STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **TASTY SUB, LLC** for Revision of a Determination or for Refund of New York State Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for the Period June 1, 2013 through May 31, 2016.	ORDER DTA NO. 829008

Petitioner, Tasty Sub, LLC, filed a petition for revision of a determination or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2013 through May 31, 2016.

On June 30, 2021, petitioner, by Stuart B. Ratner, P.C. (Stuart B. Ratner, Esq.), filed a motion to reopen the record pursuant to 20 NYCRR 3000.16. The Division of Taxation, by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel), filed an affirmation and exhibits in opposition. Petitioner filed a reply. The Division of Taxation filed a sur reply on November 22, 2021, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's motion to reopen the record based upon ineffective assistance of representation and newly discovered evidence should be granted.

FINDINGS OF FACT

1. On June 3, 2021, a default determination was issued in this matter; the determination also denied a motion for summary determination brought by petitioner the day before the scheduled hearing and, upon motion of the administrative law judge, imposed a $500.00 penalty on petitioner under the authority of Tax Law § 2018. The findings of fact and conclusions of law from the June 3, 2021 determination are incorporated herein by reference as if set forth in their entirety.

2. The petition in this proceeding was signed by petitioner's then-representative Michael Buxbaum, CPA. A power of attorney form authorizing Mr. Buxbaum to represent petitioner was signed by petitioner's managing member, Mohammad Rashid, on January 2, 2019. On January 21, 2021, Mr. Buxbaum withdrew as petitioner's representative.

3. On June 30, 2021, petitioner filed the instant motion to reopen the record based upon ineffective representation by Mr. Buxbaum, and newly discovered evidence. In its motion, petitioner asserts that it was denied due process by "Buxbaum's bizarre and unexplained behavior before the Division and its administrative law judges as a result of Buxbaum's failure to appear at various hearings and/or reply to the Division's requests." It asserts that Mr. Buxbaum failed to inform it of what proof was necessary to prevail in this matter and that it learned of the scheduled hearing in this matter independently of Mr. Buxbaum. Petitioner asserts that the default resulted due to Mr. Buxbaum's ineffective assistance of counsel and maintains that Mr. Buxbaum failed to appear without petitioner's full knowledge or awareness. Petitioner also alleges that it was unaware of Mr. Buxbaum's email communications with the Division of Tax Appeals. Further, petitioner argues that it was denied due process by Mr. Buxbaum's "bizarre and unexplained behavior before the Division of Tax Appeals and its administrative law judges."

This behavior, according to petitioner, defeated its right to be adequately represented, as Mr. Buxbaum performed no acts on its behalf. Moreover, petitioner states that Mr. Buxbaum's actions caused it to be unable to properly discover or introduce relevant evidence into the record. In sum, petitioner states that "(Mr.) Buxbaum should be considered as a bellwether for ineffective assistance of representation before the Division resulting in the Petitioner being denied an effective hearing on the merits of the Petitioner's case altogether." Petitioner asserts that its right to effective representation was thwarted because Mr. Buxbaum's actions caused it to be unable to properly discover or introduce relevant evidence into the record. Petitioner asserts that it has new evidence that was not presented by Mr. Buxbaum that must be considered.

4. Included in the motion papers is the declaration of Mr. Rashid.[1] Mr. Rashid acknowledges that he was aware of the January 6, 2021 hearing prior to that date and that he was reassured by Mr. Buxbaum that "he would handle the matter accordingly." Mr. Rashid adds that he subsequently learned that Mr. Buxbaum disregarded the hearing. Consequently, Mr. Rashid states that he felt misled. Mr. Rashid states that petitioner used sales reports produced by the cash register system required by its franchisor to determine gross sales. He adds that petitioner's accountant, Kent Wahlberg, CPA, then calculated that 8% of petitioner's sales consisted of non-taxable sales and, accordingly, deducted that amount from gross sales on its sales tax returns. Mr. Rashid asserts that the bank deposit analysis performed by the Division was erroneous as the additional funds in the account were not from unreported sales, but rather non-taxable intra-company bank transfers. Mr. Rashid further averred that the franchisor made the purchases at issue on behalf of petitioner pursuant to the franchise agreement and paid the requisite sales tax.

[1] It is noted that this declaration was not notarized.

5. Attached to petitioner's motion is the declaration of Kent Wahlberg, CPA.[2] Mr. Wahlberg has been providing bookkeeping, accounting and tax preparation services to petitioner since 1995. He states that petitioner is required by its franchisor to use a "specific franchise approved cash register system" that instantaneously electronically reports all sales activity to the franchisor. It is that report that petitioner uses to calculate gross sales and, ultimately, taxable sales, according to Mr. Wahlberg. He adds that since the system does not differentiate between taxable and non-taxable sales, based on his industry experience, he applies an 8% discount to gross sales to account for non-taxable sales. Mr. Wahlberg also confirms Mr. Rashid's statements regarding the intra-company bank deposits and equipment purchases.

6. Also included with petitioner's motion papers if the declaration of Heather Murray, Tax Specialist in the Tax Group at Franchise World Headquarters, LLC, which provides services to petitioner's franchisor.[3] In her role, she is responsible for federal and state tax compliance for the franchisor and its related entities. She states that, after a review of the franchisor's records, the equipment purchase identified by the Division's auditor was made by petitioner's franchisor and that the appropriate sales tax was paid.

7. In response, the Division asserts that there is no remedy to reopen the record due to ineffective representation and that Mr. Buxbaum, in his status as a certified public accountant, was qualified to represent petitioner during these proceedings. The Division further asserts that what is contained in the declarations submitted by petitioner in its motion to reopen is evidence known to petitioner all along and cannot be considered as "newly discovered." Furthermore, the Division characterizes petitioner's claims as conclusory and not supported by documentary

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[2] This declaration is notarized by a Connecticut notary.

[3] This declaration is also notarized by a Connecticut notary.

evidence.

8. In its reply to the Division's response, petitioner submitted copies of its bank statements and canceled checks for a sample period of May 2014 through October 2014; also included was a spreadsheet entitled "Summary of Non-Sales Deposits to Tasty Sub's Bank Account for Period of May 2014 through October 2014." The spreadsheet summarizes payroll checks cashed by petitioner by date and amount during the sample period and the copies of the bank statements and canceled checks have handwritten notations on them flagging the cashed employee checks. Petitioner alleges that during the audit period, it transferred funds from its Connecticut franchises to its New York franchises to enable its New York employees to cash their weekly payroll checks without cost. The employees would endorse over the payroll checks to petitioner who would cash same. The employee checks were then deposited into petitioner's checking account.

9. In its sur-reply, the Division alleges that petitioner has failed to establish how the bank statements and canceled checks included in petitioner's reply could not have been discovered with due diligence at the time of the originally scheduled hearing.

10. On the same day that the instant motion was filed, petitioner filed an application to vacate the default determination pursuant to 20 NYCRR 3015 (b) (3). By order dated November 24, 2021, Supervising Administrative Law Judge Herbert M. Friedman, Jr., denied petitioner's application to vacate the default determination. On December 9, 2021, petitioner filed an exception with the Tax Appeals Tribunal.

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:
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> > (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.
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> (b) Procedure. A motion to reopen the record or for reargument, 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. A timely motion to reopen or reargue shall not extend the time limit for taking an exception to such determination; however, upon application for an extension of time to file an exception pursuant to section 3000.20 of this Part 'good cause' shall be deemed to include the timely filing of a motion to reopen the record or reargue. An administrative law judge shall have no power to grant a motion made pursuant to this section after the filing of an exception with the tax appeals tribunal."

During the pendency of this motion, petitioner filed an exception to the Tax Appeals Tribunal (***see*** finding of fact 10). Therefore, in accordance with 20 NYCRR 3000.16 (b), the undersigned is without power to grant petitioner's motion. Petitioner's arguments on the motion are nonetheless addressed for sake of a complete record (***see Matter of Riehm v Tax Appeals Tribunal***, 179 AD2d 970 [3d Dept 1992], ***lv denied*** 79 NY2d 759 [1992], ***reargument denied*** 80 NY2d 893 [1992]).

B. As noted, petitioner moves to have the default reopened on the ground that its former representative, Michael Buxbaum, CPA, provided ineffective representation. Such contention is not a basis to vacate a default determination (***see Matter of Auto Parts Center***, Tax Appeals Tribunal, July 24, 2003). Moreover "'in the context of civil litigation, an attorney's errors or omissions are binding on the client and, absent extraordinary circumstances, a claim of ineffective assistance of counsel will not be entertained'" (***HBJOBaron Assoc. v Leahing***, 142 AD3d 585, 585 [2nd Dept 2016], quoting ***Mendoza v Plaza Homes, LLC***, 55 AD3d 692, 693

[2nd Dept 2008]). In the instant motion, petitioner has not made a showing of such extraordinary circumstances. "Petitioner voluntarily chose. . . [Buxbaum] as [its] representative in the action, and [it] cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" ***Link v Wabash Railroad***, 370 US 626, 633-634 [1962] quoting ***Smith v Ayer***, 101 US 320, 326 [1979]).

C. As part of its argument, petitioner alleges that the matter should be reopened because its former representative, Mr. Buxbaum, was not authorized to represent it. Petitioner contends that Tax Law § 2014, which limits the right to represent clients in proceedings before the Division of Tax Appeals to attorneys, certified public accountants, licensed public accountants and enrolled agents, evinces an intent by the Legislature to achieve effective representation by competent professionals. Petitioner argues that Mr. Buxbaum's "incompetence" rendered him unqualified to represent it in this matter. In making this argument, petitioner cites to ***Matter of Coliseum Palace*** (Tax Appeals Tribunal, November 17, 1988) and ***Matter of Haber*** (Tax Appeals Tribunal, August 1, 1996). These cases, however, are distinguishable as Mr. Buxbaum is a certified public accountant licensed in New York State and is therefore qualified to represent clients in proceedings before the Division of Tax Appeals (***see*** Tax Law § 2014). Tax Law § 2014 does not speak to whether an individual who is otherwise qualified, is competent.

D. Petitioner also argues that the matter should be reopened as it has newly discovered evidence that would change the results of the instant matter. First, as a preliminary matter, a motion to reopen the record based on newly discovered evidence is not applicable to a default determination (***State v Williams***, 26 Misc3d 743 [Sup Ct, Albany County, September 18, 2009]

[The rule allowing relief from judgment based on newly discovered evidence that probably would have changed the result at trial is not applicable to a default judgment]). There is a specific procedure applicable to reopen a default determination (***see*** 20 NYCRR 3000.15 [b] [3]), which petitioner has already availed itself of (***see*** finding of fact 10). Regardless, however, petitioner's motion nonetheless fails as its evidence is not newly discovered. "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***, 97 AD2d 965, 966 [2nd Dept 1988). The bank statements and the declarations from Kent Wahlberg, Heather Murray and petitioner's managing member[4] do not constitute newly discovered evidence because its claim that said evidence was undiscoverable is premised on the allegation that Mr. Buxbaum failed to inform it that it needed same to effectively present its case. Evidence that is not presented because of a representative's misfeasance or malfeasance does not make that evidence undiscoverable. Petitioner's claim that Mr. Buxbaum was incompetent undermines its claim that said evidence was undiscoverable with due diligence. As succinctly stated by the Seventh Circuit in ***Slavin v Comm'r***, 932 F2d 598, 601 (7th Cir 1991), "[s]hortcomings by counsel may be addressed in malpractice actions; they do not authorize the loser to litigate from scratch against the original adversary." Based upon the foregoing, petitioner's motion to reopen the record based upon ineffective representation and newly discovered evidence is rejected.

[4] Mr. Rashid's declaration is of no evidentiary value as it was not notarized (***see*** CPLR § 2309)

E. Petitioner, Tasty Sub, LLC's, motion to reopen the record based upon ineffective assistance of representative and newly discovered evidence is denied.

DATED: Albany, New York
February 10, 2022

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE