STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ANTHONY CAPECI	:	ORDER
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods March 1, 2008 through February 28, 2014 and March 1, 2010 through February 28, 2014.	:	DTA NOS. 828636, 828637, 828638, 828639 AND 828640

In the Matter of the Petition	:	
of	:	
44th ENTERPRISES CORPORATION	:	
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 March 1, 2010 through February 28, 2014.	:	

In the Matter of the Petition	:	
of	:	
MLB ENTERPRISES CORPORATION	:	
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 March 1, 2010 through February 28, 2014.	:	

Petitioner, Anthony Capeci, 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 periods March 1, 2008 through February 28, 2014 and March 1, 2010 through February 28, 2014.

Petitioner, 44th Enterprises Corporation, 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 March 1, 2010 through February 28, 2014.

Petitioner, MLB Enterprises Corporation, 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 March 1, 2010 through February 28, 2014.

Petitioners, by their representative, Meister Seelig & Fein, LLP (Howard Davis, Esq. and Amit Shertzer, Esq., of counsel), filed a motion dated November 13, 2019 for an order granting summary determination in their favor pursuant to 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), responded to petitioners' motion on December 13, 2019. Pursuant to 20 NYCRR 3000.5 (d), the 90-day period for issuance of the order on petitioners' motion commenced on December 13, 2019.

The Division of Taxation filed a motion dated November 25, 2019, for an order declaring that petitioners' requests for admission dated October 3, 2019 were not proper or in the alternative for an order allowing the Division of Taxation to withdraw or amend its deemed admissions pursuant to 3000.6 (b) (3) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners filed a response to the Division of Taxation's motion on December 23, 2019. Pursuant to NYCRR 3000.5 (d), the 90-day period for issuance of the order on the Division's motion commenced on December 26, 2019.

Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following combined order on petitioners' and the Division of Taxation's motions.

FINDINGS OF FACT

1. Petitioners, Anthony Capeci, 44th Enterprises Corporation and MLB Enterprises Corporation, commenced this proceeding by filing petitions with the Division of Tax Appeals on March 26, 2018. The petitions of Anthony Capeci were filed in protest of the following notices of determination, dated December 1, 2016:

Notice No.	Periods Ended	Tax	Interest	Penalty
L-045796580	05/31/08 - 02/28/14	$3,863,002.13	$4,909,599.02	$1,545,198.94
L-045794592	05/31/10 - 02/28/14	$1,798,108.53	$1,757,904.95	$719,241.65
L-045794593	05/31/10 - 05/31/12	$0.00	$0.00	$86,000.00
L-045794594	05/31/10 - 02/28/14	$501,699.02	$481,054.84	$200,678.12
L-045794595	05/31/10 - 02/28/14	$0.00	$0.00	$156,000.00

Notice L-045796580 was issued to Mr. Capeci as an officer/responsible person of Metro Enterprises Corp. Notices L-045794592 and L-045794593 were issued to Mr. Capeci as an officer/responsible person of MLB Enterprises Corporation. Notices L-045794594 and L-045794595 were issued to Mr. Capeci as an officer/responsible person of 44th Enterprises Corporation.

The petition of 44th Enterprises Corporation (44th) was filed in protest of a notice of determination (L-045789538), dated November 30, 2016, which asserted penalty of $156,000.00, for the periods ended May 31, 2010 through February 28, 2014, and a notice of determination (L-045789743), dated November 30, 2016, which asserted tax in the amount of $501,699.02,

plus interest of $480,664.58 and penalty of $200,678.12 for the same periods.

The petition of MLB Enterprises Corporation (MLB) was filed in protest of a notice of determination (L-045790014), dated November 30, 2016, which asserted penalty of $86,000.00, for the periods ended May 31, 2010 through May 31, 2012, and a notice of determination (L-045789856), dated November 30, 2016, which asserted tax in the amount of $1,798,108.53, plus interest of $1,786,492.83 and penalty of $719,241.65 for the periods ended May 31, 2010 through February 28, 2014.

The matters were associated by the Division of Tax Appeals at petitioners' request.

2. The Division of Taxation (Division) filed its answers to the petitions on May 30, 2018.

3. Petitioners served requests for admission (requests), dated October 3, 2019, on the Division containing 133 separately numbered requests. A general breakdown of the requests consists of the following: requests 1 through 11, and 31 through 39 pertain to shareholder, ownership, officer, employee, vendor and agent information for petitioners MLB, 44th, and Metro Enterprises Corp. (Metro), an entity not a party to the current proceedings; requests 12 through 13 and 19 through 21 pertain to check signing for MLB, 44th, and Metro; requests 14 through 18 pertain to ownership, shareholder, officer and employee information with regard to Metro; requests 22 through 26, and 30 pertain to the signing of tax returns for MLB, 44th and Metro; requests 27 through 29 pertain to profits from MLB and 44th; requests 40 through 43, 46, and 49 through 62 pertain to the operation and control of the employees and clubs operated by MLB and 44th; requests 44 and 45 pertain the business operations of Metro; requests 47 through 48, 63, 64, 67, 69, 70 through 73, 78 through 81, and 94 pertain to the use and processing of scrip at the clubs operated by MLB and 44th; requests 65 and 66 pertain to credit card and ATM limits; request 68 pertains to contracts between MLB, 44th and their employees; requests 74

through 77 pertain to fees paid by petitioners' patrons, the reporting of receipts and payment of taxes; request 82 pertains to tax reporting information for Metro; request 83 pertains to Metro's treatment of scrip; requests 84 through 85 pertain to MLB and 44th collection and recording of fees; requests 86 through 87 pertain to Metro's operations; requests 88 through 91 pertain to prior activities between petitioners and the Division; request 92 requests a legal conclusion that gratuities are not subject to sales tax; request 93 pertains to tax information of Metro; requests 95 through 97 pertain to the collection of sales tax on cash payments and treatment of gratuities; request 98 pertains to the Division's treatment of payments received by entertainers; request 99 requests a legal conclusion that credit card and scrip payments are not subject to sales tax; requests 100 through 102 pertain to sales made at clubs operated by MLB and 44th, and by Metro; request 103 requests a legal conclusion that cash payments made by customers to entertainers in the clubs are not subject to sales tax; request 104 pertains to payment of employees at petitioners' clubs; requests 105 through 109 and 120 pertain to the Division's legal position, opinion letters and regulations; request 110 is a broad question regarding "customary" practice in gentlemen's clubs; requests 111 through 113, and 115 through 117 call for legal conclusions; request 114 pertains to MLB, 44th and Metro's sales and business operations; request 118 and 119 pertains to Metro's books and records; requests 121 and 122 pertain to John Scarfi who is not a party to this action and call for legal conclusions; requests 123 through 132 call for legal conclusions; and request 133 is repetitive of other requests.

4. The Division served its response to petitioners' requests on October 31, 2019. In its response, the Division objected to requests numbered 1 through 20, 24 through 34, 36 through 38, 40 through 46, 48 through 56, 58 through 62, 64, 68 through 73, 75 through 77, 79 through 83, 85 through 87, 93, 97, 104, 110, 122, 123, and 125 through 128 on the basis that petitioners

could not reasonably believe such information is within the knowledge of the Division. The Division objected to requests numbered 35, 39, 47, 84, 94, 100, and 102 on the basis that such matters are in substantial dispute and petitioners could not reasonably believe such matters are free from substantial dispute. The Division objected to items 22 and 23 "because Petitioners could not reasonably expect the Division to know what they mean by 'all tax returns.' Further, without copies of the documents, petitioners could not reasonably believe such information is within the knowledge of the Department." The Division objected to requests numbered 57, 63, and 114 on the basis that petitioners could not reasonably believe such information is within the knowledge of the Division and such matters are in substantial dispute. The Division objected to request numbered 92 on the basis that petitioners could not reasonably believe such matters are free of substantial dispute and implies a legal conclusion. The Division objected to request numbered 96 on the basis that the request is unclear and that petitioners could not reasonably believe such matters are free of substantial dispute. The Division objected to request numbered 98 as such matters are privileged. The Division objected to requests numbered 107 and 108 on the basis that it cannot "admit or deny those matters since they refer to an alleged position that does not exist." The Division objected to request numbered 121 as a legal question to be determined by the Division of Tax Appeals. The Division objected to request numbered 124 on the basis that such matters are a legal question to be determined by the Division of Tax Appeals and petitioners could not reasonably believe such matters are free of substantial dispute. The Division admitted to request numbered 21 to the extent that "Mr. Capeci had authority to sign checks and in fact signed checks for Metro" and objected to the remainder of the request on the basis that petitioners could not reasonably believe such information is within the knowledge of the Division. The Division admitted to requests numbered 65 and 66, 78, 101, and 111. The

Division admitted to request numbered 67 to the extent that "patrons used scrip to pay dance fees" and objected to the remainder of the request on the basis that petitioners could not reasonably believe such information is within the knowledge of the Division. The Division admitted to request numbered 74 to the extent that "patrons paid dance fees to obtain entertainment" and objected to the remainder of the request on the basis that petitioners could not reasonably believe such information is within the knowledge of the Division. The Division denied requests numbered 88 through 91, 95, 99, 103, 105, 106, 109, 112, 113, 115, 116, 120, and 129 through 133. The Division denied the statements in request numbered 117 but admitted that taxable scrip payments to the entertainers will remain taxable regardless of the entertainers' relationship with the club. The Division admitted to requests numbered 118 and 119 to the extent that "records were maintained and provided of scrip payments made to dancers" and stated that it "is not required to admit or deny the statement about who maintained the records because Petitioner could not reasonable believe that such information is within the knowledge of the Department."

5. Petitioners filed a motion dated November 13, 2019 for an order granting summary determination in their favor. Petitioners argue that because the Division did not respond to its requests within 20 days, that the requests are deemed admitted, and accordingly there are no facts in dispute and summary determination should be granted in favor of petitioners.

6. The Division filed a motion dated November 25, 2019, for an order declaring that petitioners' requests were not proper or in the alternative for an order allowing it to withdraw or amend its deemed admissions.

CONCLUSIONS OF LAW

A. Section 3000.6 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal

provides as follows:

> "Admissions. (1) At any time after service of the answer, and not later than 20 days before the hearing, a party may serve upon another party a written request for admission of the following:
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> (i) the genuineness of any papers or documents;
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> (ii) the correctness or fairness of representation of any photographs described in and served with the request; and
>
> (iii) the truth of any matters of fact set forth in the request. *The request shall pertain to matters as to which the party requesting the admission believes there can be no substantial dispute at the hearing, and which are within the knowledge of the adverse party or can be ascertained by him or her upon reasonable inquiry.* Copies of the papers, documents or photographs shall be served with the request unless copies have already been furnished.
>
> (2) The party to whom the request to admit is directed may choose to respond by serving a statement expressly admitting the matters in question. However, the party is deemed to admit each of the matters *as to which an admission was properly requested* unless, within 20 days after service of the request, or within such further time as the supervising administrative law judge may allow, the party to whom the request is directed serves upon the party requesting the admission, a verified statement:
>
> (i) denying specifically the matters of which an admission is requested;
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> (ii) setting forth in detail the reasons why those matters cannot be truthfully admitted or denied; or
>
> (iii) setting forth a claim in detail that the matter of which an admission is requested cannot be fairly admitted without some material qualification or explanation, that the matters constitute a trade secret or that such party would be privileged or disqualified from testifying concerning them. Where the claim is that the matters cannot be fairly admitted without some material qualification or explanation, the party must admit the matters with such qualification or explanation.
>
> (3) Any admission made, or deemed to be made, by a party pursuant to a request made under this section, is for the purpose of the pending proceeding only, and does not constitute an admission for any other purpose, nor may it be used in any other proceeding in the Division of Tax Appeals. *The administrative law judge designated by the tribunal may, at any time, allow a party to amend or withdraw any admission on such terms as may be just*. Any admission shall be subject to all

> pertinent objections to admissibility which may be interposed at the hearing" (emphasis added).

There is no dispute that the Division's responses to petitioners' requests were served more than 20 days after the service of the requests. As such, the Division would be deemed to admit each of the matters *as to which an admission was properly requested*. The issue, then, is whether the admissions were properly requested.

As noted above, the regulations require that requests for admissions "shall pertain to matters as to which the party requesting the admission reasonably believes there can be no substantial dispute at the hearing and which are within the knowledge of the adverse party or can be ascertained by him or her upon reasonable inquiry" (20 NYCRR 3000.6 [b] [1] [iii]).

A review of petitioners' requests show that the majority are for matters which are clearly in substantial dispute or for matters involving petitioners' and other nonparty's business operations and relationships with employees. Such matters cannot reasonably be expected to be within the knowledge of the Division or be obtained by reasonable inquiry. Some of the requests involve other nonparty taxpayer information which would be protected by various secrecy provisions of the Tax Law (***see*** Tax Law § 697 [e]). Accordingly, such requests were improper and I agree with the Division's objections as stated in their October 31, 2019 response (***see*** finding of fact 4). Since requests numbered 1 through 20, portions of requests 21, 22 through 34, 35, 36 through 64, portions of 67, 68 through 73, portions of 74, 75 through 77, 79 through 87, 92 through 94, 96, 97, 100, 102, 104, 107, 108, 110, 114, portions of 118 and 119, and 122 through 128 were for matters that cannot reasonably be expected to be within the knowledge of

the Division or be obtained by reasonable inquiry, or were for matters that cannot reasonably be believed to be free from substantial dispute, request numbered 98 involved privileged matters protected by the secrecy provisions of the Tax Law, and request numbered 121 was a legal question, such admissions were not properly requested in the first instance (***see*** 20 NYCRR 3000.6 [b] [1] [iii]) and thus the provision for deemed admissions does not apply to such items (***see 32nd Ave. LLC v Angelo Holding Corp.***, 134 AD3d 696 [2d Dept 2015]). Accordingly, such items are not deemed admitted.

As it has been determined that the vast majority of petitioners' requests were improper in the first instance, the proper remedy is to vacate the request for admission in its entirety (***see Berg v Flower Fifth Ave. Hosp.***, 102 AD2d 760 [1st Dept 1984] [holding that it is "unwise and unnecessary for the court to prune the requests to construct for counsel and the parties a proper notice to admit" and the proper remedy is to vacate the notice to admit in its entirety; ***see also Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison***, 214 AD2d 453, 454 [1st Dept 1995]; ***Lewis v Hertz Corp.***, 193 AD2d 470, 470 [1st Dept 1993]). Accordingly, petitioners' requests for admissions dated October 3, 2019 are hereby vacated and there are no deemed admissions thereto.

B. The Division further moves, in the alternative, for an order to withdraw any deemed admission. Administrative law judges are given wide latitude with this regard and "may, at any time, allow a party to amend or withdraw any admission on such terms as may be just" (20 NYCRR 3000.6 [b] [3]).

As it has been determined above that petitioners' requests for admission are vacated in their entirety and no deemed admissions result therefrom, this issue is moot.

C. Petitioners move for summary determination contending that because the

Division did not respond to its requests within 20 days, that the requests are deemed admitted, and accordingly there are no facts in dispute and summary determination should be granted in favor of petitioners. As determined above, however, petitioners' requests are vacated and the Division is not deemed to have admitted the requests. There are, therefore, material factual matters in dispute.

A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" and the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]).

Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in

admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992], citing ***Zuckerman***).

Petitioners rely solely on the requests for admissions and their contention that the Division is deemed to have admitted to the requests in its argument that there are no questions of fact. Petitioners' argument must fail as the requests have been determined to be improper and are vacated in their entirety and there are no deemed admissions. There are clearly material facts in dispute and summary determination is improper.

The parties will have a full and fair opportunity to present evidence and develop the record during the hearing, which will proceed as scheduled.

D. Petitioners' motion for summary determination is denied, the Division's motion for an order declaring petitioners' requests for admissions improper is granted, and petitioners' requests for admissions are vacated.

DATED: Albany, New York
January 09, 2020

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE