STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
YORK & 62ND SPONSOR CORPORATION	:	DECISION DTA No. 809601
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Tenzer, Greenblatt, Fallon & Kaplan, Esqs. ("Tenzer"), Attn: Ira A. Finkelstein, Esq., The Chrysler Building, 405 Lexington Avenue, New York, New York 10174, filed an exception to the order of the Administrative Law Judge issued on March 11, 1993 denying its motion to withdraw the subpoena duces tecum issued by the Division of Tax Appeals on September 22, 1992 at the request of petitioner York & 62nd Sponsor Corporation, c/o Robert I. Postel, Esq., Penthouse Suite, 435 East 52nd Street, New York, New York 10022. Tenzer appeared pro se (Ira Finklestein, Esq., of counsel). Petitioner appeared by Robert I. Postel, Esq.[1]

Tenzer filed a brief on exception. Petitioner filed a letter in lieu of a brief in response. Tenzer filed a letter replying to petitioner's letter, which was received on August 19, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

[1]Mr. Postel has been requested on several occasions to submit a power of attorney in this matter. To date, no power has been received by the Tax Appeals Tribunal. The Tax Appeals Tribunal is unable to contact petitioner directly because we have no address for petitioner other than in care of Mr. Postel. Since this case is being remanded to the Administrative Law Judge and remains open, giving petitioner another chance to see that a power is submitted, the brief submitted by Mr. Postel is accepted. However, if no power of attorney is submitted to the Administrative Law Judge on remand, petitioner will be subject to an order based on default for its failure to appear in the proceeding.

ISSUE

Whether the Administrative Law Judge correctly denied Tenzer's motion to withdraw the subpoena of petitioner's legal records held by Tenzer.

FINDINGS OF FACT

We find the following facts. These findings of fact do not contradict the facts found by the Administrative Law Judge. However, the Administrative Law Judge's findings of fact have been incorporated into our findings of fact only to the extent that they are relevant to the issues stated in our decision.

Petitioner, York & 62nd Sponsor Corporation, filed a petition on May 20, 1991, contesting an assessment of tax in the amount of $1,056,284.00 under article 31-B of the Tax Law. As relevant to this proceeding, the petition states:

> "1) The commissioner errored [sic] in asserting that the sales price of 8,170 shares affected by the tax is $13,619,390 [sic], claiming that insufficient evidence of the sales was submitted.
>
> "2) The commissioner errored [sic] in not recognizing the basis for acquisition of the property as $11,341,800 [sic]. In addition, the commissioner rejected certain expenses attributable to the basis."

Thus, it would appear that petitioner was a cooperative housing corporation and that the transfer of real property in issue involved the sale of shares to tenant stockholders. At petitioner's request, Administrative Law Judge Daniel J. Ranalli issued a subpoena duces tecum to the law firm of Tenzer, Greenblatt, Fallon & Kaplan requesting "[a]ll files in connection with the acquisition of premises known as 446 East 62nd Street, New York, NY and the conversion of that property to cooperative ownership." This motion to withdraw the subpoena resulted.

The parties to the motion agree that petitioner acquired the premises located at 440 East 62nd Street with the intention of converting it to cooperative ownership and that Tenzer rendered legal services in connection with those transactions. In support of its motion to withdraw the subpoena, Tenzer submitted an affidavit from Ira A. Finkelstein, Esq., which states that Tenzer has a valid retaining lien upon the subpoenaed files by reason of client fees owed to Tenzer. In

an affidavit submitted by Robert I. Postel, Esq., on December 9, 1992, petitioner claims that it is not indebted to Tenzer and, as a consequence, that Tenzer does not have a retaining lien against the files. By letter to the parties, dated December 31, 1992, the Administrative Law Judge requested that the parties submit additional evidence to resolve the factual matters raised by the conflicting affidavits.

A supplemental affidavit and supporting evidence were submitted by Mr. Finkelstein in support of Tenzer's motion. Petitioner submitted no additional documentation. According to Mr. Finkelstein, Tenzer represented a corporation named First Wall Street Corporation ("First Wall Street"), which he refers to repeatedly as Tenzer's "former client". It is not certain whether petitioner was also a former client of Tenzer's.

First Wall Street has or had a controlling interest in petitioner and several other corporations. Tenzer is currently owed attorney's fees by First Wall Street for legal services performed for First Wall Street and certain of its related companies.

OPINION

In the determination below, the Administrative Law Judge denied Tenzer's motion to quash the subpoena of legal documents relevant to the cooperative conversion and sale of the property at 446 East 62nd Street, which transaction had prompted an assessment to be issued to petitioner under the Real Property Gains Tax. Specifically, it was concluded that Tenzer had not established that it had a valid retaining lien on the documents subpoenaed, as it failed to show that petitioner was its client, and if it was, that there were any outstanding fees for services rendered by Tenzer for petitioner.

On exception, Tenzer asserts that it has a valid retaining lien upon the subpoenaed files in light of the amounts due and owing to Tenzer by its former client, First Wall Street. Tenzer argues that it was reasonable under the circumstances for it to look initially to First Wall Street for payment of the work performed on petitioner's cooperative conversion, which Tenzer claims was submitted to it by First Wall Street as part of a package.

In response, petitioner states that Tenzer has offered no legal or policy reason why the subpoena should not be enforced. Moreover, because Tenzer has not asserted that the payment for legal services was due and owing from petitioner (as opposed to First Wall Street), it should be required to turn over petitioner's records. As to the five conversions which were delivered to Tenzer by First Wall Street, petitioner states:

> "these five matters were not even referred to the Tenzer Firm in the same year, much less at the same time. In addition, each of those transactions involved different groups of investors, . . . and different partnerships and corporate entities" (Petitioner's brief, p. 4).
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> * * *
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> "the Tenzer Firm has adduced no evidence whatsoever--and none there can be--that even a single stockholder, officer, or director of Petitioner was ever a shareholder, office [sic], or director of any other business entity or client for which the Tenzer Firm provided legal services which remain unpaid to date" (Petitioner's brief, p. 5).

To secure payment of his or her fee, an attorney has a common law retaining lien on the books, records, documents, and moneys of the client which come into the attorney's possession in the course of rendering services to the client (7 NY Jur 2d, Attorneys at Law, § 168). An attorney's lien, of whatever nature, is valid only so long as there exists an unpaid balance owing to the attorney from the client [citation omitted]" (Cooper v. Cranin, 104 AD2d 550, 479 NYS2d 254, 255; see Turzio v. Ravenhall, 34 Misc 2d 17, 227 NYS2d 103 [New York City Court]).

We find BMP Realty Co. v. Village of Tannersville (103 AD2d 966, 479 NYS2d 561) to set forth the principle which controls the question before us. In that case, an appeal was taken from an order denying the motion of the plaintiffs, two corporations, to have their former attorneys turn over the plaintiffs' files in order to determine the final fee owed. The law firm had represented the plaintiffs in the action then at issue and in other matters, as well as a third corporation, Wickham Contracting Company, Inc. One person served as a corporate officer in all three corporations. During the course of its representation, the law firm billed Wickham for services rendered to both Wickham and the plaintiffs. Wickham acceded to this procedure and,

in fact, made partial payments, but never specified which debts should be credited. When its accumulated legal fee remained unpaid, the firm obtained a default judgement against Wickham, and withdrew as counsel to Wickham and the plaintiffs in all matters. When the plaintiffs moved to have their records turned over, the law firm refused, claiming it had a retaining lien on these records for the amount of the judgement against Wickham.

The plaintiffs contended that the judgement obtained against Wickham lacked force against them and sought to have the court determine the amount owed by the plaintiffs and, upon payment thereof, a return of their papers. The Appellate Division stated that:

> "[i]f Wickham and plaintiffs were indeed separate entities, the superceded law firm may not be permitted to withhold papers from one to ensure payment from another, and the relief requested should be granted. However, the record suggests that these corporations may be separate on paper only" (BMP Realty Co. v. Village of Tannersville, supra, 479 NYS2d 561, 562).

In modifying the lower court's denial of the motion and remitting the matter for a hearing, the court stated that the controlling question to be decided was whether the plaintiffs and Wickham "acted as a single entity in dealing with the superceded law firm" (BMP Realty Co. v. Village of Tannersville, supra, 479 NYS2d 561, 562, emphasis added). The court then stated that if the three corporations were acting as one, the money judgement against Wickham would be collateralized by the firm's retaining lien on all of the papers it possessed relating to these entities, including those pertaining to the underlying suit (BMP Realty Co. v. Village of Tannersville, supra, 479 NYS2d 561, 562).

As stated by the Administrative Law Judge, the parties to the motion agree that Tenzer rendered legal services in connection with petitioner's acquisition of the premises at 440 East 62nd Street. It is also not disputed that Tenzer performed legal services for First Wall Street. What has yet to be determined is whether petitioner and First Wall Street (and its other controlled corporations) acted as a single entity in its dealings with Tenzer and, if so, whether there is an outstanding debt for services performed by Tenzer with respect to this association. The burden

of proving these facts shall be on the party initiating the proceeding (State Administrative Procedure Act § 306[1]). Because Tenzer initiated this proceeding by filing a motion to withdraw or modify the subpoena issued by the Chief Administrative Law Judge, the burden of proof rests with it.

Because, as in BMP Realty, the proper legal standard was not identified in the proceeding below, and the record has not been developed with respect to these factual issues, we remand the case to the Administrative Law Judge for a new determination, allowing the parties an opportunity to submit additional evidence on these issues (BMP Realty Co. v. Village of Tannersville, supra). This matter should be addressed by the Administrative Law Judge as quickly as possible. If the parties take exception to the new determination of the Administrative Law Judge, they may do so by filing a timely exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded for the issuance of a new determination by the Administrative Law Judge.

DATED: Troy, New York
December 30, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner