

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : |
| of | : |
| WEST 20TH STREET ENTERPRISES CORPORATION | : |
| PACIFIC CLUB HOLDINGS, INC. | : |
| SUSHI FUN DINING & CATERING, INC. | : |
| AND DOMINICA O'NEILL | : |
| for Revision of Determinations or for Refunds of New York | : |
| State Sales and Use Taxes Under Articles 28 and 29 of the Tax | : |
| Law for the period December 1, 2007 through November 30, | : |
| 2013. | : |

Petitioners, West 20th Street Enterprises Corporation, Pacific Club Holdings, Inc., Sushi Fun Dining & Catering, Inc., and Dominica O’Neill, filed petitions for revision of determinations or for refunds of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2007 through November 30, 2013.

On March 30, 2020 the Division of Taxation, by its representative, Amanda Hiller, Esq. (David Gannon, Esq., of counsel), brought a motion, seeking an order modifying a subpoena served upon it in the above-captioned matter on March 19, 2020 pursuant to 20 NYCRR 3000.5 and 20 NYCRR 3000.7 (c). By request, the Division was granted permission to supplement its original motion. Petitioners, appearing by their representative, Ackerman, LLP (Alvan L. Bobrow, Esq., of counsel) did not respond to the motion. The 90-day period for issuance of this order began on June 8, 2020.

Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to modify or quash an attorney issued subpoena served upon the Division of Taxation.

II. Assuming the Division of Tax Appeals has jurisdiction to modify or quash an attorney issue subpoena, should the same be modified or quashed.

FINDINGS OF FACT

1. During the period in question, petitioner, West 20th Street Enterprises Corporation operated an adult entertainment establishment called the VIP Club, in New York (the Club). Selim Zherka and Maurice Kavanagh owned West 20th Street Enterprises Corporation. Petitioner, Sushi Fun Dining & Catering, Inc., operated the restaurant operations at the Club. Sushi Fun Dining & Catering, Inc., was owned by Mssrs. Zherka and Kavanagh. Petitioner, Pacific Club Holdings, Inc., sold scrip to patrons of the Club. Pacific Club Holdings, Inc., was owned by petitioner Dominica O'Neill.

2. On March 5, 2020, a hearing was held in these matters. The gravamen of these matters is whether the sale of scrip by petitioner, Pacific Club Holdings, Inc., constitutes an admission charge to a place of amusement subject to sales tax.

3. Prior to the conclusion of the hearing, petitioners requested that the hearing record be left open to submit three affidavits of current or former entertainers or employees of the Club and two deposition transcripts from a Fair Labor Standards Act suit brought against a related club that Mr. Zherka owned and operated. Petitioners' request was granted, but otherwise the record was closed.

4. During the course of petitioners' opening statement at the hearing, petitioners' representative stated that a subpoena had been prepared and was on its way to the Division of

Taxation's Office of Counsel in an attempt to discern why notices of determination issued to Times Square Restaurant Group, Ltd., Times Square Restaurant #1, Inc., Three Amigos SJL, Restaurant, Inc., and Maurice Kavanagh, were cancelled by the Office of Counsel subsequent to a hearing in the Division of Tax Appeals in those matters (the Times Square matters), and prior to a determination being issued. A hearing in the Times Square matters occurred on June 26, 2019. The issue in those matters is identical to that in the present matter, i.e., whether the sale of scrip constitutes an admission charge to a place of amusement subject to sales tax. The notices of determination issued to the petitioners in the Times Square matters were settled via stipulations for discontinuance of proceeding and were filed with the Division of Tax Appeals on October 28, 2019. Petitioners' representative herein, Alvan Bobrow, Esq., also represented the petitioners in the Times Square matters. The corporate entities therein have the same owners as the corporate petitioners herein.

5. On March 19, 2020, petitioners served a subpoena duces tecum on the Division seeking "any and all documents and communications concerning or related to the decision to cancel the notices of determination issued to [the Times Square matters' petitioners]." The subpoena was issued by petitioners' representative, Alvan Bobrow, Esq.

CONCLUSIONS OF LAW

A. First, the Division has made a motion to withdraw or quash the subpoena served upon it in this matter. CPLR 2304 clearly provides that a motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. However, if the subpoena is not returnable in a court, ". . . a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court" (*id*). Here, the person who issued it was not an

employee of the Division of Tax Appeals; rather it was issued by petitioners' attorney, Mr. Bobrow. Accordingly, any motion to quash or modify must be brought in Supreme Court. Contrary to the Division's argument, although the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) provide that an attorney may issue a subpoena pursuant to CPLR 2302 (*see* 20 NYCRR § 3000.7), the Division of Tax Appeals has no jurisdiction to act on such subpoena (*see* CPLR 2304). The case relied upon by the Division, *Matter of the Application of Moody's Corp. and Subsidiaries v New York State Dept of Taxation & Fin., et al.*, (Sup Ct, Albany County, April 3, 2017, Ryba, J; Index No. 5594-16) (unpublished opinion), for the proposition that the Division of Tax Appeals has jurisdiction to modify or quash an attorney issued subpoena, is misplaced. In *Moody's*, the Court held that if an agency has the power to issue subpoenas in an administrative proceeding, the supreme court does not have authority to issue a subpoena duces tecum for production of documents at that proceeding (*id*). *Moody's* makes no mention of where jurisdiction lies to challenge an attorney issued subpoena (*id*). As set forth above, the Division of Tax Appeals lacks jurisdiction to modify or quash the subpoena at issue herein. Accordingly, the Division's motion is denied.

B. Assuming the Division of Tax Appeals had jurisdiction to rule on the Division's motion to withdraw or modify the subpoena, it is observed that petitioners, through their attorney, lacked the requisite authority to issue the same. The subpoena was served upon the Division allegedly under the authority of CPLR 3101 (a) (4). As noted by the Division, CPLR 3101 (a) (4) is a disclosure device not applicable to proceedings in the Division of Tax Appeals. Section 305 of the State Administrative Procedure Act provides that "[e]ach agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings." The disclosure

devices of the CPLR do not apply to an administrative agency unless they are adopted as a rule by the agency (*Matter of Heim v Regan*, 90 AD2d 656 [3d Dept 1982]). The Rules reject the applicability of the disclosure devices of the CPLR to administrative proceedings in the Division of Tax Appeals and allow for only limited discovery. Specifically, section 3000.5 (a) of the Rules provides:

“General. To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR, but does not include motions related to discovery procedures as provided for in the CPLR. For good cause shown, the tribunal or an administrative law judge designated by the tribunal may grant a form of discovery by order.”

Thus, under the Rules, a party who wishes to request discovery must: (1) make a motion to the Division of Tax Appeals; and (2) establish good cause for granting the motion. Here, no such motion was ever made (*id*).

C. Moreover, while the Division of Tax Appeals’ enabling legislation specifically authorizes the use of attorney subpoenas issued pursuant to CPLR 2302 (*see* Tax Law § 2016), an attorney subpoena cannot be used to subpoena government records (*see* CPLR 2307). The authority to issue such a subpoena in a proceeding before the Division of Tax Appeals is vested in the Division of Tax Appeals (*see* Tax Law § 2016; CPLR 2302 *cf.* CPLR 2307; *Irwin v Board of Regents of University of State of New York*, 27 NY2d 29 [1970]; *Matter of the Application of Moody’s Corp. and Subsidiaries v New York State Dept of Taxation & Fin., et al.*). Here, petitioners never requested that the undersigned Administrative Law Judge issue a subpoena for the production of such records prior to the hearing in this matter.

D. Finally, it is noted that the subpoena in question was served upon the Division two weeks after the March 5, 2020 hearing in this matter. The hearing record was only left open for

petitioners to submit specific documents. Other than those specific documents, the hearing record was closed. The hearing record was not left open for documents that petitioners had yet to subpoena. Accordingly, assuming the Division of Tax Appeals had jurisdiction to rule on the Division's motion to modify or quash an attorney issued subpoena, the subpoena would be quashed.

E. Based upon the foregoing, the Division's motion is denied

DATED: Albany, New York
September 3, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE