

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

PATRICK MURPHY :

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
and the New York City Administrative Code for the
Year 2006. :

ORDER
DTA NO. 825277

In the Matter of the Petition :

of :

KATHLEEN MURPHY :

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
and the New York City Administrative Code for the
Year 2006. :

Petitioners, Patrick and Kathleen Murphy, filed petitions¹ for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2006.²

¹Petitioners Patrick and Kathleen Murphy filed separate petitions challenging the same Notice of Deficiency, which was issued to them jointly, and raising similar issues. For purposes of judicial economy, therefore, the petitions have been consolidated under DTA Number 825277. The Demand for Bill of Particulars at issue here, however, was solely served by petitioner Patrick Murphy. Hence, unless otherwise noted, all references to “petitioner” shall mean Patrick Murphy.

² The captions on the pleadings filed after the petitions have added the year 2007 to the period at issue. This change appears to have been a repeating error originating with the Division of Taxation’s answer. The sole year at issue, as evidenced by the petitions and subject notice, is 2006.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Marvis A. Warren, Esq., of counsel), brought a motion, filed July 16, 2013, seeking an order pursuant to 20 NYCRR 3000.6(a)(2) vacating a Demand for a Bill of Particulars dated June 26, 2013, and filed by petitioner Patrick Murphy. Petitioner appeared pro se and submitted his affirmation in opposition to the motion, dated August 14, 2013.

After due consideration of the motion, the supporting affidavit of Marvis A. Warren, Esq., the affirmation in opposition submitted by petitioner, and all the pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's demand for a bill of particulars should be vacated.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Deficiency, number L-035037360-3, dated November 22, 2010 to petitioners, Patrick and Kathleen Murphy, asserting personal income tax due under Article 22 of the Tax Law and the New York City Administrative Code for the year 2006. The essence of the deficiency comes from the Division's determination that petitioners failed to properly report and pay tax on flow-through gains from the sale of real property. The subject notice asserted tax due in the amount of \$229,057.00, plus penalty of \$70,134.50 and interest of \$71,559.01.

2. Petitioners simultaneously filed separate petitions on October 18, 2012, each seeking cancellation of the subject notice primarily on the basis that the Division incorrectly determined petitioners' treatment of the gains from the sale of real property. Additionally, petitioners maintain that they were denied due process of law under the United States and New York State

constitutions based on the conduct of the Division's auditors. Moreover, petitioners argue that the subject notice is barred by the statute of limitations.

2. In its answer, dated December 19, 2012, the Division denied petitioners' allegations and affirmatively stated that the gain realized from the sale of the real property was properly treated as flow-through income to petitioners.

3. On or about June 26, 2013, petitioner served a Demand for a Bill of Particulars on the Division that sought the following information: 1) names and addresses of individuals providing evidence supporting the assertions in the Division's answer; 2) identification of documents and facts supporting the Division's position in its answer with regard to the gains; and 3) dates and times of various events that occurred during the Division's audit. Petitioner's demand also sought similar information with regard to the burden of proof in this matter.

4. The Division of Taxation brought the instant motion to vacate the demand on the basis that the demand is overly broad, and seeks legal interpretations, material that is evidentiary in nature, and information pertaining to issues for which petitioner bears the burden of proof.

CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure, 20 NYCRR 3000.6(a), provide that a party may, by the use of a demand for a bill of particulars, seek further details of the allegations in a pleading to prevent surprise at the hearing and limit the scope of proof (*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 definitively the claims to be defended against (*Johnson, Drake and Piper v. State of New York*, 43 Misc2d 513, 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 an 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]).

As detailed in Finding of Fact 3, petitioner's demand attempts to obtain identification of documents, facts and the names of individuals that support the Division's position as espoused in its answer. Such focus is too broad and nothing more than an attempt to force the Division to disclose evidence or provide legal interpretations. As such, it is an improper effort at discovery and does not meet the requirements of a proper demand (*see Horsemen's Benevolent and Protective Assn.*).

B. Additionally, a party is only required to particularize that for which it has the burden of proof, not those matters which it need not prove upon trial (*Hydromatics, Inc. v. Count Nat. Bank*, 23 AD2d 576, 256 NYS2d 438 [1965]). In cases involving personal income tax, such as here, the burden of proof is upon the petitioner, with some exceptions, none of which are present in this case (Tax Law § 689[e]). Therefore, the burden of proof remains with petitioners with respect to the issues addressed in the demand, i.e., 1) the existence of flow-through income; 2) petitioner's employment relationship with JJF Realty Management Inc.; 3) the purported untimely issuance of the notice of deficiency by the Division and associated violation of Tax Law § 3000 et seq.; and 4) the abatement of penalties, and the Division is not obligated to provide a bill of particulars with regard to them.

C. Given the substantial number of requests for information that is deemed not the proper subject of a demand, "this court will not involve itself in pruning . . . the demand for a bill of particulars, . . . but rather will vacate the entire demand . . ." (*Posh Pillows Ltd. v. Hawes*, 138 AD2d 472, 474, 525 NYS2d 877 [1988]).

D. The Division of Taxation's Motion to Vacate the Demand for a Bill of Particulars is granted.

DATED: Albany, New York
November 7, 2013

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE