

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN SCARFI : ORDER
for Revision of a Determination or for Refund of Sales : DTA NOS. 828745
and Use Taxes under Articles 28 and 29 of the Tax Law for : AND 828746
the Period December 1, 2008 through February 28, 2014. :

In the Matter of the Petition :
of :
METRO ENTERPRISES CORP. :
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, 2008 through February 28, 2014. :

Petitioner, John Scarfi, 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 December 1, 2008 through February 28, 2014.

Petitioner, Metro Enterprises Corp., 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, 2008 through February 28, 2014.

A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on July 15, 2019, and a briefing schedule was established at the conclusion of the hearing, which was subsequently postponed due to petitioners' filing of multiple post-hearing motions. Petitioners appeared by Ackerman, LLP (Alvan L. Bobrow, Esq., of counsel).

The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

On August 14, 2019, petitioners filed a motion to reopen the record and for reargument pursuant to 20 NYCRR 3000.16, and to recuse Osborne Jack from representing the Division of Taxation in this matter. By order dated January 2, 2020, the Division of Tax Appeals denied petitioners' motion to reopen the record and for reargument, and to recuse Osborne Jack.

On January 28, 2020, petitioners filed with the Division of Tax Appeals a motion for reconsideration of motion to reopen record, for reargument, and to recuse Osborne Jack from representing the Division of Taxation in this proceeding (motion for reconsideration), and a motion of John Scarfi to intervene and for summary determination (motion to intervene and for summary determination). On February 11, 2020, petitioners filed with the Division of Tax Appeals a motion to consolidate. By letter dated February 14, 2020, the Division of Tax Appeals gave the Division of Taxation until March 16, 2020 to respond collectively to petitioners' motion for reconsideration, motion to intervene and for summary determination, and motion to consolidate. By letter dated February 20, 2020, the Division of Taxation informed petitioners that it did not receive petitioners' motion to intervene and for summary determination, and requested that petitioners serve said motions upon it so that it could prepare a response. By letter dated March 12, 2020, the Division of Taxation requested an extension of time to respond to petitioners' motion for reconsideration, motion to intervene and for summary determination, and motion to consolidate, on the basis that it had still not received a copy of petitioners' motion to intervene and for summary determination. The Division of Tax Appeals granted the Division of Taxation's request for an extension of time to April 10, 2020 to respond to petitioners' motions. The Division of Tax Appeals further instructed petitioners to immediately serve the Division of Taxation with a copy of the motion to intervene and for summary determination and

file proof of service. By letter dated April 6, 2020 the Division of Taxation requested an additional extension of time to respond to petitioners' motion for reconsideration, motion to intervene and for summary determination, and motion to consolidate, on the basis that it had still not received a copy of petitioners' motion to intervene and for summary determination. In the request, the Division of Taxation stated that on March 16, 2020, it received a faxed copy of an affidavit of John Scarfi from petitioners, but not a copy of the motion or referenced exhibits. On April 9, 2020, petitioners emailed the Division of Taxation incomplete portions of the motion to intervene and for summary determination, and copied the Division of Tax Appeals by email. By letter dated April 14, 2020, the Division of Tax Appeals noted that the portion of the motion to intervene and for summary determination that petitioners emailed the Division of Tax Appeals and Division of Taxation was incomplete and inconsistent with the motion filed with the Division of Tax Appeals. Petitioners were given until May 15, 2020 to serve the Division of Taxation with the complete motion to intervene and for summary determination, and to file an affidavit of service with the Division of Tax Appeals, or said motions would be dismissed, and the Division of Taxation was granted an extension until June 29, 2020 to respond to petitioners' motion for reconsideration, motion to intervene and for summary determination, and motion to consolidate. The 90-day period for the issuance of this order commenced on June 29, 2020. 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.

ISSUES

- I. Whether petitioners' motion to intervene and for summary determination should be granted.
- II. Whether petitioners' motion for reconsideration should be granted.

III. Whether petitioners' motion to consolidate should be granted.

FINDINGS OF FACT

1. Petitioners commenced this proceeding by filing petitions with the Division of Tax Appeals on June 6, 2018. The petition of John Scarfi was filed in protest of notices of determination numbers L-045794597, L-045794596, L-045794591, and L-045796581, all dated December 1, 2016, which asserted the following amounts due:

Notice No.	Periods Ended	Tax	Interest	Penalty
L-045794597	02/28/14	\$0.00	\$0.00	\$10,000.00
L-045794596	02/28/14	\$25,339.55	\$12,132.30	\$10,135.71
L-045794591	02/28/14	\$98,622.50	\$45,304.22	\$37,848.90
L-045796581	05/31/08 - 02/28/14	\$3,863,002.13	\$4,909,599.02	\$1,545,198.94

The petition of Metro Enterprises Corp. (Metro) was filed in protest of a notice of determination L-045794061, dated December 1, 2016, which asserted tax in the amount of \$3,863,002.13, plus interest of \$4,909,599.01 and penalty of \$1,545,198.94, for the periods ended May 31, 2008 through February 28, 2014.

2. The Division of Taxation (Division) filed its answers to the petitions on August 8, 2018.

3. Petitioners served a request for admission and second request for admission, dated June 20, 2019 and June 25, 2019, respectively, on the Division. The Division responded to petitioners' request for admission and second request for admission on July 10, 2019 and July 15, 2019, respectively.

4. A consolidated hearing was held on July 15, 2019. At the conclusion of the hearing the record was closed and a briefing schedule was established, with the final brief to be submitted by November 5, 2019. This date was later postponed due to the post-hearing motions filed by petitioners.

5. On August 14, 2019, petitioners filed a motion to reopen the record and for reargument pursuant to 20 NYCRR 3000.16, and to recuse Osborne Jack from representing the Division of Taxation in this matter. Petitioners also requested that the hearing transcript be corrected. By order dated January 2, 2020, the Division of Tax Appeals denied petitioners' motion to reopen the record and for reargument, and to recuse Osborne Jack, and corrected the hearing transcript as indicated in conclusion of law E of that order (*see Matter of Scarfi and Metro Enterprises Corp.*, Division of Tax Appeals, January 2, 2020).

6. On January 28, 2020, petitioners filed with the Division of Tax Appeals a motion for reconsideration, and a motion to intervene and for summary determination. Both motions were mailed to the Division of Tax Appeals in the same Federal Express envelope with a postmark date of January 28, 2020, and were received by Division of Tax Appeals on January 29, 2020. The motion for reconsideration was seven pages, consisting of the following: four pages of written argument signed by petitioners' representative, with the typed name appearing below the representative's signature as "Alvan L. Boborow [sic]" requesting that the administrative law judge reconsider and revise the order denying petitioners' motion to reopen record, for reargument, and to recuse Osborne Jack from representing the Division on the basis that the order did not resolve each and every issue raised in petitioners' motion; a one-page, unsworn certificate of service signed by petitioners' representative, again with the typed name appearing below the representative's signature as "Alvan L. Boborow [sic]," stating that the motion for

reconsideration was served on Osborne Jack by regular mail on January 28, 2020; and a two-page appendix of case citations.

Petitioners' motion to intervene and for summary determination filed with the Division of Tax Appeals consisted of the following: 12 pages of written argument entitled "motion of John Scarfi to intervene and for summary determination" signed by Alvan L. Bobrow and dated January 27, 2020; a six-page affidavit in support of the motion to intervene and for summary determination signed by John Scarfi and dated January 28, 2020; three pages of an undated, purported affidavit of Anthony Capeci in support of John Scarfi's motion to intervene and for summary determination with a blank jurat in the section for a notary public signature and stamp;¹ documents marked Exhibit A, consisting of the petition and attachments in the matter of 44th Enterprises Corporation; documents marked Exhibit B, consisting of notices of determination issued to John Scarfi; documents marked as Exhibit C consisting of the petitions and attachments in the matter of Metro Enterprises Corp. and John Scarfi; petitioners' first set of requests for admission in the matter of MLB Enterprises Corp., 44th Enterprises Corp., and Anthony Capeci; and an affirmation of Amit Shertzer in the matter of MLB Enterprises Corp., 44th Enterprises Corp., and Anthony Capeci.

7. On February 11, 2020, petitioners filed a motion to consolidate. The motion to consolidate, signed by petitioners' representative, states that "Petitioners in this case respectfully move the Administrative Law Judge to consolidate this matter with In Re MLB Enterprises, Corp., 44th Enterprises Corp., and Anthony Capeci, DTA Nos. 828636, 828637, 828638, 828639, 828640. All the preceding parties support and do not object to this motion. Both proceedings involve virtually identical factual records and substantially similar issues of law. As a result, it

¹ As the purported affidavit is not sworn to before a notary public, it is accorded no weight.

is in the interests of judicial economy to address the issues in both cases in one order. In addition, resolving both matters in a consolidated proceeding will reduce the possibility of inconsistent judgments. As such, the Administrative Law Judge should consolidate the proceedings for the purpose of efficient resolution.” The motion to consolidate was not accompanied by any affidavits, affirmations, or any other supporting papers.

8. By letter dated February 14, 2020, the Division of Tax Appeals acknowledged receipt of petitioners’ motion to consolidate, motion for reconsideration, motion to intervene and for summary determination (jointly referred to as motions), and gave the Division until March 16, 2020 to respond to all of the motions simultaneously.

9. On February 20, 2020, the Division sent a letter to petitioners’ representative, Mr. Bobrow, with a copy to the Division of Tax Appeals, stating that the Division did not receive petitioners’ motion to intervene and for summary determination and requesting that petitioners serve a copy of that motion on it so that it could prepare a response.

10. By letter dated March 12, 2020, the Division requested an extension of time to respond to petitioners’ motions on the basis that the Division had still not received a copy of petitioners’ motion to intervene and for summary determination. The Division stated that in addition to its letter dated February 20, 2020 requesting that petitioners serve a copy of said motion, the Division also requested a copy of the motion in person from petitioners’ representative on March 5, 2020, and by voice mail on March 12, 2020.

11. By letter dated March 12, 2020, the Division of Tax Appeals granted the Division’s request for an extension of time to April 10, 2020 to file a response to the motions. The Administrative Law Judge further directed petitioners to immediately serve the Division with a copy of the motion to intervene and for summary determination and file proof of service.

12. By letter dated April 6, 2020, the Division requested an additional extension of time to respond to petitioners' motions, on the basis that the Division still had not received a copy of petitioners' motion to intervene and for summary determination. The letter further stated that on March 16, 2020, the Division received a faxed copy of an affidavit of John Scarfi from petitioners, but the affidavit did not include a copy of the motion or referenced exhibits.²

13. By letter to the parties dated April 7, 2020, the undersigned administrative law judge granted the Division's request for an extension of time to May 31, 2020 to respond to petitioners' motions and further stated:

“ Mr. Jack indicated in the request that petitioners have yet to serve the complete motion to intervene and for summary determination on the Division. By letter dated March 12, 2020, I instructed petitioners to immediately serve the Division with a copy of the motion to intervene and for summary determination and file proof of service with the Division of Tax Appeals. To date, petitioners have not filed a proof of service and have apparently not properly served the Division of Taxation. Petitioners are once again instructed to serve the Division with a copy of the motion to intervene and for summary determination and file proof of service with the Division of Tax Appeals. If petitioners fail to properly serve the Division and file proof of service by May 1, 2020, petitioners' motion to intervene and for summary determination will be dismissed for failure to follow proper procedures in accordance with the Tax Appeals Tribunal Rules of Practice and Procedure.”

14. On April 9, 2020, petitioners' representative sent an email to Mr. Jack of the Division and to the Division of Tax Appeals. In the email, Mr. Bobrow stated, in part, as follows:

“Osborne: As you know from my prior correspondence my New York City office (Fifth Avenue and 53rd Street) closed because one or more employees tested positive for the virus. While we originally anticipated returning to work at the end of March, there is no definite return date as of today. Since the duplicate signed originals of the: Motion of John Scarfi to Intervene and for Summary Determination; and, the Metro Enterprises Corp. and John Scarfi's Motion to Consolidate are in my office filing cabinets and I cannot retrieve them, I am

² The affidavit of John Scarfi is the same as that filed with the Division of Tax Appeals in support of petitioners' motion to intervene and for summary determination, but does not include the referenced exhibits, the written argument signed by Mr. Bobrow, the unsworn “affidavit” of Mr. Capeci, the requests for admissions in the matter of MLB Enterprises Corp., 44th Enterprises Corp., and Anthony Capeci, nor the affidavit of Amit Shertzer, which were filed with Division of Tax Appeals in support of the motion to intervene and for summary determination on January 28, 2020 (*see* finding of fact 6).

forwarding to you duplicate signed copies of these items which I located on my computer system with Proof of Service (See, attachments). I have no reason to doubt that they are in any way different from the copies originally filed with you and Judge Russo for which I have the Certified Return Receipt in the office. Please let me know by e-mail whether you require any other documents and I will use my best efforts to provide them.

Judge Russo: May I please have your guidance as to whether providing the documents above satisfies the instructions in your letter to me of April 7, 2020.
Thank You, Alvan Bobrow”

Attached to Mr. Bobrow’s email was a copy of petitioners’ motion to consolidate, dated February 11, 2020, together with a certificate of service signed by Mr. Bobrow stating that the “foregoing duplicate copy of Petitioners Metro Enterprises Corp. and John Scarfi’s Motion to Consolidate was served on Osborne Jack, Esq. via e-mail on the Ninth day of April 9 [sic], 2020.” Also attached to the email was a copy of the 12-page written argument entitled “motion of John Scarfi to intervene and for summary determination” signed by Alvan L. Bobrow, dated January 27, 2020, which was filed with the Division of Tax Appeals on January 28, 2020 (*see* finding of fact 6), and a certificate of service signed by Mr. Bobrow, stating that “the foregoing duplicate copy of John Scarfi’s motion to intervene and for summary determination was served on Osborne Jack, Esq. via e-mail on the Ninth day of April 9 [sic], 2020.” None of the other documents filed with the Division of Tax Appeals by petitioners on January 28, 2020 in support of their motion to intervene and for summary determination were included with the email (*see* finding of fact 6).

15. By letter dated April 14, 2020, the administrative law judge acknowledged that the Division of Tax Appeals received the email referenced in finding of fact 14 and noted that attached to Mr. Bobrow’s email was a copy of petitioners’ motion to consolidate, dated February 11, 2020, together with a certificate of service dated April 9, 2020, and “a copy of A PORTION of the motion of John Scarfi to intervene and for summary determination, together with a

certificate of service dated April 9, 2020.³ The letter further stated that:

“the emailed copy of the motion to intervene and for summary determination is incomplete and inconsistent with the motion filed with the Division of Tax Appeals, dated January 27, 2020, in that the emailed version does not contain the exhibits and affidavits that were included with the motion filed with my office. As such, petitioners have still not properly served the Division of Taxation with said motion. Although Mr. Bobrow contends that he has been unable to access his office due to the current COVID-19 pandemic, such explanation does not excuse petitioners’ failure to originally serve the motion dated January 27, 2020, on the same date as such motion was filed with the Division of Tax Appeals, a date which preceded the subsequent lock down of nonessential businesses due to the pandemic. Petitioners’ disregard of the Tax Appeals Tribunal Rules of Practice and Procedure regarding motion practice and proper service, as well as ex parte communications resulting from sending documents to the Division of Tax Appeals without sending the same to the Division, is clearly prejudicial to the Division.

Nevertheless, due the current circumstances of the COVID-19 pandemic, petitioners are given an extension of time, until May 15, 2020, in which to properly serve the Division of Taxation with the COMPLETE motion to intervene and for summary determination, including all exhibits and affidavits that were included with such motion filed with the Division of Tax Appeals. Petitioners are further ordered to file a detailed affidavit of service with the Division of Tax Appeals by May 15, 2020, listing a description and date of each document served on the Division, in order to confirm that such documents are consistent with the motion and exhibits previously filed with the Division of Tax Appeals. If petitioners fail to properly serve the Division and file proof of service by May 15, 2020, petitioners’ motion to intervene and for summary determination will be dismissed for failure to follow proper procedures in accordance with the Tax Appeals Tribunal Rules of Practice and Procedure.”

16. Petitioners did not file an affidavit of service with the Division of Tax Appeals affirming that the complete motion to intervene and for summary determination was served on the Division, and have presented no evidence of proper service of said motion. Petitioners did not request an extension of time beyond the May 15, 2020 deadline to properly serve the Division and file proof of service of said motion. The Division affirms that it was not served with the complete motion to intervene and for summary determination.

³ While the Division of Tax Appeals does not normally accept emailed correspondence from parties, in light of the ongoing pandemic and the number of individuals working remotely, the email was acknowledged under these special circumstances.

CONCLUSIONS OF LAW

A. First addressing petitioners' motion to intervene and for summary determination, the Tax Appeals Tribunal Rules of Practice and Procedure (Rules) clearly require that "[a] copy of each written motion shall be served on the adverse party" (20 NYCRR 3000.5 [b]) and "[a]ny brief shall be filed with the motion and a copy served on the adverse party" (20 NYCRR 3000.5 [c]). Petitioners' blatant disregard for this provision as mandated in the Rules is inexcusable. Petitioners were given numerous opportunities to cure their failure to serve the Division with the motion to intervene and for summary determination, yet failed to comply. Such failure is not merely a procedural technicality. Rather, it results in prejudice to the Division by not allowing it to respond to said motion, as well as constituting prohibited ex parte communications by filing written communications with the Division of Tax Appeals and not providing a copy to the opposing party (see 20 NYCRR 3000.10). As such, petitioners' motion to intervene and for summary determination is denied for failure to follow proper motion practice procedures, and the petitioners' arguments in support of said motion will not be addressed herein.

B. On January 28, 2020, petitioners filed a motion for reconsideration of motion to reopen record, for reargument, and to recuse Osborne Jack from representing the Division of Taxation in this proceeding, requesting that the administrative law judge reconsider and revise the order in *Matter of Scarfi and Metro Enterprises Corp.* (Division of Tax Appeals, January 2, 2020) denying petitioners' motion to reopen record, for reargument, and to recuse Osborne Jack from representing the tax department on the basis that the order did not resolve each and every issue raised in petitioners' motion. Petitioners argue that the order should be reconsidered and revised to address the merits of each claim raised in the motion, dated August 14, 2019, that contended the record should be reopened and reargued on the basis of fraud, misrepresentation

and misconduct by the Division. The order for which petitioners seek reconsideration denied petitioners' August 14, 2019 motion on the basis that it was "premature and procedurally improper" in that "[t]he regulation is crystal clear and unambiguous that motions to reopen the record or for reargument shall be made within thirty days after the determination has been served (20 NYCRR 3000.16 [b])" (*Matter of Scarfi and Metro Enterprises Corp.*, Division of Tax Appeals, January 2, 2020). Since a determination had not been issued yet, the motion was denied as procedurally improper, and the merits of petitioners' motion alleging fraud, misrepresentation and misconduct by the Division were not addressed.

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) 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).

As the Tax Appeals Tribunal has held, there is no statutory authority for this agency to reconsider its decisions and, therefore, our authority to do so as a quasi-judicial body is limited (*Matter of Trieu*, Tax Appeals Tribunal, June 2, 1994, *confirmed Matter of Trieu v Tax Appeals Tribunal*, 222 AD2d 743, 634 NYS2d 878, *appeal dismissed* 87 NY2d 1054, 644 NYS2d 146; *Matter of Jenkins Covington, N.Y. v Tax Appeals Tribunal*, 195 AD2d 625, 600

NYS2d 281, *lv denied* 82 NY2d 664, 610 NYS2d 151). “A motion to reargue is thus addressed to our discretion and any reconsideration of a previous decision must be for compelling reasons” (*Matter of Landschaftliche Brandkasse Hannover*, Tax Appeals Tribunal, September 25, 2018).

A strict standard is appropriately applied when reviewing a motion for reconsideration, and “reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked” (*Shrader v CSX Transp.*, 70 F3d, 255, 257 [2d Cir 1995]). 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]).

Petitioners argue that the merits of their August 14, 2019 motion contending that the record should be reopened on the basis of fraud, misrepresentation and misconduct by the Division should be addressed in the order. Petitioners point to no relevant fact or controlling principal of law that was overlooked or misapprehended. Instead, they raise the same arguments here as those raised in the August 14, 2019 motion that was denied as procedurally premature and improper. The order clearly stated that the motion was procedurally improper and such was the basis for denial. As a determination has yet to be issued in the underlying action, it is not the proper time to address arguments raised in support of a motion to reopen and reargue (*see* 20 NYCRR 3000.16 [b]; *Matter of Javed*, Tax Appeals Tribunal, October 6, 2011). Accordingly, petitioners’ motion for reconsideration is denied.

C. Petitioners separately filed a motion to consolidate on February 20, 2020. The motion to consolidate seeks to have the matters of Metro Enterprises Corp. and John Scarfi consolidated with the matters of Anthony Capeci (Division of Tax Appeals numbers 828636, 828637, and 828638), 44th Enterprises Corp. (Division of Tax Appeals number 828639), and MLB Enterprises, Corp., (Division of Tax Appeals number 828640). Petitioners allege that all of these matters involve virtually identical factual records and substantially similar issues of law, and “in the interest of judicial economy” should be addressed in one order.

The motion to consolidate was not accompanied by any affidavits, affirmations, or any other supporting papers. Significantly, the petitioners in the matters of MLB Enterprises, Corp, 44th Enterprises Corp, and Anthony Capeci did not submit any affidavits or affirmations in support or join in petitioners’ request for consolidation. Indeed, petitioners’ motion papers do not provide evidence that the parties or their representatives in the matters of MLB Enterprises, Corp, 44th Enterprises Corp, and Anthony Capeci were even given notice of the motion.

The petitioners in MLB Enterprises, Corp., 44th Enterprises Corp., and Anthony Capeci executed powers of attorney designating representatives other than the representative appearing on behalf of the petitioners herein. As such, the factual record, issues of law, and even procedural status of those matters cannot be discussed herein and are protected by the secrecy provisions of the Tax Law (*see* Tax Law § 1146). Accordingly, petitioners’ motion to consolidate must be denied.

D. Petitioners' motion to intervene and for summary determination, dated January 27, 2020, motion for reconsideration, dated January 28, 2020, and motion to consolidate, dated February 11, 2020, are denied. A revised briefing schedule will be issued in due course.

DATED: Albany, New York
September 24, 2020

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE