STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
HARVEY AND KATHRYN WACHSMAN	:	ORDER DTA NOS. 806930
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1983.	:	AND 806931

Upon petitioners' Notice of Motion for an order, pursuant to CPLR 5015(a)(2), relieving petitioners from a determination issued April 16, 1992 and vacating and setting aside that determination and granting a new administrative hearing upon the ground of newly-discovered evidence which, if introduced at the prior hearing, would probably have produced a different result, and upon the affidavit of Harvey Wachsman, made January 19, 1993, and the affirmation of Laurence Keiser, Esq., dated January 21, 1993, together with an annexed exhibit, and upon an affirmation of Andrew J. Zalewski, Esq., dated February 23, 1993, together with an annexed exhibit in opposition thereto, the following facts are found:

On March 20, 1991, a hearing was held before Brian L. Friedman, Administrative Law Judge, in the matter of the petitions of Harvey and Kathryn Wachsman for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 1983. The issues to be decided at the hearing were as follows:

I. Whether petitioner Kathryn Wachsman timely filed a petition with the former Tax Appeals Bureau of the former State Tax Commission seeking administrative review of a personal income tax deficiencyasserted, by the Division of Taxation, to be due from petitioner for the year at issue.

II. Whether the Division of Taxation properly determined that petitioners were taxable as residents pursuant to Tax Law former § 605(a).

III. If not, whether petitioners properly allocated income derived from New York

sources pursuant to the provisions of Tax Law former § 632 and 20 NYCRR 131.18.

In a determination dated April 16, 1992, Issue I was determined in petitioner Kathryn Wachsman's favor, i.e., it was found that the petition of Kathryn Wachsman was timely filed with the former State Tax Commission and, therefore, that the Division of Tax Appeals had jurisdiction of the subject matter contained in the petition.

With respect to Issue II, the determination held that, for the year at issue, petitioners were domiciliaries of Connecticut; however, it was further found that petitioners were properly taxable as residents of the State of New York by virtue of having maintained a permanent place of abode in New York during 1983 and having failed to sustain their burden of proving that they did not spend, in the aggregate, more than 183 days in the State of New York during 1983.

By virtue of the holding relative to Issue II, Issue III was rendered moot.

Petitioners subsequently filed a Notice of Exception to the determination with the Tax Appeals Tribunal.

Conclusion of Law "E" of the determination held, in part, as follows:

> "It is undisputed that petitioners do not have daily records of their whereabouts during 1983. They do maintain, however, that such records existed in the form of a daily diary kept by Harvey Wachsman's secretary at Pegalis and Wachsman. Two possible explanations for the present unavailability of this diary were presented at the hearing.
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> "Petitioners' former accountant, Mr. Hanley, testified that the days-in-and-out allocation on the tax return was prepared through discussions with petitioners. As to the summary schedules attached to the petitions, Mr. Hanley is not sure whether or not he saw the diary, but he admitted that it would not have been placed within his firm's files (see, Finding of Fact "5"). Therefore, it must be determined that the water damage to the Time Storage warehouse and the subsequent transfer of petitioners' records to Record Keepers was not the cause for petitioners' inability to produce substantiation for their days in and out of New York for 1983.
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> "Petitioner Harvey Wachsman testified (see, Finding of Fact "6") that his only possible explanation for the inability to produce daily records for 1983 was that, due to the extensive growth and resulting construction by Pegalis and Wachsman, his records were sent to storage and could not, therefore, be located."

In his affidavit (paragraphs "3" through "9") sworn to January 19, 1993, petitioner Harvey Wachsman stated as follows:

> "3. During 1983, I was a principal in the firm of Pegalis & Wachsman, P.C. at 175 East Shore Road, Great Neck, New York.

"4. During 1983, as was the usual and customary practice in my office, my personal secretary kept a daily diary of all my scheduled trials, meetings, appointments, and whereabouts, both in state and out of state. This diary was kept at all times at my office in Great Neck, New York.

"5. At the time of the hearing in this case, I was unable to locate the 1983 diary despite diligent effort, due to the fact that the diary was placed in storage along with files, books, records, and other documents. Storage of all these materials began sometime in the middle 1980's when our law practice grew so rapidly that we were forced to move into several office spaces at two different locations, which continued for the next several years.

"6. As testified to by this affiant, in 1988 building construction began at our offices at 175 East Shore Road, and further storage of documents, business records, books, etc. was necessary. At that point in time thousands of boxes had been placed in storage, which remained there pending completion of the expansion project.

"7. That project was only recently completed, and the materials in storage were finally returned to the office, opened, and placed on shelves and in cabinets and drawers.

"8. Within the past week, in the course of emptying boxes, my office staff located my 1983 diary, which, as I had previously testified, was in storage and unable to be located. I immediately notified my counsel of this discovery.

"9. The 1983 diary is supportive of the summary schedules previously submitted by me and provides proof that I was not present in New York for more than 183 days."

The affirmation of the Division of Taxation's ("Division") representative, Andrew J. Zalewski, Esq., submitted in opposition to petitioners' motion, contends that petitioners' motion papers (more particularly, the affidavit of petitioner Harvey Wachsman) do not establish that due diligence was exercised in attempting to locate the evidence (the 1983 diary) which they now seek to introduce. In addition, the affirmation further states that petitioners have not established that the newly-discovered evidence, if permitted to be introduced, would probably have produced a different result since petitioners' motion papers fail to address the nonresident wage allocation issue (Issue III in the determination which was rendered moot in view of the holding that petitioners were New York residents for 1983). Therefore, it is the contention of the Division that petitioners have failed to show that such newly-discovered evidence would produce a different result.

OPINION

In Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991) the

Tribunal discussed the issue of reopening a matter that, under law, had finally determined the controversy between the Division and petitioner therein.

> "As we have repeatedly held, we have no statutory authority to reconsider our decisions and in the absence of statute, our authority to reconsider our decisions is limited (Matter of Fisher, supra; Matter of Capitol Coin, Tax Appeals Tribunal, August 23, 1989; Matter of Goldome Capital Inv., supra). Our authority is limited, due to the long established principle, as articulated by the Court of Appeals in the case of Evans v. Monaghan, 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 v. Monaghan, 306 NY 312, 118 NY2d 452, 457). Evans v. Monaghan 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). This standard is substantially the same as that developed under Rule 2221 of the Civil Practice Law and Rules for a motion to renew (CPLR 2221[a]). A motion to renew must be based upon additional, material facts which existed at the time the prior motion was made, but were not then known to the party and, thus, were not made known to the court (Foley v. Roche, 68 AD2d 558, 418 NYS2d 588, 594). The additional facts must be ones that could not have readily and with due diligence been made part of the original motion (Foley v. Roche, supra, 418 NYS2d 588, 594). The motion to renew should be denied if the party fails to offer a valid excuse for not submitting the additional facts upon the original application (Zebrowski v. Pearl Kitchens, ___ AD2d ___, 568 NYS2d 242; Barnes v. State of New York, 159 AD2d 753, 552 NYS2d 57, appeal dismissed 76 NY2d 935, 563 NYS2d 63; Foley v. Roche, supra, 418 NYS2d 588, 594). Because the basic standard established by Evans is similar to that under Rule 2221(a), we are guided by the case law under Rule 2221(a) and conclude that to obtain reconsideration of a Tribunal decision, the party must show that the newly discovered facts could not have been discovered with due diligence and the party must offer a valid excuse for not submitting the facts upon the original application." (Matter of Jenkins Covington, N.Y., Tax Appeals Tribunal, November 21, 1991).

As is the case with the Tax Appeals Tribunal, the authority for an Administrative Law Judge to reconsider or reopen the record with respect to an issued determination is limited. Absent specific and exceptional circumstances, such as a remand from the Tribunal (see, e.g., Matter of Petro Enterprises, Tax Appeals Tribunal, September 19, 1991) or a default determination (see, 20 NYCRR 3000.10[b]), the standard set forth by the Tribunal in Jenkins Covington is also applicable to a determination of an Administrative Law Judge.

In an application, pursuant to CPLR 5015(a)(2) to vacate a judgment on the grounds of newly-discovered evidence, the moving party must show that the newly-discovered evidence is

material, is not merely cumulative, is not of such a nature as would merely impeach the credibility of an adverse witness and that it would probably change the result if a new trial were granted. He must also show that the evidence has been discovered since the trial and could not have been discovered before the trial by the exercise of due diligence (Mully v. Drayn, 51 AD2d 660, 378 NYS2d 187). Only evidence which was in existence but undiscoverable with due diligence at time of judgment may be characterized as newly-discovered evidence (Commercial Structures v. City of Syracuse, 97 AD2d 965, 468 NYS2d 957).

Clearly, in the present matter, the 1983 diary is material. The testimony of both petitioners (see, Hearing Tr., pp. 57, 58, 79, 80) reveals that each recognized the importance of the 1983 diary in substantiating their days spent in and out of New York for that year. Had the diary been introduced into evidence at the hearing, it, combined with clarifying testimony, could well have produced a different result, i.e., petitioners might have been able to prove that they spent less than 183 days in New York and, as such, would not have been taxable as New York residents for 1983. Petitioner Harvey Wachsman's affidavit sets forth that the diary was discovered since the hearing and the reasons therefor. The only element which has not clearly been proven by petitioners in their moving papers is that they exercised due diligence in attempting to locate the diary prior to the hearing. Although Mr. Wachsman's affidavit (see, paragraph "5") states that he "was unable to locate the 1983 diary despite diligent effort", no further elaboration was contained therein. However, as previously pointed out, petitioners were certainly aware of the importance of this diary. This is not a case where the determination pointed out to petitioners what was necessary for them to sustain their burden of proof and, as a result thereof, petitioners then sought leave to introduce such evidence. If, as petitioner Harvey Wachsman's affidavit points out, thousands of boxes containing documents, business records, books, etc. were placed in storage, it is neither incredible nor inconceivable that the 1983 diary could not be located.

The Division contends that because, in the determination of April 16, 1992, Issue III (nonresident income allocation) was rendered moot and because petitioners' motion papers do

not address this issue, they have failed to establish that the newly-discovered evidence would produce a different result. This contention is without merit. If the introduction of the 1983 diary results in a determination that petitioners were not taxable as residents of the State of New York for 1983, such determination would certainly produce a different result. If petitioners' original allocation to New York were found to be correct, petitioners would owe no additional tax. If their allocation was erroneous, additional tax would be owed. In either case, however, by virtue of their being found not to be taxable as New York State residents, their tax liability would differ from the result contained in the determination of April 16, 1992 which sustained, in its entirety, the notices of deficiency issued to petitioners on July 14, 1986.

Petitioners' motion for an order, pursuant to CPLR 5015(a)(2), relieving them from a determination issued April 16, 1992, vacating and setting aside that determination and granting a new administrative hearing is hereby granted.

DATED: Troy, New York
March 25, 1993

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE