STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GAETANO MODICA	:	ORDER DTA NO. 826119
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period December 1, 2008 through November 30, 2011.	:	

Petitioner, Gaetano Modica, 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 December 1, 2008 through November 30, 2011.

On May 22, 2014, the Division of Taxation brought a motion seeking summary determination based upon the timeliness of petitioner's request for a conciliation conference. Petitioner filed a response in opposition to the motion for summary determination on June 18, 2014. On September 11, 2014, Supervising Administrative Law Judge Daniel J. Ranalli issued a determination that dismissed the petition and sustained the subject notice of determination.

On September 17, 2014, petitioner brought a motion to reopen the record and for reargument pursuant to 20 NYCRR 3000.16. On October 9, 2014, the Division of Taxation filed an affirmation in opposition to petitioner's motion. Petitioner appeared throughout this proceeding by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Based upon the motion papers and the record of proceedings on the previously filed motion, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

ISSUES

I. Whether petitioner has established that the supervising administrative law judge overlooked or misapprehended relevant facts, or misapplied any controlling principle of law in his determination in this matter.

II. Whether petitioner has established grounds to reopen the record in this matter.

FINDINGS OF FACT

1. On September 11, 2014 the supervising administrative law judge issued a determination that granted the Division of Taxation's motion dismissing the petition in this matter. The issue addressed was whether the Division of Taxation (Division) established proper mailing of the notice of determination that petitioner had protested. The findings of fact and conclusions of law from the September 11, 2014 determination are incorporated herein by reference.

2. Petitioner brings this motion for reargument based upon an asserted misapprehension by the supervising administrative law judge concerning the import of the certified mail record and affidavits that formed the basis of the determination. Specifically, petitioner points to an imprint on the last page of the certified mail record (CMR) that states:

Post Office
Hand write total # of pieces and Initial.
Do Not stamp over written areas

3. According to petitioner, the failure of the supervising administrative law judge to discuss this directive imprinted by the Division on the certified mail record and the postal employee's failure to follow the same render the determination erroneous contending that the decision on ***Matter of Rakusin*** (Tax Appeals Tribunal, July 26, 2001) was misapplied.

Petitioner contends that since the Postal Service employee did not write in the number of pieces delivered to the post office, the certified mail record was not properly completed.

4. Petitioner's basis to reopen the record is the assertion that the affiants and the Postal Service employee could be subpoenaed to testify concerning the mailing of the notice of determination in issue. Petitioner does not indicate how this testimony would constitute newly discovered evidence, what this testimony would entail, or how it would change the determination.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal's Rules of Practice and Procedure provide for a motion to reopen the record or for reargument to be made to the administrative law judge who rendered a determination within 30 days after that determination has been served (20 NYCRR 3000.16 [b]).

B. 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, 567 [1979]; ***see also***, ***Matter of Varrington Corp.***, Tax Appeals Tribunal, November 9, 1995). A motion for reargument "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked–matters, in other words, that might reasonably be expected to alter the conclusion reached by the court" (***Shrader v CSX Transp.***, 70 F3d 255, 257 [2d Cir 1995]). A motion for reargument is not "a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (***Foley v Roche***).

C. Petitioner's motion for reargument must be denied as petitioner has not shown that the supervising administrative law judge misapprehended the relevant facts or misapplied the relevant law. On the specific points raised by petitioner for reconsideration, careful review of the

mailing documents and affidavits indicate proper mailing of the notice of determination was established in accordance with the Division's articulated policies. Contrary to petitioner's assertions, ***Matter of Rakusin***, does not stand for the proposition that the Postal Service employee must, under all circumstances, write the number of pieces of mail delivered to the Postal Office on the certified mail record. The Division's policy, as articulated in the Peltier affidavit is that the Postal Service employee may circle the number of pieces listed on the CMR to indicate the same were received.

D. Turning to petitioner's motion to reopen the record, 20 NYCRR 3000.16 (a) provides that [a]n 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.

E. Petitioner's motion seeking to reopen the record must also be denied. Petitioner has not attempted to offer an explanation as to how testimony from the Division's affiants and the Postal Service employee who completed the certified mail record that "could be subpoenaed to testify at a hearing" is newly discovered evidence; nor does petitioner explain how this testimony would have resulted in a different outcome. In reaching this conclusion it must be stressed that when the Division filed its motion for summary determination, it was incumbent upon petitioner to produce evidence in admissible form sufficient to raise an issue of fact requiring a hearing (***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Alvord & Swift v. Muller Constr. Co.***, 46

NY2d 276 [1978]). As noted in the determination, petitioner's response to the Division's motion for summary determination took the form of an affidavit from petitioner's representative that made the same arguments advanced herein. Such argumentation from petitioner's representative was not enough to raise a material issue of fact to defeat the Division's motion for summary determination (***Zuckerman*** at 562), nor does it provide a basis to reopen the record.

F. Petitioner's motion to reopen the record and for reargument is denied.

DATED: Albany, New York
November 26, 2014

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE