STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **LEXINGTON INSURANCE COMPANY** for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Period January 1, 2008 through December 31, 2012.	: : : : :	ORDER DTA NOS. 828483 AND 828484
In the Matter of the Petition of **AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY** for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Period January 1, 2008 through December 31, 2012.	: : : : : :	

Petitioners, Lexington Insurance Company and American International Specialty Lines Insurance Company, filed petitions for redetermination of a deficiency or for refund of the franchise tax on insurance corporations under article 33 of the Tax Law for the period January 1, 2008 through December 31, 2012.

On September 30, 2019, the Division of Taxation, appearing by Amanda Hiller, Esq. (David Markey, Esq., of counsel), brought a motion seeking an order, pursuant to 20 NYCRR 3000.7 (c), withdrawing a subpoena duces tecum served upon the Division of Taxation in the above-captioned matter on September 19, 2019. The motion was accompanied by an affirmation, dated September 27, 2019, of Deborah R. Liebman, Esq., with attached exhibits, and

a memorandum of law in support of withdrawal. On October 30, 2019, petitioners, appearing by Baker & McKenzie LLP (Maria P. Eberle, Esq., and Lindsay M. LaCava, Esq., of counsel), submitted an affirmation of Ms. LaCava, with exhibits, dated October 30, 2019, and brief in opposition to the motion to withdraw. Subsequent to the filing of petitioners' brief in opposition, the Division of Taxation provided petitioners with a copy of its privilege log, which it had previously provided only to the Division of Tax Appeals. The administrative law judge, by letter dated November 15, 2019, granted petitioners until November 30, 2019, to file a supplemental brief addressing any issues raised by the privilege log. By letter dated November 19, 2019, petitioners submitted a supplemental brief. By letter dated December 3, 2019, the Division of Taxation asked the administrative law judge to accept the letter as a reply to petitioners' supplemental brief, which request the administrative law judge granted by letter dated December 13, 2019. The 90-day period for issuance of this order began on December 3, 2019. After due consideration of the Division's motion, the parties' affirmations and exhibits, their briefs, and all the pleadings and proceedings had herein, James P. Connolly, 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 of Taxation's audit of petitioners, its issuance of certain advisory opinions to petitioners, and the taxation of unauthorized insurance companies under article 33 of the Tax Law should be withdrawn upon the basis that disclosure of the documents sought via the subpoena is precluded by reason of Tax Law secrecy or pursuant to privilege.

FINDINGS OF FACT

1. Petitioners American International Specialty Lines Insurance Company (AISLIC) and

Lexington Insurance Company (Lexington) are foreign insurance companies that write surplus line policies for property and casualty insurance risks that are not typically insurable through standard insurance carriers. Petitioners are not authorized under a certificate of authority or license issued by the New York State Superintendent of Financial Services. AISLIC was formerly known as Chartis Specialty Insurance Company.

2. For each of the tax periods beginning with the tax period ended December 31, 2008 and through the tax period ended December 31, 2012 (years at issue), petitioners filed separate forms CT-33-NL, Insurance Corporation Franchise Tax Return, to report their liability under article 33 of the Tax Law (article 33 tax), each reporting a total liability of $250.00 for each period.

3. On February 17, 2012, the Division of Taxation (Division) issued TSB-M-12(4)C, Filing Requirements and the Calculation of Tax for Unauthorized Insurance Corporations (2012 TSB-M), which explains the application of the article 33 tax to unauthorized insurance corporations. In addition to announcing a change in the Division's interpretation of how the article 33 tax applies to unauthorized life insurance companies not relevant here, the 2012 TSB-M also advised that unauthorized non-life insurance companies are required to compute tax under Tax Law § 1502, and not Tax Law § 1502-a, for taxable years beginning or after January 1, 2003.

4. On or about June 4, 2012, petitioners filed separate petitions for an advisory opinion from the Division concerning whether unauthorized surplus lines insurance companies are to compute their article 33 tax under Tax Law § 1502-a or Tax Law § 1502 (the article 33 computation issue). The Division issued separate advisory opinions to AISLIC and Lexington (TSB-A-16[4]C and TSB-A-16[5]C, respectively [petitioners' advisory opinions]) on June 10, 2016, concluding that the companies must compute their article 33 tax pursuant to Tax Law § 1502 and not § 1502-a.

5. In 2012, the Division commenced an audit of petitioners' article 33 returns for the years at issue.

6. As a result of the audit, the Division issued separate notices of deficiency, dated August 23, 2017 (notices) to petitioners, assessing additional article 33 tax, plus interest. Petitioners both filed petitions with the Division of Tax Appeals on November 20, 2017, protesting the notices.

7. In January 2018, petitioners each made requests under the Freedom of Information Law (FOIL) for documents relating to the issuance of the 2012 TSB-M, petitioners' advisory opinions, and the Division's audit of petitioners. In response, the Division issued a series of FOIL production letters, pursuant to which the Division disclosed some documents, while redacting or refusing to disclose others. Petitioners filed administrative appeals of the FOIL production letters. The Division responded with letters dated May 24, 2018, April 24, 2019, May 28, 2019, and September 5, 2019 (FOIL determination letters), signed by Deborah R. Liebman, Deputy Counsel, which disclosed additional documents, while continuing to withhold or release others only in redacted form. Ms. Liebman's May 24, 2018 letter indicates that the Division disclosed Lexington's full audit report. On July 19, 2019, AISLIC filed an article 78 proceeding in Albany County Supreme Court, Index No. 04366-19, protesting the Division's April 24, 2019 FOIL determination, which proceeding is still pending.

8. By letter dated September 11, 2019, petitioners requested, inter alia, that the Division of Tax Appeals issue a subpoena duces tecum for service on the Division. The Division objected to the request for a subpoena by letter dated September 13, 2019. By letter dated September 16, 2019, the undersigned administrative law judge asked petitioners to justify the broad scope of the documents requested. Petitioners responded by letter dated September 18, 2019, agreeing to narrow the subpoena duces tecum requested. By a letter of the same date, the

Division of Tax Appeals issued the modified subpoena duces tecum, dated September 18, 2019 (subpoena), requested by petitioners, which petitioners served on the Division on September 19, 2019. The subpoena sought the following documents:

> "(1) Any and all documents and records relating to audits performed by the Department of Taxation and Finance (Department) of Lexington Insurance Company (Lexington) and American International Surplus Lines Insurance Company (AISLIC) for purposes of the franchise under Article 33 of the Tax Law (Article 33 Tax) for the 2008 through 2012 tax years, including, but not limited to, the Department's audit log, audit narrative, accompanying schedules, and any and all correspondence between the Department and Lexington and/or AISLIC and its representatives, and any and all internal Department correspondence.
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> (2) Any and all documents and records related to the Advisory Opinions that were issued on June 10, 2016 to petitioners in response to the Petitions for Advisory Opinion filed by Lexington and AISLIC respectively, on June 2012, regarding the taxation of unauthorized surplus line insurance companies for purposes of the Article 33 Tax, including, but not limited to, any and all correspondence between the Department and Lexington and/or AISLIC and their representatives and any and all internal Department correspondence.
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> (3) Any and all documents and records, including, but not limited to, Department directives, policies, notifications, resolutions, and/or internal correspondence and memoranda related to the taxation of unauthorized insurance companies, including excess line or surplus lines insurance companies, for purposes of the Article 33 Tax as applicable for the tax years 1999 through 2012."

9. The Division's motion seeks a withdrawal of the subpoena and for such other relief as the Division of Tax Appeals may grant. In support of its motion, the Division submitted the affirmation, dated September 27, 2019, of Ms. Liebman. Attached to the Liebman affirmation are the FOIL determination letters. Also accompanying the affirmation, as exhibits Q, R, S, and T, are "the entirety of the documents responsive to [petitioners'] subpoena" (subpoenaed documents), according to the affirmation. The affirmation asserts that the subpoenaed documents are the same documents the Division withheld or redacted in responding to petitioners' administrative appeals of the Division's FOIL determination letters, except to the extent that the FOIL requests had sought documents relating to periods prior to 1999. Included with each of those exhibits is a privilege log providing certain information about the documents.

Specifically, each privilege log contains three columns, the first listing the document number, the second providing a description of each subpoenaed document, and a third column providing one or more "reason[s]" for the withholding of the document. The privilege logs do not identify the author of the document or the date the document was created.

10. In its privilege logs, the Division claims that the subpoenaed documents are protected from disclosure based on the Tax Law secrecy or specified privileges, as follows:

(i) Public interest privilege: all except S187.[1]

(ii) Attorney work product: Q14 through Q18, Q42 through Q53, Q57 through Q69, Q71 through Q110, Q112 through Q115, R44 through R54, R109, S30 through S94, S129, S130, S136, S137, S140 through S143, S152, S164, S176 through S184, S188 through S190, and T81 through T85.

(iii) Attorney-client privilege: Q29 through Q41, Q54 through 56, Q70, Q111, Q116, R39 through R54, R70 through R85, R88, R91, R92, R96, R97, R100, R101, R128, R130, R132, R134, R135, R137 through R140, R146, R148, R157 through R162, R164, R184 through R186, S99 through S102, S118, S125, S128, S131 through S135, S138, S139, S144 through S147, S150, S153 through S158, S165, T30 through T32, T34 through T56, T70, T72 through T74, T86 through T91, T94 through T101, T103 through T119, T121, T122, T127 through T130, T134 through T137, T144, and T154.

(iv) Tax Law secrecy: Q27, Q28, Q70, R44 through R54, R85, R107, R108, R111, R113, R114, R116, R118; R120, R121, R123, R124, R127, R139, R142 through R145, R150 through R152, R154, R155, R157, R160, R161, R166 through R169, R184, R185, S153 through S184, S187, T57 through T63, T81 through T91, T94 through T99, T120 through T133, T138, T141 through T143, T148 through T153, T155, and T156.

11. Review of the privilege logs indicates that the "Document Description" column for several of the subpoenaed documents is incorrect. The table below shows the existing description of the document and the corrected description.

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[1] The subpoenaed documents will be referred by the letter of the exhibit in which they are found and their number within the exhibit. Thus, S187 refers to document number 187 in exhibit S to the Liebman affirmation.

Doc. No.	Existing Description	Correct Description
R85	Email regarding draft advisory opinions	Email regarding DTA petitions
S188 through S190	Notes containing information on tax filings w/ yrs not covered by POA (redacted); text in blue released	Notes with regard to AO petitions (redacted); text in blue released
T63	DTF email regarding taxpayer not covered by POA (redacted); text in blue released	DTF email regarding Article 33 issue
T81 through T85	Draft OOC Memo regarding unauthorized alien life insurance companies	DTF email regarding Article 33 issues
T86 through T87	OOC Memo regarding unauthorized alien life insurance companies	DTF email regarding Article 33 issues
T92 and T93	DTF email regarding Article 33 issue	OOC memo regarding unauthorized alien life insurance companies
T100	DTF email regarding 2002 draft legislation (redacted); text in blue released	OOC email regarding Article 33 issue
T101 through T106	Various	OOC memo regarding unauthorized alien life insurance companies
T107 through T109	DTF email regarding Advisory Opinion drafts	DTF email regarding 2002 draft legislation
T111 through T113	DTF email regarding Advisory Opinion drafts	1998 Request for Counsel advice and response
T139 and T140	DTF email regarding Draft TSB-M	DTF email regarding Article 33 issues
T143	Letter regarding taxpayer not covered by POA	DTF email regarding Advisory Opinion Drafts
T146	DTF email regarding Article 33 issues (redacted); text in blue released	DTF email regarding Article 33 issues

12. Exhibit T is comprised of 162 pages, but the privilege log for that exhibit only has entries for the first 156 documents.

13. Attached to the Liebman affirmation is an affirmation, dated August 23, 2019, of Colleen M. McMahon, an attorney in the Division's Office of Counsel, who was the record access officer assigned to handle the document inspection process for petitioners' FOIL requests. Ms. McMahon's affirmation explains that attorneys in the Office of Counsel prepare draft advisory opinions, which they then circulate to other units in the Division for written comment. Once finalized, the advisory opinions are signed by Ms. Liebman. According to the McMahon affirmation, the drafting of TSB-Ms, on the other hand, is done by the Division's Taxpayer Guidance Division, "with input of other workgroups within [the Division]." Consistent with this explanation, review of the subpoenaed documents reveals that the Division worked on a collaborative basis regarding the issuance of TSB-M-12(4)C, petitioners' advisory opinions, and even the audit of petitioners and other taxpayers. Thus, the large majority of the subpoenaed documents relate to this collaborative process, including emails or other communications to transmit draft documents for comment within the Division, provide comments on the drafts, respond to comments, or to arrange to meet regarding the comments. There are some documents, however, whose deliberative function is not clear upon review. Thus, R1 through R28 are described in the exhibit R privilege log as pages from an audit file ("draft audit report"). The first 13 are described as "draft" audit materials even though R1 is the first page of an audit report, and bears dated signatures on all the signature lines and is annotated as "closed." However, the next 16 pages are not labeled as "draft," which would lead to the inference that they are final documents from the audit file. Ms. Liebman's affirmation does not address whether these documents are final or not. Furthermore, R30 through R38 are described as "Draft Powerpoint Presentation." The first of those pages, R30, where the title of the

presentation might be, is blank and the Liebman affirmation does not provide any information about whether the draft presentation was intended for use within the Division or for presentation to taxpayers and their representatives.

14. The Liebman affirmation does not (i) identify the public interest that would be harmed by disclosing the subpoenaed documents or the extent of any such harm; (ii) make any assertion as to whether any of the subpoenaed documents have been disclosed to persons who are not employed by the Division; or (iii) specify when the Division first anticipated litigation with regard to any of the subpoenaed documents.

15. S165 through S175 is a copy of a Division of Tax Appeals petition, with a Division of Tax Appeals date stamp of December 5, 2011 (2011 Division of Tax Appeals petition). The petition raises the article 33 computation issue.

16. Ms. Liebman's affirmation also does not identify the persons functioning as attorneys within the Division. Review of the subpoenaed documents indicates that the following persons are attorneys representing the Division, based on "OOC" or "Counsel" appearing in their email address, or their having signed a document with an attorney title: Mary Ellen Ladouceur, Ms. Liebman, Brian J. McCann, Ellen Roach, and Clifford Peterson. Furthermore, Q36 is an email from Mary Ellen Ladouceur in Office of Counsel, dated June 7, 2012, assigning petitioners' advisory opinions to "Ellen Roach, "review by Jim D." Copied on that email is "James Della Porta." Based on Q36 and other subpoenaed documents showing Mr. Della Porta's work on the advisory opinions, "Jim D." is determined to be James Della Porta, and he is determined to be an attorney in Office of Counsel.

17. The subpoenaed documents include several documents described by the privilege logs as "attorney notes," or "OOC staff notes" that the Division claims are protected by the attorney work product privilege relating to the preparation of petitioners' advisory opinions. In

most cases, it is not possible to determine whether they were prepared by attorneys, given the privilege logs' failure to indicate who prepared the subpoenaed documents and the lack of a signature line or other indication of authorship on the documents themselves (Q81, Q113, S152, and S188 through S190). In a few instances, it is possible to determine that the creators were, in fact, Office of Counsel attorneys. For example, Q112 is a handwritten note, dated February 28, 2014, with the name "Jim Della Porta" at the top, and containing legal analysis of petitioners' advisory opinion requests. To cite another example, Q114 is a document, dated February 24, 2014, with handwritten notes containing legal analysis from a meeting between "MEL and JDP," about petitioners' advisory opinion requests. Those two persons are determined to be Mary Ellen Ladouceur and James Della Porta.

18. Almost all the materials for which the Division claims the attorney work product privilege are drafts of petitioners' advisory opinions or emails or "notes" relating thereto (advisory opinion materials). The documents not related to the preparation of petitioners' advisory opinions are the following:

> (i) a draft version and a final version, of an advice of counsel memorandum on Office of Counsel letterhead (2011 Office of Counsel memorandum) with a signature line for Ms. Roach, dated, respectively, July 11, 2011, and August 12, 2011 on the subject of the article 33 computation issue (R44 through R54);
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> (ii) emails between audit staff, which contain no analysis or trial strategy by the Division's attorneys (T81 through T85);
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> (iii) a 2014 email between Office of Counsel attorneys containing legal analysis regarding legislation (R109);
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> (iv) a 2014 transmittal email between Office of Counsel attorneys containing no legal analysis or trial strategy (S164); and
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> (v) the Division's answer in the Division of Tax Appeals proceeding commenced by the 2011 petition (S176 through S184) (***see*** finding of fact 15).

19. Turning to the claimed attorney-client privileged documents, most are emails or other correspondence between the Division's attorneys and other Division personnel concerning the

proper drafting of the 2012 TSB-M or petitioners' advisory opinions. Several, however, are described in the privilege logs as emails concerning 2002 legislation, 2008 legislation, or "proposed legislation" (e.g., T30 and T31, T41 through T50 and T52 through T56). Others are chain emails between personnel in the Division's audit division or between such persons and attorneys in the Division's Office of Counsel, the primary purpose of which concerns the timing of Office of Counsel's issuance of petitioners' advisory opinions. In many cases those emails forward other emails that might be covered by the attorney-client privilege, were they sent separately. Thus, for example, R128 and R129, is a two-page email dated June 14, 2012, from an auditor to an attorney in the Office of Counsel, in which the auditor refers the attorney to a recent Division of Tax Appeals determination and claims that it is relevant to a legal issue the two are working on. The auditor subsequently forwarded that June 14, 2012 email several times, in emailing Office of Counsel attorneys (or other Audit Division personnel) primarily about the delay in the Office of Counsel's issuance of certain advisory opinions (e.g., R137, R138, R148, S138, and T114 (same document as R148). Finally, the Division also claims attorney-client privilege for several emails or other documents that do not appear to be attorney-client communications, as the Division's attorneys are not named as senders or recipients and their advice is not mentioned (e.g., Q70, R84, S148, S149, S165, T72 through T74, and T154).

20. The Division claims that several legal memoranda, prepared by the Division's attorneys, including drafts, are privileged as attorney-client communications. The memoranda have the following notice on the first page in bold font:

> "Confidential Attorney-Client and Attorney Work Product Privileged
> Not to be Given to Anyone Outside the Tax Department Without Office of Counsel Approval."

Review of the emails on which attorney-client privilege is sought shows that no persons outside the Division were sent the emails. Moreover, Q14 is an email, dated September 29, 2017, from

audit staff to one of the auditors who worked on petitioners' audit, transmitting a copy of a draft of petitioners' advisory opinions. The email asserts that the drafts are protected attorney work product and should not be kept in the auditor's "work folder."

21. Exhibit Q's privilege log describes Q41 as an "OOC memo regarding advisory opinion," and treats it as exempt from disclosure pursuant to the attorney-client privilege. Review of the document shows it to be a legal memorandum from "Cliff" to "Deb," in which the author discusses the draft advisory opinion requested by petitioners and attaches a previous draft of the advisory opinion. Based on review of the subpoenaed documents, it is determined that "Cliff" is Clifford Peterson, one of the Division attorneys that worked on that advisory opinion request, and "Deb" is Ms. Liebman, who signed finalized advisory opinions for the Division.

22. The documents the Division seeks to protect based on Tax Law secrecy contain information relating to tax returns, related advisory opinion requests, audits performed on such tax returns, or litigation involving such audits, except T57 through T63, which have no such tax information. In some cases, such as T82 through T87, the documents do not identify the particular taxpayer being discussed, but they provide sufficient detail that an informed person might guess the taxpayer's identity. On the following documents, the Division claimed that disclosure was barred by Tax Law secrecy, notwithstanding that the only information shown related to petitioners for the years at issue, its advisory opinion requests, the audit of petitioners, or the subsequent litigation thereof in the Division of Tax Appeals: Q27, Q28, Q70, R85, R114, R116, R127, R139, R150 through R152, R155, R157, R160, R167 through R169, R184, R185, S187, T120 through T126, and T141 through T143.[2] Q70 and S187 are handwritten documents,

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[2] T79, T124, and R157 are the same email document. Exhibit T's privilege log claims the public interest privilege as the sole grounds for the nondisclosure of T79, while the privilege log claims that T124 should not be disclosed based on secrecy grounds as well as the public interest privilege. The privilege log claims that R157 should not be disclosed based on public interest privilege, secrecy, and attorney-client privilege.

in regard to which the privilege logs claim the Division redacted tax information concerning years "not covered by [power of attorney]."

23. Attached to the petitions were power of attorney forms (POA-1), dated November 20, 2017, in which petitioners authorized their current representatives "to act as their representatives with **full authority** to receive confidential information and to perform **any and all acts** the taxpayers can perform, unless limited below, in connection with the following matters" (bold font in the original). The forms identify the matters for which they are appointing their current representatives for corporation tax for the period 2008 through 2012. The line on the form that petitioners could have used to limit their representatives' authority was left blank.

24. With regard to the following documents, information concerning the tax returns or tax audits of other taxpayers are mentioned, but the Division's privilege logs do not claim secrecy: T64 through T70, T93, T101 through T105, T139, T154, T157 through T162.

CONCLUSIONS OF LAW

A. On this motion pursuant to section 3000.7 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules), the Division seeks to have the subpoena duces tecum issued by the Division of Tax Appeals withdrawn, or for such other relief as the Division of Tax Appeals may grant, based on the claim that the documents sought by the subpoena are protected from disclosure by virtue of Tax Law secrecy, or the public interest, attorney work product, or attorney-client privileges. Any subpoena issued by an administrative law judge is regulated by the civil practice law and rules (CPLR) (***see*** Tax Law § 2006 [10]). A motion to withdraw a subpoena is equivalent to a motion to quash under CPLR 2304 (***see Matter of Winners Garage, Inc***., Tax Appeals Tribunal, October 8, 2009; ***see also Ayubo v Eastman Kodak Co.***, 158 AD2d 641 [2d Dept 1990]). A motion under CPLR 2304 is a proper vehicle for quashing a subpoena duces tecum before trial based on a claim that the documents sought are protected from

disclosure by privileges (***see Empire Wine & Spirits LLC v Colon***, 145 AD3d 1157, 1158 [3d Dept 2016]; ***Matter of Moody's Corp.***, Tax Appeals Tribunal, March 22, 2019). In light of the Division's request for "such other relief as the Division of Tax Appeals may grant," and "to facilitate the rapid resolution" of this matter (***see*** 20 NYCRR 3000.0 [a]), this determination will treat the Division's motion as a motion to withdraw or modify the subpoena and will thus determine whether each of the subpoenaed documents is protected from disclosure by Tax Law secrecy or the privileges asserted by the Division.

B. As a preliminary matter, petitioners argue that the Division's motion should be denied because the privilege log it submitted in connection with its motion did not have all the information required by CPLR 3122 (b), citing ***Stenovich v Wachtell, Lipton, Rosen & Katz*** (195 Misc 2d 99 [Sup Ct NY County, 2003]). This argument is rejected. As the Division points out, CPLR 3122 is in article 31 of the CPLR, which is the article governing discovery. The Rules do not allow discovery in Division of Tax Appeals proceedings and, in any event, the Division is making this motion pursuant to CPLR 2304, which applies to subpoenas issued outside the discovery context. Unlike CPLR 3122 (b), CPLR 2304 does not mandate any particular form for a privilege log. Nonetheless, the lack of information in the privilege log will be taken into account in determining whether the Division has met its burden of establishing the nondisclosability of the subpoenaed documents. "[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (***Spectrum Sys. Intl. Corp. v Chemical Bank***, 78 NY2d 371, 377 [1991]). This burden "cannot be satisfied by counsel's conclusory assertions of privilege; rather the proponent of the privilege must set forth with competent evidence establishing the elements of the privilege" (***Delta Fin. Corp. v Morrison***, 17 Misc 3d 1113(A) [Sup Ct, Nassau County, 2007], citing ***Martino v Kalbacher***, 225

AD2d 862 [3d Dept 1996]).

C. The Division's motion claims that every subpoenaed document but one is protected from disclosure by virtue of the public interest privilege. The Court of Appeals, in one of the leading cases discussing the public interest privilege, described it thusly:

> "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 communications 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. . . .While some commentators have argued that the privilege is qualified and requires a balancing of the needs of the litigants against the potential harm to the public interest that may result from disclosure, these, in reality, are two sides of the same coin. 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" (***Cirale v 80 Pine St. Corp***., 35 NY2d 113, 118 [1974] [internal citations and footnote references omitted]).

The Third Department has explained that "the proponent of entitlement to the public interest privilege must demonstrate that a specific public interest would be jeopardized by dissemination of the information claimed to be confidential" and instructed that:

> "[i]n order to determine the legitimacy of the claimed public interest privilege, the trial court must balance the harmful effect of disclosure to the public interest against the injury imposed on the party seeking the confidential information by nondisclosure. If disclosure would be more harmful to the public interest than nondisclosure is to the party seeking the information, disclosure must be denied" (***Labarbera v Ulster County. Socy. for Prevention of Cruelty to Animals***, 277 AD2d 672, 673 [3d Dept 2000]).

The Division's brief in support of its motion notes that the public interest served by nondisclosure here is "the interest at the heart of Public Officers Law § 87(2)(g), whose purpose is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure" (quotations and citations omitted). "The encouragement of candor in the development of policy" is a public interest that can be

taken into account for purposes of the public interest privilege (***see Matter of World Trade Ctr. Bombing Litig.***, 93 NY2d 1, 9 [2003]). As petitioners point out, however, "the conclusory assertion of a general harm to the public interest if the disputed documents are disclosed is insufficient to justify non-disclosure" (***Moody's***, citing ***Cirale*** at 118). In other words, it cannot be merely assumed that disclosure of the subpoenaed documents would inhibit the candor of deliberations within the Division. For example, in ***Weingard v City of New York*** (9 Misc 3d 891, 892 [Sup Ct, NY County, 2003]), the trial court rejected the application of the public interest privilege to personnel file materials, including evaluations, because "[t]he Court is not persuaded that the candor of the [employees'] evaluators would be diminished by the speculative prospect that their evaluations may one day be discoverable in a civil action." Similarly, in ***Martin A. v Gross*** (194 AD2d 195 [1st Dept 1993]), cited in ***Matter of World Trade Ctr.***, the issue was whether the public interest privilege applied to an internal investigatory report by the New York City Human Resources Administration's Child Fatality Review Panel (Panel) relating to the death of an infant murdered by his parents after being identified by the City's Child Welfare Administration (CWA). To establish that release of the report would not be in the public interest, the City submitted an affidavit by the Panel's executive deputy administrator that the CWA's caseworkers would not be candid in their statements to the Panel if they knew that the Panel's reports were subject to disclosure in civil litigation, thus impairing the Panel's ability to identify shortcomings in the CWA's procedures. Based on that proof, among other factors, the Second Department held that the public interest privilege applied to the report. Here, in contrast, the Division has not submitted any "competent evidence" asserting that disclosure of the subpoenaed documents would chill the Division's deliberative process, because the Liebman affirmation does not address those issues. Without a factual explanation, in evidentiary form, of the harm to the public interest for this forum to evaluate, it would be speculative to conclude that

the chilling effect of the disclosure of the subpoenaed documents would be so great as to outweigh petitioners' interest in accessing the documents, so as to cause overall harm to the public interest (***see, e.g., Uniformed Fire Officers Assn., Local 854 v City of New York***, 100 AD3d 546, 546-547 [1st Dept 2012] ["The City failed to show that the public interest would be harmed by the disclosure of drafts of a public safety consultant's report recommending a change to the 911 call system"]; ***Dunivan v New York State Elec. & Gas Corp.***, 23 Misc 3d 1132(A) [Sup Ct, Chemung County 2009] [holding that the public interest privilege did not bar disclosure of a report by a third-party contractor hired by a utility to investigate the cause of an explosion because the utility's "contention that candid and unrestrained self-evaluation and/or investigation of the incident is only possible where the results of the evaluation or investigation are protected from disclosure is speculative and is not supported by any evidence in the record"]). Accordingly, the Division did not meet its burden of establishing that the public interest privilege applies to the subpoenaed documents.

D. Even assuming the Division's factual showing is sufficient to invoke the public interest privilege herein in general, the Division has not established, in the case of some of the subpoenaed documents, that those documents played any role in its deliberative process. Thus, R1 through R13 are described as draft versions of various types of audit documents, i.e., "draft audit reports," "Draft Audit Report Schedule A," etc. However, the Division has not established that those documents are in fact drafts, especially because the first such page bears signatures on all signature lines, is not stamped as "draft," and in fact bears the handwritten notation "closed." R14 through R29 are other audit file-related documents. Given that exhibit R's privilege log does not describe those documents as "drafts," and the documents themselves give no indication of being drafts, the Division's proof is inadequate to show that those documents are deliberative materials protected by the public interest privilege. Finally, review of R30 through R38,

described in the privilege log as "Draft Powerpoint Presentation," does not reveal whether the presentation was prepared for internal use, in which case the presentation might have played a role in the Division's deliberative process, or was prepared for external use, i.e., in explaining the Division's policy to taxpayers or their representatives. This failure to demonstrate the deliberative role of R1 through R38 is an additional reason for rejecting the Division's claim that the public interest privilege applies to those documents.[3]

E. The attorney work-product privilege stems from CPLR 3101 (c), which grants an absolute immunity from disclosure, unlike the conditional "material . . . prepared for litigation" privilege in CPLR 3101 (d) (2). Attorney work product includes materials prepared by an attorney, acting as an attorney, which contain the attorney's analysis and trial strategy (***see Graf v Aldrich,*** 94 AD2d 823, 824 [3d Dept 1983]). Crucially, however, the privilege only applies to materials prepared for current litigation or future litigation (***see Mahoney v Staffa***, 184 AD2d 886, 887 [3d Dept 1992]; ***Ural v Encompass Insur. Co. of Am.***, 97 AD3d 562, 566 [2d Dept 2015]; 7 Carmody-Wait 42:116 [2d Ed.] ["The assertion of the work-product privilege requires an affidavit by an attorney showing that the information was generated by an attorney for the purpose of litigation"]). Petitioners argue that, in the context of the attorney work-product privilege, "prepared for litigation" means "prepared principally or exclusively to assist in anticipated or ongoing litigation," quoting ***Stenovich*** (195 Misc 2d at 116). This is certainly the

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[3] Petitioners argue that, in asserting the public interest privilege, the Division is implicitly relying on the FOIL exemption for inter- or intra-agency materials under Public Officers Law § 87 (2) (g). According to petitioners, that provision only exempts "pre-decisional," "deliberative" documents, and because petitioners' advisory opinions merely apply TSB-M-12(4)C, those advisory opinions are actually "post-decisional" in nature, rendering Public Officers Law § 87 (2) (g)'s exemption, and, by extension, the public interest privilege, inapplicable. To the extent that this argument is not mooted by the conclusion above that the Division has not met its burden of showing the applicability of the public interest privilege to any of the documents here, the argument is rejected. Petitioners have provided no New York precedent supporting the proposition that an advisory opinion that is binding on the agency with regard to the requester (***see*** 20 NYCRR 2376.4) is not a final agency decision, such that documents relating to its preparation could not qualify for protection as intra-agency material under Public Officers Law § 87 (2) (g). More importantly, petitioners also have not shown that qualifying for that FOIL exemption should be considered a prerequisite for qualifying for the public interest privilege.

rule for CPLR 3101 (d) (2)'s privilege for materials prepared for litigation (***see Vandenburgh v Columbia Mem. Hosp.***, 91 AD2d 710, 711 [3d Dept 1982] [holding that, because a hospital incident report was "multi-motived," i.e., not prepared exclusively for litigation, it did not qualify as privileged under CPLR 3101 [d] [2]). Given that the attorney work-product privilege in CPLR 3101 (c) "has been uniformly given a narrow construction by the courts" (***Chemical Bank v National Union Fire Ins. Co. of Pittsburgh, Pa.***, 70 AD2d 837, 838 [1st Dept 1979]), the rule excluding "multi-motived" materials should also apply to the attorney work-product privilege created by that provision (***see also Millen Indus., Inc. v American Mut. Liab. Ins. Co.***, 37 AD2d 817 [1st Dept 1971] [internal reports of an insurance company made in the regular course as to whether to allow or deny a claim are not privileged, but "once [the company] has rejected the claim, reports made by it to aid in the resistance of the claim are made for the purposes of litigation . . . and are protected by CPLR 3101(c), (d)"]). Accordingly, following ***Stenovich***, it is determined that only materials prepared primarily or exclusively for litigation qualify for the attorney work-product privilege.

Applying these rules, it is apparent that the Division's reliance on the attorney work-product privilege herein is also vitiated by a failure of proof. The Division's brief in support of its motion notes that an "attorney's work-product is privileged both in the context of the litigation for which it was prepared and in that of any subsequent legal proceeding," but then does not specify the litigation, in anticipation of which, the documents it seeks to protect under the attorney work-product privilege were prepared. Likewise, the Liebman affirmation also does not state when the Division first anticipated litigation concerning any of the documents allegedly qualifying for the attorney work-product privilege. It is true that the subpoenaed documents include the 2011 Division of Tax Appeals petition raising the same article 33 computation issue as addressed in the 2011 Office of Counsel memorandum (***see*** finding of fact

18) and in the advisory opinions materials that make up the bulk of the documents the Division seeks to protect under the attorney work-product privilege. Nonetheless, with the exception noted in conclusion of law F, the Division has not shown that the attorney work-product privilege applies to the subpoenaed documents. The 2011 Office of Counsel legal memorandum was dated prior to the filing of that petition, and there is no proof that the Division anticipated having to litigate the article 33 computation issue at the time it was prepared. As for the advisory opinion materials, it may well be that, in deliberating over how to draft the advisory opinions sought by petitioners, the Division personnel kept in mind that the Division was litigating the article 33 computation issue in the Division of Tax Appeals. The fact remains, however, that petitioners' advisory opinions were prepared in response to the petitions for advisory opinion filed by petitioners and not to prepare for litigation (***see*** 20 NYCRR § 2376.1 ["Advisory opinions are issued at the request of any person who is or may be subject to a tax or liability under the Tax Law or claiming exemption from such a tax or liability"]). Accordingly, the attorney work-product privilege does not apply to the advisory opinion materials because they were not prepared primarily or exclusively in anticipation of litigation.[4]

The same is true for the documents not related to petitioners' advisory opinions, for which the Division is claiming protection from disclosure under the attorney work-product privilege (***see*** finding of fact 18). For example, R44 through R54 are a draft and final version of an advice of counsel memoranda prepared in the Office of Counsel. This document, which pre-dates the filing of the 2011 Division of Tax Appeals petition (***see*** findings of fact 15 and 18), also does not qualify for the attorney work-product privilege because there is no proof that it was

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[4] Many of the claimed attorney work product documents do not so qualify for other reasons, including the Division's failure to prove that they were prepared by Office of Counsel attorneys (Q81, Q113, S152, S165 through S175, S188 through S190, and T81 through T85), or because the documents do not contain any legal analysis or trial strategy (S164).

prepared exclusively or primarily for litigation. The same is true for R109.

F. In sum, it is determined that the attorney work-product privilege applies only to the Division's answer in the proceeding commenced by the 2011 Division of Tax Appeals petition, S176 through S184.

G. A party asserting the attorney-client privilege:

> "bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,' that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived" (***Ambac Assur. Corp. v Countrywide Home Loans, Inc.***, 27 NY3d 616, 624 [2016]).

Unlike the attorney work-product privilege, the attorney-client privilege "is not tied to the contemplation of litigation" (***Spectrum Sys. Intl. Corp.***, 78 NY2d at 380). The privilege applies between state agency personnel and the agency's attorneys (***Mahoney***, 178 AD3d at 887).

Petitioners argue that the attorney-client privilege should not apply to emails between Division staff and Office of Counsel attorneys about pending or draft legislation (***see*** finding of fact 19). This argument is rejected. If the emails concern advice on how the legislation is to be interpreted or redrafted, or what steps the Division should take in regard to the legislation, the Division's attorneys are performing legal duties. Thus, such emails are eligible for the attorney-client privilege as long as the other requirements of the attorney-client privilege were met (***see Ambac Assur. Corp.***).

In determining whether the attorney-client privilege applies, this determination has accepted as an attorney employed with the Division those persons who have signed documents in that capacity, or whose email address indicates that they work for the Division's Office of Counsel (***see*** finding of fact 16). Furthermore, this determination concludes that the Division has not waived the attorney-client privilege here by disclosing any of the documents to third parties, because the names of persons outside the Division have not appeared as recipients on any

of the emails, for which attorney-client privilege is claimed, and because the Division has taken reasonable steps to ensure the confidentiality of the subpoenaed documents (***see*** finding of fact 20), including inserting on each of its legal memoranda a notice identifying it as subject to attorney-client privilege (***see Manufacturers and Traders Trust Co.***, 132 AD2d 392, 399 [4th Dept 1987] ["The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure"]; Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B CPLR C4548 ["(CPLR 4548), in effect, constitutes a legislative finding that when the parties to a privileged relationship communicate by e-mail, they have a reasonable expectation of privacy"]).

Review of the subpoenaed documents the Division claims are protected by attorney-client privilege reveals that a number do not qualify because they are not communications involving the Division's attorneys or conveying their advice (e.g., Q70, R84, T72 through T74, T154, and S165). Accordingly, the attorney-client privilege does not apply to those documents (***see Ambac Assur. Corp.***). As also noted in finding of fact 19, other emails treated as attorney-client privileged documents by the privilege logs do not so qualify because their primary or predominant purpose is not legal in nature, even though they forward other emails that, standing alone, might qualify for the privilege (***see Spectrum Sys. Intl. Corp.***, 78 NY2d at 378 [to be covered by the attorney-client privilege, the document must be primarily or predominantly legal in nature]).

H. In light of the above rules and analysis, the following documents are found to qualify for the attorney-client privilege:

> Q40, Q41, Q54 through Q56, Q111, Q116, R39 through R54, R70 through R83, R85, R88, R91, R92, R96, R97, R100, R101, R128 through R130, R132, R135, R139, R140, R146, R160, R161 through R162, R164, R184 through R186, S99 through S102, S118, S125, S128, S131-S135, S144 through S147, S150, S153

through S158, T30 through T32, T34 through T56, T88 through T91, T94 through T98, T101, T103 through T108, T111 through T113, T115, T117 through T119, T128 through T130, and T134 through T137.

I. Tax Law § 1518 provides, with some exceptions, that:

> "Except in accordance with the proper judicial order or as otherwise provided by law, it shall be unlawful for the commissioner of taxation and finance . . . any officer or employee of the department of taxation and finance, . . . to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any return required under this article."

The secrecy provisions of the Tax Law "necessarily extend[] to any document that reflects information included in a return" (***New York State Dep't of Taxation and Fin.***, 141 AD3d 997, 1001 [3d Dept 2016]). Based on that reasoning, it is determined that Division of Tax Appeals pleadings are also subject to Tax Law secrecy when they result from audits performed by the Division.

It is axiomatic that Tax Law secrecy does not preclude a taxpayer, or persons duly authorized by the taxpayer, from receiving documents containing the taxpayer's own tax information. The Division does not appear to dispute this, which is why, for example, the Division provided petitioners with Lexington's audit report here; yet, many of the subpoenaed documents the Division claims are subject to secrecy under Tax Law § 1518 contain only petitioners' tax information (***see*** finding of fact 22). In some instances the privilege logs claim that the documents in question are not covered by the "POA," presumably referring to the powers of attorney forms attached to the petitions herein. Those forms authorize petitioners' representatives to receive "confidential information . . . in connection with the matter below," which is identified on the forms as corporation tax matters for the period 2008 through 2012, "unless limited below." Petitioners did not limit the authority of their representatives to receive confidential information. These power of attorney forms are broad enough to authorize petitioners' representatives to receive any tax information relating to petitioners, even if

otherwise protected from disclosure by Tax Law § 1518, as long as the information is requested in relation to petitioners' corporation tax liabilities for the 2008 through 2012 period. Because the subpoena was requested in relation to this matter, which concerns petitioners' corporation tax liabilities under article 33 of the Tax Law for the 2008 through 2012 period, it is determined that the Division may not rely on Tax Law § 1518 as a basis for not disclosing the documents containing that information identified in finding of fact 22. This is true, even in those cases where the tax information on the document also relates to petitioners for a period prior to the 2008 through 2012 period (e.g., Q70 and S187).

J. Based on the above rules and analyses, the following documents are found to be subject to Tax Law secrecy and thus protected from disclosure to petitioners (whether or not the Division asserted Tax Law secrecy):

> R44 through R54, R107, R108, R113, R120, R123, R142, R145, R154, R166, S153 through S184, T64 through T70, T82 through T97, T99, T101 through T106, T127 through T133, T137 through T139, T148 through T151, and T154 through T162.

K. In sum, because the Division has failed to establish, in the case of many of the subpoenaed documents, that they are immune from disclosure by virtue of Tax Law secrecy or any of the claimed privileges, its motion to withdraw the subpoena must be denied. However, nothing in this order prejudices the Division's right to challenge the admissibility of any of the documents found to be subject to disclosure herein if those documents are offered for introduction into evidence at hearing.

L. The Division of Taxation's motion for a withdrawal of the subpoena duces tecum, dated September 18, 2019, issued by the Division of Tax Appeals, is granted to the extent that the subpoena is modified to exclude from its scope the documents identified in conclusions of

law F, H, and J. In all other respects, the Division of Taxation's motion is denied.

DATED: Albany, New York
January 23, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE