STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **NERAC, INC** | : | ORDER<br>DTA NO. 822568 |
| 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, 1996 through February 29, 2008. | : | |

Petitioner, Nerac, 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 December 1, 1996 through February 29, 2008.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion filed July 22, 2009, seeking a protective order pursuant to 20 NYCRR 3000.5(a ) and CPLR 3103 relieving the Division from the obligation of responding to all or part of a Notice to Admit served upon the Division dated July 13, 2009. Petitioner appears in this matter by Morrison & Foerster LLP (Irwin M. Slomka, Esq., of counsel).

After due consideration of the motion, the supporting affirmation of Robert A. Maslyn, Esq., and all the pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Taxation should be relieved of the obligation of responding to all or part of a Notice to Admit served upon the Division.

## *FINDINGS OF FACT*

1. Petitioner, Nerac, Inc., filed a petition dated October 16, 2008 protesting the assessment of sales tax determined upon an audit of petitioner conducted by the Division of Taxation (Division). The premise upon which the assessment was based is the Division's belief that the services petitioner furnished to its clients constituted the provision of an information service subject to tax pursuant to Tax Law § 1105(c)(1). The Division filed its answer, dated December 24, 2008, in opposition to the petition. A hearing on the merits in this matter is scheduled to be held on August 4 and 5, 2009.[1]

2. On or about July 13, 2009, petitioner served a Notice to Admit on the Division which generally sought, in 17 separately numbered paragraphs, admissions with respect to:

a) the commencement of the audit of petitioner (paragraph 1);

b) certain actions which occurred during, as the result of and in connection with petitioner's request for an Advisory Opinion concerning the subject matter at issue in this proceeding (paragraphs 2 through 16); and

c) the recommencement of the audit which ultimately resulted in the Notice of Determination at issue in this proceeding (paragraph 17).

3. The Division brought the instant motion pursuant to 20 NYCRR 3000.5(a) for a protective order, as set forth at CPLR 3103, on the basis that the Notice to Admit seeks admissions as to matters that are not material, relevant or necessary to the determination of the issue in this proceeding, positing that being required to respond to the Notice to Admit would constitute an undue burden upon the Division. Review of the Division's motion papers reveals that those matters on which it specifically seeks to be relieved from responding are set forth in

[1] The scheduled hearing also encompasses the associated companion Matter of John Ruest (DTA No. 822651).

paragraphs 2 through 16 of the Notice to Admit, with no apparent objection to the matters set forth in paragraphs 1 and 17.

4. There appears to be no dispute between the parties that petitioner's request for an Advisory Opinion was withdrawn and that no such Advisory Opinion was issued.

## *CONCLUSIONS OF LAW*

A. The Tax Appeals Tribunal's Rules of Practice and Procedure provide, in relevant part, that a party may, after service of the answer but not later than 20 days before the hearing, serve upon any other party a written request for admission of "the truth of any matter of fact set forth in the request. The request shall pertain to matters as to which the party requesting the admission reasonably believes there can be no substantial dispute at the hearing and which are within the knowledge of the adverse party or can be ascertained by him or her upon reasonable inquiry." (20 NYCRR 3000.6([b][1][iii])

B. 20 NYCRR 3000.6(b)(2) provides, in relevant part, as follows:

> The party to whom the request to admit is directed may choose to respond by serving a statement expressly admitting the matters in question. However, the party is deemed to admit each of the matters as to which an admission was properly requested unless, within 20 days after service of the request . . . , the party to whom the request is directed serves upon the party requesting the admission, a verified statement:
>
> (i) denying specifically the matters of which an admission is requested;
>
> (ii) setting forth in detail the reasons why those matters cannot be truthfully admitted or denied; or
>
> (iii) setting forth a claim in detail that the matters of which an admission is requested cannot be fairly admitted without some material qualification or explanation, that the matters constitute a trade secret or that such party would be privileged or disqualified from testifying concerning them. Where the claim is that the matters cannot be fairly admitted without some material qualification or explanation, the party must admit the matters with such qualification or explanation.

C. 20 NYCRR 3000.6(b)(3) provides, in relevant part, as follows:

> Any admission made, or deemed to be made, by a party pursuant to a request made under this section, is for the purpose of the pending proceeding only, and does not constitute an admission for any other purpose, nor may it be used in any other proceeding in the division of tax appeals. . . . *Any admission shall be subject to all pertinent objections to admissibility which may be interposed at the hearing.* (Emphasis added.)

D. 20 NYCRR 3000.5(a) provides, in relevant part, that "[t]o better enable the parties to expeditiously resolve the controversy, this Part permits an application . . for an order, known as a motion. Motions for costs or disbursements or motions related to discovery procedures as provided for in the CPLR will not be entertained." 20 NYCRR 3000.5(a) provides further that "the administrative law judge may be guided but not bound by the provisions of the CPLR." The Division acknowledges that the Rules of Practice and Procedure do not address protective orders in connection with a Notice to Admit, but notes that under the CPLR, a motion for a protective order may be made with regard to a Notice to Admit.

E. Finally, CPLR 3103 provides, in relevant part, as follows:

> **Protective orders**
>
> **(a) Prevention of abuse.** The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.
>
> **(b) Suspension of disclosure pending application for protective order.** Service of a notice of motion for protective order shall suspend disclosure of the particular matter in dispute.

F. Upon being served with a Notice to Admit a party may either file no response, in which case the matters for which admissions are sought would be deemed admitted, or may file a verified statement either specifically denying such matters, detailing why such matters cannot be

truthfully admitted or denied, or detailing why such matters cannot be fairly admitted without some material qualification or explanation (20 NYCRR 3000.6[b][2]). The Division, however, seeks an order excusing it from responding at all to the Notice to Admit, upon the claims that the matters as to which admissions are sought are not material, necessary or relevant to the determination of the issues in the case, and that the Division should not be required, while preparing for a hearing, to expend time and effort in ascertaining the accuracy of matters allegedly not relevant or necessary for resolution of a case.

G. As an initial matter, 20 NYCRR 3000.6(b) provides that the adverse party upon whom a motion is served shall have a period of 30 days after the date of service of the motion to file a response thereto. 20 NYCRR 3000.6(e) provides that the filing of a motion does not constitute cause for postponement of a hearing from the date set therefore, unless a continuance is specifically ordered by the administrative law judge following receipt of the motion. The Division has chosen not to respond to the Notice to Admit, but rather to bring the subject motion seeking to be excused from responding to the Notice to Admit. Given that the subject motion was filed July 22, 2009, and that the hearing in this matter is scheduled for August 4 and 5, 2009, the period of time within which a response to this motion could be filed by petitioner is less than the 30-day period for such a response as provided at 20 NYCRR 3000.6(b). These circumstances would ordinarily result in a denial of the motion on such basis, without postponement of the hearing date and without prejudice to the moving party's ability to raise any appropriate arguments based on the motion at hearing. However, in the interest of completeness, the substance of the Division's motion will be addressed briefly hereinafter.

H. Review of the matters as to which admissions are sought, as set forth in the Notice to Admit, does not reveal that expecting the Division to respond thereto in the manner set forth in

20 NYCRR 3000.6(b)(2) would impose an unduly burdensome, expensive, annoying, embarrassing, disadvantageous or prejudicial task to the Division, the imposition of which would constitute an abuse of process within the contemplation of CPLR 3103. Further, the Division's complaint that such matters are immaterial, unnecessary and irrelevant to the determination of the issues in the case is not a basis for an order relieving a party from responding to a Notice to Admit. Rather, any objections based thereon may, appropriately, be interposed at the hearing (20 NYCRR 3000.6[b][3]). In this respect, the Division might choose to respond by not responding, leaving the matters in question deemed admitted, per 20 NYCRR 3000.6(b)(2), but nonetheless subject to objection as immaterial, unnecessary and irrelevant to resolution of the issues in the case. This latter conclusion applies, as well, to the Division's argument that the matters for which admissions are sought appear to be within the personal knowledge of petitioner or its representative.

I. The Division of Taxation's Motion for a protective order is denied and the case will proceed to hearing as scheduled.

DATED: Troy, New York
July 28, 2009

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE