STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARLO SENECA	:	ORDER DTA NO. 829298
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, 2014 through November 30, 2016.	:	

Petitioner, Carlo Seneca, 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, 2014 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 or 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 December 1, 2014 through November 30, 2016, and determined that Eden Ballroom owed additional sales and use taxes.

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

3. The Division issued notice of determination L-047838954, dated March 26, 2018, to petitioner, in the amount of $771,820.03 in tax, plus interest and penalty, as a responsible person for the sales taxes due from Eden Ballroom for the period December 1, 2014 through November 30, 2016.

4. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of notice of determination L-047838954. A conciliation conference was held on October 16, 2018, and on January 18, 2019, BCMS issued a conciliation order (CMS No. 000302526) sustaining notice of determination L-047838954.

5. Petitioner filed a petition challenging the conciliation order (CMS No. 000302526).

6. Petitioner and the Division executed a mutual consent, on July 21, 2022, to have these matters determined on submission without a hearing pursuant to section 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,[1] 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

[1] The correspondence refers to "petitioners" in the plural as two separate parties, petitioner and Anthony Piacquadio (***see*** DTA Nos. 829297 and 829589) were using the same representative for their respective interrelated cases and correspondence with the Division of Tax Appeals.

> Division, on or before September 29, 2022. Thereafter, no additional evidence will be accepted from the petitioners."[2]

7. On August 24, 2023, the Division of Tax Appeals issued a determination, modifying notice of determination L-047838954, and granting the petition in part and otherwise denying the petition. The determination found petitioner not liable as a responsible person as a member of Eden Ballroom, but liable as a responsible person of Eden Ballroom for the periods at issue, except for the period of June 2014 through January 2015.

8. On September 25, 2023,[3] 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 referred to two affidavits, one from Mr. Piacquadio, an individual affiliated with Eden Ballroom, and one from Mr. Geniton, a former managing member of Eden Ballroom, dated September 24 and 22, 2023 respectively, and document titled the "Second Amended and Restated Amended Operating Agreement of Eden Ballroom LLC" (amended operating agreement), dated August 5, 2014.[4] Both affidavits related to the amended operating agreement.

9. In Mr. Piacquadio's affidavit, he asserts that he looked for the amended operating agreement in preparation for 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

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[2] 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.

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

[4] Petitioner fails to include the affidavits or amended operating agreement with his motion but instead included them in Mr. Piacquadio's own separate motion.

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 determination in this matter, Mr. Piacquadio 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." Mr. Geniton also makes additional assertions about who was managing Eden Ballroom during the years at issue.

10. 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 amended operating agreement shows someone other than petitioner was the "sole manager" of Eden Ballroom.

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:
>
> (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."

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 Distribs., 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.

In addition, as noted, the Rules limit motions to reopen the record to the grounds of newly discovered evidence (***see*** 20 NYCRR 3000.16 [a] [1]). Newly discovered evidence means evidence that was in existence but undiscoverable with due diligence at the time of the hearing (***Matter of 44th Enters. Corp.***, Tax Appeals Tribunal, May 26, 2022, citing ***Matter of Frenette***, ***Commercial Structures v City of Syracuse***, 97 AD2d at 966). The factual assertions regarding the management of Eden Ballroom made by Mr. Geniton in his affidavit is not evidence that was in existence at the time the record was closed but rather a backhanded attempt by petitioner to get additional testimony into the record after the record was closed.

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. The amended operating agreement does not conclusively indicate who were responsible persons of Eden Ballroom during the periods at issue. 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 Corp.***, 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 Carlo Seneca to reopen the record and for reargument is denied.

DATED: Albany, New York
January 18, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE