STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WINNERS GARAGE, INC.	:	ORDER DTA NO. 821662
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, 2001 through February 29, 2004.	:	

The Division of Taxation filed an exception to the Order of the Administrative Law Judge issued on April 16, 2009. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Glannon, Esq., of counsel). Petitioner appeared by Lev Wolkowicki, *pro se*.

The Division of Taxation did not file a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a brief in reply. Oral argument was not requested.

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

ISSUE

Whether the Administrative Law Judge improperly denied the motion of the Division to quash a subpoena duces tecum issued to Jose Rances, an employee of the Department of Taxation and Finance, to appear and give testimony in this matter.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") assigned David Perl, an auditor in the Division's Queens District Office, to conduct a sales and use tax field audit of Winners Garage, Inc. ("Winners Garage") for the period March 1, 2001 through February 29, 2004. As a result of the audit, the Division issued to Winners Garage a Notice of Determination (Notice No. L-025089655), dated March 18, 2005, asserting additional sales and use taxes due in the amount of $299,865.48 for the period March 1, 2001 through February 29, 2004, plus penalties of $115,909.50 and interest of $115,702.30, for a balance due of $531,477.34.

On March 21, 2005, the Division also issued two additional notices of determination, one to Lev Wolkowicki, as a responsible officer or person of Winners Garage, Inc., and one to Ruth Wolkowicki, as a responsible officer or person of Winners Garage, Inc., for additional sales and use taxes in the amount of $217,491.23, plus penalties of $83,633.83 and interest of $71,524.37, for a total amount due of $372,649.63, for the period December 1, 2001 through February 29, 2004.

On April 20, 2007, petitioner, Winners Garage, filed a timely petition for review of the Notice of Determination with the Division of Tax Appeals. On the same date, Lev Wolkowicki and Ruth Wolkowicki each filed a timely petition for review of the notices of determination with the Division of Tax Appeals.

David Perl, the Division's witness, testified about the audit of Winners Garage for the period March 1, 2001 through February 29, 2004 during the hearing held on July 1, 2008 and July 2, 2008.[1] At the hearing, Mr. Perl testified, among other things, that he discussed the audit of Winners Garage for the period March 1, 2001 through February 29, 2004 with the following

[1] The matters of Winners Garage, Inc., Lev Wolkowicki and Ruth Wolkowicki have been consolidated for hearing, with Administrative Law Judge Winifred M. Maloney assigned to hear these consolidated matters.

individuals: his supervisor; the auditor who conducted the audit of Winners Garage for an earlier period; and the auditor conducting the audit of Winners Garage for a more recent period. He also testified that his supervisor was present during all three field audit appointments. Mr. Perl was scheduled to testify again at the continued hearing scheduled to be held on March 4, 2009 through March 6, 2009.

Lev Wolkowicki, on behalf of Winners Garage, requested the issuance of subpoenas requiring the attendance and testimony of Theodore Bernstein, Steven Cassel and Jose C. Rances, Division employees, and the production of certain documents in their possession at the continued hearing scheduled to be held in Troy, New York, on March 4, 2009 through March 6, 2009.[2] Winners Garage requested the attendance of Messrs. Bernstein, Cassel and Rances at the hearing because each one possessed knowledge relevant to the tax liability at issue, the various methods of operation utilized in the New York City taxi industry, and the taxation of those taxi operations.

On February 17, 2009, Administrative Law Judge Winifred M. Maloney issued subpoenas duces tecum to Messrs. Bernstein, Cassel and Rances directing them to appear and give testimony at the hearing in the Matter of Winners Garage, Inc., to be held from March 4, 2009 through March 6, 2009, and at any recessed or adjourned date. The subpoenas duces tecum also directed Messrs. Bernstein, Cassel and Rances to bring and produce documents used to determine the number of vehicles in the audit and guidelines relevant to determination of tax in the New York City taxi industry.

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[2] Mr. Wolkowicki's undated request was received by the Division of Tax Appeals on February 12, 2009. Pursuant to 20 NYCRR 3000.10, a copy of Mr. Wolkowicki's correspondence was sent to the Division's representative, Michael Glannon, Esq., via facsimile on February 12, 2009.

By notice of motion, dated February 27, 2009 and received by the Division of Tax Appeals on March 2, 2009, the Division moved for an order withdrawing or, in the alternative, modifying the subpoenas issued to Messrs. Bernstein, Cassel and Rances. The Division's motion was supported by copies of the subpoenas duces tecum issued to Messrs. Bernstein, Cassel and Rances, the affirmation of Michael J. Glannon, Esq., the Division's representative, and the affidavits of Theodore Bernstein, Steven Cassel and Jose C. Rances. No papers in response to the motion were submitted by Winners Garage.

In his affirmation, Mr. Glannon asserts that not one of the three subpoenaed Division employees was the auditor assigned to the audit of Winners Garage for the period March 1, 2001 through February 29, 2004. Mr. Glannon argues that Mr. Perl is "clearly the best person to testify about the audit he conducted and the liability of Winners Garage" for the period in issue. Mr. Glannon further argues that compliance with the subpoenas "would constitute an undue burden on the work of Messrs. Bernstein, Cassel and Rances as well as imposing unnecessary lodging and food expenses on the Department for the three subpoenaed Department employees to comply with the subpoenas." Accordingly, Mr. Glannon requests that the subpoenas be withdrawn in their entirety or, in the alternative, that the subpoenas be modified to require attendance of Messrs. Bernstein, Cassel and Rances for not more than one day.

Theodore Bernstein, a Tax Auditor 2 in the Division's Queens District Office, supervised Mr. Perl during the audit of Winners Garage for the period at issue.

Steven Cassel, a Tax Auditor in the Division's Queens District Office, conducted the audit of Winners Garage for an earlier period.

Jose C. Rances, a Tax Auditor II in the Division's Queens District Office, is conducting the audit of Winners Garage for a more recent period.

On March 4, 2009 through March 6, 2009, the continued hearing in the matters of Winners Garage, Lev Wolkowicki and Ruth Wolkowicki was held. At the commencement of the continued hearing on March 4, 2009, the Division's motion to withdraw the subpoenas issued to Messrs. Bernstein, Cassel and Rances was orally denied. The Division's alternative motion to modify the subpoenas issued to Messrs. Bernstein, Cassel and Rances was orally granted, with Winners Garage required to present the testimony of the subpoenaed witness first. Mr. Wolkowicki was allowed to determine the order in which the subpoenaed witnesses testified.

At the continued hearing, the examination of the Division's witness, Mr. Perl, continued. The Division completed presentation of its case on March 4, 2009. Winners Garage began presenting witnesses and documents in support of its position on March 5, 2009.

In compliance with the subpoena duces tecum issued to him, Steven Cassel appeared and produced documents at the hearing held on March 4, 2009 through March 6, 2009. The examination of Mr. Cassel began on March 5, 2009 and was completed on March 6, 2009, at which point he was excused.

In compliance with subpoena duces tecum issued to him, Theodore Bernstein appeared and produced the same documents on March 4, 2009. The examination of Mr. Bernstein began on March 6, 2009 but was not completed. A continued hearing was scheduled to be held on July 20, 2009 through July 23, 2009 in Troy, New York.

The subpoena duces tecum issued to Jose C. Rances was properly served by Winners Garage. Mr. Rances did not appear at the hearing held on March 4, 2009 through March 6, 2009. At the hearing, the Division indicated that an exception will be taken to the denial of its motion to withdraw the subpoena issued to Jose C. Rances.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In her Order, the Administrative Law Judge noted that pursuant to the Tax Law and the Rules of Practice and Procedure of the Tax Appeals Tribunal, upon request of any party, a subpoena may be issued by an Administrative Law Judge to require the attendance of witnesses or to require the production of documentary evidence at a hearing. She further observed that 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 who issued the subpoena (20 NYCRR 3000.7[c]).

As Tax Law § 2006(10) provides that any subpoena issued under the authority of Tax Law shall be regulated by the New York Civil Practice Law and Rules, the Administrative Law Judge observed that CPLR § 2304 provided that "[R]easonable conditions may be imposed upon the granting or denial of a motion to quash or modify."

The Administrative Law Judge found that petitioner had requested the issuance of each of the subpoenas based on his allegation that each subpoenaed individual possessed knowledge of "the audit at issue, the methods of operation utilized in the New York City taxi industry, and the taxation of same."

In support of its motion to quash, however, the Division submitted affidavits of Messrs. Bernstein, Cassell and Rances, which collectively claimed that since David Perl conducted the audit of Winners Garage for the period March 1, 2001 through February 29, 2004, he was the best person to testify about such audit. Each subpoenaed individual also claimed that compliance with the subpoena would unduly burden his work and create a financial hardship for the Division in lodging and food expenses for at least three nights in Troy, New York.

The Administrative Law Judge found the affidavits to be "conclusory and insufficient to show that Messrs. Bernstein, Cassel and Rances lack relevant evidence in this matter" and that testimony presented at the hearing on July 1, 2008 and July 2, 2008 clearly indicated that Mr. Perl discussed the audit in question with all three subpoenaed witnesses. The Administrative Law Judge noted that the probable importance of Messrs. Bernstein, Cassel and Rances as witnesses could not be determined until each testified at the hearing (***see***, ***Matter of Edge Ho Holding Corp.***, 256 NY 374 [1931]). Accordingly, the Administrative Law Judge denied the Division's motion to withdraw the subpoenas. However, the Administrative Law Judge did modify the subpoenas to require petitioner to call the three subpoenaed witnesses as its first witnesses.

ARGUMENTS ON EXCEPTION

On exception, the Division states that it does not challenge the portion of the Administrative Law Judge's Order that denied the motion to quash the subpoenas issued to Messrs. Bernstein and Cassel. The Division notes that these two individuals, in addition to auditor David Perl, have already appeared and testified at length in this proceeding.

The Division disagrees with the Administrative Law Judge's conclusion that Jose Rances possessed knowledge of the audit at issue and that the Division failed to establish that Mr. Rances lacked relevant evidence in this matter. The Division asserts that requiring Mr. Rances to attend the continued hearing in this matter would be unreasonable, oppressive, excessive in scope or unduly burdensome.

Petitioner, in opposition, argues that the subpoena issued to Mr. Rances directed him to appear at the hearing and to produce documents used to determine the number of vehicles in the audit of petitioner and guidelines relevant to determination of tax in the New York City taxi

industry. Petitioner believes that such documents are relevant to proving petitioner's contention that tax was assessed to his corporation based on past audit results and by relying on the method of management generally employed by other taxicab companies in New York City, while his taxicab company is operated differently than others in New York City and should be assessed based on the specific manner in which his company is operated.

In reply, the Division argues that petitioner's brief in opposition was untimely and should not be considered. In the alternative, the Division urges that petitioner's arguments are unpersuasive because of the extensive testimony already provided by Messrs. Bernstein and Cassel, and that there is no need to also subpoena Mr. Rances, as he had no involvement in the audit in question.

OPINION

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.23[b]), provide that the Tribunal may, on its own motion, order extensions of time for good cause, provided that no statutory prohibition exists. An extension of time for filing a brief correspondingly extends the time for filing any other brief due at the same time and for filing succeeding briefs, unless the Tribunal orders otherwise. There is no statutory time limit prescribed for filing briefs with the Tribunal.

On May 19, 2009, petitioner was advised in writing that any brief in opposition to the Division's exception was to be served on or before June 15, 2009. On June 24, 2009, the Secretary to the Tribunal wrote to petitioner (with a copy to the Division) noting that it had no record of a brief in opposition having yet been filed, and extended the date for filing such brief until on or before July 9, 2009, with a reply brief due on or before July 16, 2009. Petitioner filed its brief in opposition on June 29, 2009. The Division filed its reply brief on July 15, 2009.

We find, therefore, that due to the extension of time for filing petitioner's brief in opposition by the Tribunal *sua sponte*, petitioner's brief in opposition was timely filed and can be considered by the Tribunal in deciding this matter.

As noted by the Administrative Law Judge in her order, Tax Law § 2006(10) authorizes Administrative Law Judges to subpoena witnesses to appear and testify at a hearing and to produce books, papers and documents pertinent to its proceedings. Pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.7[a]), upon the request of any party, the Administrative Law Judge assigned to the case:

> will issue subpoenas to require the attendance of witnesses or to require the production of documentary evidence (at a hearing): provided, however, that, where it appears to the person requested to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he may in his discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. In the event that the person requested to issue the subpoena shall after consideration of all of the circumstances determine that the subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as he or she deems appropriate.

An Administrative Law Judge is also authorized to consider a motion to quash, modify or withdraw a subpoena that (s)he issued (20 NYCRR 3000.7[c]; ***see***, ***Matter of Fisher***, Tax Appeals Tribunal, April 19, 1990). Unlike non-final orders generally, a party may appeal an Order of an Administrative Law Judge granting or denying a request to withdraw or modify a subpoena by filing an exception with the Tribunal (20 NYCRR 3000.7[e]).

Subpoenas issued under the authority of Tax Law § 2006(10) are regulated by New York's Civil Practice Law and Rules. In a challenge to a subpoena issued by the Attorney

General on the grounds that it was unconstitutionally vague and indefinite, the New York Court of Appeals upheld the subpoena, stating that:

> unless the subpoena calls for 'documents which are utterly irrelevant to any proper inquiry' (citation omitted) or its 'futility ... to uncover anything legitimate is inevitable or obvious', the courts will be slow to strike it down (citations omitted). ***La Belle Creole Intl. v. Attorney-Gen. of the State of New York*** (10 NY2d 192 at 196-197 [1961]).

As Judge Cardozo stated in ***Matter of Edge Ho Holding Corp., supra*** at 381-382):

> Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.

We note that the subpoenas on their face do not refer to any specific tax period which is somewhat ambiguous. However, in its motion to quash or have the subpoenas withdrawn, the Division failed to set forth any facts or argument to support its case that the subpoenas should be modified in any respect. All three affidavits in support of its motions contain canned language pointing to the fact that another individual was the auditor during the taxable period at issue in this case and the fact that it would be a waste of the Division employees' time and resources to attend. The affidavits do not address the question of whether the subpoenas were irrelevant to the case or whether the subpoenaed employees had within their possession any documents relating to the proceeding at issue. We will not accept conclusory statements that the subpoena is onerous without any statement regarding whether the details sought to be produced were inconsequential in comparison to the effort to be made in compliance with such subpoena. As a result, we find that the Division has failed to demonstrate that the Administrative Law Judge,

having jurisdiction to issue a subpoena to Jose Rances in this matter, acted improperly by refusing to grant the Division's motion to quash that same subpoena.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

The exception of the Division of Taxation is denied and the order of the Administrative Law Judge is sustained.

DATED: Troy, New York
October 8, 2009

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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