STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
		ORDER
LINCARE, INC.	:	DTA NO. 823971
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 March 1, 2005 through February 29, 2008.	:	

Petitioner, Lincare, Inc., filed a petition 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 March 1, 2005 through February 29, 2008.

The parties waived a hearing and submitted the matter for determination based on documents and briefs. On May 30, 2013, a determination was issued denying the petition and sustaining the notice of determination.

On June 28, 2013, petitioner, by its representative, Mark Weiss, Esq., brought a motion to reopen the record pursuant to 20 NYCRR 3000.16 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, appearing by Amanda Hiller, Esq. (Marvis A. Warren, Esq., of counsel), opposed the motion in a response, dated July 23, 2013, which date commenced the 90-day period for issuance of this order. Based upon the motion papers and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the determination should be set aside and new evidence accepted, which petitioner contends will produce a different result.

FINDINGS OF FACT

1. Petitioner filed a petition for revision of a certain determination issued to it for the period March 1, 2005 through February 29, 2008. The parties waived their right to a hearing, instead submitting the matter for determination based on documentation and briefs. A determination was issued on May 30, 2013 that concluded that petitioner's purchases of oxygen cylinders were taxable and not entitled to a resale exemption.

2. In its motion to reopen the record for the sole purpose of introducing new evidence, petitioner claimed that it had "identified" documentation that was newly discovered and which would have produced a different result had it been introduced into evidence. The documentation referred to was additional customer agreements, additional invoicing documents and records that demonstrate petitioner rented the cylinders to customers.

3. Petitioner claims that the "newly discovered" evidence was not previously identified because it had already been supplied to the Division, which, based upon such evidence, stipulated that petitioner had rented the oxygen cylinders to its customers.

4. Petitioner claims that the evidence it submitted on submission supports its characterization of the terms of the stipulation and that "new documentation will further confirm its position that it resold the oxygen cylinders at issue."

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:
>
> (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.
>
> (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. Petitioner's motion must fail because it presented no facts that 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 [1954]), 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*).

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:

> [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 judgment 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 "recently identified documentation" that was identified by petitioner did not constitute "newly discovered evidence" in accordance with the regulation and case law. Petitioner has merely suggested that it be permitted to submit "further" customer agreements, invoices and unidentified documents to prove rental of cylinders. It has not averred that the evidence was undiscoverable with due diligence when the record was open. In fact, just the opposite appears to be the case, since petitioner states in its motion that it did not "identify and submit" the documentation because it had already submitted it to the Division of Taxation.

C. Petitioner's motion to reopen the record is hereby denied.

DATED: Albany, New York
OCT 10 2013

ADMINISTRATIVE LAW JUDGE