STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEPHEN AND NANCI FISHER	:	ORDER DTA NO. 806534
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 Administrative Code of the City of New York for the Years 1977 and 1984.	:	

Petitioners, Stephen and Nanci Fisher, 2040 Polk Street, San Francisco, California 94109, filed a petition 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 Administrative Code of the City of New York for the years 1977 and 1984.

A hearing was commenced before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 19, 1997 at 9:25 A.M., and was continued to conclusion before the same Administrative Law Judge at the same location on June 20, 1997 at 9:20 A.M., with all briefs to be submitted by October 14, 14, 1997. The briefing schedule was twice extended such that all briefs were to be submitted by January 5, 1998, which date commenced the six-month period for the issuance of a determination on the petition. Petitioners appeared pro se by petitioner Stephen Fisher. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen Dix, Esq., of counsel).

On September 29, 1997 petitioner Stephen Fisher filed a motion for a new hearing. By a letter from Kathleen Dix, Esq., dated October 1, 1997,the Division of Taxation set forth its response in opposition to petitioners' motion. Petitioner Stephen Fisher replied by a letter dated October 7, 1997. Based on the motion papers, the Division's response in opposition, petitioners' reply, the transcript of hearing and evidence introduced thereat, and all pleadings and documents submitted, Dennis M. Galliher, Administrative Law Judge, renders the following

order.

FINDINGS OF FACT

1. Petitioner Stephen Fisher filed an amended petition, dated November 15, 1996, arguing that the Division of Taxation ("Division") erroneously denied the full refund claimed on petitioners' 1977 tax return; that certain business deductions claimed by petitioners were denied erroneously by the Division; that the Division owes petitioners refunds that were not calculated into the Division's Consolidated Statement of Tax Liabilities dated June 14, 1996 concerning petitioners' income tax liability for 1984; and that the Division's claim for interest on the amount owed should be cancelled because the Division had not paid petitioners interest on unpaid refunds owed to petitioners. More specifically, petitioners claimed that certain documents show that the Division owed petitioners a refund of $1,155.27 based on petitioners' 1981 tax return, and a refund of $874.00 for 1980 which was not credited to petitioners until 1987 and for which petitioners received no interest. In petitioners' original petition, filed in 1981, petitioners sought review of their personal income tax for the years 1975 through 1978. In a first amended petition filed in 1989, petitioners sought review of the years 1977 and 1984.

2. The Division filed an amended answer, dated February 5, 1997, denying that the Division owed petitioners refunds that were not calculated into their 1984 tax liability and denying knowledge or information sufficient to form a belief as to the truth of petitioners' allegations that the $874.00 refund was credited to petitioners' tax liabilities in 1987 with no interest paid, and that the $1,055.00 refund for 1981 was not paid to petitioners or credited to petitioners' tax liabilities. The Division affirmatively stated that Tax Law § 685 requires that penalties be assessed for failure to timely file a tax return or to pay the tax as shown due on a return unless it is shown that nonpayment of taxes is due to reasonable cause and not due to willful neglect, and that petitoners have not met their burden of establishing reasonable cause and the absence of willful neglect for failure to timely report and pay taxes for 1984.

3. Petitioners filed a Notice of Demand for Bill of Particulars, dated February 5, 1997. The Division filed a motion to vacate the demand dated February 12, 1997. By an Order dated

April 10, 1997, Administrative Law Judge Faulkner denied the Division's motion. Thereafter, on May 12, 1997, the Division served the requested Bill of Particulars, followed by a letter dated June 16, 1997 as an amendment providing additional information relevant to the Bill of Particulars.

4. The matter came on for hearing before Administrative Law Judge Faulkner on June 19, 1997 and the hearing was continued and concluded before Administrative Law Judge Faulkner on June 20, 1997. The June 19th proceedings commenced at 9:25 A.M. and concluded at 4:40 P.M., and the June 20th continued proceedings commenced at 9:20 A.M. and concluded at 11:35 A.M. During the course of the hearing, the Division introduced some 31 exhibits (Exhibits "A" through "EE"), together with the testimony of two witnesses in explanation of certain of the documents. Petitioners, appearing pro se by petitioner Stephen Fisher, introduced some 18 exhibits together with the testimony of petitioner Stephen Fisher. Upon conclusion of the hearing, a briefing schedule was established for the submission of written arguments.

5. After the hearing, petitioners filed a motion dated August 4, 1997, seeking recusal of Administrative Law Judge Faulkner and reargument with a new hearing. The Division responded with a letter in opposition to this motion on August 20, 1997. While petitioners' motion was pending, Administrative Law Judge Faulkner left her position with the Division of Tax Appeals in order to accept employment with the Federal government. In turn, the parties were advised by the Division of Tax Appeals' Chief Administrative Law Judge that the motion for recusal of Administrative Law Judge Faulkner was rendered moot and that the case was assigned to Administrative Law Judge Dennis M. Galliher. The parties were, in turn, advised by a letter dated Septmenber 22, 1997 that the briefing schedule in the case was extended to the respective dates November 3, 1997 (petitioners), December 8, 1997 (Division) and January 5, 1998 (petitioners' reply).

6. On September 29, 1997, the instant motion for a new hearing was received from petitioners. Petitioners' motion alleges four facts upon which petitioners base their demand for

a new hearing, as follows:

> "Fact 1: Today (September 25, 1997); petitioner first received notice of the resignation of administrative law judge (M. Faulkner) who had presided at his June, 1997 hearing.
>
> "Fact 2: The current status of the instant hearing process is that both parties are scheduled to submit briefs - Judge Faulkner has not rendered her findings of fact or conclusions of law. [1]
>
> "Fact 3: A new judge has been assigned to the case.
>
> "Fact 4: Over 500 pages of documentary evidence were submitted by the parties during the hearing -and- there exists long-standing questions about the credibility of witnessess. (Refer to following page for further explanation)."

The thrust of petitioners' motion is that because this case involves a substantial amount of documentary evidence ("over 500 pages of documentary evidence . . . that has to be weighed and analyzed") and the testimony of two witnesses with respect thereto, and that because the judge who presided at the hearing and heard such witnesses will not be available to render a determination, it follows that the new judge assigned to the case must grant a new hearing. Petitioners complain most specifically about the Division's accounting of petitioners' liability (amounts owed, refunds applied or credited against such amounts, and attendant interest calculations) prepared at the request of Administrative Law Judge Faulkner as a detailed summary and explanation of the Division's calculations underlying its position in this case. This document, referred to by petitioners as the "Eckler report", was prepared based on the documents submitted into the record on the first day of hearing, and was itself submitted into evidence as Exhibit "EE" on the second day of hearing along with testimony by its author, Theodore Eckler, concerning the underlying documents relied upon and explaining the calculations. Petitioners argue that upon review they have discovered that the "claims [in the Eckler report] were as wrong and unreliable as all other tax department claims."

7. The Division's response in oppostion to the motion asserts that granting a new hearing is a matter of discretion for the successor administrative law judge rather than a requirement.

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[1] By a letter dated October 27, 1997, the parties were advised that the briefing schedule would be suspended until resolution of petitioners' motion, after which a new briefing schedule would be established.

The Division goes on to argue that neither of the Division's witnesses were personally involved in issuing the original deficiencies against petitioners (for the years 1977 or 1984) or in making adjustments to such liabilities over time. Rather, the Division points out that such witnesses testified in explanation of the Division's records and associated calculations. In sum, the Division's position is that no prejudice will result to petitioners if the case is finalized at this point upon written arguments from the parties and without additional hearing.

8. In a reply, petitioners assert that the credibility of one of the Division's witnesses, Mr. Eckler, who prepared the accounting summary and explanation for the second day of hearing, is at issue. Petitioners describe the Eckler report as a "new analysis", and assert that they will submit, in contrast, a report in similar form but "radically different in substance and conclusion." Petitioners maintain that "credibility decisions" will have to be made with regard to the Eckler report and with regard to petitioners' report to be submitted in response.

CONCLUSIONS OF LAW

A. At the outset, it is noted that the resolution of this motion should in no way be considered an assessment of the validity of either party's case, but instead is simply a determination as to the need for a new hearing. While the Rules of Practice and Procedure of the Tax Appeals Tribunal do not specifically address a motion for a new hearing where there is an assignment of another administrative law judge, some guidance may be found at 20 NYCRR 3000.15(f) and 20 NYCRR 3000.16(a) and (b).

B. 20 NYCRR 3000.15(f) provides as follows:

> "Assignment of another administrative law judge. Whenever an administrative law judge is disqualified or it becomes impractical for him or her to continue the hearing, another administrative law judge may be assigned to continue with the case, unless it is shown that substantial prejudice to a party will result therefrom."

This regulation, which is nearly identical to State Administrative Procedure Act (SAPA) § 303, clearly anticipates and provides for circumstances such as the present where the departure of an administrative law judge for new employment necessitates the assignment of a matter to another administrative law judge for resolution. This regulation also speaks of

"substantial prejudice" as the applicable standard with respect to such assignment. Thus, it is logical to apply such standard to the attendant question of whether, in such an instance, it is necessary for the newly-assigned administrative law judge to rehear the matter.

C. Contrary to petitioners' assertion, there is no requirement that a new hearing must be granted as a matter of law upon assignment of a successor administrative law judge (see, 58 Am Jur 2d, New Trial, § 522). In fact, it is well established that the concept of a fair administrative hearing does not require that the administrative law judge who took the evidence must also make the final determination in the case (Rothkoff v. Rattner, 104 Misc 2d 204, 428 NYS2d 138; Kelly v. Duffy, 144 AD2d 792, 534 NYS2d 551; Flores v. New York State Education Dept., 146 AD2d 881, 536 NYS2d 869). This very point is established by the existence of a statute (SAPA § 303) and a regulation (20 NYCRR 3000.15[f]) providing for the assignment of a successor administrative law judge when necessary, but not including any mandate that a new hearing must be conducted by the successor administrative law judge. Rather, the issue of whether a new hearing should be granted is a matter of discretion for the successor administrative law judge (see, 58 Am Jur 2d, New Trial, §§ 517 et seq). In essence, the issue becomes whether, upon review of the entire existing record and in the discretion of the newly-assigned administrative law judge, the matter can be decided upon such record without substantial prejudice to the litigants absent a rehearing of the matter. It follows that in making a determination on the need for a new hearing, and ultimately in rendering a final determination in the case, the successor administrative law judge must have available for review the entire hearing record (id.). The question of whether witness credibility is a central factor in the case must be examined, as must the opportunity given the parties to submit evidence at the original hearing.

D. In addition to the foregoing, 20 NYCRR 3000.16 provides, in relevant part, as follows:

> "(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 msiconduct of an opposing party.
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> "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."

While the foregoing regulation deals with vacatur of a determination that has been issued, and thus does not speak specifically to the circumstances present here, it does recognize the possibility of reopening a record, and specifies the grounds therefor as either the discovery of new evidence which could not, despite reasonable diligence, have been discovered in time for the hearing, or fraud, misrepresentation, or other misconduct of an opposing party.

E. After thorough review of the transcript and record from the June 19th and 20th hearing dates, with specific attention to the opportunity afforded both parties to provide documentary and testimonial evidence in support of their respective positions, it is concluded that the instant circumstances do not warrant a new hearing. First, it is apparent that both parties had ample, full and fair opportunities to submit their evidence in this matter. Petitioners do not state, either at hearing or in their motion, that they will be presenting "new" evidence at a new hearing. At the same time, the Division makes no claim that it has or would offer any additional evidence at a new hearing. Petitioners' assertions in this matter center mainly on the claim that the Division's position has changed over time, that such position has never been correct, and that the Division's current position is likewise incorrect or contains errors. In turn, it is clear that the Division's position in this matter has been set forth in the record. Although petitioners describe the Division's summary and explanation of its position (the Eckler report) as a "startling new report," the record reveals that the same is a presentation of the Division's calculation of petitioners' liability for the years in issue (1977 and 1984) including calculations showing the application of refunds for other years and attendant interest accrual calculations. This document is itself based on the other documents offered in evidence by the Division, and

serves as a summary compilation of the Division's position. While the document itself was newly created at the time of the hearing, its content is based on information in the record and thus cannot be considered "startling" or "new". Petitioners claimed the need to review the Eckler report in order to comprehend and refute such report. In their motion papers, petitioners state that after review, they have discovered such report to be "as wrong and unreliable as all other tax department claims." Petitioners further claim that their own analysis will show that such report is incorrect. This refuting analysis can certainly be accomplished via petitioners' post-hearing written arguments without need for a new hearing. At the hearing, petitioners were specifically asked if there was additional evidence to be submitted, concerning the basis for the 1977 asserted deficiency (a matter based on disallowance of a portion of claimed deductions for such year), the basis for the 1984 asserted deficiency (an admitted math error with an attendant late-filing penalty remaining in contest), and whether there remained any refunds due petitioners which had not been accounted for by the Division. Petitioners did not specify or produce any additional evidence at hearing on these points, nor have petitioners pointed to any new evidence to be adduced at a new hearing. There would appear to be no purpose served by granting a new hearing at which additional evidence will not be produced.

F. Petitioners also argue that there is a great deal of documentary evidence in the record and that the credibilty of one of the Division's witnesses, Mr. Eckler, is an issue. As to the volume of documentary evidence, described as "over 500 pages," there is no reason to accept that the amount of documentary evidence in a record alone compels granting a new hearing, or that a new hearing would in this case serve the purpose of assisting the administrative law judge's review of the evidence simply because of the volume of such evidence in the record.

As to petitioners' credibility argument, the same fails to recognize that neither of the Division's witnesses at hearing were involved in either the process by which the deficiencies in question were originally calculated and asserted, or were adjusted thereafter during the interim years. Rather, the Division's witnesses were called to testify in explanation of the documents upon which the Division's position is premised. Credibility of witness testimony has been

described as consisting of two components, to wit, "competency" and "veracity". "Competency" involves the "opportunity and capacity to perceive" and, thereafter, the "capacity to recollect and communicate." "Veracity" involves whether the communicated recollection appears "truthful" (see, Matter of Avildsen, Tax Appeals Tribunal, May 19, 1994; see also, Pay TV of Greater New York, Inc., Tax Appeals Tribunal, July 14, 1994). In this case, the testimony of the Division's witnesses centered on the interpretation of documents rather than on their recollection of events. Thus, the question is not so much the credibility of the witnesses, but rather their qualification to interpret the documents at issue and, ultimately, the correctness of their interpretation. In short, resolution of this case rests largely on the documentary evidence itself, and not on the Division's witnesses' recollection of events. The accuracy and correctness of the parties' positions in this case can be determined from review of the documents in the record, as summarized by the Division in the Eckler report and by petitioners in their yet-to-be submitted summary analysis.

G. As stated above, during the course of the hearing each party was afforded ample opportunity to present evidence and to challenge their opponent's evidence. In fact, the parties can, by submission of written arguments based on the evidence in the record, complete this matter. Such being the case, there is no apparent reason to schedule a new hearing. A decision to proceed in this case without a new hearing will not deprive either party of the opportunity to make a complete record or result in any apparent prejudice, much less substantial prejudice, to petitioners.

H. Petitioners' motion for a new hearing is denied and this matter shall proceed with the filing of written arguments (briefs). Petitioners' brief is to be submitted by March 13, 1998, the Division's brief by April 10, 1998, and petitioners' reply brief by May 1, 1998.

DATED: Troy, New York
January 29, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE