STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of **RONALD P. BELLANTONIO AND RICHARD ROCK** for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2013 and 2014.	:	ORDER DTA NOS. 828044 AND 828045

Petitioner, Ronald Bellantonio and Richard Rock,[1] filed a petition for redetermination of deficiencies or for refund of personal income tax under article 22 the Tax Law for the years 2013 and 2014.

A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on November 27, 2018. Petitioner appeared by John Juva, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Ellen Krejci, Esq., of counsel). The record was held open following the hearing until January 4, 2019, for petitioner to submit returns of its clients from 2013 and 2014, and until February 4, 2019 for the Division to respond to the submission. The Division filed a post-hearing brief and petitioner filed a reply brief. A determination was issued by the Division of Tax Appeals on December 5, 2019, denying the petitions and sustaining the statutory notices.

Petitioner filed a motion to reopen the record and for reargument, dated December 19, 2019, pursuant to 20 NYCRR 3000.16. The Division of Taxation was granted until February 7,

[1] Petitioner conducted business as a partnership under the name Ronald Bellantonio and Richard Rock.

2020 to file a response in opposition to the motion, which date began the 90-day period for the issuance of this order. Based upon the motion papers, and all the pleadings and proceedings associated with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

The facts as determined in ***Matter of Bellantonio and Rock***, Division of Tax Appeals, December 5, 2019 (***Bellantonio and Rock*** determination), are fully incorporated herein by reference. The following additional findings of fact are made:

1. The Division of Taxation (Division) filed a hearing memorandum with the Division of Tax Appeals on November 16, 2019 and mailed a copy to petitioner.[2] Included in the Division's hearing memorandum, under the section "list all exhibits which you will introduce at hearing," was, among other items, the following:

"(B) Notice and Demand, Assessment ID L-044070520-4, December 7, 2015;

* * *

(E) Notice and Demand, Assessment ID L-044367740-2, February 4, 2016;

* * *

(N) Selected New York State tax returns and filings of petitioners' clients [as listed on attachments to December 7, 2015 Notice and Demand and February 4, 2016 Notice and Demand] for tax years 2013 and 2014;

(O) Bill jacket, Laws of 2008, Chapter 57;

(P) Bill jacket, Laws of 2010, Chapter 57;

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[2] Although the hearing memorandum was not introduced into the record at hearing, it is contained in the official file of the Division of Tax Appeals in this matter. Pursuant to the State Administrative Procedure Act § 306 (4), official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (***Matter of Ordway***, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (***see Bracken v Axelrod***, 93 AD2d 913 [3d Dept 1983]; ***Matter of Kolovinas,*** Tax Appeals Tribunal, December 28, 1990). Accordingly, official notice is hereby taken of the Division's hearing memorandum.

(Q) Bill jacket, Laws of 2011, Chapter 61."

2. During cross-examination of Mr. Bellantonio to rebut his testimony that all of petitioner's clients were elderly or particularly vulnerable to identity theft, the Division introduced as exhibit P returns for tax years 2013 and 2014 of 12 individuals who were petitioner's clients. The names of these same individuals are listed on the attachment to the notices and demands issued to petitioner, as taxpayers for whom petitioner filed paper returns (***see Matter of Bellantonio and Rock*** determination, findings of fact 5 and 6). The notices and demands and attachments thereto were attached to the petition filed by petitioner in this matter.

3. Petitioner's representative objected to the admission of the Division's exhibit P on the grounds that it was not listed in the Division's hearing memorandum. Upon review of the Division's hearing memorandum, the administrative law judge observed that the documents were listed therein as "(N)" (***see*** finding of fact 1 above) and overruled petitioner's objection.

Later in the hearing petitioner's representative renewed his objection to exhibit P, and the following discourse ensued:

"Mr. Juva: Your honor, can I go off the record for a moment.

Judge Russo: For what purpose?

Mr. Juva: For purposes of discussing your sustaining [sic] of my objection relating to the introduction of these returns as evidence.

Judge Russo: If it has something regarding your objections and my overruling the objection, then no, it should be stated on the record.

Mr. Juva: You want to stay on record. Okay. I want to call to your Honor's attention the fact that counsel has in her hearing memorandum listed this as selected returns of the taxpayer as listed in the attachment. The attachment was not considered part of the hearing memorandum.

Ms. Roach: That's the attachment to - - that's actually the attachment to Exhibit C and 3 - - sorry, C and E . . . It's actually been mentioned. It's part of the - - in demand that you received. I'll show you here.

Mr. Juva: Your Honor, I don’t feel I have to - - I should be given copies of all these - -

Ms. Roach: This was part of this exhibit.

Mr. Juva: This was not given to me prior to today and I had no objection to the introduction of the jurisdictional documents perhaps not realizing that the jurisdictional documents included part of counsel’s exhibits. I have not had an opportunity to review these documents. I have not had an opportunity for the taxpayer to review these documents and prepare better to answer the questions.

Judge Russo: If you would like to go off the record for a few minutes right now and review them so that you can - -

Mr. Juva: I don’t believe that would be adequate.

Judge Russo: What document is that.

Ms. Roach: Sure. This is the notice and demand. The notice and demand that was sent to the taxpayer because it was a $50 penalty for each return that was paper filed included the names and last four of the social of all the ones that were picked for that.

Judge Russo: Mr. Juva, this notice and demand was something that was in the taxpayer’s possession prior to today, so you did have an opportunity to see that particular document, the notice and demand, before today. And the returns, I already overruled your objection because this was listed in the Division’s hearing memorandum. So please continue.”

4. After the last witness was excused from the stand, petitioner’s representative was asked if he had any further documents or testimony, and he responded that he just had a closing argument. The dates for submission of post-hearing briefs was then discussed and the following dialogue transpired:

“Mr. Juva: Okay. Let’s hold the record open for the 45 days to decide whether I want - -

Judge Russo: No, we don’t do it that way. I don’t hold the record open, sir.

Mr. Juva: Okay.

Judge Russo: The record will be closed today for the submission of documents and

evidence. A brief is a legal argument, a written legal argument. It doesn't have to be in legal memorandum form, you can do it as a letter. But you cite what you feel supports your arguments as far as the evidence and you make your legal arguments in the brief. It's not holding the record open. It's strictly for purposes of legal argument. Your written legal argument after the hearing based on the evidence that's in the record today.

Mr. Juva: Let me ask you a question then. Would that give me an opportunity to respond to these documents that I've just been given to today. If the record is going to be closed, then I don't have an opportunity to respond to these documents.

Judge Russo: What in particular are you interested in submitting in response to the documents?

Mr. Juva: Well, I won't know until I review the information.

Judge Russo: Well, I don't hold the record open [open-]ended with regard to anything in particular. If you say there's returns of specific individuals that I know I would like to put in in response to something like that, but you have to state something fact certain that you want the record held open for, if you want me to consider it.

Mr. Juva: I'm sure your honor realized we're at a disadvantage where counsel has presented voluminous documents which I was not aware of at this time and to ask me to respond to it after reviewing it for a few minutes is certainly unfair.

Judge Russo: As I have already said, this wasn't the first time you've heard of them. She cited everything in her hearing memorandum. So you were, in fact, aware before today that she was going to be introducing these documents. If you feel looking at what she put in that there's other returns of taxpayers that you want to put in, then you can make a request for that.

Mr. Juva: Okay.

Judge Russo: Is that your request?

Mr. Juva; Yeah, that's my request.

Judge Russo: Okay. I will hold the record open for an additional 30 days for the petitioner to submit the specific returns that he prepared for his clients in the years at issue, 2013 and 2014.

Mr. Juva: Would that be limited to just the returns or would it also include other documents that we felt might be necessary?

Judge Russo: Again, it's not going to be an open-ended any sort of documents.

You have to tell me what it is that you have in mind.

Mr. Juva: Well, I won't know until I review it, so we're just going back and forth, Judge. I won't know until I review the documents. All right, what was the other choice, counsel provide me with a brief and I respond, is that the other choice.

Judge Russo: Usually, the way we do it is petitioner gets the opening brief, you present your brief first, then the Division does a brief and then you have an opportunity to do a reply brief, but that's different than putting in additional evidence. If you wish to put in additional returns, then I have to grant your request to keep the record open for those specific returns. So if you want to do that, I'll hold the record open for 30 days so that you can put in the specific returns that he prepared for the years at issue that you feel are supportive of your case, then the Division will get time to respond to those returns.

Mr. Juva: Well it would be more than just returns. I mean, if I - - you know, if counsel alleges that taxpayers were on the surface of the return competent and because of their nature of their employment and the amount of their income, that they can't be technologically incompetent, I want to be able to come up with some sort of documentation, whether it's a physician's letter or a statement from the taxpayer to rebut that.

Judge Russo: Well, sir, that was the basis of your entire argument and case which you should have been prepared for today. Your entire case is based on reasonable cause of why returns were not e-filed, so in support of your case, you should have prepared for today arguments of why you felt it was inappropriate to e-file for those cases. So no, I will not hold the record open for extraneous arguments which should have been here today. If you want to submit specific returns, that's what I'm going - - I'll hold the record open. I will look at my calendar and set the specific dates. I will hold the record open for 30 days to submit particular returns. If you feel that this is not representative of your clientele and you want to submit the other returns of your clients to show their date of birth or whatever other reason you feel that's necessary, you can do that for the two years at issue. Following that, you will have the opportunity to submit a brief. The division will then submit their brief and then you can submit a reply brief."

The record was then held open until January 4, 2019 for petitioner to submit returns of its clients from 2013 and 2014 in regard to the question of e-filing versus filing paper returns, and the Division was given until February 4, 2019 to reply to any returns submitted by way of affidavit if the returns were inaccurate based on what was filed with the Division. The parties were instructed that other than those specific items, the record was closed at the

conclusion of the hearing.

Within the time allowed following the hearing, petitioner submitted 50 personal income tax returns it had prepared for clients for the years 2013 and 2014.

5. During the cross-examination of Mr. Bellantonio, the Division also introduced, as exhibits N and O, portions of the bill jackets for the Laws of New York 2008, Chapter 57 (New York Bill Jacket, 2008 S.B. 6807, Ch 57), and Laws of New York 2010, Chapter 57 (New York Bill Jacket, 2010 A.B. 9710, Ch 57), respectively. Petitioner's representative objected to the bill jackets on the grounds that he was not provided with a copy prior to the hearing. The Division's representative responded that the bill jackets were cited in the Division's hearing memorandum, and Mr. Juva continued his objection that he was not provided with a copy prior to the hearing. The objection was overruled and the following discourse took place:

> "Judge Russo: I did not order parties to exchange documents before the hearing. You were aware that this was going to be one of her exhibits and this - - a document which is available to the public, so I will allow it.
>
> Mr. Juva: I would like the record to indicate that the taxpayer is being prejudiced by not having been given an opportunity to review the documents prior to the hearing.
>
> Judge Russo: We can go off the record for a few moments right now if you would like to review it.
>
> Mr. Juva: Not now. Not now.
>
> Judge Russo: But as I said, it was noted in her hearing memo that she was going to be putting this in and it is an item that is available to the public. If you wanted to conduct research, it's available in the state library, so you could have seen it before today's hearing."

6. A determination in this matter was issued by the Division of Tax Appeals on December 5, 2019 denying the petition.

7. On December 24, 2019, the Tax Appeals Tribunal received from petitioner both a notice of exception to the administrative law judge's determination and motion to reopen record or for reargument. On January 6, 2020, the Tax Appeals Tribunal received from petitioner correspondence withdrawing the notice of exception to the administrative law judge's determination. By letter dated January 8, 2020, the Tax Appeals Tribunal acknowledged petitioner's withdrawal of the notice of exception to the administrative law judge's determination, and stated that as petitioner had filed a motion to reopen record or for reargument with the administrative law judge, petitioner's request for an extension to file an exception would be held in abeyance pending the issuance of the order on the motion.

8. Petitioner's motion to reopen record or for reargument alleges misconduct of the opposing party and claims that:

> "The Division's Hearing Memorandum dated November 16, 2018 exhibit N lists does not specify which tax returns will be presented. There are over 180 tax returns filed by petitioner. Counsel knew which returns would be presented at the hearing but did not disclose the names. Without this advance notice, a discussion of the returns at the hearing was prejudicial to the petitioner.
>
> Within the same hearing memorandum, exhibits O, P, and Q described Bill jacket laws of 2005, 2010 and 2011 were too vague to allow for an adequate response by petitioner.
>
> Based upon the above, we are requesting the record to be reopened and the matter be allowed to be reargued."

Petitioner did not include a supporting affidavit or any other papers in support of its motion.

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tax Appeals Tribunal's Rules of Practice and Procedure 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. Petitioner alleges misconduct by the Division as its basis for moving to reopen and reargue in this matter, arguing that: 1) the Division's hearing memorandum does not specify which tax returns will be presented, and 2) within the same hearing memorandum, exhibits O, P, and Q described bill jacket laws of 2005, 2010 and 2011 were too vague to allow for an adequate response by petitioner. Petitioner's arguments are rejected.

The Tax Appeals Tribunal's Rules of Practice and Procedure (regulations) provide, in part, that a hearing memorandum shall contain "a list of all exhibits to be introduced at hearing," and further that:

> "(d) (1) Upon a finding that a party has failed to make a good faith effort to comply with the requirements of this section, the administrative law judge may preclude the testimony of witnesses or introduction of evidence not included in the hearing memorandum.
>
> (2) Documents and testimony introduced only for purposes of rebuttal or to impeach a witness may be allowed without inclusion on the hearing memorandum" (20 NYCRR 3000.14 [b] [2]; [d] [1] and [2]).

It is first noted that the Division introduced tax returns of some of petitioner's clients in rebuttal to Mr. Bellantonio's testimony that petitioner's clients were "middle-aged, older and elderly" and particularly vulnerable to identity theft (***see Bellantonio and Rock*** determination, findings of fact 9 and 10). As the documents were introduced for purposes of rebuttal, it was not necessary for the Division to include them in the hearing

memorandum in the first instance (***see*** 20 NYCRR 3000.14 [d] [2]).

Furthermore, contrary to petitioner's argument, the Division did, in fact, list in its hearing memorandum that it intended to introduce selected tax returns of petitioner's clients for the years at issue, and referred to the list of clients' names that were included in the notices and demands. The Division thus gave fair notice that it might have introduced any or all of the returns listed. The Division thus made a good faith effort to comply with the requirements of the regulations.

Petitioner's representative made the same objection to the returns at the hearing as petitioner now raises in its motion as a basis to reopen the record. Petitioner's objection was overruled during the hearing (***see*** finding of fact 3 and 4) and is rejected as a basis to reopen and reargue. Moreover, petitioner was given additional time to submit other clients' returns in response to the returns the Division introduced, and exercised that option. As such, petitioner's claim of prejudice is without merit.

C. Petitioner's second claim of misconduct on the basis that the Division's hearing memorandum's reference of exhibits O, P, and Q described as bill jacket laws of 2005, 2010 and 2011 were too vague to allow for an adequate response by petitioner is likewise rejected. The Division's hearing memorandum contains an adequate citation to the bill jackets that were introduced into the record. Such bill jackets are public records and are available to any party who seeks them. Had petitioner's representative wished to see the bill jackets ahead of the hearing, he merely needed to engage in legal research to obtain the publicly available legislative information.

Again, petitioner raised the same objection during the hearing as now raised in its motion to reopen and reargue. Petitioner's objection was overruled at hearing and is rejected as a basis to reopen and reargue. A motion to reargue a prior determination "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. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (***Foley v Roche***, 68 AD2d 558, 567 [1st Dept 1979], ***lv denied*** 56 NY2d 507 [1982]; ***see Matter of Barker***, Tax Appeals Tribunal, June 23, 2011; ***see also*** CPLR 2221 [d] [2]).

D. Petitioner's motion to reopen the record and for reargument is denied.

DATED: Albany, New York
August 6, 2020

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE