

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARION SAKOW</b>	:	ORDER
	:	DTA NO. 850084
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under	:	
Article 22 of the Tax Law for the Year 2015.	:	

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Petitioner, Marion Sakow, filed two petitions for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2015.<sup>1</sup>

Petitioner, appearing by the Law Offices of Carol M. Luttati (Carol M. Luttati, Esq., of counsel), filed a demand for a bill of particulars, dated June 24, 2022. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), brought a motion on July 20, 2022, seeking an order pursuant to 20 NYCRR 3000.6 (a) (2) vacating the demand for a bill of particulars. In opposition to the Division of Taxation’s motion to vacate the demand for a bill of particulars, petitioner filed the affirmation of Carol M. Luttati, Esq., and annexed exhibits, dated August 19, 2022, which date began the 90-day period for issuance of this order. Based upon the pleadings, motion papers and other documents filed by the parties, Winifred M. Maloney, Administrative Law Judge, renders the following order.

***ISSUE***

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

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<sup>1</sup> On March 14, 2022, petitioner simultaneously filed two petitions related to the year 2015. The two petitions were consolidated by the Division of Tax Appeals under DTA No. 850084.

***FINDINGS OF FACT***

1. On or about August 13, 2016, Walter I. and petitioner Marion Sakow filed a New York State resident income tax return, form IT-201, for the year 2015 (the Sakows' joint tax return for the year 2015).

2. Walter I. Sakow passed away on September 13, 2017.

3. Based upon a field audit conducted of the Sakows' tax return for the year 2015, the Division of Taxation (Division) issued to Marion Sakow and Walter I. Sakow a notice of deficiency, notice number L-049489137, dated February 19, 2019 (notice of deficiency), asserting tax due in the amount of \$305,061.00, plus interest and penalties.

4. In protest of the notice of deficiency, a request for conciliation conference was filed with the Bureau of Conciliation and Mediation Services (BCMS). After a conciliation conference held on March 12, 2020, BCMS issued a conciliation order (CMS No. 000309733), dated December 17, 2021, denying petitioner's request and sustaining the notice of deficiency (conciliation order #1).

5. Petitioner, Marion Sakow, filed a form IT-285, request for innocent spouse relief (and separation of liability and equitable relief), for the year 2015 (form IT-285) with BCMS. Subsequently, BCMS forwarded petitioner's form IT-285 to the Division's Civil Enforcement Division (CED) for review of same.

6. On June 3, 2021, the Division's "CED-Innocent Spouse" unit issued to petitioner a relief from joint liability determination for the year 2015, which denied her request for innocent spouse relief, separation of liability or equitable relief (separation of liability relief denial notice) for the following reasons:

"1. Based on the explanation given, you do not qualify for separation of liability relief.

2. You did not show in the statement and supporting documentation attached to your request for relief that paying the liability in full would result in economic hardship. . . .

3. You did not show in the statement and supporting documentation attached to your request for relief that you did not know, or have reason to know, at the time you signed the joint personal income tax return, of the item(s) giving rise to the deficiency or that the liability reported on the return would not be paid.

4. You received significant benefit from the unpaid tax during the 2015 tax year.”

7. Petitioner protested the separation of liability relief denial notice at BCMS. After a teleconference held on June 22, 2021, BCMS issued conciliation order (CMS No. 000328823), dated December 17, 2021, denying petitioner’s request for separation of liability relief, and sustaining the separation of liability relief denial notice (conciliation order #2).

8. On March 14, 2022, petitioner simultaneously filed two petitions with the Division of Tax Appeals. The first petition protests the notice of deficiency and conciliation order #1 (the specific merits petition), and the second petition protests the separation of liability relief denial notice and conciliation order #2 (the separation of liability relief petition). The Division of Tax Appeals consolidated the two petitions into the instant matter under DTA number 850084.

9. Included as an attachment to the specific merits petition was a 7-page “Section VIII: Reasons(s) [sic] for Dispute” that contained allegations of fact and error in separately numbered paragraphs under the following headings:

Section VIII “A” contained 15 numbered paragraphs related to the Division’s disallowance of petitioner’s schedule E loss on her 202 East 29th Street property (29th Street property) because no rental income was reported from the 29th Street property;

Section VIII “B” contained 31 numbered paragraphs related to the Division’s inclusion in the Sakows’ income for the year 2015 of an alleged “flow thru capital gain” from the sale of 264 – 266 West 25th Street, New York, New York (25th Street property) by Mawash LLC, an entity in which the Division alleges petitioner’s now deceased husband was a 25% member;

Section VIII “C” contained 2 numbered paragraphs related to the negligence penalty asserted under Tax Law §§ 685 (b) (1) and (b) (2);

Section VIII “D” contained 2 numbered paragraphs related to the substantial understatement of liability penalty asserted under Tax Law § 685 (p); and

Section VIII “E” contained 10 paragraphs related to the denial of petitioner’s claim for separation of liability relief<sup>2</sup> under Tax Law § 654.

10. Included as an attachment to the separation of liability relief petition are 41 numbered paragraphs in which petitioner made allegations of fact and error summarized as follows:

(i) Subsequent to the issuance of the notice of deficiency, petitioner filed a request for conciliation conference in which she raised, among other items, her request for relief from joint and several liability under Tax Law § 654 and “reserved the right to supplement her *pro forma* Protest” by submitting to the assigned conciliation conferee a memorandum of law with accompanying supporting documents and exhibits.

(ii) Thereafter, petitioner submitted her form IT-285 in which she elected separation of liability relief under Tax Law § 654 and Internal Revenue Code (IRC) (26 USC) § 6015 (c) with respect to any understatement of tax on the Sakows’ joint tax return for the year 2015 that was allocable to her deceased husband.

(iii) As part of her form IT-285, petitioner allocated the Division’s proposed schedule E loss of \$283,061.00 to herself and its proposed unreported gain of \$3,114,353.00 from the sale of the 25th Street property to her deceased husband.

(iv) BCMS forwarded petitioner’s form IT-285 to CED for issuance of a determination. On June 3, 2021, the “CED-Innocent Spouse” unit issued a separation of liability relief denial

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<sup>2</sup> In paragraph E10, petitioner incorporated by reference the sum and substance of the averments made in her separation of liability relief petition.

notice.

(v) Petitioner protested the separation of liability relief denial notice at BCMS, which issued conciliation order (CMS No. 000328823), dated December 17, 2021, denying her request and sustaining the separation of liability relief denial notice.

(vi) Petitioner is entitled to separation of liability relief because she filed a joint return for the year 2015 and “meets both of the applicable requirements (either one of which alone is sufficient to qualify for relief) at the time” she filed her form IT-285. Specifically, petitioner was no longer married to Mr. Sakow because he died on September 13, 2017; and petitioner was not a member of the same household as her deceased husband, with whom she had filed a 2015 joint tax return, at any time during the 12-month period ending on the date that she filed the form IT-285.

(vii) The Division erroneously denied petitioner’s request for separation of liability relief on the grounds that:

(a) she did not show that paying the liability in full would result in economic hardship because economic hardship is not a factor in deciding whether to grant or deny relief under separation of liability;

(b) she did not show when she signed the joint tax return, she did not know, and had no reason to know that there was an understatement of tax for the year 2015 because “knowledge” is not a factor in deciding whether to grant or deny relief under separation of liability; and

(c) petitioner received significant benefit from the unpaid tax during the year 2015 because “significant benefit” is not a factor in deciding whether to grant or deny relief under separation of liability.

(viii) During a BCMS teleconference, held in lieu of a BCMS conciliation conference,

petitioner's request for separation of liability relief was discussed, where the Division allegedly failed to set forth its continued reasons for denying petitioner's request for separation of liability relief.

11. On June 1, 2022, the Division filed its answer to the consolidated petitions. The Division's answer sets forth eight affirmative statements that may be summarized as follows:

(a) The Division conducted "an audit of Walter I. and Marion Sakow as to Tax Year 2015."

(b) On February 19, 2019, the Division issued a notice of deficiency asserting that Mr. and Mrs. Sakow "owe tax of \$305,061.00 plus penalties and interest for Tax Year 2015, pursuant to Article 22 of the Tax Law."

(c) In protest of the notice of deficiency, petitioner requested a conciliation conference with BCMS, which was held on March 12, 2020. By conciliation order (CMS No. 000309733), dated December 17, 2021, the conferee sustained the notice of deficiency.

(d) The Division issued a "Relief from Joint Liability Determination, dated June 3, 2021, denying Petitioner's request for Innocent Spouse Relief, Separation of Liability or Equitable Relief for Tax Year 2015, pursuant to Article 22 of the Tax Law."

(e) Petitioner requested a BCMS conciliation conference as to the separation of relief denial notice, which was held on June 22, 2021. "By Conciliation Order dated December 17, 2021 (CMS No. 328823), the conferee denied the request for innocent spouse relief and sustained the statutory notice."

(f) "The Notices were properly issued by the Division."

(g) "[T]he Notices are presumed to be correct."

(h) Petitioner has the burden of establishing, "by clear and convincing evidence, that the

Notices were improper and/or erroneous.”

12. On June 18, 2022, petitioner filed a reply affirmatively stating that:

“the Division is in error on the issue of the burden of proof. In order to qualify for Separation of Liability Relief under NYS Tax Law §654 and IRC §6015(c), the Petitioner must have filed a joint return and meet only one of the following two requirements at the time she filed, on 2/27/2020, her Form IT-285, Request for Innocent Spouse Relief (and Separation of Liability and Equitable relief):

(a) Petitioner was no longer married to Walter Sakow, with whom she filed a joint 2015 return, because Walter Sakow died on 9/13/2017; or

(b) Petitioner was not a member of the same household as her deceased husband, Walter Sakow, with whom she filed a 2015 joint return, at any time during the 12-month period ending on 2/27/2020, the date that the Petitioner filed her Form IT-285.

Petitioner also must establish a basis for allocating erroneous items on the Form-285 [sic]. The burden of proof (i.e. the burden of production as well as the burden of persuasion), then shifts to the Division to establish facts to be proven by the Division that support a legally recognized ground/ defense upon which Petitioner may, notwithstanding her satisfying the requirements for Separation of Liability Relief, be denied such relief.”

13. On June 24, 2022, petitioner served the Division with a demand for a bill of particulars (Demand). Specifically, the Demand sought:

“1. State with particularity, all facts to be proven by the Division (that bears the burden of proof) as to any and all defense(s) to the Petitioner’s request for Separation of Liability Relief under NYS Tax Law §654 and IRC §6015(c).

2. State with particularity, all facts to be proven by the Division (that bears the burden of proof) showing that on 10/15/2016, when the Petitioner signed the 2015 joint return, she had ‘actual knowledge’ (defined as actual and clear awareness of the omitted income) of the receipt of unreported income allocable to her husband, Walter Sakow (since deceased) – namely, the check for \$3,114,353.10 from LCP 25<sup>th</sup> Street Management LLC payable to Walter Sakow with respect to the sale of 264-266 West 25<sup>th</sup> Street, New York, NY – giving rise to the understatement of tax/deficiency (or portion thereof).

3. State with particularity, all facts to be proven by the Division (that bears the burden of proof) showing that the Petitioner and Walter Sakow transferred assets as part of a fraudulent scheme.

4. State with particularity, all facts to be proven by the Division (that bears the burden of proof) showing that Walter Sakow transferred property to the Petitioner to avoid tax or the payment of tax, or that the Petitioner transferred property to Walter Sakow to avoid tax or the payment of tax.

5. State with particularity, all facts to be proven by the Department (that bears the burden of proof) that support the assertion of the negligence penalty under NYS Tax Law §§685(b)(1) and (b)(2).

6. State with particularity, all facts to be proven by the Department (that bears the burden of proof) that support the assertion of the substantial understatement of liability penalty under NYS Tax Law §685(p).”

14. The Division filed a motion dated July 20, 2022, to vacate the Demand on the grounds that it is evidentiary in nature, relates to matters of law, is unduly burdensome, and constitutes impermissible requests for discovery. In support of its motion, the Division submitted the affirmation of Jennifer Hink-Brennan, its representative. Ms. Hink-Brennan, in her affirmation, asserts that the Division’s contentions in the answer fully and adequately advised petitioner of its claims.

15. On August 19, 2022, petitioner filed the affirmation of Carol M. Luttati, her representative, opposing the Division’s motion to vacate the Demand and requesting oral argument on the motion under 20 NYCRR 3000.5 (c).<sup>3</sup> Ms. Luttati, in her affirmation, asserts that the Demand “principally seeks the factual particulars as to the Affirmative Defenses which the Division may raise to defeat Petitioner’s claim for Separation of Liability Relief under NYS Tax Law §654 and IRC §6015(c).” Included as an attached exhibit to Ms. Luttati’s affirmation is the Division’s Publication 89, Innocent Spouse Relief (and Separation of Liability and Equitable relief).

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<sup>3</sup> By letter dated September 21, 2022, the undersigned Administrative Law Judge denied petitioner’s representative’s request for oral argument on the motion.



### **CONCLUSIONS OF LAW**

A. The Rules of Practice and Procedure of the New York State Tax Appeals Tribunal (Rules) provide for bills of particulars at 20 NYCRR 3000.6. That section states, in pertinent part, as follows:

(a) Bills of particulars. (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 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.

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]). Since a wealth of case law has been created under CPLR 3041, “Bill of Particulars in Any Case,” it is helpful to refer to that section for guidance in matters before the Division of Tax Appeals.

C. The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claims which he or she must defend against (*see Johnson, Drake and Piper v State of New York*, 43 Misc 2d 513, 515 [Ct of Claims 1964]). A demand for a bill of particulars may be used to amplify the pleadings, prevent surprise and limit issues, but may not be used to gain disclosure of evidentiary detail that adverse parties will rely upon to prove their claim (*Bassett v Bondo Sangsa Co., Ltd.*, 94 AD2d 358, 359 [1st Dept 1983], *appeal dismissed* 60 NY2d 962 [1983]; *State of New York v Horsemen’s Benevolent and Protective Assn.*, 34 AD2d 769, 770 [1st Dept 1970]).

D. The consolidated petitions and the reply informed the Division of both the scope of the issues to be addressed at the hearing and of petitioner’s position with regard to those issues. In her Demand, petitioner seeks clarification of the Division’s denial of her request for

separation of liability relief, and the Division's assertion of penalties under Tax Law §§ 685 (b) (1); (b) (2); and (p). In its motion to vacate the Demand, the Division contends that the Demand is evidentiary in nature, relates to matters of law, is unduly burdensome, and constitutes impermissible requests for discovery. The Division also contends that its answer fully and adequately advised petitioner of its claims.

The first four items requested by petitioner's Demand concern the Division's denial of her request for separation of liability relief. Once petitioner established her entitlement to separation of liability under Tax Law § 654 and IRC § 6015 (c), the burden shifted to the Division to establish that petitioner and her spouse transferred assets as part of a fraudulent scheme; at the time petitioner signed her joint return, she had actual knowledge of any erroneous item giving rise to the deficiency that was allocable to Mr. Sakow; or that Mr. Sakow transferred property to her to avoid tax or the payment of tax. The Division's answer contains a general, vague statement that petitioner's request for separation of liability relief was denied under article 22 of the Tax Law. In its current state, with regard to its denial of her request for separation of liability relief, the Division's answer fails to give petitioner knowledge of the claims against which she will have to defend at hearing. Petitioner does not request any of the evidence the Division may use to support its claims regarding its denial of her request for separation of liability relief but merely requests disclosure of the claims themselves. Petitioner is entitled to know the claims that she must defend against (*see Johnson, Drake and Piper v State of New York*). As the Division's claims are affirmative defenses, it is not unduly burdensome upon the Division to merely articulate these claims.

E. The remaining two items requested in the Demand relate to penalties asserted under Tax Law §§ 685 (b) (1); (b) (2); and (p). Since the Division does not bear the burden of proof

regarding the penalties asserted in this matter, the demand for clarification of the two items is improper.

F. Accordingly, the Division is directed to supply a bill of particulars responding to paragraphs 1 through 4 of petitioner's demand for a bill of particulars within 30 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  
November 17, 2022

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE