

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CRYSTAL CLEAR POOL SERVICES, INC.** :  
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 November 30, 2010. :  
:

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ORDER  
DTA NO. 826209

Petitioner, Crystal Clear Pool Services, Inc., 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 November 30, 2010.

On November 7, 2014, petitioner, appearing by Michael Buxbaum, CPA, filed a motion pursuant to 20 NYCRR 3000.8 to recuse the administrative law judge assigned to the case. The Division of Taxation did not respond to the motion. The Division of Taxation's response was due on December 8, 2014, and it is this date that began the 90-day period for the issuance of this order

Upon review of the entire case file in this matter, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

***FINDINGS OF FACT***

1. On April 9, 2014, The Division of Tax Appeals received a petition from petitioner, Crystal Clear Pool Services, contesting an assessment of sales and use taxes for the period March 1, 2008 through November 30, 2010. The petition was answered by the Division of Taxation

(Division) on May 21, 2014. By letter dated October 3, 2014, the Hearing Support Unit of the Division of Tax Appeals sent a letter to both parties advising them that Administrative Law Judge Herbert M. Friedman, Jr., had been assigned to the matter. On October 15, 2014 the Hearing Support Unit sent an email to both parties advising that a prehearing conference telephone call had been scheduled for Tuesday, October 28, 2014 at 11:00 A.M. The email stated that the conference call would involve a discussion of petitioner's case and a related matter, the petition of Craig Appelbaum, a person alleged to be responsible for the sales tax of petitioner.

2. The conference call was held as scheduled on October 28, 2014. On the same date Judge Friedman sent a letter to both parties memorializing the conference and stating, "[w]e have set the hearing in the above matters [petitioner and Mr. Appelbaum] for March 27, 2015. A formal notice of hearing with the exact location and starting time will be issued in due course."

3. On the same date, October 28, 2014, Casey E. Callanan, Esq., the Division's then representative in this matter, sent a letter to Judge Friedman, with a copy to Mr. Buxbaum, petitioner's representative, who had participated in the conference call. In the letter, Mr. Callanan stated that the parties to the conference call discussed only the matter of petitioner, but that there was a related case involving Mr. Appelbaum that should also be heard on March 27, 2015. It would appear that Mr. Callanan had not yet read Judge Friedman's letter of the same date, because Judge Friedman's letter clearly stated that both matters would be scheduled for March 27, 2015.

4. Judge Friedman responded to Mr. Callanan's letter by a letter dated November 3, 2014 to Mr. Callanan, with a copy to Mr. Buxbaum. In that letter, Judge Friedman stated that he had reviewed his notes and his confirming letter to the parties and was "comfortable with the fact that we discussed both of the above matters [petitioner and Mr. Appelbaum] during the call. As was

agreed, and confirmed in my letter, both matters will be heard on March 27, 2015.”

5. Mr. Buxbaum did not respond to the letters from either Judge Friedman or Mr. Callanan, but instead filed the instant motion to recuse Judge Friedman from the case because he “has demonstrated a bias against the petitioner or the appearance of bias by stating that a **discussion** occurred with the Office of Counsel on a teleconference that I participated in.”

### *CONCLUSIONS OF LAW*

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “[e]ither party may move before the supervising administrative law judge to recuse the administrative law judge . . . assigned to its case on the basis that the administrative law judge . . . has a personal bias with respect to the case. . . .” (20 NYCRR 3000.8[a][1]).

B. Petitioner’s basis for asking for the recusal of Judge Friedman appears to revolve around one issue, as stated in its motion, and that is Judge Friedman “has demonstrated ‘prejudgement’ by scheduling the hearing for the business with the alleged responsible person at the same time and without first **discussing**, during any conference call, whether or not the alleged responsible person intends to dispute and protest his personal responsibility.”

C. The motion for recusal must be denied for a variety of reasons. First, the party alleged to have been the subject of bias is Mr. Applebaum. However, the motion was brought on behalf of the corporation, not the individual. No bias is alleged against the corporate petitioner. For this reason, alone, the motion is denied.

D. To be clear to all the parties that no bias has been demonstrated against any party to this matter, however, the remaining reasons that the motion must fail will be discussed. Petitioner argues that Mr. Appelbaum has been the subject of bias because there was no discussion of his

personal responsibility for the tax in issue during the conference call. A review of the petition filed by Mr. Appelbaum indicates that the only issue raised is the conduct of the audit. The issue of his personal responsibility is not raised at all in the petition. If Mr. Appelbaum wishes to raise this issue, the remedy is not to have the administrative law judge recused, rather he should request that his petition be amended to reflect this new issue. Finally, petitioner alleges that Judge Friedman showed bias by writing a letter indicating that both matters were discussed during the conference call. The email to the parties clearly indicated that both matters were to be the subject of the conference call, and Judge Friedman's letter after the conference clearly indicates that both matters were to be heard at the same consolidated hearing. Mr. Callanan's letter shows that he was confused about what was discussed during the conference call. Mr. Buxbaum's motion shows that he was also confused about what was discussed. However, confusion is not bias. Petitioner may have proven that there was confusion, but there has been no evidence whatsoever presented to show bias. The remedy, of course is for the parties to have another conference call so that they may clear up the confusion.

E. The motion of petitioner, Crystal Clear Pool Services, Inc., for recusal of the administrative law judge is denied.

DATED: Albany, New York  
February 19, 2015

/s/ Daniel J. Ranalli  
SUPERVISING  
ADMINISTRATIVE LAW JUDGE