STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUBEN MARTE	:	ORDER DTA NO. 818999
for Revision of a Determination or for Refund of Sales Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1998 through May 31, 2000.	:	

Petitioner, Ruben Marte d/b/a Marte Grocery, 48 Pocantico Street, Sleepy Hollow, New York 10591, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1998 through May 31, 2000.

A hearing was commenced at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 8, 2003 at 10:45 A.M. and continued to conclusion on January 9, 2003 at 10:45 A.M. On January 23, 2003, petitioner made a motion to reopen the hearing in order to permit the introduction of additional evidence. Based upon petitioner's motion, the Division of Taxation's letter in opposition, and all pleadings, documents and testimony submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On January 8, 2003 and January 9, 2003, a hearing was held on the petition of Ruben Marte d/b/a Marte Grocery. The central issue presented was whether the observation test conducted by the Division of Taxation ("Division") was reasonably calculated to reflect the

taxes due. At the hearing, petitioner presented testimony and documents in support of his position.

2. Two investigators appeared at the hearing in response to a subpoena by petitioner's representative, Gopaljee Jaiswal, Esq. The investigators were permitted to give their testimony before petitioner testified. When Mr. Jaiswal indicated that he did not need the investigators any longer, they were excused.

3. After the break for lunch on January 9, 2003, Investigator Barr resumed his testimony. In reply to a question by Mr. Jaiswal, Investigator Barr stated that he and Investigator Cruz did not discuss their testimony in this matter. Investigator Barr was not asked if he discussed his testimony with the Division's representative.

3. Near the conclusion of the hearing, petitioner's representative stated that there was no additional evidence that he wished to offer. Thereafter, the Division's representative stated that he did not have additional evidence to offer at that time, but requested an opportunity to submit an affidavit into evidence from one of the investigators, who had previously been excused. The purpose of the affidavit was to respond to certain testimony from petitioner. Mr. Jaiswal strenuously objected to this request which was subsequently granted. The opposition to the motion continued after the initial ruling was made and after Mr. Jaiswal had been reminded that a ruling had been made. Mr. Jaiswal was then firmly reminded, a second time, that a ruling had been made. Later, after arrangements were made for the Division to submit the affidavit after the hearing, the record was closed.

4. On January 21, 2003, petitioner made a motion to reopen the hearing in order to permit the introduction of additional evidence. In support of his motion, petitioner's representative states that the hearing was not totally closed on January 9, 2003 because the Administrative Law

Judge allowed the Division to file an affidavit and further allowed petitioner to file a response. Petitioners' representative acknowledged that he stated at the hearing that he did not have other documents to submit into evidence but contends that he was distressed at the time he made this statement because the Administrative Law Judge raised his voice and he could not make an intelligent decision.

5. Petitioner requests that the following documents be received in evidence:

(A) Exhibit "A" of petitioners' motion consists of five letters which may be briefly summarized as follows: (1) In a letter dated August 28, 2002, Mr. Jaiswal requested that the Division's representative, Robert A. Maslyn, Esq., provide the names of the auditors who made the observations and prepared the assessments; (2) In a letter dated September 10, 2002, Mr. Maslyn provided the names of the individuals who conducted the observation test of the business, John Barr and Richard Cruz, and the name of the auditor who performed the audit, Richard Wessels. Mr. Maslyn stated that he intended to produce the auditor as a witness as well as affidavits from each investigator; (3) In a letter dated September 19, 2002, Mr. Jaiswal told Mr. Maslyn that he would appreciate it if Mr. Maslyn would produce the witnesses in person in order to save his client the expense of serving subpoenas and paying witnesses fees; (4) In a letter dated October 18, 2002, Mr. Jaiswal stated that he had not yet received a response to his request that Mr. Maslyn present the two investigators. He also stated that had not received a response to his offer in compromise; and, (5) In a letter dated October 24, 2002, Mr. Maslyn told Mr. Jaiswal that if he wished to call the investigators, he could subpoena them. He also told Mr. Jaiswal that his office recommended that the offer in compromise be rejected and, further, that the informal settlement offers were not attractive.

(B) Petitioner offered a Notice to Admit and the response thereto.

(C) Petitioner submitted a letter dated December 10, 2002 along with a tax amnesty application.

(D) Petitioner's attorney requests that a certain statement by him, made under penalty of perjury, be included in the hearing record. This statement concerned: (1) an inquiry by Investigator Barr to Mr. Jaiswal regarding whether he was entitled to money for lunch from Mr. Jaiswal; (2) an allegation that Mr. Maslyn improperly discussed the case with Mr. Barr and Mr. Cruz during a recess in the hearing for lunch; (3) an assertion that Mr. Jaiswal did not want to call the investigators to testify before his other witnesses testified but he had no choice; (4) a contention that the investigators left the hearing location without Mr. Jaiswal's permission after their testimony was completed; and, (5) an argument that permission to submit an affidavit to rebut the testimony of petitioner after the close of the hearing was an egregious deviation from the accepted procedure for holding a hearing.

(E) Petitioner submitted an affidavit by Victor J. Cannistra, CPA, which stated that it was Mr. Maslyn, over Mr. Jaiswal's concern, who wanted the two investigators released before the hearing was completed. Mr. Cannistra also made a statement regarding a conversation at an audit conference.

6. In opposition to the motion, the Division raises three distinct points. First, the Division states that evidence cannot be submitted after the hearing is concluded. The Division submits that the record was closed and that Mr. Jaiswal was not prevented from having an opportunity to submit additional evidence. Second, the Division maintains that there is no legal basis to grant the motion. The Division notes that 20 NYCRR 3000.16 applies after a determination has been rendered, and even if a determination had been rendered, the evidence was not newly discovered.

The Division contends that an attorney is not prohibited from conferring with a nonparty witness. Lastly, the Division posits that the submissions are improper and lack probative value.

7. In a reply affidavit, Mr. Jaiswal asserts that Mr. Maslyn was coaching and tampering with witnesses. He also states that he did not complain about fairness, prejudice or misconduct of the Administrative Law Judge. His concern pertained to what he regarded as the unwarranted raising of his voice by the Administrative Law Judge.

CONCLUSIONS OF LAW

A. There are numerous difficulties with petitioners' motion. First, petitioner's claim that he was too distressed to make an intelligent decision on whether to submit additional evidence does not correspond to the record of the hearing. At the time petitioner's representative was asked whether he had additional evidence to offer, a difference had not arisen over the submission of the Division's affidavit and there was no reason for him to feel distressed or be unable to intelligently answer a question.

Second, the assertion that the Division's representative was engaged in improper conduct is also baseless. Petitioner has not presented any statute, rule or regulation which prevents an attorney from speaking with a nonparty witness. In this regard, it is noted that when Investigator Barr took the stand after the lunch break on January 9, 2003, he stated, in response to a question by Mr. Jaiswal, that he and Investigator Cruz, who had testified earlier, did not discuss the particular observation test at issue in this matter. In view of the concern at this juncture, it is inexplicable that Mr. Jaiswal did not take the opportunity to ask Investigator Barr if he discussed this audit with the Division's representative. There is no reason to believe that the Division's representative tainted the testimony of the investigators.

B. The Tax Appeals Tribunal has established a firm policy of not allowing the submission of evidence after the record is closed. In ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991), a question presented was whether the Administrative Law Judge erred by rejecting exhibits which were attached to the taxpayer's post-hearing brief. The Tribunal affirmed the decision to reject the documents and provided the following explanation:

> In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (***see, Matter of Oggi Rest***., Tax Appeals Tribunal November 30, 1990; ***Matter of Morgan Guar. Trust Co. of N.Y.***, Tax Appeals Tribunal, May 10, 1990; ***Matter of International Ore & Fertilizer Corp.***, Tax Appeals Tribunal, March 1, 1990; ***Matter of Ronnie's Suburban Inn***, Tax Appeals Tribunal, May 11, 1989; ***Matter of Modern Refractories***, Tax Appeals Tribunal, December 15, 1988).

C. Turning to the particular documents offered with this motion, petitioner first seeks to have admitted a series of letters concerning his request to have the Division produce the investigators as witnesses. These letters are irrelevant to the issues raised at the hearing. Petitioner next seeks to have the Notice to Admit and his response admitted in evidence. These documents have already been included in the record as the Division's exhibits "E" and "F." There is no reason to include them in the record another time. The next document petitioner seeks to have admitted into evidence is his amnesty application. The amnesty application has no bearing on this matter and is irrelevant. Petitioner next wishes to include his own sworn statement regarding the order of the witnesses at the hearing. There are two problems with this offer. First, the regulation of the course of the hearing is determined by the administrative law judge (20 NYCRR 3000.15). Here, since the investigators were present because of a subpoena,

it made sense to permit them to give their testimony at the earliest opportunity so that they did not have to stay any longer then was necessary. Further, the order of the witnesses has no bearing on the merits of the underlying issues. Second, portions of the statement appear to be an attempt by petitioner's representative to influence the determination regarding the credibility of certain witnesses. Findings regarding credibility are within the province of the administrative law judge and may not be usurped through a representative's sworn statement. Lastly, the statement from Mr. Cannistra, pertaining to the order of the hearing, is also irrelevant.

D. The motion of Ruben Marte d/b/a Marte Grocery to reopen the record is denied.

DATED: Troy, New York
May 8, 2003

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE