STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

KENSINGTON GATE OWNERS INCORPORATED :

:

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 September 1, 1992 through December 31, 1994. :

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In the Matter of the Petition :

of :

SUNRISE POINT EAST CONDOMINIUM : ORDER

DTA NOS. 817445,

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 October 1, 1992 through December 31, 1994. : 817446, 817447, 817448, 817449, 817450 and 817451

In the Matter of the Petition :

of :

TOPPER REALTY CORP. :

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 December 1, 1992 through December 1, 1994. :

In the Matter of the Petition :

of :

WESTBURY TERRACE CONDOMINIUM :

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 October 1, 1992 through December 31, 1994. :

In the Matter of the Petition :

of :

WHITE OAKS NURSING HOME f/k/a WOODBURY HEALTH RELATED FACILITY :

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 August 1, 1993 through December 30, 1995. :

In the Matter of the Petition :

of :

WILLOW HOUSE OWNERS CORP. :

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 December 1, 1992 through November 30, 1995. :

In the Matter of the Petition	:
of	:
30 GRACE AVENUE APARTMENTS CORP.	:
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 December 1, 1992 through December 1, 1994.	:

Petitioners Kensington Gate Owners, Incorporated, c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, Sunrise Point East Condominium, c/o M. Topper, 84 East Park Avenue, Long Beach, New York 11561, Topper Realty Corp., 84 East Park Avenue, Long Beach, New York 11561, Westbury Terrace Condominium, 135 Post Avenue, Westbury, New York 11590, White Oaks Nursing Home f/k/a Woodbury Health Related Facility, 8565 Jericho Turnpike, Woodbury, New York 11797, Willow House Owners Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747 and 30 Grace Avenue Apartments Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, filed an exception to the determination of the Administrative Law Judge issued on August 16, 2001.

Subsequently, by Notice of Motion, dated October 30, 2001, petitioners moved to have the record reopened and additional documents added to the record. In response to the motion, the Division of Taxation submitted an affirmation in opposition to petitioners' motion to reopen the record.

Petitioners appeared by Robert A. Wagner, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel).

The Tax Appeals Tribunal delivers the following order on the motion to reopen this matter.

FINDINGS OF FACT

We find the following facts.

A determination was issued in this matter on August 16, 2001 by Administrative Law Judge Catherine M. Bennett. Petitioners filed an exception with the Tax Appeals Tribunal (hereinafter "Tribunal") on or about September 12, 2001. Petitioners filed their motion to reopen the record with the Tribunal on or about October 30, 2001. The motion requests an order which would reopen the record for the purpose of introducing nine LILCO invoices for Willow House Owners, one of the petitioners in this proceeding. Petitioners state that the invoices were just recently obtained after additional searching was conducted of Willow House Owners' records.

Petitioners did not bring this motion at any time prior to September 17, 2001 or make such motion to the Administrative Law Judge who was responsible for the determination of this matter.

ORDER

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:
>
> (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 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.

Petitioners' motion to reopen is denied. Our rules of practice anticipate that a motion to reopen will be made to the Administrative Law Judge who rendered the determination (20 NYCRR 3000.16[b]). The determination of the Administrative Law Judge was issued on August 16, 2001. Petitioners did not make this motion until October 30, 2001. Thus, the motion was made more than 30 days after the issuance of the determination and after an exception to that determination had been filed with the Tribunal. Our regulations prohibit the Administrative Law Judge from granting a motion to reopen after the filing of an exception with the Tribunal (20 NYCRR 3000.16[b]; ***see***, ***Matter of Frenette***, Tax Appeals Tribunal, February 1, 2001).

In addition, even if timely filed with the Administrative Law Judge, the motion presented no facts which would constitute a basis for reopening the record. Our authority is limited by the principle articulated in ***Evans v. Monaghan*** (306 NY 312, 118 NE2d 452, 457), 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 of person

> and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible.

Evans establishes that it is appropriate to reopen an administrative hearing where one party offers important, newly discovered evidence which due diligence would not have uncovered in time to be used at the previous hearing (***Evans v. Monaghan***, ***supra***).

The regulation of the Tribunal at 20 NYCRR 3000.16, which is patterned after Civil Practice Law and Rules ("CPLR") 5015, sets forth as one of the grounds to grant such motion "newly discovered evidence." The Appellate Division in ***Matter of Commercial Structures v. City of Syracuse*** (97 AD2d 965, 468 NYS2d 957) specifically addressed what constitutes newly discovered evidence (when in that case it was unclear whether such evidence existed at the time of the judgment). The Court stated:

> [t]he newly-discovered evidence provision of CPLR 5015 is derived from rule 60(b)(2) of the Federal Rules of Civil Procedure [citations omitted]. The Federal Rule permits reopening a judgement only upon the discovery of *evidence which was "in existence* and hidden at the time of the judgment" [citation omitted]. In our view, the New York rule was intended to be similarly applied. 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***, ***supra***, 468 NYS2d, at 958, emphasis added).

In the instant matter, the nine LILCO invoices sought to be entered into the record by petitioners do not constitute "newly discovered evidence" in accordance with the regulation and case law.

Upon reading the motion filed by petitioners on October 30, 2001 and the Division of Taxation's affirmation in opposition to petitioners' motion to reopen, dated December 7, 2001, and due deliberation having been had thereon, it is

ORDERED that said motion be and the same is hereby denied. The Secretary to the Tribunal is directed to transmit this matter for a decision on the merits of the case following completion of the briefing schedule.

DATED: Troy, New York
February 14, 2002

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner