STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEONARD AND LUCILLE MERKOWITZ	:	
for Redetermination of Deficiencies or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1975, 1977, 1978, 1979, 1980, 1981, 1982, 1991 and 1992.	:	ORDER DTA NOS. 819012 AND 819928

Petitioners, Leonard and Lucille Merkowitz, 192-04 L 71 Crescent, Fresh Meadows, New York 11365, filed petitions for redetermination of deficiencies or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1975, 1977, 1978, 1979, 1980, 1981, 1982, 1991 and 1992.

A determination in this matter was issued on February 16, 2006 by Joseph W. Pinto, Jr., Administrative Law Judge. On March 20, 2006, petitioners filed a motion to reopen the record pursuant to 20 NYCRR 3000.16 for the sole purpose of submitting additional evidence.

Based upon the motion of petitioners, filed March 20, 2006, the response of the Division of Taxation, filed April 17, 2006, and all the pleadings and proceedings associated with this matter, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioners filed petitions for the redetermination of certain deficiencies issued to them for the years 1975, 1977, 1978, 1979, 1980, 1981, 1982, 1991 and 1992. Petitioners waived their

right to a hearing and instead chose to have the case decided by submission of documentary evidence and briefs. On February 16, 2006, the Administrative Law Judge issued a determination in the matter.

2. On March 20, 2006, petitioners filed a motion to reopen the record for additional evidence which stated only:

> Attached is the tax preparer's transmittal advice for the 1981 New York State and City IT 201. This indicates a payment of $6,680 to be made upon the filing of the return, which matches the "paid" amount indicated on the NYS microfiche for 1981. Full comment will be provided with the Notice of Exception when filed.

Attached to the motion was a one-page document, the transmittal advice, entitled "Instructions For Filing," date stamped October 15, 1982.

3. By response, filed April 17, 2006, the Division of Taxation ("Division") contended that the motion was untimely because it had been filed 32 days after the issuance of the determination.

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tax Appeals Tribunal's Rules of Practice and Procedure provides for motions to reopen the record 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:
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> (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
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> (2) fraud, misrepresentation, or other misconduct of an opposing party.
>
> (b) Procedure. A motion to reopen the record . . ., 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.

B. The motion to reopen the record was timely despite the contention of the Division to the contrary. The determination was issued on February 16, 2006, and the motion was made on March 20, 2006. Although the motion was filed on the 32nd day following issuance of the determination, the 30th day fell on a Saturday. The next business day was Monday, March 20, 2006 (20 NYCRR 3000.1[q]). Pursuant to General Construction Law § 25-a, when any period of time before which an act is required to be done ends on a Saturday, Sunday or legal holiday, such act may be done on the next succeeding business day. (See ***Matter of American Express Co.***, Tax Appeals Tribunal, July 3, 1991; ***Matter of Bur-Sul, Ltd.***, Tax Appeals Tribunal, February 13, 1992.) Therefore, petitioners' filing of the motion on Monday, March 20, 2006 was timely.

C. However, petitioners' motion must fail because it presented no facts which constituted a basis for reopening the record. The authority to reopen the record 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 established 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 (20 NYCRR 3000.16[a][1]; ***Evans v. Monaghan***, ***supra***).

In ***Matter of Frenette*** (Tax Appeals Tribunal, February 1, 2001), the Tribunal stated:

> 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:
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> > [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 this matter, the "transmittal advice" sought to be entered into the record by petitioner did not constitute "newly discovered evidence" in accordance with the regulation and case law.

D. Petitioners' motion to reopen the record in this matter, dated March 20, 2006, is denied.

DATED: Troy, New York
April 27, 2006

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE