STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW CINGULAR WIRELESS PCS LLC	:	ORDER DTA NO. 825318
for Revision of a Determination or for Refund of Sales and and Use Taxes under Articles 28 and 29 of the Tax Law for the Period November 1, 2005 through September 30, 2010.	:	

Petitioner, New Cingular Wireless PCS LLC, 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 November 1, 2005 through September 30, 2010.

After both parties filed motions for summary determination, a determination was issued on July 17, 2014 granting the Division of Taxation's motion and denying petitioner's refund application.

On August 18, 2014, petitioner, by its representative, Margaret C. Wilson, Esq., 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. (Robert A. Maslyn, Esq., of counsel), opposed the motion in a response, filed September 15, 2014, 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 vacated and new evidence accepted or reargument granted, which petitioner contends will produce a different result.

FINDINGS OF FACT

1. Petitioner, New Cingular Wireless PCS LLC (New Cingular), filed a petition for refund of sales and use taxes for the period March 1, 2005 through February 29, 2008 following the Division of Taxation's (Division) denial of a refund application. The application was filed in November 2010 and the Division denied same on August 6, 2012. The Division filed a motion for summary determination that was opposed by petitioner, which cross-moved for summary determination. A determination was issued on July 17, 2014 that granted the Division's motion and denied petitioner's cross-motion, concluding that petitioner's refund application was flawed in that petitioner had not demonstrated, under any interpretation, that it had repaid its customers the sales tax it had erroneously collected from them and remitted to the Division.

2. In its motion to reopen the record for the sole purpose of introducing new evidence, petitioner claimed that it had not funded the New York State sales tax pre-refund escrow as called for in the July 2010 Global Class Action Settlement Agreement (Global Agreement) between New Cingular and its New York customers because the Division had informed petitioner that, notwithstanding any such funding of the pre-refund escrow, it would still deny the refund claim on other grounds.

3. After reviewing the determination issued herein, petitioner decided to fund the New York pre-refund escrow in accordance with the terms of the Global Agreement and believes that the Division now must pay the refund claim.

4. On August 14, 2014, New Cingular entered into an escrow agreement with U.S. Bank National Association (U.S. Bank) providing for the escrow of $106,038,598.59 by New Cingular pursuant to the Global Agreement entered into as of July 9, 2010 and approved by the United States District Court for the Northern District of Illinois. According to the affidavit of Damien Daley, dated August 14, 2014, an employee of U.S. Bank, the bank has received the funds from New Cingular and is holding them pursuant to the escrow agreement.

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 ***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 (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 new evidence, which it concedes was not in existence at the time of the determination. Petitioner read the determination and correctly understood that it had an obligation under the Global Agreement to fund the New York pre-refund escrow account and only then took steps to comply. Evidence of that compliance, the affidavit of Damien Daley, indicated that the escrow agreement between petitioner and U.S. Bank was created on August 14, 2014 following the issuance of the determination on July 17, 2014. Therefore, notwithstanding petitioner's allegation that it had relied on the Division's representation that funding of the escrow would be "futile," the evidence it wishes this forum to reopen the record to receive was not in existence at the time of the determination and cannot be considered newly discovered (***Matter of Commercial Structures***).

C. Payment into the pre-refund escrow account presents a different factual landscape and a new issue not before this forum on the motions for summary determination, and acceptance of evidence pertaining to a new issue would be contrary to the very concept of finality spoken of in

Evans. (***See also Matter of D & C Glass Corp.***, Tax Appeals Tribunal, June 11, 1992.)

D. By definition , the affidavit of Damien Daley does not constitute "newly discovered evidence" in accordance with the regulation and case law since it was created after the determination was issued. As such, it is not newly discovered evidence that justifies reopening the record. (***Matter of Reeves***, Tax Appeals Tribunal, September 2, 2004.)

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

DATED: Albany, New York
December 4, 2014

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