STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DEBORAH VATCHER	:	ORDER
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 2000 through November 30, 2000.	:	DTA NO. 819505

Upon the motion dated November 19, 2004 of petitioner, Deborah Vatcher, 4301 E. Abraham Lane, Phoenix, Arizona 85050-6896, brought by her attorneys, Lawrence D. Garr, Esq., and Lisa M. Kaas, Esq., for an order vacating[1] the determination dated August 19, 2004 in this matter and reopening the record to allow for the introduction of further evidence, and upon the response in opposition dated December 17, 2004 of Christopher C. O'Brien, Esq., (Michael P. McKinley, Esq., of counsel), Frank W. Barrie, Administrative Law Judge, renders the following order:

FINDINGS OF FACT

1. A determination dated August 19, 2004 was issued to petitioner by the Division of Tax Appeals, which denied her petition and sustained a Notice of Determination dated June 13, 2002. The determination was based upon a review of an administrative record created by the parties after the holding of a formal hearing before an Administrative Law Judge at the offices of the Division of Tax Appeals in New York City on February 25, 2004 and the subsequent submission

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[1] Petitioner's attorneys designated this motion as one "to reopen the record." As discussed in the Conclusions of Law, it is properly deemed a motion to vacate a determination.

of briefs. Petitioner appeared at the hearing by her then authorized representative, Harvey H. Mendelsohn, CPA.

2. At the outset of the hearing, the Administrative Law Judge advised the parties:

> Anything that either party would want me to consider must be made a part of today's record, and my determination will be based only on a careful review of today's record. I don't go outside the record that we are making today, which means that [if] either side wants me to consider any evidence, it has to be brought out at today's hearing (tr., p. 8).

3. At the conclusion of the hearing, the Administrative Law Judge further advised the parties:

> [P]rior to the closing arguments, I will note on the record that my determination will be based only on the evidence introduced into the hearing record this morning. I won't review any other evidence outside of the record, and if it hasn't been brought out at today's hearing, I will not consider it. So if either side wants me to consider any particular evidence, it has to be brought out now. Having said that, Mr. McKinley, anything else in the nature of evidence?" (Tr., . 39-40.)

At which point, Mr. McKinley on behalf of the Division of Taxation ("Division") stated, "No, your Honor" (tr., p. 40). Then the Administrative Law Judge said, "Mr. Mendelsohn, anything else in the nature of evidence?" (tr. p. 40). Mr. Mendelsohn replied, "No, your Honor" (tr. p. 40).

4. Before the hearing was concluded the parties were asked whether they wished to submit written arguments in support of their positions and the following briefing schedule was established: petitioner's initial brief, due March 26, 2004; Division's answering brief, due April 30, 2004; and petitioner's reply brief, due May 21, 2004. Petitioner's former representative did not submit an initial brief, but did reply to the brief submitted by the Division.

5. In his determination, the administrative law judge rejected petitioner's contention that as a mere *employee* she may not be determined to be a person required to collect sales tax on behalf of a business entity. Rather, he pointed out the expansive definition of "person required

to collect [sales] tax" in Tax Law § 1131(1), and noted that although "petitioner's mother or stepfather might be viewed as also responsible for the collection and remittance of Donmyr's sales tax," petitioner failed to prove that she was not "a person under the duty to act for Donmyr." The record established at the hearing showed that:

> [P]etitioner, as an employee of her parents' business, designated herself the controller of Donmyr on sales tax returns and on a withholding, wage reporting and unemployment insurance return which she signed on behalf of the enterprise. Further, the record establishes that petitioner assumed other tasks or functions as a consequence of her employment by the Midas franchise business including performing the role of contact person or liaison between the business and the Division of Taxation . . . .

Neither petitioner nor any witness with personal knowledge of the operations of Donmyr testified at the hearing, and the administrative law judge concluded that "petitioner must suffer the consequences of her failure of proof."

CONCLUSIONS OF LAW

A. In light of the pivotal fact that a determination in this matter has already been issued, petitioner's motion seeks to vacate a determination. 20 NYCRR 3000.16, which governs "motions to reopen record or for reargument," provides for "an order vacating a determination" of an administrative law judge upon the following limited grounds:

> (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.

Petitioner has not established either one of these grounds so as to justify the vacating of the determination in this matter dated August 19, 2004. The affidavits and letter included with petitioner's motion clearly are not "newly discovered evidence" (***see***, ***Matter of Youngstown Yacht Club, Inc.***, Tax Appeals Tribunal, October 16, 1997 [wherein the Tribunal observed that

documents which did not exist at any time prior to the closing of the administrative record cannot be considered "newly discovered"]). Further, petitioner's contention that her prior representative's malpractice represented "fraud" on the court is distinct from the "fraud" committed by an *opposing* party which would justify the vacating of a determination (***see***, ***Matter of Nusco***, Tax Appeals Tribunal, March 31, 1994 [wherein the Tribunal noted that there is no right to another hearing on the basis of the "willfully inadequate" representation of a taxpayer at the original hearing]).

B. In addition, the Division correctly points out that petitioner's motion was not timely made. Pursuant to 20 NYCRR 3000.16(b), petitioner's motion should have been made "within thirty days after the determination has been served." (***See also***, ***Matter of Auto Parts Center, Inc.,*** Tax Appeals Tribunal, July 24, 2003.) Requests for extensions to file an exception to the Tax Appeals Tribunal are simply *not* the equivalent of requests for extensions of time to file the motion to vacate the determination.

C. Further, cases relied upon by petitioner are not on point. For example, the appellate court in ***Lanc v. Donnelly*** (184 AD2d 840, 584 NYS2d 214) merely revived a complaint that had been struck and removed from the trial court's calendar for failure to prosecute. Here, the matter has already been adjudicated.

D. It is ordered that the motion of Deborah Vatcher to vacate the determination in this matter and to reopen the record to allow for the introduction of further evidence is denied.

DATED: Troy, New York
February 24, 2005

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE