

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ANDREA WOODNER** : ORDER  
 : DTA NO. 827878  
for Redetermination of a Deficiency or for Refund of :  
New York State and New York City Personal Income Tax :  
under Article 22 of the Tax Law and the Administrative :  
Code of the City of New York for the Year 2009. :  
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Petitioner, Andrea Woodner, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2009.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel) issued a demand for a bill of particulars, dated September 27, 2017. Petitioner, appearing by Steptoe and Johnson, LLP (Beth Tractenberg, Esq., of counsel), brought a motion, dated October 6, 2017, seeking an order pursuant to 20 NYCRR 3000.6 (a) (2), vacating the demand for a bill of particulars. In opposition to the motion, the Division of Taxation filed the affirmation of Charles Fishbaum, Esq., dated November 1, 2017, and annexed exhibits. Pursuant to 20 NYCRR 3000.5 (d), the 90-day period for issuance of this order began on November 6, 2017. Based upon the pleadings, motion papers and other documents filed by the parties, James P. Connolly, Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Taxation’s demand for a bill of particulars should be vacated.

***FINDINGS OF FACT***

1. Petitioner, Andrea Woodner, commenced this proceeding by filing a petition on October 6, 2016, with the Division of Tax Appeals in protest of a notice of deficiency, dated March 7, 2014, which asserted additional New York State and City personal income tax due, plus interest, for the year 2009.

2. The basis for the asserted deficiency is the audit determination of the Division of Taxation (Division) that petitioner, on her 2009 New York State and New York City personal income tax return, failed to properly report gain from a transaction in 2009 (2009 Transaction), in which Avenue All Stars LLC (AAS) transferred to her its 100% interest in 25 Park Avenue LLC (the Property), in return for which petitioner redeemed her 35% interest in AAS.

3. At the time of the 2009 Transaction, 25 Park Avenue LLC owned a building in New York City.

4. Item 6 of the petition includes the following assertions:

- “4. The property distributed to Petitioner in [2009] . . . is a building located in New York City. [AAS] purchased the Property in 2007 for \$11.3 million.
5. Petitioner contributed cash to [AAS] in the amount of \$10.26 million in 2007.
6. [AAS] owned the Property (through a 100% owned limited liability company) at all times from the date of purchase until the Property was distributed to Petitioner. [AAS] included the income and deductions from the Property in determining its taxable income for the period that [AAS] owned the Property. [AAS] earned the income from and paid the expenses of owning and operating the Property. [AAS] had all the benefits and burdens of owning and operating the Property while [AAS] owned the Property. The Property was one of several real estate investments owned by [AAS].

10. Petitioner did not contribute cash to [AAS] in [2009]. Petitioner did not own the Property before it was transferred to her in complete liquidation of her membership interest.
11. [AAS]'s tax basis in the Property in [2009] (prior to its distribution to Petitioner) was approximately \$11.78 million. Petitioner's initial tax basis in the Property immediately following its distribution to her was approximately \$2.8 million. When distributed to Petitioner, the Property was subject to a non-recourse debt of approximately \$100,000.
12. Petitioner's tax basis in her membership interest in [AAS] immediately prior to her withdrawal was approximately \$14.5 million, of which approximately \$11.8 million represented Petitioner's allocable share of [AAS]'s aggregate non-recourse debt. When she withdrew from [AAS], Petitioner received a "constructive" cash distribution (only for income tax purposes) of approximately \$11.7 million, calculated as her pre-withdrawal share of [AAS]'s non-recourse debt (approximately \$11.8 million) less the \$100,000 non-recourse debt on the Property when distributed to her. The amount of the constructive distribution to Petitioner was less than her tax basis in her interest in [AAS] immediately prior to her withdrawal. As a result, Petitioner recognized no taxable gain when she withdrew from [AAS], but the tax basis of the Property in her hands was reduced to the amount of her remaining tax basis in her interest in [AAS] after the constructive distribution (approximately \$2.8 million)."

5. The Division filed its answer to the petition on December 15, 2016, and filed an amended answer on or about December 27, 2016. By letter dated August 22, 2017, the Division sought permission from the Division of Tax Appeals to file a second amended answer, which permission was granted. Paragraph 21 of the second amended answer asserted that the 2009 transaction "was not undertaken for a substantial business purpose."

6. On or about September 15, 2017, petitioner filed a reply to the Division's second amended answer. Paragraph 4 of the reply denied the allegations in, among others, paragraph 21 of the second amended answer.

7. On or about September 27, 2017, the Division served a demand for a bill of particulars (Demand) on petitioner, pursuant to section 3000.6 (a) (1) of the Tax Appeals Tribunal Rules of Practice and Procedure (Rules). The Demand sought the following:

“1. The substantial business purpose that is logically inferred from paragraph 4 of the Reply, in which Petitioner denies the Division's assertion of no substantial business purpose.

2. The substantial business purpose of the transactions or events described in paragraphs 4, 5, 6, 10, 11, 12 of the Petition.”

8. On October 6, 2017, petitioner filed the instant motion for an order vacating the Demand. Petitioner's motion argues that the Demand is improper because it seeks evidence, instead of merely seeking to amplify the pleadings, and because it seeks to require petitioner to particularize an issue in the reply to the second amended answer on which the Division has the burden of proof.

9. In opposition to petitioner's motion, the Division argues that it does not have the burden of proof in this matter and its Demand merely seeks to crystallize the issues herein.

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

A. The Rules permit the use of a bill of particulars in proceedings in the Division of Tax Appeals “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.22 [e]).

B. An administrative law judge may be guided but not bound by the provisions of the New York Civil Practice Law and Rules (CPLR) (*see* 20 NYCRR 3000.5 [a]). Since a wealth of

case law has been created under CPLR 3041, “Bill of Particulars in Any Case,” it is helpful to refer to that section for guidance in matters before the Division of Tax Appeals.

C. The purpose of a demand for a bill of particulars is to enable the party demanding the particulars to know definitively the claims to be defended against (*see Johnson, Drake and Piper v State of New York*, 43 Misc 2d 513, 515 [Ct of Claims 1964]) or to crystallize the issues that will be raised at hearing (*see e.g. Bassett v Bando Sangsa Co., Ltd.*, 94 AD2d 358, 359 [1st Dept 1983], *appeal dismissed* 60 NY2d 962 [1983]). However, a demand for a bill of particulars may not be used to probe into an adversary’s legal interpretations or to obtain disclosure of evidence (*see id.*). While drawing a line between a demand for a bill of particulars that seeks evidence versus one that seeks only to crystallize the issues is an inherently difficult task (*see Practice Commentary CPLR 3041, C3041:2 [Bills of Particular, Defined]*), it is especially important to make that distinction in this forum, where an Administrative Law Judge may not entertain a motion for discovery (*see* 20 NYCRR 3000.5 [a]).

D. Here, the Demand seeks particularization of the assertions in certain paragraphs of the petition and reply that petitioner had a substantial business purpose for its contribution of capital to AAS, the operation of AAS, and the 2009 Transaction. Two of the paragraphs of the petition specified by the Demand, paragraphs 12 and 13, do not make any assertion about the substantial business purpose of the capital contribution, AAS’s operation, or the 2009 Transaction, but rather address how petitioner accounted for those transactions. Thus, the Demand is inappropriate in regard to those paragraphs. Even where the specified paragraphs in the petition and reply do concern the substantial business purpose for the capital contribution, AAS’s operation, or the 2009 Transaction, however, the Demand is still inappropriate because it goes beyond clarifying

the petition and reply and seeks evidentiary detail. Accordingly, the Demand is not permitted by the Rules and must be vacated.

E. Petitioner's motion to vacate the Division's demand for a bill of particulars is granted.

DATED: Albany, New York  
January 25, 2018

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE