

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CHRISTOPHER SHEEHAN AND** : **ORDER**  
**GUNDA SABEL-SHEEHAN** : **DTA NO. 827290**  
: :  
for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under the New York City :  
Administrative Code for the years 2004 through 2009. :  
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Petitioners, Christopher Sheehan and Gunda Sabel-Sheehan, filed a petition for redetermination of a deficiency or for refund of personal income tax under the New York City Administrative Code for the years 2004 through 2009.

On June 14, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), brought a motion seeking an order withdrawing, or in the alternative, modifying, a subpoena duces tecum served upon it on June 6, 2017, in the above-captioned matter. Petitioners appeared in opposition to the motion by Hodgson Russ, LLP (Timothy P. Noonan, Esq., of counsel). The parties completed their submissions by July 24, 2017, which date began the 90-day period for issuance of this order. Based upon the motion papers, and all pleadings and proceedings associated with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the subpoena duces tecum served upon the Division of Taxation seeking the production of various documents should be withdrawn or modified.

***FINDINGS OF FACT***

1. Petitioners, Christopher Sheehan and Gunda Sabel-Sheehan timely filed New York resident income tax returns for years 2004 through 2012 from an address in Larchmont, New York.
2. Petitioners relinquished their New York City apartment in 2003 and thereafter resided in Larchmont, New York.
3. Petitioners did not maintain living quarters in New York City from 2004 through 2012.
4. In May 2014, amended resident income tax returns for the years 2010 through 2012 were prepared and filed, claiming refunds of all New York City personal income tax paid by petitioners for these years, and requesting a total refund of \$539,452.00 for 2010, 2011 and 2012.
5. The refunds petitioners claimed for 2010 through 2012 were granted by the Division of Taxation (Division) in September 2014, with interest.
6. In November 2014, petitioners filed amended New York State resident personal income tax returns for the years 2004 through 2009, claiming refunds of all New York City personal income tax erroneously paid for these years, as follows:

Year	Overpayment Claimed in Original Return	Overpayment Claimed in Amended Return	Refund Claimed
2004	\$104,410.00	\$236,894.00	\$132,484.00
2005	\$23,693.00	\$289,822.00	\$266,129.00
2006	\$128,309.00	\$244,641.00	\$116,332.00
2007	\$46,161.00	\$188,360.00	\$142,199.00
2008	\$134,291.00	\$262,693.00	\$128,402.00
2009	\$139,600.00	\$261,290.00	\$121,690.00

7. The basis of the refund claims is that petitioners ceased being residents of New York City in 2003, but had mistakenly continued to pay tax as if they were residents of New York City for the years 2004 through 2009.

8. The Division issued five notices of disallowance to petitioners denying the claimed refund for each of the years 2004, 2005, 2007, 2008, and 2009.

9. The 2004 and 2007 Notices of Disallowance are both dated July 1, 2015. The 2008 and 2009 Notices of Disallowance are dated July 2 and July 3, 2015, respectively. The 2005 Notice of Disallowance is dated September 29, 2015. The Division issued an Account Adjustment Notice to petitioners dated September 15, 2015, denying the refund claimed for the year 2006.

10. Each of the five notices of disallowance stated that petitioners' refund for the year at issue in the notice was time-barred and further stated, in relevant part, that:

“NYS did not erroneously or illegally collect NYC tax. The tax was collected based on the law and the tax computed for NYS/NYC residents.

The 2010-2012 amended returns were processed as filed. The refunds were granted under the three year statute of limitations NYS Tax Law § 687(a).

Based on our review, it has been determined that relief under NYS Tax Law § 697(d) will not be granted and the refund request has been denied.”

11. Petitioners filed a petition challenging the refund denials, alleging that the Division erred in denying the refund claims, and that the Division arbitrarily refused to exercise its special refund authority under Tax Law § 697 (d).

12. A hearing in this matter was scheduled for June 23, 2017.<sup>1</sup>

13. On May 26, 2017, petitioners made a request to the undersigned administrative law judge for issuance of a subpoena to be directed to the Division for the following:

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<sup>1</sup> The June 23, 2017 hearing was adjourned pending resolution of this motion.

- a. Statistics regarding requests made to the Division of Taxation (Division) to exercise its special refund authority under Tax Law § 697 (d) during the last ten years including the total number of requests made, the number denied and the number granted.
- b. Redacted copies of all requests or applications for Tax Law § 697 (d) relief that were granted by the Division during the last ten years.
- c. Copies of any and all memoranda, legal opinions, correspondence or other documents (but not including published advisory opinions) referring to the Division's interpretation of Tax Law § 697 (d) or the scope of the Division's or the Tax Commissioner's special refund authority under Tax Law § 697 (d).
- d. Copies of any opinions of counsel referring to or discussing Tax Law § 697 (d).

14. On June 5, 2017, the undersigned administrative law judge granted petitioners' request and issued a subpoena duces tecum directed to the Division.

15. Following service of the subpoena duces tecum on the Division, the Division moved to have the subpoena withdrawn or modified.

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

16. The Division bases its motion on several grounds. First, it argues that the statistical information petitioners seek does not exist. The Division then asserts that the secrecy provisions of Tax Law § 697 (e) bar the Division from disclosing other returns and from disclosing opinions of counsel. Finally, the Division alleges that the subpoena requiring it to produce memoranda, legal opinions, correspondence and opinions of counsel is excessive in scope, unduly burdensome and does not specifically describe an item which the Division could reasonably produce as the request has an unlimited time frame. The Division also requests an in camera inspection of the subpoenaed documents prior to the hearing if the subpoena is not withdrawn.

17. Petitioners maintain that the materials sought by the subpoena duces tecum are material and relevant to their claim.

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

A. Tax Law § 2006 (10) authorizes the Tax Appeals Tribunal to subpoena and require the attendance of witnesses at hearing and the production of books, papers and documents pertinent to its proceedings and the power to delegate its power to subpoena to its administrative law judges and other employees. The Tax Appeals Tribunal's Rules of Practice and Procedure provide that, upon request of any party, a subpoena may be issued by an administrative law judge to require the attendance of witnesses or to require the production of documentary evidence (at a hearing) (20 NYCRR 3000.7 [a]). Upon service of a subpoena, any person to whom such a subpoena is directed may request that the subpoena be withdrawn or modified by filing a request with the administrative law judge assigned to the case or the administrative law judge who issued the subpoena (20 NYCRR 3000.7 [c]). Any subpoena issued under the authority of Tax Law § 2006 (10) "shall be regulated by the civil practice law and rules."

B. The standard to be employed in determining whether to vacate or modify a subpoena is whether the subpoenaed documents or witness are ". . . are utterly irrelevant to any proper inquiry' (citation omitted) or its 'futility ... to uncover anything legitimate is inevitable or obvious' . . ." (*La Belle Creole Intl. v Attorney-Gen. of the State of New York* (10 NY2d 192, 196 [1961]; *Matter of Winners Garage*, Tax Appeals Tribunal, October 8, 2009).

C. The first item to be addressed is the Division's objection to that part of the subpoena that directs the Division to turn over "statistics regarding requests made to the Division of Taxation (Division) to exercise its special refund authority under Tax Law § 697(d) during the last ten years including the total number of requests made, the number denied and the number granted." Here, the requested documents do not appear to be utterly irrelevant. Nonetheless, the Division has asserted the requested statistics are not in a document maintained by the Division

and the Division is under no obligation to create such an item. The Division, however, submitted no evidence to establish this fact; it was asserted in a conclusory fashion in the form of an unsworn letter requesting the subpoena be withdrawn. The fact that a document does not exist is not a valid basis for withdrawing a subpoena as the requested documents would appear to be relevant to petitioners' case if they existed. Accordingly, it is incumbent upon the Division to provide an affidavit from the Commissioner of Taxation and Finance or appropriate delegee at the hearing attesting that the requested records do not exist.<sup>2</sup>

D. Turning to that portion of the subpoena that directs the Division to turn over redacted copies of all requests or applications for Tax Law § 697 (d) relief that were granted by the Division, the Division alleges that the secrecy provisions bar disclosure. In contrast, petitioners assert that the secrecy provisions do not apply because they are seeking redacted copies. Tax Law § 697 (e) provides that, except in accordance with proper judicial order or as otherwise provided by law, it is unlawful for the Division to divulge or make known in any manner the amount of income or any of the particulars set forth or disclosed in any tax report or required return. Tax Law § 697 (e) further provides that the Division cannot be required to produce any return or evidence of anything contained in them in any action or proceeding in any court, except under certain narrowly defined circumstances. The exceptions are set forth in Tax Law § 697 (e) (3) and (3-a), (f) through (i) and (k) through (o). Petitioners' claim does not fall within any of these statutorily prescribed exceptions. The use of taxpayer's returns or return information is strictly prohibited (*see Matter of Manufacturers Trust Co. v Browne*, 269 App Div 108 [1ST Dept 1945] *affd* 296 NY 549 [1946]). While tax returns may be disclosed

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<sup>2</sup> While the Division's reply included an affirmation from the Division's representative attesting to this fact, it was not considered in rendering this order (*see Eujoy Realty Corp v Van Wanger Communications, LLC*, 22 NY3d 413 [2013]).

pursuant to a “proper judicial order,” the term has been interpreted to mean an order carrying out one of the aforementioned exceptions or issued in a case in which the tax return itself was in issue (*see New York State Department of Taxation and Finance v New York State Department of Law*, 44 NY2d 575 [1978]). This matter involves neither, nor does the statute allow for a redacted copy of a return to be disclosed (*Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation & Fin.*, 141 AD 3d 997 [3d Dept 2016]). Accordingly, that part of the subpoena directing the Division to turn over redacted copies of all requests or applications for Tax Law § 697 (d) relief that were granted by the Division is withdrawn.

E. Next, the Division asserts that the portion of the subpoena directing it to produce copies of any and all memoranda, legal opinions, correspondence or other documents (but not including published advisory opinions) referring to the Division's interpretation of Tax Law § 697 (d) or the scope of the Division's or the Tax Commissioner's special refund authority under Tax Law § 697 (d) is excessive in scope, unduly burdensome and does not specifically describe an item which the Division could reasonably produce as the request has an unlimited time frame. The Division further asserts that petitioners have failed to show the relevancy of these items. First, contrary to its line of argument, the Division, in challenging the subpoena, has the burden of demonstrating the utter irrelevancy of the demands (*see Matter of Hogan v Cuomo*, 67 AD3d 1144 [3rd Dept 2009]; *Gertz v Richards*, 233 AD2d 366 [2nd Dept 1996]). In this case, the requests appear to be entirely relevant as petitioners are seeking the standards employed by the Division in deciding whether to exercise its discretionary refund authority. The Division's conclusory claim taking the form of unsworn boilerplate is simply not enough to meet its burden (*see Matter of Winners Garage*). However, the Division makes a valid point in alleging that the request is excessive in scope or unduly burdensome based upon the unlimited time period for

which documents are sought. Accordingly, it is hereby limited to the past ten years (*Ayubo v Eastman Kodak Co.*, 158 AD2d 641 [2nd Dept 1990]).

F. Finally, the Division asserts that copies of any opinions of counsel referring to or discussing Tax Law § 697 (d) are protected by secrecy laws and the attorney/client privilege and further asserts that the request is excessive in scope, unduly burdensome and does not specifically describe an item which the Division could reasonably produce as the request has an unlimited time frame. Moreover, the Division claims that petitioners have failed to show the relevancy of these items. As to the Division's claim that the opinions of counsel are protected by secrecy laws, the Division has not set forth any explanation or evidentiary submission such as an affidavit identifying any opinions and why secrecy shields them from disclosure. Case law has held that the Division's opinions on an area of law are not shielded from secrecy (*see People v Sprint Communications*, 148 AD3d 471 [1st Dept 2017]). There is no indication that any of the unidentified opinions contain any information garnered from unrelated taxpayers' tax returns. Instead, the Division has thrown out boilerplate language claiming privilege which is simply not sufficient to warrant modification or withdrawal of the subpoena for these items (*see Matter of Winners Garage*). To the extent there are opinions that identify unrelated taxpayers, the Division may redact the taxpayer's name and identifying information (*see People v Sprint Communications*).

G. Finally, to the extent the Division claims any privilege from disclosure as ordered by the modified subpoena, the Division's request for in camera inspection of the documents in question prior to the hearing is granted. The Division will be required to provide a privilege log detailing with specificity the reasons why any documents required to be produced at the hearing in this matter are privileged.



H. The Division of Taxation's motion to withdraw and/or modify the subpoena is granted to the extent of Conclusions of Law D, E and F. The Division is directed to furnish the requested documents, consistent with the terms of this Order, at the hearing in this matter.

DATED: Albany, New York  
October 19, 2017

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE