

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CDECRE ARTWORK EAT LLC</b>	:	ORDER
for Revision of a Determination or for Refund of Sales and Use	:	DTA NO. 828952
Taxes under Articles 28 and 29 of the Tax Law for the Period	:	
June 1, 2015 through November 30, 2016.	:	

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Petitioner, CDECRE Artwork EAT LLC, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2015 through November 30, 2016.

On August 10, 2020, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), brought a motion seeking an order modifying a subpoena, delivered on July 30, 2020, in the above-captioned matter pursuant to 20 NYCRR 3000.5 and 20 NYCRR 3000.7 (c). Petitioner, appearing by Hodgson Russ, LLP (Timothy P. Noonan, Esq., of counsel), filed a response on September 30, 2020. The Division of Taxation's request for oral argument was denied. The 90-day period for issuance of this order began on October 2, 2020. Based upon the motion papers, the affidavits 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 delivery by Federal Express constitutes proper service of a subpoena duces tecum upon the Division.

II. Whether a subpoena duces tecum issued by the Administrative Law Judge requiring the production of records by the Division of Taxation is jurisdictionally defective because it requires the attendance of the records access officer or delegee to appear and give testimony in conjunction with the production of records.

III. Whether a subpoena duces tecum requiring the production of certain government records should be withdrawn or modified.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) conducted a sales and use tax audit of petitioner, CDECRE Artwork EAT LLC, for the period June 1, 2015 through November 30, 2016 (the audit period).

2. During the audit, the Division issued a statement of proposed audit changes to petitioner dated July 11, 2018, which asserted additional sales tax due by petitioner with respect to three transactions (the transactions).

3. According to a field audit report prepared by the Division, the primary issue in the audit is the application of trade-in credits allowed for under 20 NYCRR 526.5 (f) that were utilized by petitioner in calculating the sales tax on the transactions and the resulting sales tax due by petitioner for the audit period. The field audit report states the Division's position that the trade-in credits were not allowed because "this arrangement is-not a traditional 'trade-in' covered under the law."

4. At the conclusion of the audit, the Division issued a notice of determination to petitioner, assessment number L-048691566, dated August 13, 2018 (the notice), which asserted \$3,622,597.50 in additional sales tax due plus interest for the audit period.

5. On November 1, 2018, petitioner filed a petition with the Division of Tax Appeals protesting the notice.

6. In its petition, petitioner asserts that it served as a qualified intermediary (QI) during the audit period with respect to several IRC §1031 exchanges for clients involving artwork and that, in doing so, it followed the rules governing “trade-ins” for vendors under 20 NYCRR 526.5 (f) when calculating the total receipt subject to sales tax.

7. The petition further asserts that the sales tax asserted due in the notice is premised on the Division’s disallowance of the trade-in credit with respect to three transactions for which petitioner served as a QI. In this regard, the petition alleges that the Division is taking the position that the “trade-in” credit applicable to vendors under 20 NYCRR 526.5 (f) does not apply to IRC § 1031 transactions.

8. The crux of this matter is whether the trade-in credit under 20 NYCRR 526.5 (f) can be claimed with respect to a transaction that qualifies as a like-kind exchange under IRC § 1031.

9. In the petition, petitioner alleged that the Division’s position is inconsistent with its treatment of 1031 exchanges in other published rulings and, as such, the notice is arbitrary and capricious and lacks a rational basis.

10. On October 28, 2019, petitioner moved for summary determination.

11. The Division submitted an affirmation in opposition to petitioner’s motion for summary determination alleging that there are material facts in dispute such that the motion should be denied.

12. By order dated March 16, 2020, the motion for summary determination was denied.

13. A hearing in this matter was scheduled for December 9, 2020.

14. On July 22, 2020 petitioner filed a request for a subpoena duces tecum with the undersigned Administrative Law Judge (the subpoena request). The subpoena request enumerated four categories of responsive records that petitioner requested be included in a subpoena duces tecum addressed to the Division.

15. On July 28, 2020, the undersigned Administrative Law Judge issued the requested subpoena duces tecum (the subpoena). The subpoena directed the Division's records access officer to appear and give testimony and produce the following at the December 9, 2020 hearing:

“Copies of all records concerning the application of ‘trade-in credits’ under 20 NYCRR 526.5(f) in the context of a like-kind exchange under IRC § 1031. The term ‘records’ includes any and all books, papers, documents, memoranda, legal opinions, Opinions of Counsel, correspondence or other similar documents (but not including published advisory opinions) in the possession of the Division of Taxation (the ‘Division’) that address, pertain to, refer to, or otherwise concern this subject matter to the extent that the same is in the possession of the Division and is dated and/or was created, prepared, or otherwise obtained by the Division at any time during the 10-year period preceding the date of this subpoena. The Division shall redact the identity of any taxpayer(s) (other than Petitioner) referenced in any of the foregoing records. Such redactions, if any, shall be confined to the name(s), address(es), and/or taxpayer identification number(s) of any such taxpayer(s).

Copies of any and all notes, emails, memoranda, legal opinions, correspondence or other similar documents created as part of or relating to the issuance of the following Technical Services Bureau Advisory Opinions: TSB-A-99(7)S, TSB-A-00(49)S, and/or TSB-A-02(20)S. The Division shall redact the identity of any taxpayer(s) (other than Petitioner) referenced in any of the foregoing records. Such redactions, if any, shall be confined to the name(s), address(es), and/or taxpayer identification number(s) of any such taxpayer(s).

Copies of every Field Audit Report (Form DO-1637.2) for any sales and use tax field audit conducted by the Division of Taxation in the past 10 years that addressed or otherwise audited the application of ‘trade-in credits’ under 20 NYCRR 526.5(f) in the context of a like-kind exchange under IRC § 1031. The Division shall redact the identity of any taxpayer(s) (other than Petitioner) referenced in any of the foregoing records. Such redactions, if any, shall be confined to the name(s), address(es), and/or taxpayer identification number(s) of any such taxpayer(s).

Copies of records previously withheld by the Division of Taxation in response to petitioner's request for records under the Freedom of Information Law.”<sup>1,2</sup>

16. Petitioner, through counsel, sent a copy of the subpoena to counsel for the Division by Federal Express addressed to the Division's counsel.

17. On August 10, 2020, the Division moved to modify or withdraw the subpoena. The Division's motion papers consisted of a notice of motion and the affirmation of Osborne Jack, Esq., to which a copy of the subpoena sent to the Division by Federal Express on July 31, 2020, with a copy of the Federal Express envelope were attached. The Division also included a memorandum of law.

18. In support of modifying or withdrawing the subpoena, Mr. Jack averred that it was his understanding that the Division does not maintain records in a manner that easily lends itself to key word searches. The Jack Affirmation also stated the following in paragraphs 9, 10, and 11:

“9. The subpoena should be withdrawn because it is jurisdictionally defective.

10. Further, the subpoena should be modified because, other than the audit file that was the subject of the FOIL request, it is unreasonable, oppressive, excessive in scope, unduly burdensome, overly broad, violative of 20 NYCRR 3000.50 and 20 NYCRR 3000.7.

11. Further, if the subpoena is not withdrawn, it should be modified to reflect that the Division is entitled to assert at hearing all available privileges including but not limited to secrecy, attorney-client privilege, attorney work product, and/or public interest privilege.”

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<sup>1</sup> The subpoena contains a typographical error in the citation to 20 NYCRR § 526.5 (f). Although not made an issue, by this order such error is deemed to be corrected.

<sup>2</sup> On March 20, 2019, petitioner made a freedom of information law request (FOIL request) with the Division requesting copies “all records pertaining to the sales and use tax audit of [petitioner]...” In responding to petitioner's FOIL request, the Division withheld 50 pages of documents alleging they were intra-agency or inter-agency communications not subject to disclosure under FOIL. Petitioner did not appeal the denial of the withheld documents to the Division's records appeal officer.

19. The Division's motion to quash did not request in camera review of any of the records sought in the subpoena.

20. On September 29, 2020, an employee of petitioner's counsel served a copy of the subpoena upon the Attorney General of the State of New York by hand-delivery.

21. On September 29, 2020, an employee of petitioner's counsel served counsel for the Division with a copy of the subpoena by certified mail in an envelope bearing the legend "URGENT LEGAL MAIL" addressed as follows:

Osborne Jack, Esq., Office of Counsel  
Department of Taxation and Finance  
W.A. Harriman Campus, Building 9  
Albany, NY 12227

22. On September 29, 2020, an employee of petitioner's counsel served the Division's Records Access Officer with a copy of the subpoena by certified mail in an envelope bearing the legend "URGENT LEGAL MAIL" and addressed as follows:

Records Access Officer or delegee  
New York State Department of Taxation & Finance  
Bldg 9, Room 100  
Albany, NY 12227

23. On September 30, 2020, counsel for petitioner filed an affidavit of service with the Division of Tax Appeals.

24. Petitioner timely opposed the Division's motion to modify or withdraw the subpoena.

25. By letter dated October 27, 2020, the December 9, 2020 hearing was adjourned pending the final determination on the Division's motion to modify or withdraw the subpoena.

26. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 27 proposed findings of fact. Proposed findings of fact 1, 2, 4 through 8, 10 through 13, and 18 through 27 of the proposed findings of fact are supported by the record, and have been consolidated, condensed,

combined, renumbered and substantially incorporated herein (*see* State Administrative Procedure Act § 307 [1]). Proposed findings of fact 3, 9, and 14 through 17 have been accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered and substantially incorporated herein (*id.*)

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

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

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

C. The first issue to be addressed is whether petitioner properly served the subpoena on the Division. Specifically, the Division objects to petitioner's attempt to effectuate service by

sending the subpoena to it via Federal Express. Petitioner claims that service was properly effectuated because section 3000.22 (e) (2) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides for service of motions and other papers on the Division's Office of Counsel by delivery or by mail. Petitioner's argument ignores that any subpoena issued under the authority of Tax Law § 2006 (10) "shall be regulated by the civil practice law and rules." Under the CPLR, a subpoena must be served in the same manner as a summons (*see* CPLR 2303 [a]). Service upon the state is governed by CPLR 307. The use of Federal Express to deliver the subpoena to the Division is not authorized under CPLR 307. Thus, it is concluded that petitioner did not properly serve the subpoena on the Division when it did so by Federal Express. Notwithstanding that the subpoena was not properly served in the first instance, petitioner subsequently had copies of the subpoena personally served upon the attorney general's office and via certified mail upon the Division in accordance with CPLR 307. Accordingly, that part of the Division's motion seeking that the subpoena be modified or withdrawn based upon defective service is denied

D. The Division also alleges that the subpoena duces tecum is jurisdictionally defective because it calls for the appearance of the Division's records officer. This assertion is rejected because the subpoena, while requiring the appearance of the records access officer or delegee, makes such appearance solely for the purpose of authenticating the subpoenaed records (*see* CPLR 2305 [b] [2] [providing that "[a]ny person may comply with a subpoena duces tecum for a trial, hearing or examination by having the requisite books, documents or things produced by a person able to identify them and testify respecting their origin, purpose and custody"]). The language of the subpoena is consistent with that used in civil practice in the courts of New York



(*see e.g.*, 4 West's McKinney's Forms CPLR § 12:74 [Subpoena duces tecum upon trial of action]; Blumberg Legal Form 72 [Judicial Subpoena Duces Tecum]).

E. Next, the Division requests that the subpoena be withdrawn because it would be unduly burdensome and oppressive to comply with the subpoena. As support for its claim, the Division's representative submitted an affirmation wherein he states that it is his understanding that the Division's computer system does not lend itself to key word searches. The Division's claims are rejected as the Division's representative gives no basis for his knowledge nor has the Division articulated with any specificity how complying with the subpoena would be unduly burdensome and oppressive despite the alleged intellectual technology shortcomings. Since the Division is a party to this proceeding, its assertion that complying with the subpoena would be unduly burdensome is simply unavailing. Other than the request for audit reports of other taxpayers, the subpoena request does not appear to be utterly irrelevant nor does it appear that the subpoena would be an exercise in futility. The subpoena is narrowly tailored to uncover documents that go to the heart of the matter; i.e., whether "trade-in" credits applicable to vendors under 20 NYCRR 526.5 (f) apply to IRC § 1031 transactions.

F. Next, the Division contends there is no authority to subpoena other taxpayer records. Pursuant to Tax Law §1146 (a), the so-called secrecy provision, the use of other taxpayer's returns or return information is strictly prohibited (*see People v Sprint Communications Inc.*, 148 AD3d 471 [1st Dept 2017]; *Matter of Manufacturers Trust Co. v Browne*, 269 App Div 108 [1st Dept 1945] *affd* 296 NY 549 [1946]). While tax returns may be disclosed pursuant to a "proper judicial order," the term has been interpreted to mean an order carrying out one of the aforementioned exceptions or issued in a case in which the tax return itself was in issue (*see New York State Dept. of Taxation and Fin. v New York State Department of Law*, 44 NY2d 575

[1978]). This matter involves neither, nor does the statute allow for a redacted copy of a return to be disclosed or anything emanating from the return (*Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation & Fin.*, 141 AD 3d 997 [3d Dept 2016]). Audit reports from other taxpayers necessarily emanate from return information. Accordingly, that part of the subpoena directing the Division to turn over redacted copies of audit files of other taxpayers is withdrawn.

G. Next, the Division has asserted that the documents petitioner seeks via the subpoena are privileged pursuant to secrecy, attorney-client privilege, attorney work product, and/or public interest privileges. While the documents petitioner seeks from the Division may certainly be subject to such privileges, a ruling on such cannot be made at this time as the Division has only made the blanket claim that such privilege applies. The Division has not proffered anything by way of evidentiary submission that establishes any privileges apply. While the subpoena requires the production of certain documents that would appear from their description to be privileged, a determination cannot be made that any privileges do in fact apply without a detailed description of the document and what privilege applies and/or an actual examination of said documents (*see Matter of Moody's Corporation & Subsidiaries*, Tax Appeals Tribunal, March 22, 2019). For these reasons, the Division's motion seeking to have the subpoena withdrawn or modified based upon the assertion of privilege is denied without prejudice to reassert its claims of privilege at the hearing in this matter or as directed by the Administrative Law Judge. In accordance with foregoing, the Division will be required to provide a privilege log detailing with specificity the reasons why any documents required to be produced pursuant to the subpoena are privileged. As stated in *People ex rel. Hickox v Hickox*, 64 AD2d 412, 413–414 (1st Dept, 1978):

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

H. Based upon the foregoing, the Division of Taxation’s motion to withdraw and/or modify the subpoena is granted to the extent of Conclusion of Law F, but is otherwise denied.

The Division is directed to furnish the requested documents, consistent with the terms of this Order, at the hearing in this matter, or as otherwise directed by the Administrative Law Judge.

DATED: Albany, New York  
December 30, 2020

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE