STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN SCARFI	:	ORDER DTA NOS. 828745
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 February 28, 2014.	:	AND 828746

In the Matter of the Petition	:	
of	:	
METRO ENTERPRISES CORP.	:	
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, 2008 through February 28, 2014.	:	

Petitioner, John Scarfi, 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 February 28, 2014.

Petitioner, Metro Enterprises Corp., 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, 2008 through February 28, 2014.

A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on July 15, 2019, and a briefing schedule was established at the conclusion of the hearing, with the final brief to be submitted by November 5, 2019. Petitioners appeared by

Ackerman, LLP (Alvan L. Bobrow, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

On August 14, 2019, petitioners filed a motion to reopen the record and for reargument pursuant to 20 NYCRR 3000.16, and to recuse Osborne Jack from representing the Division of Taxation in this matter. The Division of Taxation filed a response in opposition to the motion on October 4, 2019, which date began the 90-day period for the issuance of this order. Based upon the motion papers, and all the pleadings and proceedings associated with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioners commenced this proceeding by filing petitions with the Division of Tax Appeals on June 6, 2018. The petition of John Scarfi was filed in protest of notices of determination numbers L-045794597, L-045794596, L-045794591, and L-045796581, all dated December 1, 2016, which asserted the following amounts due:

Notice No.	Periods Ended	Tax	Interest	Penalty
L-045794597	02/28/14	$0.00	$0.00	$10,000.00
L-045794596	02/28/14	$25,339.55	$12,132.30	$10,135.71
L-045794591	02/28/14	$98,622.50	$45,304.22	$37,848.90
L-045796581	05/31/08 - 02/28/14	$3,863,002.13	$4,909,599.02	$1,545,198.94

The petition of Metro Enterprises Corp. (Metro) was filed in protest of a notice of determination L-045794061, dated December 1, 2016, which asserted tax in the amount of $3,863,002.13, plus interest of $4,909,599.01 and penalty of $1,545,198.94, for the periods ended May 31, 2008 through February 28, 2014.

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

2. The Division of Taxation (Division) filed its answers to the petitions on August 8, 2018.

3. Petitioners served a request for admission and second request for admission, dated June 20, 2019 and June 25, 2019, respectively, on the Division. The Division responded to petitioners' request for admission and second request for admission on July 10, 2019 and July 15, 2019, respectively.

4. A consolidated hearing was held on July 15, 2019. At the conclusion of the hearing the record was closed and a briefing schedule was established, with the final brief to be submitted by November 5, 2019.

5. Mr. Scarfi executed a power of attorney individually and as president of Metro appointing Alvan L. Bobrow, Esq., as the parties' representative. Mr. Scarfi and Mr. Bobrow were present at the hearing. At the beginning of the hearing, the administrative law judge instructed non-party witnesses, including Anthony Capeci and Jennifer M. Kinsely, Esq., to wait outside of the hearing room until called. Mr. Capeci had filed separate petitions with the Division of Tax Appeals which were not associated with or consolidated with the matters involved in the hearing and Ms. Kinsely was his attorney, and as such, Mr. Capeci and Ms. Kinsely were not parties to the proceedings.[1] When the non-party witnesses were instructed to wait outside of the hearing room, Mr. Bobrow stated that Mr. Capeci was "the owner of one of the related entities.

[1] Official notice of the petitions filed in ***Matter of Capeci***, assigned Division of Tax Appeals numbers 828636, 828637, and 828638, is taken pursuant to State Administrative Procedure Act (SAPA) § 306 (4). Pursuant to SAPA § 306 (4) official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (***Matter of Ordway***, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (***see Bracken v Axelrod***, 93 AD2d 913 [3d Dept 1983]).

And is going to be called. I . . . I subpoenaed him, he is one of my witnesses." Mr. Bobrow did not state that Mr. Capeci was a party to the petitions and did not object to Mr. Capeci or Ms. Kinsley waiting outside of the hearing room.

A short recess in the proceedings was held following the direct examination of the Division's witness, Christine Scala. During the break and off the record, petitioners, together with Mr. Capeci and Ms. Kinsley, requested that Mr. Capeci and Ms. Kinsley be allowed to observe the remainder of the hearing. When the proceedings continued on the record, Mr. Capeci and Ms. Kinsley were present in the hearing room and no objections were stated. However, the transcript does not indicate that the witnesses were present in the room at that time.

6. On August 14, 2019, petitioners filed the instant motion to reopen the record and for reargument pursuant to 20 NYCRR 3000.16, and to recuse Osborne Jack from representing the Division of Taxation in this matter. Petitioners also request that the hearing transcript be corrected to reflect what portions of the hearing Mr. Capeci and Ms. Kinsley observed. The Division of Taxation filed a response in opposition to the motion on October 4, 2019.

7. Included as an exhibit with petitioners' motion is a copy of a declaration by Osborne Jack, Esq., the Division's representative in this matter, dated July 26, 2019, allegedly submitted in federal district court in ***MLB Enterprises Corp. v New York State Department of Taxation and Finance and Commr. of New York State Department of Taxation and Finance*** (Southern District Court, 19-CV-04679), by Mr. Jack as an attorney in the Office of Counsel of the Division, in support of the defendants' motion to dismiss the complaint based on a lack of subject matter jurisdiction.

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tax Appeals 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) Procedure. A motion to reopen the record or for reargument, with or without a new hearing, *shall be made to the administrative law judge who rendered the determination within thirty days after the determination has been served*" (emphasis added).

B. Petitioners allege "fraud, misrepresentation, or misconduct by the Tax Department" in moving to reopen and reargue prior to the issuance of a determination in this matter. Petitioners' motion to reopen the record and reargue must fail as premature and procedurally improper. The regulation is crystal clear and unambiguous that motions to reopen the record or for reargument shall be made within thirty days *after* the determination has been served (20 NYCRR 3000.16 [b]).

No determination has been rendered at this time. As such, petitioners' motion to reopen the record and reargue is procedurally improper and is denied (***see Matter of Javed***, Tax Appeals Tribunal, October 6, 2011, affirming ***Matter of Javed***, Division of Tax Appeals, January 27, 2011 [holding that § 3000.16 is applicable only where an administrative law judge determination has been issued following a hearing or submission]).

C. Petitioners further request attorney fees under CPLR § 3123 (c), which provides for penalties for unreasonable denial of requests to admit. The Tax Appeals Tribunal Rules of Practice and Procedure clearly state that motions for costs or disbursements or motions related to discovery procedures as provided for in the Civil Rules of Practice and Procedure will not be entertained (***see*** 20 NYCRR 3000.5 [a]). Moreover, contrary to petitioner's argument, the Division properly responded to petitioners' requests for admissions. As such, petitioners' request for attorney fees is denied.

D. Petitioners also move to recuse Mr. Jack from representing the Division in this matter. Petitioners contend that Mr. Jack should be disqualified based on Rule 3.7 of the New York Rules of Professional Conduct, claiming that he has "become an essential fact witness in the case." Rule 3.7 provides, in part, as follows:

> "(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
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> (1) the testimony relates solely to an uncontested issue;
>
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
>
> (3) disqualification of the lawyer would work substantial hardship on the client;
>
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
>
> (5) the testimony is authorized by the tribunal."

Petitioners contend that Mr. Jack "has become an essential fact witness in the case" because Mr. Jack submitted a declaration in federal district court in ***MLB Enterprises Corp. v New York State Department of Taxation and Finance and Commr. of New York State***

Department of Taxation and Finance (Southern District Court, 19-CV-04679). Included with petitioners' motion papers is a copy of a declaration signed by Mr. Jack, as an attorney in the Office of Counsel of the Division, in support of the defendants' motion to dismiss the complaint based on a lack of subject matter jurisdiction.

Petitioners' argument that Mr. Jack should be recused due to the declaration is without merit. It is first noted that this agency does not have jurisdiction to enforce the Rules of Professional Conduct (***see Matter of Haber***, Tax Appeals Tribunal, August 1, 1996; ***Matter of R.A.F. General Partnership***, Tax Appeals Tribunal, November 9, 1995).[2]

Secondly, MLB Enterprises Corp., the plaintiff in the matter for which Mr. Jack submitted the attorney declaration in federal court, is not a petitioner in this proceeding. ***Matters of MLB Enterprises Corp.*** were not associated or consolidated with this proceeding. As such, contrary to petitioners' argument, the mere act of submitting an affidavit in an unassociated federal court case does not make Mr. Jack a fact witness in this matter.

Third, as the Division correctly notes, Mr. Jack was not called as a witness and did not testify in this matter. As the hearing concluded on July 15, 2019, Mr. Jack will not be a witness in this matter.

Finally, the mere submission of a declaration as an attorney for a party in a federal matter pursuant to 28 USC § 1746 does not necessarily make the affiant a fact witness. It is common practice for attorneys to submit affirmations in support of motions (***see generally*** West's McKinney's Forms Civil Practice Law and Rules § 5:18 [c], [d]; 97 N.Y. Jur. 2d Summary Judgment, Etc. § 181 ["The customary procedure in regard to a motion to dismiss is to serve a

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[2] ***Matter of Haber*** and ***Matter of R.A.F. General Partnership*** held that the Tax Appeals Tribunal does not have jurisdiction to enforce the Code of Professional Responsibility against an attorney. The Code of Professional Responsibility was replaced with the Rules of Professional Conduct on April 1, 2009 (***see*** 22 NYCRR 1200 et seq.).

notice of motion to dismiss supported by the attorney's affidavit or affirmation indicating the nature of the litigation or controversy and explaining the grounds on which the motion is based"]). A review of the declaration shows that the statements are based on Mr. Jack's review of the audit file and explain the background on which the motion to dismiss is based.

Petitioners' motion to recuse Mr. Jack from representing the Division in this matter is accordingly denied.

E. Also included within petitioners' motion is a request to correct the hearing transcript. The Tribunal's Rules of Practice and Procedure provide that:

> "[i]f either party deems the transcript to be inaccurate in any material respect, the party shall promptly notify the administrative law judge, setting forth specifically the alleged inaccuracies. The administrative law judge shall specify the corrections to be made in the transcript, and such corrections shall be made a part of the record" (20 NYCRR 3000.15 [d] [7]).

Petitioners request that the transcript be corrected in order to indicate what portions of the hearing its non-party witnesses, Mr. Capeci and Ms. Kinsley, observed.

By way of background, Mr. Capeci and Ms. Kinsely, present as non-party witness, were instructed to wait outside of the hearing room until called, pursuant to 20 NYCRR 3000.15 (d). The hearing involved the petitions of Metro and Mr. Scarfi. Mr. Capeci had filed separate petitions with the Division of Tax Appeals which were not associated with or consolidated with the matters involved in the hearing, and as such, Mr. Capeci was not a party to the proceedings. At the beginning of the hearing, when non-party witnesses were instructed to wait outside of the hearing room until called, petitioners' representative inquired regarding Mr. Capeci:

> Mr. Bobrow: "who is here is the owner of one of the related entities. And is going to be called. I . . . I subpoenaed him, he is one of my witnesses, so I assume he could stay or should he wait outside?"
>
> ALJ: "No, he should - - he should wait outside if he's not a party to the proceeding today."

Mr. Bobrow: "Okay" (Transcript pp. 6 - 7).

Petitioners' representative did not raise an objection nor state that Mr. Capeci or Ms. Kinsley were parties to the proceeding. As the witnesses were not parties to the proceeding, good cause existed to examine them separately from other witnesses pursuant to 20 NYCRR 3000.15 (d).

After a break in the proceedings, upon request by petitioners, together with Mr. Capeci and Ms. Kinsley, made off the record, Mr. Capeci and Ms. Kinsley observed the remainder of the hearing.

While not "material" to the matter at hand, for purposes of clarifying the record, the transcript is hereby corrected to indicate at p. 51 of the transcript that Mr. Capeci and Ms. Kinsley were present during the remainder of the proceedings.

F. Petitioners' motion, dated August 14, 2019, to reopen the record and for reargument, and to recuse Osborne Jack from representing the Division of Taxation in this matter is denied, and the transcript is corrected as indicated in conclusion of law E. A revised briefing schedule will be issued in due course.

DATED: Albany, New York
January 02, 2020

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE