STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
44TH ENTERPRISES CORPORATION	:	ORDER DTA NO. 828639
for Revision of Determinations 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	:	DTA NO. 828640
for Revision of Determinations 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, 44th Enterprises Corporation, filed a petition for revision of determinations 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 determinations 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. A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on January 29, 2020, at 10:30 a.m. Petitioners appeared by Meister Seelig & Fein LLP (Amit Shertzer, Esq., and Kevin A. Fritz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Following the hearing, petitioners filed a brief in support of their petitions, the Division

of Taxation filed a brief in opposition, and petitioners filed a reply brief. The Division of Tax Appeals issued a determination on February 18, 2021, denying the petitions and sustaining the notices of determination dated November 30, 2016.

Petitioners filed a motion to reopen the record or for reargument, together with supporting documents, on April 12, 2021. The Division of Taxation filed a response on May 10, 2021. The 90-day period for the issuance of this order commenced on May 12, 2021. Upon review of petitioners' motion, the Division of Taxation's response, and the entire record herein, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners' motion to reopen the record or for reargument should be granted.

FINDINGS OF FACT

The facts as determined in ***Matter of 44th Enterprises Corp. and MLB Enterprises Corp.***, Division of Tax Appeals, February 18, 2021, are fully incorporated herein by reference. The following additional findings of facts are made.

1. During the hearing for this matter on January 29, 2020, petitioners requested that two boxes of documents they described as ledgers, and marked as exhibits 42 and 43, be admitted into the record. Petitioners did not have copies of the documents and did not provide copies for the Division of Taxation (Division). The administrative law judge instructed petitioners that they were required to make copies of any documents introduced into the record and that they were required to provide the Division with a set. Later during the hearing petitioners' representative acknowledged that they "will work on getting a full copy made and have another copy ready for Mr. Jack or whoever else needs a full copy of the records." The exhibits were accepted into the record on the contingency that petitioners were going to make copies.

2. At the conclusion of the hearing, the administrative law judge advised the parties the

record would be closed, and the following dialogue occurred:

> "Judge Russo: once I close the record today, nothing further will be accepted. I know we are waiting for copies of Exhibits 42 and 43, so if we conclude today and don't come back tomorrow, what I will do is I'm not going to take them in at this time since you need to make the copies. I'll hold the record open for a date certain for you to make the copies and sent [sic] them to me and Mr. Jack.
>
> Mr. Shertzer: Your Honor, are you going to want us to send you the originals or is a copy okay?
>
> Judge Russo: We are allowed to take copies, but make sure they're legible because if they're not legible they are going to be useless to me.
>
> Mr. Shertzer: Sure, understood."

The ALJ established February 12, 2020 as petitioners' deadline to provide Exhibits 42 and 43 to the Division of Tax Appeals and to the Division's representative, Mr. Jack.

The ALJ again stated, "As I stated previously, once I close the record, nothing further will be accepted other than Exhibits 42 and 43 which I held the record open for" and further, "As I was saying, once I close the record, nothing further will be accepted. With that in mind, Mr. Shertzer, do you have anything further for the petitioner?" Petitioners' representative, Mr. Shertzer responded, "No, Your Honor." After the hearing, petitioners sent copies of Exhibits 42 and 43 within the time allowed.

CONCLUSIONS OF LAW

A. Section 3000.16 of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) 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) 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*" (emphasis added).

The Rules are crystal clear that a motion to reopen or reargue *shall* be made within thirty days after the issuance of a determination. The determination in this matter was issued on February 18, 2021. Petitioners' motion was not filed until April 12, 2021, beyond the thirty-day time limitation. As such, petitioners' motion is rejected as untimely (***see Matter of Strachan***, Tax Appeals Tribunal, June 28, 2018; ***Matter of Czernicki***, Tax Appeals Tribunal, April 22, 2004; ***Matter of Auto Parts Center, Inc.***, Tax Appeals Tribunal, July 24, 2003; ***Matter of American Futures Groups, Inc.***, Tax Appeals Tribunal, February 6, 2003).

B. Petitioners' argument that their time-barred motion should be accepted on the claim of "good cause" is likewise rejected. There is no provision in the Rules for a good cause exception to the thirty-day time limit for motions to reopen and reargue. The use of the mandatory term "shall" generally creates an obligation impervious to judicial discretion (***see Lexecon Inc. v Milberg Weiss Bershad Hynes & Lerach***, 523 US 26, 35 [1998], citing ***Anderson v Yungkau***, 329 U.S. 482, 485 (1947).

Petitioners' reliance on ***Matter of Rosenthal*** (Division of Tax Appeals, April 14, 1994) and ***Matter of Dilaurenti*** (Division of Tax Appeals, November 27, 2020) is of no avail. First, both cases are Division of Tax Appeals administrative law judge (ALJ) determinations which have no precedential effect (***see*** Tax Law § 2010.5; 20 NYCRR 3000.15 [e] [2]). Second, neither case stands for the proposition that the thirty-day time limit for filing a motion to reopen or reargue after a determination is issued may be extended.

In ***Matter of Dilaurenti***, the ALJ found that the COVID pandemic constituted good cause to extend the time for the issuance of the determination. The Rules specifically provide

that an ALJ "*may*" extend the six-month period for the issuance of a determination for good cause shown (20 NYCRR 3000.15 [e] [1], emphasis added). Such finding is inapposite to the matter here, wherein there is no such permissive language for an extension of time to file a motion to reopen or reargue. Rather, the 30-day time limit for filing a motion to reopen or reargue is mandatory, as exhibited by the use of the word "shall" in requiring that such motions ***shall*** be filed within 30 days from the issuance of the determination. When the same Rules use both "may" and "shall," the normal inference is that each is used in its usual sense, the one act being permissive, the other mandatory (***see Anderson v Yungkau***, 329 US 482, 485).

Petitioners' reliance on ***Matter of Rosenthal*** is likewise baseless. In that case, the ALJ allowed an extension of time for the submission of documents on the sole basis that he did not state in the original submission schedule that the record would be closed after the last submission date. Unlike here, that case did not involve a party attempting to reopen the record or reargue after a determination had already been issued. There can be no question here that the record was closed at the conclusion of the hearing, and that once the determination was issued, the Rules establishing the deadline for filing motions to reopen or reargue control (***see Matter of Strachan***; ***Matter of Czernicki***; ***Matter of Auto Parts Center, Inc.***; ***Matter of American Futures Groups, Inc.***).

C. Even if the Rules allowed for an exception to the thirty-day time limit for filing a motion to reopen or reargue, which they clearly do not, petitioners have not shown good cause for their failure to timely file said motion. Petitioners claim that they did not have immediate access to ledgers introduced as exhibits 42 and 43 because they were maintained in a third-party's office that was closed due to the COVID-19 pandemic, and that another individual, Jennifer Kinsley, who is neither a party or witness to this proceeding, nor petitioners' representative, needed to review the ledgers prior to petitioners filing their motion. Petitioners fail to note that the very documents that they contend were inaccessible for immediate review

were their own exhibits 42 and 43 that they introduced at the hearing. During the hearing, this administrative law judge specifically instructed petitioners' representative that if they intended to present the ledgers into the record, they were required to make copies. Petitioners' representative acknowledged that he "will work on getting a full copy made and have another copy ready for Mr. Jack or whoever else needs a full copy of the records." If petitioners failed to heed the administrative law judge's instructions and keep a copy of their own exhibits, such failure lies directly with them and their attempt to use the COVID-19 pandemic as an excuse for their own failure is reprehensible.

D. Petitioners have also failed to show that the evidence they seek to introduce is "newly discovered" and could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding (***see*** 20 NYCRR 3000.16 [a] [1]). Petitioners assert that the administrative law judge relied on "new factual issues" in determining that that ledgers did not support petitioners' argument that scrip was used solely for voluntary gratuities. Contrary to petitioners' argument, the determination was reached based on a careful and thorough review of the evidence in the record, including the two boxes of ledgers introduced by petitioners themselves. The evidence petitioners seek to introduce with the motion, namely the affidavits of John Scarfi and Jennifer Kinsley, is not "newly discovered." Rather, Mr. Scarfi already testified at the hearing and had a full opportunity to explain the ledgers and inconsistencies therein. Additionally, petitioners could have offered the testimony of Ms. Kinsley at the hearing but did not. They have made no showing that the evidence they now seek to introduce could not have been discovered with the exercise of reasonable diligence in time to be offered into the record during the hearing. Petitioners had a full opportunity to explain their exhibits during the hearing and their failure to provide sufficient testimony falls upon them. The determination, based on a review of the testimony and exhibits, that the documents do not support petitioners' position is not a "new factual issue." "To permit

[petitioners], at this late date, to reopen the case to fill in the gaps in proof which they created at the trial would work an imposition on the public, the Court and to the defendants" (***Cone Mills Corp. v Becker***, 67 Misc 2d 749, 751 [Sup Ct 1971]). As such, the affidavit of John Scarfi and affirmation of Jennifer Kinsley attached to petitioners' motion will not be admitted into the record.

E. Finally, petitioners have not shown that the evidence they seek to introduce would produce a different result, as required by 20 NYCRR 3000.16 (a) (1), nor have they asserted fraud, misrepresentation or misconduct by the opposing party pursuant to 20 NYCRR 3000.16 (a) (2). Instead, petitioners raise the same arguments they previously made based on the Labor Law, which have been rejected. A motion to reopen or reargue is not an opportunity for a party to relitigate the same arguments that they previously raised and lost. 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]).

F. Accordingly, it is hereby ORDERED that petitioners' motion to reopen the record or for reargument is denied.

DATED: Albany, New York
August 5, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE