STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of INTERNATIONAL PETROLEUM TRADERS, INC. for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A and Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1988 through January 31, 1989.	:ORDER DTA NO. 808564

Upon petitioner's notice of motion to reopen on the basis of newly discovered evidence pursuant to CPLR 5015(a)(2) and upon the affidavit of Kenneth L. Robinson, Esq., sworn to on October 15, 1992, and upon the affirmation of Donald C. DeWitt, Esq., sworn to on November 10, 1992, in opposition to said motion, the following facts are found:

On May 21, 1991, a hearing in the instant matter was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Troy, New York. Petitioner appeared at said hearing and was represented by Kenneth L. Robinson, Esq. The Division of Taxation ("Division") was represented by Peter J. Martinelli, Esq. and Donald C. DeWitt, Esq.

The issue of the hearing was whether petitioner was entitled to a refund of motor fuel tax and sales and use taxes pursuant to Tax Law §§ 289-c(8) and 1120(e). The refund claim was based upon transactions in which petitioner transferred motor fuel to a purchaser in New York State which then exported the product to Ontario, Canada.

During the course of the hearing petitioner introduced into the record of this matter documents relating to the importation into Canada ofsome of the product purchased. It was petitioner's position that these documents established that all the motor fuel at issue was exported from New York to Ontario and that the proper amount of duty was paid. Petitioner made the same allegation in reference to these documents in its Request for Conciliation

Conference filed on August 21, 1989 and in its petition filed on August 20, 1990. However, these documents related only to 8,503 gallons of the total of 551,763 gallons of motor fuel at issue in this matter.

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

"MR. SACCA: I also want to remind the parties that once I close the record, I will accept no other evidence.... Does either side have anything they wish to add?

"MR. MARTINELLI: Nothing at this time.

"MR. ROBINSON: No.

"MR. SACCA: Then this record is closed."

On May 7, 1992, a determination was issued wherein the Administrative Law Judge found that petitioner was entitled to a refund or credit on 8,503 gallons of motor fuel sold because petitioner had established that this amount of product had been immediately exported to an identified facility in Canada with the authorization of appropriate Canadian customs agencies. As to the remaining gallons of motor fuel sold, the Administrative Law Judge found that there was no documentation in the record which established that these gallons were exported into an identified facility in Ontario, Canada with the express knowledge of the Canadian authorities.

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

> "19. At the time of the May 21, 1991 evidentiary hearing, IPT could not obtain from its customer or other source the same Canadian customs documents for the transactions at issue that IPT had secured for a prior Golden State transaction. (Administrative Law Judge Findings of Fact No. '4')
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> "20. As a result of IPT's continued investigation, it appears likely that IPT should be able to obtain the documentation that, had it been available on May 21, 1991, would have entitled IPT to the sought-after refunds.
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> "21. Petitioner now moves, pursuant to 20 N.Y.C.R.R. § 3000.5(a) and CPLR §§ 2221 and 5015(a)(2), to have the Tax Appeals Tribunal reopen the evidentiary hearing in this matter based upon newly-discovered evidence of Petitioner's Canadian customs invoices relating to the sale of motor fuel sold and exported during the relevant period, December, 1988 and January, 1989.
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> "22. In regard to Petitioner's first request, IPT has determined that the Canadian customs invoices relating to the motor fuel sold and exported during the relevant period by Golden State may now be available and would have a profound effect on the outcome of this case.

"23. The documents should be available from the Provincial Government of Ontario and through discovery of Golden State.

"24. The Department itself has laid the foundation for the relevancy of the Canadian customs invoices and receipts during the relevant period. These documents establish the number of gallons of motor fuel sold by IPT to Golden State in December, 1988 and January, 1989, then transported into Fort Erie, Ontario, Canada, to an identified facility. Further, these documents show authorization of applicable Canadian Customs agencies after the appropriate sales and excise taxes were paid. (See Administrative Law Judge's Determination, p. 5, dated May 7, 1992).

"25. These documents, coupled with the state of events surrounding the relevant transactions, clearly establish that IPT fully satisfied the requirements of Tax Law §§ 1120(e) and 289-c(8) by selling motor fuel to a purchaser licensed or registered by the taxing authorities of Pennsylvania as a distributor or dealer of motor fuel and which motor fuel was immediately exported to an identified facility in the Province of Ontario.

"26. The purpose of §§ 289-c(8) and 1120(e) is to ensure that the motor fuel is actually exported from New York State and sold in the destination place. This goal was accomplished. The Law Bureau admitted that all motor fuel sold by IPT to Golden State was exported to Ontario, Canada. The unrebutted testimony on the record as well as the Canadian Customs invoices and receipts will show that all motor fuel at issue went to an identified facility in Ontario.

"27. Accordingly, IPT would have fully satisfied the requirements of Tax Law §§ 1120(e) and 289-c(8), as evidenced by the Canadian Customs invoices and receipts.

"28. Thus, pursuant to §5015 of the CPLR, these newly discovered documents, which were not discovered in time to move for a new trial under CPLR § 4404, should relieve Petitioner from the Administrative Law Judge's decision as their existence would have produced a different result at trial.

"29. Second, Petitioner requests that the Tax Appeals Tribunal rehear Petitioner's claim based upon new and controlling case law which permits a seller for export to obtain from the purchaser properly completed export certificates after the time of delivery of the motor fuel. In the Matter of Ashland Oil, Inc., DTA No. 807583, dated February 27, 1992.

"30. Pursuant to Ashland Oil, "it is inappropriate to determine taxability based solely upon whether proper documentation was produced at the time of the transaction" Id at p. 6. Rather, the Petitioner is entitled to establish the nontaxability of a transaction at a Division of Tax Appeals hearing.

"31. The Department, under the guidelines of Ashland Oil, is compelled to concern itself with, in essence, substance over form. Where the record clearly demonstrates that the transactions at issue qualify for tax-free status, it is improper to deny a refund so long as export status is verified, the purpose of the rules has been fulfilled.

"32. This result is consistent with the evidentiary requirements contained within Tax Law §§ 289-c(8) and 1120(e).

"33. Ashland Oil also held that there is no requirement that the export documentation be obtained prior to or at the time of delivery of the motor fuel. Petitioner should be permitted to obtain properly completed export documents after the time of delivery of the motor fuel to establish its claim for a refund of the taxes paid.

"34. This documentation would, ensure 'that claimed tax-free sales do, in fact, qualify as such'. Ashland Oil, p. 6."

The Canadian customs invoices were not made a part of petitioner's motion to reopen.

No evidence was presented regarding why such invoices were undiscovered or unavailable at the time of the May 21, 1991 hearing.

OPINION

Section 3000.5 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in relevant part, as follows:

> "Motion Practice. (a) General. 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....
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> * * *
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> (6) The appropriate sections of the CPLR regarding motions, where not in conflict with this Part, are applicable to the motion being made."

Petitioner's motion to reopen was made under CPLR 5015, entitled "Relief from judgment or order", which provides, in pertinent part:

> "(a) On Motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
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> * * *
>
> (2) newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404...."

To warrant the reopening of the record on the basis of newly discovered evidence, the movant must show that the evidence is material, is not merely cumulative, is not of such a nature as would merely impeach credibility of an adverse witness and that it would probably change results if a new hearing were granted; the party requesting the reopening of the hearing must also show that the evidence has been discovered since the hearing and could not have been discovered before the hearing by exercise of due diligence (Mully v. Drayn, 51 AD2d 660, 378 NYS2d 187; Levantino v. Insurance Co. of North America, 102 Misc 2d 77, 422 NYS2d 995). 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 on the grounds of newly discovered evidence. The Tribunal concluded that in order for a party 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. 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 courts pursuant to CPLR 5015(a)(2) and 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 these standards to the instant matter it is clear that petitioner has made no showing that the so-called newly discovered evidence would probably change the results of the determination, was unavailable at the time of the hearing or could not have been discovered with due diligence prior to the hearing. As petitioner has not submitted the Canadian custom invoices, and has alleged only that it "appears that IPT should be able to obtain the documentation", the documentation "may now be available" and the invoices "should be available", it cannot be determined that such evidence would probably change the results of the determination. Furthermore, in the absence of any information regarding why the invoices 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. The statement in paragraph 19 of petitioner's affidavit in support that the determination (Finding of Fact "4") found that certain

evidentiary documents could not be obtained by petitioner at the time of the May 21, 1991 hearing is incorrect. There was no evidence or argument presented at the hearing on the issue of the availability of the documents as petitioner characterized the documents submitted as relating to all the gallons of motor fuel at issue. An allegation that petitioner was unable to obtain all the relevant invoices would have been inconsistent with petitioner's characterization of the invoices presented as relating to all the motor fuel transferred. Having failed to show that the evidence in question would probably have changed the result of the hearing and that the evidence in question constitutes newly discovered evidence, petitioner's motion to reopen must be denied pursuant to CPLR 5015(a)(2) and the Tribunal's holding in Matter of Jenkins Covington, N.Y., Inc., (supra). (See also, Pezenik v. Milano, 137 AD2d 748, 524 NYS2d 828; Federal Deposit Insurance Corp. v. Schwartz, 116 AD2d 619, 497 NYS2d 477; Matter of Commercial Structures v. City of Syracuse, 97 AD2d 965, 468 NYS2d 957.)

Additionally it is noted that petitioner may not rely upon the Administrative Law Judge determination in Matter of Ashland Oil, Inc., (February 27, 1992) as Tax Law § 2010(5) provides, in relevant part, as follows:

> "Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division...."

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

DATED: Troy, New York
December 17, 1992

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE