STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **ANTHONY PIACQUADIO** | : | ORDER<br>DTA NOS. 829297<br>AND 829589 |
| for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2013 through November 30, 2016. | : | |

Petitioner, Anthony Piacquadio, filed petitions for revision of determinations or for refunds of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2013 through November 30, 2016.

A determination in this matter was issued on August 24, 2023, by Nicholas A. Behuniak, Administrative Law Judge. On September 25, 2023, petitioner, appearing by Polsinelli, P.C. (Scott Ahroni, Esq., of counsel), filed a motion to reopen the record and for reargument pursuant to section 3000.16 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, appearing by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), filed its response by October 25, 2023, which date began the 90-day period for the issuance of this order.

Based upon the motion papers, and all the pleadings associated with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner's motion to reopen the record and for reargument should be granted.

## *FINDINGS OF FACT*

1. The Division of Taxation (Division) conducted a sales tax audit of Eden Ballroom, LLC (Eden Ballroom) for the period of December 1, 2013 through November 30, 2016, and determined that Eden Ballroom owed the State additional sales and use taxes.

2. As part of the audit of Eden Ballroom, the Division determined that petitioner, Anthony Piacquadio, was a responsible person of Eden Ballroom.

3. The Division issued notice of determination L-047838953, dated March 26, 2018, to petitioner, in the amount of $843,285.00 in tax, plus interest and penalty, as a responsible person for the sales taxes due from Eden Ballroom for the period of September 1, 2014 through November 30, 2016.

4. The Division issued notice of determination L-048708314, dated August 21, 2018, to petitioner, in the amount of $394,618.39[1] in tax, plus interest and penalty, as a responsible person for the sales taxes due from Eden Ballroom for the period of December 1, 2013 through November 30, 2016.

5. The Division issued notice of determination L-048760959, dated September 17, 2018, to petitioner, in the amount of $137,150.33 in tax, plus interest and penalty, as a responsible person for the sales taxes due from Eden Ballroom for the period of December 1, 2014 through November 30, 2016.

6. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of notice of determination number L-047838953. A conciliation conference was held on October 16, 2018, and on January 18, 2019,

[1] The Division subsequently recomputed and reduced the liability of notice of determination number L-048708314 to $237,344.00, plus interest.

BCMS issued a conciliation order (CMS No. 000302527) sustaining notice of determination number L-047838953.

7. Petitioner filed a request for conciliation conference with the Division's BCMS in protest of notices of determination L-048708314 and L-048760959. A conciliation conference was held on April 11, 2019, and on July 19, 2019, BCMS issued a conciliation order (CMS No. 000304604) sustaining notices of determination numbers L-048708314 and L-048760959.[2]

8. On March 28, 2019, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order (CMS No. 000302527). The Division of Tax Appeals designated the petition DTA No. 829297.

9. On September 26, 2019, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order (CMS No. 000304604). The Division of Tax Appeals designated the petition DTA No. 829589.

10. Petitioner and the Division executed a mutual consent, on July 21, 2022, to have these matters determined on submission without a hearing pursuant to 20 NYCRR 3000.12 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). The undersigned sent correspondence to the parties, dated July 26, 2022, indicating, in part:

> "1. The Division shall submit its documentary evidence, with copies to the petitioners,[3] on or before August 16, 2022. Thereafter, no additional evidence will be accepted from the Division.
>
> 2. Petitioners shall submit their respective documentary evidence and initial briefs (with proposed findings of fact and conclusions of law), with copies to the

[2] The Division subsequently canceled notice of determination number L-048760959.

[3] The correspondence refers to "petitioners" in the plural as two separate parties, petitioner and Carlos Seneca (***see*** DTA 829298) were using the same representative for their respective interrelated cases and corresponding with the Division of Tax Appeals together.

> Division, on or before September 29, 2022. Thereafter, no additional evidence will be accepted from the petitioners."[4]

11. On August 24, 2023, the Division of Tax Appeals issued a determination, denying the petitions and sustaining notices of determination number L-047838953, dated March 26, 2018, and number L-048708314, dated August 21, 2018. The determination found petitioner liable as a responsible person because petitioner failed to meet his burden of proof that he was not a member of Eden Ballroom, or that he was not otherwise a responsible person under the Tax Law because he failed to meet his burden of proof that he did not have certain corporate powers.

12. On September 25, 2023,[5] petitioner filed a motion to reopen the record and for reargument pursuant to Section 3000.16 of the Rules. Along with the motion, petitioner submitted the affirmation of his attorney, Scott Ahroni, in support of the motion as well as a memorandum of law, both dated September 24, 2023. In addition, petitioner submitted two affidavits, one from petitioner and one from Mr. Geniton, dated September 24 and 22, 2023 respectively, and a document titled the "Second Amended and Restated Amended Operating Agreement of Eden Ballroom" (amended operating agreement), dated as of August 5, 2014. Both affidavits related to the amended operating agreement.

13. In petitioner's affidavit, he asserts that he looked for the amended operating agreement in preparation of petitioner's December 16, 2022 evidence submission for this case but did not find it. In Mr. Geniton's affidavit, he asserts that he searched for the amended operating agreement in November of 2022 in preparation of petitioner's December 16, 2022 evidence submission for this case but did not find it. After issuance of the August 24, 2023

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[4] After petitioners' request for an extension of the relevant due dates was granted, the final deadlines were September 14, 2022, for the Division's submission of evidence, and December 16, 2022, for petitioners' submission of evidence.

[5] September 23, 2023 is the 30th day from August 24, 2023. However, as September 23rd fell on a Saturday, the motion was required to be filed by Monday, September 25, 2023 (***see*** General Construction Law § 25-a).

determination in this matter, petitioner and Mr. Geniton again looked for the amended operating agreement in anticipation of the motion to reopen the record and for reargument. Mr. Geniton asserts that he then "began digging as deep as [he] could through old boxes and files in [his] shed, garage, basement, and closets at [his] residence" and "[a]fter three days of intense searching, on September 21, 2023, [he] uncovered the [amended operating agreement], stuffed in an old laptop bag under some papers in a box."

14. In his affirmation, Mr. Ahroni asserts that the Division of Tax Appeals should reopen the record to allow the amended operating agreement into evidence and that said agreement shows that petitioner was not a member of Eden Ballroom and that the determination of whether a person is a member of a limited liability company (LLC) is governed by New York State's Limited Liability Company Law (NY Limit Liab Co) § 602, and not "administrative documents." Mr. Ahroni asserts that petitioner did not have sufficient control over Eden Ballroom to be found a responsible person and, thus, the determination of August 24, 2023 should be reversed.

## ***CONCLUSIONS OF LAW***

A. Section 3000.16 of the Rules 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:
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> (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
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> (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."

B. Petitioner's motion to reopen the record must fail because he presented no facts which constituted a basis for reopening the record. The authority to reopen the record is limited by the principle articulated in ***Evans v Monaghan*** (306 NY 312, 323 [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."

Section 3000.16 of the Rules is patterned after Civil Practice Law and Rules (CPLR) 5015, a provision that allows a party to move for relief from a judgment or order on certain grounds, including newly discovered evidence (***see Matter of Frenette***, Tax Appeals Tribunal, February 1, 2001). Newly discovered evidence for purposes of CPLR 5015 means "evidence which was in existence but undiscoverable with due diligence at the time of judgment" (***Matter of Commercial Structures v City of Syracuse,*** 97 AD2d 965, 966 [4th Dept 1983]). The Tax Appeals Tribunal has long applied this standard or the similar standard applicable to motions to renew in determining whether to reopen the record following the conclusion of a hearing (***see e.g. Matter of Jenkins Covington, N.Y., Inc.***, Tax Appeals Tribunal, November 21, 1991, ***confirmed***, 195 AD2d 625 [3d Dept 1993], ***lv denied*** 82 NY2d 664 [1994]; ***Matter of Youngstown Yacht Club***, Tax Appeals Tribunal, October 16, 1997; ***Matter of Reeves***, Tax Appeals Tribunal, September 2, 2004; ***Matter of Jay's Distributors, Inc.***, Tax Appeals Tribunal, April 15, 2015).

In this matter, petitioner has failed to establish that the evidence in question, the amended operating agreement, could not have been discovered with due diligence in time for the scheduled submission of petitioner's evidence. Mr. Geniton found the amended operating

agreement after the August 24, 2023 determination was issued. Since the determination was not in favor of petitioner and petitioner sought to file an exception, Mr. Geniton searched again for the amended operating agreement. Petitioner fails to provide any details surrounding Mr. Geniton's initial search for the amended operating agreement. Moreover, Mr. Geniton's second search for the amended operating agreement proved successful and petitioner offers no explanation regarding the nature of how Mr. Geniton's second search was above and beyond the reasonable diligence that should have been undertaken in order to locate the amended operating agreement before the submission due date. Therefore, petitioner failed to establish, or even offer an argument, that the amended operating agreement could not have been found with reasonable diligence in time for submission into the record of the proceedings.

C. Furthermore, petitioner has failed to establish that even if the "newly discovered evidence" had been introduced into the record, it would probably have produced a different result. Petitioner argues that the determination of who is a member of an LLC is made pursuant to NY Limit Liab Co Law, and not pursuant to "administrative documents." Although petitioner does not explain what he means by "administrative documents," presumably he is referring to the other evidence in the record which indicates petitioner was a member of the LLC. NY Limit Liab Co § 603 provides:

> "(a) Except as provided in the operating agreement,
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> (1) a membership interest is assignable in whole or in part;
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> (2) an assignment of a membership interest does not dissolve a limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights or powers of a member;
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> (3) the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled; and

> (4) a member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of his or her membership interest. Unless otherwise provided in the operating agreement, the pledge of, or the granting of a security interest, lien or other encumbrance in or against, any or all of the membership interest of a member shall not cause the member to cease to be a member or to cease to have the power to exercise any rights or powers of a member.
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> (b) The operating agreement may provide that a member's interest may be evidenced by a certificate issued by the limited liability company and may also provide for the assignment or transfer of any of the interest represented by such a certificate. A member's interest may be a certificated security or an uncertificated security within the meaning of section 8-102 of the uniform commercial code if the requirements of section 8-103(c) are met, and if the requirements are not met such interest shall, for purposes of the uniform commercial code, be deemed to be a general intangible asset. The existence of the restrictions on the sale or transfer of a membership interest, as contained in this chapter and, if applicable, in the operating agreement, shall be noted conspicuously on the face or back of every certificate representing a membership interest issued by a limited liability company. Any sale or transfer in violation of such restrictions shall be void.
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> (c) Unless otherwise provided in an operating agreement and except to the extent assumed by agreement, until the time, if any, that an assignee of a membership interest becomes a member, the assignee shall have no liability as a member solely as a result of the assignment."

Contrary to petitioner's arguments, neither NY Limit Liab Co §§ 602 or 603 indicate that the membership agreement itself is solely conclusive of the determination of whether a party is a member of an LLC. Thus, petitioner fails to establish that admission of the amended operating agreement would change the result of the determination.

D. Petitioner also brought a motion for reargument in this matter on the grounds that the administrative law judge overlooked or misapprehended the relevant facts, and also erroneously interpreted and misapplied the applicable law. 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 [1st Dept 1979]; ***see also Matter of Varrington Corporation***, Tax Appeals Tribunal, November 9, 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,*** 68 AD2d at 567 [citations omitted]). A motion for reargument is not an opportunity for petitioner to make the arguments he wishes he had made earlier in the proceedings. Therefore, petitioner's motion for reargument is rejected.

E. The motion of Anthony Piacquadio to reopen the record and for reargument in this matter is denied.

DATED: Albany, New York
January 18, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE