

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YING FENG WANG	:	
for Revision of a Determination or for Refund of	:	ORDER
Sales and Use Taxes under Articles 28 and 29 of the	:	DTA NO. 822003
Tax Law for the Period June 1, 2003 through	:	
May 31, 2006.	:	

Petitioner, Ying Feng Wang, 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 June 1, 2003 through May 31, 2006.

The Division of Taxation (Division), by its representative, Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel), filed a demand for a bill of particulars. In response, petitioner, currently appearing by Frederick A. Griffen, Esq., filed a bill of particulars and a motion to vacate or modify the bill of particulars. In opposition to petitioner's motion to vacate the demand for the bill of particulars, the Division filed an affidavit dated April 22, 2008, which commenced the 90-day period for issuing this order. Based on the pleadings, motion papers, and other documents filed by the parties, Arthur S. Bray, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. The Division issued a Notice of Determination to petitioner, Ying Feng Wang, dated April 30, 2007, which stated that he was an officer or responsible person of “Ying Feng Wang” [sic]. The notice assessed sales and use taxes in the amount of \$123,701.21, plus interest in the amount of \$47,175.70 and penalty in the amount of \$47,330.70, for a balance due of \$218,207.61.

2. Petitioner filed a petition which was sworn to December 21, 2007. In his petition, he contested the imposition of tax for reasons which may be summarized as follows:

- (1) The Division utilized external indices despite the availability of adequate books and records.
- (2) The Division did not make adequate requests for books and records.
- (3) The Division failed to utilize available electronic records.
- (4) The Division did not properly serve notices upon petitioner.
- (5) The audit and determination are without a rational basis and do not comply with New York law.
- (6) The Division lacks jurisdiction.
- (7) Petitioner denies all adjustments in the proposed assessments.
- (8) The Division improperly made responsible person assessments against petitioner.
- (9) The taxpayer is not responsible for the tax, penalties and interest.
- (10) The taxpayer is not responsible for transferee liability from any other entity.

3. The Division’s answer, dated March 5, 2008, set forth 17 affirmative statements. The allegations of fact, as opposed to assertions of law, may be summarized as follows:

(1) Petitioner owned and operated a restaurant in New York.

(2) In May 2006, the Division commenced a field audit of petitioner's books and records for the period June 1, 2003 through May 31, 2006 and, as part of the audit, requested access to petitioner's books, records and source documents.

(3) Petitioner was unable or unwilling to produce the books and records requested by the Division.

(4) Petitioner's books and records were determined to be inadequate for the performance of a detailed audit.

(5) Based upon an observation of petitioner's business on two days in September 2006, the Division estimated petitioner's business sales during the audit period and the sales tax due thereon.

(6) Petitioner executed a consent to extend the statute of limitations.

(7) The Division issued a Notice of Determination assessing sales and use tax plus interest and penalties for the period in issue.

(8) The Division assessed an additional penalty based upon an underreporting of sales and omitting tax in excess of 25 percent of the amount of tax required to be shown on the return.

(9) The Bureau of Conciliation and Mediation Services issued an order sustaining the Notice of Determination.

(10) Petitioner has not shown that the failure to pay sales and use tax was due to reasonable cause.

4. Petitioner served a reply which either denied the affirmative allegations in the Division's answer or denied knowledge or information sufficient to form a belief.

5. The Division served a demand for a bill of particulars. To the extent in issue, the bill demanded the following:

1. a. Identify and specify each and every book or record made available to the Department of Taxation and Finance;

* * *

- d. identify the person making such books and records available;

* * *

2. Specify and describe “each and every” manner by which the appointment letter and records request list dated May 4, 2006 was not an adequate request for books and records.

* * *

4. Specify the manner and method in which the issuance of the Notice of Determination to petitioner was not properly served.

5. Identify the manner and method petitioner will allege at hearing such Notice was served, or if petitioner alleges it was not served in any manner, state the same.

6. State the address at which petitioner resided on the date the Notice was sent (April 30, 2007).

7. State the date on which petitioner last resided at the address to which the assessment was sent.

8. Set forth the standards of New York law petitioner will claim were allegedly violated and/or not properly met for the performance of the audit herein, specifying case law, statute, or regulation.

9. a. Specify the manner in which the Statute of Limitations bars all or part of the assessment herein;

b. Identify particular quarterly periods allegedly beyond the period of time in which the Department could properly assess the petitioner.

6. Petitioner filed a bill of particulars and a motion to vacate or modify the bill of particulars. Petitioner's objections to certain demands and the Division's response thereto are as follows:

a. Demand 1(a) asked petitioner to identify "each and every" book or record made available to the Division. Petitioner objected to demand 1(a) on the ground that it was an improper request for evidentiary material and was burdensome.

In response, the Division stated that it is not burdensome for petitioner to set forth what books and records were supplied and that petitioner should be required to amplify his pleading.

b. Demand 1(d) requested that petitioner identify the person or persons making such books and records available. Petitioner submits that demand 1(d) improperly requested the identity of witnesses.

The Division contends that this is merely a particularization of petitioner's claim that he supplied books and records.

c. Demand (2) asked petitioner to identify "each and every" way in which the appointment letter and records request list were inadequate. According to petitioner, demand (2) was overly broad and burdensome.

The Division submits that this demand is not broad or burdensome because it is merely a specification of why the request for records was allegedly inadequate.

d. Demands (4) through (7) concern the service of the Notice of Determination. Petitioner posits that demand numbers (4), (5), (6) and (7) are improper because they request evidentiary material on which the Division has the burden of proof. The Bill of Particulars further states that "the Division lacks proof of proper service of the alleged notices upon petitioner."

The Division maintains that petitioner has the burden of proof on all issues and the request is directed to the allegation that the notice was improperly served.

e. Demand (8) asked petitioner to set forth case law, statutes and regulations by which the audit violated New York law. Petitioner asserts that demand number (8) is improper because it requests evidentiary material on which petitioner will rely to prove its claim and is overly broad and burdensome because it requests petitioner to provide case law. The remainder of the request which demands case law is allegedly improper in that it is outside the scope of a bill of particulars.

The Division responds that a demand for the identification of statutes that petitioner will rely on is not improper, citing *Sacks v. Town of Thompson* (33 AD2d 627 [1969]).

f. Demand (9) requested that petitioner specify the manner in which the Statute of Limitations bars all or part of the assessment and further requests that petitioner identify the particular quarterly periods beyond the period for issuing an assessment. According to petitioner, demand number (9) is improper in that it requests evidentiary material on an issue on which the Division has the burden of proof. The Bill also provides that “the Division lacks proof of proper service of Notice of Determination within the applicable statute of limitations.”

The Division replies that it does not have the burden of proof and that it is a matter of proper notice of what petitioner intends to prove at the hearing.

CONCLUSIONS OF LAW

A. The regulations setting forth the Rules of Practice and Procedure before the New York State Tax Appeals Tribunal provide for bills of particulars at 20 NYCRR 3000.6. That section states, in pertinent part, as follows:

(a) Bills of particulars. (1) After all pleadings have been served, a party may wish the adverse party to supply further details of the allegations in a pleading to prevent surprise at the hearing and to limit the scope of proof. For this purpose, a party may serve written notice on the adverse party demanding a bill of particulars within 30 days from the date on which the last pleading was served.

(2) The written demand for a bill of particulars must state the items concerning which such particulars are desired.

B. The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial (*see State of New York v. Horsemen's Benevolent and Protective Assn.*, 34 AD2d 769, 311 NYS2d 511 [1970]). A bill of particulars is not a form of disclosure (*Tully v. Town of North Hempstead*, 133 AD2d 657, 519 NYS2d 764 [1987]). The bill is intended to offer a more expansive statement of the pleader's contentions rather than the evidentiary basis upon which they rest (20 NYCRR 3000.6; *State of New York v. Horsemen's Benevolent and Protective Assn.*, 34 AD2d 769, 311 NYS2d 511 [1970], *supra*). Petitioner brings this motion to vacate a portion of the Demand for a Bill of Particulars on the ground that the demand impermissibly demands evidentiary materials and the identity of witnesses. Petitioner also asserts that the demand is unreasonably burdensome and oppressive.

C. Given the stated intention of a Demand for a Bill of Particulars, it is determined that a portion of the Division's bill is overly broad, burdensome and beyond the scope of a Demand for a Bill of Particulars. It seeks information for purposes of trial preparation, not information to limit the issues and assist in their crystallization. Petitioner's motion to vacate the Division's demand is granted for the following reasons:

(1) Demands 1(a) and 1(d) improperly seek evidentiary materials and the identity of witnesses rather than a clarification of the pleadings (*see State of New York v. Horsemen's Benevolent and Protective Assn.*, 34 AD2d 769, 311 NYS2d 511 [1970], *supra*).

(2) Demand (2) is overly broad and burdensome. The petition did not make any reference to an appointment letter or records request list. Further, the Division has been sufficiently apprised of the issue to prepare for a hearing.

(3) With respect to demands (4), (5) and (9), petitioner's Bill of Particulars clearly states that "the Division lacks proof of proper service of the alleged notices upon petitioner." A similar assertion is made with respect to demand (9). Although the burden of proof is generally upon petitioner (20 NYCRR 3000.15[d][5]), the burden of proving proper mailing is on the Division (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Petitioner's response was adequate to allow the Division to prepare for the hearing.

(4) Demands (6) and (7) are vacated because they seek evidence and not a clarification of the pleadings.

(5) Demand (8), which requests a specification of case law, statute or regulation, is improper. This material is not necessary to assist in trial preparation or to avoid surprise at a hearing. Similarly, the Division's reliance upon *Sacks v. Town of Thompson* (33 AD2d 627 [1969], *supra*) is misplaced because the Division has not shown such disclosure is necessary for the Division to prepare its case.

D. Petitioner's motion to vacate portions of the Division's demand is granted.

DATED: Troy, New York
July 10, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE