

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of
CDECRE ARTWORK EAT LLC
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.

ORDER
DTA NO. 828952

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 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. By order dated December 30, 2020, the administrative law judge ordered an in camera inspection of the responsive documents pursuant to the terms of the order. On May 28, 2021, the Division of Taxation submitted documents for in camera review as well as the affirmation of Osborne K. Jack, Esq., and a brief. Petitioner filed a response on July 2, 2021. The 90-day period for issuance of this order commenced on July 9, 2021, the due date of petitioner's response. 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.

ISSUE

Whether certain government records required to be produced by a subpoena duces tecum served upon the Division of Taxation by petitioner are shielded from disclosure by the public interest privilege and/or the attorney-client privilege.

FINDINGS OF FACT

1. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 18 proposed findings of fact.¹ Proposed findings of fact 1 through 4, 6, 8 through 11, 22 and 23 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 5, 7, and 24 through 28 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.

2. 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).

3. 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).

4. According to a field audit report prepared by the Division, the primary issue in the audit is the application of trade-in credits allowed 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

¹ The proposed findings of fact are numbered 1 through 11 and 22 through 28. There are no proposed findings of fact numbered 12 through 21.

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."

5. 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.

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

7. 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.

8. The petition further states that the sales tax asserted due in the notice is premised on the Division's disallowance of the trade-in credits with respect to the 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.

9. 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.

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

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

12. 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.

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

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

15. 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.

16. 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."²

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

18. 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.

19. 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.

² 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.

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.”

20. The Division’s motion to modify or withdraw the subpoena did not request in camera review of any of the records sought in the subpoena.

21. 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.

22. 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

23. 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

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

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

26. 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.

27. On December 30, 2020, the administrative law judge issued an order granting the Division's motion in part and denying the Division's motion in part and ordered an in camera inspection of the documents responsive to petitioner's subpoena.³

28. In accordance with the December 30, 2020 order, the Division submitted a binder of documents responsive to the subpoena, a privilege log, the affirmation of Osborne K. Jack and a memorandum of law.

29. Mr. Jack avers that he canvassed employees from various units within the Division requesting documents responsive to the subpoena and that upon review of the requested documents, claims that the vast majority of the documents requested by petitioner are protected from disclosure by either the attorney-client or the public interest privilege, or both.

30. Mr. Jack separated the responsive documents contained in the binder into six tabs and placed them into a binder as follows:

- i. Tab 1 of the binder contains 65 pages of emails obtained from Richard Graf of the Division's Field Audit Management;
- ii. Tab 2 contains 257 pages of emails and attachments obtained from Mary Ellen Ladouceur, a principal attorney in the Division's Office of Counsel;
- iii. Tab 3 contains the Advisory Opinion file (189 pages) for TSB-A-00(49)S;
- iv. Tab 4 contains the Advisory Opinion file (90 pages) for TSB-A-02(20)S;
- v. Tab 5 contains the Advisory Opinion file (58 pages) for TSB-A-99(7)S; and
- vi. Tab 6 contains 51 pages withheld by the Division in its response to petitioner's FOIL request.

³ Findings of fact 1 through 25 from the December 30, 2020 order are set forth in the findings of fact herein. The conclusions of law of the December 30, 2020 order are incorporated herein by reference.

31. The Division's privilege log is reproduced below:

CDECRE Privilege Log			
DTA 828952			
	Document Page #	Document Description	Reason
Tab 1	1-2, 27-33, 52-53, 63	Emails between OOC and audit staff	Attorney-client
	3-4, 22-26, 44-65	Email exchanges between audit staff, FAM and OOC	Public interest
	5-22, 34-43	Scheduling emails, petitioner's documents	Ok to release
Tab 2	1-5, 11-26, 171-188	Emails between OOC and audit staff	Attorney-client
	11-26, 171-188, 190-195	Email exchanges between audit staff, FAM and OOC	Public interest
	6-10, 27-170, 189, 197-257	Scheduling emails, petitioner's documents	Ok to release
Tab 3	1-2, 7-189	Internal discussions about the petition and drafts	Public interest
	3-6	Published AO	Ok to release
Tab 4	2-6	Published AO	Ok to release
	1, 7-90	Draft AO, deliberative discussions about the AO	Public interest
	60-65	Email chain between OOC and departmental personnel	Attorney-client
Tab 5	2-5	Published AO	Ok to release
	1, 6-50	Discussions and deliberations about the AO, drafts and edits	Public interest
	51-58	Copy of AO petition	Ok to release
Tab 6	1-51	Internal emails discussing the audit of CDECRE	Public interest

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 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. As noted, in the December 30, 2020 order, the undersigned administrative law judge ordered an in camera inspection of the documents that the Division claimed were shielded from disclosure based upon privilege. In addition to submitting the responsive documents, the Division submitted an affirmation from its representative, a privilege log and a brief wherein it alleges that various documents are shielded by the attorney-client privilege and/or the public

interest privilege.⁴ “The 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]).

D. The attorney-client privilege applies to confidential communications between clients and their attorneys made “in the course of professional employment” (CPLR 4503 [a] [1]). “The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client” (*Spectrum Sys. Intl. Corp. v Chemical Bank*, at 379).

E. The public interest 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 (*Cirale v 80 Pine St. Corp.* (35 NY2d 113, 118 [1974])). In determining whether a public interest privilege is applicable, a court must weigh the government's interest in encouraging candid discussion and representation of views among its employees in the development of policy, against the degree to which the public interest may be served by disclosure (*id.*). The privilege will be applied where the government demonstrates that the public interest in confidentiality outweighs the public interest in disclosure (*see Matter of World Trade Ctr. Bombing Litig.*, 93 NY2d 1, 8–9 [1999]), There must be specific support for the claim of privilege (*Colgate Scaffolding & Equipment Corp. v York Hunter City Services, Inc.*, 14 AD3d 345 [1st Dept 2005]). A broad, conclusory

⁴ In its response, petitioner has asserted that the privilege log is not specific enough in detailing the various documents for which privilege is claimed. As noted by petitioner, there are no formal requirements for a privilege log. Whatever deficiencies may exist in the privilege log have been rectified by the submission of the documents to the administrative law judge for in camera inspection.

assertion is insufficient. A potential harm should be identified, such as a threat to public security or danger to a confidential informant (*Matter of World Trade Center Bombing Litigation*).

F. With these legal standards in mind, the following rulings are made:

TAB 1

a) In camera review of pages 1 and 2 of Tab 1 reveals an email from an attorney in the Division's Office of Counsel to Mr. Graf inquiring as to whether the Division has ever issued guidance with respect to trade-in credits and Mr. Graf's response thereto. There is no indication that this email inquiry was made in order to render legal advice or services to the Division's audit staff, nor has the Division demonstrated the specific public interest that would be jeopardized in disclosing said emails. The Division has asserted that the public interest provision shields these documents from disclosure but has proffered no specific resulting harm to the public from such disclosure. The Division simply relies upon the existence of the public interest provision as its basis for nondisclosure. The audit of petitioner is the subject of each of these emails. Petitioner is clearly entitled to know the basis upon which the Division's notices were issued. Petitioner is entitled to see these emails and the Division is directed to turn over said emails at the hearing in this matter.

b) In camera review of pages 3, 4 and 22 through 26 of Tab 1 reveals a string of emails by and between the Division's auditors and petitioner directly concerning the audit. The Division has not demonstrated the specific public interest that would be jeopardized in disclosing said emails. Therefore, the Division is required to turn over said pages to petitioner at the hearing in this matter.

c) In camera review of pages 27 through 33 of Tab 1 reveals a series of emails by and between petitioner and the Division's auditors that were eventually forwarded to Mr. Graf, who

in turn forwarded them to the Division's Office of Counsel seeking legal advice. The emails to and from Mr. Graf and the Office of Counsel appear on page 27. The attorney-client privilege shields the emails appearing on page 27 to and from Mr. Graf and the Office of Counsel; review of the forwarded emails, however, indicates they were not originally generated for the purpose of obtaining legal advice nor has the Division demonstrated the specific public interest that would be jeopardized in disclosing said emails. Therefore, the Division is directed to turn over pages 28 through 33 of Tab 1 to petitioner at the hearing in this matter.

d) In camera review of pages 44 through 51, pages 54 through 62 and pages 64 through 65 of Tab 1 reveal email communications by and between the auditors relating to the underlying audit. The Division has not demonstrated the specific public interest that would be jeopardized in disclosing said emails. Therefore, the Division is required to turn over said pages to petitioner at the hearing in this matter.

e) In camera review of pages 52 and 53 reveal an email communication from the Division's representative, Mr. Jack, responding to an email Mr. Graf sent to Mr. Jack as well as the Division's auditors. Review of this email indicates it was written in order to render legal advice or services to the Division's audit staff. Therefore, it is privileged and need not be produced.

f) In camera review of page 63 of Tab 1 reveals an email communication from Ms. Ladouceur responding to an email Mr. Graf sent to her that requests legal assistance. Review of this email indicates it was written in order to render legal advice or services to the client; therefore, it is privileged and need not be produced.

TAB 2

a) In camera review of pages 1 through 5 and pages 11 through 20 of Tab 2 contain a series of emails by and between the Division's auditors as well as petitioner that were eventually forwarded to Mr. Graf. At the top of page 1 is a March 16, 2017 email from Mr. Graf to Ms. Ladouceur forwarding said emails wherein Mr. Graf requests legal advice from the Division's Office of Counsel. Pages 11 through 15 contain the same series of emails as contained in emails on pages 1 through 5 except that by email also dated March 16, 2017 (appearing on page 11), Ms. Ladouceur forwards same to other attorneys in the Division's Office of Counsel for review and comment and copies Mr. Graf. The top of page 16 of Tab 2 is Mr. Graf's response to Ms. Ladouceur. The specific emails from Mr. Graf to Ms. Ladouceur and Ms. Ladouceur's response thereto and subsequent emails to and from attorneys in the Division's Office of Counsel are protected by the attorney-client privilege; however, the emails forwarded by Mr. Graf to Ms. Ladouceur do not appear to have been prepared to obtain legal advice, nor has the Division established the specific public interest that would be jeopardized in disclosing said emails. The Division is directed to redact these emails and turn the remaining pages over to petitioner at the hearing in this matter.

b) Pages 21 through 26 of Tab 2 is a September 5, 2017 email to Ms. Ladouceur from Mr. Graf wherein Mr. Graf forwards attachments from petitioner's representative as well as a series of emails from the Division's auditors in this matter.⁵ Pages 171 through 178 contain the same emails as pages 21 through 26 except that the top of page 171 contains an email from Ms. Ladouceur to other attorneys in the Division's Office of Counsel. The specific emails from Mr. Graf to Ms. Ladouceur and Ms. Ladouceur's response thereto and subsequent email to attorneys

⁵ Pages 27 through 170 contain correspondence and documents originally sent to the Division's auditors; the Division concedes that no privilege applies to these documents.

in the Division's Office of Counsel are protected by the attorney-client privilege; however, the emails forwarded by Mr. Graf to Ms. Ladouceur do not appear to have been prepared to obtain legal advice and therefore are not privileged. The Division is directed to redact these emails and turn the remaining pages over to petitioner at the hearing in this matter.

c) pages 190 through 196 of Tab 2 contain a series of emails by and between attorneys in the Division's Office of Counsel specifically discussing this matter. These emails are attorney-client privileged and not subject to disclosure.

TABS 3, 4, 5 (advisory opinion files)

In camera review of pages 1, 2 and 7 through 189 of Tab 3; pages 1 and 7 through 90 of Tab 4; and pages 1 and 6 through 50 of Tab 5 reveals these documents are drafts of the published advisory opinions with markups and communications between personnel within the Division concerning the drafts of the respective advisory opinions. All of these documents are properly classified as non-final deliberative communications leading up to the publication of the respective advisory opinions. In this case, the Division clearly has an interest in shielding the internal deliberative processes, in formulating policy leading up to the publication of advisory opinions, from disclosure. Shielding these documents from disclosure ensures that the Division's personnel tasked with such role 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. Petitioner's conclusory claim that it believes the Division historically allowed trade-in credits to qualified intermediaries in like kind exchanges and now has changed course, does not outweigh the Division's interest in nondisclosure. Petitioner's need for these documents appears to be a fishing expedition as none of the three published advisory opinions deal with trade-in credits. In addition, advisory opinions cannot be

cited as precedent and they are only binding on the Division with respect to the requesting party. Advisory opinions are not precedential and are in no way binding herein (*see* Tax Law § 171 [24]; 20 NYCRR 2376.4). Nonfinal agency deliberations contained in said files are utterly irrelevant to the determination of tax in this matter. Therefore, all of Tabs 3, 4 and 5 (other than what the Division has consented to releasing in its privilege log) are shielded from disclosure.

TAB 6

Finally, Tab 6 contains a series of emails withheld by the Division in response to a FOIL request made by petitioner. The Division has asserted that the public interest provision shields these documents from disclosure but has proffered no specific resulting harm to the public from such disclosure. Petitioner is entitled to see these emails and the Division is directed to turn over said emails at the hearing in this matter.

G. Based upon the foregoing, the Division of Taxation is directed to turn over all documents consistent with the terms of this Order at the hearing in this matter.

DATED: Albany, New York
October 7, 2021

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE