

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LEXINGTON INSURANCE COMPANY : ORDER
: DTA NOS. 828483
for Redetermination of a Deficiency or for Refund of : AND 828484
Franchise Tax on Insurance Corporations under Article 33 :
of the Tax Law for the Period January 1, 2008 through :
December 31, 2012. :
:

In the Matter of the Petition :
of :
AMERICAN INTERNATIONAL SPECIALTY LINES :
INSURANCE COMPANY :
for Redetermination of a Deficiency or for Refund of :
Franchise Tax on Insurance Corporations under Article 33 :
of the Tax Law for the Period January 1, 2008 through :
December 31, 2012. :

Petitioners, Lexington Insurance Company and American International Specialty Lines Insurance Company, filed petitions for redetermination of a deficiency or for refund of the franchise tax on insurance corporations under article 33 of the Tax Law for the period January 1, 2008 through December 31, 2012.

On February 13, 2020, the Division of Taxation, appearing by Amanda Hiller, Esq. (David Markey, Esq., of counsel), brought a motion seeking an order, pursuant to 20 NYCRR 3000.16 (i), vacating the order issued in these matters by the Division of Tax Appeals on January 23, 2020, granting in part and denying in part the Division of Taxation's motion to withdraw a

subpoena duces tecum signed by the undersigned administrative law judge and served upon the Division of Taxation on September 19, 2019, and (ii) reopening the record, in order to allow the Division of Tax Appeals to reconsider that order in light of nine additional responsive documents not included in the record on the motion to withdraw the subpoena duces tecum. The February 13, 2020 motion was accompanied by an affirmation, dated February 12, 2020, of Deborah R. Liebman, Esq., with attached exhibits, and a letter dated February 13, 2020, of David Markey, Esq., in support of the motion. On March 10, 2020, petitioners, appearing by Baker & McKenzie LLP (Maria P. Eberle, Esq., Lindsay M. LaCava, Esq., and Michael Tedesco, Esq., of counsel), submitted an affirmation of Ms. Eberle, dated March 9, 2020, with attached exhibits, and a memorandum in opposition to the motion. After due consideration of the Division of Taxation's motion, the parties' affirmations and exhibits, the letter and memorandum submitted by the parties, and all the pleadings and proceedings had herein, James P. Connolly, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion to vacate the order issued in response to its motion to withdraw a subpoena duces tecum and to reopen the record pertaining to the motion to withdraw should be granted.

FINDINGS OF FACT

1. Petitioners, Lexington Insurance Company and American International Specialty Lines Insurance Company, filed separate petitions with the Division of Tax Appeals on November 20, 2017, protesting certain notices of deficiency dated August 23, 2017, assessing additional article 33 tax, plus interest (notices) issued to them by the Division of Taxation (Division).

2. At the request of petitioners, by letter dated September 18, 2019, the Division of Tax Appeals issued a subpoena duces tecum (subpoena), which petitioners served on the Division on September 19, 2019.

3. On September 30, 2019, the Division of Taxation brought a motion seeking an order, pursuant to 20 NYCRR 3000.7 (c), withdrawing the subpoena (motion to withdraw the subpoena). In support of its motion to withdraw the subpoena, the Division submitted the affirmation, dated September 27, 2019, of Ms. Deborah Liebman, Deputy Counsel in the Division's Office of Counsel. Attached to the Liebman affirmation, as exhibits Q, R, S, and T, were "the entirety of the documents responsive to [petitioners'] subpoena" (subpoenaed documents), according to the affirmation.

4. By an order dated January 23, 2020, the undersigned administrative law judge granted the motion in part, and denied the motion in part, modifying the subpoena to exclude certain of the subpoenaed documents.

5. On this motion, the Division seeks to vacate the January 23, 2020 order, and reopen the record with regard to the motion to withdraw the subpoena in order to allow the Division of Tax Appeals to consider nine additional documents responsive to the subpoena. In support of its motion, the Division submitted the affirmation, dated February 12, 2020, of Ms. Liebman, which explains that "[u]pon review of the [January 23, 2020 order], the Division discovered that nine (9) documents responsive to the [subpoena] . . . were missing from the documents that were included" as exhibits to Ms. Liebman's September 27, 2019, affirmation and "should have been included as part of Exhibit T" to that affirmation. Ms. Liebman's affirmation further notes that the nine documents were also "not accounted for" in the privilege logs attached to those exhibits.

The Division attached the nine documents, along with a privilege log for the documents, as an exhibit to the February 12, 2020 Liebman affirmation,

“(1) as the grounds for reopening the record . . . ; (2) to ensure that there is a complete record for purposes of the [motion to withdraw the subpoena]; and (3) to provide [the administrative law judge] with the opportunity to conduct an in camera review of all the documents that are the subject of the [subpoena].”

6. Mr. Markey’s letter in support of the motion states that:

“The nine documents were unintentionally omitted from the papers submitted with the Division’s [motion to withdraw]. This error was discovered only upon review of [the January 23, 2020 order].”

CONCLUSIONS OF LAW

A. On this motion, citing § 3000.16 of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules), the Division seeks to vacate the January 23, 2020 order denying in part and granting in part the Division’s motion to withdraw the subpoena, and to reopen the record for that motion. That section 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. Section 3000.16 contemplates the vacating of a “determination,” not an order as the Division seeks to do herein. Accordingly, the Division’s motion must fail.

C. Even assuming the Division’s motion was permissible under the Rules, it has not established a basis for vacating the order. It has not asserted any fraud or misrepresentation on the part of petitioners. Nor has it asserted, let alone proven, that the

nine documents it seeks to include in the record via this motion constitute “newly discovered evidence.” Ms. Liebman’s affirmation on this motion states that the Division only discovered the omission of the nine documents from exhibit T to Ms. Liebman’s September 27, 2019 affirmation upon reviewing the order. This statement, reinforced by the statement in Mr. Markey’s letter accompanying this motion that the omission was “unintentional[]” and an “error,” indicates that the Division had the documents at the time of its preparation of exhibit T, but inadvertently failed to include them in that exhibit. This does not satisfy the “newly discovered evidence” standard. In *Matter of Frenette* (Tax Appeals Tribunal, February 1, 2001), the Tax Appeals Tribunal noted that the “newly discovered evidence” language in section 3000.16 of the Rules is derived from CPLR 5515. Under that standard, “[o]nly evidence which was in existence but undiscoverable with due diligence at the time of judgment may be characterized as newly discovered evidence” (*Matter of Frenette*, quoting *Matter of Commercial Structures v City of Syracuse*, 97 AD2d 965, 966 [4th Dept 1983], *lv denied* 59 NY2d 606 [1983]).

D. The Division’s motion, dated February 13, 2020, to vacate the Division of Tax Appeals’ order dated January 23, 2020, and to reopen the record in this matter, is denied.

DATED: Albany, New York
May 7, 2020

/s/ James P. Connolly

ADMINISTRATIVE LAW JUDGE