

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
	:	
of	:	
	:	DECISION
123 LINDEN, LLC	:	DTA NOS. 830249 AND
	:	830866
for Revision of a Determination or for Refunds of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period June 1, 2017 through	:	
December 13, 2020.	:	

The Division of Taxation filed an exception to the order of the Administrative Law Judge issued on November 2, 2023. The order denied a motion brought by the Division on July 10, 2023, seeking an order withdrawing three subpoenas duces tecum issued by the Administrative Law Judge at petitioner's request pursuant to 20 NYCRR 3000.7 (a). The Division of Taxation appeared by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel). Petitioner appeared by H. Friedman & Associates, CPA (Herschel Friedman, CPA).

The Division of Taxation filed a brief in support of the exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument was heard on September 26, 2024, in New York, New York, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether the subpoena duces tecum for three Division of Taxation employees requiring their appearance and production of certain documents for in camera inspection was

properly issued by the Administrative Law Judge.

II. Whether petitioner is required to exhaust all other remedies before requesting the Administrative Law Judge to issue a subpoena to the Division to produce third-party tax information.

FINDINGS OF FACT

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

1. On December 14, 2020, petitioner, 123 Linden LLC, filed an application for credit or refund of sales or use tax (application) in the amount of \$558,000.00 for the period June 1, 2017 through December 13, 2020. This application was based upon petitioner's claim that it erroneously paid sales tax on a capital improvement contract with Yuanda USA Corporation (Yuanda).

2. On January 25, 2021, the Division issued to petitioner a refund claim determination notice, document locator number: AM2012116957 (refund claim #AM2012116957), that denied a claim for refund of sales or use tax in the amount of \$558,000.00 for the period June 1, 2017 through December 13, 2020 (refund denial notice). The explanation section of the refund denial notice provided the following detailed explanation:

“Your claim for credit or refund of sales or use tax is being denied in full.

The New York State Sales and Use Tax law [sic] imposes a tax on the cost of the building materials used in the performance of a capital improvement. The purchaser of the materials, whether it.s [sic] the contractor or the homeowner, must pay the sales tax on those materials at the time of the purchase. If the contractor supplies, and installs the materials that are used in a capital improvement, the contractor must pay the tax on all materials that are used. The contractor then includes the sales tax he paid in the cost of the materials that he charges to his customer. The contractor may or may not choose to show this cost on the invoice to his customer.

Your claim for a refund is being denied because you were not charged sales tax on the purchase of a capital improvement i.e. [sic] materials, supplies and labor. As required by law, any sales tax charged must be separately stated on the invoice. If you are charged tax on a capital improvement, the invoice would show tax charged on the total of materials, supplies and labor. The sales tax shown on the statement you included with your claim was merely a recoupment by the contractor of his cost of materials. Accordingly, your claim is denied in full.

In addition, the Sales and Use Tax Law requires that a refund application be filed within three years from the date the taxes are payable to the Tax Department. Sales Tax is deemed to be payable on the 20th day of the month following the quarter in which the sale/purchase was made.

Your claim was filed on 12/21/2020. Based on the three year [sic] statute of limitations, your claim can only include periods beginning on 09/01/2017. All taxes paid on sales/purchases made before that date cannot be recommended for approval.”

3. Petitioner timely filed its petition with the Division of Tax Appeals on February 2, 2021, in protest of the refund denial notice. The Division of Tax Appeals assigned DTA number 830249 to this petition (petition DTA number 830249). In its petition, petitioner asserted that sales tax was paid for services that were in the nature of and in conjunction with a capital improvement that are exempt from tax. The Division filed its answer to the petition on April 14, 2021.

4. Subsequently, on May 6, 2021, petitioner filed a motion seeking summary determination in petition DTA number 830249, pursuant to 20 NYCRR 3000.9 (b). The Division filed a response to the motion on June 4, 2021. By order dated September 2, 2021, the Administrative Law Judge denied petitioner’s motion for summary determination and directed the scheduling of a hearing in petition DTA number 830249.

5. Subsequently, a hearing for petition DTA number 830249 was scheduled to be held in New York City, on March 1, 2022. During the exchange of documents immediately preceding

the scheduled hearing date, petitioner discovered a page of notes included at the back of the Division's proposed exhibit "C," its answer.

6. Among the exhibits attached to Mr. Friedman's affidavit in opposition to the Division's motion to withdraw or modify the subpoenas is the Division's answer and the page of notes. That page of notes provided, as follows:

"On December 14, 2020, TDAB-Sales Tax Refunds received an Application for Credit or Refund from 123 Linden LLC in the amount of \$558,000.00. The request was for sales tax paid on a capital improvement. Along with the application were invoices/schedules, copies of cancelled checks, lien waiver, power of attorney, and letter of explanation from the representative.

A review of the documentation was performed which included reviewing the invoice and the description of the job performed, an internet review of the contractor performing the job including the type of services they provide, and a review of the contractor's sales tax filing history. Based on this review, it was determined that the claimant was not charged tax on a capital improvement, i.e. [sic] materials, supplies and labor, but that sales tax was only shown on the contractor's schedule as recouping the sales tax paid on the materials used in the job. A denial letter was prepared by the reviewer advising the claimant that sales tax was not paid on the capital improvement and a refund cannot be granted. The denial letter was reviewed and approved by the supervisor and refund team leader. Denial letter was issued to the claimant on 01/25/21."

7. As a result of its discovery of the page of notes, petitioner requested that the Division provide all the documents which played a role in the denial of the refund claim. However, the Division refused to comply with petitioner's request. Subsequently, the undersigned granted petitioner's request for an adjournment of the hearing for petition DTA number 830249.

8. On November 19, 2021, petitioner filed a separate application for credit or refund of sales or use tax in the amount of \$391,211.98 for the period September 1, 2018 through December 31, 2019.¹ This application included only three transactions under petitioner's contract with Yuanda. The Division assigned refund claim #AM2111135515 to this application.

¹ In the letter accompanying this application, petitioner's representative referred to it as the "Sales Tax refund application (Protective Claim) of 123 Linden LLC."

9. By letter, dated December 22, 2021, Laura Mugrace, an auditor in the Division's Transaction Desk Audit Bureau, returned refund claim #AM2111135515 to petitioner.

Specifically, Ms. Mugrace's letter stated, in part, as follows:

"Upon review of the AU-11 filed on 11/19/21 for the period from 09/01/18-12/31/19 requesting a refund in the amount of \$391,211.98, it appears this is a duplicate of prior claim AM2012116957. That claim in the amount of \$558,000.00 was filed on 12/21/20 for the period 06/01/17-12/13/20. Therefore, this claim is being returned to you as a duplicate."

10. In an email, dated December 31, 2021, petitioner's representative asked the Division's auditor, Ms. Mugrace, whether refund claim #AM2111135515 "is still under review by the Audit Division" or whether "this claim has been finally disposed of." In a reply email, dated December 31, 2021, Ms. Mugrace confirmed that "[t]his claim was returned because it is a duplicate of prior claim #AM2012116957 and will not be reviewed by the Audit Division."

11. On February 28, 2022, petitioner filed a petition with the Division of Tax Appeals, in protest of the Division's denial of petitioner's refund claim #AM2111135515. The Division of Tax Appeals assigned DTA number 830866 to this petition (petition DTA number 830866). On May 4, 2022, the Division filed its answer for petition DTA number 830866.

12. At the request of petitioner, the Division of Tax Appeals associated the petitions assigned DTA numbers 830249 and 830866.

13. After the scheduled March 1, 2022 hearing for petition DTA number 830249 was adjourned, petitioner filed a freedom of information law (FOIL) request (F-10558) with the Division that requested all documents pertaining to sales tax refund claim #AM2012116957 and sales tax refund claim #AM2111135515.

14. The Division responded by correspondence, dated April 21, 2022, to petitioner's FOIL request (F-10558). Specifically, Jennifer Hink-Brennan, Esq., the Division's Records

Access Officer, wrote, in part, as follows:

“This letter relates to your Freedom of Information Law request as referenced [for 123 Linden LLC – F-10558] requesting records maintained by the Department. The cost of photocopying the enclosed documents is \$56.00. . . . The enclosed materials are outlined below:

- Sales Tax Refund Claim #AM2012116957
- Sales Tax Refund Claim #AM2111135515

Please be advised that:

- Nine pages of the file are withheld pursuant to Section 87(2)(b) of the Freedom of Information Law. These pages contain information concerning businesses for whom there is no Power of Attorney on file and the release of this information would constitute an invasion of privacy.

I certify that to the best of my knowledge we have no other documents that are responsive to your FOIL request. If you feel that additional records exist and are within the control of the Department of Taxation and Finance, please articulate a demonstrable factual basis to support this contention.”

15. These associated matters were scheduled for hearing in Albany on August 15 and 16, 2023.

16. By letter, dated May 22, 2023, petitioner’s representative requested the Administrative Law Judge to issue subpoenas “duces tecum ad testificandum” for Ms. Mugrace, Ms. Albano and Ms. Hink-Brennan, to compel their personal appearances at the hearing in these associated matters, “for testimony and production of documents.” Petitioner’s representative, in his letter, requested that the subpoenas:

“cover ALL materials and documentation that were involved in the decision making processes and their confirmation, in the denial of the refund claims at issue. . . . In particular and without limitation this request seeks the production of the third party [sic] tax returns that were repeatedly requested by Petitioner and withheld to date.”

17. The Division’s representative sent a letter to the Administrative Law Judge, on June 2, 2023, in reply to petitioner’s request for subpoenas in these associated matters.

18. On June 26, 2023, the Administrative Law Judge issued a subpoena duces tecum for Jennifer Hink-Brennan, Esq., Records Access Officer, to appear and attend the hearing in these associated matters in Albany, on August 15 and 16, 2023, and bring and produce the following:

“1. All materials and documentation involved in the original decision-making processes and their confirmation, in the denial of sales tax refund claims # AM201211695 [sic] and # AM2111135515, and the continued consideration and evaluation of these refund claims, including without limitation, the third-party tax returns contained in the file(s).”

On the same date, the Administrative Law Judge issued a subpoena duces tecum for Laura Mugrace, Tax Technician I, and a subpoena duces tecum for Diane Albano to appear and attend the hearing in these associated matters in Albany on August 15 and 16, 2023. Both these subpoenas required the production of:

“1. All materials and documentation involved in the original decision-making processes and their confirmation, in the denial of sales tax refund claims # AM201211695 [sic] and # AM2111135515, and the continued consideration and evaluation of these refund claims, including without limitation, the third-party tax returns contained in the file(s).”

All three subpoena duces tecum were served on the Division on June 30, 2023 at 12:41 p.m.

19. In support of its motion to withdraw or modify subpoenas, the Division submitted, among other things, (i) the affidavit, dated July 10, 2023, of Brandon Batch; (ii) the subpoenas duces tecum for Ms. Hink-Brennan, Ms. Mugrace and Ms. Albano, respectively, each of which was issued by the undersigned on June 26, 2023 and served on the Division on June 30, 2023; (iii) the letter from petitioner’s representative, dated May 22, 2023, requesting the issuance of the subject subpoenas, one each for Ms. Hink-Brennan, Ms. Mugrace and Ms. Albano, respectively, directing each one’s appearance and production of certain documents; (iv) the letter from the Division’s representative, dated June 2, 2023, in reply to petitioner’s request for subpoenas in these matters; and (v) the affidavit, dated July 10, 2023, of Jennifer L. Hink-Brennan.

20. In his affidavit, Mr. Batch asserts that the subpoena request for Ms. Hink-Brennan is not made in good faith or is not relevant to the current case. Mr. Batch further asserts that to the best of his knowledge, “the only connection Jennifer Hink-Brennan has to the present case is that she was assigned” a FOIL request from petitioner. Mr. Batch claims that a request for a lawyer who oversaw a FOIL request “is overburdensome and irrelevant to the matter at hand.” He further claims that if petitioner is unhappy with the result of its FOIL request, petitioner is able to appeal the FOIL response through the proper channels and proper courts. Mr. Batch contends that petitioner “intends to use the Court to force Jennifer Hink-Brennan to testify to FOIL law and why she withheld sensitive documentation.” He further contends that the subpoena for Ms. Hink-Brennan “is an attempt to force the Division to produce irrelevant documentation and be over-burdensome to the Division and the Court, creating unnecessary issues that are not relevant to the case or issue at hand.” With respect to the subpoenas duces tecum for Ms. Mugrace and Ms. Albano, respectively, each requiring the production of certain documents, Mr. Batch, in his affidavit, asserts that “the request for specific third-party tax returns is against” the provisions of Tax Law § 1146 (a) and, therefore, those subpoenas should be modified to exclude the terms “without limitation, the third-party tax returns contained in the file(s).”

21. In her affidavit, Ms. Hink-Brennan asserts that at no time has she “ever handled or supervised any audit or litigation issues for Division of Tax Appeals matters #830249 and #830866” for the Division. She further asserts that her “only connection to these DTA matters is that [she] reviewed a FOIL request from Petitioner’s representative.” With respect to that FOIL request, Ms. Hink-Brennan further claims that she “complied with all applicable New York State laws, in completing [her] FOIL review, including following any secrecy provisions contained in the New York State Tax Law.” Ms. Hink-Brennan maintains that she has no knowledge whether

petitioner or petitioner's representative has appealed the response to the FOIL request. In addition, Ms. Hink-Brennan asserts that she has "no personal knowledge" of these matters. As such, the Division requests that petitioner's subpoena for Ms. Hink-Brennan be withdrawn.

22. In opposition to the Division's motion to withdraw or modify the subpoenas, petitioner submitted, among other items, the affidavit, dated July 26, 2023, of Mr. Friedman. In his affidavit, Mr. Friedman admits that petitioner was not able to obtain a third-party waiver from Yuanda for its tax returns. Mr. Friedman claims that the Division's allegations in its motion papers that petitioner is (i) acting in bad faith, (ii) "trying to complicate this case by demanding irrelevant documents without cause," and (iii) "trying to be overly burdensome, causing unnecessary issues," are groundless. He further claims that the Division "was not forthright by concealing the fact that the auditor thoroughly reviewed the third party vendor, Yuanda's, sales tax return history and filings as part of the consideration of Petitioner's refund claim." Mr. Friedman, in his affidavit, also asserts that the concealed information played a significant role in the denial of the sales tax refund claim #AM2012116957, because the reasons expressed by the Division in the refund denial notice, dated January 25, 2021, "are in direct contradiction to the documentation provided by Petitioner to the Division." In Mr. Friedman's affidavit, petitioner contends that the Division has no standing to make the motion to withdraw the subpoena for Ms. Hink-Brennan and to modify the subpoenas for Ms. Mugrace and Ms. Albano. Petitioner further contends that the instant motion was made by the Division only; however, "the Division was not subpoenaed and as such does not possess the requisite standing to make this motion." Petitioner argues that:

"[t]he Division cannot file one collective motion on its own behalf to withdraw or modify subpoenas issued to three other persons, who were subpoenaed because they have personal knowledge, and access to documents relevant to Petitioner's case."

With respect to the subpoena for Ms. Hink-Brennan, petitioner asserts that it was properly issued. Petitioner further asserts that appealing the FOIL response is not the only action available to it. Pursuant to 20 NYCRR 3000.7 (a), an administrative law judge has the discretion and may issue a subpoena to require the attendance of any witness. With respect to the Division's contention that the subpoenas as issued demand protected third-party tax returns in violation of Tax Law § 1146 (a), petitioner asserts that this is a sales tax refund case, a related tax matter, and therefore, the tax returns sought are not protected or immune from subpoena.

23. With permission, the Division filed a sur-reply to the Division's request to withdraw or modify the subpoenas issued by the undersigned in these associated matters. The undersigned permitted the Division to submit a sur-reply limited to a clarification of case law. The Division submitted the affidavit of Brandon Batch as its sur-reply. In his affidavit, Mr. Batch asserts that "the petitioner incorrectly states that the Division has no standing, without citing law or case law." Mr. Batch further asserts that the Division believes that:

"as employees of the Division, in relation to an audit performed by the Division, they have the right to be represented by the Division, whom the subpoenas were served through the office of counsel of the New York State Department of Taxation and Finance."

In Mr. Batch's affidavit, the Division argues that petitioner has misread the actual language of Tax Law § 1146 (a). The Division maintains that the full language of Tax Law § 1146 (a) makes it clear that an officer charged with the protection of tax records shall not be required to produce any such record, or even what is contained in them, to any court, except on behalf of the Commissioner. Although the Commissioner may require the production of such records, the Division maintains that, in the present case, the Commissioner has not allowed the release of such records. Mr. Batch, in his affidavit, asserts that, in the present case, the "audit file did not

contain third-party tax returns,” and the “auditors did not make their determination based on the third-party tax returns.”

24. By letter, dated July 27, 2023, the undersigned adjourned the hearing in these associated matters scheduled to be held on August 15 and 16, 2023, pursuant to 20 NYCRR 3000.5 (e).

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed applicable law and held that it was appropriate and lawful pursuant to Tax Law § 2006 (10)² and 20 NYCRR 3000.7 (a) and (c) for the Administrative Law Judge to issue subpoenas for witnesses and documents pertinent to its proceedings and for the Division, acting on behalf of the persons to whom the subpoenas were issued, to request a motion to withdraw or modify those subpoenas.

Turning to the Division’s motion for withdrawal of the subpoena to the Division’s FOIL Officer, the Administrative Law Judge found that the documents sought through Ms. Hink-Brennan were relevant since the Division had produced a proposed exhibit “C,” which indicated the Division had conducted a review of Yuanda’s sales tax history in connection with denying sales tax refund claim #AM2012116957. The Administrative Law Judge noted that the FOIL request made by petitioner in the sales tax refund claims #AM2012116957 and #AM2111135515 was a direct result of the Division’s use of third-party tax information used in its review and denial of petitioner’s refund claims. The Administrative Law Judge, therefore, found that the subpoenaed documents were relevant and not unduly burdensome.

The Administrative Law Judge next considered the Division’s request to modify the subpoena for Ms. Mugrace and Ms. Albano to exclude the terms “without limitation, the third-

² The Division correctly noted that the Administrative Law Judge mistakenly cited Tax Law § 2010 (6) instead of Tax Law § 2006 (10).

party tax returns contained in the file[s].” The Administrative Law Judge noted that petitioner was seeking only those materials in the files for refund claims #AM2012116957 and #AM2111135515 and not the disclosure of third-party tax return information that are not contained in those files. The Administrative Law Judge found that the three witnesses were being called to produce documents from petitioner’s audit file which was part of the decision-making process and held that documentation of review of the third-party sales tax filings contained in petitioner’s audit file was pertinent to the case and declined to modify the subpoenas.

As a result of the review, the Administrative Law Judge denied the Division’s motion to modify or withdraw the subpoenas stating that documents produced by the three witnesses would be submitted for an in camera review during which the Administrative Law Judge would determine what portion of such third-party returns, third-party tax filing history or other facts shown would be admitted into evidence at the hearing.

ARGUMENTS ON EXCEPTION

Petitioner contends that the Administrative Law Judge’s order should be affirmed in all respects and suggests that the Division is not operating out of a solemn duty to protect the privacy of taxpayer data but rather a desire to conceal its reliance on third-party tax information in its denial of the requested refunds. With regard to the subpoena issued to the Records Access Officer for documents and testimony, petitioner confirmed that it seeks no substantive testimony from Ms. Hink-Brennan other than the identification and authentication of the documents as custodian of those records.

The Division seeks the withdrawal of the subpoena for Jennifer Hink-Brennan and the

modification of the three subpoenas to remove language requiring the production of third-party information.

On exception, the Division challenges the Administrative Law Judge's "executive branch" authority to issue subpoenas which the Division contends is limited to the "judicial branch." The Division further challenged the subpoena to the Records Access Officer as a violative of the FOIL appeal process and not relevant to the issue of whether the taxpayer can sustain its burden of proof since Ms. Hink-Brennan "has no personal knowledge and of and cannot otherwise testify as to the issue in this matter." The Division asserts that the subpoena was "an attempt to circumvent the FOIL process, and its appeals procedure" and was otherwise "burdensome." The Division contends that petitioner bears the burden of proof and should have exhausted its options to secure the third-party's tax information directly from the third party via a request for a subpoena.

Lastly, citing Tax Law § 1146 (a) the Division contends it is not possible to produce the information as it is entrusted with the secrecy of taxpayer information and the Division of Tax Appeals is "without authority to require otherwise," and that a subpoena should have been issued to or a waiver obtained from the third party granting the Division permission to release the information sought. The Division argues that it could be subject to "criminal sanctions" for "[a] violation of tax secrecy" and warned that, if affirmed, the in camera review suggested by the Administrative Law Judge would mean she "assumed the onus of the potential ramifications of making an improper disclosure."

OPINION

Tax Law § 2006 (10) provides that this Tribunal and the administrative law judges within the Division of Tax Appeals have the authority to:

“[t]o take testimony and proofs, administer oaths, take affidavits and certify acknowledgements in relation to any proceeding conducted pursuant to the authority of the division of tax appeals. The tribunal shall have the power to subpoena and require attendance of witnesses and the production of books, papers and documents pertinent to the proceedings which it is authorized to conduct, and to examine them in relation to any matter which it has power to investigate and to issue commissions for the examination of witnesses who are out of this state or unable to attend proceedings conducted pursuant to the authority of the division or excused from attendance of such proceedings . . . A subpoena issued under this subdivision shall be regulated by the civil practice law and rules.”

The Administrative Law Judge correctly noted that Tax Law § 2006 (10) authorizes the Tax Appeals Tribunal, and those it may designate and authorize to act, to issue subpoenas requiring the attendance of witnesses and/or the production of books, papers and documents (*see also* 20 NYCRR 3000.15 [c] [2]). A subpoena issued under said section shall be regulated by the civil practice law and rules (CPLR) (Tax Law § 2006 [10]).

The Tax Appeals Tribunal’s Rules of Practice and Procedure (Rules) provide that, upon the request of any party, an administrative law judge will issue a subpoena to require the attendance of a witness or the production of documentary evidence at a hearing (*see* 20 NYCRR 3000.7 [a]). That regulation states, in relevant part:

“[u]pon the request of any party, the administrative law judge or presiding officer 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” (*id.*).

We find that in response to the Division’s argument in its motion to withdraw the subpoenas, the Administrative Law Judge correctly found that there was no facial

indication that the requested subpoenas duces tecum were unreasonable, oppressive, excessive in scope or unduly burdensome (*see* 20 NYCRR 3000.7 [a]-[c]).

It is well established under our Rules and decisions regarding the issuance of subpoenas that an administrative law judge may consider a motion to quash, modify or withdraw a subpoena (20 NYCRR 3000.7 [c]; *see also* CPLR 2304; *Matter of Winners Garage, Inc.*, Tax Appeals Tribunal, October 8, 2009; *see also Matter of Fisher*, Tax Appeals Tribunal, July 19, 1990). The gravamen of the Division's complaint that it should not be required to turn over any third-party tax information even if that information is relied upon or contained in petitioner's audit file is that: (1) it is petitioner who has the burden of establishing it is entitled to the refund; (2) there are other routes to obtain this information which should be exhausted; and (3) the information is protected by privacy laws which the Division may not violate by complying with the subpoena. We take these arguments in turn.

Petitioner bears the burden of proof in establishing its entitlement to the requested refunds (20 NYCRR 3000.15 [d] [5]); *see Matter of Gallagher*, Tax Appeals Tribunal, October 23, 2003). Here, petitioner contends that its vendor Yuanda wrongly charged petitioner sales tax on a capital improvement it undertook for petitioner and that the proof is in the tax information maintained by the Division and is being withheld from petitioner. Petitioner contends that the Division has withheld third-party information critical to proving its case. The Administrative Law Judge ordered the Division to produce those documents for in camera review, where she will rule on their relevancy. We find that the Administrative Law Judge acted within her authority in ordering the production of these documents for the purpose of in camera review (*see Matter of Moody's Corp. & Subsidiaries*, Tax Appeals Tribunal, March 22, 2019). The burden of production of the subpoenaed documents and witnesses rests with the Division, although, as

noted by the Division, the burden of proving an entitlement to the claimed refund remains with petitioner (*see* Tax Law § 1132 [c] [1] [establishing that the burden of proving any receipt is not taxable is borne by the person required to collect tax or the customer]; *see also* 20 NYCRR 3000.15 [d] [5]).

The Division's second argument centers on its contention that a petitioner must exhaust all other remedies outside of issuance of a subpoena to the Division before seeking access to the third-party tax information maintained by the Division. Specifically, the Division contends that "the best source" for Yuanda's tax return information is Yuanda itself and petitioner should have subpoenaed the documents from this corporation. Notably, the Division cited no legal authority for this exhaustion argument. Simply because petitioner could have requested a subpoena be issued to Yuanda does not create a legal requirement that it must first do so. Additionally, the Division of Tax Appeals is expressly authorized by statute to issue a subpoena to compel the production of documents in an administrative proceeding (*see* Tax Law § 2006 [10]; 20 NYCRR 3000.7 [a]; *see also Matter of Moody's Corp. & Subsidiaries*). Accordingly, we find the Division's contention that petitioner should have first sought the withheld documents from Yuanda to be without merit.

Lastly, we consider the Division's argument concerning the privacy of the sought records pursuant to the prohibitions against routine disclosure of tax information contained in Tax Law § 1146. In its motion to the Administrative Law Judge, the Division sought to modify the subpoenas for Ms. Mugrace and Ms. Albano to exclude the terms "without limitation, the third-party tax returns contained in the file(s)." The Division asserts that the modification is necessary pursuant to Tax Law § 1146 (a) that prohibits the disclosure of third-party tax information. Tax Law § 1146 (a) provides, in relevant part, as follows:

“Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who in any manner may acquire knowledge of the contents of a return or report filed with the commissioner pursuant to this article, to divulge or make known in any manner any particulars set forth or disclosed in any such return or report. The officers charged with the custody of such returns and reports shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the commissioner in an action or proceeding under the provisions of the tax law or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the commissioner is a party or a claimant, or on behalf of any party to any action, proceeding or hearing under the provisions of this article when the returns, reports or facts shown thereby are directly involved in such action, proceeding or hearing, in any of which events the court, or in the case of a hearing, the commissioner may require the production of, and may admit into evidence, so much of said returns, reports or of the facts shown thereby, as are pertinent to the action, proceeding or hearing and no more. The commissioner may, nevertheless, publish a copy or a summary of any decision rendered after a hearing required by this article. Nothing herein shall be construed to prohibit the delivery to a person who has filed a return or report or his duly authorized representative of a certified copy of any return or report filed in connection with his tax.”

We find that there is no need to modify the subpoenas for Ms. Mugrace and Ms. Albano. We have held that in camera inspection of material and documentation is warranted where “it is difficult to determine if [the] government’s assertion of privilege is warranted without forcing disclosure of the very thing sought to be withheld” (*see Matter of Moody’s Corp. & Subsidiaries*, citing *Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 119 [1974]). Here, the Division’s concerns about the unwarranted disclosure of third-party tax information are premature. The Administrative Law Judge is not ordering the Division to disclose the third-party information to petitioner or the public-at-large, but merely to submit it for review in camera and ex parte of petitioner in order to conduct a determination of its relevancy. In the event that the documents being sought contain relevant detail needed to support petitioner’s claim, we are confident that the Administrative Law Judge’s obligations relating to the privacy of a third-party’s tax information will remain during and subsequent to the subject in camera review. The

Administrative Law Judge, after conducting an in camera review of the documents subject to the subpoena, shall determine whether such information may be disclosed under applicable law (*see e.g. Matter of Moody's Corp. and Subsidiaries*). The information including the tax returns as it relates to the third-party must be disclosed only to the extent that the information was used in the decision-making processes in the denial of the refund claims at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The order of the Administrative Law Judge is modified to limit the testimony of the Division's Records Access Officer to the authentication of the documents identified as responsive to the subpoena duces tecum, but is otherwise affirmed; and
3. The motion of the Division of Taxation to modify or withdraw the subpoenas duces tecum, dated June 26, 2023, is denied except as provided in paragraph 2 above.

DATED: Albany, New York
March 20, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner