STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **YOEL AND SARA GOLDENBERG** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2016.	:	ORDER DTA NO. 850090

Petitioners, Yoel and Sara Goldenberg, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2016.

On February 24, 2026, a subpoena duces tecum and ad testificandum for Michele Milavec, Esq., Office of Counsel, Division of Taxation, was issued at petitioners' request, directing her to appear and testify at a hearing and to produce certain documents. The subpoena was, in turn, served on Ms. Milavec on March 9, 2026.

On March 18, 2026, the Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), brought a motion, pursuant to 20 NYCRR 3000.5 and 3000.7 (c), seeking an order withdrawing or modifying the subpoena duces tecum and ad testificandum for Ms. Milavec. The motion was accompanied by an affirmation, dated March 17, 2026, of Mr. Lennard and attached exhibits. On April 16, 2026, petitioners, appearing by H. Friedman and Associates, CPA (Herschel Friedman, CPA), submitted a letter brief in opposition to the Division's motion to withdraw or modify the subpoena. With permission, the Division of

Taxation filed a reply to petitioners' opposition to the motion to withdraw or modify the subpoena by May 7, 2026, which date began the 90-day period for the issuance of this order.

Based upon the Division of Taxation's motion, petitioners' response and the Division of Taxation's reply, and all pleadings and proceedings had herein, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation's motion to modify or withdraw the subpoena duces tecum and ad testificandum for Ms. Milavec was timely filed.

II. Whether the subpoena duces tecum and ad testificandum for Ms. Milavec, requiring her appearance and testimony, and the production of certain documents should be withdrawn or modified.

FINDINGS OF FACT[1]

1. Petitioners, Yoel and Sara Goldenberg, filed a 2016 New York State resident income tax return (form IT-201) on July 15, 2020, (2016 income tax return) and requested a refund in the amount of $115,750.00, representing New York State and City refundable credits, including the Empire State child credit, New York City school tax credit and a Qualified Empire Zone Enterprise (QEZE) credit for real property taxes.

2. The Division of Taxation (Division) has no record of petitioners filing an application for an automatic six-month extension of time to file for individuals, form IT-370, for tax year 2016.

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[1] Findings of fact 1 through 12 are the facts as found in ***Matter of Goldenberg***, Tax Appeals Tribunal, July 10, 2025.

3. An affirmation by the Division indicated that, on February 27, 2019, the Division issued an account adjustment notice to petitioners disallowing their claimed refund of $115,750.00 for tax year 2016 in full.[2]

4. On March 1, 2021, the Division issued a notice of disallowance to petitioners, disallowing petitioners' claimed refund of $115,750.00 for tax year 2016.

5. Petitioners requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS), which was conducted by teleconference on November 19, 2021. By conciliation order, dated March 4, 2022 (CMS No. 000328331), the conferee sustained the notice of disallowance dated March 1, 2021.

6. On March 23, 2022, petitioners filed a timely petition with the Division of Tax Appeals in protest of conciliation order.

7. On October 10, 2023, the Division filed a notice of motion for summary determination, accompanied by the affirmation of Michele W. Milavec, Esq., the Division's representative. In support of its motion, the Division submitted the affidavit of its employee, Samantha Hepp, a Taxpayer Services Specialist 2 in the Individual Liability Resolution Center of the Division. Ms. Hepp has been employed by the Division since 2007 and has held her current position since April 2023. Her job duties include managing staff devoted to resolving protests of personal income tax returns and advocating on behalf of the Division at BCMS conferences. In performing her job duties, Ms. Hepp reviewed the Division's correspondence, case contacts, filing history and other documents regarding petitioners' 2016 personal income tax return and refund claim as kept in the regular course of business.

8. Ms. Hepp averred that petitioners first filed a refund claim for tax year 2016 with the

[2] The record from the summary determination motion contains no document dated February 27, 2019. The record from the summary determination motion does include an account adjustment notice dated September 9, 2020.

filing of their personal income tax return, form IT-201, on July 15, 2020. According to Ms. Hepp, the Division has no record of petitioners filing a request for extension to file, form IT-370, for tax year 2016. Ms. Hepp explains that, pursuant to Tax Law § 687 (a), any refund is limited to the amount of taxes paid within the three-year period immediately preceding the filing of the refund claim, plus the period for any extension of time to file the return. Furthermore, the amounts that petitioners requested as a refund consisted solely of refundable credits, which, in the absence of any extension of time to file, are deemed to have been paid as of April 18, 2017, pursuant to Tax Law § 687 (i).

9. Based on her review of the Division's records and her personal knowledge of the Division's policies and procedures, Ms. Hepp concluded that petitioners were not entitled to their claimed refund for tax year 2016 because the amount of any such refund was subject to the limitation set forth in Tax Law § 687 (a). Similarly, Ms. Hepp concluded that the Division's records did not indicate that any monies had been illegally or erroneously collected from or paid by petitioners and, thus, the special refund authority set forth in Tax Law § 697 (d) would be inapplicable to this matter.

10. In their response in opposition to the Division's motion for summary determination, petitioners stated that there are critical facts in dispute that counter-indicate granting summary determination. Specifically, petitioners asserted that they were led to believe that they had been granted an extension of time to file their 2016 personal income tax return through an exchange of emails between petitioners' accountant and an employee of the Division.

11. In support of their opposition to the Division's motion for summary determination, petitioners submitted the affidavit of petitioner Yoel Goldenberg. Therein, Mr. Goldenberg recounted that on March 23, 2020, petitioners' accountant, Robert Moster, asked for an extension

to file petitioners' 2016 tax return via an email to a Division employee, Kristen Belli, on account of Mr. Moster's office closing due to the COVID-19 pandemic. Ms. Belli replied via email that she understood and would need an update in 60 days, or around May 26, 2020. Attached to Mr. Goldenberg's affidavit is a two-page printout of an email string involving Mr. Moster, Ms. Belli and a person named Jack Goldenberg. Based on that email communication, Mr. Goldenberg avers that both petitioners believed that they had been granted an extension of time to file their 2016 income tax return.

12. Mr. Goldenberg stated that petitioners' belief that New York State had extended deadlines for tax filings from April 15, 2020 to July 15, 2020, was reinforced by Mr. Goldenberg's review of New York Executive Order No. 202.12 and the Announcement Regarding Relief from Certain Filing and Payment Deadlines Due to the Novel Coronavirus, COVID-19, Notice N-20-2. Mr. Goldenberg avered that, based on the March 23, 2020, email communication with the Division employee, petitioners understood that the deadline for filing their 2016 income tax return had been extended to July 20, 2020, and that they would be entitled to the QEZE credit and refund claimed in their 2016 return. Mr. Goldenberg offered no explanation for the discrepancy between the dates given in Ms. Belli's email (May 26, 2020), the extended due date given in the Division notice (July 15, 2020) and the date that petitioners ultimately believed to be the extended filing deadline for their 2016 income tax return (July 20, 2020).

13. On February 1, 2024, Administrative Law Judge Alejandro Taylor granted the Division's motion for summary determination. Petitioners timely filed an exception to the determination of the Administrative Law Judge with the Tax Appeals Tribunal (Tribunal).

14. On July 10, 2025, the Tribunal issued a decision remanding the matter to the administrative law judge "for a hearing on the questions surrounding the different dates indicated for the issuance of an account adjustment notice for the year in issue" (***Matter of Goldenberg***, Tax Appeals Tribunal, July 10, 2025).[3] Specifically, the Tribunal determined that a question of fact existed involving the conflicting dates contained in an affirmation of Ms. Milavec, Esq., dated October 10, 2023 (Milavec affirmation), submitted by the Division that stated the Division issued an account adjustment notice to petitioners on February 27, 2019, and the account adjustment notice that was entered into the record, which was dated September 9, 2020.[4] The Tribunal noted that although the Division argued on exception that the date in the affirmation was merely a typographical error, contradicted by documentation and other evidence in the record and should be ignored, and that petitioners conceded they had no evidence to refute the claim that it was an erroneous entry, nevertheless, such issue was inappropriate for a summary determination, stating:

> "[i]n the present case, these affidavits create a foundational issue that cannot be resolved in the context of a motion to dismiss or for summary determination. Instead, a fact-finding hearing is necessary to clarify the matter. Thus, the standard for summary determination is not met and the matter should be remanded for a hearing on the questions surrounding the different dates indicated for the issuance of an account adjustment notice for the year in issue. If indeed such a notice was issued on that date, it may indicate that petitioners did place the Division on notice of a potential refund claim for that tax year" (***id.***).

[3] The matter on remand was assigned to the undersigned administrative law judge, as the administrative law judge who issued the summary determination was unavailable at the time.

[4] Specifically, the Milavec affidavit stated, "The Division conducted a processing review of the petitioners' tax return for the year 2016. On February 27, 2019, the Division issued an Account Adjustment Notice - Personal Income Tax, Form DTF-160 dated September 9, 2020, to the petitioners that disallowed the claimed refund of $115,750.00 for tax year 2016, in full, as untimely pursuant to Tax Law § 687. A copy of the Account Adjustment Notice – Personal Income Tax dated September 9, 2020, is included in this motion as **Attachment 3** in the affidavit of Samantha Hepp, **Exhibit A**."

15. During prehearing proceedings on remand, by letter dated August 26, 2025, petitioners' representative requested the undersigned to issue subpoenas for the appearance and testimony of Kristen Belli and Bruce C. Mereness, employees of the Division of Taxation.

16. On September 3, 2025, the undersigned issued subpoenas for Kristen Belli and Bruce C. Mereness, to appear and testify at the hearing in this matter on November 24, 2025 and any adjourned date thereof. The undersigned directed that the scope of the testimony would be limited to the issue remanded by the Tribunal regarding the questions surrounding the different dates indicated for the issuance of an account adjustment notice for the year in issue.[5]

17. Petitioners then filed a motion, dated September 11, 2025, seeking reargument before the Tribunal and modification of its decision in ***Matter of Goldenberg***. Petitioners argued, among other things, that the undersigned misconstrued the remand to be limited to the specific question of the dates indicated for the issuance of an account adjustment notice for the year in issue, that the remand should not be limited to this narrow issue, and that the Tribunal improperly applied the holding in ***Matter of Marrero*** (Tax Appeals Tribunal, May 21, 2020) to the present matter.

18. The Tribunal issued an order, dated January 8, 2026, denying petitioners' motion. Rejecting petitioners' argument that the issue on remand should not be limited to the discrepancy in dates of the account adjustment notice, the Tribunal reiterated its holding in ***Matter of Goldenberg***, stating:

> "[f]ollowing the decision in ***Matter of Marrero*** (Tax Appeals Tribunal, May 21, 2020), this Tribunal determined that the question of a different date in the affirmation created 'a foundational issue that cannot be resolved in the context of a motion to dismiss or for summary determination. Instead, a fact-finding hearing is necessary to *clarify the matter*' (***Matter of Goldenberg***, [Tax Appeals Tribunal,] July 10, 2025 [emphasis added])" (***Matter of Goldenberg***, Tax Appeals Tribunal, January 8, 2026).

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[5] These subpoenas are not at issue here.

The Tribunal also rejected petitioners' argument that its reliance on ***Matter of Marrero*** was misplaced and found that ***Matter of New Cingular Wireless PCS, LLC v Tax Appeals Trib. of the State of N.Y.*** (153 AD3d 976 [3d Dept 2017]), cited by petitioners, was not controlling.

19. This matter was then transferred back to the undersigned for further proceedings and a virtual hearing was rescheduled for May 7, 2026.

20. By letter, dated February 17, 2026, petitioners' representative requested the undersigned to issue a subpoena "ad testificandum and duces tecum" for Ms. Milavec, Esq., an attorney in the Division's Office of Counsel, "compelling limited testimony and the production of specifically identified, non-privileged Division records" for the scheduled hearing. Petitioners' representative requested that the subpoena compel the Division to produce the following documents at or before the hearing:

> "(a) Any and all system printouts, transcripts, account histories, screen captures, electronic records, internal case file notes, or other Division records that contain, reference, or reflect the date February 27, 2019 in connection with petitioners' tax year 2016 account;
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> (b) Any and all documents or system reports from which the February 27, 2019[,] date was derived or transcribed in preparation of the [Division's] affirmation dated October 10, 2023;
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> (c) Any account adjustment notices, transcripts, or system-generated account records for petitioners' tax year 2016 for the period January 1, 2019 through July 15, 2020;
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> (d) Any metadata or revision history of the [Division's] October 10, 2023 affirmation reflecting when and how the February 27, 2019[,] date was inserted or modified."

21. On February 24, 2026, the undersigned issued a subpoena duces tecum and ad testificandum for Ms. Milavec, Esq., Office of Counsel, to appear and attend the virtual hearing in this matter on May 7, 2026, and at any recessed or adjourned date thereof, to testify and give

evidence under oath and to produce, by April 16, 2026, by way of filing by mail with the Division of Tax Appeals and copy sent to petitioners' representative, the following documents:

> "(a) Any and all system printouts, transcripts, account histories, screen captures, electronic records, internal case file notes, or other Division of Taxation records that contain, reference, or reflect the date February 27, 2019 in connection with petitioners' tax year 2016 account;
>
> (b) Any and all documents or system reports from which the February 27, 2019, date was derived or transcribed in preparation of the Division of Taxation's affirmation dated October 10, 2023;
>
> (c) Any account adjustment notices, transcripts, or system-generated account records for petitioners' tax year 2016 for the period January 1, 2019 through July 15, 2020;
>
> (d) Any metadata or revision history of the Division of Taxation's October 10, 2023 affirmation reflecting when and how the February 27, 2019 date was inserted or modified."

This subpoena is the subject of the Division's current motion to withdraw or modify.

22. By letter, dated February 27, 2026, Ms. Milavec informed the Division of Tax Appeals that this matter was reassigned to Bruce D. Lennard, Esq., of the Office of Counsel. The letter further stated that Ms. Milavec agreed to voluntarily appear as a witness at the hearing to testify.

23. The subpoena was delivered by a process server to Amelia Lehman, Office Assistant 1, at W.A. Harriman Campus, Building 9, Albany, New York, on March 5, 2026, and was mailed to Ms. Milavec via United States Postal Service (USPS) on March 9, 2026.

24. On March 18, 2026, the Division filed a motion seeking an order withdrawing or modifying the subpoena. In support of the motion, the Division submitted an affirmation, dated March 17, 2026, of Bruce D. Lennard, Esq., a copy of the subpoena issued by the undersigned on February 24, 2026, and a copy of the envelope, addressed to Ms. Milavec, in which the subpoena was mailed, bearing a machine-metered (Pitney Bowes) postmark of March 9, 2026, and no

USPS postmark. In his affirmation, Mr. Lennard asserts that the premises set forth in the subpoena request are false and invalid and the subpoena is vague, overbroad and unduly burdensome. Mr. Lennard argues that the only issue on remand is whether an account adjustment notice with a date of February 27, 2019, was issued to petitioners in relation to tax year 2016 and asserts that the February 27, 2019, date referenced in the Milavec affirmation that was submitted in support of the Division's motion for summary determination was a "drafting error" and that the date should have been September 9, 2020. He further argues that the "hearing on remand is not about the origin, source, and meaning of the date 'February 27, 2019' or about identifying a 'source record' from which that date was derived. It is simply about whether the Division issued an account adjustment notice with that date printed on the notice."

25. Petitioners argue, in opposition to the Division's motion to withdraw or modify the subpoena, that the Division's motion should be rejected as untimely[6] and further that sworn testimony and document production are necessary on the grounds that the Division's account of the Milavec affirmation has evolved during the proceedings, that the Division's arguments in its motion are conclusory and made by an individual without first-hand knowledge of the drafting of

[6] Petitioners initially raised the issue of the timeliness of the Division's motion in a letter dated March 23, 2026, in which it contended that the subpoena was served on March 5, 2026, and the Division's motion, filed on March 18, 2026, was "untimely on its face." Attached to petitioners' letter was an affirmation of service, dated March 9, 2026, of Austin Taylor, stating that on March 5, 2026, he served a true copy of the subpoena to "Amelia Lehman, Office Assistant 1[,] a person of suitable age and discretion" and also mailed a copy of the subpoena to Ms. Milavec, at "WA Harriman Campus, Bldg. 9, Albany, NY 12227" via USPS on March 9, 2026. The Division responded by letter, dated March 24, 2026, arguing that the motion was timely pursuant to Civil Practice Law and Rules (CPLR) §§ 2303 (a) and 308 (2). Petitioners responded, by letter dated March 24, 2026, arguing that the provisions of the CPLR do not apply to this matter. The Division then responded by another letter, also dated March 24, 2026, arguing that pursuant to State Administrative Procedure Act (SAPA) §§ 100, 303 and 304 the CPLR does apply. By letter dated March 25, 2026, the undersigned informed the parties that pursuant to 20 NYCRR 3000.7 (c), a request to modify or withdraw a subpoena shall "conform to the procedural requirements of this Part for motions" and, as such, their responses and arguments contained in their correspondence should be made in accordance with 20 NYCRR 3000.5. The Division was granted permission to file a reply to petitioners' response by May 7, 2026, and both parties were instructed that the arguments raised by them in their correspondence of March 23 and 24, 2026, would not be addressed unless raised in petitioners' response to the motion to withdraw or modify the subpoena or the Division's reply. The parties thereafter incorporated these arguments into their response and reply to the motion.

the Milavec affirmation, that the document requests are narrowly tailored to the remanded issue, that the Division's request that the subpoena be modified to require only the production of an account adjustment notice dated February 27, 2019, is not made in good faith, would produce nothing and would leave the fact-finding hearing without a documentary record, that the offered voluntary testimony of Ms. Milavec is not a substitute for the production of documents and further that the subpoena "provides the only enforceable guarantee of both appearance and production."

26. With permission, the Division filed a reply to petitioners' opposition to the motion to withdraw or modify the subpoena. The Division argues, in part, that the factual record on remand "is limited to whether or not a Notice was issued on February 27, 2019" and the subpoena "should be limited to requiring the Division to produce such a Notice, if one was issued on February 27, 2019." The Division further argues that "this hearing is not about Attorney Milavec, or about the drafting error that she made in her affirmation beyond the fact of that error. It is simply about whether or not a Notice was issued on February 27, 2019." According to the Division:

> "13. While the drafting error in Attorney Milavec's affirmation ultimately led to the need to address this question, the hearing is not about how the drafting error was made or how it came about or where Attorney Milavec may have gotten the date. . . . On reflection, no explanation was even necessary.
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> 14. Put simply, there is no need for sworn testimony and document production regarding the drafting error, per se, because the drafting error itself is largely irrelevant except to the extent of background that an error was made.
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> 15. The drafting error is largely irrelevant because it does not, itself, establish that a Notice was or was not issued on February 27, 2019. It merely raises a factual issue that needs to be resolved.
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> 16. As the drafting error is merely the genesis of the hearing, the subpoena should be limited to the production of a Notice issued on February 27, 2019, if one exists."

The Division additionally argues that it timely filed its motion to withdraw or modify the subpoena. The Division argues that pursuant to CPLR § 2303 (a), service is deemed complete upon the latter of the delivering or mailing of the subpoena. The Division contends that in this case, service was completed on March 9, 2026, the date the subpoena was mailed to Ms. Milavec. The Division argues that since its motion was filed on March 18, 2026, which was not more than 10 days after the date of service of the subpoena, such motion was timely. The Division further reiterates its argument from its March 24, 2026, letter, disputing petitioners' argument that the CPLR does not apply to this matter, and contends that, pursuant to SAPA §§ 100, 303 and 304, the CPLR does apply.

CONCLUSIONS OF LAW

A. Tax Law § 2006 (10) authorizes the Tribunal to subpoena and require the attendance of witnesses at a 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 Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) provide that, upon request of any party, a subpoena will be issued by an administrative law judge to require the attendance of witnesses or to require the production of documentary evidence at a hearing (***see*** 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 (***see*** 20 NYCRR 3000.7 [c]).

B. Addressing first the preliminary matter of the timeliness of the Division's motion to withdraw or modify the subpoena, the Rules provide that a person to whom a subpoena is directed may "prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena" request that the subpoena be withdrawn or modified by filing such request with the administrative law judge assigned to the matter (***id.***). Petitioners argue that the Division's motion to withdraw or modify the subpoena should be rejected as untimely, contending that it was filed more than 10 days after the alleged service of the subpoena. Petitioners claim that the subpoena was served on Ms. Milavec on March 5, 2026 and, therefore, the Division's motion, filed on March 18, 2026, was "untimely on its face." The Division argues that pursuant to CPLR §§ 308 (2) and 2303 (a), where, as here, service of a subpoena is made by delivery to a person of suitable age and discretion at the place of business of the person to be served and by mailing of the subpoena, by first class mail, to the person to be served at her actual place of business, service is not complete until the later of the delivering or mailing of the subpoena. The Division contends that, based on the provisions of CPLR §§ 308 (2) and 2303 (a), service of the subpoena at issue here was not completed until it was mailed to Ms. Milavec on March 9, 2026. The Division argues that because the motion was filed within 10 days of that date, it was timely filed. Petitioners argue, in response, that the CPLR does not apply to this matter.

Petitioners' argument that the CPLR does not apply is without merit. Tax Law § 2006 (10) grants Division of Tax Appeals' administrative law judges the power to issue subpoenas to require the attendance of witnesses and the production of documents pertinent to such proceedings and specifically provides that "[a] subpoena issued under this subdivision shall be regulated by the civil practice law and rules" (***see Matter of 123 Linden, LLC***, Tax Appeals Tribunal, March 20, 2025; ***see also Matter of Hiller v 123 Linden, LLC***, Sup Ct, Albany County, May 15, 2026, Lynch J., Index No. 912273-25; ***Matter of Winners Garage, Inc.***, Tax Appeals Tribunal, October 8, 2009 ["Subpoenas issued under the authority of Tax Law § 2006 (10) are regulated by New York's Civil Practice Law and Rules"]). Accordingly, it is proper to look to the provisions of the CPLR to determine the date of service of the subpoena.

CPLR § 2303 (a) provides, in part, that:

> "[a] subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons, except that where service of such a subpoena is made pursuant to subdivision two or four of section three hundred eight of this chapter, the filing of proof of service shall not be required and service shall be deemed complete upon the later of the delivering or mailing of the subpoena, if made pursuant to subdivision two of section three hundred eight of this chapter."

CPLR § 308 (2), in turn, addresses personal service on a natural person and provides, in part, for service made by delivery to a person of suitable age and discretion at the actual place of business of the person to be served *and* by mailing the subpoena to the person to be served at their last known residence or actual place of business.

The affirmation of service in the record shows that the process server served the subpoena upon Ms. Milavec by delivering it to "a person of suitable age and discretion," Amelia Lehman, Office Assistant 1, at W.A. Harriman Campus, Building 9, Albany, New York, on March 5, 2026, and by mailing a copy of it to Ms. Milavec via USPS on March 9, 2026, to the same address. Thus, the service of the subpoena was made pursuant to the provisions of CPLR § 308 (2).

As noted above, CPLR § 2303 (a) provides that where service of a subpoena is made pursuant to CPLR § 308 (2), "service shall be deemed complete upon the *later of* the delivering or mailing of the subpoena" (emphasis added). As the subpoena here was mailed to Ms. Milavec on March 9, 2026, a date that falls *after* the subpoena was delivered to a person of suitable age and discretion at Ms. Milavec's place of business, the date of mailing is deemed the date of service. The Division's motion to withdraw or modify the subpoena, filed on March 18, 2026, was filed within 10 days of the date of service and is, therefore, timely.

C. Addressing next the arguments made by the Division in support of its request to withdraw or modify the subpoena, the standard to be employed in determining whether to vacate or modify a subpoena is whether the subpoenaed documents or witness "are utterly irrelevant to any proper inquiry or [their] futility . . . to uncover anything legitimate is inevitable or obvious" (***Matter of La Belle Creole Intl., S.A. v Attorney-General of State of N.Y.***, 10 NY2d 192, 196 [1961] [internal quotation marks and citations omitted]; ***Matter of Winners Garage, Inc.***).

The Division argues that petitioners document requests are "wildly overbroad, vague, and unduly burdensome" and contends that "the Division should not be forced to produce the documents requested with the exception of an account adjustment notice, dated February 27, 2019, if one exists." According to the Division, the sole question on remand is whether the Division denied petitioners' 2016 refund claim by an account adjustment notice dated February 27, 2019, and asserts that the foundational issue the Tribunal found could not be decided on a summary determination motion was whether an account adjustment notice with that date exists.

The Division's argument misconstrues the Tribunal's decision, which states:

> "In the present case, *these affidavits create a foundational issue that cannot be resolved in the context of a motion to dismiss or for summary determination*. Instead, a fact-finding hearing is necessary to clarify the matter. Thus, the standard for summary determination is not met and the matter should be *remanded for a hearing on the questions surrounding the different dates indicated for the issuance of an account adjustment notice for the year in issue*. If indeed such a notice was issued on that date, it may indicate that petitioners did place the Division on notice of a potential refund claim for that tax year" (***Matter of Goldenberg*** [emphasis added]).

The foundational issue is not merely the notice itself, as argued by the Division, rather the foundational issue is the question surrounding the different dates indicated in the Milavec affirmation for the issuance of an account adjustment notice. Such questions may include not only whether such a notice was issued on that date, but also, if no such notice exists, why that date was stated in the affirmation. It is precisely the question of the conflicting dates stated in the affirmation that the Tribunal found required a fact-finding hearing.

Addressing the Division's objections to paragraphs (a) and (b) of the subpoena, which direct the Division to produce "system printouts, transcripts, account histories, screen captures, electronic records, internal case file notes, or other Division of Taxation records that contain, reference, or reflect the date February 27, 2019 in connection with petitioners' tax year 2016 account" and "documents or system reports from which the February 27, 2019, date was derived or transcribed in preparation of the Division of Taxation's affirmation dated October 10, 2023," I find that the requested documents are not "utterly irrelevant to any proper inquiry" (***Matter of La Belle Creole Intl., S.A. v Attorney-General of State of N.Y.***, 10 NY2d at 196). The Division, in challenging the subpoena, has the burden of demonstrating the utter irrelevancy of the demands and has failed to meet this burden (***see Matter of Hogan v Cuomo***, 67 AD3d 1144, 1145 [3d Dept 2009]; ***Gertz v Richards***, 233 AD2d 366, 366-367 [2d Dept 1996]). In this case, the requests appear to be entirely relevant to the question surrounding the conflicting dates in the Milavec affirmation and specifically the date of February 27, 2019, as one of the affirmed dates of the account adjustment notice. The Division's conclusory claim contained in Mr. Lennard's affirmation that the February 27, 2019, date stated in the Milavec affirmation was a "drafting error" and its boilerplate objections that the requests are overbroad, vague and unduly burdensome is simply not enough to meet its burden (***see Matter of Winners Garage, Inc.***).

Turning to paragraph (c) of the subpoena, which directs the Division to produce "[a]ny account adjustment notices, transcripts, or system-generated account records for petitioners' tax year 2016 for the period January 1, 2019 through July 15, 2020," the Division is correct that the request is excessive in scope to the extent that the period requested extends beyond the limited issue on remand. The relevant dates in question are February 27, 2019, and September 9, 2020, the conflicting dates of the purported issuance of the account adjustment notice as stated in the Milavec affirmation. The conflicting statement of these two dates created the question of fact that the Tribunal found required a hearing. As such, the subpoena is modified to require the production of any account adjustment notices, transcripts or system-generated account records dated February 27, 2019, and/or September 9, 2020, for petitioners' tax year 2016.

Regarding paragraph (d) of the subpoena, which directs the Division to produce metadata or revision history of the Division's October 10, 2023, affirmation reflecting when and how the February 27, 2019, date was inserted or modified, the Division argues that it should not "be forced to have a forensic analysis performed on the origin of Attorney Milavec's affirmation by identifying and providing undefined metadata or document revision histories" in light of the limited scope on remand. However, contrary to the Division's argument, the question of how the date of February 27, 2019, is relevant given that the matter was remanded specifically for "the questions surrounding the different dates indicated for the issuance of an account adjustment notice for the year in issue" (***Matter of Goldenberg***) as asserted in the Milavec affirmation. Furthermore, the Divion has produced no evidence to support its argument that the production of such information would be unduly burdensome. The Division's conclusory claim that the request is overbroad, vague and unduly burdensome is merely unsworn boilerplate language that is simply not enough to meet its burden (***see Matter of Winners Garage***).

D. The Division further contends that in requesting a subpoena for Ms. Milavec's testimony, petitioners "completely misconstrue the remand in this matter, describing it as an inquiry into the 'origin, source, and meaning' of the date 'February 27, 2019'" and that petitioners "refuse to accept Attorney Milavec's explanation of a drafting error . . ." However, Ms. Milavec's "explanation of a drafting error" was discussed by the Tribunal, which stated, "[o]n exception, the Division claims that it was merely a typographical error, contradicted by documentation and other evidence in the record and asserts, therefore, that the date is clearly erroneous and should be ignored" (***Matter of Goldenberg***). The Tribunal found that such explanation on exception was insufficient to resolve the issue in the context of a motion for summary determination and that the question of the conflicting dates could not be resolved without a fact-finding hearing on the issue (***id.***). Indeed, the Division's assertion that the date of February 27, 2019, contained in the Milavec affirmation is "a drafting error" is conclusory, and was made by Mr. Lennard, who did not draft the affirmation with the date in question. The whole purpose for the remand is that the Tribunal found that the issue of the conflicting dates in the affirmation could not be decided in a summary determination and that a fact-finding hearing was needed to clarify this issue.

Contrary to the Division's argument, Ms. Milavec's testimony is entirely relevant to "clarify the matter" regarding "questions surrounding the different dates indicated for the issuance of an account adjustment notice," since the different dates were averred to in her affirmation (***Matter of Goldenberg***). She is the individual with first-hand knowledge and, as such, her testimony is relevant for the fact-finding hearing required by the Tribunal. Moreover, the Division's offer that Ms. Milavec will be available in the absence of a subpoena is not a sufficient ground to withdraw or modify the subpoena for her testimony. Indeed, petitioners are correct that such voluntary offer to testify does not provide the enforcement tool of a subpoena. Specifically, the Rules provide that if a party fails to comply with a subpoena without reasonable cause, the administrative law judge has the power to preclude the noncomplying party from introducing any proofs concerning such witnesses, documents or things, or from introducing them in evidence and may draw the inference that the precluded evidence is unfavorable to the noncomplying party's position (***see*** 20 NYCRR 3000.15 [d] [3]). Without the subpoena, such enforcement is unavailable.

E. The Division of Taxation's motion to withdraw or modify the subpoena is granted to the extent indicated in conclusion of law C, but is otherwise denied. The Division is directed to furnish the requested documents and testimony, consistent with the terms of this order, at the hearing in this matter to be scheduled in due course.

DATED: Albany, New York
July 30, 2026

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE