

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ESTATE OF ALDO GUCCI	:	ORDER
	:	DTA NO. 812160
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Tax under Article 22 of the Tax	:	
Law and the New York City Administrative Code	:	
for the Years 1977 through 1984.	:	

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Petitioner, the Estate of Aldo Gucci, by its attorney Piper & Marbury (Stuart A. Smith, Esq., of counsel) brings this Motion, on notice to the Division of Taxation, for Reargument and/or Reconsideration of the Order of Preclusion dated May 12, 1994 on the basis of newly-discovered evidence pursuant to CPLR 5015(a)(2). Petitioner has submitted the affidavit of Stuart A. Smith, Esq., sworn to on June 8, 1994, together with the exhibits annexed thereto, and the affidavit of Angelo Rosato, co-executor of the Estate of Aldo Gucci, sworn to on June 9, 1994 in support of this motion. Petitioner also submitted a memorandum of law in support of its position, as well as a reply brief. The Division of Taxation appears in opposition to this motion by its representative, William F. Collins, Esq. (Craig Gallagher, Esq. of counsel). Only a brief was submitted by the Division in opposition to the motion. After due consideration of the facts and documents contained in the motion record and the arguments made thereon, Winifred M. Maloney, Administrative Law Judge, issues the following order.

**FINDINGS OF FACT**

Petitioner filed a petition with the Division of Tax Appeals on August 9, 1993, which requested a redetermination of a deficiency of New York State and New York City personal income taxes for the years 1977 through 1984 in the amount of \$6,695,678.55.<sup>1</sup>

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<sup>1</sup>Petitioners are listed as Angelo Rosato and Stuart A. Smith, Co-executors, Estate of Aldo Gucci. The petition is signed only by Stuart A. Smith, Co-executor.

The petition alleges that petitioner was neither domiciled in New York nor a statutory resident thereof during the years in question. Attached to the petition is a one-page statement which includes allegations of fact as well as arguments of law. The statement of facts does not comply with the regulatory requirement that the petition contain separately numbered paragraphs setting forth a statement of facts upon which the petitioner relies to prove each alleged error of the Commissioner (see, 20 NYCRR 3000.3[b][5]). The statement does, however, set forth such facts in narrative fashion.

The Division of Taxation ("Division") served an answer, dated October 5, 1993, signed by Craig Gallagher. Mr. Gallagher also served a demand for a bill of particulars, dated October 4, 1993, upon petitioner's representative, Stuart A. Smith. By its demand, the Division requested inter alia: (1) an itemization of the days petitioner was present in New York State and City during the audit period; (2) a list of jurisdictions other than New York where petitioner was physically present, and the percentage of time spent in each jurisdiction during the audit period; (3) a statement identifying the street address, city, county and state of all real property in which petitioner owned an interest, either individually or jointly, during the audit period; (4) a statement identifying any rental income petitioner may have received from any real property owned during the audit period; (5) a list of all addresses where petitioner received mail during the audit period, as well as an explanation of the dates during which petitioner received mail at those addresses; (6) a list of all addresses where petitioner maintained a residence during the audit period, as well as an explanation of the dates during which petitioner resided at those addresses; (7) a detailed description of all residences maintained by petitioner during the audit period, including total square footage of each dwelling, the number of rooms and the date the residence was acquired; (8) a list identifying the legal name and address of each business and/or investment venture in which petitioner participated during the audit period, the duties of petitioner in relation to each venture, petitioner's title or official position with respect to each venture, and whether the venture was a sole proprietorship, partnership or corporation; (9) a list identifying each charge account (individual or joint) petitioner held with any retail stores, gasoline companies and charge account service companies (e.g., American Express) during the audit period, including the street, city, county and state of the issuer or issuing bank (for the service companies), the date on which each account was opened and closed and the number of each account; (10) a list of those professional associations of which petitioner was a member during the audit period, including the date on which petitioner first joined and the address of each local

and/or regional chapter to which petitioner belonged; (11) a list of each professional license held by petitioner during the audit period; (12) a list of each state and/or country for which petitioner had a motor vehicle driver's license during the audit period, including the date on which the license was first issued and the date of surrender or termination of the license; (13) a list of the license numbers and state of registration of each motor vehicle owned by petitioner during the audit period and the dates of registration of those vehicles; (14) a statement as to whether or not petitioner had a will in effect during the audit period and the name and address of the attorney who prepared it, when it was prepared and the state in which it was executed; (15) a list of each state or country in which petitioner filed an income tax return during the audit period, including which, if any, of these returns were filed as a resident; (16) a statement as to whether or not petitioner held a visa, green card, passport or other papers or documentation permitting extended visits or stays in the United States; and (17) a statement as to whether or not petitioner ever filed a declaration of intent, and/or applied for or was granted status as a United States citizen.

On October 29, 1993, the Division granted petitioner an unlimited time extension, subject to ten days notice, to provide the bill of particulars.

By letter dated March 28, 1994, the Division requested petitioner to provide the bill of particulars on or before April 7, 1994.

On April 6, 1994, petitioner's representative contacted the Division's representative, Craig Gallagher, to request a short adjournment regarding the bill of particulars. Petitioner's representative requested Mr. Gallagher to delay the filing of the motion to preclude, and also assured him that the bill of particulars would be provided on or before April 14, 1994.

Petitioner did not provide the bill of particulars within the extension period.

On April 15, 1994, the Division brought a motion to the Division of Tax Appeals for an order precluding petitioner from giving evidence at hearing of items regarding which particulars were demanded and not delivered, or, in the alternative, for a conditional order of preclusion requiring petitioner to serve a bill particulars by a set date.

On April 28, 1994, petitioner served a bill of particulars on the Division.

On May 11, 1994, petitioner's representative sent a letter to the Division's representative concerning the status of the Division's motion to preclude. In this letter Mr. Smith states that:

"[a]s you are aware, I served a detailed Bill of Particulars on April 28, 1994, which I am sure you have received. During this week I have repeatedly attempted to telephone you in order to ascertain whether you still intend to pursue your motion to preclude which you have noticed for this Friday, May 13. As of this writing, I have received no communication from you with regard to your intentions concerning this motion.

"In these circumstances, unless I hear from you to the contrary by the close of business today, I will assume that your motion will be removed from the calendar."

Petitioner did not respond to the Division's motion to preclude.

Upon review of the Division's motion papers, an order, dated May 12, 1994, was issued by Assistant Chief Administrative Law Judge Daniel J. Ranalli. Pursuant to Judge Ranalli's order, petitioner was to produce a bill of particulars no later than May 16, 1994, or be precluded from giving evidence at the hearing of any items not particularized by that date.

Upon receipt of a facsimile copy of Judge Ranalli's conditional order of preclusion, petitioner's representative responded to Judge Ranalli by letter dated May 12, 1994. In this letter, Mr. Smith stated that he believed he had fully complied with the Division's request for a bill of particulars, based on the fact that he had served the bill of particulars, dated April 28, 1994, on the Division. He also stated that it was his understanding that Mr. Gallagher would withdraw the motion once he had received the bill of particulars. Attached to this letter was a copy of the bill of particulars.

The Division, by letter dated May 12, 1994, informed petitioner's representative of the deficiency in the proffered bill of particulars. Mr. Gallagher states:

"[a]s this Order is a conditional preclusion order, please be advised that with the exception of item 1 of your Bill of Particulars, I am willing to stipulate to the Court that you have adequately provided said Bill. With respect to item 1, I consider your answer unresponsive and thus, unless you provide me with an itemization of days prior to the deadline proscribed [sic] by the Court, I intend to ask that this topic be precluded from introduction.

"If it is impossible for you to itemize any of the days either in or out of New York for the period in issue, please state so in writing. Otherwise, I assume you can prepare an itemization and believe I am entitled to it."

On May 13, 1994, the Division informed Judge Ranalli of the omission in petitioner's bill of particulars and that petitioner had been advised that a portion of the bill of particulars was nonresponsive; he also enclosed a copy of his May 12, 1994 letter to Mr. Smith.

By letter dated May 13, 1994, Mr. Smith advised Mr. Gallagher that he was attempting to get an "itemization of days" and would, to the extent that he had records relating to the itemization of days, provide them

to him by the May 16, 1994 deadline prescribed by the Order.

On May 19, 1994, a hearing in the instant matter was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Troy, New York. Petitioner was represented by Stuart A. Smith, Esq. The Division was represented by Craig Gallagher, Esq.

The issues at the hearing were whether, during tax years 1977 through 1984, petitioner, Aldo Gucci, was a domiciliary and/or a statutory resident of New York State and New York City.

The Division, as part of its evidence, submitted the bill of particulars ("Exhibit J"); the Order of Preclusion ("Exhibit K"); and the supplemental bill of particulars ("Exhibit M")<sup>2</sup>.

At the beginning of petitioner's case, its representative requested that the record be held open and a continued hearing date be granted in order that a newly-discovered witness could testify as to decedent petitioner's whereabouts during the audit period.<sup>3</sup>

The Division's representative objected to petitioner's request on the basis that the order of preclusion "prohibits the introduction of any day count information after May 16, 1994" (tr. pp. 18-19). The Division's representative did concede that some day count information for the year 1984 was provided; however, he noted that nothing had been provided for 1977 through 1983. The Division's representative contended that this matter is precluded at hearing and that "there would be no purpose served in calling this witness as any of the documentation Mr. Smith referred to is inadmissible at this point" (tr. p. 19).

After listening to the arguments made by both petitioner's and the Division's representatives on the issues of whether the order of preclusion was in effect or whether the record should remain open to allow petitioner to present a newly-discovered witness's testimony and documents at a continued hearing, Administrative Law Judge Winifred M. Maloney ruled that Judge Ranalli's order of preclusion was in effect (tr. p. 30). Petitioner's

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<sup>2</sup>The supplemental bill of particulars was prepared by petitioner's representative in response to the Order of Preclusion. This supplemental bill of particulars contains a cover letter dated May 16, 1994 and 6 handwritten and typed pages which are captioned "Dr. Aldo Gucci Travel Analysis" for years 1984 through 1989.

<sup>3</sup>This newly discovered witness, Ruby Hamra, was formerly Director of Public Relations and Advertising for the Gucci worldwide business. It appears from the record that Ms. Hamra's professional association ended with the Gucci organization around the same time decedent petitioner left the business. The record is silent as to exactly when the decedent petitioner left the business.

representative was directed to make a motion to reargue the order based on newly-found evidence.<sup>4</sup>

Petitioner presented only one witness, Kathleen Campanile, who testified about her professional relationship with decedent petitioner, Aldo Gucci, which commenced in 1988. Her testimony included a discussion of the documents described as the Supplemental Bill of Particulars (Ex. M) which she prepared in 1991 (Tr., pp. 37-39).

At the hearing, no documentary evidence was submitted on behalf of petitioner (tr., p. 14).

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

"9. Pursuant to the terms of the Order of Preclusion, I sought and received on May 13, 1994 from Kathryn [sic] Campanile, the secretary to the Estate of the decedent taxpayer additional itemization of day records. I reviewed these materials over the weekend and instructed my secretary to send them to Mr. Gallagher by telecopier on May 16, 1994.

"10. At our [sic] around that time, the Executor of the Estate of the decedent advised me that he had been attempting to reach Ms. Ruby Hamra, who had served as Director of Advertising and Public Relations of Gucci Shops, Inc. during the period 1964 - 1984. The Executor, Angelo Rosato, believed that Ms. Hamra might have additional information with respect to the itemization of days spent in and out of New York by the decedent during the years 1977-84.

"11. Mr. Rosato finally reached Ms. Hamra and I made an appointment to meet with her on May 18, 1994, the day before the hearing in this matter. It was impossible for me to have met with her any earlier because she had been in Toronto, Canada attending to the affairs of her ill sister, and I was out of the office on May 16 and May 17 because of my observance of religious holidays.

"12. On the afternoon of May 18, 1994, I met with Ms. Hamra for several hours and asked her to review the Bill of Particulars that I filed in this case and to speak to her knowledge and records concerning the decedent's travel schedule during 1977-84. She told me that she believed that she had extensive records of the decedent's travel and that in fact she regularly traveled with him during the period in question. In this respect, she stated to me her recollection that the decedent spent no more than 50 days in New York State and New York City per year during the period 1977-84.

"13. At our meeting, I asked Ms. Hamra whether she would be willing to accompany me to the hearing before the Division on the following morning in Troy, New York. She responded that she was unable to do so because she had conflicting professional obligations that required her

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<sup>4</sup>The following time frame was set for submission of the motion: the motion to reargue and any supporting brief were due June 9, 1994; the Division's response and brief were due June 28, 1994; and petitioner's reply brief was due July 8, 1994 (tr., p. 31). Petitioner's representative was advised that if the motion was not filed within the time frame then the record would be closed. Judge Maloney informed both parties' representatives that if the motion was filed, an order would be issued which would either lift the order of preclusion and allow a continued hearing for Ms. Hamra's testimony and the newly-discovered evidence or close the record (tr., p. 30).

presence in New York City.

"14. When it became apparent to me that Ms. Hamra could not attend the hearing on May 19, 1994, I telephoned Mr. Gallagher to ascertain whether he had any objection to holding the record open in order to permit her to testify at a later date. Mr. Gallagher was not available when I called. Accordingly, I telephoned Judge Ranalli to ask him whether the Division would ordinarily permit the record in the case to be held open in order to permit an additional witness to testify about a critical issue. He told me that the Division permitted such a procedure but that I should confer with my adversary. Later that afternoon, I spoke to Mr. Gallagher who told me that he would have to consider it in greater detail.

"15. At the hearing the next morning, I presented the testimony of Ms. Campanile. Ms. Campanile began to work for the decedent in 1988 and is the custodian of the records of the Estate of the decedent. At the hearing, I explained the foregoing circumstances regarding the availability of Ms. Hamra and the importance of her testimony. In response, Mr. Gallagher on behalf of the Department objected to having Ms. Hamra testify on the ground that the admission of such testimony would violate the Order of Preclusion."

The affidavit of Angelo Rosato, Co-executor of the estate of Aldo Gucci, outlines the steps he took on behalf of the estate to find individuals who could "speak with authority on the question of the number of days Aldo Gucci spent in New York State and New York City during the period 1977 through 1984". Mr. Rosato asserted:

"3. I have previously advised Mr. Smith that most of the people who worked with Aldo Gucci during the period in question are either living abroad, are deceased, or are otherwise unavailable.

"4. In late April or early May, 1994, I recalled that Ms. Ruby Hamra might be able to testify as to the number of days Aldo Gucci spent in New York State and New York City during the period 1977 through 1984. She worked in the capacity as the Director of Advertising and Public Relations for Gucci Shops, Inc. and personally knew Aldo Gucci. I had not seen Ms. Hamra for some years and had little contact with her after she left the employ of Gucci Shops, Inc. I spent a considerable amount of time trying to locate her during late April and early May. I finally located her in Toronto, Canada where she was attending to the needs of her sister. I urged her to meet with Mr. Smith and provide him with her recollection with respect to the decedent's travel during the audit period and/or furnish any documentary evidence in her possession."

The motion papers do not contain either an affidavit by Ms. Ruby Hamra or any evidence which she may have in her possession. The exhibits submitted pertain only to the procedural history of this case prior to the issuance of petitioner's motion.

Petitioner, in its brief, argues that the preclusion order should be revoked "in its entirety on the grounds that: (1) the Department had given assurances to Petitioner that the Motion seeking the Order would be withdrawn -- thus the Motion never should have been considered; and (2) Petitioner had complied with the Order's requirements even prior to the issuance of the Order, which therefore made the Order unnecessary". Petitioner

further argues that it is just and appropriate for the Division to relieve it from the preclusion order with respect to the newly-discovered evidence now available through Ms. Hamra. Petitioner contends that:

"justice cannot be substantially achieved without the testimony and documentary evidence of Ruby Hamra. In fact, Ms. Hamra's testimony and documentary evidence is so compelling that taken together they would almost certainly affect the disposition of this matter."

The Division contends that "[t]he Order issued by the Division of Tax Appeals was a conditional preclusion order, granting the petitioner time in which to comply so as to avoid preclusion of evidence at trial". The Division further contends that it "agreed to stipulate that with the exception of item 1 of the bill of particulars, the petitioner had complied with the conditional preclusion order." Therefore, only item 1 of the Demand for Bill of Particulars, a request for an itemization of days, was and is in issue now. The Division argues that petitioner never supplied an itemization of days, and consequently, the conditional order became final on May 16, 1994, precluding the introduction of evidence on this topic. Furthermore, with respect to petitioner's argument number 2, the Division contends that "petitioner did not fully comply with the order's requirements" inasmuch as the day count information was never supplied.

Citing relevant case law, the Division maintains that "a moving party seeking relief from an order on the basis of newly-discovered evidence bears a heavy burden of proof to obtain the relief sought". The Division argues that petitioner has failed to specify what new evidence exists and has failed "to substantiate its claim of locating a relevant witness". The Division further argues that it is unclear from the record whether or not newly-discovered evidence actually exists. In addition, the Division contends that the petitioner has failed to substantiate the relevance of the claimed new witness, Ms. Hamra. The Division argues that petitioner has failed to submit an affidavit from Ms. Hamra, who has been described as a witness with personal and material knowledge of the facts in issue.

The Division further asserts that "the petitioner has failed to show that this alleged new evidence was undiscoverable with due diligence".

Finally, the Division maintains that petitioner has failed to meet the basic requirements to implement CPLR 5015, and therefore its motion for relief from the preclusion order should be denied.

Petitioner, in its reply brief, contends that it provided the bill of particulars on April 28, 1994 prior to the issuance of the preclusion order, and therefore, "the Division's Order was wholly unnecessary". Petitioner

contends that it is seeking to supplement the information in the bill of particulars with newly-discovered evidence. Petitioner further argues that Ms. Hamra's information concerning the late Aldo Gucci's travel during the 1977 - 1984 period, as well as her documentary evidence is the kind of information which the Division sought in its Demand for Bill of Particulars. Petitioner maintains that it was not aware of Ms. Hamra's information, "notwithstanding diligent efforts, at the time the Bill of Particulars was submitted".

Lastly, petitioner contends that in the interests of justice petitioner should be relieved "from the constraints of the order with respect to the newly discovered evidence of Ms. Hamra's testimony and documents".

OPINION

A. Section 3000.5 of the Tax Appeals Tribunal Rules of Practice and Procedure 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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"(6) The appropriate sections of the CPLR regarding motions, where not in conflict with this Part are applicable to the Motion being made."

B. Petitioner's motion to revoke the Order in its entirety is based, inter alia, on the following grounds: (1) the motion should never have been considered because the Department had given assurances to petitioner that the motion would be withdrawn; and (2) since petitioner had complied with the Order's requirements prior to its issuance, the Order was unnecessary. In addition, the motion is 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. . . ."

C. By Order of Assistant Chief Administrative Law Judge Daniel J. Ranalli, dated May 12, 1994, petitioner was directed to file a bill of particulars no later than May 16, 1994, or face preclusion, at the hearing, of any items not particularized. This order was issued in accordance with 20 NYCRR 3000.6(a)(3). Petitioner contends that the bill of particulars it served on April 28, 1994, prior to the issuance of the Order, met the requirements of the Order and therefore rendered the Order unnecessary. Petitioner also contends that it was assured by the Division that the motion for the preclusion order would be withdrawn based on petitioner's service of the bill of particulars.

These arguments are without merit. After review of the submitted bill of particulars, the Division determined that petitioner's response to item 1, the day count information, was unresponsive. By letter dated

May 12, 1994, the Division notified petitioner that it found the answer to item 1 unresponsive and demanded that a response be produced by the date prescribed by the Order, May 16, 1994, or face preclusion of this topic at the hearing. At the May 19, 1994 hearing, in response to petitioner's requests that the record remain open, a newly-discovered witness be allowed to testify and a continued hearing date be scheduled, the Division argued that the supplemental bill of particulars was not responsive inasmuch as it covered only one year of the audit period, 1984. Therefore, the Division argued, since petitioner had failed to comply with Judge Ranalli's conditional order of preclusion, it should be precluded from giving any testimony or evidence pertaining to the item 1 day count itemization. During the hearing, Administrative Law Judge Winifred M. Maloney ruled that the preclusion order was in effect.

Petitioner carries the burden of proving that the late Aldo Gucci was not a domiciliary or statutory resident of New York during the years 1977 through 1984 (see, Tax Law § 689[e]); therefore, petitioner had an obligation to particularize as to this issue (see, Holland v. St. Paul Fire & Marine Ins. Co., 101 AD2d 625, 475 NYS2d 156, 157). The order of preclusion became effective on May 16, 1994 upon petitioner's failure to adequately respond to Item 1, the day count itemization for the period 1977 through 1984, in accordance with 20 NYCRR 3000.6(a)(5).

D. In its Motion to reargue and/or reconsider the order of preclusion, petitioner has requested that in the interests of justice relief should be granted under CPLR 5015(a)(2). To qualify as new evidence, the evidence must have been in existence but have been undiscoverable with due diligence at the time of the original order or judgment (Matter of Commercial Structures v. City of Syracuse, 97 AD2d 965, 468 NYS2d 957, 958; Federal Deposit Insurance Corporation v. Schwartz, 116 AD2d 619, 497 NYS2d 477, 478; Matter of Jenkins Covington, N.Y., Inc., Tax Appeals Tribunal, November 21, 1991, confirmed 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151). Petitioner has failed to produce the evidence upon which it bases its motion. Mr. Smith's affidavit alludes to a conversation he had with Ms. Hamra and her belief that she had extensive documents. It is unclear from his affidavit whether he had seen the "extensive documents" or in fact if any exist. The motion papers do not include an affidavit by Ms. Hamra which summarizes her potential testimony and identifies documentary evidence which she possesses. Absent also are copies of the newly-discovered evidence for review by the Administrative Law Judge.

The Estate of Aldo Gucci has failed to meet the "due diligence" test associated with CPLR 5015(a)(2). Co-

executor Angelo Rosato, in his affidavit, states that he recalled the existence of Ms. Hamra in late April or early May 1994 and "spent a considerable amount of time trying to locate her". Mr. Rosato's affidavit fails to elaborate the efforts he took to locate Ms. Hamra. He also fails to explain what triggered his recollection of Ms. Hamra's existence at such a late date in the proceedings. I find Mr. Rosato's affidavit to be very vague and lacking of any proof that the estate had made any effort, let alone a diligent effort, to locate either witnesses or evidence to prove its case.

E. CPLR 5015(a) does vest a court with the discretionary power to relieve a party from its judgment or order. However, conditional orders of preclusion may not be ignored with impunity and they may be vacated only upon the showing of extraordinary and exceptional circumstances (Nessia v. Marrone, 59 AD2d 1054, 400 NYS2d 227, 228).

Petitioner has failed to demonstrate the existence of "extraordinary and exceptional circumstances". The record discloses laxness on the part of petitioner even though it was afforded numerous extensions of time to serve the bill of particulars. The bill of particulars was served only after the Division made the motion to preclude and after the hearing had been scheduled. The bill of particulars was deemed deficient by the Division and a demand for a response to item 1, the day count itemization, was made. The supplemental bill of particulars was made up of documents prepared sometime in 1991 (see Finding of Fact "23") and failed to address day count information for the years 1977 through 1983, the majority of the years in the audit period. It is unclear what sparked Co-executor Angelo Rosato's memory in late April or early May 1994 and made him recall the existence of Ms. Hamra and her potentially important testimony, or why a search was not made sooner for witnesses to support petitioner's position, especially in light of the fact that petitioner is the representative of a deceased person.

In addition, the papers submitted do not include an affidavit of merits (see, Sortino v. Fisher, 20 AD2d 25, 245 NYS2d 186, 195). Mr. Smith's affidavit contains only secondhand information. The affidavit of merits should be made by an individual who has personal knowledge of the facts, usually the party in the action. However, because petitioner is the representative of a deceased person, merit must be shown by evidentiary facts (Sortino v. Fisher, supra). The affidavit of Ms. Hamra setting forth her knowledge of the late Aldo Gucci's presence in New York during the audit period, 1977 through 1984, as well as the evidence upon which she bases her knowledge of the facts would have constituted an acceptable affidavit of merits. Furthermore, neither

Mr. Smith's nor Mr. Rosato's affidavit contains an adequate excuse for noncompliance (see, Jones v. Bryce, 76 AD2d 966, 429 NYS2d 68, 69; Sortino v. Fisher, supra).

F. Petitioner's motion for Reargument and/or Reconsideration on the basis of newly-discovered evidence is denied. The hearing record is closed, a briefing schedule will be set and a determination rendered on such record in due course.

DATED: Troy, New York  
September 1, 1994

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE