

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:
of	:
WEST 20TH STREET ENTERPRISES CORPORATION	:
PACIFIC CLUB HOLDINGS, INC.	:
SUSHI FUN DINING & CATERING, INC.	:
AND DOMINICA O'NEILL	:
for Revision of Determinations or for Refunds of New York	:
State Sales and Use Taxes Under Articles 28 and 29 of the Tax	:
Law for the period December 1, 2007 through	:
November 30, 2013.	:

ORDER
DTA NOS. 828472,
828473, 828474 AND
828475

Petitioners, West 20th Street Enterprises Corporation, Pacific Club Holdings, Inc., Sushi Fun Dining & Catering, Inc., and Dominica O'Neill, filed petitions for revision of determinations or for refunds of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2007 through November 30, 2013.

A consolidated hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on March 5, 2020, with all briefs to be submitted by November 6, 2020. Petitioners appeared by Bartons, LLP (Alvan L. Bobrow, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K Jack, Esq., of counsel). By determination dated May 6, 2021, the petitions were denied and the statutory notices were sustained.

On June 5, 2021, petitioners filed a motion for reargument pursuant to 20 NYCRR 3000.16. On July 1, 2021, the Division of Taxation filed a response in opposition to the motion. The 90-day period for the issuance of this order commenced on July 6, 2021. Based upon the

motion papers, and all the pleadings and proceedings associated with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

Whether the administrative law judge overlooked, misapprehended or misapplied a controlling principle of law such that petitioners' motion for reargument should be granted.

FINDINGS OF FACT

On May 6, 2021, a determination was issued in this matter. The findings of fact and conclusions of law as set forth in the May 6, 2021 determination are incorporated herein by reference as if set forth in their entirety.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners allege that the administrative law judge failed to address their argument that the decision in *Matter of Metro Enters. Corp. v New York State Dept. of Taxation & Fin.*, 171 AD3d 1377 [3d Dept 2019] "...rejected the (Division of Taxation's [Division's]) policy that scrip is always taxable, but instead required consideration of the relationships between the clubs, the issuer of the scrip and the entertainers, in order to analyze sales taxability, a procedure the Audit Division utterly failed to do." Petitioners request that the administrative law judge address this issue that they assert is paramount to the relief they seek.

In response, the Division asserts that the *Metro* case did not set forth an industry directive. The Division further asserts that there is no merit to petitioners' motion and, therefore, it should be denied.

CONCLUSIONS OF LAW

A. Section 3000.16 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) sets forth the standards governing a motion to reargue. Section 3000.16 of the Rules provides 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. A motion to reargue is not provided for in the Division of Tax Appeals enabling legislation and thus is limited and must be exercised with great care (*Matter of Trieu*, Tax Appeals Tribunal, June 2, 1994, *confirmed Matter of Trieu v Tax Appeals Trib.*, 222 AD2d 743 [3d Dept 1995], *appeal dismissed* 87 NY2d 1054 [1996], *lv denied* 88 NY2d 809 [1996]; *Matter of Jenkins Covington, N.Y. v Tax Appeals Trib.*, 195 AD2d 625 [3d Dept 1993], *lv denied* 82 NY2d 664 [1994]). A motion to reargue 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 a controlling principle of law (CPLR 2221 [d] [2]). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v Lord & Taylor, Inc.*, 10

AD3d 374, 375 [2nd Dept 2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]; *Frisenda v X Large Enterprises, Inc.*, 280 AD2d 514, 515 [2d Dept 2001]). Instead, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked (*Hoffmann v Debello-Teheny*, 27 AD3d 743 [2d Dept 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v Jeannot*, 18 AD3d 679 [2d Dept 2005]).

C. As noted, petitioners have alleged that the administrative law judge did not address their argument that the Court in *Matter of Metro Enters. Corp. v. New York State Dept. of Taxation & Fin.* “...rejected the Division’s policy that scrip is always taxable, but instead required consideration of the relationships between the clubs, the issuer of the script and the entertainers, in order to analyze sales taxability, a procedure the Audit Division utterly failed to do.”

D. Petitioner’s motion is denied as petitioners misread the *Metro* case. Contrary to petitioners’ line of argument, the administrative law judge did not overlook a controlling principle of law as the Court in *Metro* did not set forth a directive to the Division that it was required to consider the relationship between the clubs, the issuer of the scrip and the entertainers, in order to analyze sales taxability during an audit. The *Metro* matter involved a seller of scrip who sought declaratory judgment that it was not a vendor, that neither it nor its owner was a person required to collect tax, and that it could not be held liable for sales tax obligations incurred by the adult entertainment clubs where it sold scrip. The court held that Metro failed to exhaust administrative remedies and dismissed the complaint finding that there were “...questions of fact regarding the relationship between plaintiffs, the dancers and the

registered clubs” (*Metro* at 1380). The determination in this matter addressed relationships between petitioner entities, the dancers and said entities and the sale of scrip, and how it was used in the Club. The administrative law judge did not directly address petitioners’ argument as it was based on a misreading of the *Metro* case, and therefore was not at all germane to the issues of whether the sale of scrip at an adult entertainment establishment is subject to sales tax and whether the various entities operating that Club are liable for said tax. Stated simply, petitioner has not set forth an exceptional reason that would require the Division of Tax Appeals to exercise its limited authority to reconsider its prior determination (*see Matter of Sungard Securities Finance LLC*, Tax Appeals Tribunal, September 25, 2015).

E. Based upon the foregoing, West 20th Street Enterprises Corporation’s, Pacific Club Holdings, Inc.’s, Sushi Fun Dining & Catering, Inc.’s, and Dominica O’Neill’s, motion to reargue is denied.

DATED: Albany, New York
September 30, 2021

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE