

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WINNERS GARAGE, INC. : ORDER
for Revision of a Determination or for Refund of Sales : DTA NO. 821662
and Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period March 1, 2001 through February 29, 2004. :

Petitioner, Winners Garage, Inc., 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, 2001 through February 29, 2004.¹

By motion dated February 27, 2009 and received by the Division of Tax Appeals on March 2, 2009, the Division of Taxation, appearing by Daniel Smirlock, Esq. (Michael J. Glannon, Esq., of counsel), seeks an order withdrawing or, in the alternative, modifying the subpoenas issued to Theodore Bernstein, Steven Cassel and Jose C. 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, pursuant to 20 NYCRR 3000.7(c). In support of its motion, the Division submitted the affirmation of Michael J. Glannon, Esq., dated February 27, 2009, and attached exhibits. Petitioner, appearing by Lev Wolkowicki, did not file a response to the motion. Based upon the motion papers, and all pleadings and proceedings associated with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ Ruth Wolkowicki and Lev Wolkowicki filed associated petitions for revision of a determination or for refund of sales and use taxes for the period December 1, 2001 through February 29, 2004.

FINDINGS OF FACT

1. 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.

2. 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.

3. 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.

4. 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, 2008.² At the hearing, Mr. Perl testified, among other things, that he discussed the audit

² 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.

of Winners Garage for the period March 1, 2001 through February 29, 2004 with the following 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.

5. 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, 2009.³ 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.

6. 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.

³ 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.

7. 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.

8. 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.

9. 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.

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

11. 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.

12. 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.

13. 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.

14. 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.

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

16. 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.

CONCLUSIONS OF LAW

A. Tax Law § 2006(10) authorizes the Tax Appeals 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 Tax Appeals Tribunal provide that, 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) (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]).

B. Section 2304 of the CPLR provides, in pertinent part, as follows:

A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. 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 Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

C. As noted above, Winners Garage filed a petition challenging the assessment issued to it as a result of the Division’s sales and use tax audit for the period March 1, 2001 through February 29, 2004. As such, Winners Garage bears the burden of proving by clear and convincing evidence that the audit method was unreasonable or that the results were unreasonably inaccurate (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679 [1988]). Winners Garage requested the issuance of the subpoenas to Messrs. Bernstein, Cassel

and Rances because each one possessed knowledge of the audit at issue, the methods of operation utilized in the New York City taxi industry, and the taxation of same. Subpoenas were joined with subpoenas duces tecum and were issued to Theodore Bernstein, Steven Cassel and Jose C. Rances, employees in the Division's Queens District Office, on February 17, 2009.⁴ The Division seeks the withdrawal of the subpoenas (ad testificandum) issued to all three Division employees. In support of its motion, the Division submitted affidavits of Messrs. Bernstein, Cassell and Rances. I find these affidavits to be conclusory and insufficient to show that Messrs. Bernstein, Cassel and Rances lack relevant evidence in this matter. Messrs. Bernstein, Cassel and Rances, in their respective affidavits, merely claim that David Perl conducted the audit of Winners Garage for the period March 1, 2001 through February 29, 2004 and is the best person to testify about such audit. Each also claims that compliance with the subpoena will 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. Testimony adduced at the hearing on July 1, 2008 and July 2, 2008 clearly indicates that Mr. Perl discussed the audit in question with all three subpoenaed witnesses, and that Mr. Bernstein, Mr. Perl's supervisor during the audit at issue, was present during all three field audit appointments. The probable importance of Messrs. Bernstein, Cassel and Rances as witnesses can not be determined until each testifies at the hearing (*Matter of Edge Ho Holding Corp.*, 256 NY 374 [1931]). Accordingly, the Division's motion to withdraw the subpoenas is denied.

D. The Division has requested that, in the alternative, if the subpoenas are not withdrawn in their entirety, the subpoenas be modified to require attendance for not more than one day. It

⁴ CPLR 2305(b)(1) provides that a subpoena duces tecum may be joined with a subpoena to testify (subpoena ad testificandum) at a trial, hearing or examination or may be issued separately.

claims that requiring the attendance of Messrs. Bernstein, Cassel and Rances for the three-day continued hearing will unduly burden their work and impose a financial hardship on the Division because it will incur lodging and food expenses for its employees, the three subpoenaed witnesses, for at least three nights in Troy, New York.

Although I do not believe it is appropriate to modify the subpoenas to require the attendance of Messrs. Bernstein, Cassel and Rances for not more than one day, the subpoenas are modified as follows. As an accommodation to Mr. Wolkowicki, who is proceeding pro se, the Division began presenting its case at the hearing held on July 1, 2008 and July 2, 2008. When the hearing ended on July 2, 2008, the Division had not rested. At the continued hearing which commenced on March 4, 2009, examination of the Division's witness, Mr. Perl, continued. Upon completion of the Division's case, Winners Garage began presenting witnesses and documents in support of its petition. I directed Winners Garage to call the three subpoenaed witnesses as its first witnesses. Mr. Wolkowicki, on behalf of Winners Garage, was allowed to decide the order in which the subpoenaed witnesses testified.

E. As noted above, the examination of Mr. Cassel was completed and he was excused on March 6, 2009. The examination of Theodore Bernstein, which began March 6, 2009, is not completed. Subpoenaed witness Jose C. Rances failed to appear at the continued hearing held on March 4, 2009 through March 6, 2009.

F. The Division of Taxation's motion to withdraw the subpoenas is denied. The Division of Taxation's motion to modify the subpoenas is granted. The subpoenas issued to Theodore Bernstein, Steven Cassel, and Jose C. Rances are ordered modified in accordance with Conclusion of Law D.

DATED: Troy, New York
April 16, 2009

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE