

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KENSINGTON GATE OWNERS :
INCORPORATED :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 1992 through December 31, 1994. :

In the Matter of the Petition :
of :
SUNRISE POINT EAST CONDOMINIUM :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period October 1, 1992 through December 31, 1994. :

ORDER
DTA NOS. 817445,
817446, 817447,
817448, 817449,
817450 AND 817451

In the Matter of the Petition :
of :
TOPPER REALTY CORP. :
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1992 through December 1, 1994. :

In the Matter of the Petition :

of :

WESTBURY TERRACE CONDOMINIUM :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period October 1, 1992 through December 31, 1994. :

In the Matter of the Petition :

of :

WHITE OAKS NURSING HOME f/k/a :
WOODBURY HEALTH RELATED FACILITY :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period August 1, 1993 through December 30, 1995. :

In the Matter of the Petition :

of :

WILLOW HOUSE OWNERS CORP. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1992 through November 30, 1995. :

In the Matter of the Petition :

of :

30 GRACE AVENUE APARTMENTS CORP. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1992 through December 1, 1994. :

Petitioner, Kensington Gate Owners Incorporated, c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1992 through December 31, 1994.

Petitioner, Sunrise Point East Condominium, c/o M. Topper, 84 East Park Avenue, Long Beach, New York 11561, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 1, 1992 through December 31, 1994.

Petitioner, Topper Realty Corp., 84 East Park Avenue, Long Beach, New York 11561, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through December 1, 1994.

Petitioner, Westbury Terrace Condominium, 135 Post Avenue, Westbury, New York 11590, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 1, 1992 through December 31, 1994.

Petitioner, White Oaks Nursing Home f/k/a Woodbury Health Related Facility, 8565 Jericho Turnpike, Woodbury, New York 11797, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1993 through December 30, 1995.

Petitioner, Willow House Owners Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through November 30, 1995.

Petitioner, 30 Grace Avenue Apartments Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Manhasset, New York 11747, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through December 1, 1994.

The Division of Taxation brought a motion, dated March 20, 2000, pursuant to 20 NYCRR 3000.6(a)(2), to partially vacate petitioners' Demands for Bills of Particulars. The Division of Taxation is represented by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel). Petitioners, represented by Robert A. Wagner, Esq., filed an affirmation in opposition to the Division of Taxation's motion on March 29, 2000, which date commenced the 90-day period for the issuance of this order. Based on the affirmation of Cynthia E. McDonough, Esq., the affirmation of Robert A. Wagner, Esq., in opposition to the motion and the documents attached thereto, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation's motion to partially vacate petitioners' demands for bills of particulars should be denied on the basis that the Division of Taxation consolidated the matters named above on its own action, without permission from the Division of Tax Appeals.

II. Whether the Division of Taxation has proven that petitioners' demands for bills of particulars call for items inappropriate to such a demand, and thus should be vacated in part.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a notice of determination to Kensington Gate Owners Incorporated ("petitioner") dated July 13, 1998, asserting additional sales and use tax for the period ended November 13, 1995 in the amount of \$12,428.35, plus penalty and interest for a total amount due of \$20,835.45.

The Division issued a notice of determination to Sunrise Point East Condominium (“petitioner”) dated March 20, 1998, asserting additional sales and use tax for the period ended December 11, 1995 in the amount of \$8,223.11, plus penalty and interest for a total amount due of \$13,265.88.

The Division issued a notice of determination to Topper Realty Corp. (“petitioner”) dated March 20, 1998, asserting additional sales and use tax for the period ended January 22, 1996 in the amount of \$5,256.88, plus penalty and interest for a total amount due of \$8,385.80.

The Division issued two notices of determination to Westbury Terrace Condominium (“petitioner”) dated May 11, 1998, asserting additional sales and use tax for the periods ended December 11, 1995 and December 12, 1995 in the amounts of \$5,654.30, plus penalty and interest for a total amount due of \$9,249.73 and \$981.53 plus penalty and interest for a total amount due of \$1,605.13, respectively.

The Division issued two notices of determination to White Oaks Nursing Home (“petitioner”) dated May 22, 1998, asserting additional sales and use tax for the period ended November 13, 1996 in the amount of \$31,954.50 plus penalty and interest for a total amount due of \$47,296.94 and \$12,758.54 plus penalty and interest for a total amount due of \$18,884.28, respectively.

The Division issued a notice of determination to Willow House Owners Corp. (“petitioner”) dated June 8, 1998, asserting additional sales and use tax for the period ended January 24, 1996 in the amount of \$12,736.53, plus penalty and interest for a total amount due of \$20,745.18.

The Division issued a notice of determination to 30 Grace Avenue Apartments Corp. (“petitioner”) dated July 13, 1998, asserting additional sales and use tax for the period ended

January 24, 1996 in the amount of \$13,927.21, plus penalty and interest for a total amount due of \$22,899.87.

2. The seven petitioners appeared before the Bureau of Conciliation and Mediation Services on May 13, 1999 in protest of the above-referenced notices, each of which was sustained by conciliation orders (CMS Nos. 169607, 167836, 167826, 168343, 168528, 169078, and 169608) dated October 22, 1999.

3. Petitioners commenced a proceeding in the Division of Tax Appeals by the filing of seven petitions in a timely manner on December 8, 1999. Their representative, Robert A. Wagner, Esq., submitted the seven petitions in the same mailing. Each of the petitions bore assertions of identical error by the Division and were differentiated only by amount of asserted tax, and the assessed tax period in some instances. The Division of Tax Appeals associated the seven cases in its tracking system.

4. The Division filed answers to each of the seven petitions dated February 10, 2000, denying knowledge or information sufficient to form a belief as to the factual allegations in the petitions and affirmatively setting forth the basis of the Division's assessments. Petitioners in this matter had filed refund claims for the respective periods in issue for sales and use taxes paid to Long Island Lighting company ("LILCO") for the purchase of energy products used for residential purposes. Although the refund claims were reviewed along with petitioners' backup documentation (consisting of handwritten worksheets prepared by a company known as Utility Bill Analysis ["UBA"], computer sheets stamped with "LILCO," and a summary statement of bills rendered by LILCO), and thereafter granted to petitioners, the Division now contends petitioners did not properly receive such funds. Subsequent to the payment of petitioners' refund claims, the Division discovered discrepancies, in similar utility tax refund claims, between the

summary sheets submitted by UBA and the actual amount of sales taxes billed by LILCO in its invoices to its other customers. The Division's auditors compared actual LILCO invoices for the other refund claims and found that the invoices: (i) did not show any sales taxes charged, or (ii) showed only a reduced sales tax amount charged to reflect the reduced local sales tax rate, or (iii) showed a tax amount charged at a rate which included local school taxes not subject to refund.

Having discovered such discrepancies, the Division requested petitioners to provide actual LILCO invoices and canceled checks for selected months of the refund periods in issue, or in the alternative, a statement from LILCO (now Long Island Power Authority or LIPA) indicating the actual amount of tax billed to petitioners for the refund periods in question, in order to verify the actual amount of sales taxes paid. Petitioners did not provide any further documentation and the Division concluded that all the refunds were paid in error. The assessments referenced above reflect the Division's conclusion.

5. Petitioners served seven identical demands for bills of particulars, dated March 3, 2000. The demands ask the Division to set forth true copies of the worksheet prepared by UBA, the computer sheets bearing the "LILCO" stamp, the summary statement of bills rendered by LILCO and to particularize, among other things, individuals involved in the refund claim review and decision-making process (including names, office or title, address, telephone number), the date the refund claim was reviewed or a decision was made to refund petitioners' funds. Regarding the discrepancies noticed by the Division in other taxpayer claims for refund, the demands request the name, office or title, telephone number, and address of the person responsible for discovering such discrepancies, in addition to the date the same was identified. The demands also request the details of the discrepancies discovered and the names and addresses of the other taxpayers referred to by the Division. Lastly, the demands ask for the names of the Division

auditor who compared the actual LILCO invoices for the other refund claims, including the auditor's office or title, telephone number and address.

6. The Division filed a motion on March 20, 2000 for an order to partially vacate petitioners' demands for bills of particulars. The Division filed one notice of motion which listed all seven petitioners and Division of Tax Appeals identifying numbers.

With respect to petitioners' demands, the Division has agreed to meet paragraph 1 of the demand, requesting the handwritten worksheets prepared by UBA, computer sheets stamped with "LILCO" and a summary statement of bills rendered by LILCO. Regarding the remaining demands, the Division asserts that petitioner seeks evidentiary material not appropriately sought by petitioners; that petitioners wrongfully seek information concerning the identity of potential witnesses; that petitioners seek material which is protected by the secrecy provisions of Tax Law § 1146; and that petitioners seek material and information concerning matters on which the Division does not bear the burden of proof.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure provide that a party may serve a demand for a bill of particulars to an adverse party in order "to prevent surprise at the hearing and to limit the scope of the proof" (20 NYCRR 3000.6[a][1]). The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claim which he or she must defend against (*Johnson, Drake and Piper v. State of New York*, 43 Misc 2d 513, 251 NYS2d 500, 503). A demand for a bill of particulars may be used to amplify the pleadings, prevent surprise and limit the issues, but it may not be used to gain the identity of witnesses or disclosure of evidentiary detail that adverse parties will rely on to prove their claim (*Bassett v. Bondo Sangsa Co., Ltd.*, 94 AD2d 358, 464 NYS2d 500, 501, *appeal dismissed* 60

NY2d 962, 471 NYS2d 84). The supplying of evidentiary material is not the purpose of the bill (*State of New York v. Horsemen's Benevolent & Protective Assn.*, 34 AD2d 769, 311 NYS2d 511; *Yardarm Club Hotel v. Morgan*, 22 AD2d 700, 253 NYS2d 920). The bill is intended to offer a more expansive statement of the pleader's contentions rather than the evidentiary basis upon which they rest (Siegel, NY Prac § 238, at 382 [3d ed]). In addition, a bill of particulars is tied in with the burden of proof. Parties are required to particularize only that of which they have the burden of proof (*id.*).

It has also been established that a bill of particulars is not a form of disclosure (*Tully v. Town of North Hempstead*, 133 AD2d 657, 519 NYS2d 764; *Bouton v. County of Suffolk*, 125 AD2d 620, 509 NYS2d 846). It is important to note that the Tax Appeals Tribunal Rules of Practice and Procedure preclude an administrative law judge from entertaining a motion for prehearing discovery (20 NYCRR 3000.5[a]). In light of this directive, it is especially important that any line which is drawn errs on the side of restricting demands to those which are clearly intended to limit and crystallize the issues which will be raised at hearing.

B. The Division has agreed to provide the documents requested in paragraph 1 of the demand for a bill of particulars. Therefore, the Division will provide the information or documents requested in this paragraph.

C. Addressing the first issue, whether the Division's motion should be denied on the basis that the Division consolidated the matter concerning the seven petitioners without permission, petitioners' arguments have no merit.

Upon receipt by the Division of Tax Appeals of the seven petitions, each case was properly assigned a separate DTA number in accordance with Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.3[f]). However, official notice is taken of the practice

of the Division of Tax Appeals to *associate* cases when, as in this case, the petitions are submitted by the same representative, in the same mailing, all having identical issues set forth in their petitions. Furthermore, in this case, the seven petitioners all appeared at the same conciliation conference held before the Bureau of Conciliation and Mediation Services. Clearly there is an inference by petitioners' representative to have the cases associated for efficiency and economy, and as such was initiated by petitioners' representative. When the Division filed its notice of motion for an order to partially vacate petitioners' demands for bills of particular, the Division opted to address identical bills of particular language in one motion document. This was deemed a response to each demand and did not act to consolidate these matters before the Division of Tax Appeals. Nor did it prejudice petitioners' rights in any manner. Petitioners may choose to consolidate their cases for hearing purposes and it is at that time that these matters are officially consolidated. Accordingly, petitioners have not established that the Division's motion should be vacated on the basis of case association.

D. The remaining requests in petitioners' demands for bills of particular are determined to be beyond the scope and purpose of a bill of particulars. First, the Division does not bear the burden of proof to show why petitioners may not be entitled to the former refunds. It would thus be inappropriate to require the Division to particularize each aspect of its determination that tax is due and owing (Siegel, NY Prac § 238, [3rd ed]), provided petitioners have been adequately apprised. It is petitioners' burden to show that the assessments are erroneous. Secondly, paragraphs 2, 3(a) and 3(c) of the demands for bills of particular clearly request information used to gain the identity of potential witnesses, in this case, Division employees. It is well established that a demand for a bill of particulars cannot be used for such purpose (*Bassett v. Bondo Sangsa Co., Ltd., supra*), and will thus not be permitted in this case. Accordingly,

paragraphs 2, 3(a) and 3(c) in the demand for a bill of particulars requesting the identification of individuals are stricken from the demand.¹

E. Paragraph 3(b) is likewise beyond the scope of a proper bill of particulars inasmuch as it seeks evidentiary information and is irrelevant to the documentation which supported petitioners' claims for refund. Furthermore, it seeks audit information on other taxpayers in violation of the secrecy provisions of Tax Law § 1146, and is therefore an inappropriate request for a demand.

Petitioners argue that the Division is relying upon the discrepancies it found concerning other customers, and has thereby waived any potential claim to privilege. I disagree. The Division has essentially noted that the discrepancies pertaining to other customers of LILCO raised its awareness that the refunds acquired by petitioners may have been improper, and it is on the basis of the such awareness that it has requested information from petitioners to prove otherwise. The Division may only rely on the documentation which was exchanged between LILCO and petitioners, not other customers, to evaluate the issuance of an assessment to petitioners herein. The secrecy provision has in no way been waived by the Division.

F. Accordingly, based upon the motion documents and the supporting affidavits submitted by the parties, the Division's motion to partially vacate petitioners' demands for bills of

¹ It is noted that pursuant to 20 NYCRR 3000.7 an Administrative Law Judge may issue subpoenas to require the attendance of witnesses or the production of documentary evidence at hearing provided that what the subpoena seeks is not unreasonable, oppressive, excessive in scope or unduly burdensome.

particular is granted with respect to paragraphs 2 and 3 in their entirety. This matter shall proceed to hearing in due course as scheduled.

DATED: Troy, New York
June 01, 2000

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE