

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HENRY SCHEIN, INC.</b>	:	ORDER
	:	DTA NO. 821783
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 March 1, 1993 through	:	
November 30, 1997.	:	

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Petitioner, Henry Schein, Inc., 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 March 1, 1993 through November 30, 1997.

The Division of Taxation (Division) by its representative, Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel), filed a motion on December 7, 2007 for an order vacating a demand for a bill of particulars dated November 20, 2007 filed by petitioner's representative, Jones Day (Maryann B. Gall, Esq., and Phyllis J. Shambaugh, Esq., of counsel). Petitioner filed a response to the Division of Taxation's motion on January 4, 2008, and the Division filed a reply to petitioner's response on January 17, 2008, which date began the 90-day period for the issuance of this order. Based on the pleadings, motion papers and other documents filed by the parties, Thomas C. Sacca, Administrative Law Judge, renders the following order.

***FINDINGS OF FACT***

1. Petitioner (HSI) commenced this proceeding by filing a petition with the Division of Tax Appeals in protest of a conciliation order issued by the Bureau of Conciliation and

Mediation Services, dated May 11, 2007. The conciliation order sustained a Notice of Determination dated September 23, 2005, which asserted additional sales and use taxes due, plus interest, for the period March 1, 1993 through November 30, 1997.

2. The notice of determination of additional sales and use taxes due is based upon a field audit of petitioner's records.

3. During the course of the field audit, the Division of Taxation obtained a consent extending the period of limitation for the assessment of sales and use taxes under Articles 28 and 29 of the Tax Law (Consent) signed by petitioner's tax director.

4. Petitioner contends that the consent is invalid because it was not signed by an owner, partner or corporate officer, and the Division of Taxation did not request a corporate power of attorney.

5. Petitioner served the Division with a Demand for a Bill of Particulars dated November 20, 2007.

6. With reference to the Consent extending the period of limitations, petitioner requested in its bill of particulars the following:

- (a) Did the Department request such Consent?
- (b) When did the Department request the Consent?
- (c) The name or names of the auditor who requested the Consent.
- (d) To whom did the auditor direct the request for the Consent?
- (e) How did the auditor request the Consent? By personal visit? By phone? By U.S. Mail? By Fax?

- (f) In requesting the Consent, did the auditor follow the following procedures set forth in section 10.1.5.4 of the New York State Audit Manual Sales Tax Field Audit Guidelines (Audit Guidelines).
  - (i) Complete the Consent in triplicate?
  - (ii) Determine HSI's legal name?
  - (iii) Enter HSI's name, identification number and tax periods on the Consent?
  - (iv) Request Consent for not less than three months?
  - (v) Instruct HSI's signatory to insert his/her title and date signed on all copies?
  - (vi) Advise HSI the Consent can only be signed by (1) owner or partner; (2) corporate officer; or (3) party operating under valid power of attorney?
- (g) The name or names of the auditor who received the Consent.
- (h) The date on which the auditor received the Consent.
- (i) By what method of delivery did the auditor receive the Consent? Via personal visit to HSI headquarters in Melville, NY?
- (j) If the Consent was received by personal visit, state the name of the person at HSI with whom he met.
- (k) Did the auditor receive the Consent via regular U.S., Mail?
- (l) If the Consent was received by regular mail, from where was the Consent sent?
- (m) If the Consent was received by regular mail, did the auditor retain the envelope in which the Consent was received?
- (n) If the Consent was not received by personal visit or regular mail, was the Consent received by fax?

- (o) Was the auditor's receipt of the Consent entered into any record at the Suffolk District Office?
- (p) If so, what was the document?
- (q) State the name of the auditor who processed the Consent.
- (r) In processing the Consent, did the auditor follow the procedures in section 10.1.5.7 of the Audit Guidelines?
  - (i) Explain the purpose and implications of signing Consent to HSI?
  - (ii) Upon receipt of Consent have the original plus two copies endorsed by team leader, section head or district office manager?
    - (A) if no, why not?
    - (iii) Return endorsed copy of Consent to HSI?
      - (A) State the name of the auditor who returned the Consent; and
      - (B) How was the Consent returned?
    - (iv) Keep original Consent in audit file?
- (s) The name or names of the auditors, team leader, section head or district office manager who reviewed the Consent.
- (t) The date or dates on which the auditors, team leader, section head or district office manager reviewed the Consent.
- (u) Did the auditor, team leader, section head, or district audit manager discuss the Consent with others in the Department?
- (v) With whom did the auditors, team leader, section head or district office manager discuss the Consent?

(w) The date or dates on which the auditors, team leader, section head or district audit manager discussed the Consent?

(x) Where did the auditors, team leader, section head or district office manager discuss the Consent?

(y) Did the auditor, as required by section 10.1.5.7(B) of the Audit Guidelines, obtain the endorsement of the Consent by the team leader, section head or district audit manager?

(z) The name of the team leader, section head or district audit manager who endorsed the Consent per Audit Guidelines section 10.1.5.7(B)?

7. With reference to a fax message claimed to have been sent by the Division of Taxation to a Mr. Salomon that inquired as to the name of the person who signed the Consent form and whether the signatory was a corporate officer, petitioner requested the following:

(a) Why was the alleged fax sent to Mr. Salomon?

(b) The name of the auditor who sent the alleged fax.

(c) The time the auditor began to send the alleged fax.

(d) The time the auditor completed sending the alleged fax.

(e) Was the alleged fax sent to fax number 631-777-3596?

(f) Was the alleged fax sent to fax number 631-843-5675?

(g) If the fax was not sent to either of these numbers, to what fax number was the alleged fax sent?

(h) Where was the fax machine used to send the alleged fax located?

(i) Was the fax machine located in the Suffolk District Office?

(j) What company manufactured the fax machine used to send the alleged fax?

(k) Did the fax machine used have the capability to verify that the fax was sent and print the date, time and fax number to which the fax was sent?

(l) If so, the confirmation date and time of the fax.

(m) If so, the confirmed fax number.

(n) Assuming that the fax machine used did not have the capability to print the confirmation date and time of the fax, please state how a record of the fax was made.

(o) Is this machine still in use at the Suffolk District Office?

8. With regard to the Division's allegation that Mr. Salomon advised the auditor by phone that the tax director was authorized to sign the Consent, petitioner requested the following:

(a) Did the auditor call Mr. Salomon?

(b) If so, the name of the auditor who made the alleged call.

(c) If so, the date and time the auditor made the alleged call.

(d) Did the auditor keep a record, other than the Tax Field Audit Record, of the phone numbers called?

(e) If so, is the phone log included in a taxpayer's audit file?

(f) If not, did Mr. Salomon call the auditor?

(g) If Mr. Salomon called the auditor, provide the date and time of the call.

(h) Does the Department routinely make audio recordings of telephone calls between its auditors and taxpayers?

(i) Did the Department make an audio recording of the alleged call?

9. With regard to a letter dated October 17, 2000 sent by an auditor to a Mr. Steven Paladino, petitioner requested the following:

(a) The name of the auditor who drafted the letter.

- (b) The name of the auditor or other Department employee who typed the letter.
- (c) The name of the team leader, section head or district audit manager who reviewed the letter prior to it being sent.
- (d) The name of the auditor or other Department employees who mailed the letter.
- (e) Was the letter prepared on a computer using a word processing program?
- (f) If so, what word processing program was used?
- (g) Was a document management program used?
- (h) If so, what document management program was used?
- (i) What was the letter's creation date as recorded by the computer program?
- (j) Was the letter saved on the computer's hard drive?
- (k) Was the letter saved on a disk or CD?
- (l) What was the saved date as recorded on the computer storage device?
- (m) The name of the Department employee or employees with knowledge of the Suffolk District Office's mailing procedures.
- (n) The method of mailing. Was the letter sent certified mail? Overnight delivery?
- (o) The date the letter was mailed.

10. With regard to the Division's allegation that the auditor never received a response to the October 17, 2000 letter, petitioner requested (1) the name of the auditor and (2) the steps taken to confirm that HSI received the October 17, 2000 letter.

11. With regard to the Division's statement in its answer that neither the Tax Law nor the regulations require that a waiver extending the limitation for assessment be signed by an officer of a corporate taxpayer, petitioner requested the following:

- (a) Pursuant to what statute did the Department request that HSI confirm that the tax director was an officer of HSI?
- (b) Pursuant to what regulation did the Department request that HSI confirm that the tax director was an officer of HSI?
- (c) If the Department's request that HSI confirm that the tax director was an officer of HSI is based on case law, provide the name of the case.
- (d) If the Department's request that HSI confirm that the tax director was an officer of HSI is based on Department policy, please provide:
  - (i) The name and title of the Department employee who originated the policy;
  - (ii) The date of the policy;
  - (iii) Is the policy written?
  - (iv) Who wrote the policy?
  - (v) How were taxpayer's notified of the policy?

12. With regard to the Division's allegation that the waiver is valid because the tax director had both real and apparent authority to sign the waiver, petitioner requested the following:

- (a) State the Department's definition of "real authority."
- (b) State the Department's definition of "apparent authority."
- (c) The name or names of the Department employee or employees who determined that the tax director had real and/or apparent authority to sign the waiver.
- (d) The information on which the Department employee or employees relied to make this determination.
- (e) To the extent that the Department's claim of reliance is based on prior audits of HSI or one of its subsidiaries, HSI requests that the Department provide the following:



- (i) The name of the entity audited;
- (ii) The date the audit began;
- (iii) The audit period;
- (iv) The type of tax involved;
- (v) The issues in the audit;
- (vi) The names of the auditor or auditors who performed the audit;
- (vii) The names of the HSI or subsidiary employees who worked with the auditor(s) during the audit;
- (viii) The date the audit was completed;
- (ix) Resolution of the audit.

13. With regard to the Division's statement that the notice was timely issued and therefore valid, petitioner requested the following:

- (a) On what statute is the Division's statement based?
- (b) On what regulation is the Division's statement based?
- (c) If the Division's statement is based on Department policy, provide the following:
  - (i) The name and title of the Department employee who originated the policy.
  - (ii) The date of the policy.
  - (iii) Is the policy written?
  - (iv) Who wrote the policy?
  - (v) How were taxpayer's notified of the policy?

### ***CONCLUSIONS OF LAW***

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that a party may serve a demand for a bill of particulars upon 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]). Generally, under the CPLR, a party need particularize only those matters upon which it has the burden of proof (*see Holland v. St. Paul Fire & Marine Ins. Co.*, 101 AD2d 625, 475 NYS2d 156, 157 [1984]).

B. Petitioner’s claim in this matter is that the Division of Taxation is barred by the statute of limitations found in Tax Law § 1147(b) from assessing additional sales and use taxes for the period in issue because the consent extending period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law is invalid. The requirements of section 1147 have been held to constitute a statute of limitations which must be pleaded as an affirmative defense (*Matter of Convissar v. State Tax Commn.*, 69 AD2d 929, 415 NYS2d 305 [1979]; *Matter of Servomation v. State Tax Commn.*, 60 AD2d 374, 400 NYS2d 887 [1977]), and the burden of proof is thus on the one asserting it (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826 [1987], *lv denied* 71 NY2d 806, 530 NYS2d 109 [1988] ). As the Division does not have the burden of proof on the timeliness issue, it is not obligated to submit a bill of particulars on this issue (*Matter of Vermont Morgan Corp. v. Ringers Enterprises*, 92 AD2d 1020, 461 NYS2d 446 [1983]), and petitioner’s demand for a bill of particulars is improper (*Northway Engineering, Inc. v. Felix Industries, Inc.*, 77 NY2d 332, 567 NYS2d 634 [1991]).

C. 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 [1964]). A demand for a bill of particulars may be used to amplify the pleadings, prevent surprise and limit the issues, but may not be used to gain 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 [1983], *lv dismissed* 60 NY2d 962, 471 NYS2d 84 [1983]; *State of New York v. Horsemen's Benevolent*

*and Protective Assoc.*, 34 AD2d 769, 311 NYS2d 511 [1970]). Here, most of the over 100 separate requests for information in the 10-page demand are excessively detailed and improperly request material evidentiary in nature, and since the few proper demands are commingled with the proper ones, the remedy, under the circumstances, is to vacate the entire demand (*Arroyo v. Fourteen Estusia Corp.*, 194 AD2d 309, 598 NYS2d 471 [1993]).

D. The Division of Taxation's motion to vacate petitioner's demand for a bill of particulars is granted.

DATED: Troy, New York  
February 21, 2008

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE