

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**CHU T. YOON AND SOO J. YOON**  
for Redetermination of a Deficiency or for Refund of  
New York State and City Personal Income Taxes under  
Article 22 of the Tax Law and the Administrative Code  
of the City of New York for the Years 2013 through  
2015.

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ORDER  
DTA NO. 829543

Petitioners, Chu T. Yoon and Soo J. Yoon, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2013 through 2015.

On November 13, 2019, the Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Michael Trajbar, Esq., of counsel), filed an answer to the petition and concurrently served petitioners with a demand for a bill of particulars. In a letter dated November 26, 2019, petitioners, appearing by their representative Leibowicz & Ahroni, PLLC (Barry Leibowicz, Esq. and Scott Ahroni, Esq., of counsel), sent the Division a response to the demand for the bill of particulars. On November 27, 2019, petitioners filed a motion to vacate or modify the demand for the bill of particulars. On December 16, 2019, the Division of Taxation filed a response to petitioners' motion to vacate or modify the demand for the bill of particulars. Pursuant to 20 NYCRR 3000.5 (d) and 3000.6, the 90-day period for issuance of this order commenced on December 27, 2019. Based upon the motion papers and all pleadings and

documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioners' motion seeking to vacate or modify the Division of Taxation's demand for a bill of particulars should be granted.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued petitioners a notice of deficiency (notice), dated September 8, 2017, which asserted that petitioners owed \$82,084.00 in additional New York State and New York City personal income taxes, plus interest and penalties.

2. Through a series of payments amounting to \$125,680.66, from January 15, 2018 through July 31, 2018, petitioners fully satisfied the amounts due under the notice.

3. By a letter dated June 25, 2019, petitioners requested a refund of \$125,680.66 (refund claim).

4. Petitioners claim that by a letter dated August 23, 2019, the Division denied petitioners' refund claim. The Division denies this assertion and claims its August 23, 2019 letter "sustained" the notice.

5. Petitioners commenced this proceeding by filing a petition with the Division of Tax Appeals on September 10, 2019 in protest of the notice and the alleged denial of the refund claim. Section VIII of the petition form states:

"The petitioner alleges that the [Division] made the following errors and asserts the following facts. In separately numbered paragraphs, list each error of the [Division] that the petitioner intends to prove at the hearing. Where necessary, additional pages may be added."

6. In section VIII of the petition, petitioners assert that the Division conducted an audit of them. The petition asserts that after the audit was completed, the Division determined the

petitioners were domiciled in New York State, maintained a permanent place of abode within the State, were present in the State for more than 183 days during each of the years at issue, and were tax residents of the State for the periods at issue. The petition also notes that: the Division issued the notice and that the petitioners thereafter made payments that satisfied the amounts assessed in the notice; petitioners sought a refund of the amounts remitted as payment on the notice; petitioners denied the validity of all of the Division's calculations, assessments and adjustments; the Division's audit and the related procedures, calculations and analyses are defective and invalid; and the notice was not properly served and the Division lacks jurisdiction in this matter.

7. Except for the accounting of the amounts remitted to the Division in payment of the notice, petitioners' assertions in the petition are broad conclusory statements. In particular, paragraph 12 of the petition asserts: "[t]he Division improperly assessed and/or calculated penalties and/or interest in this matter," and paragraph 16 of the petition asserts: "[t]he audit, and the resulting determination, is defective and invalid in that its calculations, procedure and analysis were defective, without any reasonable or rational basis, and does not comply with the standards of New York Law for such audit or resulting determination. As such, it is void as a matter of law."

8. The Division served an answer on November 13, 2019 (answer) articulating its audit findings that petitioners maintained a permanent place of abode in New York City during the years at issue, that petitioners spent more than 183 days in the City during the years at issue, that petitioners were "resident individuals" and "city resident individuals" as defined in the Tax Law for the years at issue, and that these conclusions resulted in the assessment of additional taxes due and penalties under Tax Law section 685 (p) and interest.

9. Concurrent with the answer, the Division served petitioners with a 10 paragraph demand for a bill of particulars (bill). The bill generally sought information related to the following areas: clarity regarding the errors that the petitioners allege the Division made in assessing and calculating the interest and penalties due; the legal authority supporting the petitioners' assertions regarding the adjustments the Division made to the petitioners' tax filings; the reasons petitioners claimed the subject audit was defective and invalid; the reasons why petitioners claimed the notice was improperly served; and, the reasons why petitioners claimed the Division lacks jurisdiction in the matter.

10. In particular, paragraph 1 of the bill demanded that petitioners: "[s]tate the specific error or errors [petitioners] allege were made by the [Division] in determining the penalties and/or interest in this matter as alleged in Paragraph 12 of the petition," and paragraph 5 of the bill demanded that petitioners "[s]tate the reasons why [petitioners] believe the audit referenced in [the petition] was 'defective and invalid in its calculations, procedures and analysis.'"

11. In a letter dated November 26, 2019, petitioners sent the Division a response to the bill (bill response). In the bill response, petitioners stated general objections to the bill including that the bill was improper because it requested evidentiary material, was overly broad and burdensome, requested lists and descriptions of evidence petitioners intended to introduce at the hearing, requested the legal authority petitioners rely upon for their positions, sought information that the Division already has equal access to, and sought information protected by the attorney-client privilege and other applicable privileges or protections. The bill response stated that the Division improperly determined that petitioners were tax residents of New York State and New York City for the periods at issue, and given that petitioners were not residents of the State or City, no additional tax or penalties should be due. The bill response also asserted that should the

petitioners be found to have been residents of the State and the City for the years at issue, petitioners had reasonable cause for the tax positions taken.

12. On November 27, 2019, petitioners filed a motion to vacate or modify the bill of particulars (motion). In their motion, petitioners restated several of the objections noted in the bill response. In addition, in the motion, petitioners went through eight of the ten paragraphs of the bill and stated why they object to the specific demand made in the paragraph analyzed; however, in the motion, petitioners did not specifically address the demands made in paragraphs one and five of the bill.

13. On December 16, 2019, the Division filed a single sentence response (motion response) to petitioners' motion. In the motion response, the Division withdrew every demand made in the bill except for the demands made in paragraphs one and five.

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

A. The Tax Appeals Tribunal Rules of Practice and Procedure (Rules) provide that a party may serve a demand for a bill of particulars on 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]). The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claim which he or she must defend against (*see Johnson, Drake & Piper v State of New York*, 43 Misc 2d 513 [Ct Cl 1964]). A demand for a bill of particulars may be used to amplify the pleadings, prevent surprise and limit the issues, but it may not be used to gain the identity of witnesses or the disclosure of evidentiary detail that adverse parties will rely on to prove their claim (*see Bassett v Bondo Sangsa Co.*, 94 AD2d 358 [1st Dept 1983], *appeal dismissed* 60 NY2d 962 [1983]; *see also Northway Eng'g v Felix Indus.*, 77 NY2d 332, 336 [1991]).

B. 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 article 22 matter (*see* Tax Law § 689).

C. Weinstein-Korn-Miller, N.Y. Civ Prac, ¶ 3041.11 states:

“If a rough formula can be derived from the cases, it is probably one predicated on the volume of information requested and whether furnishing it will limit the issues and assist in their crystallization or whether the information appears to be sought for purposes of trial preparation. A request for a bill that includes elaborate demands or is burdensome to respond to is not defective for that reason alone. The request must be viewed in light of the pleading it is intended to particularize. If the pleading is prolix, ambiguous or conclusory, a party may be given wider latitude in his request for a bill than might otherwise be the case. At the other extreme, however, if the pleading is sufficiently detailed, the court may deny a request for a bill under the assumption that evidence is being sought” (Weinstein-Korn-Miller, N.Y. Civ Prac, ¶ 3041.11 [2d ed] [*footnotes omitted*]).

D. The petition in this proceeding contains two broad reaching statements whose scope are not narrowed by the other pleadings. The Division is warranted in requesting that petitioners provide particulars regarding these two claims made in the petition.

E. The Division’s first demand is that petitioners particularize their broad and ambiguous claim that “[t]he Division improperly assessed and/or calculated penalties and/or interest in this matter.” This is an entirely appropriate demand since the petitioners’ claim leaves the door open as to whether petitioners are challenging the actual assessment of penalties and/or interest, or whether petitioners are challenging the underlying mathematical calculations performed by the

Division in arriving at those numbers, or both claims. Petitioners certainly may challenge these issues, but they need to provide more insight into the issues in controversy by elaborating the claimed errors the Division made.

F. The Division's second demand is that petitioners particularize their claim that they believe the audit was "defective and invalid in its calculations, procedure and analysis." This also is an appropriate demand since petitioners' claim challenges almost every potential aspect of the audit without providing the slightest insight into what aspects they find flawed. It is appropriate to demand that such an open-ended, sweeping claim be refined to provide the Division an idea of what petitioners are challenging.

G. Petitioners have an obligation to provide the Division with fair notice of the issues they intend to raise at a hearing. Because certain claims in the petition are conclusory, lacking in factual detail, and are so broad that they may encompass a significant number of options and permutations regarding what might be litigated, the Division was warranted in requesting that petitioners provide details concerning those claims.

H. A party served with a bill of particulars may make a motion to vacate or modify such a demand within 20 days after receipt thereof (*see* 20 NYCRR 3000.6 [a] [2]). Here petitioners filed the motion within the required time frame. The Division's response to the motion was to withdraw eight of the ten demands made in the original bill. As noted above, the remaining two demands made by the Division are appropriate

I. Petitioners' motion to vacate or modify the bill is denied as to the remaining two demands made by the Division (*see* conclusions of law E, F and G).<sup>1</sup>

DATED: Albany, New York  
March 17, 2020

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> The appropriateness of petitioners' responses to the Division's demand for a bill of particulars is not at issue in this order since the Division did not challenge those responses as inadequate (*see* 20 NYCRR 3000.6 [a] [4]).