

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
ANTHONY CAPECI : **ORDER**
for Revision of Determinations or for Refund of Sales : **DTA NOS. 828636,**
and Use Taxes under Articles 28 and 29 of the Tax Law for : **828637, 828638,**
the Periods March 1, 2008 through February 28, 2014 and : **828639 AND 828640**
March 1, 2010 through February 28, 2014.

In the Matter of the Petition :
of :
44TH ENTERPRISES CORPORATION :
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, 2010 through February 28, 2014. :

In the Matter of the Petition :
of :
MLB ENTERPRISES CORPORATION :
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, 2010 through February 28, 2014. :

Petitioner, Anthony Capeci, 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 periods March 1, 2008 through February 28, 2014 and March 1, 2010 through February 28, 2014.

Petitioner, 44th Enterprises Corporation, 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, 2010 through February 28, 2014.

Petitioner, MLB Enterprises Corporation, 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, 2010 through February 28, 2014.

Petitioners, by their representative, Meister Seelig & Fein, LLP (Howard Davis, Esq. and Amit Shertzer, Esq., of counsel), filed a motion dated September 17, 2019 for an order recusing or disqualifying Osborne K. Jack from representing the Division of Taxation in this matter. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), filed a response to petitioners' motion dated October 17, 2019. Pursuant to 20 NYCRR 3000.5 (d), the 90-day period for issuance of this order commenced October 17, 2019. Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioners commenced this proceeding by filing petitions with the Division of Tax Appeals on March 26, 2018. The petitions of Anthony Capeci were filed in protest of the following notices of determination, dated December 1, 2016:

Notice No.	Periods Ended	Tax	Interest	Penalty
L-045796580	05/31/08 - 02/28/14	\$3,863,002.13	\$4,909,599.02	\$1,545,198.94
L-045794592	05/31/10 - 02/28/14	\$1,798,108.53	\$1,757,904.95	\$719,241.65

L-045794593	05/31/10 - 05/31/12	\$0.00	\$0.00	\$86,000.00
L-045794594	05/31/10 - 02/28/14	\$501,699.02	\$481,054.84	\$200,678.12
L-045794595	05/31/10 - 02/28/14	\$0.00	\$0.00	\$156,000.00

Notice L-045796580 was issued to Mr. Capeci as an officer/responsible person of Metro Enterprises Corp. Notices L-045794592 and L-045794593 were issued to Mr. Capeci as an officer/responsible person of MLB Enterprises Corporation. Notices L-045794594 and L-045794595 were issued to Mr. Capeci as an officer/responsible person of 44th Enterprises Corporation.

The petition of 44th Enterprises Corporation (44th Enterprises) was filed in protest of a notice of determination (L-045789538), dated November 30, 2016, which asserted penalty of \$156,000.00, for the periods ended May 31, 2010 through February 28, 2014, and a notice of determination (L-045789743), dated November 30, 2016, which asserted tax in the amount of \$501,966.05, plus interest of \$480,664.58 and penalty of \$200,678.12.

The petition of MLB Enterprises Corporaton (MLB) was filed in protest of a notice of determination (L-045790014), dated November, 2016, which asserted penalty of \$86,000.00, for the periods ended May 31, 2010 through May 31, 2012, and a notice of determination (L-045789856), dated November 30, 2016, which asserted tax in the amount of \$1,798,108.53, plus interest of \$1,786,492.83 and penalty of \$719,241.65.

The matters were associated by the Division of Tax Appeals at petitioners' request.

2. The Division of Taxation (Division) filed its answers to the petitions on May 30, 2018.

3. On September 17, 2019, petitioners filed a motion for an order recusing or disqualifying Osborne K. Jack from representing the Division of Taxation in this matter.

4. Included as an exhibit with petitioners' motion is a copy of a declaration by Osborne Jack, Esq., the Division's representative in this matter, dated July 26, 2019, allegedly submitted in federal district court in *MLB Enterprises Corp. v New York State Department of Taxation and Fin. and Commr. of New York State Department of Taxation and Finance* (Southern District Court, 19-CV-04679), by Mr. Jack as an attorney in the Office of Counsel of the Division, in support of the defendants' motion to dismiss the complaint based on a lack of subject matter jurisdiction.

CONCLUSIONS OF LAW

A. Petitioners move to recuse Mr. Jack from representing the Division in this matter. Petitioners contend that Mr. Jack should be disqualified based on Rule 3.7 of the New York Rules of Professional conduct, claiming that he has "become an essential fact witness in the matters before this tribunal."

Rule 3.7 provides, in part, as follows:

"(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.”

Petitioners contend that Mr. Jack “has become an essential fact witness” because Mr. Jack submitted a declaration in federal district court in *MLB Enterprises Corp. v New York State Department of Taxation and Finance and Commr. of New York State Department of Taxation and Finance* (Southern District Court, 19-CV-04679).

It is first noted that this agency does not have jurisdiction to enforce the Rules of Professional Conduct (*see Matter of Haber*, Tax Appeals Tribunal, August 1, 1996; *Matter of R.A.F. General Partnership*, Tax Appeals Tribunal, November 9, 1995).¹

Furthermore, petitioners’ argument that Mr. Jack should be recused or disqualified due to the declaration is without merit. Included with petitioners’ motion papers is a copy of a declaration signed by Mr. Jack, as an attorney in the Office of Counsel of the Division, in support of the defendants’ motion to dismiss the complaint based on a lack of subject matter jurisdiction.

Petitioners allege that:

“Mr. Jack offers factual testimony, without relying on outside documentary or testimonial evidence, about the nature of the transactions in dispute in this Proceeding, stating in paragraph 9 [of the declaration] that:

- Metro’s purported receipts from scrip transactions were maintained in a bank account in MLB’s name;
- Despite MLB’s claim that scrip was solely used as gratuities to its exotic dancers, MLB had not maintained records demonstrating that any of the monies received by it with regard to its patrons’ purchases of scrip on its premises were remitted to the dancers as tips; and
- MLB and its employees acted as agents of Metro, and MLB itself was selling the scrip.”

¹ *Matter of Haber* and *Matter of R.A.F. General Partnership* held that the Tax Appeals Tribunal does not have jurisdiction to enforce the Code of Professional Responsibility against an attorney. The Code of Professional Responsibility was replaced with the Rules of Professional Conduct on April 1, 2009 (*see* 22 NYCRR 1200 et seq).

Petitioners' argument takes the statements contained in the declaration out of context and omits important qualifying language. Specifically, contrary to petitioners' argument that Mr. Jack "offers factual testimony without relying on outside documentation or testimonial evidence," the actual language in the declaration states that:

"The audit determined that Metro's purported receipts from such transactions were maintained in a bank account in MLB's name. . . . The Department's auditors also found that, despite MLB's claim that the scrip was solely used as gratuities to its exotic dancers, MLB had not maintained records demonstrating that any of the monies received by it with regard to its patrons' purchases of scrip on its premises were remitted to the dancers as tips Thus it appears, based on the audit, that MLB and its employees were acting as agents of Metro and/or that MLB was itself selling the scrip" (emphasis added).

Reading the declaration as a whole, in complete context, shows that the statements are based on Mr. Jack's review of the audit file. Moreover, the statement asserting that MLB had not maintained records regarding any of the monies received by it with regard to its patrons' purchase of scrip relates to an uncontested issue, as petitioners admitted as such in their complaint for declaratory and injunctive relief, stating, "MLB does not . . . record scrip transactions in its corporate books" (*see* petitioners' exhibit A, complaint in *MLB Enterprises Corp. v New York State Department of Taxation and Finance and Commr. of New York State Department of Taxation and Finance* [Southern District Court, 19-CV-04679] at ¶ 1).

Further, petitioners disingenuously claim that Mr. Jack "testified that MLB and Metro failed to prove they actually provided cash to entertainers who redeemed scrip." Petitioners do not cite to any testimony of Mr. Jack or statement in the declaration, and instead cite to the affidavit of Mr. Capeci, at paragraph 9, which refers to the transcript dated July 15, 2019 in the *Matter of Metro Enterprises Corp. and John Scarfi* (DTA Nos. 828745 and 828746) without

any page citation in support of their allegation.² A review of the complete transcript in *Matter of Metro and Scarfi* shows that Mr. Jack did not testify in that matter.

Finally, the mere submission of a declaration as an attorney for a party in support of a motion to dismiss does not necessarily make the affiant a fact witness. It is common practice for attorneys to submit affirmations in support of motions (*see generally* West's McKinney's Forms Civil Practice Law and Rules § 5:18 [c], [d]; 97 N.Y. Jur. 2d Summary Judgment, Etc. § 181 ["The customary procedure in regard to a motion to dismiss is to serve a notice of motion to dismiss supported by the attorney's affidavit or affirmation indicating the nature of the litigation or controversy and explaining the grounds on which the motion is based"]).

B. Petitioners' motion, dated September 17, 2019, to recuse or disqualify Osborne Jack from representing the Division of Taxation in this matter is denied.

DATED: Albany, New York
December 5, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE

² Petitioners attached an incomplete copy of the transcript from the *Matter of Metro and Scarfi*. Official notice of the complete transcript in *Matter of Metro and Scarfi* (DTA Nos. 828745 and 828746), dated July 15, 2019, is taken pursuant to State Administrative Procedure Act (SAPA) § 306 (4). Pursuant to SAPA § 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]). As such, official notice of the transcript in *Matter of Metro and Scarfi* is hereby taken.