STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
AQUIFER DRILLING & TESTING, INC. AND HARLAN L. REXRODE, JR.	:	ORDER DTA NOS. 823592 AND 823593
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2002 through November 30, 2008.[1]	:	

Petitioners, Aquifer Drilling & Testing, Inc., and Harlan L. Rexrode, Jr., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2002 through December 31, 2008.

Pursuant to 20 NYCRR 3000.6(a)(2), by a motion dated October 4, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel), moved for an order vacating petitioners' Demand for Bill of Particulars dated August 3, 2010. With its Notice of Motion, the Division submitted the affirmation of Robert A. Maslyn, Esq., in support of the motion, with annexed exhibits. On November 3, 2010 petitioners, appearing by Schulz & Associates, PC (Laura Alto, Esq., of counsel), submitted the affirmation of Laura Alto, Esq., in opposition to the Division's motion, with annexed exhibits. Accordingly, the 90-day period for issuance of this determination commenced on November 3, 2010, the date on which

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[1] The period in issue for petitioner Aquifer Drilling & Testing, Inc., includes two audit periods spanning December 1, 2002 through August 31, 2005 and September 1, 2005 through November 30, 2008, respectively. The period in issue for petitioner Harlan L. Rexrode, Jr., includes only the second of such two audit periods (i.e., September 1, 2005 through November 30, 2008).

petitioners' affirmation in opposition was filed. After due consideration of the affirmations, annexed exhibits, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion seeking an Order vacating petitioners' Demand for Bill of Particulars should be granted.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted a sales and use tax audit of petitioner Aquifer Drilling & Testing, Inc. (ADT), for the sales tax quarterly periods spanning December 1, 2002 through August 31, 2005 and September 1, 2005 through November 30, 2008, respectively (the audit periods). Per agreement between the parties, these audits were conducted via test period auditing, whereby ADT's sales were examined in detail for a chosen month out of each of the above-noted audit periods. The resulting error rate determined thereby for each such test period was applied against ADT's sales for each such audit period to determine additional tax due.

2. On April 6, 2009, the Division issued to petitioner ADT a Notice of Determination (L-031724388-3) assessing additional tax due for the period December 1, 2002 through August 31, 2005 in the amount of $1,803,965.64, plus interest. On February 18, 2010, the Division issued to petitioner ADT a Notice of Determination (L033336467-6) assessing additional tax due for the period September 1, 2005 through November 30, 2008 in the amount of $2,808,946.89, plus interest and penalty.

3. On February 19, 2010, the Division issued to petitioner Harlan L. Rexrode, Jr., a Notice of Determination (L-033345449-5) assessing additional tax due for the period September 1, 2005

through November 30, 2008 in the amount of $2,808,946.89, plus interest and penalty. This notice was issued to Mr. Rexrode as a person allegedly responsible to collect and remit sales and use taxes on behalf of petitioner ADT.

4. On April 20, 2010, petitioners challenged these notices by filing petitions for a hearing with the Division of Tax Appeals. The petitions allege that an engineer or an engineering firm retained by a party with an interest in real property, in turn retains ADT to provide geotechnical and/or hydrogeologic information concerning the property site, such as depth to the water table, depth to bedrock, direction of flow of the sub-surface water, the condition of the soil and the condition of the underground water. ADT performs various test borings and installs various temporary monitoring wells at the property site to obtain the required information, and communicates the information to its engineer or engineering firm client at the site as it is being collected from the test borings and temporary monitoring wells. ADT thereafter fills in the test borings and removes the temporary monitoring wells and leaves the site in essentially the same condition as it was prior to the conduct of ADT's activities. ADT's client then allegedly uses the information provided by ADT during the course of performing its own engineering services for its client. ADT alleges that neither it nor its clients have any interest in the real property at which the information is gathered.

5. The petitions allege that ADT's services are a transfer of information concerning real property between a buyer and a seller, neither of whom has any proprietary interest in the property, and as such cannot be considered to constitute a taxable service of maintaining, servicing or repairing such property (Tax Law § 1105[c][5]). The petitions further allege that ADT's services are specifically exempt from sales tax per Tax Law § 1105(c)(1) as the furnishing of information that is "personal or individual in nature and which is not or may not be

substantially incorporated in reports furnished to other persons. . . ." The petitions further detail ADT's challenge to include the claim that even if the services in question constituted the "maintenance, service or repair of real property," the same would be sales between ADT's clients and the property owners, such that the sale of ADT's services to its engineer clients would not be subject to tax as sales for resale. The petitions also allege that ADT has been the subject of previous audits wherein no issue was raised by the Division as to the taxability of ADT's services, and that the Division has issued advisory opinions to other firms providing services allegedly identical to those performed by ADT concluding that such services were not subject to sales tax. Finally, the petitions allege that even if ADT's services are subject to tax, per Tax Law § 1105(c)(5), nearly all of such services performed by ADT concern tax exempt projects and therefore would not be subject to tax on such basis.

6. On July 7, 2010 and July 14, 2010, respectively, the Division submitted its answers and its subsequent amended answers to the petitions, affirmatively alleging therein that the services performed by ADT constituted servicing real property the receipts from which are subject to tax per Tax Law § 1105(c)(5), and that petitioners bear the burden of establishing the contrary, per Tax Law § 1132(c) and 20 NYCRR 533.2.

7. On August 3, 2010, petitioners submitted a reply to the Division's answers and also served a Demand for a Bill of Particulars seeking particulars as follows:

> 1) State in detail the factual and legal basis for the Division's conclusion that Aquifer Drilling & Testing, Inc. ("ADT") "made sales of tangible personal property and/or enumerated services that were subject to tax under Articles 28 and 29 of the Tax Law," as alleged in paragraph 4 of the Division's Amended Answer.
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> 2) State in detail the factual and legal basis for the Division's conclusion that "the services provided by [ADT] were determined to be servicing of real property, the receipts from which are subject to tax under Tax Law § 1105(c)(5)," as alleged in paragraph 10 of the Division's amended answer.

8. On September 13, 2010, with particulars not having been provided in response to petitioners' Demand, petitioners' counsel forwarded (electronically) copies of petitioners' Demand to the Division.[2] On October 4, 2010, the Division filed the subject motion to vacate petitioners' demands for particulars as overly broad.

9. On November 3, 2010, petitioners submitted an affirmation in opposition to the Division's motion arguing that the motion should be denied as not having been timely filed, i.e., within 20 days of receipt of petitioners' Demand, and that the demands were proper in seeking further details to the Division's answer to the petition.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure permit the use of a bill of particulars in proceedings in the Division of Tax Appeals. Specifically, section 3000.6(a) of the Rules provides as follows:

> (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 the 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.
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> (2) The written demand for a bill of particulars must state the items concerning which such particulars are desired. If the party upon whom such demand is served is unwilling to give such particulars, he or she may, in writing to the supervising administrative law judge, make a motion to the tribunal to vacate or modify such demand within 20 days after receipt thereof. The motion to vacate or modify should be supported by papers which specify clearly the objections and the grounds for objection. If no such motion is made, the bill of particulars demanded shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise.

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[2] Petitioners' papers include an affidavit of service and certified mailing receipts attesting to service of petitioners' demands on August 3, 2010. In contrast, the Division's papers deny receipt of the demands at any time prior to petitioners' counsel's transmission of the same in electronic form to the Division's representative herein on September 13, 2010.

> (3) In the event a party fails to furnish a bill of particulars, the administrative law judge designated by the tribunal may, upon motion, issue an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered. A motion for such relief shall be made within 30 days of the expiration of the date specified for compliance with the request.
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> (4) Where a bill of particulars is regarded as defective by the party upon whom it is served, the administrative law judge designated by the tribunal may, upon notice, make an order of preclusion or direct the service of a further bill. In the absence of special circumstances, a motion for such relief shall be made within 30 days after the receipt of the bill claimed to be insufficient.
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> (5) A preclusion order may provide that it will be effective unless a proper bill is served within a specified time.

B. As noted above, the Rules provide that a party may serve a demand for a bill of particulars upon an adverse party seeking further details of the allegations in a pleading so as "to prevent surprise at the hearing and limit the scope of proof" (20 NYCRR 3000.6[a][1]); ***see State of New York v. Horsemen's Benevolent and Protective Assn.***, 34 AD2d 769, 311 NYS2d 511 [1970]). It is intended to enable the party demanding the particulars to know definitely the claims to be defended against (***Johnson, Drake and Piper v. State of New York***, 43 Misc 2d 513, 515, 251 NYS2d 500, 503 [1964]). Consequently, demands for particulars should be restricted to those which are clearly intended to limit and crystallize the issues which will be raised at hearing and not to probe into your adversary's legal interpretations or used to obtain disclosure of evidence (***see e.g. Bassett v. Bando Sangsa Co., Ltd.***, 94 AD2d 358, 464 NYS2d 500 [1983], ***appeal dismissed*** 60 NY2d 962, 471 NYS2d 84 [1983]).

C. 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]). In proceedings in the Division of Tax Appeals a presumption of correctness attaches to a notice of determination and the petitioner bears the burden of overcoming that presumption (***see e.g***. ***Matter of Estate of Gucci***, Tax Appeals Tribunal, July 10,

1997 citing ***Matter of Atlantic & Hudson***, Tax Appeals Tribunal, January 30, 1992). More specifically, in matters before the Division of Tax Appeals, the petitioner bears the burden of proof except as otherwise provided by law (20 NYCRR 3000.15[d][5]). Since a party is only required to serve a bill of particulars of that which the party has the burden of proof, and not of those matters which it need not prove upon trial, petitioners' demands for particulars concerning the Division's position that ADT's services were taxable as servicing real property are properly vacated (***see Hydromatics, Inc. v. Count Nat. Bank***, 23 AD2d 576, 256 NYS2d 438 [1965]).[3]

D. In addition to the foregoing, the remedy for failure to serve a bill of particulars or for service of an inadequate bill of particulars, is an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered (20 NYCRR 3000.6[a][3]), or a conditional order of preclusion that becomes effective unless a proper bill is served within a specified time frame (20 NYCRR 3000.6[a][5]). Here, the Division has specified the basis upon which petitioners have been assessed as subject to tax, i.e., upon the position that the service provided by ADT constitutes servicing real property per Tax Law § 1105(c)(5). In turn, and notwithstanding petitioners' claim to the contrary, a reasonable reading of the notices and the Division's amended answers bears out that at this stage of the proceedings there is no indication that petitioners were not and are not apprised of the existence of the assessed deficiencies or the periods in question. While petitioners clearly disagree with the Division's conclusion as to the

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[3] In contrast to Tax Law § 1105(a), which imposes sales tax on all retail sales of tangible personal property, except as otherwise provided, Tax Law § 1105(c) imposes tax on specific enumerated services. Accordingly, whether a service is taxable as one of the specifically enumerated services is properly construed pursuant to the rule applicable when determining whether a transaction is subject to taxation at all (***see Matter of Grace v. New York State Tax Commn***., 37 NY2d 193, 371 NYS2d 715 [1975], ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 [1975]), that is, most strongly against the government and in favor of the citizen (***see Matter of Building Contractors Association v. Tully***, 87 AD2d 909, 449 NYS2d 547 [1982]). This rule of construction stands in contrast to the rule with respect to exemptions from tax, i.e., strictly and narrowly against the taxpayer (***see Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819, 620 NYS2d 582 [1994], ***lv denied*** 85 NY2d 806, 627 NYS2d 323 [1995]). Nonetheless, even with such a construction, proof of entitlement to the exclusion remains petitioners' burden, and petitioners must show that the service ADT provides is not one of those set out in Tax Law § 1105(c).

taxability of ADT's service, there is no question that petitioners are apprised of the Division's premise for its assessment, have been provided with sufficient information so as to enable the preparation of a defense to the assessed deficiencies, and will not be surprised or disadvantaged at hearing absent a bill of particulars further elucidating the issues (***see Matter of Fillopow***, Tax Appeals Tribunal, June 16, 2009). The detail and clarity of the manner in which petitioners have set forth their allegations of error and their position in these matters itself establishes the conclusion that petitioners fully comprehend (and disagree with) the Division's position. Under these circumstances, no apparent benefit would result from requiring that a bill of particulars be furnished, and petitioners' demand therefor is properly vacated. At the hearing in this matter petitioners and the Division will be given a full opportunity to present their cases and to argue the law and facts which support their respective positions.[4]

E. The Division of Taxation's Motion to Vacate the Demand for a Bill of Particulars is granted, and these matters shall proceed to hearing in due course.

DATED: Troy, New York
January 27, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[4] Under the circumstances presented herein, which support vacatur of petitioners' demand for a bill of particulars (in particular the absence of any apparent prejudice, surprise or disadvantage to petitioners in defending against the subject assessments without further particulars thereof), and noting the question concerning when the Division's counsel actually received the demands (***see*** Finding of Fact 8 at footnote 2), petitioners' argument that the Division's motion should be denied as untimely (***see*** Finding of Fact 9) is rejected.