STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAY'S DISTRIBUTORS, INC.	:	ORDER DTA NO. 824052
for Redetermination of a Deficiency or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period March 1, 2004 through December 31, 2006.	:	

Petitioner, Jay's Distributors, Inc., filed a petition for redetermination of a deficiency or for refund of cigarette tax under Article 20 of the Tax Law for the period March 1, 2004 through December 31, 2006.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 1384 Broadway, New York, New York, on August 15, 2012 at 10:00 A.M. On July 3, 2013, a determination was issued denying the petition and sustaining the notice of deficiency.

On August 1, 2013, petitioner, by its representative, Michael Buxbaum, CPA, brought a motion to reopen the record or for reargument 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. (Michelle M. Helm, Esq., of counsel), opposed the motion in a response, dated July 10, 2013[1] but deemed received on September 1, 2013, which date commenced the 90-day period for issuance of this order. Based upon the motion papers and all the pleadings and

[1]This was a proper and timely response to an earlier attempt by petitioner to file a motion to reopen, which was deemed invalid until it was filed in accordance with the Tribunal's Rules.

proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the determination should be vacated and new evidence accepted or reargument granted, which petitioner contends will produce a different result.

FINDINGS OF FACT

1. Petitioner, Jay's Distributor's, Inc., filed a petition for revision of a determination under Article 20 of the Tax Law for the period March 1, 2004 through December 31, 2006. A hearing in this matter was held on August 15, 2012, and on July 3, 2013 the administrative law judge issued a determination in the matter. The determination concluded that petitioner's records were not adequate for a detailed audit of petitioner's tobacco products business and that the Division of Taxation's (Division) use of an indirect audit methodology was warranted and reasonable, and resulted in a reasonable estimation of petitioner's tax liability for the audit period. In addition, fraud penalty and additional interest were sustained based upon the Division's finding that petitioner commingled its inventory; engaged in circular, unexplained transactions; failed to maintain complete records; and knowingly underreported and underpaid its tobacco products tax.

2. On July 10, 2013, petitioner sent to the Division of Tax Appeals, by facsimile transmission only, a letter that it claimed constituted a motion to reopen the record to accept an Inspector General's report, dated May 2013, concerning the Petroleum, Alcohol, and Tobacco Bureau of the Tax Department, and its involvement with certain cigarette operations. Petitioner claimed that the director of the Petroleum, Alcohol, and Tobacco Bureau had told petitioner its operations and reporting practices were satisfactory and that petitioner had relied to its detriment

on these statements. Thus, petitioner believes the Division should be estopped from asserting a deficiency.

3. The Division responded to this letter on July 10, 2013, by facsimile transmission and also by hand delivery by a recognized overnight delivery service, contending that the Inspector General's report makes no reference to petitioner and has no bearing on the instant proceedings.

4. After being informed that the motion to reopen had to be served by mail or by hand in order to be preserved, petitioner properly filed a notice of motion with underlying affirmation and exhibits on August 1, 2013 that set forth additional bases for reopening the record:

a) the Division failed to properly allege the fraud penalty in its answer;

b) the Division delayed the expedition of this matter for 13 months while it failed to allege fraud penalty;

c) the Division failed to comply with petitioner's FOIL requests;

d) the Division failed to give petitioner adequate notice of the documents and witnesses it was going to call at hearing in its hearing memorandum, hindering petitioner's ability to adequately prepare for hearing and subjecting it to surprise; and

e) the Division failed to provided the full criminal file with regard to petitioner, proving to be very harmful to petitioner's case, since petitioner believes the administrative law judge's determination was "largely based upon information from the criminal file that petitioner never saw until the day of hearing . . . ."

Based on these failures, petitioner believes the record should be reopened so that it may call additional witnesses to refute the criminal file and other information it was not previously provided.

5. In addition to the alleged failures by the Division that petitioner believes form the basis for reopening the record, it also urges that the record be reopened to enter the Federal tax returns for Vikisha, Inc., which petitioner contends demonstrate significant business volume that exceeds petitioner's, and intercompany transactions used to meet inventory needs.

6. The Division did not respond to the petitioner's second, amended motion.

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tribunal's Rules of Practice and Procedure provides for motions to reopen the record or for reargument, 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. The authority to reopen the record is limited by the principle articulated in ***Evans v. Monaghan*** (306 NY 312, 323 [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*** at 325).

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 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, petitioner seeks to introduce a set of three United States income tax returns, pages 1 and 2 only, for Vikisha, Inc., for the years 2004, 2005 and 2006. These returns do not constitute "newly discovered evidence" in accordance with the regulation and case law. Petitioner has not provided any explanation as to why this evidence could not have been discovered with due diligence in time to produce it at the hearing (***Matter of Reeves***, Tax Appeals Tribunal, September 2, 2004). Petitioner has also failed to establish what impact, if any, the introduction of this evidence would have on the result reached in the determination. The mere assertion that Vikisha had a larger business volume than petitioner and made several intercompany transactions of bulk merchandise, does nothing to establish relevancy or probative value.

In addition, although it appears petitioner has abandoned its original request to reopen the record to admit the Inspector General's report of May 2013, for the sake of a complete record herein it will be addressed. The report was issued after the record in this matter had closed for the submission of documents on August 15, 2012 and after the brief submission deadline of

January 13, 2013. Therefore, it could be considered newly discovered evidence and admitted into the record if it probably would have produced a different result.

As stated earlier, the report was a scathing review of the Division's Petroleum, Alcohol and Tobacco Bureau, stemming from the Department's lack of supervision of this bureau by administrators, who the report concluded had permitted a cigarette interdiction operation to be run without basic investigative protocols or financial oversight. One of these operations was a *cigarette* interdiction operation in Pennsylvania known as Operation Keystone. Petitioner believed it was harmed by this operation and insinuated that its unaccounted for sales may have originated in product provided to it as part of Operation Keystone.

Petitioner's business operation, which was the subject of the audit, concerned its tobacco products, not cigarettes. The tobacco products returns in issue were filed for importation of cigars, chewing tobacco and other tobacco products. Therefore, any assertion that there was a connection between Operation Keystone and the audit in issue is baseless. As the Inspector General's report bears out and the Division contends, petitioner was not mentioned in the report and the report bears no relevance to the audit in issue. Therefore, although the report may qualify as newly discovered, it would not alter the conclusions reached in the determination because it is deemed irrelevant and immaterial with respect to the audit of petitioner's tobacco products returns and tax liability.

C. With respect to petitioner's allegation of fraud, misrepresentation, or other misconduct by the Division, it is concluded that there is was no evidence in the record of such conduct, and petitioner has offered none on its motion to support such a claim. With no offering of newly discovered evidence on this issue it is not properly before this forum on the motion.

D. The purpose of a motion to reopen the record is not a party's opportunity to seek records it could have obtained prior to or at hearing. The Tribunal's regulations provide for a number of vehicles that can be utilized to obtain information from a party (20 NYCRR 3000.6, 3000.7), but it does not appear that petitioner chose to utilize them.

Petitioner did allege that it availed itself of a freedom of information request, but laments that the Division failed to fully respond to its request. However, this forum is not the venue to which petitioner should direct an appeal and it will not be addressed herein. (Public Officers Law § 89 [4][a], [b].)

E. Petitioner's other contentions in support of reopening the record are beyond the scope of this motion. Issues raised with regard to the pleading of fraud penalty, prior notice of witnesses and documents to be presented at hearing, and failure to be presented with petitioner's full criminal file, should have been argued at hearing or on exception. Asking for the record to be reopened to litigate issues that were or should have been apparent at that time is contrary to the very concept of finality spoken of in ***Evans***.

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

DATED: Albany, New York
November 27, 2013

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