STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
XUONG TRIEU A/K/A HENRY CHAO	:	ORDER DTA NO. 807969
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1982 and 1983.	:	

Upon petitioner's Notice of Motion, motion and attached brief in support, all dated December 23, 1992, seeking an order reopening the record of a hearing to allow for the introduction of evidence regarding the matter at issue, to conduct discovery and to file an amended petition, and upon the affirmation of Michael J. Glannon, Esq., dated January 15, 1993, in opposition thereto, and upon the reply affirmation of Arthur Pelikow, Esq., dated January 21, 1993, the following facts are found:

On February 3, 1989, the Division of Taxation ("Division") issued to petitioner, Xuong Trieu a/k/a Henry Chao, a Notice of Deficiency asserting additional personal income tax due for the years 1982 and 1983 in the aggregate amount of $153,508.01, plus penalty and interest.

Petitioner, by his then-representative, Louis Miu, CPA, requested a prehearing conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") to challenge the above-described Notice of Deficiency. A conciliation conference was held on October 26, 1989, at which petitioner appeared by Louis Miu, CPA, and the Division appeared by its auditor, Stanley Smeich. Thereafter, onDecember 22, 1989, a Conciliation Order (No. 096613) was issued sustaining in full the above-described statutory notice.

On March 21, 1990, a petition challenging the tax, penalty and interest at issue was filed with the Division of Tax Appeals. This petition is signed by Charles Becker, Esq., as

petitioner's appointed representative, and is accompanied by a properly executed power of attorney in favor of Mr. Becker. The petition lists specific allegations of error and of facts to be proven which reveal that petitioner's representative had a clear recognition of the issues involved in the case and the reasons and bases for the amount of tax liability in dispute.

The case was set down for hearing on December 10, 1991 at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York at 1:15 P.M. The hearing took place at that time, before Dennis M. Galliher, Administrative Law Judge, concluding at approximately 2:40 P.M. on the same date. At said hearing, petitioner appeared by Charles Becker, Esq. The Division appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel). Neither party offered direct testimony. Rather, at hearing the Division's attorney offered 12 documents as exhibits and petitioner's attorney offered 5 documents as exhibits, each in support of their respective positions. Near the conclusion of the hearing the Administrative Law Judge summarized his understanding of petitioner's position in the case. In turn, petitioner's counsel agreed that such summary accurately stated petitioner's arguments.

Each party was given an opportunity to submit additional documents, post-hearing, on or before January 31, 1992, and to submit briefs thereafter by April 22, 1992. In turn, both parties submitted additional documents post-hearing (Exhibits "M" and "6", respectively), and also submitted briefs. All of the aforementioned documents, together with the parties' arguments as articulated at hearing and by brief, were considered in rendering a determination in the matter.

On June 25, 1992, a determination in this matter was issued by Administrative Law Judge Dennis M. Galliher, reducing petitioner's audited taxable income by $7,000.00 (reflecting correction of a mathematical error) but otherwise sustaining the Notice of Deficiency. This motion to reopen the record was received by the Division of Tax Appeals on December 23, 1992, approximately six months after the determination was issued.

Petitioner's motion, in essence, is premised upon the position that the hearing record is incomplete and/or inadequate. Specifically, petitioner's current representative states that "[t]he

record is devoid of testimony, and is incomplete to the extent that numerous documents, of an irrefutable nature, should have been, but were not introduced into evidence." Petitioner likens the December 10, 1991 hearing to an "exploratory conference", and seeks to reopen the matter in order to prove petitioner's case as follows:

(a) by calling petitioner and the Division's auditor as witnesses;

(b) through a filed stipulation of facts;

(c) by deposition of witnesses;

(d) by introduction of third-party documents all predating the years at issue;

(e) by deposition of one Yin Kwok;[1] and

(f) by "probing" into the audit report of one Allan Burstein concerning an allegation that deficiency assessments for the years in question had been previously issued to and paid by petitioner.

Petitioner also would file an amended petition alleging that petitioner came to the United States in 1975; that he had transferred capital to this country before 1975; that he had a net worth in excess of over $200,000.00 before the years in issue; that with loan repayments of $278,000.00 his capital (liquid funds) was in excess of $500,000.00; and that the three-year statute of limitations applies because there was no omission of income in excess of 25% of petitioner's adjusted gross income.

By its affirmation in opposition to this motion, the Division points out that petitioner was represented by counsel at, as well as before, the hearing, was afforded ample opportunity to present his case, and that none of the evidence petitioner would offer at a reopened hearing constitutes newly-discovered evidence.

On or about July 27, 1992, an exception to the Administrative Law Judge's determination was received by the Tax Appeals Tribunal. Correspondence between petitioner's counsel and the Secretary to the Tribunal reveals that such exception is being held in abeyance

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[1] Such deposition would apparently be in addition to an affidavit previously made by Mr. Kwok and submitted during the proceedings on December 10, 1991.

pending the outcome of the instant motion.

OPINION

A. The regulation at 20 NYCRR 3000.5 discusses the general procedure and parameters of motion practice before the Division of Tax Appeals. The instant motion is not specifically addressed by said section, but is allowable pursuant to 20 NYCRR 3000.5(a) which states, in pertinent part, as follows:

> "To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR . . . ."

B. CPLR 4404(b) provides as follows:[2]

> "Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue."

The general scope of CPLR 4404 has been commented upon as follows:

> "CPLR 4404 is designed to unify the motion for new trial with that for judgment notwithstanding the verdict or decision. A CPLR 4404 motion is inapplicable unless there has been a verdict by a jury, a decision by a court sitting without a jury, or a hung jury. It is predicated on the assumption that the judge who presides at the trial--whether jury . . . or nonjury . . . is in the best position to evaluate errors at the trial, if the motion is made while his recollection is fresh." (4 Weinstein-Korn-Miller, NY Civ Prac ¶ 4404.01.)

Clearly, the instant motion appeals to the discretion of the trial judge.

> "The Trial Judge must decide whether substantial justice has been done . . . and 'must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision'" (see Micallef v. Miehle Co., 39 NY2d 376, 381, 384 NYS2d 115, 118).

C. CPLR 4405 concerns the time and the judge before whom a post-trial motion is to be made. It provides that said motion should be made before the judge who presided at the trial

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[2]Petitioner's reply affirmation cites to CPLR 5015(c). Said section deals with setting aside default judgments. Since the June 25, 1992 determination in this matter was not a default determination (compare, 20 NYCRR 3000.10[b]), petitioner's reliance on CPLR 5015(c) is misplaced.

within 15 days of the decision, verdict or discharge of the jury. As stated above, this is to insure that the motion is made while a recollection of the trial and facts is fresh in the trier's mind. The fact that petitioner herein waited approximately 6 months from the issuance of the determination and approximately 12 months from the time of the hearing to bring this motion, clearly weighs heavily against reopening the instant matter.

D. In Matter of Jenkins Covington, N.Y., Inc. (Tax Appeals Tribunal, November 21, 1991) the Tribunal discussed and set forth the standard to apply on the issue of reopening a matter that under law had finally determined the controversy between the Division and petitioner therein.

> "As we have repeatedly held, 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, supra; Matter of Capitol Coin, Tax Appeals Tribunal, August 23, 1989; Matter of Goldome Capital Inv., supra). 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). Evans v. Monaghan 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). This standard is substantially the same as that developed under Rule 2221 of the Civil Practice Law and Rules for a motion to renew (CPLR 2221[a]). A motion to renew must be based upon additional, material facts which existed at the time the prior motion was made, but were not then known to the party and, thus, were not made known to the court (Foley v. Roche, 68 AD2d 558, 418 NYS2d 588, 594). The additional facts must be ones that could not have readily and with due diligence been made part of the original motion (Foley v. Roche, supra, 418 NYS2d 588, 594). The motion to renew should be denied if the party fails to offer a valid excuse for not submitting the additional facts upon the original application (Zebrowski v. Pearl Kitchens, ___ AD2d ___, 568 NYS2d 242; Barnes v. State of New York, 159 AD2d 753, 552 NYS2d 57, appeal dismissed 76 NY2d 935, 563 NYS2d 63; Foley v. Roche, supra, 418 NYS2d 588, 594). Because the basic standard established by Evans is similar to that under Rule 2221(a), we are guided by the case law under Rule 2221(a) and conclude that to obtain reconsideration of a Tribunal decision, the party must show that the newly discovered facts could not have been discovered with due diligence and the party must offer a valid excuse for not submitting the facts upon the original application." (Matter of Jenkins Covington, N.Y., Inc., Tax Appeals Tribunal, November 21, 1991.)

E. When a petitioner avails himself of the right to petition an asserted deficiency, it is

incumbent upon that petitioner to prepare for formal hearing and to carry his burden of proof (20 NYCRR 3000.10[d][4]). Even though petitioner in this matter had approximately two years, post BCMS conference, to prepare for hearing, and was afforded full opportunity to present his case before the Administrative Law Judge, another month to submit additional documents, and ample time thereafter to submit briefs, it becomes apparent (specifically from the allegations set forth in this motion) that petitioner failed to adequately prepare or present the case. "[W]here a party fails to adequately prepare for trial, he is not entitled to another trial" (see, Grossbaum v. Dil-Hill Realty Corp., 58 AD2d 593, 395 NYS2d 246, 248). Petitioner, in large measure, raises the same basic arguments herein as were presented and addressed in the Administrative Law Judge's determination. As to the evidence, allegedly pertinent but not presented at hearing (see Finding of Fact "7"), there is neither allegation nor argument that the same did not exist or was not available at or before the time of hearing, or that petitioner availed himself of steps to obtain and present such evidence (or that such steps were unavailable). In short, the same is not newly discovered evidence (see, Matter of Jenkins Covington, N.Y., Inc., supra), and what petitioner seeks (deposition of witnesses, introduction of third-party documents, presentation of testimony by petitioner and the auditor, etc.) represents steps which could and should have been undertaken prior to and/or during the hearing. Noted in particular on this score is petitioner's claim that deficiency assessments were previously issued to and paid by petitioner for the years at issue (see Finding of Fact "7[f]"). This claim was raised in the original petition and was addressed in the June 25, 1992 determination, specifically at footnote "3" thereof. Basic evidence relating to this claim (e.g., a Statement of Audit Changes, cancelled check or other payment receipt, etc.), which presumably would have been in petitioner's possession and control, was not submitted at hearing. There is no claim that such evidence was unavailable to petitioner. Therefore, it cannot be said that the same would constitute newly discovered evidence. Finally, to accept the claim that the asserted shortcomings in petitioner's case were not petitioner's fault due to his alleged ignorance of legal proceedings would ignore the fact that petitioner was represented by counsel at all times and that the Notice of Hearing

clearly advises petitioner and his counsel of the burden imposed.[3]

F. Petitioner's motion seeks, at best, to utilize the determination of the Administrative Law Judge issued on June 25, 1992 as a guide for reopening a hearing for which petitioner was apparently underprepared, and

also to reargue the case, the proper avenue for which would be an exception taken to the Tribunal. Petitioner's motion to reopen must be denied. To rule otherwise would be a mockery of the administrative process and frustrate the very purpose of the regulations of the Tax Appeals Tribunal, i.e., "to provide the public with a clear, uniform, rapid, inexpensive and just system of resolving controversies with the Division of Taxation" (20 NYCRR 3000.0[a]; see, Matter of Jenkins Covington, N.Y., supra).

G. Accordingly, in my discretion, I find that substantial justice was done with regard to the petitioner in this case, and based upon my experience and sense of fairness, petitioner's motion to reopen the record to allow for the introduction of evidence regarding the matters at issue and for reargument is denied with prejudice (Micallef v. Miehle Co., supra; CPLR 4404[b]).

DATED: Troy, New York
March 11, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

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[3]On this score Exhibit "A" at hearing, the Notice of Hearing, issued to petitioner and to his representative, Mr. Becker, and specifying the location date and time of the hearing provides, in pertinent part, as follows:

> "Except as otherwise provided by law, the petitioner has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show that there is no deficiency or that a refund is due. Such proof may be made by sworn testimony of the petitioner's witnesses or by documentary or other evidence introduced during the course of the hearing" (emphasis added).