STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
RONALD JERRETT	:	ORDER DTA NOS. 822202 AND 822203
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2000 through November 30, 2005.	:	

On April 1, 2008, petitioner, Ronald Jerrett, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2000 through November 30, 2005. On June 17, 2008, the Division of Tax Appeals issued an Order Dismissing Petition for each of the subject petitions.

Petitioner, by his representative, Green & Seifter Attorneys, PLLC (David G. Burch, Esq., of counsel), filed a motion to reopen or reargue these matters on July 17, 2008. The reply from the Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), was due by August 18, 2008, which date commenced the 90-day period for the issuance of this order. After due consideration of all documents and arguments submitted, Daniel J. Ranalli, Administrative Law Judge, issues the following order.

FINDINGS OF FACT

1. On April 18, 2008, the Division of Tax Appeals issued two notices of intent to dismiss petition to petitioner, Ronald Jerrett, at his Parish, New York, address, because his petitions appeared to be filed 259 days late. The notices indicated that, pursuant to 20 NYCRR 3000.9(a)(4), petitioner had 30 days, or until May 19, 2008, to respond. Petitioner did not

respond; accordingly, on June 17, 2008, the Division of Tax Appeals issued two orders dismissing both petitions.

2. Among the documents accompanying petitioner's motion to reopen or argue were copies of the following:

(i) the April 1, 2008 petitions and supporting documents;
(ii) the June 17, 2008 orders dismissing the petitions;
(iii) the July 13, 2007 conciliation orders and accompanying letter;
(iv) a July 2, 2006 letter to the conciliation conferee requesting an adjournment until petitioner's release from prison;
(v) a December 26, 2007 Notice and Demand for Payment; and
(vi) a July 16, 2007 affidavit from petitioner, Ronald Jerrett.

The Division included all documents in its submission supporting the April 18, 2008 notices of intent to dismiss, except for the orders dismissing petition and petitioner's affidavit.

3. In his affidavit, petitioner alleges that the Division failed to provide a copy of the conciliation order in a timely fashion. As requested in the July 2, 2006 letter, the conciliation conference was rescheduled to May 22, 2007, and petitioner appeared personally at the conference. Petitioner alleges that, at the conference, he informed both the conciliation conferee and the tax auditor that he had been released from prison and resumed residing at his address prior to incarceration, where the notices had been sent. Petitioner alleges that he did not receive the July 13, 2007 conciliation orders until April 4, 2008 because the orders were sent to his former address at prison despite alerting the Division of his address change.

CONCLUSIONS OF LAW

A. The regulation of the Tax Appeals Tribunal at 20 NYCRR 3000.16 provides for motions to reopen the record or for reargument, and states, in pertinent part:

> (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:
>
> > (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.

In light of this rule, petitioner's motions must fail because petitioner neither produced newly discovered evidence nor alleged fraud or misconduct by the Division in the context of these proceedings.

B. In ***Matter of Jenkins Covington, N.Y.*** (Tax Appeals Tribunal, November 21, 1991 ***confirmed*** 195 AD2d 625, 600 NYS2d 281 [1993] ***lv denied*** 82 NY2d 664, 610 NYS2d 151 [1994]), the Tribunal stated that, in the absence of statutory authority, the ability to reconsider final determinations is limited to the principle stated in ***Evans v. Monaghan*** (306 NY 312, 323, 118 NE2d 452, 458 [1954]:

> [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.

The Court in ***Evans*** established that it is appropriate to reopen where a party offers important, newly discovered evidence that due diligence would not have uncovered in time for the hearing.

The additional material evidence must have "existed at the time the prior motion was made, but [was] not then known to the party" (***Matter of Jenkins Covington, N.Y.*** citing ***Foley v. Roche***, 68 AD2d 558, 568, 418 NYS2d 588, 594 [1979]).

C. Here, the exhibits and affidavit provided by petitioner clearly fail to meet the definition of newly discovered evidence. In his affidavit, petitioner does not present any information that was not known to him when the notices of intent to dismiss were issued. Additionally, all of petitioner's submissions were within his knowledge when the notices of intent to dismiss were issued. Having failed to avail himself of the opportunity to respond to the notices, he may not be allowed to reopen or reargue these matters by claiming his submissions were newly discovered evidence.

D. Petitioner alleges neither fraud nor misconduct by the Division in the context of these proceedings and, as such, the matter may not be reopened or reargued pursuant to 20 NYCRR 3000.16(a)(2).

E. The motion of petitioner Ronald Jerrett dated July 17, 2008, to reopen the record or for reargument in these matters, is hereby denied.

DATED: Troy, New York
October 16, 2008

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE