether petitioner was liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Classic Carpentry, Inc. According to the affirmation of Mr. Silberling, the testimony of witnesses below demonstrated that petitioner was signing checks for the payment of the withholding tax liability on a weekly basis but the checks were not being deposited by two other individuals, Frank Stubbolo and Ken Stubbolo. These same individuals allegedly prevented others from informing petitioner of this diversion of funds. Mr. Silberling contends that this deception by the Stubbolos negated petitioner's ability to have willfully failed to pay the withholding taxes.

In support of his contention, Mr. Silberling has produced two newspaper articles from *Newsday*, dated August 31, 2000 and September 1, 2000, respectively, which call into question the honesty of the Stubbolos and reveal that they are being investigated by the Nassau County

District Attorney for possible violations of laws in connection with state and county subsidies they received for two ventures in Nassau County.

Although he concedes the articles were not in existence until September 1, 2000, Mr. Silberling urges that they be admitted into evidence because of their relevance and because doing so would best serve the interests of justice.

Petitioner did not bring this motion at any time prior to October 23, 2000, or make such motion to the Administrative Law Judge who was responsible for the determination of this matter.

### ***ORDER***

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.

Petitioner's motion to reopen is denied. Our rules of practice anticipate that a motion to reopen will be made to the Administrative Law Judge who rendered the determination (20 NYCRR 3000.16[b]). The determination of the Administrative Law Judge was issued on June 22, 2000. Petitioner did not make this motion until October 23, 2000. Thus, the motion was made more than 30 days after the issuance of the determination and after an exception to that determination had been filed with the Tribunal. Our regulations prohibit the Administrative Law Judge from granting a motion to reopen after the filing of an exception with the Tribunal (20 NYCRR 3000.16[b]).

In addition, even if 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 judgement 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, emphasis added).

In the instant matter, the newspaper articles sought to be entered into the record by petitioner do not constitute “newly discovered evidence” in accordance with the regulation and case law.

Upon reading the motion filed by petitioner on October 23, 2000 and the affirmation of Stephen P. Silberling, Esq. in support thereof, and the Division of Taxation’s letter in opposition, dated November 27, 2000, 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 following completion of the briefing schedule.

DATED: Troy, New York  
February 1, 2001

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner