

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MICHAEL STRACHAN : ORDER
DTA NO. 826530
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law and :
the New York City Administrative Code for the Year 2009. :

Petitioner, Michael Strachan, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2009.

A determination in this matter was issued on February 9, 2017, by Donna M. Gardiner, Administrative Law Judge. On March 21, 2017, petitioner filed a motion to reopen the record pursuant to 20 NYCRR 3000.16 for the sole purpose of submitting additional evidence.

Based upon the motion of petitioner, filed March 21, 2017, the affirmation in opposition to the motion by the Division of Taxation, filed on April 5, 2017, and all the pleadings and proceedings associated with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioner, Michael Strachan, filed a petition contesting a notice of deficiency issued to him for the tax year 2009. A formal hearing in this matter was held on February 5, 2016. The issue presented was whether petitioner established that he was a real estate professional and entitled to claim a deduction for certain losses incurred from rental real estate activities for the

tax year 2009. At the hearing, petitioner presented evidence in the form of documents and testimony in support of his petition.

2. Near the end of the hearing, both sides were given until April 5, 2016, to submit documentation regarding petitioner's exhibit "7." This one-page exhibit is titled "Activity Grouping Election." It is an affirmative statement upon which petitioner declared that he wished to aggregate the four properties listed therein as an appropriate economic unit for the measurement of gain or loss for purposes of Internal Revenue Code § 469. Since it could not be determined whether this form was an Internal Revenue Service (IRS) document or whether it was actually filed with the IRS, both sides wanted to contact the IRS for confirmation. The procedure for keeping the record open was discussed, in pertinent part, as follows:

"JUDGE GARDINER: We went off the record briefly to discuss the due dates for further submissions. Both sides have until April 5th to submit documentation from the IRS, either confirmation that this particular form was filed or received, or any other documentation that pertains to the aggregating of the properties for the passive losses.

After that time[,] petitioner will have until May 5th to file [his] brief in support. The Division will have until June 6th to file [its] brief in opposition. Mr. Eisman [petitioner's representative], your reply brief if you require it, on June 27th.

These dates are firm. I will grant extensions provided the extension requests are in writing to me prior to the date for the submission. Please copy the other side on that.

With that said, other than that additional piece of evidence with respect to Petitioner's Exhibit 7, is there any further documents you would like to introduce at this time.

MR. LAKE: No, thank you.

JUDGE GARDINER: Mr. Eisman?

MR. EISMAN: No.

JUDGE GARDINER: With that being said, the record is now closed”
(Transcript, pp. 215-217).

After a diligent search, neither party was able to obtain any documentation regarding the election in issue.

3. A determination in this matter was issued on February 9, 2017.

4. On March 21, 2017, petitioner filed a motion to reopen the record to submit additional evidence. Petitioner set forth the following reason for his request, in pertinent part, as follows:

“IRS [c]ompleted the extensive audit of my 2009 income tax which was running concurrently with NY State 2009 tax audit and the decision was for 2009[.] I was determined to be a Real Estate Professional (see attached signed decision). This decision was rendered September 2, 2016 after hearing and brief.”

Attached to the motion was a copy of *Strachan v. Commissioner of Internal Revenue*, Docket No. 17419-14, dated September 2, 2016, that reflects a stipulation between the parties regarding the final disposition of tax years 2009-2011, an IRS document for the tax year 2009, dated December 19, 2016, which reflects that the IRS applied a 2009 Form 1040 overpayment to an amount owed for 2011, and a brief in support of his position that he was a real estate professional and entitled to deduct certain losses for the tax year 2009.

5. By response, filed April 5, 2017, the Division of Taxation (Division) contends that the motion should be denied because it presented no facts that constitute a basis for reopening the record. The Division states that the motion was untimely, because it was not made within 30 days after the determination was served. Moreover, the Division notes that, even if the motion is deemed to be timely filed, petitioner has failed to establish that the documents submitted constitute newly discovered evidence that would alter the result set forth in the determination.

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) 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. As set forth in the Rules, petitioner was required to serve his motion to reopen the record within thirty days after the issuance of the determination. The determination in this matter was issued on February 9, 2017 and, thus, any motion was required to be filed by March 13, 2017.¹ As this motion was filed on March 21, 2017, it is deemed untimely.

C. Even if the motion was timely filed, petitioner has not established any facts warranting a reopening of the record. 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

¹The 30th day following the issuance of the determination was Saturday, March 11, 2017. The next business day was Monday, March 13, 2017. Pursuant to General Construction Law § 25-a, when any period of time before which an act is required to be done falls on a Saturday, such act may be done on the next succeeding business day.

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 that due diligence would not have uncovered in time to be used at the previous hearing (20 NYCRR 3000.16[a][1]; *Evans v. Monaghan*). As the Tribunal reasoned in *Matter of Frenette* (Tax Appeals Tribunal, February 1, 2001), newly discovered evidence is evidence which was in existence but undiscoverable with due diligence at the time of the formal hearing. Clearly, the decision of the United States Tax Court and the IRS notice were not in existence prior to the closing of the record in this matter and, as such, do not constitute newly discovered evidence.

D. Furthermore, the documents submitted do not address the issue presented in the petition. The decision submitted, dated on September 2, 2016, is a stipulation that reflects a resolution for open audit years 2009 through 2011 between petitioner and the IRS. The stipulation sets forth certain calculation adjustments to be made to petitioner’s Federal income tax liability for the years 2009 through 2011. In reviewing the documents submitted, there is no mention of petitioner’s qualification as a real estate professional for the years at issue. Thus, these documents do not establish that a different result would have occurred if they were made part of the record herein.

E. The motion of Michael Strachan to reopen the record is denied.

DATED: Albany, New York
June 29, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE