STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ROBERT QUIGLEY** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2017.	:	ORDER DTA NO. 829315

Petitioner, Robert Quigley, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2017.

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), filed a motion that was received by the Division of Tax Appeals on October 4, 2019, seeking an order precluding petitioner from giving evidence at hearing regarding matters for which particulars have not been provided in response to a demand for a bill of particulars. The Division of Taxation submitted the affirmation of Colleen M. McMahon, Esq., dated September 20, 2019, with annexed exhibits, in support of its motion. Thereafter, the Division of Taxation filed a motion on October 21, 2019, for an order determining that its motion to preclude was timely, or, in the alternative, granting an extension of time in its favor pursuant to 20 NYCRR 3000.23 (b), so as to make the motion to preclude timely. The Division of Taxation submitted the affirmation of Colleen M. McMahon, Esq., dated October 21, 2019, with annexed exhibits in support of its motion. Petitioner, by his representative, Thomas Carrella, EA, did not respond to either motion. Pursuant to 20 NYCRR 3000.5 (d) and 3000.6, the 90-day period for issuance of this order commenced on November 21, 2019. Based upon the motion

papers and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division of Taxation's motion seeking an order of preclusion was timely filed.

II. Whether the Division of Taxation's motion seeking an order of preclusion should be granted.

FINDINGS OF FACT

1. Petitioner commenced this proceeding by filing a petition with the Division of Tax Appeals on April 6, 2019 seeking a refund. Petitioner asserted that his employer erroneously reported his line-of-duty injury pay as taxable income. Petitioner attached correspondence from the Division of Taxation (Division) dated April 9, 2018, advising that it adjusted the amounts reported on his 2017 income tax return. The letter stated that injury pay is not taxable for federal purposes and is not included in box 1 on form W-2, wage and tax statement. Because the injury pay was not reported as taxable income, it was not allowed as a subtraction from wages and petitioner's return and refund were adjusted accordingly. The resulting refund allowed was $3,177.00. Petitioner also attached a letter from the Division dated July 25, 2018, stating that the refund requested cannot be allowed and providing the same reasons as those stated in the letter of April 9, 2018. Petitioner also included a conciliation order from the Bureau of Conciliation and Mediation Services (BCMS) dated March 1, 2019, sustaining the July 25, 2018 letter.

2. The Division served an answer dated July 24, 2019. In its answer, the Division asserted that petitioner filed a resident income tax return for 2017, requesting a refund of $5,893.00. The Division asserted that it performed an audit of petitioner's tax return for 2017

and issued petitioner an account adjustment notice dated April 9, 2018, reducing his claimed refund to $3,177.00. The Division issued petitioner a refund in that amount. The Division alleges that petitioner filed additional information requesting a refund of $2,716.00 and that the Division issued an "informal disallowance notice" to the petitioner dated July 25, 2019, denying his claim for the additional refund.

3. On July 25, 2019, the Division served petitioner with a demand for a bill of particulars (demand). The demand generally sought information in the following areas: facts supporting petitioner's position, details regarding petitioner's injury while in the line of duty, and the grounds for petitioner's legal arguments.

4. Petitioner did not respond to the demand.

5. On October 4, 2019, the Division of Tax Appeals received the Division's motion to preclude petitioner from offering evidence at the hearing regarding matters that the Division has demanded particularization on (the first motion).[1] It was sent by certified mail with control number 7019 0700 0000 3468 5389. The sender's receipt for this motion was not provided with the motion.

6. On October 21, 2019, the Division filed a motion for an order determining that the previously filed motion to preclude was timely, or, granting an extension of time to the Division to make the Division's motion to preclude timely (the second motion). With the second motion, the Division provided the affidavit of Jennifer L. Hink-Brennan, Esq., sworn to on October 21, 2019. Ms. Hink-Brennan averred that she delivered what was represented to her by Colleen M.

[1] Ms. McMahon's affirmation in support of the motion asserts that a copy of the petition in this matter is attached as exhibit A and a copy of the Division's "last Amended Answer" is attached as exhibit B. However, upon review, only the first page of the petition is attached, with accompanying exhibits, and the answer that is attached provides a different caption and DTA number than the instant matter and does not match the answer that was previously filed.

McMahon, Esq., as two copies of the Division's first motion, to the US Postal Service Office located at 1475 Western Ave Ste 51, Albany, New York (the Stuyvesant Post Office), and that the postal worker accepted the motions for mailing, stamped the sender's receipt for each copy of the motion with the postmark dated September 23, 2019, initialed in the postmaster box on each receipt and indicated one item was provided for mailing on each receipt. Copies of the sender's receipts were attached to Ms. Hink-Brennan's affidavit. One receipt showed certified control number 7019 0700 0000 3468 5389, the address of the New York State Division of Tax Appeals, and the initial of the postmaster for one piece of certified mail. The year and month of the postmark are clear, but the date is illegible and appears to read September 3, 2019. The second receipt showed certified control number 7019 0700 0000 3468 5654, the address of petitioner's representative, Thomas Carrella, a postmark date of September 23, 2019, the initial of the postmaster for one piece of certified mail.

7. Petitioner was given until November 21, 2019 to respond to both motions, but he did not respond.

CONCLUSIONS OF LAW

A. Unless a party served with a demand for a bill of particulars makes a motion to vacate or modify such demand within 20 days after receipt thereof, or is otherwise directed by the administrative law judge, the bill of particulars demanded must be served within 30 days after the demand is made (***see*** 20 NYCRR 3000.6 [a] [2]). If that party fails to provide a bill of particulars, the initiating party may make a motion seeking an order precluding the party from giving evidence at hearing regarding the items that have not been particularized (***see*** 20 NYCRR 3000.6 [a] [3]). Such motion must be made within 30 days of the expiration of the date specified for compliance with the demand for a bill of particulars (***see id.***).

B. Here, the Division served the demand on July 25, 2019. Petitioner's response was due within 30 days after the demand was made (***see*** 20 NYCRR 3000.6 [a] [2]). Here, 30 days after the demand was made was Saturday, August 24, 2019. Accordingly, petitioner had until Monday, August 26, 2019 to respond (***see*** General Construction Law § 25-a; ***Matter of American Express Co.***, Tax Appeals Tribunal, July 3, 1991). When petitioner failed to respond by that date, the Division was required to file its motion to preclude within 30 days thereafter, or on or before Wednesday, September 25, 2019 (***see*** 20 NYCRR 3000.6 [a] [3]).

In its second motion, the Division provided the affidavit of Jennifer L. Hink-Brennan, Esq. Attached to Ms. Hink-Brennan's affidavit was a receipt with an illegible postmark submitted as proof of the date of mailing. If a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee who received the document, the date of the postmark on such receipt is the date of filing (***see*** 20 NYCRR 3000.22 [c] [2]). Where a postmark made by the United States Postal Service on an envelope containing the relevant document is not legible, the burden is on the person required to file the document to prove when the postmark was made (***see*** 20 NYCRR 3000.22 [a] [2] [iii]; ***Matter of Good Luck Liq., Inc.***, Tax Appeals Tribunal, July 20, 2000).

Ms. Hink-Brennan averred that on September 23, 2019, Ms. McMahon gave her two envelopes and indicated that they contained the Division's first motion. One envelope was addressed to the Division of Tax Appeals. The other envelope was addressed to Mr. Carrella. Ms. Hink-Brennan also asserted that on that same day she delivered those envelopes to the Stuyvesant Post Office, where the postal employee accepted the envelopes for mailing, stamped the receipt for each envelope with the date of September 23, 2019, initialed the postmaster box on the receipts and indicated one item was provided for mailing on each receipt. Because Ms.

Hink-Brennan averred that she personally delivered the two envelopes containing the first motion for mailing to the Stuyvesant Post Office on September 23, 2019, the Division has submitted sufficient evidence to prove that the postmark on the receipt for the envelope containing the first motion to be mailed to the Division of Tax Appeals was stamped by the United States Postal Service on September 23, 2019. This conclusion is further supported by the fact that the receipt for the copy of the first motion that was sent to petitioner's representative had a postmark date of September 23, 2019, and Ms. Hink-Brennan stated that she provided both motions to the Stuyvesant Post Office employee at the same time.

As it has been concluded that the postmark on the receipt for the Division's first motion was September 23, 2019, such motion was made within 30 days after the deadline by which petitioner was required to provide a bill of particulars. Therefore, the Division's first motion was timely, and this order will not address the alternative relief requested in the Division's second motion for an extension of time to file such motion pursuant to 20 NYCRR 3000.23 (b).

C. "It is generally stated that a bill of particulars amplifies a pleading by setting forth in greater detail the nature of the allegations and what the party making them intends to prove" (***Northway Eng'g v Felix Indus.***, 77 NY2d 332, 336 [1991]). 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 to prevent surprise at hearing and to limit the scope of proof (***see*** 20 NYCRR 3000.6 [a] [1]). Moreover, an administrative law judge is guided but not bound by the provisions of the New York Civil Practice Law and Rules (CPLR) (***see*** 20 NYCRR 3000.5 [a]). 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 the petitioner bears the burden of overcoming that presumption (***see Matter of Aronoff***, Tax Appeals Tribunal, November 27, 2013). Thus, petitioner bears the burden of proof in this matter.

D. 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 regarding items of which particulars have not been delivered (***see*** 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 (***see*** 20 NYCRR 3000.6 [a] [5]). "The appropriate sanction for failure to provide a bill should . . . be limited to preventing the harm which would otherwise be caused by failure to furnish the particulars." ***Northway Eng'g***, 77 NY2d at 336.

E. Where a party fails to move against a demand for a bill of particulars it is deemed to have waived all objections unless the request is "palpably improper" (***see State v General Elec. Co.***, 173 AD2d 939, 941 [3d Dept 1991]). Demands seeking material which is evidentiary in nature are palpably improper (***see id.***). It is well settled that items of a demand for a bill of particulars that call for evidentiary material are not proper demands (***see Rockefeller v Hwang***, 106 AD2d 817 [3d Dept 1984]).

F. Here, petitioner's claim in his petition that his line-of-duty pay should not have been treated as taxable by his employer for 2017 is sufficient to prevent surprise at the hearing and allowed for a responsive pleading by the Division. Accordingly, no further particularization or amplification is necessary. It is evident from the demand made by the Division that it understands the nature of the allegations and what petitioner intends to prove. Moreover, the demands discussed herein seek evidentiary material and information beyond the scope of a bill of particulars.

G. The Division of Taxation's motion for an order of preclusion is denied.

DATED: Albany, New York
February 13, 2020

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE