STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of THOMAS L. BYRAM, OFFICER OF BAPTIST MEDICAL CENTER OF NY, INC. for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1981 through 1983.	:	ORDER DTA NO. 808333

Upon petitioner's notice of motion to renew on the basis of newly discovered evidence pursuant to CPLR 2221 and upon the affidavit of Edward A. Kotite, Esq., sworn to on August 18, 1992, together with the exhibits annexed thereto and upon the affidavit in opposition of Lawrence A. Newman, Esq., sworn to on August 31, 1992, the following facts are found:

On August 29, 1991, a hearing in the instant matter was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Troy, New York. Petitioner appeared at said hearing and was represented by Edward A. Kotite, Esq. The Division of Taxation was represented by Lawrence H. Newman, Esq.

The issue at the hearing was whether, during the years 1981 through 1983, petitioner was liable for penalty pursuant to Tax Law § 685(g) as a person required to collect and pay over withholding tax on behalf of Baptist Medical Center of NY, Inc. and who willfully failed to do so.

At the close of the hearing the following exchange occurred between the Administrative Law Judge and the parties' representatives:

> "MR. ALSTON: Before we close, I just note that once we do close, I'll accept no further evidence in this matter.
>
> "Anything further you wish to add, Mr. Newman?
>
> "MR. NEWMAN: Nothing further.
>
> "MR. ALSTON: Mr. Kotite?

"MR. KOTITE: Nothing, sir.

"MR. ALSTON: Unless either of the parties wish to file briefs, I'll close the record. Does either party wish to file a brief or memorandum?

"MR. KOTITE: I would just like to file a little something, yeah.

"MR. ALSTON: And what about the Division, Mr. Newman?

"MR. NEWMAN: Only in response.

* * *

"MR. ALSTON: Other than that, does anyone have anything else they wish to add at this point?

"MR. NEWMAN: No.

"MR. KOTITE: No.

"MR. ALSTON: There being nothing further, the record in this matter is now closed. Thank you very much."

On June 18, 1992, a determination was issued wherein the administrative law judge found that petitioner was a person responsible to collect and pay over withholding tax and that petitioner had willfully failed to do so. The administrative law judge thus sustained the notice

of deficiency protested by petitioner in his petition.

In the determination the administrative law judge made the following finding of fact (numbered "11"):

> "Notwithstanding petitioner's contention to the contrary, the record herein is insufficient to show that the Board of Trustees ever explicitly advised petitioner not to pay withholding taxes or passed resolutions to that effect."

In his affidavit in support of the motion, Mr. Kotite made the following assertions:

> "3. This motion is based on newly discovered records which were previously unavailable to Byram and which mandate the granting of the motion.
>
> "4. The evidence to support the motion are copies of minutes of meetings of the Board of Trustees of the Baptist Medical Center of NY, Inc. which conclusively demonstrate that Byram was directed by the Trustees not to pay withholding taxes.
>
> "5. The evidence further demonstrates that Byram's actions in not paying withholding taxes was approved and supported by both the United States Bankruptcy Court and the New York State Department of Health. This documentary proof would directly affect key findings of fact (in particular, finding of fact #11) and conclusions (in particular, conclusion of law, D, G and K) of law of the Administrative Law Judge and necessitate new findings of facts and conclusions of law favorable to Petitioner."

The minutes of meetings of the Board of Trustees of Baptist Medical Center of NY, Inc. were annexed to Mr. Kotite's affidavit.

No evidence was presented regarding why such minutes were undiscovered or unavailable at the time of the August 29, 1991 hearing.

OPINION

In Matter of Jenkins Covington, N.Y., Inc. (Tax Appeals Tribunal, November 21, 1991) the Tribunal discussed the issue of reopening a matter that under law had finally determined the controversy between the Division of Taxation 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.)

Similar to the Tribunal, the authority for an Administrative Law Judge to reconsider or reopen the record with respect to an issued determination is limited. The statutes and rules of practice and procedure generally do not provide for such reconsideration or reopening of the record. The rules do make an exception with respect to default determinations (see 20 NYCRR 3000.10[b]). In addition, the Tribunal may remand a matter back to an Administrative Law Judge to reopen a hearing (see, e.g., Matter of Petro Enterprises, Inc., Tax Appeals Tribunal, September 19, 1991) or to reconsider a determination (see, e.g., Matter of Air Flex Custom Furniture, Inc., Tax Appeals Tribunal, September 12, 1991). Absent such specific and exceptional circumstances, however, the standard enunciated by the Tribunal in Jenkins Covington is properly applicable herein. Moreover, to apply a lesser standard for reconsideration or reopening of a record would be inconsistent with the very purpose of the Tribunal's Rules of Practice and Procedure, 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]). Certainly, a lesser standard would put at risk the integrity of the administrative hearing process.

Applying this standard to the instant matter it is clear that petitioner has made no showing

that the so-called newly discovered evidence, i.e., the minutes of meetings of the board of trustees of the hospital, was either unavailable at the time of the hearing or could not have been discovered with due diligence prior to the hearing. In the absence of any information regarding why the minutes were not introduced into the record at the hearing it must be concluded that petitioner has failed to establish the assertion that such evidence is newly discovered. Having failed to show that the evidence in question constitutes newly discovered evidence, petitioner's motion to renew must be denied pursuant to the Tribunal's holding in Matter of Jenkins Covington, NY, Inc. (supra).

Additionally, it should be noted that, even if petitioner had shown that the evidence in question was newly discovered, upon my review of the evidence submitted with petitioner's motion it does not appear that this documentation supports petitioner's contention that he was directed by the Board of Trustees not to pay withholding taxes. The documentation does reveal that the Board of Trustees was aware of the hospital's withholding tax deficiencies. The documentation also reveals that the Board was aware that its members and the administrators of the hospital potentially faced personal liability for these taxes. As noted, however, the documentation does not reveal a directive ordering petitioner not to pay withholding tax.

In accordance with the foregoing discussion, petitioner's motion to renew on the basis of newly discovered evidence is denied.

DATED: Troy, New York
November 5, 1992

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE