

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
123 LINDEN, LLC	:	ORDER
	:	DTA NOS. 830249 AND
for Revision of a Determination or for Refunds of	:	830866
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period June 1, 2017 through	:	
December 13, 2020.	:	

Petitioner, 123 Linden, LLC, filed petitions for revision of a determination or for refunds of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2017 through December 13, 2020.

On June 26, 2023, three subpoena duces tecum, one each for Jennifer Hink-Brennan, Esq., Laura Mugrace and Diane Albano, respectively, were issued, at petitioner's request, directing the Division of Taxation (Division) to produce certain documents. Those subpoenas duces tecum were, in turn, served on the Division on June 30, 2023.

On July 10, 2023, the Division, appearing by Amanda Hiller, Esq. (Brandon Batch, Esq. of counsel), brought a motion, pursuant to 20 NYCRR 3000.7 (c), seeking an order withdrawing the June 26, 2023 subpoena duces tecum for Jennifer Hink-Brennan, or modifying the subpoenas duces tecum for Laura Mugrace and Diane Albano, respectively. The motion was accompanied by an affidavit, dated July 10, 2023, of Brandon Batch, Esq., and attached exhibits, and the affidavit, dated July 10, 2023, of Jennifer Hink-Brennan, Esq. On July 26, 2023, petitioner, appearing by H. Friedman and Associates, CPA (Herschel Friedman, CPA), submitted an affidavit, dated July 26, 2023, of Herschel Friedman, and attached exhibits in opposition to the

motion to withdraw or modify the subpoenas. With permission, the Division filed a sur-reply to the Division's motion to withdraw or modify the subpoenas by August 17, 2023, which date began the 90-day period for the issuance of this order. Based upon the Division's motion, attached affidavits and exhibits, petitioner's responding affidavit and attached exhibits submitted in opposition to the Division's motion, the Division's sur-reply, and all pleadings and proceeding had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation has standing to bring the motion to withdraw or modify the subpoenas duces tecum issued in this matter.

II. Whether the subpoena duces tecum for Jennifer Hink-Brennan, Esq., requiring her appearance and production of certain documents should be withdrawn.

III. Whether the subpoenas duces tecum for Laura Mugrace and Diane Albano, respectively, should each be modified to exclude the production of "without limitation, the third-party tax returns contained in the file(s)."

FINDINGS OF FACT

1. On December 14, 2020, petitioner, 123 Linden LLC, filed an application for credit or refund of sales or use tax (application) in the amount of \$558,000.00 for the period June 1, 2017 through December 13, 2020. This application was based upon petitioner's claim that it erroneously paid sales tax on a capital improvement contract with Yuanda USA Corporation (Yuanda).

2. On January 25, 2021, the Division issued to petitioner a refund claim determination notice, document locator number: AM2012116957 (refund claim #AM2012116957), that denied a claim for refund of sales or use tax in the amount of \$558,000.00 for the period June 1, 2017

through December 13, 2020 (refund denial notice). The explanation section of the refund denial notice provided the following detailed explanation:

“Your claim for credit or refund of sales or use tax is being denied in full.

The New York State Sales and Use Tax law [sic] imposes a tax on the cost of the building materials used in the performance of a capital improvement. The purchaser of the materials, whether it.s [sic] the contractor or the homeowner, must pay the sales tax on those materials at the time of the purchase. If the contractor supplies, and installs the materials that are used in a capital improvement, the contractor must pay the tax on all materials that are used. The contractor then includes the sales tax he paid in the cost of the materials that he charges to his customer. The contractor may or may not choose to show this cost on the invoice to his customer.

Your claim for a refund is being denied because you were not charged sales tax on the purchase of a capital improvement i.e. [sic] materials, supplies and labor. As required by law, any sales tax charged must be separately stated on the invoice. If you are charged tax on a capital improvement, the invoice would show tax charged on the total of materials, supplies and labor. The sales tax shown on the statement you included with your claim was merely a recoupment by the contractor of his cost of materials. Accordingly, your claim is denied in full.

In addition, the Sales and Use Tax Law requires that a refund application be filed within three years from the date the taxes are payable to the Tax Department. Sales Tax is deemed to be payable on the 20th day of the month following the quarter in which the sale/purchase was made.

Your claim was filed on 12/21/2020. Based on the three year [sic] statute of limitations, your claim can only include periods beginning on 09/01/2017. All taxes paid on sales/purchases made before that date cannot be recommended for approval.”

3. Petitioner timely filed its petition with the Division of Tax Appeals on February 2, 2021, in protest of the refund denial notice. The Division of Tax Appeals assigned DTA number 830249 to this petition (petition DTA number 830249). In its petition, petitioner asserted that sales tax was paid for services that were in the nature of and in conjunction with a capital improvement that are exempt from tax. The Division filed its answer to the petition on April 14, 2021.

4. Subsequently, on May 6, 2021, petitioner filed a motion seeking summary determination in petition DTA number 830249, pursuant to 20 NYCRR 3000.9 (b). The Division filed a response to the motion on June 4, 2021. By order dated September 2, 2021, the undersigned denied petitioner's motion for summary determination and directed the scheduling of a hearing in petition DTA number 830249.

5. Subsequently, a hearing for petition DTA number 830249 was scheduled to be held in New York City, on March 1, 2022. During the exchange of documents immediately preceding the scheduled hearing date, petitioner discovered a page of notes included at the back of the Division's proposed exhibit "C," its answer.

6. Among the exhibits attached to Mr. Friedman's affidavit in opposition to the Division's motion to withdraw or modify the subpoenas is the Division's answer and the page of notes. That page of notes provided, as follows:

"On December 14, 2020, TDAB-Sales Tax Refunds received an Application for Credit or Refund from 123 Linden LLC in the amount of \$558,000.00. The request was for sales tax paid on a capital improvement. Along with the application were invoices/schedules, copies of cancelled checks, lien waiver, power of attorney, and letter of explanation from the representative.

A review of the documentation was performed which included reviewing the invoice and the description of the job performed, an internet review of the contractor performing the job including the type of services they provide, and a review of the contractor's sales tax filing history. Based on this review, it was determined that the claimant was not charged tax on a capital improvement, i.e. [sic] materials, supplies and labor, but that sales tax was only shown on the contractor's schedule as recouping the sales tax paid on the materials used in the job. A denial letter was prepared by the reviewer advising the claimant that sales tax was not paid on the capital improvement and a refund cannot be granted. The denial letter was reviewed and approved by the supervisor and refund team leader. Denial letter was issued to the claimant on 01/25/21."

7. As a result of its discovery of the page of notes, petitioner requested that the Division provide all the documents which played a role in the denial of the refund claim. However, the

Division refused to comply with petitioner's request. Subsequently, the undersigned granted petitioner's request for an adjournment of the hearing for petition DTA number 830249.

8. On November 19, 2021, petitioner filed a separate application for credit or refund of sales or use tax in the amount of \$391,211.98 for the period September 1, 2018 through December 31, 2019.¹ This application included only three transactions under petitioner's contract with Yuanda. The Division assigned refund claim #AM2111135515 to this application.

9. By letter, dated December 22, 2021, Laura Mugrace, an auditor in the Division's Transaction Desk Audit Bureau, returned refund claim #AM2111135515 to petitioner.

Specifically, Ms. Mugrace's letter stated, in part, as follows:

"Upon review of the AU-11 filed on 11/19/21 for the period from 09/01/18-12/31/19 requesting a refund in the amount of \$391,211.98, it appears this is a duplicate of prior claim AM2012116957. That claim in the amount of \$558,000.00 was filed on 12/21/20 for the period 06/01/17-12/13/20. Therefore, this claim is being returned to you as a duplicate."

10. In an email, dated December 31, 2021, petitioner's representative asked the Division's auditor, Ms. Mugrace, whether refund claim #AM2111135515 "is still under review by the Audit Division" or whether "this claim has been finally disposed of." In a reply email, dated December 31, 2021, Ms. Mugrace confirmed that "[t]his claim was returned because it is a duplicate of prior claim #AM2012116957 and will not be reviewed by the Audit Division."

11. On February 28, 2022, petitioner filed a petition with the Division of Tax Appeals, in protest of the Division's denial of petitioner's refund claim #AM2111135515. The Division of Tax Appeals assigned DTA number 830866 to this petition (petition DTA number 830866). On May 4, 2022, the Division filed its answer for petition DTA number 830866.

¹ In the letter accompanying this application, petitioner's representative referred to it as the "Sales Tax refund application (Protective Claim) of 123 Linden LLC."

12. At the request of petitioner, the Division of Tax Appeals associated the petitions assigned DTA numbers 830249 and 830866.

13. After the scheduled March 1, 2022 hearing for petition DTA number 830249 was adjourned, petitioner filed a freedom of information law (FOIL) request (F-10558) with the Division that requested all documents pertaining to sales tax refund claim #AM2012116957 and sales tax refund claim #AM2111135515.

14. The Division responded by correspondence, dated April 21, 2022, to petitioner's FOIL request (F-10558). Specifically, Jennifer Hink-Brennan, Esq., the Division's Records Access Officer, wrote, in part, as follows:

"This letter relates to your Freedom of Information Law request as referenced [for 123 Linden LLC – F-10558] requesting records maintained by the Department. The cost of photocopying the enclosed documents is \$56.00. . . . The enclosed materials are outlined below:

- Sales Tax Refund Claim #AM2012116957
- Sales Tax Refund Claim #AM2111135515

Please be advised that:

- Nine pages of the file are withheld pursuant to Section 87(2)(b) of the Freedom of Information Law. These pages contain information concerning businesses for whom there is no Power of Attorney on file and the release of this information would constitute an invasion of privacy.

I certify that to the best of my knowledge we have no other documents that are responsive to your FOIL request. If you feel that additional records exist and are within the control of the Department of Taxation and Finance, please articulate a demonstrable factual basis to support this contention."

15. These associated matters were scheduled for hearing in Albany on August 15 and 16, 2023.

16. By letter, dated May 22, 2023, petitioner's representative requested the undersigned to issue subpoenas "duces tecum ad testificandum" for Ms. Mugrace, Ms. Albano and Ms. Hink-

Brennan, to compel their personal appearances at the hearing in these associated matters, “for testimony and production of documents.” Petitioner’s representative, in his letter, requested that the subpoenas:

“cover ALL materials and documentation that were involved in the decision making processes and their confirmation, in the denial of the refund claims at issue. . . . In particular and without limitation this request seeks the production of the third party [sic] tax returns that were repeatedly requested by Petitioner and withheld to date.”

17. The Division’s representative sent a letter to the undersigned, on June 2, 2023, in reply to petitioner’s request for subpoenas in these associated matters.

18. On June 26, 2023, the undersigned issued a subpoena duces tecum for Jennifer Hink-Brennan, Esq., Records Access Officer, to appear and attend the hearing in these associated matters in Albany, on August 15 and 16, 2023, and bring and produce the following:

“1. All materials and documentation involved in the original decision-making processes and their confirmation, in the denial of sales tax refund claims # AM201211695 [sic] and # AM2111135515, and the continued consideration and evaluation of these refund claims, including without limitation, the third-party tax returns contained in the file(s).”

On the same date, the undersigned issued a subpoena duces tecum for Laura Mugrace, Tax Technician I, and a subpoena duces tecum for Diane Albano to appear and attend the hearing in these associated matters in Albany on August 15 and 16, 2023. Both these subpoenas required the production of:

“1. All materials and documentation involved in the original decision-making processes and their confirmation, in the denial of sales tax refund claims # AM201211695 [sic] and # AM2111135515, and the continued consideration and evaluation of these refund claims, including without limitation, the third-party tax returns contained in the file(s).”

All three subpoena duces tecum were served on the Division on June 30, 2023 at 12:41 p.m.

19. In support of its motion to withdraw or modify subpoenas, the Division submitted, among other things, (i) the affidavit, dated July 10, 2023, of Brandon Batch; (ii) the subpoenas duces tecum for Ms. Hink-Brennan, Ms. Mugrace and Ms. Albano, respectively, each of which was issued by the undersigned on June 26, 2023 and served on the Division on June 30, 2023; (iii) the letter from petitioner's representative, dated May 22, 2023, requesting the issuance of the subject subpoenas, one each for Ms. Hink-Brennan, Ms. Mugrace and Ms. Albano, respectively, directing each one's appearance and production of certain documents; (iv) the letter from the Division's representative, dated June 2, 2023, in reply to petitioner's request for subpoenas in these matters; and (v) the affidavit, dated July 10, 2023, of Jennifer L. Hink-Brennan.

20. In his affidavit, Mr. Batch asserts that the subpoena request for Ms. Hink-Brennan is not made in good faith or is not relevant to the current case. Mr. Batch further asserts that to the best of his knowledge, "the only connection Jennifer Hink-Brennan has to the present case is that she was assigned" a FOIL "request from Petitioner." Mr. Batch claims that a request for a lawyer who oversaw a FOIL request "is overburdensome and irrelevant to the matter at hand." He further claims that if petitioner is unhappy with the result of its FOIL request, petitioner is able to appeal the FOIL response through the proper channels and proper courts. Mr. Batch contends that petitioner "intends to use the Court to force Jennifer Hink-Brennan to testify to FOIL law and why she withheld sensitive documentation." He further contends that the subpoena for Ms. Hink-Brennan "is an attempt to force the Division to produce irrelevant documentation and be over-burdensome to the Division and the Court, creating unnecessary issues that are not relevant to the case or issue at hand." With respect to the subpoenas duces tecum for Ms. Mugrace and Ms. Albano, respectively, each requiring the production of certain documents, Mr. Batch, in his affidavit, asserts that "the request for specific third-party tax returns

is against” the provisions of Tax Law § 1146 (a) and, therefore, those subpoenas should be modified to exclude the terms “without limitation, the third-party tax returns contained in the file(s).”

21. In her affidavit, Ms. Hink-Brennan asserts that at no time has she “ever handled or supervised any audit or litigation issues for Division of Tax Appeals matters #830249 and #830866” for the Division. She further asserts that her “only connection to these DTA matters is that [she] reviewed a FOIL request from Petitioner’s representative.” With respect to that FOIL request, Ms. Hink-Brennan further claims that she “complied with all applicable New York State laws, in completing [her] FOIL review, including following any secrecy provisions contained in the New York State Tax Law.” Ms. Hink-Brennan maintains that she has no knowledge whether petitioner or petitioner’s representative has appealed the response to the FOIL request. In addition, Ms. Hink-Brennan asserts that she has “no personal knowledge” of these matters. As such, the Division requests that petitioner’s subpoena for Ms. Hink-Brennan be withdrawn.

22. In opposition to the Division’s motion to withdraw or modify the subpoenas, petitioner submitted, among other items, the affidavit, dated July 26, 2023, of Mr. Friedman. In his affidavit, Mr. Friedman admits that petitioner was not able to obtain a third-party waiver from Yuanda for its tax returns. Mr. Friedman claims that the Division’s allegations in its motion papers that petitioner is (i) acting in bad faith, (ii) “trying to complicate this case by demanding irrelevant documents without cause,” and (iii) “trying to be overly burdensome, causing unnecessary issues,” are groundless. He further claims that the Division “was not forthright by concealing the fact that the auditor thoroughly reviewed the third party vendor, Yuanda’s, sales tax return history and filings as part of the consideration of Petitioner’s refund claim.” Mr. Friedman, in his affidavit, also asserts that the concealed information played a

significant role in the denial of the sales tax refund claim #AM2012116957, because the reasons expressed by the Division in the refund denial notice, dated January 25, 2021, “are in direct contradiction to the documentation provided by Petitioner to the Division.” In Mr. Friedman’s affidavit, petitioner contends that the Division has no standing to make the motion to withdraw the subpoena for Ms. Hink-Brennan and to modify the subpoenas for Ms. Mugrace and Ms. Albano. Petitioner further contends that the instant motion was made by the Division only; however, “the Division was not subpoenaed and as such does not possess the requisite standing to make this motion.” Petitioner argues that:

“[t]he Division cannot file one collective motion on its own behalf to withdraw or modify subpoenas issued to three other persons, who were subpoenaed because they have personal knowledge, and access to documents relevant to Petitioner’s case.”

With respect to the subpoena for Ms. Hink-Brennan, petitioner asserts that it was properly issued. Petitioner further asserts that appealing the FOIL response is not the only action available to it. Pursuant to 20 NYCRR 3000.7 (a), an administrative law judge has the discretion and may issue a subpoena to require the attendance of any witness. With respect to the Division’s contention that the subpoenas as issued demand protected third-party tax returns in violation of Tax Law § 1146 (a), petitioner asserts that this is a sales tax refund case, a related tax matter, and therefore, the tax returns sought are not protected or immune from subpoena.

23. With permission, the Division filed a sur-reply to the Division’s request to withdraw or modify the subpoenas issued by the undersigned in these associated matters. The undersigned permitted the Division to submit a sur-reply limited to a clarification of case law. The Division submitted the affidavit of Brandon Batch as its sur-reply. In his affidavit, Mr. Batch asserts that “the petitioner incorrectly states that the Division has no standing, without citing law or case law.” Mr. Batch further asserts that the Division believes that:

“as employees of the Division, in relation to an audit performed by the Division, they have the right to be represented by the Division, whom the subpoenas were served through the office of counsel of the New York State Department of Taxation and Finance.”

In Mr. Batch’s affidavit, the Division argues that petitioner has misread the actual language of Tax Law § 1146 (a). The Division maintains that the full language of Tax Law § 1146 (a) makes it clear that an officer charged with the protection of tax records shall not be required to produce any such record, or even what is contained in them, to any court, except on behalf of the Commissioner. Although the Commissioner may require the production of such records, the Division maintains that, in the present case, the Commissioner has not allowed the release of such records. Mr. Batch, in his affidavit, asserts that, in the present case, the “audit file did not contain third-party tax returns,” and the “auditors did not make their determination based on the third-party tax returns.”

24. By letter, dated July 27, 2023, the undersigned adjourned the hearing in these associated matters scheduled to be held on August 15 and 16, 2023, pursuant to 20 NYCRR 3000.5 (e).

CONCLUSIONS OF LAW

A. Tax Law § 2010 (6) authorizes the Tax Appeals Tribunal, and those it may designate and authorize, to issue subpoenas requiring the attendance of witnesses and/or the production of books, papers and documents pertinent to proceedings which it is authorized to conduct. A subpoena issued under said section shall be regulated by the civil practice law and rules (CPLR). The Tax Appeals Tribunal’s Rules of Practice and Procedure (Rules) specifically provide that, upon the request of any party, an administrative law judge will issue a subpoena to require the attendance of a witness or the production of documentary evidence at a hearing (*see* 20 NYCRR 3000.7 [a]). Since there was no facial indication that the requested subpoenas duces tecum were

“unreasonable, oppressive, excessive in scope or unduly burdensome,” they were issued as required under the noted regulation, and in turn, were properly served by petitioner (20 NYCRR 3000.7 [b]).

B. The Rules also permit “any person to whom [such] subpoena is directed” to request, by motion to an administrative law judge, that the subpoena be modified or withdrawn (20 NYCRR 3000.7 [c]). In response to the subpoenas duces tecum, the Division timely filed its motion to withdraw or modify the issued subpoenas, pursuant to 20 NYCRR 3000.7 (c). Specifically, the Division asserts that the subpoena for Jennifer Hink-Brennan be withdrawn, and the subpoenas for Laura Mugrace and Diane Albano, respectively, each be modified to exclude the production of “without limitation, the third-party tax returns contained in the file(s).” Petitioner filed an affidavit in opposition to the Division’s motion to withdraw or modify the subpoenas.

C. Petitioner contends that the Division has no standing to make the motion to withdraw the subpoena for Ms. Hink-Brennan and to modify the subpoenas for Ms. Mugrace and Ms. Albano. Petitioner’s contention is meritless. The record includes copies of the three subpoenas served in this matter. A review of these subpoenas indicates that none were personally served on the individuals named on such subpoenas. Rather, the service of each of these subpoenas was received by H. Kelly, an employee of the Division, on June 30, 2023 at 12:41 p.m., on behalf of the named Division employees. As the Division correctly points out, petitioner failed to cite any statute or case law supporting its position. Since each of these subpoenas relate to the proceedings in these two matters, the Division’s representative has standing to bring the current motion regarding such subpoenas served on employees of the Division, in their official capacity

as Division employees. As such, the Division properly filed the motion to withdraw or modify the issued subpoenas, pursuant to 20 NYCRR 3000.7 (c).

D. The Division seeks the withdrawal of the subpoena duces tecum for Ms. Hink-Brennan. It argues that Ms. Hink-Brennan's only connection to the present case is that she was assigned to review and respond to petitioner's FOIL request. The Division further argues that the subpoena for Ms. Hink-Brennan would force the Division to produce irrelevant documentation and would be overly burdensome to the Division and the Division of Tax Appeals, thereby, creating unnecessary issues that are not relevant to the case or the issue at hand. Contrary to the Division's arguments, the documentation sought by petitioner through the subpoena for Ms. Hink-Brennan is relevant. As a result of the exchange of documents shortly before the hearing scheduled for petition DTA number 830249 for March 1, 2022, petitioner discovered a page of notes at the back of the Division's proposed exhibit "C." That page of notes clearly indicated that the Division, in conducting its review of refund claim #AM2012116957, conducted an internet review of Yuanda, the contractor performing the job, and reviewed Yuanda's sales tax filing history. Based upon the auditor's review of the documentation submitted in support of the refund claim, the internet review of Yuanda and a review of Yuanda's sales tax filing history, it was determined that petitioner's refund claim should be denied because sales tax was not paid on the capital improvement. Subsequently, petitioner made the FOIL request for all documents pertaining to sales tax refund claims #AM2012116957 and #AM2111135515. Ms. Hink-Brennan was assigned to review and respond to petitioner's FOIL request. Petitioner made the FOIL request as a direct result of the Division's use of third-party information in its review and denial of refund claim

#AM2012116957. Contrary to the Division's claims, the subpoena for Ms. Hink-Brennan is relevant to the present case, and is not overly burdensome.

E. The Division seeks a modification to the subpoenas for Ms. Mugrace and Ms. Albano, respectively, to exclude the terms "without limitation, the third-party tax returns contained in the file(s)." The Division argues that this modification is necessary because Tax Law § 1146 (a) prohibits the disclosure of third-party tax returns. Petitioner asserts that the Division used third-party information in its determination of refund claim #AM2012116957, and such material and documentation is part of the Division's files for petitioner's refund claims #AM2012116957 and #AM2111135515. Petitioner further asserts that it is only seeking the production of the third-party material and documentation in the Division's files for refund claims #AM2012116957 and #AM2111135515, not the disclosure of any third-party tax returns that are not part of such files.

F. Tax Law § 1146 (a) provides, in relevant part, as follows:

"Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who in any manner may acquire knowledge of the contents of a return or report filed with the commissioner pursuant to this article, to divulge or make known in any manner any particulars set forth or disclosed in any such return or report. The officers charged with the custody of such returns and reports shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the commissioner in an action or proceeding under the provisions of the tax law or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the commissioner is a party or a claimant, or on behalf of any party to any action, proceeding or hearing under the provisions of this article when the returns, reports or facts shown thereby are directly involved in such action, proceeding or hearing, in any of which events the court, or in the case of a hearing, the commissioner may require the production of, and may admit into evidence, so much of said returns, reports or of the facts shown thereby, as are pertinent to the action, proceeding or hearing and no more. The commissioner may, nevertheless, publish a copy or a summary of any decision rendered after a hearing required by this article. Nothing herein shall be construed to prohibit the delivery to a person

who has filed a return or report or his duly authorized representative of a certified copy of any return or report filed in connection with his tax.”

In *Matter of Tartan Oil Corp. v State of New York Dept. of Taxation & Fin.* (239 AD2d 36 [3d Dept 1998]), Tartan Oil sought Mel-Bern Service Center No. 6 Corporation’s “cash disbursement journal, cash receipts journal, check disbursement journal, purchase invoices, general ledger and a day book” through a FOIL request to the Division (*id.* at 37). Petitioner’s request was denied by the Division’s Records Access Officer and, after an administrative appeal, by the Division’s Records Appeal Officer on the grounds that the records were specifically exempted from disclosure pursuant to Public Officers Law § 87 (2) (a).² In reviewing Tax Law § 1146 (a), the Appellate Division observed that:

“a major purpose of tax secrecy statutes is to facilitate tax enforcement by encouraging taxpayers to make full and truthful declarations without fear that these statements will be revealed or used against them for other purposes (*see, Matter of New York State Dept. of Taxation and Fin. v. New York State Dept. of Law, Statewide Organized Crime Task Force*, 44 NY2d 575, 580 [1978]). Clearly, this purpose would be thwarted if material and records compiled by taxpayers in support of their returns and reports were subject to disclosure to those who are not statutorily deemed to have a legitimate interest in such information. We draw further support for the position that Tax Law § 1146(a) is intended to shield tax records from disclosure by the fact that when it speaks of disclosure, it specifically limits it to a copy or summary of any decision rendered after a hearing” (*id.* at 38 – 39).

G. In the present case, the issued subpoenas for Ms. Hink-Brennan, Ms. Mugrace and Ms. Albano, require each to appear at the hearing or any adjourned hearing for these matters, and produce all materials and documentation involved in the original decision-making processes and their confirmation, in the denial of sales tax refund claims #AM2012116957 and #AM2111135515, and the continued consideration and evaluation of such refund claims, including without limitation, the third-party tax returns contained in the file(s). In support of its

² Public Officers Law § 87 (2) (a) provides that an agency may deny access to records that “are specifically exempted from disclosure by state or federal statute.”

refund claims, petitioner submitted documentation including its written contract with Yuanda, invoices/schedules and cancelled checks. As part of its review of petitioner's refund claim #AM2012116957, the Division reviewed petitioner's supporting documentation, conducted an internet review of Yuanda and reviewed Yuanda's sales tax filing history. In reaching its conclusion to deny petitioner's sales tax refund claim #AM2012116957, the Division used material and documentation related to Yuanda including its sales tax filings (*see* findings of fact 5 and 6). I find such material and documentation related to Yuanda including Yuanda's sales tax filings to be pertinent to the present case. Therefore, I find that there is no need to modify the subpoenas issued to Ms. Hink-Brennan, Ms. Mugrace and Ms. Albano. As noted above, petitioner made the FOIL request for all documents pertaining to sales tax refund claims #AM2012116957 and #AM2111135515. The record clearly shows that petitioner made such request as a direct result of the Division's use of third-party information in its review and denial of refund claim #AM2012116957 (*id.*). In conclusion of law D, I found that the subpoena for Ms. Hink-Brennan to be relevant to the present case, because she was assigned to review and respond to petitioner's FOIL request. As a result of the Division's review of petitioner's FOIL request, nine pages of the Division's files for sales tax refund claims #AM2012116957 and #AM2111135515 were withheld pursuant to Public Officers Law § 87 (2) (b).³ At the beginning of any adjourned hearing, I will conduct an in camera review of the documents produced by Ms. Hink-Brennan, Ms. Mugrace and Ms. Albano, as directed in the subpoena duces tecum issued to each of them. During the in camera review, I will determine what portion of such third-party

³ Public Officers Law § 87 (2) (b) provides that an agency may deny access to records or portions thereof that "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions" of Public Officers Law § 89 (2).

returns, third-party tax filing history or the facts shown thereby may be admitted into evidence at the adjourned hearing in these matters (*see* Tax Law § 1146 [a]).

H. The motion of the Division of Taxation to modify or withdraw the three subpoenas, each dated June 26, 2023 is hereby denied, and these matters will proceed to hearing in due course.

DATED: Albany, New York
November 2, 2023

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE