STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOODY'S CORPORATION & SUBSIDIARIES	:	ORDER DTA NO. 827396
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2004 through 2010.	:	

Petitioner, Moody's Corporation & Subsidiaries, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under article 9-A of the Tax Law for the years 2004 through 2010.

On April 27, 2017, the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel), brought a motion seeking an order, pursuant to 20 NYCRR 3000.7 (c), withdrawing a subpoena duces tecum served upon the Division in the above-captioned matter on April 17, 2017. The motion was accompanied by an affirmation, dated April 27, 2017, and attached exhibits, and a memorandum of law in support of withdrawal. On May 24, 2017, petitioner, appearing by Eversheds Sutherland (US) LLP (Marc A. Simonetti, Esq., and Andrew D. Appleby, Esq., of counsel), submitted a brief in opposition to the motion to withdraw, together with an attached addendum. The period within which to respond to the motion closed on May 28, 2014, which date began the 90-day period for issuance of this order. By a letter dated August 17, 2017, the 90-day period was extended for an additional three months (20 NYCRR 3000.5 [d]). After due consideration of the Division's motion, attached affirmation and exhibits,

the parties' briefs, and all the pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether a subpoena duces tecum served upon the Division of Taxation, and ordering the production of various documents relating to the Division's sourcing of credit rating receipts, in general and in connection particularly with an audit of petitioner for the audit period January 1, 2004 through December 31, 2010, should be withdrawn upon the basis that disclosure of the documents sought via the subpoena is precluded by statute or protected pursuant to privilege.

FINDINGS OF FACT

Background

1. Petitioner, Moody's Corporation & Subsidiaries, is a Delaware corporation headquartered in New York. Petitioner operates a credit rating agency that analyzes financial information and also generates and publishes opinions concerning debt instruments and securities (credit ratings).

2. Petitioner was the subject of a corporation franchise tax audit under Tax Law article 9-A, conducted by the Division of Taxation (Division), covering the period January 1, 2004 through December 31, 2010 (audit period), and including the tax imposed under Tax Law § 209 and the Metropolitan Commuter Transportation District (MCTD) surcharge tax (MTA surcharge) under Tax Law § 209-B.

3. On January 11, 2012, petitioner and the Division executed a closing agreement (Closing Agreement), pursuant to Tax Law § 171 (18), relating to the audit period. Petitioner, in turn, made payment in accordance with the Closing Agreement on January 13, 2012.

4. On December 11, 2014, petitioner filed amended corporation franchise tax returns and MTA surcharge tax returns, requesting refunds for the years 2004 through 2010.

5. By letters dated March 4, 2015 and April 20, 2015, the Division denied petitioner's refund claims.

6. On December 18, 2015, petitioner filed a petition with the Division of Tax Appeals challenging the denials of the foregoing refund claims.

7. On March 30, 2016, the Division filed its answer to the petition.

8. On April 18, 2016, petitioner filed a reply to the Division's answer.

9. Petitioner seeks, via its refund claims, to set aside the Closing Agreement. More specifically, petitioner maintains that during the audit, the Division asserted that petitioner was required to source its credit rating receipts on an origination basis (i.e., where the "service" giving rise to the receipts was performed based upon the costs of performance [***see*** Tax Law § 210 (a); 20 NYCRR 4-4.3 (a)]). Petitioner asserted, in contrast, that it should be able to source such receipts upon a destination basis (i.e., initially based upon the location of the debt issuers whose creditworthiness petitioner rated, but thereafter changed to a sourcing method applicable to publishers, based upon the global investing public and using a population method as a proxy for where investors viewed the credit ratings issued by petitioner). During the audit on October 8, 2008, petitioner requested an advisory opinion confirming that such receipts are properly sourced on a destination basis. In addition, on June 30, 2009, petitioner supplemented its request for an advisory opinion by submitting a request for alternative apportionment of its credit ratings receipts (***see*** Tax Law § 210.8 [a]; 20 NYCRR 4-6.1). Petitioner asserts that the Division refused to issue an advisory opinion regarding the proper method of sourcing credit rating receipts, and stated that petitioner had to address the issue at audit.

10. In early 2011, the parties entered into negotiations to settle the audit, and these negotiations resulted in the Closing Agreement. During this time, petitioner suspected that the Division was permitting another taxpayer, McGraw-Hill, to source credit rating receipts on a destination basis. During its negotiations with the Division, petitioner inquired as to whether any other credit rating agencies were permitted to source receipts on a destination basis. Petitioner alleges the Division represented that it did not allow such destination based receipts sourcing. Petitioner chose to enter into the Closing Agreement, accepting any negotiated benefit(s) conferred thereby, including a "small reduction" (***see*** Petition at ¶ 35), rather than complete the audit process and pursue its claims that destination sourcing and/or alternative apportionment were appropriate and allowable.

11. As noted, petitioner and the Division executed the Closing Agreement on January 11, 2012. Thereafter, petitioner learned that the Division had, in fact, permitted another taxpayer to source credit rating receipts on a destination basis.[1] Petitioner has asserted that the Closing Agreement it agreed to and executed was not in its best interest, in that it paid tax thereunder pursuant to an origination sourcing method based on its reliance upon the Division's representations concerning sourcing of credit rating receipts, as made during audit settlement negotiations. Petitioner has specifically alleged that it would not have executed the Closing Agreement if the Division had not represented that it did not permit any credit rating agencies to source credit rating receipts on a destination basis.

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[1] Petitioner's "suspicion" that the Division was allowing petitioner's competitor, McGraw-Hill, to source credit rating receipts on a destination basis (***see*** Finding of Fact 10), was confirmed via the issuance of a New York City litigation determination concerning McGraw-Hill's 2003 - 2007 apportionment (***see Matter of McGraw-Hill Cos.***, TAT [H] 10-19 [GC] et al. [NYC Admin. Law Div. Feb. 24, 2014), and a New York State litigation order concerning McGraw-Hill's 2002 - 2005 apportionment (***see Matter of McGraw-Hill Cos.***, DTA No. 825598 [NYS Div. Tax App. Feb. 12, 2015]).

12. In this matter, petitioner seeks the disclosure of certain documents it claims are relevant to the substantive tax issues upon which its claims for refund are premised. Petitioner maintains that concealing the documents it seeks is "problematic" because resolving the substantive tax issues requires petitioner to establish, at the outset, whether the Division concealed the existence of an agreement with a similarly situated taxpayer that allowed destination sourcing. Petitioner has alleged here, as well as in its petition, that by concealing its agreement with McGraw-Hill, the Division concealed its true position regarding taxation of the credit rating industry. Petitioner maintains, in turn, that such concealment constituted "fraud, malfeasance, or misrepresentation of a material fact," within the contemplation of Tax Law § 171 (18), and provides sufficient grounds to set aside the Closing Agreement and reopen the matter so as to address the substantive question of how petitioner's credit rating receipts should have been sourced, as well as other audit issues.

Freedom of Information Document Requests

13. On April 14, 2014, petitioner filed two requests under the Freedom of Information Law (FOIL) seeking documents concerning the Division's sourcing of credit rating receipts for the tax years 2004 through the present, and in connection with the audit of petitioner for the audit period.[2]

14. In a June 2014 response, the Division's Records Access Officer agreed to disclose certain records to petitioner. He also identified 807 pages of materials that were responsive to petitioner's FOIL request, but were withheld as exempt. Specifically, 416 pages were withheld as exempt from disclosure by state or federal statute pursuant to Public Officers Law (POL) § 87 (2)

[2] These filings were made after petitioner's stated suspicions concerning whether the Division had allowed another taxpayer to source its receipts on a destination basis (***see*** Finding of Fact 10) were confirmed (***see*** Finding of Fact 11, n 1).

(a), and 391 pages were withheld as exempt pursuant to POL § 87 (2) (g) (iii) as inter-agency or intra-agency materials which are not final agency policy or determinations.

15. On July 23, 2014, petitioner filed FOIL administrative appeals challenging the Division's decision to withhold entirely, or to release with redactions, certain documents responsive to petitioner's FOIL request.

16. In August 2014, and with respect to the audit file, five pages were released with redactions, and 178 pages were withheld as exempt. The bases for withholding certain pages were the Division's assertions that the same, or portions thereof, were exempted from FOIL disclosure by:

> a) POL § 87 (2) (a), because the records are specifically exempted from disclosure pursuant to statute, citing Tax Law § 211 (8) (a) (the "secrecy provision" rendering corporation franchise tax reports and information confidential), and CPLR 4503 (attorney-client privilege).
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> b) POL § 87 (2) (b), because disclosure would constitute an unwarranted invasion of personal privacy.
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> c) POL § 87 (2) (e), because the records were compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations.
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> d) POL § 87 (2) (g), because the records constituted non-final inter-or-intra-agency materials that were deliberative in nature.

17. In an August 2014 determination on appeal, the Division's Records Access Appeals Officer released additional documents to petitioner, but upheld the denial of, or redaction to, the remaining documents. Specifically, of the 807 pages withheld in June 2014:

> – three pages were blank.
> – 12 pages were clearly not responsive to the request.
> – 68 pages were released without redactions.
> – 13 pages were released with redactions.
> – 711 remained withheld.

18. In a September 2014 determination on appeal as to petitioner's 183 page audit file, the Division's Records Access Appeals Officer:

– upheld the redaction of five pages.
– released an additional 26 pages without redaction.
– released an additional six redacted pages.
– upheld the prior determination to withhold the remaining 146 pages.

Court Proceedings

19. Petitioner challenged the Records Access Appeals Officer's determinations by commencing a CPLR article 78 proceeding in Albany County Supreme Court. As part of its response, the Division provided the Court with two privilege logs (Log F-02261 and Log F-02170), together with all of the withheld or redacted documents at issue (disputed documents), for the Court's in-camera review. Log F-02261 identifies documents regarding the Division's audit of petitioner, while Log F-02170 identifies documents regarding another taxpayer. Each log identifies the various documents by tab number, and with respect to each tab number lists the bases upon which exemption from disclosure was asserted by the Division.

20. By a Decision and Order dated August 31, 2015, Albany County Supreme Court held that the Division had properly responded to petitioner's FOIL requests, and upheld virtually all of the Division's determinations to withhold, or redact and disclose, the requested documents (***see Matter of the Application of Moody's Corp. and Subs. v N.Y. State Dep't of Taxation and Fin., et al.***, [Sup Ct, Albany County, August 31, 2015, Elliott, III, J; Index No. 6197-14] [unpublished opinion] [***Moody's I***]). Specifically, after his in-camera review of the documents, Judge Elliott ordered the Division to disclose 17 documents, some with redactions, that had been withheld by the Division.[3] As noted above, the documents subject to the court's in-camera review were

[3] The items to be disclosed consisted of 13 documents without redactions and 4 documents with redactions.

identified in the privilege logs by tab numbers. As part of his Decision and Order, Judge Elliott "marked up" the privilege logs, thereby indicating, with respect to the tab-numbered documents, the court's rejection of certain grounds listed by the Division in support of non-disclosure (specifically "attorney-client privilege [Public Officers Law section 87 (2) (a)"] and/or "Secrecy provisions [Tax Law section 211 and Public Officers Law section 87 (2) (a)"], and/or "deliberative, non-final, intra-agency and/or inter-agency materials [Public Officers Law section 87 (2) (g)]"). The marked-up privilege logs were attached as a part of the court's Decision and Order, and the method by which the court reviewed and marked-up the logs was described therein as follows:

> "The Court has indicated which exemptions or privileges it found did or did not apply to each document by striking out those reasons that the Court found did *not* apply. The Court has further indicated on the privilege logs which documents are to be turned over to Petitioner, as all of the privileges or exemptions asserted have been struck. In the event that the Court has ordered a document redacted prior to release, it is duly noted on the privilege logs. The Court further reviewed all redacted pages to determine if the exemptions applied and marked the privilege logs accordingly" (***Id.***, at 18, emphasis added).

21. Cross appeals were filed by the parties. By a Memorandum and Order issued on July 21, 2016, the Appellate Division, Third Department, modified the Albany County Supreme Court's Decision and Order, and required the Division to produce only 10 of the 17 documents ordered disclosed by Judge Elliott (***see Moody's Corp. v New York State Dep't of Taxation and Finance***, 141 AD3d 997 [3d Dept. 2016]) [***Moody's II***]). As part of its review on appeal, the Third Department conducted its own in-camera review of the same documents that had been submitted to Judge Elliott. The Court determined that the documents consisted of "emails, draft agreements, a final closing agreement, draft correspondence and correspondence from and regarding petitioner and nonparty taxpayers . . . documents regarding another taxpayer and . . .

documents regarding the [Division's] audit of petitioner" (***Moody's II***, at 1000). The Third Department did not include (by appending) Judge Elliott's marked-up privilege logs as part of its decision, and did not specifically and individually address all of the Division's asserted grounds for withholding, or redacting and disclosing, certain documents, or petitioner's objections to such grounds. Rather, the Court concluded that "[It had] considered the parties' remaining contentions and [found] them to be without merit or, in light of the foregoing, not necessary to resolve." The Court noted its specific modifications to Judge Elliott's Decision, and "as so modified, affirmed" (***Moody's II***, at 1004).

22. On September 16, 2016, the Third Department, on motion for reargument, issued a second Decision and Order, solely correcting the decretal paragraph of its July 21, 2016 Memorandum and Order to accurately reflect the modifications made to Judge Elliott's Order. As a result of the foregoing, on October 17, 2016, the Division released 8 of the disputed documents to petitioner.

Subpoena Proceedings

23. On September 22, 2016, petitioner commenced a special proceeding in the Albany County Supreme Court, pursuant to CPLR § 2307, seeking "a judicially issued subpoena compelling [the Division] to produce certain documents and records" that were claimed to be "material and necessary for [petitioner] to prosecute a pending petition for tax refunds in the [Division of Tax Appeals]."

24. By a Decision and Order dated December 1, 2016, the Albany County Supreme Court denied the Division's motion to dismiss, and granted the Division a period of 30 days (from service of the decision) within which to serve an answer. On January 11, 2017, the Division

served its answer and memorandum of law in opposition, and oral argument was heard on March 7, 2017.

25. By a Decision and Judgment dated April 3, 2017, the Albany County Supreme Court denied petitioner's request for a judicial subpoena (***see Matter of the Application of Moody's Corp. and Subs. v N. Y. State Dep't of Taxation and Fin., et al.***, [Sup Ct, Albany County, April 3, 2017, Ryba, J; Index No. 5594-16] [unpublished opinion] [***Moody's III***]). In her decision, Judge Ryba acknowledged that CPLR § 2307 authorizes the Court to issue a subpoena duces tecum requiring a state agency to produce any documents relevant to a pending action or proceeding. However, she concluded that because the Division of Tax Appeals is expressly authorized by statute to issue a subpoena to compel the production of documents in an administrative proceeding, per Tax Law § 2006 (10) and 20 NYCRR 3000.7 (a), "CPLR § 2307 does not apply and this Court therefore lacks authority to issue the requested subpoena duces tecum (citations omitted)." Instead, "[t]he subpoena request must be made to the agency, whose determination as to whether to issue the subpoena may be appropriately challenged in court upon judicial review of the agency's final determination." Judge Ryba further stated that:

> "In view of the foregoing conclusion, it is unnecessary to address the parties' remaining arguments. However, if the Court were to address those arguments, it would find that petitioner failed to exhaust (sic) his available administrative remedies by neglecting to request a subpoena at the agency level prior to seeking relief in Supreme Court, thereby rendering this proceeding premature (citation omitted). *It would further find that petitioner failed to overcome respondents' showing that the disputed documents are protected by the tax secrecy provisions of Tax Law § 211(8) and are otherwise privileged*." (emphasis added)

The Present Dispute

26. By a letter dated April 7, 2017, petitioner's counsel requested the issuance of a subpoena duces tecum, pursuant to 20 NYCRR 3000.7, ordering the Division to produce various

documents relating to the Division's sourcing of credit rating receipts for tax years 2004 through 2010, and in connection particularly with its audit of petitioner for the audit period January 1, 2004 through December 31, 2010.[4]

27. On April 12, 2017, the requested subpoena duces tecum was issued by the undersigned, directing the Division to produce the requested documents at the offices of petitioner's counsel on April 28, 2017. Thereafter, on April 17, 2017, the subpoena was served by petitioner upon the Division.

28. As noted, the Division raised a number of grounds against disclosure in the FOIL litigation. In this matter, petitioner specifically states that the documents it seeks by subpoena are only those that have been determined to be protected exclusively by the inter-or-intra-agency materials FOIL exemption provision of POL § 87 (2) (g), described in the two privilege logs as "Deliberative, non-final, intra-agency and inter-agency materials." Petitioner asserts that this protection is inapplicable in the context of a subpoena, and that the documents must therefore be disclosed. The Division asserts, by contrast, that the documents sought herein are statutorily protected from disclosure by subpoena upon two of the bases asserted in the FOIL litigation, to wit, tax secrecy under Tax Law § 211, and attorney-client privilege under CPLR § 4503. The Division further contends that the documents are also protected from disclosure under the public interest privilege. In order to properly address and resolve this matter, given the foregoing assertions, it is necessary to review the privilege logs so as to identify, by tab number, the particular disclosure protections assertedly applicable to the various documents.

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[4] The documents to be produced were those specified in the privilege logs for which disclosure was sought via petitioner's FOIL requests, but which were ultimately determined to be exempt from disclosure as the result of the ensuing appeals concerning those requests. The documents were identified in connection with the subpoena request by way of an addendum (Addendum A) attached to petitioner's request for the subpoena.

Review of Privilege Logs

29. In the FOIL litigation, the Division asserted the inter-or-intra-agency materials FOIL exemption provision of POL § 87 (2) (g) for all of the documents sought herein by subpoena. In addition, the Division further asserted in the FOIL litigation:

> a) statutory secrecy disclosure preclusion (but not statutory attorney-client protection) with respect to certain documents.
>
> b) statutory attorney-client disclosure protection (but not secrecy preclusion) with respect to certain documents.
>
> c) both statutory secrecy and attorney-client non-disclosure with respect to certain documents.

30. Careful review of the two privilege logs (F-02261 and F-02170), attached to the subpoena and setting forth the documents for which petitioner continues to seek disclosure, in comparison to the same two logs, as submitted to, marked up and attached to Judge Elliott's August 31, 2015 Decision and Order in ***Moody's I***, and as addressed on appeal by the Appellate Division in ***Moody's II***, reveals the following:

> a) All of the currently subpoena-requested documents are those that the Courts held to be protected from FOIL disclosure as deliberative, non-final, inter-or-intra agency materials under POL § 87 (2) (g). Petitioner does not seek disclosure herein of any of the documents with respect to which the Courts held that disclosure was precluded under the secrecy provisions of the Tax Law § 211, or protected under the statutory attorney-client privilege of CPLR § 4503.
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> b) In the FOIL litigation, and in addition to its assertion of disclosure protection under POL § 87 (2) (g), as above, the Division also asserted statutory disclosure protection under the attorney-client privilege (CPLR § 4503), per POL § 87 (2) (a), (but not also under the secrecy provisions of Tax Law § 211), with respect to the following specific documents:

1) Log F-02261: the documents identified at tabs 40, 91 and 92.[5]

2) Log F-02170: the documents identified at Tabs 33, 34, 171-176, 194-196, 198-201, 203, 204, 213, 214, 220, 221, 223-225, 227, 230, 236-244, 250, 262-264, 269, 278, 291-293, 296, 298, 309, 311, 312, 315, 344 (same as Tab No. 278), 348 (same as Tab No. 223), 351-358, 359 (same as Tab No. 188), 361-363, 367, and 369-372.

With regard to the foregoing documents, the Albany County Supreme Court specifically struck through, and thus rejected, the Division's asserted claim of statutory non-disclosure protection under the attorney-client privilege of CPLR § 4503 (per POL §87 [2] [a]), as inapplicable, and this holding was not specifically addressed or disturbed on appeal in ***Moody's II***.

c) In the FOIL litigation, and addition to its assertion of disclosure protection under POL § 87 (2) (g), as above, the Division also asserted statutory disclosure preclusion under the secrecy provisions of the Tax Law (Tax Law § 211), per POL § 87 (2) (a), (but not also under the attorney-client privilege of CPLR § 4503), with respect to the following specific documents:

1) Log F-02170: the documents identified at tabs 10-14, 90-95, 192, 197, 202, 231-235, 255, 256, 273, 274, 280, 281, 301, 314, 316, 317, 328-330, 337 (same as tab no. 192), 341, 342 (same as tab no. 273), and 343.

With regard to the foregoing documents, the Albany County Supreme Court specifically struck through, and thus rejected, the Division's asserted claim of statutory disclosure preclusion under the secrecy provisions of Tax Law § 211 (per POL §87 [2] [a]), as inapplicable, and this holding was not disturbed on appeal in ***Moody's II***.

d) In the FOIL litigation, and in addition to its assertion of disclosure protection under POL § 87 (2) (g), as above, the Division also asserted both statutory disclosure protection under the attorney-client privilege (CPLR §

[5] Review confirms that the courts held the documents identified in Log F-02261, at tabs 12 and 48, were protected from disclosure by POL § 87 (2) (g), and by the statutory secrecy provisions of Tax Law § 211 (per POL § 87 [2] [a]). Disclosure of these documents is no longer sought by petitioner. In fact, there is no assertion of statutory disclosure preclusion under the tax secrecy provisions of Tax Law § 211 with respect to any of the documents in privilege log F-02261 that remain in issue here.

> 4503), and statutory disclosure preclusion under the secrecy provisions of the Tax Law (Tax Law § 211), per POL § 87 (2) (a), with respect to the following specific documents:
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> 1) Log F-02170: the documents identified at tabs 16, 98, 99, 101-103, 105-111, 113, 114, 117-120, 122, 123, 125, 127, 129, 130, 132, 133, 139, 141, 144-154, 161, 167-169, 177, 185, 188, 190, 206-212, 257, 265, 270-272, 282-289, 303, 367, 310, 318-323, 332 (same as tab no. 111), 334 (same as tab no. 190), 335, 336, 364, and 365.

With regard to the foregoing documents, the Albany County Supreme Court specifically struck through, and thus rejected, the Division's asserted claims of statutory disclosure preclusion under the secrecy provisions of Tax Law § 211 (per POL §87 [2] [a]), and statutory disclosure protection under the attorney-client privilege of CPLR § 4503 (per POL §87 [2] [a]), as inapplicable, and this holding was not disturbed on appeal in ***Moody's II***.

> "e) In the FOIL litigation, the Division asserted disclosure protection under POL § 87 (2) (g), as above, but did not assert disclosure protection under either the attorney-client privilege (CPLR § 4503), or statutory disclosure preclusion under the secrecy provisions of the Tax Law (Tax Law § 211), per POL § 87 (2) (a), with respect to the following specific documents:
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> 1) Log F-02170: the documents identified at tabs 18, 20-32, 35, 37-52, 186, 193, 205, 222, 226, 245-249, 251-254, 258-261, 266-268, 275, 279, 300, 302, 304-306, 345, 346, 347 (same as tab no. 222), 349 (same as tab no. 226), 350, 360, 368, and 373."

31. Review of Privilege Log F-02170, as attached to the subpoena, in comparison to the same privilege log, as marked up and attached to Judge Elliott's August 31, 2015 Decision and Order in ***Moody's I***, reveals that there is only one instance, concerning the documents identified at tab no. 15, where the court upheld non-disclosure on all three of the bases asserted by the Division (i.e., POL § 87 [2] [a] upon statutory preclusion [per Tax Law § 211], statutory attorney-client privilege [per CPLR § 4503], and POL § 87 (2) (g) [deliberative, non-final intra-agency materials grounds]). In each of the other, numerous, instances where the Division claimed a statutory bar against disclosure, based upon the attorney-client privilege under CPLR § 4503, the

Supreme Court struck the same as inapplicable. In those numerous instances where the Division asserted a claim of non-disclosure based on a statutory bar, under the secrecy provisions of Tax Law § 211, the Supreme Court upheld some and rejected others. To the extent that the Division did not assert either attorney-client statutory disclosure protection, or tax secrecy statutory disclosure preclusion, with respect to certain documents, it was simply unnecessary for the reviewing courts to address the same.

32. In those instances where the Albany County Supreme Court upheld non-disclosure on the basis of statutory bar, under Tax Law § 211, the same were specifically upheld on appeal (***see Moody's II*** at 1003 [holding, "*in particular*," that the specific tab numbered items where the Albany County Supreme Court had upheld non-disclosure on secrecy grounds were indeed not subject to disclosure upon that basis (italics added)]).[6] Petitioner does not challenge those results, and as noted earlier, only seeks disclosure herein of the documents with respect to which non-disclosure was upheld by the courts on the sole basis of such documents being deliberative, non-final, intra-agency materials (per POL § 87 [2] [g]).

33. In its memorandum in support of withdrawal of the subpoena, the Division states that the Appellate Division, in ***Moody's II***, did not specifically address the Division's assertion of the secrecy provisions of Tax Law § 211 (8) as grounds for withholding the following documents:

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[6] The Court quoted the relevant portion of the secrecy provision under Tax Law § 211 (8) (a) as follows:

"It shall be unlawful for any tax commissioner, any officer or employee of the [Department], . . . or any person who [,] in any manner may acquire knowledge of the contents of a report filed pursuant to [Tax Law article 9-A], to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report under [Tax Law article 9-A]" except that the respondent Commissioner of Taxation and Finance "may . . . publish a copy or a summary of any determination or decision rendered after the formal hearing provided for in [Tax Law § 1089]."

Log F-02170: the documents identified at tabs 10-14. 16, 90-95, 98, 99, 101-103, 105-111, 113, 114, 117-120, 122, 123, 125, 127, 129, 130, 132, 122, 139, 141, 144-154, 161, 167-169, 177, 185, 188, 190, 192, 197, 202, 206-212, 215-219, 231-235, 255-257, 265, 270-274, 280-289, 301, 303, 307, 310, 314, 316-323, 328-330, 333-337, 341-343, 364, and 365 (***see*** Finding of Fact 30 [c] [1], [d] [1]).

34. In its memorandum in support of withdrawal of the subpoena, the Division states that the Appellate Division, in ***Moody's II***, did not specifically address the Division's assertion of the attorney-client protection under CPLR § 4503 as grounds for withholding the following documents:

> "a) Log F-02261: the documents identified at tabs 40, 91, and 92 (***see*** Finding of Fact 30 [b] [1]).
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> b) Log F-02170: the documents identified at tabs 16, 33, 34, 98, 99, 101-103, 105-111, 113, 114, 117-120, 122, 123, 125, 127, 129, 130, 132, 133, 139, 141, 144-154, 161, 167-169, 171-177, 185, 188, 190, 194-196, 198-201, 203, 204, 206-214, 220, 221, 223-225, 227-230, 236-244, 250, 257, 262-265, 269-272, 278, 282-289, 291-293, 296, 298, 303, 307, 309-312, 315, 318-332, 333-336, 344, 348, 351-359, 361-365, 367, 369-372 (***see*** Finding of Fact 30 [b] [2], [d] [1])."

35. The Division maintains that since the Appellate Division did not specifically address the Division's tax secrecy and attorney-client assertions in favor of non-disclosure of the documents identified above at Findings of Fact 33 and 34, on appeal in ***Moody's II***, the same bases remain validly asserted herein as grounds for non-disclosure of such documents.

36. Review reveals that the Appellate Division did not, in its decision in ***Moody's II***, in fact specifically address the Division's assertions of statutory disclosure preclusion under Tax Law § 211 (8), and statutory disclosure protection under CPLR 4305, with respect to the documents specified above in Findings of Fact 33 and 34. However, review also reveals that the Albany County Supreme Court did, in its decision in ***Moody's I***, specifically reject, by strike-through, the Division's assertions of such statutory bars to disclosure.

37. A hearing on the substantive issues raised by the petition had been scheduled for May 3 - 5, 2017, i.e., prior to petitioner's request for, and the issuance and service of, the subpoena at issue herein. During an April 20, 2017 pre-hearing telephone conference call with the parties, Division's counsel stated that the Division intended to file a motion seeking withdrawal of the subpoena. In response, the undersigned advised the parties that upon receipt of a motion to withdraw the subpoena, the scheduled hearing would be adjourned, and the subpoena would sit in abeyance pending resolution of the motion to withdraw.

CONCLUSIONS OF LAW

A. Tax Law § 2010 (6) authorizes the Tax Appeals Tribunal, and those it may designate and authorize, to issue subpoenas requiring the attendance of witnesses and/or the production of books, papers and documents pertinent to proceedings which it is authorized to conduct. A subpoena issued under said section shall be regulated by the civil practice law and rules (CPLR). The Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) specifically 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]; emphasis added). Since there was no facial indication that the requested subpoena was "unreasonable, oppressive, excessive in scope or unduly burdensome," it was issued as required under the noted regulation, and in turn, was properly served by petitioner (20 NYCRR 3000.7 [b]).[7]

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[7] During the April 20, 2017 conference call (***see*** Finding of Fact 37), the undersigned advised the parties that the subpoena was in error insofar as the designated return place for production for the documents was specified as petitioner's counsel's offices. In fact, the relevant regulation provides only for the production of documents under administrative subpoena in Division of Tax Appeals matters "at a hearing" (***see*** 20 NYCRR 3000.7 [a]). The regulation does not nullify or limit a party's statutory right to use subpoenas (***see*** Tax Law § 2006.10; CPLR article 23), but rather simply specifies a consistent and reasonable place of return for administrative subpoenas issued in connection with Division of Tax Appeals matters. Petitioner's argument that such administrative subpoenas can be returnable at any reasonable time and place (***see*** petitioner's brief at Point IV) oversteps this regulation, and is

B. The Rules also permit "any person to whom [such] subpoena is directed" to request, by motion to an administrative law judge, that the subpoena be modified or withdrawn (20 NYCRR 3000.7 [c]). In response to the subpoena, the Division properly filed its motion to withdraw, asserting in particular that disclosure of the documents sought is statutorily precluded by the secrecy provisions of Tax Law § 211 (8) (a), and/or statutorily protected by the attorney-client privilege under CPLR § 4503 (a), and/or protected by the judicially developed public interest privilege.

C. Under the subpoena at issue here, petitioner seeks production of only those documents with respect to which the courts rejected all of the Division's prior assertions of exemption from disclosure in the FOIL proceedings, save for exemption under POL § 87 (2) (g) (based on the claim that the documents were deliberative, non-final, intra-or-inter agency materials) (***see*** Findings of Fact 19 through 22). In ***Moody's I***, the Albany County Supreme Court conducted an extensive in-camera review of the documents sought, but denied, via the Division's FOIL responses. In so doing, the court specifically (and necessarily) considered and addressed each of the Division's assertions in support of non-disclosure, including those based upon the statutory bars of tax secrecy and attorney-client privilege. The court determined that such bars applied in a number of instances. However, and critically, with respect to the documents sought herein, the court specifically held such statute-based bars to disclosure, as asserted by the Division, did not apply, and so indicated by strike-through markings on the privilege logs, as appended to and made a part of its decision (***see*** Finding of Fact 20; ***Moody's I***).

D. On appeal, the Appellate Division also conducted an extensive in-camera review of all of the same documents sought under the FOIL proceedings, in light of the same assertions in

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therefore rejected.

support of non-disclosure as were raised by the Division in ***Moody's I***. Upon such review, the Appellate Division affirmed the Albany County Supreme Court's holdings, with only minor modifications thereto (***see*** Finding of Fact 21; ***Moody's II***). Review and comparison of: a) the marked-up privilege logs attached to the Albany County Supreme Court's Decision in ***Moody's I***; b) the Appellate Division's Decision in ***Moody's II***, and c) the Addendum attached to the subpoena herein, confirms that none of the minor modifications made by the Appellate Division resulted in a reversal of the Albany County Supreme Court's rulings that neither tax secrecy (per Tax Law § 211), nor attorney-client privilege (per CPLR § 4503), were applicable or served as bars against disclosure of any of the documents now sought by petitioner under subpoena duces tecum in this proceeding. Notwithstanding the foregoing, however, the Division's motion for subpoena withdrawal nonetheless continues to assert that non-disclosure is warranted upon the basis of the tax secrecy provisions under Tax Law § 211, and upon the attorney-client privilege under CPLR § 4503 (***see*** Conclusion of Law B).

E. The Division appears to hinge its tax secrecy and attorney-client privilege assertions against disclosure under subpoena upon the claim that the Appellate Division noted, "in particular," those instances where Supreme Court affirmatively held the secrecy provisions of Tax Law § 211 *did* apply to bar the release of certain specific documents, but did not likewise note, "in particular," those instances where Supreme Court's rulings by strike-through indicated that such provisions, as well as the attorney-client privilege, *did not* apply as a bar to disclosure. As detailed, the Appellate Division did, in fact, specifically note its agreement that the Albany County Supreme Court properly withheld disclosure of a number of documents upon the basis of the secrecy provisions of Tax Law § 211, and in its Decision in ***Moody's II*** identified by tab number those specific documents to which it was referring. The Court expressly found some

documents were protected by tax secrecy, but not by the inter-or-intra-agency materials FOIL exemption (per POL § 87 [2] [g]), and further expressly found that some documents were protected by both (***see Moody's II*** at 1002, 1003 n. 1).

F. The Division correctly states the general proposition that "the same protections (tax secrecy, attorney-client privilege and public interest privilege) against disclosure apply here, in the context of disclosure under subpoena, as they did in petitioner's special proceeding" (***see*** Division's Memorandum in Support of Subpoena Withdrawal at 7). However, the Division fails to acknowledge that the first two of such three asserted bases for denying disclosure, with respect to the documents sought herein, were previously raised and were rejected by the courts as not applicable to such documents (***see Moody's I*** and ***Moody's II***). The Division's argument that the Appellate Division did not address, "in particular," either Tax Law § 211, or the attorney-client privilege, as grounds for withholding other documents from disclosure, overlooks the facts that: a) in every other instance where the Division asserted either of such grounds, the Albany County Supreme Court specifically struck through, and hence rejected, those asserted bases as valid grounds for non-disclosure, and b) that the Albany County Supreme Court's holdings in this respect were affirmed on appeal.

G. The Division appears to interpret the Appellate Division's conclusion that "[it had] considered the parties' remaining contentions and find them to be without merit or, in light of the foregoing, not necessary to resolve," as standing for the proposition that it was reversing the Albany County Supreme Court's rulings that the secrecy provisions and the attorney-client privilege were struck through and hence were inapplicable. This view is simply belied by review of the marked-up privilege logs. The fact that the Appellate Division did not specifically identify, by tab number, all of those rulings of the Albany County Supreme Court that struck

certain asserted bases for non-disclosure as inapplicable, does not support the broader proposition that the Appellate Division thereby did not affirm such "strike-through" rulings. If, as the Division seems to argue, the Appellate Division's Decision in ***Moody's II*** served to reverse those instances where the Albany County Supreme Court found secrecy and attorney client privilege, though asserted by the Division, did not apply, the Appellate Division would have directly said so, and most tellingly, would not have affirmed the court's decision (***see Moody's II*** at 1004 [the Albany County Supreme Court's decision "as so modified, affirmed"]).

H. In this proceeding, petitioner seeks no documents with respect to which disclosure has been held to be precluded, upon court review, by either the tax secrecy provisions or the attorney-client privilege. Rather, petitioner seeks only those documents with respect to which such potential statutory bases to bar disclosure were either: a) not asserted by the Division in the FOIL proceedings, or b) were held by the reviewing courts, after in camera-review, to be inapplicable. While raised by the Division, and addressed by the courts in the context of the FOIL proceedings, the statutory bars against disclosure, based on tax secrecy or attorney-client privilege, are the same that would be applicable in the context of this proceeding, i.e., disclosure by subpoena. The Division's arguments that tax secrecy and attorney-client privilege continue to apply are simply inconsistent with the Albany County Supreme Court's rulings that such bases for non-disclosure were held to be inapplicable to the documents specifically at issue herein, and with the Appellate Division's subsequent decision on appeal affirming the Albany County Supreme Court's holdings.

I. As described above, in the FOIL proceedings, the Division raised tax secrecy, or attorney-client privilege, or both, as statutory bars to disclosure of many, though not all, of the documents for which disclosure was sought. In some instances, neither of such bars were raised.

In the course of the two, full, in-camera inspections of the documents, the reviewing courts necessarily considered and addressed the applicability of statutory secrecy preclusion and attorney-client protection, to the extent the same were raised. Where the Division did not assert the bars of secrecy or attorney-client protection, despite the opportunity to do so, it may reasonably be presumed that the Division did not believe the same applied in those instances. Given that these statutory bases provide a clear general bar against disclosure, the fact that such bases were not raised and claimed by the Divison with respect to certain of the documents being sought herein, fully supports the conclusion that non-assertion is properly viewed as an admission that such bars did not apply with respect to those documents. In sum, and with respect to the documents at issue herein, attorney-client privilege and tax secrecy bars were either not raised, and may be considered waived, or were raised, but rejected by the Albany County Supreme Court in ***Moody's I***, and such rejection rulings were affirmed on appeal in ***Moody's II***. Accordingly, since such bars were either raised but rejected by the courts on review, or were not raised at all, it follows that neither tax secrecy preclusion nor attorney-client privilege against disclosure, with respect to the documents at issue herein, support withdrawal of the subpoena.

J. In view of the foregoing, the Division's only remaining basis in support of its motion for withdrawal of the subpoena is the assertion that disclosure is properly barred via the public interest privilege. The Division asserts that the public policy supporting non-disclosure under the public interest privilege is effectively the same as that supporting the FOIL disclosure exemption under POL § 87 (2) (g). The Division thus maintains that since disclosure of the documents sought herein was barred by POL § 87 (2) (g), such documents should likewise be barred from disclosure under the public interest privilege.

K. The public interest privilege protects from disclosure "'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communication or the sources should not be divulged'" (***Matter of World Trade Ctr. Bombing Litig.***, 93 NY 2d 1, 8 [1999], ***quoting Cirale v 80 Pine St. Corp.***, 35 NY 2d 113, 117 [1974]). "[T]he proponent of entitlement to the public interest privilege must demonstrate that a specific public interest would be jeopardized by dissemination of the information claimed to be confidential" (***Matter of Labarbera v Ulster County Socy. for Prevention of Cruelly to Animals***, 277 AD 2d 672, 673 [3d Dept 2000], ***citing Matter of World Trade Ctr.***). In this case, the public interest privilege asserted by the Division against disclosure of the documents sought via subpoena will apply if nondisclosure: a) serves the public interest better than disclosure does, and b) that petitioner's interest in seeking disclosure does not override the public interest of confidentiality. "[If] disclosure would be more harmful to the public interest than nondisclosure is to the party seeking the information, disclosure must be denied" (***id.***).

L. Determining whether the public interest privilege applies requires a balancing of the competing interests of the parties (***see Matter of World Trade Ctr.***). A showing that disclosure of the information sought would be helpful, or useful, is not sufficient to override a demonstrated or manifest potential harm to the public good by disclosure (***see Cirale*** at 118). Balancing the competing interests can include weighing "'the encouragement of candor in the development of policy against the degree to which the public interest may be served by disclosing information which elucidates the governmental action taken,'" and can also take into account "the extent to which pertinent information is available to a party from other public sources" (***World Trade Ctr.*** at 10).

M. In this case, the Division asserts that protecting its internal deliberative processes in the conduct of its audit activities, as well as in discussing policy considerations in general, serves to ensure that its personnel serving in audit and advisory roles will be able to express their opinions freely and candidly to agency decision makers. The Division maintains that this purpose is fostered by the confidentiality afforded under the privilege, and outweighs any general public benefits to be gained by disclosure. The Division posits that the public interest served by preserving confidentiality in this matter outweighs petitioner's individual interest in the pursuit of redress based upon its assertion of governmental fraud, malfeasance or misrepresentation by which petitioner alleges it was induced into executing the Closing Agreement. Petitioner, in contrast, asserts that disclosing evidence of the Division's "misconduct" serves the public interest more than concealing such alleged misconduct, and that even if the Divison establishes that non-disclosure in the context of the audit and policy formation functions described above serves the public interest, petitioner has an overriding need for the documents to evidence its claim of Division misconduct for purposes of Tax Law § 171 (18).[8]

N. FOIL exemptions do not directly apply in matters litigated before the Division of Tax Appeals (***see Matter of 4U Convenience, Inc.***, Tax Appeals Tribunal, February 12, 2016). However, while the specific FOIL based exemption for inter-or-intra agency materials is thus not dispositive as to disclosure by subpoena, its underpinnings and rationale are nonetheless instructive as guidance by analogy herein. POL § 87 (2) (g) (i)-(iii) exempts from disclosure records that are "inter-agency or intra-agency materials" that are not "statistical or factual tabulations or data," "instructions to staff that affect the public," or "final agency policy or determinations." These provisions apply to "deliberative materials or communications

[8] Petitioner's stance effectively presumes the Division engaged in "misconduct."

exchanged for discussion purposes not constituting final policy decisions," that are "predecisional, nonfinal discussion and recommendations by employees within and among agencies to assist decision makers in formulating a policy or determination" (***Matter of Bass Pro, Inc., v Megna***, 69 AD 3d 1040, 1041 - 1042 [3d Dept 2010]; ***Stein v. New York State Dept. of Transp.***, 25 AD 3d 846, 847 - 848 [3d Dept 2006]). The underpinnings of this FOIL specific disclosure exemption are indeed largely analogous to the policy considerations underlying the judicially developed public interest privilege (***see World Trade Ctr).*** While not conflating FOIL-based disclosure with subpoena-based disclosure, it is clear that the same concerns underpinning POL § 87 (2) (g), which the reviewing courts applied to the documents at issue here, appear similarly relevant with respect to the Division's general activities in conducting audits, forming policy, and engaging in negotiations both in the context of audits, and as aimed at pursuing settlements, including settlements in the context of closing agreements under Tax Law § 171 (18).

O. It is clear that the information sought here, as described by the Appellate Division in ***Moody's II*** (***see*** Finding of Fact 21), consists of materials commonly at the heart of ongoing audit activities and policy formulation processes, and is not of the type that is typically disclosed by the Division. Further, the Division successfully asserted in the FOIL proceedings, and subsequent appeals, that the materials sought were internal audit and policy discussions. Non-disclosure of such materials serves the purpose of ensuring candor by government personnel in expressing their opinions and providing advice during the deliberative process accompanying audit activities and policy formulation. In ***Moody's II***, petitioner argued that "the documents withheld included final agency policy, in particular, records regarding the position taken during audits and with regard to one taxpayer; instructions to staff that affect the public; and/or statistical or factual data." The Court, in ***Moody's II***, rejected this argument, stating:

> "Contrary to petitioner's argument, neither internal memoranda used to discuss and advance a position pending negotiations with a party nor a position taken during an audit can be characterized as a final determination by an agency (citations omitted). Rather, the opinions and recommendations exchanged by agency personnel constitute 'predecisional material, prepared to assist an agency decision maker . . . in arriving at his [or her] decision' (citations omitted)" (***see Moody's II*** at 1003).

P. The public policy supporting the exemption under POL § 87 (2) (g), to wit, ensuring that personnel in advisory roles will be able to express their opinions freely to agency decision makers, is highly analogous to the Court's specific recognition that encouraging candor in the development of public policy is a valid consideration in weighing whether the public interest privilege should apply as a bar against disclosure (***see*** Conclusion of Law L). Furthermore, it is a matter of public record, as petitioner acknowledges, that the Division did allow destination-based sourcing of credit rating receipts, in at least one instance (***see*** Finding of Fact 11, n. 1). This publically available knowledge of the very fact petitioner raises as the primary thrust behind its argument to negate the Closing Agreement must be weighed against petitioner's claim of an "overriding" need to obtain the documents at issue in order to establish its underlying claims of disparate treatment and detrimental reliance (***see*** Conclusion of Law L).

Q. In ***World Trade Ctr***., the First Department did not, as tacitly suggested by petitioner, negate the Court of Appeals holding that promoting candor in governmental policy deliberations is a valid consideration to be weighed in determining whether or not to release documents in the context of the public interest privilege. Rather, the Appellate Division, on remand, concluded that promoting internal candor was outweighed, under the facts of that particular case, by the benefit of disclosure (***see In re World Trade Center Bombing Litig.***, 263 AD2d 417 [1st Dept 1999]). In this case, petitioner alleges it was misled by the Division's statements at audit that it did not allow destination sourcing of credit rating receipts, and that petitioner did not know,

though it suspected, at the time of audit and at the time of entering into the Closing Agreement, that these statements were not entirely accurate, or at least did not rise to the level of "full disclosure" to the extent petitioner believed it was entitled. It is not disputed that, in fact, the Division did allow destination sourcing for another credit rating enterprise. Whether the Division's statements to petitioner concerning its position on the sourcing of credit rating receipts during the course of conducting its audit, and engaging in settlement negotiations, form a sufficient basis for invalidating the Closing Agreement remains to be seen. However, allowing disclosure of the Division's internal debates as to credit receipts sourcing, in general, as well as with respect to petitioner, in light of the now undisputed fact that the Division did allow destination sourcing, serves no apparent overriding purpose other than to bolster petitioner's primary argument in favor of setting aside the Closing Agreement. Petitioner can establish this point upon the materials already publicly available, and can add its own evidence thereto in the form of testimony by its own witnesses.

R. Allowing disclosure of the Division's internal audit and settlement discussions, as a general matter, effectively provides an open roadmap for questioning virtually any settlement between the Division and the taxpaying public. Thus, disclosure of the materials sought herein by subpoena, essentially paves the process for taxpayers attempting, for whatever reasons, to re-open a closing agreement with which they are, or become, dissatisfied after the fact of its execution. This invitation for second guessing after the fact is outweighed by the general public interest in preserving the finality of such negotiated agreements. On balance, petitioner's alleged need for the requested documents does not override the valid public interest in non-disclosure of internal audit and policy formulation discussions. In sum, petitioner can effectively present its

case for setting aside the Closing Agreement, based upon fraud, malfeasance or misrepresentation of a material fact, per Tax Law § 171 (18), without the documents herein sought by subpoena.

S. The underlying substantive tax arguments concerning the proper sourcing of credit rating receipts, including the question of whether petitioner was entitled to either: a) destination based sourcing, or b) a discretionary adjustment to the apportionment factors pursuant to which its business allocation percentage (BAP) would be calculated, as presented by petitioner to the Division at the time of audit, if agreed to, would appear to have represented a departure from existing law (***see*** Tax Law former § 210.3 [a] [2] [B]; 20 NYCRR 4-4.3 [a]; ***Matter of Siemens Corp. v Tax Appeals Tribunal*** (89 NY2d 1020 [1997]). Any such departure, either by change of law (or change in interpretation of existing law), or by discretionary adjustment, would necessarily involve a significant amount of analysis and consideration at the agency level, including specifically at the audit level. Audit activities involved in such considerations represent the heart of the deliberative process, including the bilateral exchange of information and the inherent give and take between the parties, as well as the ongoing internal deliberations among Division personnel (***see e.g. Matter of Jenkins Covington, Inc.***, Tax Appeals Tribunal, August 25, 1988, ***confirmed*** 195 AD 2d 625 [3d Dept 1993], ***lv denied*** 82 NY 2d 664 [1994]). Two courts have conducted full in-camera reviews of the documents sought herein, described by the Court in ***Moody's II*** as "predecisional material, prepared to assist an agency decision maker. . . . in arriving at his [or her] decision," and both courts upheld non-disclosure, notwithstanding the strong intent in favor of full disclosure under FOIL (***see Matter of Newsday, Inc. v Empire State Dev. Corp.***, 98 NY 2d 359 [2002]). This result, at a minimum, serves to inform the process in considering whether a contrary result should obtain here with respect to the very same materials.

T. Internal candor is especially relevant in tax matters, given that taxpayers have (and here had) the right to pursue requests such as destination sourcing and alternative apportionment via the audit process, and subsequent protest and litigation, as opposed to choosing to accept resolution by closing agreement. Simply put, petitioner could have exercised its right to proceed with the audit, and thereafter pursued any subsequent challenge procedures to the extent it was dissatisfied with the outcome thereof. Given all of these factors, any public interest in mandating disclosure of the documents sought herein, involving the deliberative process within the context of the Division's audit and policy making functions, is outweighed by the policy considerations supporting the public interest privilege, to wit, ensuring full, frank, and candid discussions between agency personnel, including weighing the relative merits of a variety of circumstances that arise in the process of an audit. Disclosure here might, arguably, serve petitioner to some degree. Such disclosure, however, would not serve the public interest, but would instead work to its detriment by chilling or inhibiting internal candor in the Division's audit functions, its negotiation processes, and its policy formulation activities. Accordingly, and on balance, the materials sought by the subpoena duces tecum, dated April 12, 2017, are properly protected by the public interest privilege, and the subpoena requiring disclosure of the same is hereby withdrawn.

U. The motion of the Division to withdraw the subpoena dated April 12, 2017 is hereby granted, and this matter will proceed to hearing in due course.[9]

DATED: Albany, New York
November 16, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[9] In connection with moving forward in this matter, a pre-hearing telephone conference call will be scheduled. However, 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 [d]). In light of 20 NYCRR 3000.7 (d), such call will be scheduled no sooner than 35 days after the issuance of this order.