

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MOODY’S CORPORATION & SUBSIDIARIES : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827396
Corporation Franchise Tax under Article 9-A of the :
Tax Law for the Years 2004 through 2010. :

Petitioner, Moody’s Corporation & Subsidiaries, filed an exception to an order of the Administrative Law Judge issued on November 16, 2017 that withdrew a subpoena duces tecum issued on April 12, 2017. The Division of Taxation also filed an exception to the order. Petitioner appeared by Pillsbury Winthrop Shaw Pittman, LLP (Marc A. Simonetti, Esq., and Evan M. Hamme, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs in support of their respective exceptions. Both petitioner and the Division of Taxation filed briefs in opposition and in reply. Oral argument was heard in Albany, New York on September 27, 2018, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether a subpoena duces tecum served upon the Division of Taxation, and ordering the production of various documents relating to the Division of Taxation’s sourcing of credit rating

receipts, in general and in connection particularly with an audit of petitioner for the audit period January 1, 2004 through December 31, 2010, should be withdrawn upon the basis that disclosure of the documents sought via the subpoena is precluded by statute or protected pursuant to privilege.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Such facts are set forth below.

Background

1. Petitioner, Moody's Corporation & Subsidiaries, is a Delaware corporation headquartered in New York. Petitioner operates a credit rating agency that analyzes financial information and also generates and publishes opinions concerning debt instruments and securities (credit ratings).
2. Petitioner was the subject of a corporation franchise tax audit under Tax Law article 9-A, conducted by the Division of Taxation (Division), covering the period January 1, 2004 through December 31, 2010 (audit period), and including the tax imposed under Tax Law § 209 and the Metropolitan Commuter Transportation District (MCTD) surcharge tax (MTA surcharge) under Tax Law § 209-B.
3. On January 11, 2012, petitioner and the Division executed a closing agreement pursuant to Tax Law § 171 (Eighteenth) relating to the audit period. Petitioner, in turn, made payment in accordance with the closing agreement on January 13, 2012.
4. On December 11, 2014, petitioner filed amended corporation franchise tax returns and MTA surcharge tax returns, requesting refunds for the years 2004 through 2010.

5. By letters dated March 4, 2015 and April 20, 2015, the Division denied petitioner's refund claims.

6. On December 18, 2015, petitioner filed a petition with the Division of Tax Appeals challenging the denials of the foregoing refund claims.

7. On March 30, 2016, the Division filed its answer to the petition.

8. On April 18, 2016, petitioner filed a reply to the Division's answer.

9. Petitioner seeks, via its refund claims, to set aside the closing agreement. More specifically, petitioner maintains that during the audit, the Division asserted that petitioner was required to source its credit rating receipts on an origination basis (i.e., where the "service" giving rise to the receipts was performed based upon the costs of performance [*see* Tax Law § 210 (a); 20 NYCRR 4-4.3 (a)]). Petitioner asserted, in contrast, that it should be able to source such receipts upon a destination basis (i.e., initially based upon the location of the debt issuers whose creditworthiness petitioner rated, but thereafter changed to a sourcing method applicable to publishers, based upon the global investing public and using a population method as a proxy for where investors viewed the credit ratings issued by petitioner). During the audit on October 8, 2008, petitioner requested an advisory opinion confirming that such receipts are properly sourced on a destination basis. In addition, on June 30, 2009, petitioner supplemented its request for an advisory opinion by submitting a request for alternative apportionment of its credit ratings receipts (*see* Tax Law § 210.8 [a]; 20 NYCRR 4-6.1). Petitioner asserts that the Division refused to issue an advisory opinion regarding the proper method of sourcing credit rating receipts, and stated that petitioner had to address the issue at audit.

10. In early 2011, the parties entered into negotiations to settle the audit, and these negotiations resulted in the closing agreement (*see* finding of fact 3). During this time, petitioner

suspected that the Division was permitting another taxpayer, McGraw-Hill, to source credit rating receipts on a destination basis. During its negotiations with the Division, petitioner inquired as to whether any other credit rating agencies were permitted to source receipts on a destination basis. Petitioner alleges the Division represented that it did not allow such destination based receipts sourcing. Petitioner chose to enter into the closing agreement, accepting any negotiated benefit(s) conferred thereby, including a “small reduction” (*see* petition at ¶ 35), rather than complete the audit process and pursue its claims that destination sourcing and/or alternative apportionment were appropriate and allowable.

11. As noted, petitioner and the Division executed the closing agreement on January 11, 2012. Thereafter, petitioner learned that the Division had, in fact, permitted another taxpayer to source credit rating receipts on a destination basis.¹ Petitioner has asserted that the closing agreement it agreed to and executed was not in its best interest, in that it paid tax thereunder pursuant to an origination sourcing method based on its reliance upon the Division’s representations concerning sourcing of credit rating receipts, as made during audit settlement negotiations. Petitioner has specifically alleged that it would not have executed the closing agreement if the Division had not represented that it did not permit any credit rating agencies to source credit rating receipts on a destination basis.

12. In this matter, petitioner seeks the disclosure of certain documents that it claims are relevant to the substantive tax issues upon which its claims for refund are premised. Petitioner

¹ Petitioner’s “suspicion” that the Division was allowing petitioner’s competitor, McGraw-Hill, to source credit rating receipts on a destination basis (*see* finding of fact 10), was confirmed via the issuance of a New York City litigation determination concerning McGraw-Hill’s 2003 - 2007 apportionment (*see Matter of McGraw-Hill Cos.*, NY City Tax Appeals Trib. [ALJ Div], Feb. 24, 2014), and a New York State litigation order concerning McGraw-Hill’s 2002 - 2005 apportionment (*see Matter of McGraw-Hill Cos.*, NY St Div of Tax Appeals DTA No. 825598, Feb. 12, 2015).

maintains that concealing the documents it seeks is “problematic” because resolving the substantive tax issues requires petitioner to establish, at the outset, whether the Division concealed the existence of an agreement with a similarly situated taxpayer that allowed destination sourcing. Petitioner has alleged here, as well as in its petition, that by concealing its agreement with McGraw-Hill, the Division concealed its true position regarding taxation of the credit rating industry. Petitioner maintains, in turn, that such concealment constituted “fraud, malfeasance, or misrepresentation of a material fact,” within the contemplation of Tax Law § 171 (Eighteenth), and provides sufficient grounds to set aside the closing agreement and reopen the matter so as to address the substantive question of how petitioner’s credit rating receipts should have been sourced, as well as other audit issues.

Freedom of Information Document Requests

13. On April 14, 2014, petitioner filed two requests under the Freedom of Information Law (FOIL) seeking documents concerning the Division’s sourcing of credit rating receipts for the tax years 2004 through the present, and in connection with the audit of petitioner for the audit period.²

14. In a June 2014 response, the Division’s Records Access Officer agreed to disclose certain records to petitioner. He also identified 807 pages of materials that were responsive to petitioner’s FOIL request, but were withheld as exempt. Specifically, 416 pages were withheld as exempt from disclosure by state or federal statute pursuant to Public Officers Law (POL) § 87 (2) (a), and 391 pages were withheld as exempt pursuant to POL § 87 (2) (g) (iii) as inter-agency or intra-agency materials that are not final agency policy or determinations.

² These filings were made after petitioner’s stated suspicions concerning whether the Division had allowed another taxpayer to source its receipts on a destination basis (*see* finding of fact 10) were confirmed (*see* finding of fact 11, n 1).

15. On July 23, 2014, petitioner filed FOIL administrative appeals challenging the Division's decision to withhold entirely, or to release with redactions, certain documents responsive to petitioner's FOIL request.

16. In August 2014, and with respect to the audit file, five pages were released with redactions, and 178 pages were withheld as exempt. The bases for withholding certain pages were the Division's assertions that the same, or portions thereof, were exempted from FOIL disclosure by:

- a) POL § 87 (2) (a), because the records are specifically exempted from disclosure pursuant to statute, citing Tax Law § 211 (8) (a) (the "secrecy provision" rendering corporation franchise tax reports and information confidential), and Civil Practice Laws and Rules 4503 (attorney-client privilege);
- b) POL § 87 (2) (b), because disclosure would constitute an unwarranted invasion of personal privacy;
- c) POL § 87 (2) (e), because the records were compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations;
- d) POL § 87 (2) (g), because the records constituted non-final inter-or-intra-agency materials that were deliberative in nature.

17. In an August 2014 determination on appeal, the Division's Records Access Appeals Officer released additional documents to petitioner, but upheld the denial of, or redaction to, the remaining documents. Specifically, of the 807 pages withheld in June 2014:

- three pages were blank;
- 12 pages were clearly not responsive to the request;
- 68 pages were released without redactions;
- 13 pages were released with redactions;
- 711 remained withheld.

18. In a September 2014 determination on appeal as to petitioner's 183 page audit file, the Division's Records Access Appeals Officer:

- upheld the redaction of five pages;

- released an additional 26 pages without redaction;
- released an additional six redacted pages;
- upheld the prior determination to withhold the remaining 146 pages.

Court Proceedings

19. Petitioner challenged the Records Access Appeals Officer’s determinations by commencing a CPLR article 78 proceeding in Albany County Supreme Court. As part of its response, the Division provided the Court with two privilege logs (Log F-02261 and Log F-02170), together with all of the withheld or redacted documents at issue (disputed documents), for the Court’s in camera review. Log F-02261 identifies documents regarding the Division’s audit of petitioner, while Log F-02170 identifies documents regarding another taxpayer. Each log identifies the various documents by tab number, and with respect to each tab number lists the bases upon which exemption from disclosure was asserted by the Division.

20. By a decision and order dated August 31, 2015, Albany County Supreme Court held that the Division had properly responded to petitioner’s FOIL requests, and upheld virtually all of the Division’s determinations to withhold, or redact and disclose, the requested documents (*see Matter of the Application of Moody’s Corp. and Subsidiaries v New York State Dept of Taxation & Fin., et al.*, [Sup Ct, Albany County, August 31, 2015, Elliott, III, J; Index No. 6197-14] [unpublished opinion] [*Moody’s I*]). Specifically, after his in camera review of the documents, Judge Elliott ordered the Division to disclose 17 documents, some with redactions, that had been withheld by the Division.³ As noted above, the documents subject to the court’s in camera review were identified in the privilege logs by tab numbers. As part of his decision and order, Judge Elliott “marked up” the privilege logs, thereby indicating, with respect to the tab-numbered documents, the court’s rejection of certain grounds listed by the Division in support of

³ The items to be disclosed consisted of 13 documents without redactions and 4 documents with redactions.

non-disclosure (specifically “attorney-client privilege [Public Officers Law section 87 (2) (a)]” and/or “Secrecy provisions [Tax Law section 211 and Public Officers Law section 87 (2) (a)]”, and/or “deliberative, non-final, intra-agency and/or inter-agency materials [Public Officers Law section 87 (2) (g)]”). The marked-up privilege logs were attached as a part of the court’s decision and order, and the method by which the court reviewed and marked-up the logs was described therein as follows:

“The Court has indicated which exemptions or privileges it found did or did not apply to each document by striking out those reasons that the Court found did *not* apply. The Court has further indicated on the privilege logs which documents are to be turned over to Petitioner, as all of the privileges or exemptions asserted have been struck. In the event that the Court has ordered a document redacted prior to release, it is duly noted on the privilege logs. The Court further reviewed all redacted pages to determine if the exemptions applied and marked the privilege logs accordingly” (*id.* at 18, emphasis added).

21. Cross-appeals were filed by the parties. By a memorandum and order issued on July 21, 2016, the Appellate Division, Third Department, modified the Albany County Supreme Court’s decision and order, and required the Division to produce only 10 of the 17 documents ordered disclosed by Judge Elliott (*see Matter of Moody’s Corp. and Subsidiaries v New York State Dept of Taxation & Fin.*, 141 AD3d 997 [3d Dept. 2016]) [*Moody’s II*]). As part of its review on appeal, the Third Department conducted its own in camera review of the same documents that had been submitted to Judge Elliott. The Court determined that the documents consisted of “emails, draft agreements, a final closing agreement, draft correspondence and correspondence from and regarding petitioner and nonparty taxpayers . . . documents regarding another taxpayer and . . . documents regarding the [Division’s] audit of petitioner” (*Moody’s II*, at 1000). The Third Department did not include (by appending) Judge Elliott’s marked-up privilege logs as part of its decision, and did not specifically and individually address all of the

Division's asserted grounds for withholding, or redacting and disclosing, certain documents, or petitioner's objections to such grounds. Rather, the Court concluded that "[It had] considered the parties' remaining contentions and [found] them to be without merit or, in light of the foregoing, not necessary to resolve." The Court noted its specific modifications to Judge Elliott's Decision, and "as so modified, affirmed" (*Moody's II*, at 1004).

22. On September 16, 2016, the Third Department, on motion for reargument, issued a second decision and order, solely correcting the decretal paragraph of its July 21, 2016 memorandum and order to accurately reflect the modifications made to Judge Elliott's order. As a result of the foregoing, on October 17, 2016, the Division released eight of the disputed documents to petitioner.

Subpoena Proceedings

23. On September 22, 2016, petitioner commenced a special proceeding in the Albany County Supreme Court, pursuant to CPLR 2307, seeking "a judicially issued subpoena compelling [the Division] to produce certain documents and records" that were claimed to be "material and necessary for [petitioner] to prosecute a pending petition for tax refunds in the [Division of Tax Appeals]."

24. By a decision and order dated December 1, 2016, the Albany County Supreme Court denied the Division's motion to dismiss, and granted the Division a period of 30 days (from service of the decision) within which to serve an answer. On January 11, 2017, the Division served its answer and memorandum of law in opposition, and oral argument was heard on March 7, 2017.

25. By a decision and judgment dated April 3, 2017, the Albany County Supreme Court denied petitioner's request for a judicial subpoena (*see 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] [*Moody's III*]). In her decision, Judge Ryba acknowledged that CPLR 2307 authorizes the Court to issue a subpoena duces tecum requiring a state agency to produce any documents relevant to a pending action or proceeding. However, she concluded that because the Division of Tax Appeals is expressly authorized by statute to issue a subpoena to compel the production of documents in an administrative proceeding, per Tax Law § 2006 (10) and 20 NYCRR 3000.7 (a), “CPLR § 2307 does not apply and this Court therefore lacks authority to issue the requested subpoena duces tecum (citations omitted).” Instead, “[t]he subpoena request must be made to the agency, whose determination as to whether to issue the subpoena may be appropriately challenged in court upon judicial review of the agency’s final determination.” Judge Ryba further stated that:

“In view of the foregoing conclusion, it is unnecessary to address the parties’ remaining arguments. However, if the Court were to address those arguments, it would find that petitioner failed to exhaust (sic) his available administrative remedies by neglecting to request a subpoena at the agency level prior to seeking relief in Supreme Court, thereby rendering this proceeding premature (citation omitted). *It would further find that petitioner failed to overcome respondents’ showing that the disputed documents are protected by the tax secrecy provisions of Tax Law § 211(8) and are otherwise privileged*” (emphasis added).

The Present Dispute

26. By a letter dated April 7, 2017, petitioner’s counsel requested the issuance of a subpoena duces tecum, pursuant to 20 NYCRR 3000.7, ordering the Division to produce various documents relating to the Division’s sourcing of credit rating receipts for tax years 2004 through 2010, and in connection particularly with its audit of petitioner for the audit period January 1, 2004 through December 31, 2010.⁴

⁴ The documents to be produced were those specified in the privilege logs for which disclosure was sought via petitioner’s FOIL requests, but which were ultimately determined to be exempt from disclosure as the result of the ensuing appeals concerning those requests. The documents were identified in connection with the subpoena request by way of an addendum (addendum A) attached to petitioner’s request for the subpoena.

27. On April 12, 2017, the requested subpoena duces tecum was issued by the Administrative Law Judge, directing the Division to produce the requested documents at the offices of petitioner's counsel on April 28, 2017. Thereafter, on April 17, 2017, the subpoena was served by petitioner upon the Division.

28. As noted, the Division raised a number of grounds against disclosure in the FOIL litigation. In this matter, petitioner specifically states that the documents it seeks by subpoena are only those that have been determined to be protected exclusively by the inter-or-intra-agency materials FOIL exemption provision of POL § 87 (2) (g), described in the two privilege logs as "Deliberative, non-final, intra-agency and inter-agency materials." Petitioner asserts that this protection is inapplicable in the context of a subpoena, and that the documents must therefore be disclosed. The Division asserts, by contrast, that the documents sought herein are statutorily protected from disclosure by subpoena upon two of the bases asserted in the FOIL litigation; to wit, tax secrecy under Tax Law § 211, and attorney-client privilege under CPLR 4503. The Division further contends that the documents are also protected from disclosure under the public interest privilege. In order to properly address and resolve this matter, given the foregoing assertions, it is necessary to review the privilege logs so as to identify, by tab number, the particular disclosure protections assertedly applicable to the various documents.

Review of Privilege Logs

29. In the FOIL litigation, the Division asserted the inter-or-intra-agency materials FOIL exemption provision of POL § 87 (2) (g) for all of the documents sought herein by subpoena. In addition, the Division further asserted in the FOIL litigation:

- a) statutory secrecy disclosure preclusion (but not statutory attorney-client protection) with respect to certain documents;
- b) statutory attorney-client disclosure protection (but not secrecy preclusion) with respect to certain documents;

c) both statutory secrecy and attorney-client non-disclosure with respect to certain documents.

30. Careful review of the two privilege logs (F-02261 and F-02170), attached to the subpoena and setting forth the documents for which petitioner continues to seek disclosure, in comparison to the same two logs, as submitted to, marked up and attached to Judge Elliott's August 31, 2015 decision and order in *Moody's I*, and as addressed on appeal by the Appellate Division in *Moody's II*, reveals the following:

a) All of the currently subpoena-requested documents are those that the Courts held to be protected from FOIL disclosure as deliberative, non-final, inter-or-intra agency materials under POL § 87 (2) (g). Petitioner does not seek disclosure herein of any of the documents with respect to which the Courts held that disclosure was precluded under the secrecy provisions of the Tax Law § 211, or protected under the statutory attorney-client privilege of CPLR 4503.

b) In the FOIL litigation, and in addition to its assertion of disclosure protection under POL § 87 (2) (g), as above, the Division also asserted statutory disclosure protection under the attorney-client privilege (CPLR 4503), per POL § 87 (2) (a), (but not also under the secrecy provisions of Tax Law § 211), with respect to the following specific documents:

1) Log F-02261: the documents identified at tabs 40, 91 and 92.⁵

2) Log F-02170: the documents identified at Tabs 33, 34, 171-176, 194-196, 198-201, 203, 204, 213, 214, 220, 221, 223-225, 227, 230, 236-244, 250, 262-264, 269, 278, 291-293, 296, 298, 309, 311, 312, 315, 344 (same as Tab No. 278), 348 (same as Tab No. 223), 351-358, 359 (same as Tab No. 188), 361-363, 367, and 369-372.

With regard to the foregoing documents, the Albany County Supreme Court specifically struck through, and thus rejected, the Division's asserted claim of statutory non-disclosure protection under the attorney-client privilege of CPLR 4503 (per POL § 87 [2] [a]), as inapplicable, and this holding was not specifically addressed or disturbed on appeal in

⁵ Review confirms that the courts held the documents identified in Log F-02261, at tabs 12 and 48, were protected from disclosure by POL § 87 (2) (g), and by the statutory secrecy provisions of Tax Law § 211 (per POL § 87 [2] [a]). Disclosure of these documents is no longer sought by petitioner. In fact, there is no assertion of statutory disclosure preclusion under the tax secrecy provisions of Tax Law § 211 with respect to any of the documents in privilege log F-02261 that remain in issue here.

Moody's II.

c) In the FOIL litigation, and addition to its assertion of disclosure protection under POL § 87 (2) (g), as above, the Division also asserted statutory disclosure preclusion under the secrecy provisions of the Tax Law (Tax Law § 211), per POL § 87 (2) (a), (but not also under the attorney-client privilege of CPLR 4503), with respect to the following specific documents:

1) Log F-02170: the documents identified at tabs 10-14, 90-95, 192, 197, 202, 231-235, 255, 256, 273, 274, 280, 281, 301, 314, 316, 317, 328-330, 337 (same as tab no. 192), 341, 342 (same as tab no. 273), and 343.

With regard to the foregoing documents, the Albany County Supreme Court specifically struck through, and thus rejected, the Division's asserted claim of statutory disclosure preclusion under the secrecy provisions of Tax Law § 211 (per POL §87 [2] [a]), as inapplicable, and this holding was not disturbed on appeal in ***Moody's II.***

d) In the FOIL litigation, and in addition to its assertion of disclosure protection under POL § 87 (2) (g), as above, the Division also asserted both statutory disclosure protection under the attorney-client privilege (CPLR 4503), and statutory disclosure preclusion under the secrecy provisions of the Tax Law (Tax Law § 211), per POL § 87 (2) (a), with respect to the following specific documents:

1) Log F-02170: the documents identified at tabs 16, 98, 99, 101-103, 105-111, 113, 114, 117-120, 122, 123, 125, 127, 129, 130, 132, 133, 139, 141, 144-154, 161, 167-169, 177, 185, 188, 190, 206-212, 257, 265, 270-272, 282-289, 303, 367, 310, 318-323, 332 (same as tab no. 111), 334 (same as tab no. 190), 335, 336, 364, and 365.

With regard to the foregoing documents, the Albany County Supreme Court specifically struck through, and thus rejected, the Division's asserted claims of statutory disclosure preclusion under the secrecy provisions of Tax Law § 211 (per POL §87 [2] [a]), and statutory disclosure protection under the attorney-client privilege of CPLR 4503 (per POL §87 [2] [a]), as inapplicable, and this holding was not disturbed on appeal in ***Moody's II.***

e) In the FOIL litigation, the Division asserted disclosure protection under POL

§ 87 (2) (g), as above, but did not assert disclosure protection under either the attorney-client privilege (CPLR § 4503), or statutory disclosure preclusion under the secrecy provisions of the Tax Law (Tax Law § 211), per POL § 87 (2) (a), with respect to the following specific documents:

- 1) Log F-02170: the documents identified at tabs 18, 20-32, 35, 37-52, 186, 193, 205, 222, 226, 245-249, 251-254, 258-261, 266-268, 275, 279, 300, 302, 304-306, 345, 346, 347 (same as tab no. 222), 349 (same as tab no. 226), 350, 360, 368, and 373.

31. Review of Privilege Log F-02170, as attached to the subpoena, in comparison to the same privilege log, as marked up and attached to Judge Elliott's August 31, 2015 decision and order in *Moody's I*, reveals that there is only one instance, concerning the documents identified at tab no. 15, where the court upheld non-disclosure on all three of the bases asserted by the Division (i.e., POL § 87 [2] [a] upon statutory preclusion [per Tax Law § 211], statutory attorney-client privilege [per CPLR 4503], and POL § 87 (2) (g) [deliberative, non-final intra-agency materials grounds]). In each of the other numerous instances where the Division claimed a statutory bar against disclosure based upon the attorney-client privilege under CPLR 4503, the Supreme Court struck the same as inapplicable. In those numerous instances where the Division asserted a claim of non-disclosure based on a statutory bar, under the secrecy provisions of Tax Law § 211, the Supreme Court upheld some and rejected others. To the extent that the Division did not assert either attorney-client statutory disclosure protection, or tax secrecy statutory disclosure preclusion, with respect to certain documents, it was simply unnecessary for the reviewing courts to address the same.

32. In those instances where the Albany County Supreme Court upheld non-disclosure on the basis of statutory bar, under Tax Law § 211, the same were specifically upheld on appeal (*see Moody's II* at 1003 [holding, "*in particular*," that the specific tab numbered items where the Albany County Supreme Court had upheld non-disclosure on secrecy grounds were indeed not

subject to disclosure upon that basis (*italics added*)).⁶ Petitioner does not challenge those results, and as noted earlier, only seeks disclosure herein of the documents with respect to which non-disclosure was upheld by the courts on the sole basis of such documents being deliberative, non-final, intra-agency materials (*see* POL § 87 [2] [g]).

33. In its memorandum in support of withdrawal of the subpoena, the Division states that the Appellate Division, in *Moody's II*, did not specifically address the Division's assertion of the secrecy provisions of Tax Law § 211 (8) as grounds for withholding the following documents:

Log F-02170: the documents identified at tabs 10-14, 16, 90-95, 98, 99, 101-103, 105-111, 113, 114, 117-120, 122, 123, 125, 127, 129, 130, 132, 139, 141, 144-154, 161, 167-169, 177, 185, 188, 190, 192, 197, 202, 206-212, 215-219, 231-235, 255-257, 265, 270-274, 280-289, 301, 303, 307, 310, 314, 316-323, 328-330, 333-337, 341-343, 364, and 365 (*see* finding of fact 30 [c] [1], [d] [1]).

34. In its memorandum in support of withdrawal of the subpoena, the Division states that the Appellate Division, in *Moody's II*, did not specifically address the Division's assertion of the attorney-client protection under CPLR 4503 as grounds for withholding the following documents:

a) Log F-02261: the documents identified at tabs 40, 91, and 92 (*see* finding of fact 30 [b] [1]).

b) Log F-02170: the documents identified at tabs 16, 33, 34, 98, 99, 101-103, 105-111, 113, 114, 117-120, 122, 123, 125, 127, 129, 130, 132, 133, 139, 141, 144-154, 161, 167-169, 171-177, 185, 188, 190, 194-196, 198-201, 203, 204, 206-214, 220, 221, 223-225, 227-230, 236-244, 250, 257, 262-265, 269-272, 278, 282-289,

⁶ The Court quoted the relevant portion of the secrecy provision under Tax Law § 211 (8) (a) as follows:

“It shall be unlawful for any tax commissioner, any officer or employee of the [Department], . . . or any person who [,] in any manner may acquire knowledge of the contents of a report filed pursuant to [Tax Law article 9-A], to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report under [Tax Law article 9-A]” except that the respondent Commissioner of Taxation and Finance “may . . . publish a copy or a summary of any determination or decision rendered after the formal hearing provided for in [Tax Law § 1089].”

291-293, 296, 298, 303, 307, 309-312, 315, 318-332, 333-336, 344, 348, 351-359, 361-365, 367, 369-372 (*see* finding of fact 30 [b] [2], [d] [1]).

35. The Division maintains that since the Appellate Division did not specifically address the Division's tax secrecy and attorney-client assertions in favor of non-disclosure of the documents identified above at findings of fact 33 and 34, on appeal in *Moody's II*, the same bases remain validly asserted herein as grounds for non-disclosure of such documents.

36. Review reveals that the Appellate Division did not, in its decision in *Moody's II*, in fact specifically address the Division's assertions of statutory disclosure preclusion under Tax Law § 211 (8), and statutory disclosure protection under CPLR 4305, with respect to the documents specified above in findings of fact 33 and 34. However, review also reveals that the Albany County Supreme Court did, in its decision in *Moody's I*, specifically reject, by strike-through, the Division's assertions of such statutory bars to disclosure.

37. A hearing on the substantive issues raised by the petition had been scheduled for May 3 - 5, 2017, i.e., prior to petitioner's request for, and the issuance and service of, the subpoena at issue herein. During an April 20, 2017 pre-hearing telephone conference call with the parties, Division's counsel stated that the Division intended to file a motion seeking withdrawal of the subpoena. In response, the Administrative Law Judge advised the parties that upon receipt of a motion to withdraw the subpoena, the scheduled hearing would be adjourned, and the subpoena would sit in abeyance pending resolution of the motion to withdraw.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his order by noting the statutory jurisdiction of the Tax Appeals Tribunal and its designees to issue subpoenas requiring the attendance of witnesses or the production of documents pertaining to proceedings that it is authorized to conduct.

According to the Administrative Law Judge, a subpoena thus issued is regulated by the CPLR. The Administrative Law Judge observed that under the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules), any person to whom such subpoena is directed is permitted to file a motion for modification or withdrawal of the subpoena, and the Administrative Law Judge noted that the Division had made a motion for withdrawal of the subpoena here at issue.

Next, the Administrative Law Judge described the documents that were the subject of the subpoena, which are those documents that the courts had excluded from production based only on the intra- or inter-agency materials exemption to the FOIL requests. The Administrative Law Judge recounted the preceding FOIL litigation, including the Albany County Supreme Court's in camera review of the documents there at issue, and its rejection of some of the Division's asserted statutory bases for exemption from disclosure by striking out such asserted bases on the privilege logs themselves, which the court appended to and made part of its decision and order. The Administrative Law Judge next described the Appellate Division's in camera review of the same documents in light of the Division's assertion of the same bases for non-disclosure and its conclusion to affirm the Supreme Court's holdings with only minor modifications. Notably, the Administrative Law Judge found that the modifications made by the Appellate Division did not result in a reversal of any of the Albany County Supreme Court's rulings regarding inapplicability of tax secrecy or attorney-client privilege to the documents sought by petitioner.

The Administrative Law Judge next disposed of the Division's argument that the Appellate Division's ruling was only applicable to those asserted bases against disclosure that were noted "in particular," holding that the Albany County Supreme Court's strike-through of the Division's asserted bases in *Moody's I* were in fact affirmed by the Appellate Division in *Moody's II*. The Administrative Law Judge agreed with the Division's position that the same protections against

disclosure apply in the instant matter, but found that tax secrecy and the attorney-client privilege bases were previously ruled upon pursuant to the special proceeding in *Moody's I*, which was upheld, as modified, in *Moody's II*. The Administrative Law Judge rejected the Division's argument that *Moody's II* actually had the effect of reversing the stricken-through asserted bases against non-disclosure made in *Moody's I*.

The Administrative Law Judge delineated the documents that petitioner seeks pursuant to the subpoena here at issue as only those documents against which the Division did not assert the statutory bases to bar disclosure or those documents for which the reviewing courts held that such statutory bases barring disclosure were inapplicable. The Administrative Law Judge reasoned further that where the Division did not assert the statutory bars against disclosure under tax secrecy and attorney-client privilege, such instances amounted to the Division's admission that such statutory bars to disclosure did not apply. Since such bases were either raised but rejected by the courts on review, or were not raised at all, the Administrative Law Judge concluded that neither tax secrecy preclusion nor attorney-client privilege against disclosure support withdrawal of the subpoena here at issue.

The Administrative Law Judge then addressed the only remaining basis for barring disclosure of the subpoenaed documents, the public interest privilege. The Administrative Law Judge described the public interest privilege as attaching to "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communication or the sources should not be divulged." According to the Administrative Law Judge, in order to prevail, the proponent of the privilege must demonstrate that a specific public interest would be jeopardized by dissemination of the information claimed to be confidential. The Administrative Law Judge described the

applicable test as a balancing of the public interests involved. The Administrative Law Judge stated that a showing that the disclosure of the information sought would be helpful or useful was insufficient to override a potential harm to the public good by disclosure. The balancing test may include considering the encouragement of candor in the development of governmental policy and may also take in account information available to a party from other sources.

After consideration of the various public interests for and against disclosure, the Administrative Law Judge observed that while the specific FOIL-based statutory exemption for inter- or intra-agency materials is not dispositive as to disclosure by subpoena, its rationale is instructive in the instant case. The Administrative Law Judge found that the rationale underpinning the inter- and intra-agency exemption to FOIL was largely analogous to the policy considerations underlying the judicially developed public interest privilege, even if FOIL- and subpoena-based disclosure should not be conflated.

The Administrative Law Judge concluded that, based on the public interests at play, the public interest in non-disclosure of the documents subject to the subpoena here at issue serves the purpose of ensuring candor by government personnel during the deliberative process accompanying audit activities and policy formulation and outweighs the public interest in petitioner's need to obtain the documents to establish its underlying claims of disparate treatment and detrimental reliance. In coming to his conclusion that petitioner's need for disclosure was not the overriding public interest at stake, the Administrative Law Judge relied on the existence of publicly available facts that the Division actually allowed destination sourcing and the effect that such disclosure would have on undermining the finality of any settlement agreement between the Division and a taxpayer.

The Administrative Law Judge, however, acknowledged that although disclosure may benefit petitioner, such disclosure, on balance, would not serve the public interest, but would instead work to its detriment by inhibiting internal deliberative communication in the Division's audit functions, its negotiation processes and its policy formulation activities. The Administrative Law Judge concluded that the materials here at issue were properly protected by the public interest privilege, and granted the Division's motion to withdraw the subpoena.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Administrative Law Judge erred in concluding that non-disclosure of the documents sought pursuant to the subpoena furthers the public interest more than disclosure. Petitioner argues that because the Division did not properly assert the privilege, it was discarded and waived, and an in camera review of the documents subject to the subpoena would be improper. Petitioner also disagrees with the Administrative Law Judge's consideration of whether allowing disclosure of the subpoenaed materials would encourage taxpayers to bring baseless challenges to closing agreements, thus indicating a stronger public interest in non-disclosure. Petitioner claims that the Administrative Law Judge erred in deciding that the public interest in non-disclosure outweighs the public interest in access to documents that could prove fraud, malfeasance or misrepresentation of fact by the Division.

The Division argues on exception that the Administrative Law Judge erred in concluding that the Appellate Division upheld the Albany County Supreme Court's holdings with only minor modifications, positing that the Appellate Division's decision in fact reversed some of the holdings therein. The Division also disagrees with the Administrative Law Judge's conclusion that tax secrecy and attorney-client privilege were previously raised in *Moody's I* and *Moody's II* and that such bases for non-disclosure were rejected by the courts as not applicable to the

documents here at issue. The Division argues that the Administrative Law Judge misinterpreted the Appellate Division's decision in *Moody's II* as having considered and upheld the applicability of tax secrecy preclusion and attorney-client privilege to the documents here at issue to the extent that such bases were raised, or that such bases can be considered waived by the Division to the extent they were not specifically raised. Finally, the Division argues that the Administrative Law Judge's conclusion that neither tax secrecy nor attorney-client privilege support withdrawal of the subpoena is incorrect.

OPINION

Tax Law § 2006 (10) authorizes this Tribunal and its designees to issue subpoenas requiring the attendance of witnesses or the production of books, papers and documents pertinent to the proceedings it is authorized to conduct. Our Rules provide that a subpoena will be issued to require the attendance of a witness or production of documentary evidence at a hearing, unless such requested subpoena is unreasonable, oppressive or excessive in scope (20 NYCRR 3000.7 [a]). Our Rules also provide that a person to whom a subpoena is directed may request that the subpoena be withdrawn by filing a request with the assigned administrative law judge (20 NYCRR 3000.7 [c]). Any party may appeal an adverse ruling granting or denying a request to withdraw or modify the subpoena by filing an exception with this tribunal (20 NYCRR 3000.7 [d]). This is what has occurred in the instant matter with both the Division and petitioner having taken exceptions to the order of the Administrative Law Judge withdrawing the subpoena duces tecum issued on April 12, 2017.

We do not think it necessary to recount the procedural history of this matter except to note that petitioner's exception concerns those documents that were previously ruled on in *Moody's I* and *II* as protected from disclosure under FOIL on the sole basis that such documents comprised

deliberative, non-final intra-agency materials. The central question posed here is whether the Administrative Law Judge correctly determined that the public interest privilege applies, and if so, whether he correctly concluded that the public interest was best served by non-disclosure of the requested documents.

Unlike the statutory bars against disclosure like tax secrecy (*see* Tax Law § 211) or attorney-client privilege (*see* CPLR 4503), the public interest privilege was created through common law. The Court of Appeals, in one of the leading cases on the privilege, described it as thus:

“As part of the common law of evidence, “official information” in the hands of governmental agencies has been deemed in certain contexts, privileged. Such a 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.” The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to to [sic] lose its cloak of confidentiality. It has been said that the privilege is a qualified one, which may be ineffective when it appears that the disclosure of the privileged information is necessary to avoid the risk of false testimony or to secure useful testimony. While this test may be appropriate in criminal cases, we would reject any such qualification in civil cases, since the privilege would become meaningless if it could be breached in order to secure “useful testimony.” Any testimony, if relevant to the action at bar, may be said to be useful. While some commentators have argued that the privilege is qualified and requires a balancing of the needs of the litigants against the potential harm to the public interest that may result from disclosure, these, in reality, are two sides of the same coin. Public interest encompasses not only the needs of the government, but also the societal interests in redressing private wrongs and arriving at a just result in private litigation. Thus, the balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure” (*Cirale v 80 Pine St. Corp.*, 35 NY2d 113 [1974] [internal citations and footnote references omitted]).

Accordingly, where, as here, the privilege asserted is in a context analogous to discovery in a civil matter, the privilege is unqualified and the question of whether disclosure is warranted is answered by judicial balancing of the interests of the litigant seeking disclosure and the governmental entity seeking to preclude disclosure in light of whether the overall public interest is, on balance, served by disclosure or non-disclosure (*id.*). Public interest, and what adds up to sufficient potential harm to it to warrant protection of communications under the public interest privilege, are necessarily and inherently flexible concepts (*Matter of World Trade Ctr. Bombing Litig.*, 93 NY2d 1 [1999]). A litigant's need for the materials sought is not enough on its own to outweigh the government's interest in non-disclosure because, if it were, the privilege would be rendered meaningless upon a showing that the testimony or materials sought are relevant and helpful to the litigant's case (*id.*; *see also Cirale* at 118; *Melendez v City of New York*, 109 AD2d 13, 18 [1st Dept 1985]). However, the conclusory assertion of a general harm to the public interest if the disputed documents are disclosed is insufficient to justify non-disclosure (*Cirale* at 118; *see also City of New York v Keene Corp.*, 304 AD2d 119 [1st Dept 2003]; *Matter of Labarbera v Ulster County Socy. for Prevention of Cruelty to Animals*, 277 AD2d 672 [3d Dept 2000]). There must be specific support for a claim of privilege; a determination of what constitutes sufficient potential harm to the public interest is a judicial one requiring that the government come forward and show that the public interest would be jeopardized by disclosure of information sought (*Cirale* at 118). Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by non-disclosure (*id.*).

The balancing test is based on the facts of the case, which may require an examination of the requested materials in camera. Determining whether the public interest privilege attaches in a

particular setting is a “fact-specific determination for a fact-discretion weighing court, operating in camera, if necessary” (*World Trade Center* at 8). This in camera inspection of the documents requested under subpoena is especially important where “it is difficult to determine if [the] government’s assertion of privilege is warranted without forcing disclosure of the very thing sought to be withheld” (*Cirale* at 119). Indeed, an in camera review is warranted even where the argument for non-disclosure is so overwhelming that requiring an in camera inspection of the documents prior to so concluding seems unnecessary (*Mahoney v Staffa*, 168 AD2d 809 [3d Dept 1990]).

Applying these principles to the facts in the instant matter, we find that the Administrative Law Judge erred in concluding that the public interest privilege attaches to the documents subject to the subpoena duces tecum issued on April 12, 2017 without conducting an in camera review of those documents. The Administrative Law Judge acknowledged that both the parameters of, and reasons for, the FOIL exemption regarding inter- and intra-agency materials differ from the consideration of factors prescribed in the balancing test for determining whether the public interest privilege applies. Such an acknowledgment leads to the conclusion that a review of the documents is necessary. Accordingly, we find that the Administrative Law Judge’s ultimate conclusion was premature where he made no specific findings based on a review of the documents sought whether their disclosure, on balance, serves or harms the public interest. We are cognizant of the fact that these documents have been reviewed in camera, twice, first by the Albany County Supreme Court and then on appeal by the Appellate Division, Third Department (*Moody’s I and II*), but must conclude that the required balancing test of the parties’ interests in light of the overall public interest differs enough from the statutory exemption standards under FOIL that a fresh view of the requested documents is warranted (*see Mahoney*).

We have considered petitioner's argument that the Division's assertion of the public interest privilege was improperly made and thus waived, but consider the same to be without merit. The Division asserted the privilege in its papers filed with the Administrative Law Judge giving notice of its motion for withdrawal of the subpoena here at issue. The Division argued that protecting its internal deliberative processes in the conduct of its audit and policy making activities outweighed any public interest favoring disclosure. While petitioner may disagree with the rationale given for the assertion of the privilege, claiming that the Division did not properly assert the privilege is belied by the filings in this matter. We conclude that petitioner's concerns would be resolved through conducting an in camera review of the documents here at issue.

We remand this matter to the Administrative Law Judge for an order consistent with this decision, i.e. whether, after an in camera review of the documents subject to the subpoena issued on April 12, 2017, the public interest privilege applies to such documents. This Tribunal will not retain jurisdiction over this matter on remand. In the event the parties wish to take exception to the order issued by the Administrative Law Judge on remand, they may do so by filing a timely exception thereto.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied; and
2. With regard to the exception of Moody's Corp & Subsidiaries, this matter is remanded to the Administrative Law Judge for the issuance of an order in response to the Division's motion for withdrawal consistent with this decision.

DATED: Albany, New York
March 22, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner