

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>LAWRENCE G. RAWL</b>	:	DECISION
	:	DTA No. 813892
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Tax under Article 22 of the	:	
Tax Law and the Administrative Code of the City	:	
of New York for the Years 1989, 1990 and 1991.	:	

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Petitioner Lawrence G. Rawl, c/o Hodgson, Russ, Andrews, Woods & Goodyear, LLP, 1800 One M & T Plaza, Buffalo, New York 14203-2391, filed an exception to the order of the Chief Administrative Law Judge issued on July 19, 1996. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, LLP (Michel P. Cassier, Esq. and Paul R. Comeau, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioner filed a letter in reply. Petitioner's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Jenkins and Pinto concur.

***ISSUE***

Whether the Chief Administrative Law Judge was correct in granting, in part, the Division of Taxation's motion to modify the subpoena duces tecum which he had issued at petitioner's request.

***FINDINGS OF FACT***

We find the following facts.

Petitioner filed a petition dated May 26, 1995 contesting personal income taxes assessed against him by the Division of Taxation ("Division"). Petitioner exercised certain stock options in 1991. Petitioner asserts that the Commissioner of Taxation and Finance erred in allocating compensation to New York based on his exercise of those stock options and earnings bonus units using allocation ratios from years other than 1991. Petitioner claims he was a nonresident and spent no days in New York in 1991. Petitioner asserts that the Commissioner of Taxation and Finance exceeded his statutory and regulatory authority in assessing the subject taxes for the year 1991.

The hearing in this matter was originally scheduled for March 5, 1996. On February 12, 1996, more than 20 days before the scheduled hearing date, Robert D. Plattner, Esq. ("Mr. Plattner") of Hodgson, Russ, Andrews, Woods & Goodyear, sent<sup>1</sup> a letter to Andrew Marchese, Chief Administrative Law Judge ("the Administrative Law Judge") in the Division of Tax Appeals, stating that "[i]n preparation for the hearing" they would like to issue a subpoena to the Division calling for the production of documents. It is noted that the documents requested in this letter, if provided, would be voluminous.

Kenneth Schultz ("Mr. Schultz"), the Division's attorney, responded to Mr. Plattner's request by letter<sup>2</sup> to the Administrative Law Judge, also dated February 12, 1996, requesting that petitioner's request for the subpoena be denied. Mr. Schultz argued that petitioner's request was "unreasonable, oppressive, excessive in scope and unduly burdensome" and, except for the audit file requested, "totally irrelevant." With respect to the audit file, Mr. Schultz also pointed out that "the entire audit file for this case," which covered the years 1989, 1990 and 1991, had already been provided to petitioner's counsel months earlier.

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<sup>1</sup>The letter was sent by certified mail to the Chief Administrative Law Judge. It was also sent by telecopier to the Chief Administrative Law Judge and to Kenneth J. Schultz, Esq. at the Division.

<sup>2</sup>Sent by telecopier and regular mail to the Administrative Law Judge and Paul Comeau, Esq.

On February 12, 1996, the Administrative Law Judge granted petitioner's request, in part. The subpoena issued by the Administrative Law Judge compelled the following documents to be produced on March 5, 1996:

"1. All records in your possession pertaining to the audit of Mr. Lawrence G. Rawl (Soc. Sec. No. XXX-XX-XXXX) for the tax years ending 1989, 1990 and 1991 that resulted in the issuance of a Notice of Deficiency bearing the ID Number L-009813855, whether prepared in advance of, or subsequent to, the issuance of said Notice of Deficiency.

"2. All records in your possession pertaining to any prior audits conducted by the Division or its representatives in the City of New York of Mr. Lawrence G. Rawl for State or City personal income taxes; together with copies of the returns filed for years that were audited, if any.

"3. All records pertaining to the Division's published memorandum bearing the identification number TSB-M-95(3)I and dated November 21, 1995.

"4. All internal audit memoranda from 1975 through the present, addressing the proper personal income tax treatment for non-resident taxpayers of gains realized on the exercise of stock options. Be sure to include each iteration of the field audit guidelines or other memoranda as they have changed over time."

On February 13, 1996, Mr. Schultz wrote a letter to the Administrative Law Judge, with a copy to Paul Comeau, Esq. ("Mr. Comeau"), advising him that the Division had been served with the subpoena. The letter asked: i) whether the Administrative Law Judge had considered his (Mr. Schultz's) letter of February 12, 1996 prior to issuing the subpoena; ii) whether the Administrative Law Judge had any verbal or other communication with Mr. Plattner or anyone else purporting to act for petitioner regarding this case; and iii) whether the Administrative Law Judge had received an executed power of attorney running to Mr. Plattner authorizing him to act on behalf of petitioner prior to issuing the subpoena.

The Administrative Law Judge responded to Mr. Schultz's February 13, 1996 letter by his own letter of the following day, this time copied to Mr. Comeau, petitioner's authorized representative. The Administrative Law Judge stated that the subpoena had already been signed

by the time he had received Mr. Schultz's letter, and that if he wished to object to the subpoena, he could do so by filing a motion under 20 NYCRR 3000.7(c). The Administrative Law Judge went on to state that:

"I did have a telephone conversation with Mr. Plattner on the 12th. It consisted of a discussion of the correct procedure for requesting a subpoena. A review of our file reveals a power of attorney which runs to Sharon M. Kelley and Paul R. Comeau of Hodgson, Russ, Andrews . . . . Mr. Plattner is not mentioned on the power of attorney" (Administrative Law Judge's letter dated February 14, 1996).

Subsequent to this exchange, petitioner filed a new power of attorney adding Mr. Plattner as an authorized representative.

By motion dated and received by the Division of Tax Appeals on February 22, 1996, Mr. Schultz, on behalf of the Division, sought the withdrawal of the subpoena or, in the alternative, modification of the subpoena and an in camera inspection of the documents as to which the subpoena is not withdrawn or modified.

Petitioner filed an affirmation in opposition to the Division's motion on March 25, 1996.

The Administrative Law Judge issued his order dated July 19, 1996 which provided the following disposition of the Division's motion:

***SUBPOENA ITEM NUMBER 1***

Item number 1 required the production of the audit report and workpapers for the subject period.

The audit report and workpapers had already been provided to petitioner except for a few documents the Division characterized as "immaterial." As to the immaterial documents, the Division also agreed to provide those at hearing. Accordingly, the Administrative Law Judge's order vacated item number 1 of the subpoena.

***SUBPOENA ITEM NUMBER 2***

Subpoena item number 2 required the production for inspection of copies of all records of prior audits together with copies of tax returns filed for years that were audited. The Division requested that this item be modified to read as follows:

"2. All records in your possession other than privileged material, including but not limited to attorney-client privileged information and information exempt from disclosure pursuant to § 87 of the Public Officers Law, pertaining to any prior audits conducted by the Division or its representatives in the City of New York of Mr. Lawrence G. Rawl for State of [sic] City personal income taxes, together with copies of the returns filed for years that were audited, if any" (Division's affidavit, p. 2).

The Administrative Law Judge ordered item number 2 modified as requested by the Division.

### ***SUBPOENA ITEM NUMBER 3***

Subpoena item number 3 required the Division to provide "all records pertaining to" Technical Services Bureau Memorandum TSB-M-95(3)I (the "TSB Memorandum"). The TSB Memorandum was issued by the Division one year after the Notice of Deficiency was issued and, the Division's attorney argued, could not possibly have been the basis for the tax asserted in this case. The Administrative Law Judge concluded that petitioner had not set forth any satisfactory explanation for how this material could be relevant to this audit. The Administrative Law Judge concluded that petitioner's explanation was, at best, speculation and in the realm of discovery. Accordingly, the Administrative Law Judge vacated subpoena item number 3 in its entirety.

### ***SUBPOENA ITEM NUMBER 4***

The Division publishes audit guidelines which are "detailed manuals, unpublished to the public, describing Department policy and interpretations, regarding substantive and procedural issues likely to arise during the conduct of an audit of a taxpayer" (Developing and Communicating Interpretations of the Tax Law, A Report to the Governor and the Legislature Reviewing Department of Taxation and Finance Policies and Procedures, March 1989). The Administrative Law Judge concluded that petitioner was entitled to know whether his audit was conducted within the guidelines established by the Division. However, the Administrative Law Judge regarded the request for 20 years of audit memoranda as excessive, and his order modified subpoena item number 4 as follows:

"4 All field audit guidelines, in effect for the period of time covered by the audit, which address the proper personal income tax treatment for non-resident taxpayers of gains realized on the exercise of stock options" (Order, p. 5).

The Administrative Law Judge rejected the Division's argument that FOIL places any absolute restrictions upon what may be subject to a subpoena under Tax Law § 2006. The Administrative Law Judge concluded that a number of sometimes conflicting factors must be considered in determining whether material should be subject to subpoena. The Administrative Law Judge stated that the application of a balancing test, as suggested by the Court in Matter of the Estate of Schwartz (130 Misc 2d 786, 497 NYS2d 834), is the process that must be followed.

Finally, the Administrative Law Judge's order provided that, to the extent the Division claims any privilege from disclosure as ordered by the modified subpoena, the Division's request for an in camera inspection of the documents in question prior to the hearing is granted.

#### ***OPINION***

Petitioner, on exception, disagrees with all of the conclusions in the Administrative Law Judge's order. Petitioner argues that the provisions of FOIL, which would limit or deny him access to certain records, do not apply to the subpoena here and cannot be used to deny him the records requested.

Tax Law § 2006(10) grants power to the Tribunal to subpoena and require the attendance of witnesses at hearing and the production of books, papers and documents pertinent to its proceedings and the power to delegate its power to subpoena to its administrative law judges and other employees. Any subpoena issued under the authority of Tax Law § 2006(10) "shall be regulated by the civil practice law and rules." The rules and regulations of the Tribunal provide that, upon request of any party, a subpoena may be issued by an administrative law judge to require the attendance of witnesses at a hearing or to require the production of documentary evidence (20 NYCRR 3000.7[a]). Upon service of a subpoena, any person to whom such a subpoena is directed may request that the subpoena be withdrawn or modified by

filing a request with the administrative law judge assigned to the case or the administrative law judge who issued the subpoena (20 NYCRR 3000.7[c]).

***SUBPOENA ITEM NUMBER 1***

Petitioner argues that the Administrative Law Judge erred in vacating item number 1 of the subpoena because the subpoena was no longer needed.

We reverse the Administrative Law Judge on this issue. The fact that the Division agreed to provide the documents does not mean that this item of the subpoena should be vacated. This is an item to which petitioner is clearly entitled and the subpoena will buttress that right. Upon the hearing of this matter, the Division is directed to provide petitioner, to the extent it has not already done so, the audit records requested pursuant to item number 1 of the subpoena including those documents referred to in the motion record as "immaterial."

***SUBPOENA ITEM NUMBER 2***

With respect to subpoena item number 2, petitioner argues that these documents are relevant to his case and that privileges or exemptions from disclosure under FOIL do not apply to the instant subpoena.

We agree with the Administrative Law Judge that FOIL is not an absolute restriction on the scope of a subpoena. Therefore, it is not sufficient for the Division to merely assert that a document is privileged or exempt from disclosure. The disputed document(s) must be presented to the Administrative Law Judge for in camera inspection and a determination made as to whether the document(s) must be provided to the petitioner or is privileged and exempt from disclosure. As the Court stated in Matter of the Estate of Schwartz (supra):

"while a litigant should not be denied access to information which any member of the public can obtain, it does not logically follow that because a member of the public is denied access to information, the litigant should be deprived of the opportunity to demonstrate that his interest outweighs the public's interest in confidentiality" (Matter of the Estate of Schwartz, supra, 497 NYS2d at 837).

Therefore, as suggested in Schwartz, the Administrative Law Judge should apply a balancing test to determine whether the Division's interest in non-disclosure outweighs the petitioner's interest in disclosure. To protect these issues of privilege and exemption on any subsequent

appeal, the Administrative Law Judge's reasoning and determination of said issues should be made part of his/her final determination in the matter. Since the Division has not identified specific documents subject to privilege or exemption, we reverse the Administrative Law Judge's modification of subpoena item number 2 and leave the Division to request in camera inspection, prior to hearing, for the consideration of particular documents, if any, which it claims are not subject to production by reason of exemption or privilege. This is separate, however, from the evidentiary issue of admissibility. Once the Administrative Law Judge has decided which documents must be provided to petitioner, he or she must rule on any issue of admissibility raised by the parties.

***SUBPOENA ITEM NUMBER 3***

Subpoena item number 3 requires the Division to provide a copy of all records pertaining to Technical Service Memorandum TSB-M-95(3)I ("the TSB Memorandum").

Petitioner argues that the Administrative Law Judge erred by vacating subpoena item number 3 in its entirety. Petitioner urges that, with respect to item number 3 (and item number 4), these documents are necessary to the issue of whether the Division issued the TSB Memorandum in response to petitioner's situation and whether the Division has treated different taxpayers with similar types of income differently from petitioner. We agree that petitioner is entitled to demand production of these documents.

The Division, in its motion to modify, sought to revise item number 3 by excepting from its scope "[a]ll records, other than privileged material, including but not limited to attorney-client privileged information and information exempt from disclosure pursuant to § 87 of the Public Officers Law" (Division's affidavit, p. 3). As previously stated, FOIL is not an absolute limit on the scope of a subpoena. As with subpoena item number 2, the Division may request in camera inspection prior to hearing of any documents it believes are not subject to production by reason of exemption or privilege. Therefore, we reverse that portion of the Administrative Law Judge's order which vacated item number 3 of the subpoena.



***SUBPOENA ITEM NUMBER 4***

The Division publishes audit guidelines which are detailed manuals, unpublished to the public, describing Department policy and interpretations, regarding substantive and procedural issues likely to arise during the conduct of an audit of a taxpayer. The Administrative Law Judge concluded that petitioner was entitled to know whether his audit was conducted within the guidelines established by the Division. However, the Administrative Law Judge regarded the request for 20 years of audit memoranda as excessive, and his order modified subpoena item number 4 as follows:

"4 All field audit guidelines, in effect for the period of time covered by the audit, which address the proper personal income tax treatment for non-resident taxpayers of gains realized on the exercise of stock options" (Order, p. 5).

Petitioner argues that the requested documents are relevant in determining whether the Division was treating all nonresidents with stock option income in the same manner. We find this request for documents to be overbroad and compliance therewith to be unduly burdensome. Further, the requested guidelines would not appear to be probative of the Division's actual treatment of other taxpayers. Therefore, we agree with the Administrative Law Judge's modification and believe it was reasonable under the circumstances. Thus, we affirm this portion of the Administrative Law Judge's order.

Finally, the Administrative Law Judge's order provided that, to the extent the Division claims any privilege from disclosure as ordered by the modified subpoena, the Division's request for in camera inspection of the documents in question prior to the hearing is granted. We find that this is a reasonable means of addressing any claims the Division may make concerning specific documents otherwise subject to production pursuant to subpoena and we affirm this portion of the Administrative Law Judge's order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lawrence G. Rawl is granted with respect to subpoena items numbered "1," "2" and "3," but is otherwise denied; and

2. The order of the Chief Administrative Law Judge is reversed in accordance with paragraph "1" above, but is otherwise affirmed.

DATED: Troy, New York  
June 2, 1997

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner