STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS P. AND KATHLEEN H. PUCCIO	:	ORDER DTA NO. 822476
for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2003.	:	

Petitioners, Thomas P. and Kathleen H. Puccio, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2003.

A determination in this matter was issued on January 27, 2011 by Thomas C. Sacca, Administrative Law Judge. On February 25 and 28, 2011, petitioners, appearing by Gregory Lee, Esq., filed motions to reopen the record and for reargument with a new hearing pursuant to 20 NYCRR 3000.16 for the sole purpose of submitting additional evidence. On March 25, 2011, the Division of Taxation appearing by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel), filed a letter in opposition to petitioners' motions.

Based upon the motions of petitioners, filed February 25 and 28, 2011, the response of the Division of Taxation, filed March 25, 2011, and all the pleadings and proceedings associated with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioners filed a petition for redetermination of a certain deficiency issued to them for the year 2003. A hearing in this matter was held on January 27, 2010, and on January 27, 2011 the administrative law judge issued a determination in the matter. The determination concluded that petitioner, Thomas P. Puccio, had spent in excess of 183 days in New York State and City during the year 2003.

2. In their motions to reopen the record and for reargument with a new hearing, petitioners claimed the following:

a. that they have identified newly discovered evidence, which if introduced into the record would probably have produced a different result by proving Mr. Puccio did not spend more than 183 days in New York State or City in 2003; and

b. that they exercised reasonable diligence to discover all available evidence in time to be offered into the record of this proceeding; and

c. that, following the hearing, they were able to obtain affidavits from additional individuals who were previously unavailable or unwilling to provide affidavits; and

d. that the newly discovered evidence could not have been discovered with reasonable diligence in time to be offered into the record of the proceeding.

3. In their motions to reopen the record and for reargument with a new hearing, petitioners requested that the following additional evidence be included in the record:

a. the affidavit of Tyler Erdman to establish the efforts made prior to the hearing to obtain evidence contained on Mr. Puccio's computer. The affidavit states that Mr. Erdman began assisting Mr. Puccio in December 2009 in retrieving documentation

through computer data searching techniques. The affidavit further states that Mr. Erdman employed a further intensive search following the issuance of the determination in this matter to locate additional archived data;

b. the affidavit of Joseph Medina;

c. additional Amtrak reservations;

d. an invoice from a wine and liquor store;

e. invoices from the Down Town Association;

f. the affidavit of the general manager of a limousine service;

g. additional e-mails concerning petitioner's presence in Connecticut;

h. the affidavit of the local co-counsel on a matter being held in Connecticut;

i. the affidavit of the owner of another limousine service; and

j. the affidavit of local counsel to Mr. Puccio in a matter held in Chicago, Illinois.

4. At the beginning of the hearing held in this matter on January 27, 2010, the administrative law judge advised the parties that the burden of proof was on petitioners and that the determination would be based on the documentation and testimony presented during the course of the hearing.

5. At the conclusion of the testimony, the administrative law judge stated "[w]e had a brief discussion off the record concerning additional documentation and testimony. The parties have advised me that none will be presented." There was no response from the parties to this statement. In addition, the following exchange took place between the administrative law judge and Mr. Peter Ostwald and Mr. Gregory Lee, representatives of the Division of Taxation and petitioner, respectively:

JUDGE SACCA: Also, once I close the record I won't accept any further documentation or any other evidence. So let me just make sure no one has anything further. Mr. Ostwald.

MR. OSTWALD: No, Judge, nothing further.

JUDGE SACCA: Mr. Lee.

MR. LEE: No, Judge.

CONCLUSIONS OF LAW

A. Section 3000.16 of the 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:
>
> (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. The authority to reopen the record is limited by the principle articulated in ***Evans v. Monaghan*** (306 NY 312 [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*** at 325).

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 the 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, the documentation sought to be entered into the record by petitioners does not constitute "newly discovered evidence" in accordance with the regulation and case law. Petitioners have not provided adequate explanations as to why the evidence could not have been discovered with due diligence in time to produce it at the hearing (***Matter of Reeves***, Tax Appeals Tribunal, September 2, 2004). Petitioners have also failed to establish what impact, if any, the introduction of this evidence would have on the result reached in the determination of January 27, 2011.

C. Petitioners' motions to reopen the record and for reargument with a new hearing in this matter, dated February 25 and 28, 2011, are denied.

DATED: Troy, New York
April 28, 2011

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE