STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ELIAS H. ATTEA, JR. AND KAREN ATTEA	:	ORDER DTA NOS. 815201
for Redetermination of Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1990 and 1991.	:	AND 815202

Petitioners, Elias H. Attea, Jr. and Karen Attea, move for an order reopening the record in this proceeding to permit the introduction of additional evidence. Petitioners appeared by Gary D. Borek, P.C. (Gary D. Borek, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Craig Gallagher, Esq., of counsel). Based upon the motion papers of petitioners, the Division of Taxation's answering brief and affidavit in opposition thereto, the exhibits attached to petitioners' motion papers and to the Division of Taxation's affidavit in opposition and the record on submission, Brian L. Friedman, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On April 21, 1997 and April 25, 1997, respectively, petitioners and the Division of Taxation ("Division"), by their representatives, executed a consent whereby each agreed to have this controversy determined on submission without a hearing. Subsequently, in a letter from this Administrative Law Judge dated April 29, 1997, a schedule was established for the filing of documents and briefs by the parties. The Division, in a letter dated May 27, 1997, requested a 30-day extension for the filing of its documents. By letter dated May 30, 1997, the request was

granted and the Division's documents were required to be submitted on or before July 2, 1997. The letter further advised the parties that all due dates previously set forth in the letter of April 29, 1997 would, therefore, be extended for an additional 30 days. The Division's documents were received by the Division of Tax Appeals on July 2, 1997.

In a letter dated August 4, 1997, petitioners requested an extension (until August 15, 1997) for submission of their documents and brief. The documents and the brief were mailed, by certified mail, on August 14, 1997.

The Division, by letter dated September 10, 1997, requested a 30-day extension (until October 15, 1997) for submission of its brief. Two additional requests for an extension for the filing of the Division's brief were made and the brief was timely filed on November 24, 1997.

Petitioner also requested and received two extensions for the filing of their reply brief and this reply brief was timely filed on February 27, 1998.

2. Along with their reply brief, petitioners moved to reopen the record for the submission of five additional documents (proposed exhibits "N" through "R"). The basis for this motion was stated as follows:

> The foregoing exhibits are being submitted as evidence of the extensive knowledge the Division possesses of Petitioners' wholesale tobacco business that is contradictory of the statements and positions taken by the Division in its brief in this matter. Petitioners believe that such evidence should be made a part of the record in this proceeding to counter what comes very near to be a fraud on the court committed by the Division.

3. The letter from petitioners' representative described the proposed exhibits in the following manner:

EXHIBIT	DESCRIPTION
N	Relevant portions of the transcript of oral argument before the United States Supreme Court in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros*., S. Ct. Dkt. No. 83-377 (March 23, 1994).
O	Relevant portions of New York State's petition for writ of certiorari to the United States Supreme Court in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, S. Ct. Dkt. No. 83-377 (March 23, 1994).
P	Copies of a letter, dated February 8, 1996, from counsel for Petitioner Elias H. Attea, Jr. to the Division of Tax Appeals, and a Notice of Cancellation of hte Deficiency and Discontinuance off [sic] Proceeding, dated June 5, 1996 for DTA No. 804390.
Q	Copies of four newspaper articles.
R	Copies of letter rulings of the Federal Trade Commission.

4. In its brief submitted on November 24, 1997, the Division contends, among other things, that petitioners failed to meet their burden of proof to demonstrate, by clear and convincing evidence, that the assessments at issue are erroneous. In furtherance of this argument, the Division contends that petitioner Elias J. Attea conducted a regular and continuous business in New York and that "virtually all of petitioner's business activities took place within New York State. Nothing in these papers indicates any significant business activity taking place in Tennessee."

It is unclear from petitioners' motion as to the exact statements and positions taken by the Division in its brief which petitioners find to be contrary to "the extensive knowledge the Division possesses of Petitioners' wholesale tobacco business. . . ."

5. The letter of this Administrative Law Judge which established the original schedule for the filing of the documents and briefs, i.e., the April 29, 1997 letter, stated as follows: "Any information which you want me to consider in arriving at a determination must be submitted in accordance with the schedule below. In most cases, the petitioner carries the burden of proof and

must prove all relevant and material facts by submission of documents." The letter went on to say that "[d]ocuments and briefs not filed in accordance with this schedule will be returned to the filing party."

6. In its brief in opposition to petitioners' motion, the Division states that the grounds set forth in 20 NYCRR 3000.16(a) for granting a motion to reopen the record are (1) newly-discovered evidence, or (2) fraud, misrepresentation or other misconduct of an opposing party. The Division maintains that neither ground is applicable to this case. The Division, in the brief in opposition, also specifically addresses each of the documents which petitioners now seek to introduce. In summary, the Division states that the documents do not address petitioner Elias J. Attea's activities or whereabouts during the period at issue and relate to a tax other than personal income tax.

CONCLUSIONS OF LAW

A. The provisions of 20 NYCRR 3000.16 pertain to motions to reopen the record or for reargument made *after* the Administrative Law Judge has rendered a determination. Since no determination has yet been rendered, the regulation is inapplicable in this matter.

B. The granting of a motion to reopen the record is dependent upon the sound exercise of discretion (***see, Matter of Byram***, Tax Appeals Tribunal, August 11, 1994). In ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991), the Tribunal stated: "If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record." While it is true that no hearing was held in this matter, that was a choice made by petitioners as well as by the Division. Despite the fact that there was no hearing, there was, nevertheless, a final date for submission of any and all

documents which petitioners deemed relevant and necessary to sustain their burden of proof. That date was August 15, 1997 (***see***, Finding of Fact "1").

C. In some cases, the courts have deemed it appropriate to permit the record to be reopened for receipt of new evidence (***see***, ***Iulio v. Ford Motor Company***, 31 AD2d 820, 298 NYS2d 33; ***Getti v. State***, 205 Misc 563, 129 NYS2d 385). In each of these cases, however, the motion to reopen the record was made prior to the filing of briefs. In the present matter, the motion was made by petitioners in conjunction with the filing of their reply brief, after both petitioners and the Division had filed their briefs.

D. In the letter of petitioners' representative which accompanied the reply brief and motion to reopen the record, it is stated that the exhibits sought to be introduced were being offered to counter certain statements and positions taken by the Division in its brief (***see***, Finding of Fact "2"). As indicated in Finding of Fact "3", it is unclear as to the exact statements made by the Division in its brief which petitioners contend "comes very near to be a fraud. . . ."

Petitioners have failed to set forth any rational basis upon which the granting of a motion to reopen the record would be appropriate. However, proposed exhibits "N" and "O" are portions of transcripts and petitions relating to a case before the United States Supreme Court and are, therefore, matters of public record which would properly be the subject of official notice pursuant to the State Administrative Procedure Act. The same is true for proposed exhibit "R", copies of letter rulings of the Federal Trade Commission. Had these cases and letter rulings simply been cited by petitioners in their reply brief, there could be no question that this Administrative Law Judge could consider them in the rendering of a determination in this matter. Accordingly, they shall be accepted into evidence as exhibits "N", "O" and "R". As to proposed exhibits "P" and "Q", these documents could have been included with the original exhibits submitted by petitioners

on August 14, 1997. If petitioners are allowed to submit additional evidence to respond to legal argument by the Division in its brief, it could certainly be argued by the Division that it, too, should be permitted to submit additional evidence to refute petitioners' legal argument as set forth in their reply brief. Clearly, if the parties are able to submit additional evidence after the record has been closed, merely to refute the opposition's argument, there would be neither definition nor finality to the process (***see, Matter of Schoonover, supra***). Accordingly, proposed exhibits "P" and "Q" are rejected and will be given no consideration by this Administrative Law Judge in the determination which will be rendered in this matter.

E. Petitioners' motion to reopen the record is granted to the extent indicated in Conclusion of Law "D" and, except as so granted, is in all other respects denied.

DATED: Troy, New York
May 28, 1998

/s/ *Brian L. Friedman*
ADMINISTRATIVE LAW JUDGE