BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
TAXPAYER X,	)	
	)	
Appellant.	)	
	)	
Oil & Gas Corporation Net Income Tax Tax Year 2000	)	OAH No. 06-0676-TAX

RULING ON AUGUST 20, 2007 MOTION TO COMPEL

On August 20, 2007, Taxpayer X moved to compel the Department of Revenue (DOR) to respond further to certain document requests relating to the treatment of similarly-situated taxpayers by DOR or subdivisions of DOR. Taxpayer X's motion also requested an appropriate protective order to protect the confidentiality of documents produced. After briefing, the matter was argued orally on October 23, 2007.

Early in 2007, Taxpayer X served a number of interrogatories and requests for production seeking information on how DOR had addressed, with respect to other taxpayers, the issues of allocation of income from the sale of assets, whether or not a business is unitary, and distinguishing between business and nonbusiness income. Discussions between the parties have narrowed the Taxpayer X request to the following documents at issue in this motion:

-- Informal conference decisions (ICDs)

-- Briefs from administrative proceedings leading to hearing decisions

-- An additional, somewhat murky category of documents that DOR gathered "to cull information responsive to [Taxpayer X]'s interrogatories."[1]

DOR objected to the discovery requests on a number of grounds including two that are at issue in this motion: that the information is not relevant to the subject matter of the litigation or reasonably calculated to lead to the discovery of admissible evidence, and that release of the information is precluded by taxpayer confidentiality.

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1 Taxpayer X Reply at 6. There seem to be about 60 of these documents. Taxpayer X thought at the time of its motion that they were ICDs, but learned through the briefing that they are not. Discussions at oral argument did not shed much light on which interrogatories the documents were gathered for and how they should best be categorized. Taxpayer X's position is simply that whatever they are, it would like to see them produced or described in a privilege schedule.

A. Confidentiality

Alaska Statute 43.05.230(a) makes unlawful the disclosure of the income or "the particulars" set out in a tax return or report. The statute contains several exceptions, including disclosures "in connection with official investigations or proceedings of the department" (perhaps not directly applicable here as this is not a proceeding of the department) and "as provided in AS 43.05.405 – 43.05.499."[2] This is an appeal proceeding under the latter span of statutes, which provide for discovery under a plan of discovery "consistent with the efficient, just, and speedy conduct of the appeal."

DOR proposes that the exception for appellate proceedings allows only "for the release to a taxpayer of *its own* confidential information, when the taxpayer is engaged in proceedings against DOR."[3] This position is textually implausible, as a different subsection, AS 43.05.230(b), already gives taxpayers an absolute right to receive copies of their own returns for a minimal fee. The exception for disclosure "as provided in AS 43.05.405 – 43.05.499" would be redundant if it were restricted to the taxpayer's own information. Moreover, AS 43.05.230 confidentiality has not in the past been thought to preclude the providing of information under an appropriate protective order. Thus, in *Hickel v. Halford*[4] the Supreme Court recorded with seeming approval that the Superior Court had permitted discovery under a protective order of tax information by non-taxpayers that arguably included taxpayers' "particulars."

The 1986 Attorney General opinion[5] relied upon by DOR is not to the contrary. The Attorney General opined there only on unrestricted disclosure of taxpayer particulars. Limited release under a protective order was not addressed; nor was release within the confines of an administrative proceeding to determine tax liability. As the Attorney General observed on another occasion, "statutes such as AS 43.05.230 do not create an absolute privilege."[6]

The 1996 legislative history of AS 43.05.405 – 43.05.499, establishing the Office of Tax Appeals (OTA), cements this point. The language in the OTA statute authorizing discovery under a plan "consistent with the efficient, just, and speedy conduct of the appeal" was compromise language between the Alaska Oil and Gas Association (AOGA) and the

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2 AS 43.05.230 (a)(1), (4).
3 Opposition to Taxpayer X's Motion to Compel at 4 (italics in original).
4 872 P.2d 171, 185-86 (Alaska 1994).
5 1986 Alaska Op. Atty. Gen. (Inf.) 51, 1986 WL 81153.
6 Unnumbered Op. Atty. Gen. (Inf.), 1983 WL 42553.

administration that was, among other things, specifically designed to leave the door open to discovery about "whether the state has been taking a consistent position with other taxpayers."[7] Language in the legislation that would have prohibited the use of "information of a taxpayer, other than the taxpayer whose tax liability is the subject of the appeal, that is confidential under state law" was deleted from the bill before final passage.[8]

Certainly, a protective order covering release of another taxpayer's particulars needs to respect the spirit of AS 43.05.230, keeping disclosure to the minimum information needed for "efficient, just, and speedy conduct of the appeal" and providing the best possible safeguards against inadvertent disclosure of proprietary information to competitors.

B. Other Considerations

Taxpayer X seeks the documents at issue to show that the Department of Revenue has taken legal positions in the past inconsistent with the ones it is taking in this case. It proposes two ways in which such inconsistencies could be relevant. First, it would use the inconsistencies as a direct defense to the claims in this case, by arguing that they demonstrate that DOR is treating Taxpayer X arbitrarily so as to violate its due process and equal protection rights or, perhaps, that DOR is estopped to assert a different position. Second, and more plausibly, it would use the inconsistencies in support of arguments that its own interpretation of the laws at issue is reasonable, the theory being that if DOR reached the same interpretation in the past, it cannot reasonably contend now that the old interpretation is an unreasonable or impermissible reading.

Preliminarily, one must note that not all the "interpretations" at issue will have the same standing. In the era before OTA was established, it was not the department that filed briefs in administrative proceedings, but rather a subdivision of the department. The briefs were effectively memoranda from lower-level department employees, through their attorneys, seeking to persuade the commissioner that the department ought to take a particular position. They cannot themselves be taken as positions of the department. Unappealed ICDs do in a sense

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7 Proceedings of House Judiciary Committee, March 8, 1996, remarks of Dan Seckers, AOGA Chair (section 3, "Discovery"). Mr. Seckers was discussing line 28 on page 4 of HB 427, which became the operative language in AS 43.05.445(a).

8 *Compare* HB 427A (Jan. 17, 1996) at 6, lines 11-16 *with* AS 43.05.455.

represent final positions of the department, although prior to OTA they could not have been decisions vetted at the department's highest level.

Neither party has cited much law on the discoverability of the kind of material Taxpayer X seeks. The ALJ's research suggests that courts have been divided on discovery of this kind. One perspective, expressed in such cases as *City of New York v. Republic if the Philippines*,[9] is that it simply does not matter if a taxing authority has failed to enforce a tax liability in the past or has misinterpreted the relevant provisions in the past; all that matters is whether the taxpayer before the tribunal has liability under the law, correctly interpreted. At the other end of the scale are cases such as *Exxon Corp. v. Department of Energy*,[10] permitting what it characterized as "contemporaneous construction discovery" to get at the agency's prior readings of its regulations. In *Exxon*, the court acknowledged that "It may be . . . that the only contemporaneous constructions worthy of weight are formally published rulings of that agency, qua agency," but it nonetheless permitted discovery of a broad range of lesser expressions of agency thinking in the spirit of "full development of the facts through discovery." [11]

My own view is that it may ultimately be relevant in this case if Taxpayer X can show that DOR, *as an agency*, has interpreted the governing legal provisions in the past in a way different from what it advocates today. This is because, as Taxpayer X's second rationale for discovery contends, such prior interpretations could help to establish that Taxpayer X's reading of the provisions is a permissible one or could lessen the degree of deference owed to more recent agency interpretations. On the other hand, the confidentiality concerns peculiar to this case weigh against unlimited discovery of every kind of rumination or contention by members of the agency. It does not make sense to incur the risk of inadvertent disclosure inherent in any production under a protective order to release materials whose relevance to the case is, at best, only speculative and indirect. Production will therefore be limited, in general, to (1) decisions expressing the final disposition by the agency of a given case (not superseded by any later settlement or order), and (2) briefs representing the positions taken by the department as a whole before OTA or this office. This principle should not be taken to preclude, however, a request that a particular deponent or hearing witness supply any documents in which that person has

9 2004 WL 2710026 (S.D.N.Y. 2004).

10 91 F.R.D. 26, 41-42 (N.D. Tex. 1981).

11 *Id.* at 42 n.23. *But see United States v. Farley*, 11 F.3d 1385, 1390 (7th Cir. 1993) (no discovery of "unpublished opinions of agency staff" because the court could not rely on them for statutory interpretation).

opined on the principles at issue in this case, even if those documents do not fit in one of the two categories framed above.

DOR contends that if production is compelled the disclosure should be limited to Taxpayer X's outside counsel. Taxpayer X advocates that one corporate employee, the in-house counsel with primary responsibility for overseeing this case, likewise have access to the material and be permitted to keep it in his office. It also proposes access by its testifying and non-testifying experts and their staffs.

The rationale for including the managing in-house counsel is that he needs to be fully informed about the case to make appropriate decisions about strategy and settlement. This is a persuasive rationale, but it can be served adequately by allowing him access in the offices of outside counsel; there is no need to bring the documents to a Taxpayer X office. As for expert witnesses, Taxpayer X has articulated no reason for them to receive the confidential materials. Given that the rationale for ordering discovery is to shed light on DOR's prior interpretation of legal provisions, and that it is unlikely that any expert witness will be permitted to testify on a question of legal interpretation, the rationale for access by experts is not self-evident. If Taxpayer X has a compelling need to include one or more experts in the circle of disclosure, it may move to amend the protective order.

DOR proposes to notify taxpayers of the impending release of information relevant to them, so that the taxpayers could object if so inclined. This seems a prudent step to air any specific confidentiality concerns that the litigating parties may not have identified.

C. Order

Without waiving any reconsideration or appeal rights they may have, the parties shall seek to negotiate a text for the following two orders. Insofar as they agree, the parties may modify the terms proposed below. If the parties cannot agree on a text for one or both orders, they should separately propose orders by December 21, 2007.

1. Order Compelling Production: Subject to the overall scope of the discovery requests, this order should require production of (1) unappealed ICDs issued before the effective date of ch. 108 SLA 1996; (2) any portions of ICDs issued before the effective date of ch. 108 SLA 1996 not superseded by a later ruling or settlement; (3) ICDs issued after the effective date of ch. 108 SLA 1996; and (4) briefs filed in administrative proceedings after the effective date of ch. 108 SLA 1996. In addition, the order should provide for scheduling of the approximately 60

documents that DOR gathered "to cull information responsive to [Taxpayer X]'s interrogatories," and for the parties to confer thereafter about whether any of the documents represent positions of the department subject to production under the principles of this order.

For all documents to be produced, the order should provide for, and allow time for, the pseudonyming and redaction of taxpayer identifying information and particulars to the extent not required for context. It should provide for notice of the proposed release to the involved taxpayer at its last known address, together with a copy of the protective order and a means for the taxpayer to review the pseudonymed/redacted document. The notice should instruct that objections to release subject to the protective order be filed with OAH and copied to counsel within 15 days of mailing of the notice. For each document for which no objection is received, production should proceed ten days after expiration of the objection period.

2. Protective Order: This order should be based on the proposed Protective Order lodged by Taxpayer X as Exhibit E to its original motion, with the following alterations: (1) A.B. or successor to view documents under protective order solely on premises of outside counsel; and (2) deletion of item 4(iv) [experts].

DATED this 11th day of December, 2007.

By: *Signed*
Christopher Kennedy
Deputy Chief Administrative Law Judge

Certificate of Service: The undersigned certifies that on the 11th day of December, 2007, a true and correct copy of this document was faxed and mailed to W. Stephen Smith & Laurie Hand (Morrison & Foerster); Tina Kobayashi, AAG; F. Michael Kail, Samuel T. Perkins, Thomas M. Contois (Steptoe & Johnson); A.B. (Taxpayer X); Hollie Kovach.

By: *Signed*
Linda Schwass/Kimberly DeMoss

[This document has been modified to conform to the technical standards for publication.]