STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions

of

**ACQUAVELLA FINE ARTS, LLC
AND
WILLIAM ACQUAVELLA**

for Revision of Determinations or for Refunds of New York
State Sales and Use Taxes Under Articles 28 and 29 of the Tax
Law for the Period September 1, 2012 through May 31, 2015.

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ORDER
DTA NOS. 829153,
829158, 829159 AND
829160

Petitioners, Acquavella Fine Arts, LLC and William Acquavella, filed petitions for

revision of determinations or for refunds of New York State sales and use taxes under articles 28

and 29 of the Tax Law for the period September 1, 2012 through May 31, 2015.

On July 23, 2020, the Division of Taxation, by its representative, Amanda Hiller, Esq.

(Osborne K. Jack, Esq., of counsel), brought a motion, seeking an order to modify or withdraw a

subpoena served upon it in the above-captioned matter on July 9, 2020 pursuant to 20 NYCRR

3000.5 and 20 NYCRR 3000.7 (c).   Petitioners appeared by McDermott, Will and Emery LLP

(Arthur R. Rosen and Kathleen M. Quinn, Esqs., of counsel). By request of petitioners, the

parties were given additional time to file supplemental responses. The 90-day period for

issuance of this order began on October 23, 2020.

Based upon the motion papers and documents submitted therewith, and all pleadings and

documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law

Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Acquavella Fine Arts, LLC (Acquavella) is a New York-based art gallery and dealer.

2. This matter involves four assessments issued by the Division of Taxation (Division) to petitioners for additional sales tax due after an audit was completed for the period March 1, 2012 through May 31, 2015.

3. The Division issued a notice of determination, assessment number L-048873041, dated October 10, 2018 to Acquavella, for the tax period June 1, 2013 through August 31, 2013. It also assessed petitioner, William Acquavella, as a responsible person of Acquavella, by notice of determination, assessment number L-048877692, dated October 11, 2018, for the same period.

4. A notice of determination, assessment number L-048872315, dated October 10, 2018, was issued to Acquavella for the periods September 1, 2012 through May 31, 2013, September 1, 2013 through November 30, 2013 and September 1, 2014 through May 31, 2015. The Division also issued a notice of determination, assessment number L-048877693, dated October 11, 2018, to Mr. Acquavella as a responsible person of Acquavella for the same sales tax periods.

5. On January 4, 2019, petitioners timely filed four petitions with the Division of Tax Appeals, protesting each of the notices issued to them.

6. On July 9, 2020, petitioners served a subpoena duces tecum on the Division seeking the following:

 "1. All documents relating to the Department of Taxation and Finance's sales
 and use tax audit of Acquavella LLC for the period 09/01/2009 through
 05/31/2012, Case ID Number X252440487, including the full audit file. A Power
 of Attorney authorizing McDermott, Will & Emery LLC to obtain the documents
 is attached.

 2. All documents relating to the Department of Taxation and Finance's sales and
 use tax audit of Acquavella Fine Arts LLC, Case ID Number X470486354, for the
 period 03/01/2012 through 05/31/2015, including the full audit file.

 3. All documents relating to the sales and use tax trade-in-credit provided under
 New York Tax Law § 1101(b)(3) and 20 NYCRR section 526.5(f).

 4. All documents relating to TSB-ST-155(August 6, 2015), including the decision
 to remove TSB-ST-155 from the Department of Taxation and Finance's website.

 5. All documents related to the New York State Attorney General investigation of
 Acquavella Fine Arts LLC, which commenced in 2016."

The subpoena was issued by petitioners' representatives, Arthur R. Rosen, Esq., and Kathleen M.

Quinn, Esq.

CONCLUSIONS OF LAW

A. The Division has made a motion to withdraw or modify the subpoena served upon it in

this matter. CPLR 2304 clearly provides that a motion to quash, fix conditions or modify a

subpoena shall be made promptly in the court in which the subpoena is returnable. However, if

the subpoena is not returnable in a court, ". . . a request to withdraw or modify the subpoena shall

first be made to the person who issued it and a motion to quash, fix conditions or modify may

thereafter be made in the supreme court" (*id*). In this case, the subpoena was not issued by an

employee of the Division of Tax Appeals; rather it was issued by petitioners' representatives,

who refuse to withdraw it. Accordingly, any motion to quash or modify must be brought in

supreme court. Contrary to the Division's argument that although the Tax Appeals Rules of

Practice and Procedure (Rules) provide that an attorney may issue a subpoena pursuant to CPLR

2302 (*see* 20 NYCRR § 3000.7), the Division of Tax Appeals has no jurisdiction to act on such

subpoena (*see* CPLR 2304). The Division's reliance on ***Matter of the Application of Moody's Corp. and Subsidiaries v New York State Dept of Taxation & Fin., et al.*** (Sup Ct, Albany County, April 3, 2017, Ryba, J; Index No. 5594-16) (unpublished opinion), for the proposition that the Division of Tax Appeals has jurisdiction to modify or quash an attorney issued subpoena, is misplaced. In ***Moody's***, the Court held that if an agency has the power to issue subpoenas in an administrative proceeding, the supreme court does not have authority to issue a subpoena duces tecum for production of documents at that proceeding (***id***). ***Moody's*** makes no mention of where jurisdiction lies to challenge an attorney issued subpoena (***id***). As set forth above, the Division of Tax Appeals lacks jurisdiction to modify or quash the subpoena at issue herein.

    B. The Division of Taxation's motion to modify or withdraw the subpoena is denied

DATED: Albany, New York

      January 21, 2021

                                        /s/ Donna M. Gardiner_____
                                        ADMINISTRATIVE LAW JUDGE