STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GRAND CENTRAL JT VT	:	
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 June 1, 2008 through August 31, 2010.	:	
	:	ORDER DTA NOS. 824560 AND 825201
In the Matter of the Petition	:	
of	:	
GRAND CENTRAL JT VT	:	
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 June 1, 2009 through August 31, 2010.	:	
	:	

Petitioner, Grand Central JT VT, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 2008 through August 31, 2010 and June 1, 2009 through August 31, 2010.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in Albany, New York, on September 11, 2013, at 10:30 A.M. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall). On October 30, 2014, a determination was issued denying the petitions and sustaining the notices of determination.

On November 26, 2014, 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. (Michael J. Hall), opposed the motion in a response, dated December 12, 2014. Based upon the motion papers and all the pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the record should be reopened and new evidence accepted or reargument granted pursuant to 20 NYCRR 3000.16.

FINDINGS OF FACT

1. On July 3, 2013, after hearing, a determination was issued by Administrative Law Judge Dennis M. Galliher in the Matter of Grand Central JT VT (Division of Tax Appeals, July 3, 2013)(Grand Central I). In Grand Central I, the Division of Taxation's (Division's) denial of petitioner's claim for refund of sales and use taxes paid for the period September 1, 2005 through May 31, 2008 was sustained. The substance of the determination in Grand Central I was that petitioner failed to produce adequate books and records to substantiate its reported sales and that the indirect audit method chosen by the Division was proper. Petitioner did not file an exception to the determination in Grand Central I and, thus, the matter was finally decided pursuant to Tax Law § 2010(4).

2. On October 30, 2014, a determination was issued by Administrative Law Judge Herbert M. Friedman, Jr., in the ***Matter of Grand Central JT VT*** (Division of Tax Appeals, October 30, 2014) (Grand Central II). In Grand Central II, the Division's notices of determination assessing additional sales and use taxes to petitioner for the period June 1, 2008 through August 31, 2010

were sustained. Like Grand Central I, the essence of the determination in Grand Central II was petitioner's failure to produce adequate books and records and a finding that the Division's indirect audit method was proper.

3. A central argument unsuccessfully presented at hearing by petitioner in Grand Central II was that the Division reneged on its agreement to refrain from completing the audit in that case until the litigation of Grand Central I was finished.

4. On November 26, 2014, petitioner filed a notice of motion to reopen the record or for reargument of Grand Central II with the underlying affidavit of Michael Buxbaum, and exhibits, pursuant to 20 NYCRR 3000.16. Petitioner's motion states the following bases for reopening the record:

a) the determination in Grand Central II concealed or omitted important facts and failed to disclose the truth;

b) the Division failed to follow its audit guidelines, in particular, by refusing to delay its audit in Grand Central II until Grand Central I was finally determined, and failing to review offered records;

c) the determination in Grand Central II erroneously found Ramon Vasquez, one of the Division's witnesses, to be credible;

d) the refusal by the Division of Tax Appeals to grant petitioner a second adjournment of the scheduled hearing in Grand Central II prevented attendance by one of its witnesses; and

e) the determination "shows a great deal of insensitivity to the petitioner's witness and raises many questions regarding (the administrative law judge's) impartiality in this matter."

Based on these concerns, petitioner maintains that the record should be reopened so that it may include all facts regarding the existence of its books and records and the Division's agreement to allow Grand Central I to conclude before pursuing petitioner in Grand Central II.

5. In further support of its motion, petitioner attached five letters, dated March 14, July 2, August 7, August 12, and August 14, 2013, consisting of correspondence between its representative, Michael Buxbaum, the Division's representative, Michael Hall, and the administrative law judge. The letters discussed the initial adjournment of the hearing in Grand Central II from April 30 to September 11, 2013, and the administrative law judge's subsequent denial of petitioner's request for a second adjournment. Petitioner maintains that these letters, which it did not place in the record, demonstrate that a second adjournment of the hearing in Grand Central II was improperly denied.

6. The Division's position is that petitioner's motion is factually and legally insufficient and that it has not presented anything that would warrant the relief requested. Moreover, the Division's asserts that there is nothing to support a claim that the administrative law judge acted in other than a fair and impartial manner during the proceedings.

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tribunal's Rules of Practice and Procedure provides for a motion 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 ***Matter of 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 (***see also*** 20 NYCRR 3000.16[a][1]).

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)."

C. In the instant motion, petitioner fails to present any newly discovered evidence consistent with the aforementioned principles. Petitioner attached to its motion several letters addressing its requests for an adjournment, all of which predate the September 11, 2013 hearing. They clearly were available to petitioner as of that date, but were not offered into the record despite petitioner's

full and fair opportunity to do so. Further, petitioner has not provided an adequate explanation as to why the letters could not have been produced at the hearing (***see Matter of Reeves***, Tax Appeals Tribunal, September 2, 2004). Even had they been timely produced, they do not compel the relief sought as it is within the sound discretion of the administrative law judge whether or not to grant an adjournment (***see*** 20 NYCRR 3000.15[b]; ***Matter of Trusnovec***, Tax Appeals Tribunal, December 1, 2005). In sum, the letters do not constitute "newly discovered evidence" that would allow the record to be reopened (***see Matter of Groman***, Tax Appeals Tribunal, December 4, 2014).

Likewise, petitioner is not entitled to have the record reopened in order to demonstrate the existence of its books and records. Petitioner availed itself of the opportunity for a hearing, but voluntarily allowed the record to close without presentation of the necessary substantiating books and records, all of which should have been in existence. That was the time for production of its records. It cannot now argue that it should have an additional opportunity to produce them. Such a position is inconsistent with the express language of 20 NYCRR 3000.16 and the need for finality expressed by the Court of Appeals in ***Evans*** and the Tribunal in ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991).

D. Through the remainder of its motion, petitioner seeks to argue various points concerning the Division's audit or to have certain additional facts found that were purportedly omitted from the determination in Grand Central II (***see*** Finding of Fact 4). These points, however, were or should have been argued at hearing, or must be argued on exception. They are not proper grounds under 20 NYCRR 3000.16 for success of the instant motion (***see Evans***; ***see also Matter of D & C Glass Corp.***, Tax Appeals Tribunal, June 11, 1992).

E. Finally, to the extent that petitioner's motion is based on allegations of fraud, misrepresentation, or other misconduct by the Division under 20 NYCRR 3000.16(a)(2), it is similarly unsupported. There is no evidence in the record in Grand Central II of such misconduct, and petitioner has offered nothing new in its motion to support such a claim. On the contrary, the record demonstrates that the Division's witnesses testified credibly and acted appropriately throughout the audit. In fact, the October 30, 2014 determination in Grand Central II thoroughly addressed that very issue. Without any offering of newly discovered evidence, petitioner's motion must also fail on this point.

F. Petitioner's motion to reopen the record or for reargument is denied.

DATED: Albany, New York
March 5, 2015

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE