STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
HARVEY AND KATHRYN WACHSMAN	:	DECISION DTA Nos. 806930
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1983.	:	and 806931

The Division of Taxation filed an exception to the order of the Administrative Law Judge issued on March 25, 1993 with respect to the motion of petitioners for a new administrative hearing. Petitioners are Harvey and Kathryn Wachsman, 55 Mill River Road, Upper Brookville, New York 11771. Petitioners appeared by Rhonda L. Meyer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioners filed a responding brief and the Division of Taxation replied to petitioners' response. The reply brief was received on July 8, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Administrative Law Judge properly granted petitioners' motion relieving them of a determination issued on April 16, 1992, vacating and setting aside that determination and granting petitioners a new administrative hearing.

II. Whether the Division of Taxation's exception is premature under 20 NYCRR 3000.5(a)(5).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On March 20, 1991, a hearing was held before Brian L. Friedman, Administrative Law Judge, in the matter of the petitions of Harvey and Kathryn Wachsman for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 1983. The issues to be decided at the hearing were as follows:

I. Whether petitioner Kathryn Wachsman timely filed a petition with the former Tax Appeals Bureau of the former State Tax Commission seeking administrative review of a personal income tax deficiency asserted by the Division of Taxation to be due from petitioner for the year at issue.

II. Whether the Division of Taxation properly determined that petitioners were taxable as residents pursuant to Tax Law former § 605(a).

III. If not, whether petitioners properly allocated income derived from New York sources pursuant to the provisions of Tax Law former § 632 and 20 NYCRR 131.18.

In a determination dated April 16, 1992, Issue I was determined in petitioner Kathryn Wachsman's favor, i.e., it was found that the petition of Kathryn Wachsman was timely filed with the former State Tax Commission and, therefore, that the Division of Tax Appeals had jurisdiction of the subject matter contained in the petition.

With respect to Issue II, the determination held that, for the year at issue, petitioners were domiciliaries of Connecticut; however, it was further found that petitioners were properly taxable as residents of the State of New York by virtue of having maintained a permanent place of abode in New York during 1983 and having failed to sustain their burden of proving that they did not spend, in the aggregate, more than 183 days in the State of New York during 1983.

By virtue of the holding relative to Issue II, Issue III was rendered moot.

Petitioners subsequently filed a Notice of Exception to the determination with the Tax Appeals Tribunal.

Conclusion of Law "E" of the determination held, in part, as follows:

"It is undisputed that petitioners do not have daily records of their whereabouts during 1983. They do maintain, however, that such records existed in the form of a

daily diary kept by Harvey Wachsman's secretary at Pegalis and Wachsman. Two possible explanations for the present unavailability of this diary were presented at the hearing.

"Petitioners' former accountant, Mr. Hanley, testified that the days-in-and-out allocation on the tax return was prepared through discussions with petitioners. As to the summary schedules attached to the petitions, Mr. Hanley is not sure whether or not he saw the diary, but he admitted that it would not have been placed within his firm's files (see, Finding of Fact "5"). Therefore, it must be determined that the water damage to the Time Storage warehouse and the subsequent transfer of petitioners' records to Record Keepers was not the cause for petitioners' inability to produce substantiation for their days in and out of New York for 1983.

"Petitioner Harvey Wachsman testified (see, Finding of Fact "6") that his only possible explanation for the inability to produce daily records for 1983 was that, due to the extensive growth and resulting construction by Pegalis and Wachsman, his records were sent to storage and could not, therefore, be located."

In his affidavit (paragraphs "3" through "9") sworn to January 19, 1993, petitioner Harvey Wachsman stated as follows:

"3. During 1983, I was a principal in the firm of Pegalis & Wachsman, P.C. at 175 East Shore Road, Great Neck, New York.

"4. During 1983, as was the usual and customary practice in my office, my personal secretary kept a daily diary of all my scheduled trials, meetings, appointments, and whereabouts, both in state and out of state. This diary was kept at all times at my office in Great Neck, New York.

"5. At the time of the hearing in this case, I was unable to locate the 1983 diary despite diligent effort, due to the fact that the diary was placed in storage along with files, books, records, and other documents. Storage of all these materials began sometime in the middle 1980's when our law practice grew so rapidly that we were forced to move into several office spaces at two different locations, which continued for the next several years.

"6. As testified to by this affiant, in 1988 building construction began at our offices at 175 East Shore Road, and further storage of documents, business records, books, etc. was necessary. At that point in time thousands of boxes had been placed in storage, which remained there pending completion of the expansion project.

"7. That project was only recently completed, and the materials in storage were finally returned to the office, opened, and placed on shelves and in cabinets and drawers.

"8. Within the past week, in the course of emptying boxes, my office staff located my 1983 diary, which, as I had previously testified, was in storage and unable to be located. I immediately notified my counsel of this discovery.

"9. The 1983 diary is supportive of the summary schedules previously submitted by me and provides proof that I was not present in New York for more than 183 days."

OPINION

In his order, the Administrative Law Judge adopted CPLR 5015(a)(2) as the standard to determine whether petitioners' motion to vacate the determination should be granted on the basis of newly discovered evidence. Under CPLR 5015(a)(2), the Administrative Law Judge stated that the moving party had to show that the newly discovered evidence is material, that it would probably change the result if a new trial were granted and that it could not have been discovered before the trial by the exercise of due diligence. The Administrative Law Judge concluded that the only one of these elements that had not been clearly proven by petitioners was that they had exercised due diligence in attempting to locate the diary prior to the hearing. Weighing the circumstances of this case, the Administrative Law Judge inferred that petitioners had exercised due diligence.

On exception, the Division of Taxation (hereinafter the "Division") argues that petitioners merely asserted the conclusion that diligent efforts were made to locate the diary, but did not allege facts to support that conclusion. The Division asserts that the Administrative Law Judge erred in granting the motion because, according to petitioners, petitioners did not prove that the 1983 diary was unobtainable for the formal hearing. The Division maintains that under CPLR 5015(a)(2) the courts apply a heavy burden of proof to the moving party seeking relief and that this practice should be followed by the Division of Tax Appeals.

The Division also argues that 20 NYCRR 3000.5(a)(5) does not bar our review of this matter because the order of the Administrative Law Judge is not an intermediate order rendered prior to a complete and final determination by the Administrative Law Judge. Instead, the Division contends, the Administrative Law Judge had already issued a determination that denied the petitions and sustained the notices of determination in their entirety. The Division also points out that CPLR 5701 provides an appeal as of right from any order that grants or

refuses a new trial and argues that this provision should guide us, pursuant to the direction of 20 NYCRR 3000.5(a)(6).

In response, petitioners argue that the order granting the new hearing does not finally determine the issue of whether petitioners were properly taxed as New York residents or whether petitioners properly allocated income derived from New York sources. Therefore, petitioners contend that review of the order is barred by 20 NYCRR 3000.5(a)(5).

On the merits of the case, petitioners assert that the Administrative Law Judge properly exercised his discretion to grant the rehearing and that his decision should not be disturbed. Petitioners also state that the Administrative Law Judge's order did not vacate a final judgment, as the Administrative Law Judge's determination of April 16, 1992 never became final due to petitioners' filing of an exception. As a result, petitioners argue that their motion was more in the nature of a motion to renew under CPLR 2221(a) than a motion to vacate under CPLR 5015(a)(2) and that the principles under the former should be applied here. Petitioners argue that they offered a reasonable excuse for not offering the diary at the hearing, that it could not have, despite due diligence, been obtained for the hearing and that the Division has not, and could not, claim prejudice as a result of the Administrative Law Judge's order. In these circumstances, petitioners contend that their claim for renewal was properly granted.

At 20 NYCRR 3000.5(a)(5) our regulations provide that:

> "An order by an administrative law judge on any motion which does not finally determine all matters and issues contained in the petition, for purposes of review by the tribunal, shall not be deemed final and conclusive until the administrative law judge shall have rendered a determination on the remaining matters and issues. An order by the tribunal which does not finally determine all matters and issues contained in the petition, for purposes of review under article 78 of the CPLR, shall not be deemed final and conclusive until the tribunal shall have rendered a decision on the remaining matters and issues."

As a result of the Administrative Law Judge's order, the issue of whether petitioners were residents of New York during 1983 has been reopened. Therefore, it is clear that the order did not finally determine all matters and issues contained in the petition and is not, pursuant to 20

NYCRR 3000.5, subject to our review (see, Matter of Barrier Oil Corp., Tax Appeals Tribunal, February 22, 1993; Matter of Macbet Realty Corp., Tax Appeals Tribunal, June 16, 1988). The fact that the Administrative Law Judge had previously rendered a determination that did dispose of all the issues does not change the nature of the order before us.

With respect to the Division's point that we should be guided by CPLR 5702 (which provides an appeal as of right from any order that grants or refuses a new trial), as we have already noted in Matter of Rally Oil Co., (Tax Appeals Tribunal, January 17, 1991), our procedure with respect to non-final, interlocutory orders is more like that of the Tax Court, where interlocutory orders are generally not appealable (see, Internal Revenue Code § 7482[a]), than it is like that applicable to the New York State courts under the CPLR.[1] Our procedure, articulated at 20 NYCRR 3000.5(a)(5), represents the policy decision that our system will work most efficiently under a general rule that cases stay at the Administrative Law Judge level until they are finally and completely resolved by the Administrative Law Judge and then move on for our review in one complete unit. We see no reason why this case should depart from this general rule. Therefore, we conclude that the Division's exception is premature and that the matter should be returned for the rehearing ordered by the Administrative Law Judge. If the Administrative Law Judge issues a determination on the rehearing that is unfavorable to the Division, the Division will be entitled to file an exception to that determination and the Administrative Law Judge's order granting the rehearing.

Accordingly, the exception of the Division of Taxation is dismissed and the hearing ordered by the Administrative Law Judge shall be held as expeditiously as possible.

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[1]The United States Tax Court's decision on a motion for rehearing is not a final decision and is generally not appealable to the Court of Appeals (see, Payne v. Koehler, 225 F2d 103, 55-2 USTC ¶ 9603, cert denied 350 US 904 [which deals with an appeal from a Federal District Court but, pursuant to IRC § 7482(a), the same rules apply to an appeal from a Tax Court order]).

DATED: Troy, New York
December 16, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner