STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS REEVES	:	ORDER DTA NO. 819086
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1994.	:	

Petitioner Thomas Reeves, 67 Woods Lane, East Hampton, New York 11963, filed an exception to the determination of the Administrative Law Judge issued on February 12, 2004.

Subsequently, by Notice of Motion, dated May 14, 2004, petitioner moved to have the record reopened and an additional document added to the record. In response to the motion, the Division of Taxation submitted a letter in opposition to petitioner's motion to reopen the record. Petitioner submitted a letter in response to the Division of Taxation's letter in opposition.

Petitioner appeared by Gallet, Dreyer & Berkey, LLP (David N. Milner, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Barbara J. Russo, 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 February 12, 2004 by Administrative Law Judge Dennis M. Galliher. Petitioner filed an exception with the Tax Appeals Tribunal (hereinafter "Tribunal") on March 11, 2004. Petitioner filed his motion to reopen the record with the Tribunal on May 14, 2004. The motion requests an order which would reopen the record for the purpose of allowing the introduction of the AFG Holding Company general ledger. Petitioner states that the ledger was unavailable during the conduct of the hearing but was recently discovered among the personal business records of George Perk, petitioner's former business partner.

Petitioner did not bring this motion at any time prior to May 14, 2004 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.

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 February 12, 2004. Petitioner made this motion on May 14, 2004 to the Tax Appeals Tribunal. 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]; ***see***, ***Matter of Frenette***, Tax Appeals Tribunal, February 1, 2001).

In addition, even if the motion 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 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).

In the instant matter, petitioner has not provided adequate explanation why this corporate general ledger, if it were relevant to petitioner's proof, could not have been discovered with due diligence in time to produce it at the hearing. In response to questions by the Division's attorney at the hearing concerning corporate ledgers, petitioner responded that Mr. Perk (who also testified at the hearing) had custody of all corporate financial records. However, petitioner stated that he did not make any attempt to subpoena such records from Mr. Perk prior to the hearing (Tr., pp. 57-58).

Upon reading the motion filed by petitioner on May 14, 2004, the Division of Taxation's letter in opposition to petitioner's motion to reopen the record and petitioner's letter in response, 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
September 2, 2004

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

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