

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN SCARFI :
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Periods December 1, 2008 through :
February 28, 2014. :

ORDER
DTA NOS. 828745
AND 828746

In the Matter of the Petition :
of :
METRO ENTERPRISES CORP. :
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Periods March 1, 2008 through :
February 28, 2014. :

Petitioner, John Scarfi, 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 periods December 1, 2008 through February 28, 2014. Petitioner, Metro Enterprises Corp., 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 periods March 1, 2008 through February 28, 2014.

Petitioners, by their representative, Hodgson Russ, LLP (Christopher L. Doyle, Esq., of counsel), filed a motion on October 25, 2018 for an order precluding the Division of Taxation from offering evidence at hearing with respect to matters that petitioners regard as defective in

the Division of Taxation's bill of particulars. Petitioners submitted the affirmation of Christopher L. Doyle, Esq., dated October 25, 2018, with annexed exhibits, in support of their motion. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), was granted an extension to respond to petitioners' motion and responded on December 12, 2018. Pursuant to 20 NYCRR 3000.5 (d) and 3000.6, the 90-day period for issuance of this order commenced December 12, 2018. Based upon the motion papers, the affidavit and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioners commenced this proceeding by filing petitions with the Division of Tax Appeals on June 6, 2018. The petition of John Scarfi was filed in protest of notices of determination (L-045794597, L-045794596, L-045794591, and L-045796581), dated December 1, 2016, which asserted the following amounts due:

Notice No.	Periods Ended	Tax	Interest	Penalty
L-045794597	02/28/14	\$0.00	\$0.00	\$10,000.00
L-045794596	02/28/14	\$25,339.55	\$12,132.30	\$10,135.71
L-045794591	02/28/14	\$98,622.50	\$45,304.22	\$37,848.90
L-045796581	05/31/08 - 02/28/14	\$3,863,002.13	\$4,909,599.02	\$1,545,198.94

The petition of Metro Enterprises Corp. (Metro) was filed in protest of a notice of determination (L-045794061), dated December 1, 2016, which asserted tax in the amount of \$3,863,002.13, plus interest of \$4,909,599.01 and penalty of \$1,545,198.94, for the periods ended May 31, 2008 through February 28, 2014.

The matters were consolidated by the Division of Tax Appeals upon receipt of the petitions.

2. The Division of Taxation (Division) filed its answers to the petitions on August 8, 2018.

3. Petitioners served a demand for a bill of particulars, dated September 6, 2018, on the Division.

4. As relevant here, petitioners' demand for bill of particulars requested as follows:

“As to the affirmative statement contained in paragraph 13 of the Division’s Answers to the Petitions filed by Metro and John Scarfi, respectively, a full and complete statement specifying the basis for and/or the facts underlying the Division’s position that ‘Metro and the clubs were jointly and severally liable for the taxes due’”

5. The Division responded to petitioners' demand for a bill of particulars on September 24, 2018, in part, as follows:

“The Division’s basis for asserting that Metro and the clubs are jointly and severally liable for the taxes due is that throughout their petitions Metro and John Scarfi admitted to selling scrip which was used by patrons to pay admission charges to or for the use of places of amusement (See paragraphs 6, 7, 8, 9 26 of Metro’s petition). Recipients of admission charges are responsible for the taxes due on such charges. Metro’s allegations in its petition provide the basis for the Division’s assertion in its answer that Metro is responsible for the taxes due. In fact, the allegations in the petition demonstrate that Metro fully understands the Division’s basis for alleging that Metro is responsible for the taxes due.”

6. On October 25, 2018 petitioners filed a motion for an order precluding the Division from introducing any evidence in this matter, aside from the petitions filed by petitioners, to support its position that Metro was jointly and severally liable for taxes due.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure (Rules) 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.

(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.

(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.

(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.

(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 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 [3d Dept 1984]). In proceedings in the Division of Tax Appeals, a presumption of correctness attaches to statutory notices and petitioners bear 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).

C. With respect to the demand for a bill of particulars, the Division was requested to furnish a bill with respect to the affirmative statement contained in its answer that “Metro and the clubs were jointly and severally liable for the taxes due” The Division timely responded to petitioners’ request, particularizing the affirmative statement as indicated in finding of fact 5 above. This response by the Division provided petitioners with the underlying factual basis for the affirmative statement in question, and therefore is determined to be an adequate response to petitioners’ demand for a bill of particulars.

D. Petitioners argue that the Division’s response is deficient, asserting that in paragraph 96 of Metro’s petition, it challenges the notices of determination to the extent that the amount asserted due is premised on the Division piercing the corporate veils of Metro and other entities, and further argues that the Division bears the burden of proof on this issue. Petitioners’ argument seeks to turn the burden of proof on its head. The Division denied paragraph 96 in its answers and petitioners do not seek particularization of that response. Instead, they seek particularization of paragraph 13 of the Division’s answer, which affirmatively states that “Metro and the clubs were jointly and severally liable for the taxes due” The Division does not assert in its pleadings that petitioners’ liability is based on piercing the corporate veil. It is clear from petitioners’ motion that rather than seeking amplification of the affirmative statement in paragraph 13 of the Division’s answer, as claimed in the motion, petitioners instead are seeking to have the Division particularize petitioners’ own defense of a corporate veil. Piercing the corporate veil was not asserted by the Division in the pleading for which petitioners now seek particularization. As such, petitioners’ argument is without merit.

E. Petitioners' motion for an order of preclusion is denied.

DATED: Albany, New York
March 7, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE