STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MILFORD TRACTOR CO., INC. AND HARRY T. DOUGLAS, AS OFFICER	:	ORDER AND OPINION DTA No. 808563
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 June 1, 1985 through August 31, 1988.	:	

On October 4, 1994, the Division of Taxation filed a motion with the Tax Appeals Tribunal to vacate its decision in Matter of New Milford Tractor Co. (Tax Appeals Tribunal, September 1, 1994). On October 25, 1994, petitioners filed a Notice of Cross-Motion. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of Counsel). Petitioners appeared by Robert Plautz, Esq.

ORDER

Upon reading of the Notice of Motion together with the Affirmation in Support of Motion to Vacate the Decision of the Tribunal, the reply and the supplemental correspondence dated March 6, 1995 submitted by the Division of Taxation, and the Notice of Cross-Motion in Addition to Opposition to Main Motion together with supporting affirmation and brief, and the supplemental correspondence dated February 16, 1995 submitted by petitioners and due deliberation having been had thereon,

Now on the motion of the Division of Taxation, and the cross-motion of petitioners, it is

ORDERED that the motion of the Division of Taxation be and the same hereby is denied; AND

ORDERED that the cross-motion of petitioners be and the same hereby is denied.

OPINION

Division's Motion

In the relevant portion of New Milford Tractor Co., we held that petitioners "did not have sufficient nexus with the State to sustain the liability for use tax" (Matter of New Milford Tractor Co., supra). We reversed the determination of the Administrative Law Judge based upon twoAppellate Division, Third Department decisions that articulated that Court's interpretation of Quill Corp. v. North Dakota (504 US 298): Matter of Vermont Information Processing v. Tax Appeals Tribunal (206 AD2d 764, 615 NYS2d 99) and Matter of Orvis Co. v. Tax Appeals Tribunal (204 AD2d 916, 612 NYS2d 503, lv granted 84 NY2d 805, 618 NYS2d 7). Both of these decisions had been rendered after the Administrative Law Judge's determination in the present matter. Indeed, an exception had been filed by petitioners and oral argument had been held prior to the issuance of the Appellate Division decisions. On August 10, 1994, the office of the Clerk of the Court of Appeals acknowledged receipt of the filing for appeal as of right in Vermont Information Processing. On September 27, 1994, the Court of Appeals granted the motion of the Division of Taxation (hereinafter "Division") for leave to appeal in Orvis.

The Division in its motion asks that "the Tax Appeals Tribunal should vacate its decision in the captioned matter until the final appellate decision is made in the Orvis and Vermont Information Processing cases" (Affirmation in Support, p. 3). The Division first argues that the Tax Appeals Tribunal (hereinafter "Tribunal") has inherent power to vacate its decisions and that a motion to reargue is appropriate where cases relied on by the court are overturned on appeal, citing Matter of Preston v. Coughlin (164 AD2d 101, 562 NYS2d 867); McMahon v. City of New York (105 AD2d 101, 483 NYS2d 228); and Ferrizz v. Jahelka (125 AD2d 537, 509 NYS2d 613). Then the Division argues that because the decisions of the Appellate Division upon which our decision was based were issued after oral argument in this matter, because the facts in this case indicate a greater presence in New York than the facts in the

Appellate Division cases, and because we did not request any comments from the parties on these cases prior to issuing our decision in this matter, that their motion should be granted. The Division notes that if the Court of Appeals reverses the Appellate Division our decision in this case will be based on bad law, that because the Division cannot file an Article 78 they cannot keep this matter alive until after the final appellate decision, and that we have previously ordered a stay in such circumstances.

In response, petitioners argue that the Tribunal does not have jurisdiction to vacate its decision, that this Tribunal has consistently held that its power to reopen or vacate is limited, and that the cases relied upon by the Division merely support petitioners' position. Petitioners argue that the Division was well aware of the Appellate Division decisions and that the Court of Appeals had granted their motion for leave to appeal well before the Tribunal issued its decision in this case. Therefore, it was incumbent upon the Division to take some action and none was taken.

As we recently stressed in Matter of Avildsen (Tax Appeals Tribunal, January 26, 1995), citing to a previous decision, any authority that we might have to reconsider or vacate our decision is limited:

> "we have no statutory authority to reconsider our decisions and in the absence of statute, our authority to reconsider our decisions is limited (Matter of Fisher, Tax Appeals Tribunal, July 19, 1990; Matter of Capitol Coin, Tax Appeals Tribunal, August 23, 1989; Matter of Goldome Capital Inv., Tax Appeals Tribunal, November 3, 1988). Our authority is limited, due to the long established principle, as articulated by the Court of Appeals in the case of Evans v. Monaghan, 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 (citations omitted). 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 v. Monaghan, 306 NY 312, 118 NE2d 452, 457)" (Matter of Jenkins Covington, N.Y., Tax Appeals Tribunal, November 21, 1991, affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151).

It is within this framework that we must address the arguments of the Division in support of its motion. Oral argument before the Tribunal in this matter was heard on April 20, 1994,

making the Tribunal decision due by October 20, 1994. The Appellate Division decisions in Orvis and Vermont Information Processing were issued on May 26, 1994 and July 28, 1994, respectively. The Court of Appeals acknowledged receipt of the filing of the appeal as of right in Vermont Information Processing on August 10, 1994, and granted leave to appeal in Orvis on September 27, 1994. As noted by petitioners, prior to our rendering the decision in this matter, the Division could have requested an opportunity to submit a further brief on the current law and/or to distinguish the facts in this case from those in the Appellate Division decisions. The Division could have also filed a motion for a stay. In response to this argument, the Division stated:

> "[t]he fact that the Division did not make a motion to stay the proceedings before the Tribunal's decision in this matter is irrelevant. The Tribunal has in the past sua sponte asked the parties to address cases which have come down after the brief or oral argument. See Matter of Newchannels, Tax Appeals Tribunal, September 23, 1993. Thus, it was reasonable to assume that such a procedure would be employed in this case if the Tribunal believed that Orvis and Vermont Information Processing Appellate Division decisions were directly on point. Further, it was unreasonable to expect that the Tribunal would extrapolate the Appellate Division holdings in Orvis and Vermont Information Processing to a fact pattern substantially different from that addressed by the Appellate Division" (Supplemental letter dated March 6, 1995, p. 2).

We disagree. The Division appears to argue that it could not have possibly known that this Tribunal would consider the Appellate Division decisions as the controlling precedents in this case. Yet, at the same time, the Division requests in this motion that we vacate our previous decision and keep this matter open pending the final outcome of these same two cases on appeal. The Division goes on to imply that the Tribunal was obligated to request further input from the parties if these decision were going to apply in this case. The issue in Orvis and Vermont Information Processing was the same as in the present case; namely, did the petitioners have sufficient nexus with the State to allow the constitutional imposition of the tax. The Administrative Law Judge in this case relied on the Tribunal decision in Orvis.[1] The Appellate Division decisions set forth the current controlling law on this issue. If the Division

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[1]The Division, in opposition to petitioners' exception, cited the Tribunal decisions in Orvis and Vermont Information Processing.

felt that the facts in the present matter were distinguishable, it was incumbent upon the Division to request that the Tribunal allow further briefs in this matter. The Division is correct in pointing out that this Tribunal has on occasion itself asked parties to further brief an issue or a new case. However, because we have in the past been sufficiently convinced that further argument was needed on a point to ask for it ourselves, that does not in any way impose a duty on us to make such requests, nor alleviate the responsibilities of the parties to monitor their own cases. Furthermore, we fail to see how having asked the parties to comment on the two court cases could have provided the relief requested by this motion. Absent a motion for a stay from one of the parties, a decision would still have to have been issued within the six-month time frame required by section 2006(7) of the Tax Law.

The Division was the first party to this proceeding to know about the appeals it intended to file with the Court of Appeals. The last action of the Court of Appeals, granting the motion for leave to appeal in Orvis, was in fact granted prior to our decision being issued in this case. As pointed out by the Division, this Tribunal has granted a motion for a stay in a similar situation, Matter of Net Realty (Tax Appeals Tribunal, March 12, 1992). However, the Division is incorrect in stating that the fact it did not move for a stay is irrelevant. There were remedies available to the Division prior to the issuance of the decision in this matter. The Division chose for whatever reason not to avail itself of those remedies. That certainly is not sufficient grounds for this Tribunal to vacate its decision in the face of the strong policy of finality of administrative decisions.

Petitioners argue that the cases relied upon by the Division for the proposition that this Tribunal has inherent power to vacate its decisions in reality support an order denying the Division's motion. Specifically, we would note that the case cited by the Division dealing with an administrative determination states:

> "Moreover, while administrative agencies have inherent authority to reconsider a prior determination in cases of a change of circumstances, new information or when the original determination is tentative, this authority does not extend to situations where the agency seeks 'only

> to cure procedural defects that could and should have been cured during the original administrative review' [citations omitted]" (Matter of Preston v. Coughlin, supra, 562 NYS2d 867, 869).

While the type of defect being described in Preston was a correction of a defect caused by the adjudicatory agency, this case clearly speaks to the finality of agency determinations. The Division has not provided a basis for us to find an exception to that rule in this case.

Petitioners' Cross-Motion

Petitioners urge that:

> "The Division's motion is frivolous, without merit and undertaken solely for purposes of harassment and delay and this Tribunal should therefore impose sanctions against the Division" (Petitioners' brief, Point III, p. 7).

The Division did not respond to this argument.

Tax Law § 2018 provides that the Tribunal may impose a penalty for a frivolous petition. Our regulations provide some specific examples of what would be considered a frivolous position for a petitioner to take (20 NYCRR 3000.15). There are no provisions in the statute or regulations concerning frivolous motions, or examples of frivolous positions that could be taken by the Division. We do not, however, need to reach those issues here. It is our opinion that the position of the Division in this matter was not frivolous nor taken for the purpose of delay. This was the first time these particular circumstances have been addressed by this Tribunal and the Division was entitled to the opportunity to present its arguments.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion of the Division of Taxation and the cross-motion of petitioner are denied.

DATED: Troy, New York
May 1, 1995

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

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