STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STEPHEN AND NANCI FISHER	:	DECISION
for Redetermination of a Deficiency or Refund of Personal Income Tax and City Personal Income Tax under Articles 22 and 30 of the Tax Law and the Administrative Code of the City of New York for the Years 1977 and 1984.	:	

The Division of Taxation has filed an exception to a determination of Administrative Law Judge Robert Mulligan made on December 14, 1989 at the hearing of petitioners, Stephen and Nanci Fisher, which denied the Division's request to quash or withdraw certain subpoenas issued by the Division of Tax Appeals (File No. 806534). Petitioners appeared pro se by Stephen Fisher. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

The Division filed an affidavit and brief in support of its exception. The petitioner filed a brief in opposition.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether an Administrative Law Judge has the authority to withdraw or modify subpoenas issued by the Supervising Administrative Law Judge or another Administrative Law Judge of the Division of Tax Appeals.

II. Whether the subpoenas issued to employees of the Division of Taxation and the Attorney General's Office should be withdrawn or modified.

FINDINGS OF FACT

Since a hearing on the merits has not been held in this matter, no documents or testimony are in evidence and no Findings of Fact have been made by an Administrative Law Judge. For the limited purpose of reaching the decision below, the Tribunal has reviewed the papers presented by the parties in the exception and the response to the exception, documents attached to those papers, correspondence related to this case to and from personnel of the Division of Tax Appeals, and the transcript of the hearing held on December 14, 1989 before Administrative Law Judge Robert Mulligan, and has assumed the validity of documents necessary to reach a decision. Any factual findings made here by the Tribunal are made for the sole purpose of resolving the limited issue before it and do not preclude independent findings of the same facts or additional facts by the Administrative Law Judge at the hearing on the merits.

Factual Background

The petition which is the subject of the proceedings before the Division of Tax Appeals is the amended petition of Stephen and Nanci Fisher dated February 13, 1989. The petitioners appeal from two conciliation orders, both dated November 4, 1988.

The first order is for the tax year 1977 and partially grants petitioners' request for a refund of personal income tax for that year. The petitioners had requested a refund of $1,301.10 on their tax return for 1977. By a notice dated April 1, 1981, the Division of Taxation allowed a refund in the amount of $205.88 and disallowed the remaining amount of petitioners' refund claim for that year. The petitioners filed a petition to the former State Tax Commission contesting the denial of the refund. This petition was the subject of a default order by the Commission which was subsequently reopened, as a result of which the petitioners received a conference before the Bureau of Conciliation and Mediation Services. This conference resulted in a conciliation order which granted an additional refund in the amount of $540.00. This is the conciliation order from which the petitioners have now petitioned, requesting that the entire amount of their original refund claim be granted.

The second conciliation order is for tax year 1984 and upholds the statutory notice for that year. The petitioners, in their petition, request the full amount of the refund requested by them for 1984. The Division requests that the statutory notice, which asserts an additional amount due, be upheld. The statutory notice and the petitioners' tax return for 1984 are not among the documents before us. However, they are unnecessary to the decision before us.

The petitioners also request relief relating to interest and penalties. The relief requested appears to be that interest for late payment of refunds be credited to petitioners and that any penalties assessed against petitioners be offset by penalties assessed against the Division of Taxation for late payment of refunds.

In connection with the petition for hearing, petitioners requested and the Supervising Administrative Law Judge, on October 29, 1989, issued subpoenas to the following persons: Michael Alexander, Director of Litigation; Phylis Jacobowitz, Tax Compliance Agent; August Fietkau, Assistant Attorney General; James Morris, Attorney; Andrew Haber, Senior Attorney; Barbara Burkett, Tax Compliance Agent II; Barry Bresler, Acting Deputy Commissioner and Treasurer; Roderick Chu, Commissioner; and John Langer, Deputy Commissioner for Operations. At the time the subpoenas were issued an administrative law judge had not been designated to hear the case on its merits. The subpoenas were returnable on the scheduled hearing date of December 14, 1989. Subsequently, at the request of petitioners, the subpoena for Roderick Chu, the former Commissioner of the Department of Taxation and Finance, was withdrawn and a subpoena for James Wetzler, the current Commissioner of the Department, was issued by Assistant Supervising Administrative Law Judge Daniel Ranalli. The subpoenas were issued pursuant to Rule 3000.6(c) of the Rules of the Tax Tribunal which states:

> "(c) Subpoenas. Upon request, the administrative law judge or presiding officer assigned to the case will issue subpoenas to require the attendance of witnesses at a hearing or to require the production of documentary evidence. In the event that an administrative law judge or presiding officer has not been assigned to the case or the administrative law judge or presiding officer is unavailable, the request to issue subpoenas may be made to the supervising administrative law judge. Subpoenas will be delivered to the person requesting them and service thereof will be said person's responsibility. However, an attorney representing any

party in a proceeding may issue a subpoena pursuant to section 2302 of the CPLR."

With one exception, the subpoenas are for employees of the Division of Taxation. The remaining subpoena is for an Assistant Attorney General in the Office of the Attorney General.

On November 27, 1989, the Supervising Administrative Law Judge received a motion to quash or withdraw the subpoenas from the Division of Taxation. This motion was returnable on the scheduled hearing date of December 14, 1989, and was made on notice to the petitioners. The Supervising Administrative Law Judge referred the disposition of the motion to Administrative Law Judge Robert Mulligan, who had by this time been assigned to hear the case on the hearing date. No papers in response to the motion were submitted by the petitioners. The Administrative Law Judge declined to rule on the motion on the grounds that he lacked the power to vacate, modify or enforce the subpoenas issued by another Administrative Law Judge. The Administrative Law Judge referred the parties to the Supreme Court for resolution of the status of the subpoenas. It was noted at the hearing that the Assistant Attorney General who had been subpoenaed, August Fietkau, had moved in Supreme Court, New York County to quash the subpoena issued to him. This motion was returnable January 10, 1990. This motion and other motions relating to the issued subpoenas are still pending.

The Division of Taxation excepts to the determination of Administrative Law Judge Mulligan that he did not have the power to vacate or modify the issued subpoenas, and requests that all of the subpoenas be withdrawn on the grounds that the individuals subpoenaed have no knowledge which is relevant or material to the issues before the Division of Tax Appeals, and as to certain individuals who are attorneys, on the grounds of attorney/client privilege and attorney work product immunity. The Division of Taxation asserts in its exception that the only issues before the Division of Tax Appeals are whether the remaining portion of petitioners' refund for 1977 should be granted, specifically, whether the deductions claimed by the petitioners on their Schedule C should be allowed, and, whether the petitioners properly filed and calculated their tax

for tax year 1984. The Division of Taxation argues that the subpoenas should be withdrawn because none of the individuals subpoenaed can provide testimony or documents as to the validity of petitioners' deductions for 1977 or their filing for 1984.

Petitioners have responded that the rules of the Tribunal require that the subponeas be issued and that they cannot now be withdrawn by the Tribunal. In addition, petitioners claim that all the individuals subpoenaed do have information necessary to their case.

OPINION

This is the first case involving the issuance of subpoenas by the Tribunal and the authority of the Tribunal to rule on motions to withdraw subpoenas it has issued. The statutory and regulatory authority for the issuance of subpoenas by the Tribunal is as follows.

Tax Law section 2000(10) provides in relevant part that:

> "The tribunal shall have the power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the proceedings which it is authorized to conduct . . . The tribunal may designate and authorize by resolution, duly entered upon its minutes, officers, administrative law judges and other employees of the division to exercise any of the powers or perform any of the functions provided for in this subdivision. A subpoena issued under this subdivision shall be regulated by the civil practice law and rules."

The regulations of the Tribunal provide in relevant part as follows:

> "(c) Subpoenas. Upon request, the administrative law judge or presiding officer assigned to the case will issue subpoenas to require the attendance of witnesses at a hearing or to require the production of documentary evidence. In the event that an administrative law judge or presiding officer has not been assigned to the case or the administrative law judge or presiding officer is unavailable, the request to issue subpoenas may be made to the supervising administrative law judge. Subpoenas will be delivered to the person requesting them and service thereof will be said person's responsibility. However, an attorney representing any party in a proceeding may issue a subpoena pursuant to section 2302 of the CPLR." (20 NYCRR 3000.6[c].)

By resolution, the Tribunal has authorized Administrative Law Judges to execute subpoenas for the attendance of witnesses and the production of books, papers and documents

relating to the proceedings which the Tribunal is authorized to conduct, and examine them in relation to any matter which it has power to investigate[1].

We deal first with the authority of the Administrative Law Judge to withdraw or modify subpoenas issued by the Division of Tax Appeals.

CPLR section 2304 provides clearly that a motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. However, if the subpoena is not returnable in a court, ". . . a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court."

Here, the Division of Taxation made a motion to the Supervising Administrative Law Judge to quash or withdraw the subpoenas. The Supervising Administrative Law Judge referred the disposition of the motion to the Administrative Law Judge who was assigned to hear the case on the hearing date. We find such action properly within the discretion accorded the Tribunal to administer the hearing process under its jurisdiction. Accordingly, the motion to withdraw was properly before the Administrative Law Judge and the Administrative Law Judge had the authority to rule on it pursuant to the provisions of CPLR section 2304.

We deal next with the issue of whether the Tribunal has the authority to entertain the Division of Taxation's exception to the determination of the Administrative Law Judge that he did not have the authority to rule on the motion to withdraw the subpoenas made by the Division of Taxation. We conclude that we have such authority.

Tax Law section 2006(7) provides in relevant part that the Tribunal has the authority "To provide for a review of the determination of an administrative law judge if any party to a proceeding conducted before such administrative law judge, within thirty days after the giving of notice of such determination, takes exception to the determination."

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[1]The resolution was adopted by the Tribunal effective September 1, 1987.

We recognize that Tax Law section 2006(5) and (7) contain provisions affecting the time when the denial of motions for dismissal and summary judgment can be reviewed by the Tribunal;[2] however, such provisions are not applicable to the determination at hand. Accordingly, we conclude the Tribunal has jurisdiction over this exception.

We deal next with the issue of whether the subpoenas should be withdrawn or modified.

We believe we have sufficient information before us to decide whether the subpoenas issued in this case should be withdrawn, modified or sustained. The parties have made extensive presentations in support of their respective positions and in opposition to the presentation made by the other party.

We grant in part the Division of Taxation's request to withdraw the subpoenas here with the specific exception discussed below.

We think it helpful first, to make clear the nature of the issues raised by petitioners in their petition. The matter before the Division of Tax Appeals is petitioners' refund claim for 1977 and the deficiency issued to them for 1984. Specifically, the Administrative Law Judge assigned to this case at formal hearing on the merits must determine whether petitioners' refund request for 1977 should be granted or denied and whether petitioners filed the proper returns and paid the correct amount of tax for 1984. The relevant factor is whether the deductions claimed by petitioners on their Schedule C for the year 1977 should be allowed, and whether the petitioners properly filed and calculated their tax for tax year 1984. The issue is whether the subpoenaed witnesses have information necessary to petitioners' presentation of their case on these issues. The petitioners have presented no facts or arguments that would support subpoenas for any of the individuals here for that part of the petitioners' case which concerns either tax year 1977 or 1984.

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[2]The section provides that the determination of the Administrative Law Judge denying either a motion to dismiss or a motion for summary judgment is not subject to review by the Tribunal. The effect of this explicit language is to delay Tribunal review of the action of the Administrative Law Judge on such motion until review of the Administrative Law Judge's determination on the merits, if such review is sought. The Tribunal's regulations at 20 NYCRR 3000.5(a)(5) implement these statutory provisions.

Nowhere is it alleged that any of the named individuals have knowledge of the validity of the petitioners' deductions. As the court in similar circumstances stated in Dworkin Construction Co., Inc. (Sup Ct, Rockland County, Feb. 9, 1987, Kelley, J.), "This information is in petitioner's possession and knowledge." (Dworkin, supra at 2.) To seek testimony from witnesses such as Alexander and Fietkau in order to inquire what they know about the petitioners' taxes that the petitioners do not know, (Petitioners' List of Witnesses, attached to September 10, 1989 letter from petitioners to Division of Tax Appeals Supervising Administrative Law Judge Andrew Marchese) is inadequate justification (In re Landegger, 54 NYS2d 76). Nor is the testimony of current Commissioner Wetzler as to correspondence by former Commissioner Chu with Congressman Bill Green relevant to the question of petitioners' deductions.

In addition, the original petition for the 1977 refund claim which resulted in a default subsequently vacated by the Division of Taxation is not relevant to this proceeding. Why petitioners' original petition resulted in a default and why that default was vacated is not pertinent to the matter now before the Division of Tax Appeals. Notwithstanding what occurred with petitioners' former petition, petitioners may now submit any evidence they have to support the validity of the deductions taken by them on their 1977 return in order to establish that they are entitled to the claimed refund.

Petitioners' allegation that the testimony of Commissioner Wetzler and others is relevant to their claims concerning interest and penalties is also without foundation. This claim, as embodied in petitioners' petition, appears to be that the petitioners are entitled to interest from the Division of Taxation for late payment of refunds, and that any penalties assessed against petitioners for late payment of taxes should be offset by penalties assessed against the Division of Taxation for late payment of refunds. The Division of Tax Appeals has no authority to assess penalties against the Division of Taxation and, therefore, testimony which is intended to establish that the Division of Taxation deserves to be penalized is outside the scope of the Division of Tax Appeals' jurisdiction. In addition, this testimony would not be relevant to this proceeding

because no penalties have been assessed against petitioner for tax year 1977 as the petitioners filed a return and paid all taxes for that year. The penalties to which the petitioners refer must be for other tax years which are not before the Division of Tax Appeals. The petitioners' request for interest on their refund for 1977 is dealt with below.

Viewed in its most liberal light, petitioners appear to be seeking through the testimony of some of the subpoenaed witnesses, an accounting of petitioners' tax liability for a series of years before, after and including 1977 and 1984.

Although the Division of Tax Appeals has no jurisdiction to review the amount of or the basis for petitioners' tax liabilities in years not before it, petitioners' current petition before the Division of Tax Appeals specifically requests the full amount of the original refund claim of $1,301.10. Therefore, the petitioners may properly seek testimony on how the previously granted refund amounts for 1977 were applied. If in fact petitioners have not received credit for some or all of the previously granted refund amounts for 1977, then it would appear that more than the remaining amount of $519.00 has been denied. In addition, if petitioners have not received their refund in a timely fashion they may be entitled to such interest as the statute allows.

Therefore, as Deputy Commissioner John Langer is the official whose area of responsibility within the Division of Taxation would appear to include the persons or units who would have the information relevant here, we sustain the subpoena issued to him. The subpoena is sustained for the limited purpose of responding to questions concerning the previously granted refunds for tax year 1977. The request for the production of documents is also limited to this issue. The letter of Michael Alexander dated October 23, 1987, contains an accounting of the petitioners' tax liabilities for a series of years including 1977, and indicates that the previously granted refunds have been credited to a tax liability for the tax year 1976. Other documents before us raise questions as to the origin of a tax liability for that year. Therefore, any explanation that includes a statement that the 1977 refunds have been credited to a tax liability

for a particular tax year must include evidence of the origin of that liability, such as a notice of deficiency or a tax return.

The Division of Taxation may, in the first instance, designate another person or persons who may have the necessary information. Should that person or persons' testimony be deemed inadequate, the petitioners, upon an adequate showing as to relevance, may request that the Administrative Law Judge assigned to this case issue additional subpoenas as he or she deems appropriate (Luddy v. State of New York, 45 Misc 2d 948, 258 NYS2d 303 [Ct. of Claims, 1965]).

Petitioners bear the burden of showing that the testimony provided was inadequate or insufficient before seeking the testimony of additional witnesses (Rosner v. Maimonides Hospital, 89 AD2d 847, 453 NYS2d 30, 31-32; Instructional Television Corp. v. NBC, Inc., 63 AD2d 644, 404 NYS2d 989; National Reporting, Inc. v. State of New York, 46 AD2d 576, 364 NYS2d 224, 227 [3d Dept 1975]; Besen v. CPL Yacht Sales, Inc., 34 AD2d 789, 312 NYS2d 43; Arett Sales Corp. v. Island Garden Center of Queens, Inc., 25 AD2d 546, 267 NYS2d 623).

This decision does not preclude the issuance of other subpoenas on issues not discussed here by the Administrative Law Judge assigned to this case upon a proper application and a showing that the testimony or the production of documents for which a subpoena is sought are relevant to the proceedings.

As it is not necessary to our decision, we do not decide the question of attorney/client privilege or attorney work product immunity as it applies to the subpoenas here.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The subpoenas issued to August Fietkau, Michael Alexander, Andrew Haber, James Morris, Phylis Jacobowitz, Barry Bresler, Barbara Burkett and James Wetzler are withdrawn.

2. The subpoena issued to John Langer is sustained.

DATED: Troy, New York
April 19, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner