STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GLENNA MICHAELS	:	ORDER DTA NO. 823370
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2004.	:	

Petitioner, Glenna Michaels, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2004.

On May 3, 2011 the Division of Taxation, by its representative, Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel), brought a motion, seeking an order modifying a subpoena served upon it in the above-captioned matter on April 27, 2011 pursuant to 20 NYCRR 3000.5 and 20 NYCRR 3000.7(c). Petitioner appeared in opposition to the motion by her representative, Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel). The parties completed their submissions by May 3, 2011, which date began the 90-day period for issuance of this order.

After due consideration of the Division of Taxation's motion, the affirmation of Christopher O'Brien, Esq., with attached exhibits, the affirmation in opposition of Timothy P. Noonan, Esq., with attached exhibits, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the subpoena duces tecum served upon the Division of Taxation in this matter, seeking the production of electronic correspondence concerning the Division of Taxation's interpretation of the "accrual rule" should be modified or withdrawn.

FINDINGS OF FACT

1. This matter involves the issue of when a gain accrues for tax purposes to a seller of real property who becomes a resident of New York State prior to the transfer. In filing her income tax return, petitioner took the position that the gain was attributable to that portion of the tax year when she was a Connecticut resident. After audit, the Division of Taxation (Division) took the position that the gain from the sale was not fixed and determinable until the actual closing on the real property, at which time petitioner was a New York resident, thus requiring her to include the gain as New York income.

2. Of particular importance to the determination of this matter is the application of the "accrual rule" contained in Tax Law § 639, and petitioner has sought through a subpoena duces tecum, both in the New York Supreme Court and in this forum, to access information and materials germane to the interpretation of that Tax Law section. Only the subpoena duces tecum issued by the Division of Tax Appeals is addressed herein.

3. Petitioner is seeking electronic mail (e-mail) concerning the Division's application or interpretation of the "accrual rule" contained in Tax Law § 639, Tax Law § 638 "or previous iterations" of same. Although petitioner originally requested all e-mail from the Division, in a letter from her representative, Timothy P. Noonan, Esq., to the attorney for the Division, Christopher O'Brien, Esq., dated January 27, 2011, she has modified and restricted this request to include e-mail from "[s]enior management . . . responsible for Income/Franchise Tax, including

but not limited to the Audit Director, Program Directors, District Office Managers, and all personnel in Field Audit Management." In addition, petitioner requested e-mail from all personnel in the office of counsel and the office of tax policy analysis.

4. Petitioner believes the e-mail is relevant to her argument that the Division has inconsistently applied the accrual rule and thus failed to provide a reasonable basis for the assessment.

5. Following the issuance of the subpoena duces tecum by the Division of Tax Appeals on April 13, 2011 and its service on the Division on April 27, 2011, the Division brought this motion to modify the subpoena on May 3, 2011, and a response to the motion by petitioner was made on the same day in the form of an affirmation in opposition.

6. The Division bases its motion to withdraw or modify on the grounds that the e-mails sought in the subpoena duces tecum are not relevant; that the information sought is protected and privileged by the secrecy provisions of the Tax Law; that the information sought is privileged as attorney-client communications; that some e-mails may have been destroyed by Division personnel during a Department-wide program to "clean out" old e-mails and create more storage space on computers between April 2009 and February 2010; and that a review of the information would be unduly burdensome.

7. The Division concedes that it has found 165 e-mails, some of which have attachments, with an estimated 1,000 pages of material. Mr. O'Brien conceded that he had not reviewed all the e-mails "in depth," but noted that "at least some I reviewed contain confidential taxpayer information and are wholly irrelevant to this matter."

8. Petitioner argues that the confidentiality claim is unfounded because the Division has previously produced information with taxpayer information but has redacted that material as a

safeguard. In addition, petitioner believes the Division's claim that producing the 165 e-mails would be unduly burdensome is groundless since only 165 e-mails were discovered and only a portion of those have been reviewed to see whether they satisfy the search criteria.

9. Petitioner contends that the Division's failure to take any action to preserve potentially relevant documents warrants an adverse inference at trial. She argues that a negative inference be drawn and a holding made that the missing information would have shown the Division applied the "accrual rule" in an inconsistent manner.

10. Petitioner filed her notice of intent to seek a judicial subpoena on November 22, 2010, which included a copy of the proposed subpoena duces tecum.

CONCLUSIONS OF LAW

A. The regulation at 20 NYCRR 3000.7(c) provides that a motion may be made by the party upon whom a subpoena duces tecum is served to withdraw or modify same. The motion to withdraw is tantamount to a motion to quash under CPLR 2304, and as such, it is the exclusive vehicle to challenge the validity of the subpoena. (***Ayubo v. Eastman Kodak Co.***, 158 AD2d 641 [1990].)

B. The standard to be applied on a motion to quash, modify or withdraw a subpoena duces tecum is whether the requested information is "utterly irrelevant to any proper inquiry" (***Matter of Dairymen's League Coop. Assn. v. Murtagh,*** 274 App Div 591 [1948] ***affd*** 299 NY 634 [1949]).

Based on the record, it cannot be said that the request is utterly irrelevant and the Division is directed to produce the 165 electronic mail messages and attachments to petitioner, using its own discretion with regard to sensitive taxpayer information and privileged communications. Such information may be redacted, a procedure the Division has utilized with previous

documents produced in this matter with the consent of petitioner, or omitted, with an explanation of each such omission.

The Division's estimate of the number of pages to be produced can not be considered unduly burdensome since the Division concedes it has not completed a detailed review of all the material and, therefore, can not say whether all the material is responsive to the request or how many pages will ultimately be produced. Further, a review of 165 e-mails does not facially appear to be beyond the capabilities of the Division of Taxation.

C. The parties should also be aware that this order does not ensure admission into evidence of the information produced. It has been held:

> A subpoena duces tecum for use at a trial or hearing, and the denial of a motion to quash such subpoena duces tecum, are not the equivalent of an order of disclosure. The subpoena merely directs the subpoenaed party to have the documents in court so that the court may make appropriate direction with respect to the use of such documents. (***Ayubo v. Eastman Kodak Co.*** at 945.)

Should this matter proceed to hearing, a ruling on the admissibility of the documents produced hereunder will be made. Such a ruling will be made after either party's objections are heard. Should the matter proceed following a waiver of the hearing, the administrative law judge will rule on the admissibility based only on the submissions themselves and briefs or memoranda of law submitted with the documents.

D. The Division of Taxation raised a vague reference to the destruction of electronic information during the period April 2009 through February 2010. Mr. O'Brien's affirmation is the only evidence of this alleged purge in the record and makes no representation that he had any specific knowledge that any e-mails relative to this subpoena request were destroyed. Further, the first notice the Division would have had that petitioner would seek e-mails with respect to the accrual rule was in the notice of intent to seek a judicial subpoena, filed on November 22, 2010

in the Supreme Court action. That date was nine months after the alleged purge took place, making it impossible for the Division to have taken steps to preserve the specific e-mails.

For this reason, it is concluded that petitioner's request, that a negative inference be drawn, holding that the missing information would have demonstrated an inconsistent application of the accrual rule, must be denied. There is insufficient evidence that the alleged purge occurred and, even if it did, there is nothing in the record to indicate any e-mail relevant to the subject of the subpoena duces tecum was destroyed.

Therefore, it is ORDERED, ADJUDGED and DECREED that:

1. The Division of Taxation's Motion to Withdraw or Modify Subpoena, dated May 3, 2011, is denied in accordance with the terms of this Order;

2. Petitioner's request for a negative inference based on the alleged destruction of records is denied;

3. The Division of Taxation is directed to produce the documents, consistent with the terms of this Order prior to the scheduled hearing date in this matter.

DATED: Troy, New York
June 23, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE