

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**PATRICK MURPHY** :

for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law :  
and the New York City Administrative Code for the :  
Year 2006. :

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ORDER  
DTA NO. 825277

In the Matter of the Petition :

of :

**KATHLEEN MURPHY** :

for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law :  
and the New York City Administrative Code for the :  
Year 2006. :

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Petitioners, Patrick and Kathleen Murphy, filed petitions<sup>1</sup> for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2006.

On March 14, 2014, petitioners, appearing pro se, brought a motion seeking an order withdrawing a subpoena duces tecum served upon them on March 13, 2014 in the above-captioned matter. Additionally, JJF Associates LLC, JJF Realty Management, Inc., and JJF

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<sup>1</sup>Petitioners, Patrick and Kathleen Murphy, filed separate petitions challenging the same Notice of Deficiency, which was issued to them jointly as they filed a joint personal income tax return for the year at issue. For purposes of judicial economy, the petitions have been consolidated under DTA Number 825277.

Realty ESOP Trust, appearing by Murphy & O'Connell (Patrick Murphy, Esq., of counsel)<sup>2</sup> brought a similar motion seeking an order withdrawing a subpoena duces tecum served upon them on the same date. Both motions were made pursuant to 20 NYCRR 3000.5 and 20 NYCRR 3000.7(c). The Division of Taxation appeared in opposition to the motions by its representative, Amanda Hiller, Esq. (Marvis Warren, Esq., of counsel). The parties completed their submissions by April 14, 2014, which date began the 90-day period for issuance of this order.

After due consideration of the petitioners' motions, the affirmations of Patrick Murphy, Esq., with attached exhibits, the affirmation in opposition of Marvis Warren, Esq., with attached exhibits, and all the pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

#### ***ISSUE***

Whether the subpoenae duces tecum served upon petitioners, JFF Realty Management, Inc., JFF Associates LLC, and JFF Realty ESOP Trust, seeking the production of various documents concerning the ownership and operation of those various companies during 2006, should be withdrawn.

#### ***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued a Notice of Deficiency, number L-035037360-3, dated November 22, 2010 to petitioners, Patrick and Kathleen Murphy, asserting personal income tax due under Article 22 of the Tax Law and the New York City Administrative Code for the year 2006.

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<sup>2</sup> Patrick Murphy, Esq., is also one of the petitioners in this matter.

2. This matter involves the central issue of whether petitioners failed to properly report on their New York State personal income tax return and pay tax on the Internal Revenue Code § 1231 gain from the 2006 sale of real property in Manhattan owned by JJF Associates LLC (JJF Associates). JJF Associates was owned by two members -JJF Realty ESOP Trust (ESOP), which owned 99%, and Triune Foundation, Inc. (Triune), which owned 1%. Petitioners were the sole participants of ESOP. Petitioner Patrick Murphy was the general partner of JJF Associates and president of Triune. JJF Associates reported the gain from the sale of the property on its 2006 New York State partnership return, which was signed by petitioner Patrick Murphy in his aforementioned capacity.

3. Petitioners assert that ESOP and Triune are tax exempt entities. Additionally, petitioners maintain that ESOP was a pension trust established for the benefit of the employees of JJF Realty Management, Inc. (JJF Realty). Petitioners take the position that they were employees of JJF Realty during the applicable period.

4. JJF Realty was incorporated in 1999 and dissolved by proclamation of the Secretary of State of the State of New York on June 25, 2003.

5. After an audit, the Division takes the position that petitioners failed to demonstrate that ESOP had tax exempt status or that JJF Realty actually had employees in 2006. The Division further maintains that ESOP was a “sham entity with no economic substance” and that petitioners were the sole participants in ESOP. Hence, according to the Division, the gain from the sale of the Manhattan property should flow through to petitioners as ESOP’s only participants.

6. Clearly, of particular importance to the determination of this matter is the ownership structure, compliance with formalities, and day-to-day operations of JJF Associates, ESOP, and JJF Realty. Moreover, the role of petitioners in each of the companies is of significance.

7. The Division has sought through subpoenae duces tecum, issued in this forum, to access information and materials germane to the structure and operation of JJF Associates, ESOP, and JJF Realty in 2006. In particular, the Division subpoenaed documents from petitioners demonstrating their ownership of and contributions, distributions, and forfeitures to and from ESOP during the year at issue. Additionally, the Division subpoenaed documents from the three related entities concerning 1) the operation of JJF Realty, 2) total contributions to and from ESOP, 3) securities that were allocated, either directly or indirectly, to ESOP for the benefit of petitioners, 4) federal forms claiming exemption filed by ESOP, 5) any lists of plan participants and vesting schedules for ESOP, and, 6) the determination of the basis of the Manhattan property that serves as the genesis of the gain in question.

8. Many of the documents sought were previously requested by the Division during its related audits of JJF Associates and ESOP, but have not been provided by petitioners.

9. Following the issuance of the subpoenae duces tecum by the Division of Tax Appeals on March 6, 2014 and their service by the Division on March 13, 2014, petitioners brought these motions to withdraw on March 14, 2014, and a response to the motions by the Division was made on April 14, 2004 in the form of an affirmation in opposition.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

10. Petitioners base their motions to withdraw on several grounds. First, petitioners argue that the subpoenae duces tecum violate the preemption language in section 514(a) of the Employment Retirement Income Security Act of 1974 (ERISA). Additionally, petitioners state as grounds that the documents sought in the subpoenae duces tecum are not relevant or that the request is vague and overbroad. Finally, petitioners maintain that the subpoenae were not served

in good faith. Petitioners do not identify in their moving papers the approximate number of pages that are sought by the Division.

11. The Division asserts that the documentary evidence sought by the subpoenae duces tecum is material and relevant to the proceeding at hand. It adds that petitioners' claims that the subpoenae duces tecum are vague, overly broad, and in bad faith are spurious.

### ***CONCLUSIONS OF LAW***

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

B. The standard to be applied on a motion to quash, modify or withdraw a subpoena duces tecum is whether the requested information is "utterly irrelevant to any proper inquiry" or its "futility . . . to uncover anything legitimate is inevitable or obvious" (*LaBelle Creole Intl. v. Attorney-Gen. of the State of New York*, 10 NY2d 192 [1961]; *see also Matter of Dairymen's League Coop. Assn. v. Murtagh*, 274 App Div 591 [1948] *affd* 299 NY 634 [1949]).

C. Based on the record, it cannot be said that the request is utterly irrelevant, and petitioners, as well as JJF Realty, ESOP, and JJF Associates, are directed to produce the documents listed in the subpoenae duces tecum at the hearing scheduled for May 12, 2014. The primary issue in this case is the legitimacy of the ESOP and related companies and whether petitioners treated them and the 2006 gain properly. The documents sought by the subpoenae duces tecum go to the very heart of that issue. Indeed, mindful of the fact that petitioners bear

the burden of proof in this matter, the same documents sought by the Division may serve to help petitioners meet that burden at hearing.

D. The arguments put forth by petitioners in support of the motions are not persuasive. First, in order to invoke the preemption doctrine found in section 514(a) of ERISA, petitioners need to demonstrate that ESOP qualifies for ERISA treatment. The crux of this case is petitioners' substantiation of the existence of a legitimate pension plan. Clearly, the subpoenaed documents are relevant for that point. If petitioners meet their burden on that issue at hearing, the ERISA preemption argument may be appropriate. The mere assertion of ERISA preemption, without more, however, does not serve as grounds for withdrawal of the subpoenae duces tecum issued here.

Additionally, petitioners' argument that the documents sought in the subpoenae duces tecum are not relevant, or that the request is vague and overly broad, is faulty. As discussed above, the documents sought are plainly relevant. Furthermore, the subpoenae duces tecum contain very specific document requests. Meanwhile, petitioners have not given any idea in their moving papers as to the estimated number of pages sought, thereby hobbling any claim that the Division's request is overbroad or unmanageable. Indeed, upon review, production of the documents sought does not facially appear to be beyond the capabilities of petitioners. As noted, one would believe many of these documents may actually be proffered by petitioners in light of the evidentiary burden they face at hearing. Therefore, for the same reasons, petitioners' claim of the Division's bad faith must be dismissed.

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

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

Should this matter proceed to hearing, a ruling on the admissibility of the documents produced hereunder will be made. Such a ruling will be made after either party's objections are heard.

Therefore, it is ORDERED, ADJUDGED and DECREED that:

1. Petitioners' Motion to Withdraw or Modify Subpoena is denied in accordance with the terms of this Order;
2. JJF Associates, JJF Realty, and ESOP's Motion to Withdraw or Modify Subpoena is denied in accordance with the terms of this Order;
3. Petitioners, JJF Associates, JJF Realty, and ESOP are directed to produce the subpoenaed documents, consistent with the terms of this Order, on May 12, 2014, the scheduled hearing date in this matter.

DATED: Albany, New York  
April 18, 2014

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE