

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

MARK AND CHRISTINA DEMARCO

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Year 2014.

ORDER
DTA NO. 829319

Petitioners, Mark and Christina DeMarco, 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 2014.

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 petitioners from giving evidence at hearing regarding matters for which particulars have not been delivered 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. Petitioners, by their 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. Petitioners, Mark and Christina DeMarco, commenced this proceeding by filing a petition with the Division of Tax Appeals on April 6, 2019. They filed the petition seeking a refund, but listed assessment L-047686003 as the notice being challenged and stated that the amount of tax contested is \$3,304.95. Petitioners asserted that petitioner Mark DeMarco's employer erroneously reported his line-of-duty injury pay as taxable income. They attached a statement of proposed audit change dated February 1, 2018 (the statement), to the petition, which stated that petitioners' 2014 resident income tax return was selected for review, and that their subtraction to income for line-of-duty injury pay was disallowed. The statement provided that since injury pay is not included in the taxable wages, petitioners were ineligible for the subtraction and their itemized deduction was adjusted accordingly, resulting in additional tax due. The tax due plus interest totaled a balance due of \$3,304.95.

2. The Division of Taxation (Division) served an answer dated July 17, 2019. In its answer, the Division asserted that petitioners remitted \$3,304.95 in response to the statement and

requested a refund for the same amount. The Division alleges that it issued petitioners a notice of disallowance dated November 13, 2018, denying their refund claim because they failed to submit a corrected W-2.

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

4. Petitioners did not respond to the demand.

5. On October 4, 2019, the Division of Tax Appeals received the Division's motion to preclude petitioners from offering evidence at the hearing regarding matters that the Division has demanded particularization on (the first motion).¹ The first motion sent by the Division was mailed by certified mail with control number 7019 0700 0000 3468 5426. 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. 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 both copies of motion for mailing, stamped the sender's receipt for

¹ Ms. McMahon's affirmation in support of the motion asserts that a copy of the answer is attached as exhibit B. However, upon review, only the second page of the answer is attached.

each copy 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 5426, 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 day is illegible. The second receipt showed certified control number 7019 0700 0000 3468 5501, the address of petitioners' representative, Thomas Carella, a postmark with a date of September 23, 2019, and the initial of the postmaster for one piece of certified mail.

7. Petitioners were given until November 21, 2019 to respond to both motions, but they 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. Petitioners' 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, petitioners 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 petitioners 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 for certified control number 7019 0700 0000 3468 5426 with an illegible postmark date 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 petitioners' 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 petitioners were 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, petitioners bear 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, petitioners’ claim that petitioner Mark DeMarco’s line-of-duty injury pay should not have been treated as taxable by his employer for 2014 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 petitioners intend 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