

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
EMERALD INTERNATIONAL HOLDINGS, LTD. : ORDER
for Revision of Determinations or for Refund of Sales and : DTA NOS. 827663
Use Taxes under Articles 28 and 29 of the Tax Law for : AND 827664
the Period December 1, 2011 through February 28, 2014. :

Petitioner, Emerald International Holdings, Ltd., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2011 through February 28, 2014.

On February 10, 2017, petitioner, appearing by Otu A. Obot, its president, filed a motion pursuant to 20 NYCRR 3000.8 to recuse the administrative law judge assigned to the case. Petitioner's motion also seeks to vacate the administrative law judge's order dated January 26, 2017 denying petitioner's motions for summary determination. The Division of Taxation did not respond to the instant motion.

Upon review of the entire case file in this matter, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following order.

ISSUES

- I. Whether the administrative law judge assigned to this matter should be recused.
- II. Whether the administrative law judge's order denying petitioner's motions for summary determination should be vacated.

FINDINGS OF FACT

1. On or about June 1, 2016, petitioner, Emerald International Holdings, Ltd., filed separate petitions following the issuance of conciliation orders issued by the Division of Taxation's (Division) Bureau of Conciliation and Mediation Services on March 18, 2016.

2. On October 11, 2016, petitioner filed two motions seeking summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9. As a basis for its motions, petitioner asserted that the Division provided general denials in its answers and, therefore, they did not comply with the requirements of 20 NYCRR 3000.4(b)(2)(i).

3. Petitioner's motions were denied by order of Administrative Law Judge Kevin R. Law dated January 26, 2017. In his order, Judge Law concluded that petitioner failed to make a prima facie showing of entitlement to summary determination as facts in support of the motions were set forth in the affirmation of Oto Obot, rather than in an affidavit. Citing CPLR 2106, Judge Law concluded that Mr. Obot was unauthorized to provide an affirmation. Moreover, Judge Law concluded that the Division's answers complied with the requirements of 20 NYCRR 3000.4. As a result, it was decided that issues of fact existed requiring a hearing in this matter.

4. In the present motion, petitioner, through another affirmation of Mr. Obot, asserts that Judge Law's order evidences a "biased disposition" and "reads more like a response in opposition . . . , rather than a neutral looking to arbitrate the case." Petitioner further argues that "[t]he intentional and aggravated encroachment and direct interference of the Administrative Law Judge has severely and completely damaged and compromised this case." Petitioner therefore seeks the recusal of Judge Law and vacation of his order "in the interest of integrity and justice."

5. Mr. Obot's affirmation does not indicate that he is an attorney admitted to practice in New York State, a physician, osteopath or dentist as described in CPLR 2106.¹ Petitioner did not submit an affidavit in support of the motion.

CONCLUSIONS OF LAW

A. Section 3000.8(a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides in part that:

“(1) Either party may move before the supervising administrative law judge to recuse the administrative law judge or presiding officer assigned to its case on the basis that the administrative law judge or presiding officer has a personal bias with respect to the case or that the administrative law judge or presiding officer is otherwise disqualified to hear and decide the case.

(2) The motion to recuse the administrative law judge or presiding officer must be accompanied by an affidavit setting forth the facts upon which the assertion of bias or other disqualification is based. . . .”

B. The personal bias referred to in 20 NYCRR 3000.8(a) is not limited to the personal or pecuniary interest of the administrative law judge. Many other concepts are included as well (*see Matter of 1616 Second Ave. Restaurant v. New York State Liquor Authority*, 75 NY2d 158 [1990]). An administrative law judge demonstrates a personal bias when he takes some action which indicates that he is not impartial and cannot consider the case with an open mind, but rather has some disposition to find against one of the parties (*see Tumminia v. Kuhlman*, 139 Misc 2d 394 [1988]). However, this demonstration of personal bias must be palpable and must be evident from the record. It cannot be based on speculation or some person's subjective impression (*see Manhattan & Queens Fuel Corp.*, Tax Appeals Tribunal, May 22, 1997).

¹ CPLR 2106 allows for attorneys, physicians, osteopaths or dentists, authorized by law to practice in New York State, who are not parties to the proceeding, or individuals physically located outside of the United States to submit an affirmation in lieu of and with the same force and effect as an affidavit.

C. Petitioner's motion for recusal must be denied. First, petitioner fails to meet the fundamental requirement of an accompanying affidavit with its motion (*see* 20 NYCRR 3000.8(a)(2)). As was the case with petitioner's motions for summary determination, it erroneously relied on Mr. Obot's affirmation in lieu of an affidavit, directly in contravention of CPLR 2106. There has been no showing that Mr. Obot is qualified to present an affirmation. Moreover, petitioners' basis for asking for the recusal of Judge Law appears to revolve around his legal reasoning for the denial of the motions for summary determination. Although it is clear that petitioner is unhappy with Judge Law's order, it has failed to demonstrate any facts that would support a finding of bias. The mere rendering of an adverse order hardly compels recusal.

D. In addition, petitioner's request to vacate Judge Law's order is also untenable. Judge Law's order denying summary determination is interlocutory in nature and not subject to review at this point (*see* 20 NYCRR 3000.5(f); 3000.9[b][2]). Similarly, petitioner's request is premature to serve as a motion for reargument under 20 NYCRR 3000.16 as a final determination has not been rendered in this matter.

E. The motion of petitioner, Emerald International Holdings, Ltd., for recusal of the administrative law judge and vacation of his order of January 26, 2017 is denied.

DATED: Albany, New York
March 16, 2017

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE