

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GARY B. PATRICK AND</b>	:	
<b>ELLEN M. PATRICK</b>	:	ORDER
for Redetermination of Deficiencies or for Refund of	:	DTA NO. 829885
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 Years 2015,	:	
2016 and 2017.	:	

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Petitioners, Gary B. Patrick and Ellen M. Patrick, filed a petition for redetermination of deficiencies 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 years 2015, 2016 and 2017.

Petitioners, by their representative, Hodgson Russ LLP (Andrew W. Wright, Esq. of counsel), brought a motion that was postmarked August 5, 2020, seeking an order of preclusion or in the alternative an order compelling the Division of Taxation to provide a more particularized bill of particulars pursuant to section 3000.6 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On September 2, 2020, the Division of Taxation, Amanda Hiller, Esq. (Peter B. Ostwald, Esq. of counsel) responded to petitioners' motion.<sup>1</sup> The 90-day period for issuance of this order commenced on September 4, 2020.

Based upon the motion papers, the affidavits and documents submitted therewith, and all

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<sup>1</sup> On October 2, 2020, petitioners' representative attempted to file a reply to the Division's response; however, because petitioners' representative failed to obtain the appropriate permission in order to file a reply to the Division's response, petitioners' reply was rejected and returned to petitioners (*see* 20 NYCRR 3000.5 [b]).

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

***ISSUE***

Whether petitioners' motion seeking an order of preclusion or, alternatively, an order compelling the Division of Taxation to provide a more particularized bill of particulars should be granted.

***FINDINGS OF FACT***

1. Petitioners commenced this proceeding by filing a petition on March 6, 2020 with the Division of Tax Appeals in protest of notices of deficiency L-051074996 and L-051073852 both dated December 12, 2019. The petition included 84 separately numbered paragraphs.

2. On or around May 13, 2020, the Division of Taxation (Division) filed an answer to the petition. The answer contained 13 separately numbered paragraphs. Based upon representations made in the Division's answer, the basis for the asserted deficiencies appears to be whether petitioners were domiciled in New York State and/or New York City during the years in question and thus subject to the tax consequences thereof.

3. Paragraph 6 of the answer provides that the Division: "AFFIRMATIVELY STATES that the Petitioners have not clearly and convincingly established their claimed change of domicile from New York."

4. Paragraph 7 of the answer provides that the Division: "AFFIRMATIVELY STATES that during the tax years 2015 and 2016 Petitioners were domiciled in New York City."

5. On June 11, 2020, petitioners served the Division with a demand for bill of particulars (demand). Specifically, the demand sought:

“1. Regarding the reference to ‘New York’ in the affirmative statement contained in paragraph 6 of the Division’s answer, state whether this paragraph is referring to New York State or New York City.

2. Regarding paragraph 7 of the Division’s answer, state the date on which Petitioners purportedly became domiciled in New York City.”

6. On July 10, 2020, the Division faxed to petitioners its response which indicated:

“Item #1: The reference contained in paragraph 6 of the Division’s answer refers to New York City.

Item #2: Regarding paragraph 7 of the Division’s answer, Petitioners purportedly became domiciled in New York City during the tax year 2012.”

7. On August 5, 2020, petitioners filed a motion for an order of preclusion based upon the claim that the Division’s bill of particulars was defective. Petitioners assert that the demand is defective because the second request in the demand specifically sought the date on which petitioners purportedly became domiciled in New York City and such was not answered properly since the Division’s response fails to provide an actual individual date as sought. Petitioners argue that “tax year 2012” is not a single day as the phrase “the date” demands. Petitioners argue that by not challenging the demand within 20 days of its issuance, the Division has waived its challenges thereto and must properly comply therewith. Petitioners now seek an order precluding the Division from introducing evidence at the hearing as to the time of petitioners’ purported domicile change to New York City, or in the alternative, an order that compels the Division to provide a properly particularized bill of particulars specifying the single date on which petitioners became domiciled in New York City.

8. On September 2, 2020, the Division filed its opposition to petitioners’ notice of motion for preclusion (response). In its response, the Division asserts that it does not have the

burden of proof in this case and therefore the petitioners' motion should be denied. The Division also asserts that the inquiry into an individuals' domiciliary status is "determined per annum and is not necessarily date specific." Accordingly, the Division concludes "[p]etitioners' demand for a 'specific date, *i.e.*, a single day' is unworkable." The Division claims its bill of particulars is not defective and satisfactorily amplifies its pleadings in question.

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

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that a party may serve a written notice on the adverse party demanding a bill of particulars within 30 days from the date on which the last pleading was served (*see* 20 NYCRR 3000.6 [a] [1]). The Rules further provide that if the party upon whom a demand is served is unwilling to give such particulars, that party may make a motion to vacate or modify such demand within 20 days after receipt thereof. Where no such motion is made, the bill of particulars demanded shall be served within 30 days after the demand (20 NYCRR 3000.6 [a] [2]).

B. In this case, petitioners served their demand and the Division did not object to such. Rather, the Division responded to the demand by delivering a bill of particulars.

C. Petitioners subsequently filed the motion at issue seeking to require the Division to properly respond to the demand or the issuance of an order precluding the Division from providing evidence on the matter for which particulars have not been delivered (*see* 20 NYCRR 3000.6 [a] [3] and [4]).

D. In general, a party is only required to serve a bill of particulars on that which the party has the burden of proof, not those matters which it need not prove upon trial (*see Hydromatics v County Natl. Bank*, 23 AD2d 576 [2d Dept 1965]). 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 [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 [1st Dept 1983], *appeal dismissed* 60 NY2d 962 [1983]). In this case the Division asserts, for the first time in its response to the motion for preclusion, that it does not have the burden of proof regarding the issues demanded in the bill of particulars. Petitioners, citing to 20 NYCRR 105.20 (d) (2), assert that it is the Division's burden of proof to show that petitioners changed their domicile to New York City. As noted, the Division did not object to or make a motion pursuant to 20 NYCRR 3000.6 (a) (2) seeking the demand be vacated or modified. Accordingly, the Division has waived its objections to the demand, including, at least for purposes of the motion, the argument that it does not have the burden of proof with regard to the question of when petitioners became domiciled in New York City. The Division has not provided any argument justifying deviation from the conclusion that it waived its objections to the demand.

E. The Division also argues that the year the petitioners were determined to have made New York City their domicile, 2012, is not one of the years petitioned and not within the jurisdiction of the Division of Tax Appeals. However, the Division cites to no authority that challenges whether the Division of Tax Appeals may consider and examine transactions from years prior to the years petitioned. In fact, Tax Law § 689 (g) appears to indicate otherwise.

F. The question now at issue is whether the Division's response to petitioners' demand for particulars regarding the date the Division determined petitioners became domiciled in New York City was sufficient. The Division's response to that demand was that petitioners "purportedly became domiciled in New York City during tax year 2012." Petitioners assert that they sought the particular day that the determination was applicable. The Division's response

that the determination of any individual's residency is a yearly analysis and not necessarily a single day and thus to provide a single day is "unworkable." However, the Division's response insinuating that the determination of a specific day, or a more refined period of less than a year, as the date a taxpayer moved is always "unworkable" contradicts the Division's own past practice on the issue. For example, in *Matter of Holt* (Tax Appeals Tribunal, July 17, 2008), the Division offered just such a refined determination. In light of the Division's explanation for its response to the demand for the date the petitioners allegedly changed their domicile to New York City, the Division's response is deemed insufficient as to that demand.<sup>2</sup>

G. Accordingly, the Division is ordered to provide either the specific date(s) requested in the demand, or a more refined date range than that already provided if such is more appropriate.

H. Petitioners' motion for a preclusion order is granted unless the Division serves a further bill of particulars responding to the demand as indicated in conclusion of law G, within 20 days of the date hereof.

DATED: Albany, New York  
December 3, 2020

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup> Petitioners do not challenge the adequacy of the Division's bill of particulars response to the demand pertaining to paragraph 6 of the answer.