STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOODY'S CORPORATION & SUBSIDIARIES	:	ORDER ON REMAND 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,[1] 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 12, 2017, a subpoena duces tecum was issued, at petitioner's request, directing the Division of Taxation to produce certain documents. That subpoena was, in turn, served by petitioner upon the Division.

On April 27, 2017, the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel), brought a motion, pursuant to 20 NYCRR 3000.7 (c), seeking an order withdrawing the April 12, 2017 subpoena. 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, then 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.

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[1] Moody's Corporation & Subsidiaries will be generally referred to in the singular, i.e., Moody's, with specific reference to particular subsidiary entities made as necessary for clarity or otherwise.

On November 16, 2017, 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, issued an order granting the Division's motion to withdraw the subpoena.

Petitioner, appearing by Pillsbury Winthrop Shaw Pittman, LLP (Marc Simonetti, Esq., and Evan M. Hamme, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel), each filed with the Tax Appeals Tribunal (Tribunal) an exception to the November 16, 2017 order. Each party filed briefs in support of their respective exceptions, and oral argument was heard by the Tribunal on September 27, 2018.

In a decision dated March 22, 2019, the Tribunal held that the Division had properly asserted the public interest privilege as a bar to disclosure of certain documents subject to the April 17, 2017 subpoena. The Tribunal further held that the administrative law judge erred in concluding that such privilege attaches to the documents in question without conducting an in camera review of those documents. Accordingly, the Tribunal remanded the matter to the administrative law judge for the issuance of an order addressing whether, after an in camera review of the documents subject to the subpoena issued on April 17, 2017, the public interest privilege applies to such documents, and if so, whether that privilege bars disclosure of the documents.

In compliance with the Tribunal's decision and remand, upon due consideration of all pleadings and proceedings had herein, and in particular after conducting a careful in camera review of the documents with respect to which the Division specifically asserts a bar to disclosure pursuant to the public interest privilege, 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, including specifically pursuant to the public interest privilege.

FINDINGS OF FACT

The facts set forth below are those found in the November 16, 2017 order of the administrative law judge and, in turn, found and set forth by the Tribunal in its March 22, 2019 decision. Two additional facts, numbered 38 and 39, have been added in connection with this remand order.

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 former § 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 former § 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.[2] 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

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[2] 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]).

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.

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.[3]

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

[3] 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 2).

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) (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.[4] As noted above, the documents subject to the court's in-camera review were

[4] 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.[5]

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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[5] 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.[6]

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 §

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[6] 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)]).[7] 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:

> 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,

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[7] 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]."

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]).

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 through 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.

Additional Facts

38. Upon remand, the Division provided the documents sought under subpoena to the undersigned for an in camera review, identified consistently, as throughout these proceedings, by Tab No. and page number or numbers. Specifically, the documents to be reviewed on this remand are limited to those with respect to which non-disclosure was upheld by the courts under FOIL on the sole basis that such documents were deliberative, non-final, intra-agency or inter-agency materials (pursuant to POL § 87 [2] [g]).[8]

39. In connection with providing the documents for an in camera review, the Division noted in particular that pages 152 through 157 of Privilege Log F-02261 (Tab Nos. 91 through 94), and pages 716 through 720 and 722 through 728 of Privilege Log F-02170 (Tab Nos. 361 through 365, and 367 through 370) were previously disclosed but with redactions. These documents were provided here without redactions, but identify the redacted portions by including the same in boxed text. Finally, by a letter dated May 22, 2017, petitioner submitted a revised addendum A to the subpoena, removing page 650 of Privilege Log F-02170 (Tab No 332) from

[8] The Division asserts that all of such documents are protected from disclosure by the public interest privilege. In addition, the Division continues to maintain that certain of such documents are also protected from disclosure by the tax secrecy provisions of Tax Law § 211 (8) and by the attorney-client privilege (as so indicated by strike-through), on addendum A attached to the subpoena. As directed by the Tribunal, this in camera review addresses only the applicability of the public interest privilege to the documents at issue.

the documents with respect to which disclosure is sought herein. Accordingly, that document has not been provided for in camera review.

CONCLUSIONS OF LAW

A. In the FOIL litigation, the Appellate Division affirmed the Albany County Supreme Court's decision that the specific documents at issue herein were confidential "deliberative, non-final inter-or-intra agency materials" that were, as such, simply not subject to disclosure under FOIL, pursuant to POL § 87 (2) (g) (***see Moody's I*** and ***II***). Here, unlike the previously undertaken FOIL-based review, but rather in the broader context of disclosure by subpoena versus protection under a claim of privilege, it is necessary to apply an analysis that balances the respective interests of the parties in light of the overall public benefit or detriment resulting from disclosure versus non-disclosure of the particular governmental documents in question. Hence, the Tribunal's remand ordered an in camera examination of such documents to determine whether the public interest privilege was properly applied, in the previous order issued in this matter, as a bar to disclosure.

B. In ***Cirale v 80 Pine St. Corp.*** (35 NY2d 113 [1974]), the Court of Appeals explained that:

> "As part of the common law of evidence, 'official information' in the hands of governmental agencies has been deemed in certain contexts, privileged. Such a privilege attaches to '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.' The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to to [sic] lose its cloak of confidentiality.
>
> * * *
>
> Public interest encompasses not only the needs of the government, but also the societal interests in redressing private wrongs and arriving at a just result in private litigation. Thus, the balancing that is required goes to the determination of

> the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure" (***id***. at 117).

C. In its decision on remand, the Tribunal reviewed ***Cirale***, as well as the other leading cases concerning the public interest privilege, and synthesized the same as follows:

> "Accordingly, where, as here, the privilege asserted is in a context analogous to discovery in a civil matter, the privilege is unqualified and the question of whether disclosure is warranted is answered by judicial balancing of the interest of the litigant seeking disclosure and the governmental entity seeking to preclude disclosure in light of whether the overall public interest is, on balance, served by disclosure or non-disclosure. Public interest, and what adds up to sufficient potential harm to it to warrant protection of communications under the public interest privilege, are necessarily and inherently flexible concepts. A litigant's need for the materials sought is not enough on its own to outweigh the government's interest in non-disclosure because, if it were, the privilege would be rendered meaningless upon a showing that the testimony or materials sought are relevant and helpful to the litigant's case. However, the conclusory assertion of a general harm to the public interest if the disputed documents are disclosed is insufficient to justify non-disclosure. There must be specific support for a claim of privilege; a determination of what constitutes sufficient potential harm to the public interest is a judicial one requiring that the government come forward and show that the public interest would be jeopardized by disclosure of information sought. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by non-disclosure" (***see Matter of Moody's Corporation & Subsidiaries***, Tax Appeals Tribunal, March 22, 2019 [internal citations omitted]).

D. In its decision, the Tribunal held that the only questions presented on remand are: (1) whether, after an in camera review, the public interest privilege attaches to those documents with respect to which petitioner seeks disclosure by subpoena, and (2) whether, upon such a review, involving a balancing of the competing interests of the litigants, in light of whether the overall public interest is better served by disclosure or non-disclosure, that privilege protects any of the specific documents in question from disclosure. In view of the foregoing guidance, and after reviewing the documents at issue, in camera, those questions are answered hereinafter.

E. As to the first question on remand, review of the documents reveals that the same are "confidential communications between public officers, and to public officers, in the performance of their duties," to which the public interest privilege clearly may apply as a bar against disclosure (***see Cirale v 80 Pine St. Corp.***). This conclusion is fully supported by the Appellate Division's description of the documents in question as "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). 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" (***Moody's II***, at 1003). 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)" (***Moody's II*** at 1003).

Review of the specific documents at issue, in light of the foregoing, confirms that the public interest privilege is applicable, and that such privilege may therefore potentially serve as a bar to their disclosure. Thus, the issue turns to whether, under the balancing of interests test articulated above, that privilege in fact applies as a bar to disclosure.

F. In ***One Beekman Place, Inc. v City of New York*** (169 AD2d 492 [1st Dept 1991]), the Court specifically recognized the similarity of the basis for nondisclosure under both FOIL (POL § 87 [2] [g]) and under the public interest privilege, by stating the following:

> "[I]t has long been recognized that the public interest is served by keeping certain government documents privileged from disclosure (***Cirile v 80 Pine St. Corp.***, 35 NY2d 113). It is, for example, in the public interest to encourage candid discussion and representation of views among government employees involved in the development of policy. (***Matter of Delaney v Del Bello***, 62 AD2d 281, 287.) For this reason, the Freedom of Information Law similarly exempts from disclosure interagency or intraagency materials that are not 'final agency policy or determinations.' (Public Officers Law § 87 [2] [g] [iii]; ***Matter of Xerox Corp. v Town of Webster***, 65 NY2d 131, 132.)"

G. 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). Thus, while the specific FOIL-based exemption from disclosure, as occurred in this matter, is not dispositive as to disclosure by subpoena, its underpinnings and rationale are nonetheless instructive as guidance by analogy (***id***.; ***see also Matter of World Trade Ctr. Bombing Litig.***, 93 NY2d 1 [1999]). Without conflating FOIL-based disclosure with subpoena-based disclosure, it is clear that the same concerns underpinning POL § 87 (2) (g) are similarly relevant with respect to disclosure of the Division's internal discussions and activities in developing and formulating policy, including changing existing policy, conducting audits, and engaging in negotiations in the context of such audits aimed at the pursuit of alternative resolutions or settlements, including settlements via closing agreements under Tax Law § 171 (l8), as well as potential litigation strategies. Eliminating such candor from these processes would, at a minimum, significantly impinge upon, if not hamstring, the effective operation of the Division in its audit and policy formulation activities.

H. In camera review reveals that the documents under consideration here concern matters commonly at the heart of such ongoing audit activities and policy formulation processes. Such matters are not of the type that are typically disclosed, and the Division clearly has a valid and strong interest in protecting the intricacies of its internal deliberative processes in the conduct of

its audit activities, as well as in discussing policy formulation considerations, from disclosure, to wit, ensuring that its personnel serving in audit and advisory roles will be able to express their opinions freely and candidly to agency decision makers. This interest is clearly fostered by the confidentiality afforded under the public interest privilege.

I. The central reason in support of disclosure, according to petitioner, arises from its assertion that it inquired, during its audit, as to whether the Division had permitted any other credit rating agencies to source credit rating receipts on a destination basis, rather than on the then-prevailing manner upon which receipts from services were sourced, i.e., origination (or cost of performance) sourcing (***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]; ***see also Matter of Catalyst Repository Systems, Inc.***, Tax Appeals Tribunal, July 24, 2019). Petitioner alleges the Division represented that it did not permit credit rating agencies to use destination sourcing. Petitioner further specifically alleges that it suspected the Division had allowed destination-based sourcing of credit rating receipts to McGraw-Hill, another credit rating agency that is petitioner's primary competitor. Petitioner goes on to state that its subsequent discovery that such sourcing had been allowed to McGraw-Hill (***see*** finding of fact 11, n. 2), supports its position that the Division's failure to have disclosed that information, upon petitioner's inquiries concerning sourcing, constituted fraud, malfeasance or misrepresentation of a material fact sufficient to warrant vacating the closing agreement so as to allow a reexamination of the matters at issue on audit for the years 2004 through 2010.

J. Petitioner maintains that it was misled by the Division's alleged stated position, at the time of audit, that it did not allow any credit rating agencies to source their credit rating receipts on a destination basis. Petitioner avers that this stated position was not entirely accurate, or at

least did not rise to the level of "full disclosure" to the extent petitioner believes it was entitled at the time of audit. In more direct language, petitioner maintains that Division personnel lied about the Division's true position regarding the sourcing of credit rating receipts, specifically by not disclosing its agreement with McGraw-Hill. Petitioner believes the materials sought herein by subpoena could provide evidence of the Division's fraud, malfeasance or misrepresentation, and that disclosure in this instance serves the public interest more than concealing any such alleged misconduct. Petitioner maintains, notwithstanding that non-disclosure in the context of the Division's audit and policy formation functions may, generally, serve the public interest, and is a strong factor in weighing the applicability of the public interest privilege, that it has an overriding need in this instance for the documents, since the same may provide evidence of its claim of Division misconduct for purposes of setting aside the closing agreement under Tax Law § 171 (18).

K. As concluded earlier, there is a strong public interest in protecting the Division's internal deliberative processes from disclosure so as to promote candor in such processes (***see*** conclusion of law H). Balancing the competing interests at play under the public interest privilege can include not only 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,'" but 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; ***Matter of Beekman Place, Inc.***).

L. As observed in the initial order in this matter, allowing disclosure of the Division's internal audit policies, settlement discussions, and its non-final policy deliberations by decision makers, as a general matter, effectively provides an open roadmap for questioning virtually any

settlement between the Division and the taxpaying public, including those set forth in closing agreements under Tax Law § 171 (18). Thus, disclosure of the types of documents sought herein by subpoena would essentially pave the process for taxpayers attempting, for whatever reasons, to re-open settlement agreements, including closing agreements, with which they are, or become, dissatisfied after the fact of agreeing to such settlements. Such an invitation for second guessing after the fact, in some instances perhaps generally representing simple "buyer's remorse," is outweighed by the general public interest in preserving the finality of such negotiated agreements. Finality is obviously expected with regard to any settlement agreement. With regard to closing agreements under Tax Law § 171 (18), this expectation is explicit, given the clear and limited bases set forth therein for abrogating such a closing agreement.

M. On balance, petitioner's claimed need for the requested documents (***see*** conclusion of law J), does not override the valid public interest in non-disclosure of internal audit and policy formulation discussions, absent some compelling reason therefore (***see Matter of Beekman Place, Inc.***). In camera review of the documents in question here reveals no such compelling reason in support of disclosure. 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" (***see*** finding of fact 21; conclusion of law E), 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 bare minimum, serves to inform the process in considering whether a contrary result should obtain here with respect to the very same materials. Further, it is a matter of public record that the Division did allow destination sourcing of a portion of McGraw-Hill's credit rating receipts, by discretionary adjustment, pursuant to a

specific agreement with respect thereto (***see*** finding of fact 11, n. 2; ***see also Matter of S&P Global, Inc., f/k/a/ The McGraw-Hill Companies, Inc.***, DTA No. 825598 [NYS Div. Tax App., Nov. 16, 2017; ***Matter of McGraw-Hill Companies, Inc.***, TAT [E] 10-19 [GC] et al. [NYC Tax Appeals Tribunal, October 28, 2015], ***rev'g Matter of McGraw-Hill Cos., Inc.***, TAT [H] 10-19 [GC] et al. [NYC Admin. Law Div. Feb. 24, 2014], ***confirmed S & P Global, Inc., f/k/a McGraw Hill Financial, Inc., et al.***, 147 AD3d 620 [1st Dept 2017]. Thus, the information petitioner seeks has become "information . . . available to a party from other public sources" (***see Matter of World Trade Ctr.***; ***Matter of Beekman Place, Inc.***). Under these circumstances, petitioner can effectively present its case for setting aside the closing agreement, based upon fraud, malfeasance or misrepresentation of a material fact, pursuant to Tax Law § 171 (18), upon the information already publicly available, and can add thereto its own evidence, in the form of testimony by its own witnesses and documents, without need for the documents herein sought by subpoena.

N. Given all of the foregoing factors, any general public interest in ordering 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. Disclosure of the particular documents reviewed in camera 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, as well as undermine the expected premise of finality that attaches to negotiated settlements. Upon thorough and repeated review of the particular documents in question, and applying the foregoing principles to the process of weighing and balancing the alleged beneficial interest to the petitioner seeking disclosure versus the potential harm to the Division by such

disclosure, in light of how the overall public interest is best served, it is concluded that the pubic interest privilege applies, and that there is no basis to change the prior order issued in this matter. Accordingly, and on balance, the documents sought by the subpoena duces tecum, dated April 12, 2017, are properly protected by the public interest privilege and are not subject to disclosure.

O. The motion of the Division to withdraw the subpoena dated April 12, 2017 is hereby granted, the order of withdrawal dated November 16, 2017 is reaffirmed, and this matter will proceed to hearing in due course.

DATED: Albany, New York
September 26, 2019

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE