STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT J. AND LINDA M. JARVIS	:	ORDER DTA NO. 820588
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1998 and 1999.	:	

Petitioner, Robert J. and Linda M. Jarvis, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1998 and 1999.

A determination in this matter was issued by the Division of Tax Appeals on June 5, 2008. On July 7, 2008, petitioners filed a motion to reopen the record and for reargument pursuant to 20 NYCRR 3000.16. The Division of Taxation filed a response in opposition to the motion on July 25, 2008, and petitioners filed a reply to the Division's response on August 20, 2008, which date began the 90-day period for the issuance of this order.

Petitioners appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

Based upon the motion papers, and all the pleadings and proceedings associated with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. The Division of Taxation (Division) commenced its audit of petitioners in December 2002 after a review of its records failed to disclose any New York State income tax returns for

the years 1998 and 1999. Although the Division requested that petitioners file income tax returns for such years, they failed to respond at all. Subsequently, using information in its possession in accordance with Tax Law § 681(a), the Division estimated petitioners' tax liabilities for the years 1998 and 1999, and issued two notices of deficiency, each dated May 15, 2003, reflecting such determinations. On each of these notices, the Division imposed penalties pursuant to Tax Law § 685(a)(1)(a) for failure to file the return, Tax Law § 685(b) for negligence and Tax Law § 685(c) for failure to pay estimated income tax.

2. Petitioners filed a petition for redetermination of certain deficiencies for the years 1998 and 1999. Petitioners waived their right to a hearing and instead chose to have the case decided by submission of documentary evidence and briefs. In accordance with the initial document and briefing schedule set in this matter, the Division's documents were received by the Division of Tax Appeals on August 18, 2006. After six extensions, petitioners submitted various documents and the affirmation of petitioner Robert Jarvis, an attorney licensed by the State of New York, on October 1, 2007, the final date set for the submission of petitioners' documents and initial brief in this matter. In correspondence dated August 9, 2007, the administrative law judge notified the parties that the record would close on October 1, 2007, and "no further evidence shall be admitted thereafter."

3. The documentary evidence submitted by petitioners consisted of information returns issued to either Mr. Jarvis or Mrs. Jarvis by various payors for the years 1998 and 1999, Laura Jarvis's 1998 and 1999 New York State income tax returns, Christopher Jarvis's 1999 New York State income tax return, and some documents allegedly related to Mr. Jarvis's business, a legal practice conducted in New York State during the periods at issue. Petitioners' documentary submission did not include copies of their federal or New York State income tax returns for the

years at issue. The Division did not undertake an audit review of the documents submitted by petitioners in this proceeding.

4. The issues decided in this matter were as follows:

I. Whether the Division of Taxation properly determined petitioners' tax liability for the years 1998 and 1999.

II. Whether reasonable cause exists to abate the penalties assessed.

5. On June 5, 2008, the administrative law judge issued a determination in this matter. With respect to Issue I, the determination held that, for the year 1998, no adjustment to the Division's calculation of petitioners' federal or New York adjusted gross income was warranted; however, it was found that petitioners were entitled to two dependent exemptions and credit for taxes withheld, and the Division was directed to recompute the deficiency for the year 1998 accordingly. With respect to Issue I, the determination also held that, for the year 1999, the Division's calculation of petitioners' federal adjusted gross income should be reduced by the amount of expenses determined by the administrative law judge to be ordinary and necessary business expenses for the year; petitioners were entitled to two dependent exemptions and credit for taxes withheld; and the Division was directed to recompute the deficiency for the year 1999 accordingly. With respect to Issue II, the determination held that the failure to file return penalties were automatic since petitioners did not file returns for 1998 and 1999; negligence penalties were properly imposed for both years because Mr. Jarvis failed to maintain adequate records of his business income and expenses for such years; and penalties for failure to pay estimated income tax were properly imposed for the years 1998 and 1999 because the only taxes paid by petitioners in 1998 and 1999 were taxes withheld from Mrs. Jarvis's wage income received from the South Colonie Central Schools for those years.

6. By notice of motion, dated July 7, 2008, petitioners moved for an order "vacating the Determination . . . in this matter dated June 5, 2008; reopening the record herein for the submission of additional evidence; and granting the parties an opportunity to reargue this case and to submit additional arguments in support of their positions." Petitioners' motion was supported by the affirmation of petitioner Robert J. Jarvis. No additional documents were attached to petitioners' motion. The Division filed a letter in opposition to petitioners' motion to reopen record and for reargument. Petitioners filed a letter in reply to the Division's letter.

7. In his affirmation, Mr. Jarvis asserts that, for each year at issue in this matter, petitioners were required to replace the Division's estimated tax liability with the actual figures which would have been shown on a filed return. He maintains that petitioners made what they reasonably anticipated was a sufficient, good faith evidentiary submission using the resources and evidence available at the time. Mr. Jarvis argues that, since the evidence submitted by petitioners was uncontroverted by the Division, and such evidence logically led to the conclusions advanced by petitioners, they "could not reasonably anticipate that additional confirming evidence would be required by the [administrative law judge] before making the findings requested by petitioners." Mr. Jarvis claims that "the additional evidence which Petitioners would like the record reopened for is a newly discovered requirement which could not have been known or discovered with reasonable diligence before now." Mr. Jarvis also asserts that, even without the submission of additional items, the administrative law judge did not grant appropriate deference and weight to the evidence of record, and made unfounded findings of fact and conclusions of law. He further argues that the administrative law judge "erroneously interpreted the law which is applicable to this case." Mr. Jarvis claims that, even if petitioners' request to reopen the record is denied, this motion's request for reargument and reconsideration

should be granted because "[d]oing so will allow a fuller, more complete development and discussion of the issues, in the event that this case goes before the Tax Appeals Tribunal for review."

8. In its letter in opposition to petitioners' motion to reopen the record and for reargument, the Division contends that petitioners have offered no circumstances, or new arguments, supported by the record, which would justify reopening the record or rearguing the matter. Therefore, the Division requests that petitioners' motion to reopen the record and for reargument be denied.

9. In their reply letter, petitioners disagree with the Division's assertion that they have indicated no circumstances to support their motion to reopen the record. Petitioners claim that it was not until the determination was issued that they learned that the administrative law judge believed that additional, confirming documentation was necessary. They further claim that "the Tax Law does not require any exclusive document to substantiate an allowable expense or deduction; rather, what is needed is something which reasonably supports the taxpayer's claim." Regarding the Division's contention that they have offered no new arguments in support of the motion for reargument, petitioners state that they "understand a motion for reargument to be a request for an opportunity to present such arguments." As such, they claim it seems "inappropriate (and possibly presumptuous) to present the arguments before receiving permission to do so. If and when the motion is granted, then would be the time to put forth the new arguments."

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tax Appeals 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:
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> (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.

B. Petitioners' motion to reopen the record must fail because it presented no facts which constituted a basis for reopening the record. The authority to reopen the record is limited by the principle articulated in ***Evans v. Monaghan*** (306 NY 312, 323, 118 NE2d 452, 457 [1954]), 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 established 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 (20 NYCRR 3000.16[a][1]; ***Evans v. Monaghan***).

In ***Matter of Frenette*** (Tax Appeals Tribunal, February 1, 2001), the Tribunal stated:

> 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 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 this matter, petitioners failed to identify, or present for review by the administrative law judge, the "additional, confirming evidence" sought to be entered into the record. Therefore, it is impossible to determine whether such evidence would constitute "newly discovered evidence" in accordance with the regulation and case law.

C. Petitioners also brought a motion for reargument in this matter on the grounds that the administrative law judge overlooked or misapprehended the relevant facts, and also erroneously interpreted and misapplied the applicable law. A motion for reargument is "addressed to the discretion of the court" and "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (***Foley v. Roche***, 68 AD2d 558, 418 NYS2d 588, 593 [1979]; ***see also Matter of Varrington Corporation***, Tax Appeals Tribunal, November 9, 1995). A motion for reargument

is not a "vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (***Foley***).

Petitioners, in their motion for reargument, have not offered any specific matters of fact or law that the administrative law judge overlooked or misapprehended. Indeed, petitioners admit in their reply letter that they did not include such arguments in support of their motion for reargument. Accordingly, petitioners' motion for reargument must fail.

D. Petitioners' motion to reopen the record and for reargument in this matter, dated July 7, 2008, is denied.

DATED: Troy, New York
November 6, 2008

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE