

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TOWNHOUSE BUILDERS INC. : **ORDER**
 : **DTA NO. 831580**
for Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period March 1, 2018 through May 31, :
2023. :
_____ :

Petitioner, Townhouse Builders Inc., 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 period March 1, 2018 through May 31, 2023.

Petitioner, appearing by Herschel Friedman and Associates, CPA (Herschel Friedman, CPA), served a demand for a bill of particulars on the Division of Taxation pursuant to 20 NYCRR 3000.6 (a) (1), dated June 20, 2024. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), brought a motion, dated July 9, 2024, seeking an order vacating the demand for a bill of particulars pursuant to 20 NYCRR 3000.6 (a) (2). Petitioner filed a response in opposition to the Division’s motion by August 8, 2024, which date began the 90-day period for the issuance of this order.

Based upon the pleadings, motion papers, and other documents filed by the parties, Anita K. Luckina, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner’s demand for a bill of particulars should be vacated.

FINDINGS OF FACT

1. On February 27, 2024, petitioner, Townhouse Builders Inc., filed a petition with the Division of Tax Appeals. The petition protests a refund claim determination notice issued by the Division of Taxation (Division) to petitioner, dated February 14, 2024, denying petitioner's refund claim No. AM2311175012 for sales or use tax in the amount of \$260,137.73 for the period March 1, 2018 through May 31, 2023 (the refund denial).¹

2. The refund denial advises petitioner, in relevant part, that:

“We’ve denied your refund application.

We’ve reviewed your application and have concluded that you’re not eligible for this refund.

Additional information needed.

(1) Detail [sic] schedule for the Refund Claim, for the period 03.01.18 – 05.31.23, along with proof of payment of sales and use tax. (2) Documentation/records to verify that New York State, [sic] sales and use tax was not due on Subcontractors [sic] work done (#6100) or on Other Expense purchases (#6350). This was requested but was not provided in your email response dated 1.26.24.”

3. As part of the petition, in response to “Section VIII Reason(s) for Dispute,” petitioner attached a statement averring 36 separately numbered assertions of fact and allegations of error made by the Division that “petitioner intends to prove at the hearing.”

4. On May 22, 2024, the Division filed its answer. Paragraph one of that answer denies the allegations set forth in paragraphs 1, 7, 8, 9, 14, 25, 28, 29, 30, and 33 of the petition. Paragraphs 2 through 12 of the answer contain particularized responses to paragraphs 2-6, 10-13, 15-24, 26, 27, 31, 32, and 34-36 of the petition, i.e., each response in part admits, denies or

¹ The February 26, 2024, cover letter accompanying the petition states that “[i]n order to avoid confusion, [petitioner] would like to respectfully inform [Supervising Administrative Law Judge Gardiner] that this case has a related but separate case which is currently pending at [the Bureau of Conciliation and Mediation Services (BCMS)].” The letter further advises that the related matter pending at BCMS is CMS No. 000358656 and involves an assessment (L-059391822).

denies having information or knowledge sufficient to admit or deny the allegations therein, except for the allegations in paragraph 36, which the Division neither admits nor denies “since it is a prayer for relief to which no response is required.” The remainder of the Division’s answer avers the following:

“13. AFFIRMATIVELY STATES that around May 2021 the Division initiated a sales and use tax audit of Petitioner’s books and records for the audit period.

14. AFFIRMATIVELY STATES that the auditor requested Petitioner’s books and records for the audit period, reviewed the records provided and determined those records to be adequate.

15. AFFIRMATIVELY STATES that the auditor and Petitioner’s representative discussed options for conducting the audit, including the use of a test period.

16. AFFIRMATIVELY STATES that Petitioner’s representative agreed to a test period audit for his convenience since a detailed audit would have required a substantial amount of work on his part.

17. AFFIRMATIVELY STATES that on November 22, 2023, the parties executed a Test Period Audit Method Election form to conduct a test period audit.

18. AFFIRMATIVELY STATES that on January 23, 2024, the Division issued to Petitioner Notice of Determination L-059391822-2 in the amount of \$9,420.80 tax due plus interest.

19. AFFIRMATIVELY STATES that during the audit Petitioner’s representative requested that credits be applied to the tax due.

20. AFFIRMATIVELY STATES that the Division requested that Petitioner submit a separate claim with supporting documentation for any refund.

21. AFFIRMATIVELY STATES that on or around November 22, 2023, the Division received a refund claim request from Petitioner for the claim period March 1, 2018 – May 31, 2023, in the amount of \$260,137.73. The Division assigned number AM2311175012 to this refund claim.

22. AFFIRMATIVELY STATES that on January 10, 2024, the Division sent to Petitioner’s representative a letter requesting additional information to process the refund claim, in particular the Division requested a detail [sic] schedule for the refund claim, proof that sales and use tax was paid, and documentation that sales and use tax was not due.

23. AFFIRMATIVELY STATES that on February 14, 2024, the Division issued to Petitioner a Refund Claim Determination Notice denying the refund claim in

full since Petitioner failed to provide adequate records to demonstrate that it was entitled to the full refund.

24. AFFIRMATIVELY STATES that the burden of proof is upon Petitioner to show that the refund denial at issue is erroneous or otherwise improper.”

5. Petitioner served the Division with a demand for a bill of particulars (also, demand) dated June 20, 2024, requesting that the Division “clarify and detail the claims and defenses made in the [Division’s] answer” as follows:

“1. Acts and Omissions: Specify each and every act, omission, or event that forms the basis of the Division’s denial of the allegations in paragraphs 1, 7, 8, 9, 14, 25, 28, 29, 30, and 33 of the petition.

2. Involved Parties: Identify all parties and individuals involved in the aforementioned acts, omissions, or events.

3. Factual Details: Describe in detail the nature and extent of the facts that the Division relies upon to support its admissions and denials.

4. Dates: Provide the dates when each act, omission, or event took place, particularly those related to the audit conducted and the selection of the test period.

5. Supporting Documents: Identify any documents, correspondence, or other tangible evidence that support [sic] the Division’s claims and defenses.

6. Witness Information: List all witnesses who will testify to the facts supporting the Division’s claims and defenses, including a brief summary of their expected testimony.

7. Audit Methodology: Detail the methodology used by the Division in selecting and conducting the test period audit.

8. Request for Additional Information: Explain the basis for the Division’s request for additional information and documentation, [sic] on the January 10, 2024, IDR, particularly the need for detailed schedules, proof of sales and use tax payments, and the need for Documentation [sic]/records as requested on the IDR, after the completion of the audit.

9. Refund Claim Denial: Clarify the reasons for denying the Petitioner’s refund claim despite the submission of the demanded AU-11 form and supporting documents, during the course of the audit.

10. Case Splitting Rationale: Explain the Division’s rationale for splitting the audit into separate assessment and refund cases, [sic] and how this complies with standard audit procedures and regulations.

11. Claimed Credits Exclusion: Detail the specific reasons why the claimed credits were not reflected in the final audit findings and the resultant Notice of Determination L-059391822-2.”

6. On July 9, 2024, the Division made a motion to vacate petitioner’s demand for a bill of particulars objecting, only generally, on the grounds that petitioner’s demand seeks evidentiary material rather than an amplification of the Division’s answer, attorney work product, and particularization of issues upon which the Division does not bear the burden of proof.

7. On July 24, 2024, petitioner submitted an affidavit in opposition to the Division’s motion to vacate its demand for a bill of particulars. Petitioner’s affidavit includes both general “defenses” as to why the demand is not a request for evidentiary material, attorney work product, or items for which the Division does not have the burden of proof, as well as specific assertions of these general defenses, as relevant, to each of the items requested in the demand.

SUMMARY OF THE PARTIES’ POSTIONS

8. The Division brought the instant motion to vacate petitioner’s demand for a bill of particulars on the grounds that it seeks evidentiary material rather than an amplification of the Division’s answer, attorney work product, and particulars of issues upon which the Division does not bear the burden of proof. As such, the Division submits that its motion should be granted, and the demand should be vacated.

9. Petitioner asserts that the information sought is critical for the preparation of an adequate defense and that its requests are for clarification and amplification of claims and defenses in the Division’s answer and not for evidentiary material or attorney work product.

Further, petitioner asserts that the arguments presented in its petition rebut the presumption of correctness attached to the notices of determination and shift the burden to the Division to prove that the assessment and refund denial are rational and reasonable. Thus, the Division's motion to vacate the demand for a bill of particulars should be denied.

CONCLUSIONS OF LAW

A. Rules of Practice and Procedure of the Tax Appeals Tribunal (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, in relevant part, 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.”

B. As noted above, the Rules permit the use of a bill of particulars in proceedings in the Division of Tax Appeals “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.6 [a] [1]). With respect to a motion to vacate a demand for a bill of particulars, the Rules provide that an administrative law judge “shall be guided but not bound by the [Civil Practice Law and Rules (CPLR)] in resolving [such] motions” (20 NYCRR 3000.5 [a]). Thus, it is helpful to refer to CPLR 3041 “Bill of particulars in any case” and caselaw arising under that section for guidance.

C. In New York courts, the purpose of a demand for a bill of particulars is “to amplify the pleadings, limit the proof and prevent surprise at the trial” (*Bouton v County of Suffolk*, 125 AD2d 620, 621 [2d Dept 1986] [internal quotation marks omitted], citing *Medaris v Vosburgh*, 93 AD2d 882 [2d Dept 1983], citing *Patterson v Jewish Hosp. & Med. Ctr. of Brooklyn*, 94 Misc 2d 680, 682 [Sup Ct, Kings County 1978], *affd* 65 AD2d 553 [2d Dept 1978]). It enables the party making the demand for particulars to definitively know the claims to be defended against (*see Johnson, Drake & Piper v State of New York*, 43 Misc 2d 513, 515 [Ct Cl 1964]). However, a demand for a bill of particulars may not be used to: obtain evidentiary detail (*see Bouton v County of Suffolk*, 125 AD2d at 621); probe an adversary’s legal interpretations (*see State of New York v General Elec. Co.*, 173 AD2d 939, 941 [3d Dept 1991]); seek the identity of witnesses (*see State of New York v Horsemen’s Benevolent & Protective Assn.*, 34 AD2d 769, 770 [1st Dept 1970]); or require particularization of matters which refer to the demanding party’s pleadings or which are part of the demanding party’s affirmative case, especially where such matters are covered by admissions or denials—those allegations are for the demanding party to prove (*see L. F. Dommerich & Co. v Diener & Dorskind*, 31 AD2d 516 [1st Dept 1968]; *Bisceglie v Bell Container Corp.*, 32 Misc 2d 440, 441 [Sup Ct, Kings County 1961]). While drawing a line between a demand for a bill of particulars that impermissibly seeks evidence versus one that seeks only to amplify the pleadings is inherently difficult (*see* Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, 7B CPLR C3041:2 [Bills of Particular, Defined.]), it is especially important in this forum, where an administrative law judge may not entertain a discovery motion (*see* 20 NYCRR 3000.5 [a]).

D. In general, a party need particularize its pleadings only on issues for which that party has the burden of proof, not those matters which it need not prove at trial (*see Holland v St. Paul*

Fire & Mar. Ins. Co., 101 AD2d 625 [3d Dept 1984]; *Hydromatics v County Natl. Bank*, 23 AD2d 576 [2d Dept 1965]).

E. In proceedings before the Division of Tax Appeals, a presumption of correctness attaches to a properly issued statutory notice issued by the Division—here, the refund denial—and petitioner bears the burden of proving by clear and convincing evidence that the Division’s denial of its sales tax refund claim was erroneous (*see* 20 NYCRR 3000.15 [d] [5]; *Matter of Kroll Bond Rating Agency, Inc.*, Tax Appeals Tribunal, October 1, 2018). Petitioner must demonstrate that it is entitled to the refund claimed (*see* Tax Law § 1139; 20 NYCRR 534.2; *Matter of Kroll Bond Rating Agency, Inc.*).

F. After considering the purpose of a demand for a bill of particulars, and the types of requests that impermissibly go beyond the purpose, it must be concluded that petitioner’s demand is generally overbroad and improper: it seeks evidentiary detail and witness information; it probes the Division’s legal interpretations; and it seeks particulars on issues for which the Division does not have the burden of proof. Thus, it would be appropriate to vacate the demand in its entirety (*see Posh Pillows v Hawes*, 138 AD2d 472, 474 [2d Dept 1988]).

G. However, the rule that a party should not have to particularize any claim on which it does not have the burden of proof is not an invariable one. And an exception to this rule is warranted where necessary to further the purpose of the Division of Tax Appeals: “[to provide] the public with a just system of resolving controversies with [the Division] and to ensure that the elements of due process are present with regard to such resolution of controversies” (Tax Law § 2000). In this regard, the burden of proof notwithstanding, the Rules provide that the Division’s answer “shall fully and completely advise the petitioner and the division of tax appeals of the

defense” (20 NYCRR 3000.4 [b] [2]). It is in this context that the Division may be required to particularize its pleading.

H. Such an exception to the rule arises here from the Division’s assertions regarding the refund request and denial. Specifically: around May 2021, the Division initiated a sales tax audit of petitioner; petitioner provided adequate books and records; petitioner’s claim for credit arose during the audit; the Division asked petitioner to submit a separate refund request with supporting documents; on November 22, 2023, petitioner submitted a refund claim; on January 10, 2024, “the Division sent [petitioner] a letter requesting *additional* information to process the refund claim” (emphasis added); and on February 14, 2024, the Division “[denied] the refund claim in full since Petitioner failed to provide adequate records to demonstrate that it was entitled to a *full* refund” (emphasis added) (*see* finding of fact 4). Thus, it is unclear what documents were provided by petitioner and considered by the Division—or presumed by petitioner to be considered—with respect to the refund claim, during the audit or otherwise, given the Division’s request for *additional* documents and its denial for failure to provide adequate records demonstrating the right to a *full* refund. While the burden of proving entitlement to the requested refund rests with petitioner, under these circumstances, clarifying what documents were considered in conjunction with the refund request and why such documents were insufficient or additional documents were needed certainly furthers the goal of due process and the purpose of the bill of particulars: “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.6 [a] [1]).

I. Accordingly, the Division of Taxation is directed to supply a bill of particulars responding to paragraphs 8 and 9 of petitioner’s demand for a bill of particulars within 20 days

of the date of this order but, otherwise, the Division's motion to vacate petitioner's demand for a bill of particulars is granted.

DATED: Albany, New York
October 31, 2024

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE