

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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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.

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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. :

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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. :

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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 18, 2019 for an order staying the proceeding or holding it in abeyance pending the final determinations in *Louisa Dennis v 44<sup>th</sup> Enterprises Corp. and Anthony Capeci* (Supreme Court, New York County, Index No.153420/2016) and *MLB Enterprises Corp. v NYS Dep't of Taxation and Finance, et al* (SDNY Case No. 19-cv-4679). The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), responded to petitioners' motion on October 17, 2019. Pursuant to 20 NYCRR 3000.5 (d), the 90-day period for issuance of this order commenced October 18, 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 (44<sup>th</sup> 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 Corporation (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 18, 2019, petitioners filed a motion for an order staying this proceeding or holding it in abeyance pending the final determinations in *Louisa Dennis v 44th Enterprises Corp. and Anthony Capeci* (Supreme Court, New York County, Index No.153420/2016) (*Dennis*) and *MLB Enterprises Corp. v NYS Dep't of Taxation and Fin., et al* (SDNY Case No. 19-cv-4679) (the declaratory judgment action).

#### ***SUMMARY OF PETITIONERS' POSITION***

4. Petitioners argue that the current proceedings should be stayed or held in abeyance pursuant to 20 NYCRR 3000.5 and CPLR 2201, pending the final determination in *Dennis* and the declaratory judgment action (jointly referred to as the pending litigations), contending that the pending litigations "are highly likely to determine the central issue on which the within Proceeding turns: specifically, whether an internal currency known as 'scrip' . . . is subject to sales tax."

#### ***CONCLUSIONS OF LAW***

A. Tax Law § 1140 clearly states:

"The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine [of the Tax Law] shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules."

B. In a Decision and Order dated August 7, 2019, the court in *Dennis* rejected a similar argument as that raised by petitioners here.<sup>1</sup> *Dennis* involves a class action brought by plaintiffs pursuant to Labor Law §§ 190 et seq., 652 and 663. The plaintiffs in *Dennis* are or were employees of 44th Enterprises d/b/a Lace II Gentlemen’s Club (Lace II or the club) and Anthony Capeci (collectively defendants), and seek to collect unpaid minimum wages, illegally retained tips, and improperly held wages. Defendants commenced an interpleader action against the plaintiffs, Metro Enterprises Corp. (Metro), and the Division, and sought a declaratory judgment against the Division. Defendants alleged the Division levied over \$11 million in tax assessments against them “for failing to withhold and pay sales tax, in part, on the exact same tip monies [p]laintiffs-[c]laimants seek to recover” (*Dennis* Decision and Order at p. 3).

In the first cause of action in the interpleader complaint in *Dennis*, defendants asserted that since plaintiffs, the Division and/or Metro may have claims related to the ownership of money which they allegedly owe, the court should “prohibit any and all [claims] against the subject funds in another forum to avoid the possibility of inconsistent judgments and so that a single determination can be made in this lawsuit” (*Dennis* Decision and Order at p. 5). As a second cause of action in the interpleader complaint, defendants alleged that 44th Enterprises and Capeci were not required to exhaust all administrative remedies because: 1) they were challenging the applicability of a sales tax statute and the amusement tax was not applicable to them; and 2) they lacked the money to proceed with an article 78 appeal or to post a bond in the amount of the assessed tax, thereby rendering the administrative process futile. The defendants further alleged that they were entitled to a declaratory judgment declaring that the Division lacked authority to

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<sup>1</sup> *Louisa Dennis v 44th Enterprises Corp. and Anthony Capeci, et al* (Supreme Court, New York County, August 7, 2019, Freed, J., Index No.153420/2016) (hereinafter *Dennis* Decision and Order).

hold them liable for sales tax arising from the conversion of credit to scrip by Metro or tips paid by patrons to entertainers using scrip, and for sales tax arising from the rental of party rooms (*Dennis* Decision and Order at p. 5). As a third cause of action, defendants claimed that by requiring 44th Enterprises to “withhold and pay a portion of scrip paid by patrons to [dancers] as sales tax,” the Division was violating their right to substantive and procedural due process under the Fourteenth Amendment of the United States Constitution by compelling them to violate the New York Labor Law in order to comply with the Tax Law, and sought an injunction prohibiting the Division from applying Tax Law §§ 1101 (a) (3), 1101 (d) (2) and (d) (3) and 1105 to scrip transactions (*Dennis* Decision and Order at p. 5). The fourth cause of action alleged a violation of defendants’ rights under the New York State Constitution.

Defendants in *Dennis* further moved for a preliminary injunction enjoining the parties in that action from pursuing any claims, including administrative tax procedures, in which the rights, responsibilities or obligations of the parties arising from gratuities paid in scrip to dancers at defendants’ clubs may be determined and tolling the time periods within which they must pursue administrative remedies related to tax assessments levied by the Division (*Dennis* Decision and Order at p. 6).

The Division opposed the motions for preliminary injunction in *Dennis* and cross-moved to dismiss the interpleader complaint, arguing that since defendants failed to exhaust their administrative remedies in challenging the tax assessment, the court lacks subject matter jurisdiction over the dispute. The Division further asserted that the declaratory judgment and constitutional claims are not exempt from the exhaustion requirement, and that neither 44th Enterprises, Capeci, nor Metro have established the criteria for a preliminary injunction (*Dennis* Decision and Order at p. 8).

Addressing first defendant's request for a preliminary injunction, the court denied the motion, finding that defendants had not demonstrated nor alleged that the Division intentionally or deliberately misused any tax provision, had not established a likelihood of success on the merits or irreparable injury, and had not addressed the balancing of the equities (*Dennis* Decision and Order at pp. 15-16, 19).

The court granted the Division's motion to dismiss the interpleader complaint, holding that it lacks jurisdiction because defendants failed to exhaust administrative remedies as required by Tax Law § 1140 (*Dennis* Decision and Order at p. 16). The court held that defendants failed to establish that one of the exceptions to the exclusive remedy requirement was applicable. Specifically, the court found that defendants did not allege that the Division had no jurisdiction over the matter that was taxed, and noted further that "it is beyond peradventure that the [Division] has jurisdiction over the issue of whether the defendants-stakeholders, as well as plaintiffs and Metro, are subject to the taxes in question" (*Dennis* Decision and Order at p. 17). Additionally, the court found that the exhaustion requirement was not excused by the constitutional challenges asserted by defendants, noting that:

"A constitutional claim that hinges upon factual issues reviewable at the administrative level must first be addressed to the agency so that a necessary factual record can be established. Further, the mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the required relief" (*Dennis* Decision and Order at p. 17, quoting *Dozier v New York City*, 130 AD2d 128, 134-135 [2d Dept 1987]).

The court found that the constitutional claims by the defendants "clearly involve factual issues reviewable at the administrative level including, but not limited to, whether scrip transactions at the club are subject to sales tax" and concluded that it lacks subject matter

jurisdiction over the application of the Tax Law to the defendants (*Dennis* Decision and Order at pp. 17-18).

C. Petitioners raise the same arguments in their motion for an order staying this proceeding or holding it in abeyance as those rejected by the court in *Dennis*. As noted above, the court denied the request for a preliminary injunction enjoining the parties in that action from pursuing any claims, including administrative tax procedures, and determined that defendants were required to exhaust their administrative remedies (*Dennis* Decision and Order at pp. 15-19). As such, petitioners' argument that this proceeding should be stayed pending the outcome is *Dennis* is without merit and must be rejected.

Moreover, petitioners' argument that it also has a pending declaratory judgment action in *MLB Enterprises Corp. v NYS Dep't of Taxation and Fin., et al.*, that has not yet been decided, does not require a different result. Petitioners assert in the declaratory judgment action that the Division violated MLB's due process rights by requiring that it withhold and pay sales tax on a portion of scrip allegedly paid by patrons to entertainers. As the court in *Dennis* noted, "A constitutional claim that hinges upon factual issues reviewable at the administrative level must first be addressed to the agency so that a necessary factual record can be established. . . . the mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the required relief" (*Dennis* Decision and Order at p. 17, quoting *Dozier v New York City*, 130 AD2d 128, 134-135 [2d Dept 1987]). The *Dennis* court's finding that the constitutional claims by the defendants "clearly involve factual issues reviewable at the administrative level including, but not limited to, whether scrip transactions at the club are subject to sales tax" equally applies to petitioners' argument regarding the

declaratory judgment action and likewise requires a rejection of petitioners' argument for a stay of this proceedings.

D. Petitioners' motion, dated September 18, 2019, for an order staying this proceeding or holding it in abeyance pending the final determinations in *Dennis* and the declaratory judgment action is denied.

DATED: Albany, New York  
December 5, 2019

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE