STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LOWE'S HOME CENTERS, INC.	:	ORDER DTA NO. 818411
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ending January 31, 1997 and January 31, 1998.	:	

Petitioner, Lowe's Home Centers, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending January 31, 1997 and January 31, 1998.

On December 31, 2002 petitioner, appearing by its attorneys, Phillips, Lytle, Hitchcock, Blain & Huber (Edward M. Griffith, Esq., of counsel), filed a motion for an order striking from the record the post-hearing affidavits of the expert witnesses for the Division of Taxation ("Division"), Dr. Enaldo A. Silva and Dr. Alan C. Shapiro. On January 30, 2003, Gary R. Palmer, Administrative Law Judge, after considering petitioner's motion papers and the Division's documents filed in opposition to the motion, rendered an order granting petitioner's motion and striking the two affidavits from the record.

Thereafter and by notice of motion dated February 26, 2003 the Division, appearing by Barbara G. Billet, Esq. (Nicholas A. Behuniak, Esq., of counsel), moved for an order granting leave to reargue and/or leave to renew the previous motion of petitioner pursuant to CPLR 2221(f) on the grounds that the Administrative Law Judge overlooked or misapplied certain facts, and upon such reargument or renewal, that an order be entered denying petitioner's prior

motion to strike the Silva and Shapiro affidavits from the record, and then receive said affidavits into the record of this proceeding. The Division's motion was supported by a memorandum of law and the affidavit of Nicholas A. Behuniak, Esq. In opposition to the Division's motion, petitioner's attorneys filed responding papers that included an answering brief.

The January 30, 2003 order of the Administrative Law Judge granted petitioner's motion to strike the affidavits on the ground that the affidavits served no useful purpose in this proceeding because the rebuttal testimony that the affidavits were filed in response to either was within the scope of proper rebuttal, for which any surrebuttal would be superfluous, or the testimony was beyond the scope of rebuttal, in which case the testimony would be disregarded by the Administrative Law Judge. In the latter instance the affidavits would be equally superfluous.

The Division, in its memorandum of law in support of its motion, urges the Administrative Law Judge to reconsider the findings in his January 30, 2003 order and permit surrebuttal to those portions of the Coyle and Plotkin testimony that are within the scope of proper rebuttal, because, according to the Division, to permit the prior order to stand would operate to prejudice the Division and deny to it due process of law.

In opposition to the Division's motion, petitioner's counsel point out that the Division is "not significantly prejudiced" or "prejudiced in any manner" by the exclusion of the affidavits from the record, noting that the Division had possession of the expert reports of Drs. Plotkin and Coyle sufficiently in advance of their testimony so as to permit the Division to prepare its cross examination with the assistance of its experts, Drs. Silva and Shapiro. Petitioner's counsel also noted that their review of the hearing transcripts reveal that the Division's cross examination of

Dr. Coyle encompassed 286 transcript pages, which was 112 pages more than Dr. Coyle's direct examination, demonstrating, in their view, that the attorneys for the Division had ample opportunity to examine petitioner's rebuttal witnesses.[1]

CONCLUSIONS OF LAW

A. CPLR 2221(d)(2) directs that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion . . . ."

CPLR 2221(e)(2) states that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . ."

Because the Division does not assert any new facts not offered as part of the earlier motion, the instant application is deemed to be a motion for leave to reargue. The Division, in its motion, has not offered any matters of fact or law that I overlooked or misapprehended. While I am mindful of the fact that the Division has incurred additional expense and expended additional effort in reliance on my representation that it would be permitted to rebut petitioner's rebuttal witnesses by affidavit, that does not alter the fact that these affidavits serve no legitimate purpose in the order of proof of this proceeding.

B. The Division's motion for leave to reargue the prior motion underlying the order dated January 30, 2003 is granted, and upon the granting thereof, its motion to reargue the prior motion is denied.

DATED: Troy, New York
March 27, 2003

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE

[1]In fairness, it is noted that Dr. Plotkin's direct testimony was 123 pages in length, while the Division's cross examination was 63 pages in length.