

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LATZ LANDSCAPING, INC. : ORDER
 : DTA NOS. 819252 AND
 : 819253
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 June 1, 1993 through May 31, 1999. :

In the Matter of the Petition :
of :
GLEN LATZ :
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 June 1, 1998 through May 31, 1999. :

Petitioner Latz Landscaping, Inc., c/o Glen Latz, President, 65 Piermont Road, Tenafly, New Jersey 07670, 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 June 1, 1993 through May 31, 1999.

Petitioner Glen Latz, 65 Piermont Road, Tenafly, New Jersey 07670, 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 June 1, 1998 through May 31, 1999.

The Division of Taxation (“Division”), by its representative, Barbara G. Billet, Esq. (Paul J. Connolly, Esq., of counsel), filed a motion on May 13, 2003 for an order, pursuant to 20

NYCRR 3000.6(a)(3), precluding petitioners from offering particulars at a hearing of the above-entitled matters as to which the Division has demanded particulars which were not provided by petitioners. Petitioners did not file a reply to the Division's motion. Based upon the pleadings, motion papers and other documents filed by the parties, Brian L. Friedman, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On June 7, 2001, the Division issued a Notice of Determination to Latz Landscaping, Inc. assessing sales and use taxes in the amount of \$167,240.90, plus penalties and interest, for a total amount due of \$401,615.65 for the period June 1, 1993 through May 31, 1999.

On June 29, 2001, the Division issued a Notice of Determination to Glen Latz assessing sales and use taxes in the amount of \$69,771.35, plus penalties and interest, for a total amount due of \$146,125.42 for the period June 1, 1998 through May 31, 1999.

2. Petitioners filed requests for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") and on September 13, 2002, BCMS issued conciliation orders (CMS Nos. 188434 and 188467) denying petitioners' requests and sustaining the statutory notices.

3. On December 12, 2002, the Division of Tax Appeals received petitions from each petitioner which, with the exception of an allegation by petitioner Glen Latz that "[a]ny monies owed to New York are owed by Latz Landscaping, Inc. and not by this petitioner," contain nearly identical allegations which were as follows:

1. Latz Landscaping, Inc. had a few limited customers in New York during the years in question, with only 4 main customers, one of which was a subcontractor, another collected and paid the sales tax itself.

2. New York did not correctly ascertain or construe the correct number of customers of Latz Landscaping, Inc. in New York.

3. New York used an incorrect/inaccurate sampling procedure in assigning [sic] the amount of sales and use tax due.

4. New York failed to examine all the invoices produced by Petitioner and thus failed to correctly calculate the amount of tax due, and erred in the analysis of those invoices it examined.

5. Any interest and penalties assessed are incorrect in that they referenced an incorrect amount of base tax due.

6. New York failed to separate sales on a percentage basis between taxable in-state and out-of-state sales.

7. New York failed to review proof of non-taxable sales invoices and tax exempt customer certificates.

4. On February 13, 2003, the Division served its answers to each of the petitions.

5. On February 14, 2003, by certified mail, return receipt requested, the Division served a Demand for Bill of Particulars upon each petitioner.¹ As to petitioner Glen Latz,² the Division demanded that within 30 days of the demand, that it be provided with the following particulars:

1. Identify by name and address every customer Latz Landscaping, Inc. had in New York during the years in question, as alleged in the first paragraph of item 6 of the petition.

2. Specify in what way or manner New York did not correctly ascertain or construe the correct number of customers of Latz Landscaping, Inc., in New York, as alleged in the second paragraph of item two of the petition.

3. Specify in what way or manner New York used an incorrect/inaccurate sampling procedure in assigning the amount of sales and use tax due.

¹ Attached to the Division's motion papers are United States Postal Service forms 3811 which indicate that the motion papers were served upon each petitioner on February 17, 2003.

² Except for those particulars relating to petitioner Glen Latz's alleged status as a responsible officer of the corporation (paragraph 9), the demand served upon Latz Landscaping, Inc. was identical except for certain references to specific paragraphs in the corporation's petition which are bracketed herein.

4. Specify what petitioner contends would have been a correct and accurate sampling procedure in assigning the amount of sales and use tax due.

5. Specify each and every error that New York made in its analysis of the invoices produced by petitioner as alleged in paragraph 4 of item 6 of the petition.

6. With reference to paragraph 5 [4] of item 6 of the petition, specify what petitioner considers to be the correct amount of tax due.

7. With reference to paragraph 6 [5] of item 6 of the petition, specify how it will be alleged New York should have separated sales on a percentage basis between taxable in-state and out-of-state sales.

8. With reference to paragraph 7 [6] of item 6 of the petition, specify, and attach copies of, each and every item of proof of non-taxable sales invoices and tax exempt customer certificates which it is alleged New York failed to review.

9. With reference to paragraph 8 of item 6 of the petition, in which petitioner contends he is not personally liable of the monies owed, specify:

a. Whether petitioner was an officer of Latz Landscaping, Inc. during the period of the audit, and, if so, identify the offices he held.

b. Whether petitioner owned any stock in Latz Landscaping, Inc., and, if so, what percentage of all outstanding stock.

c. Whether petitioner was authorized to sign tax returns on behalf of Latz Landscaping, Inc.

d. Whether petitioner did sign tax returns on behalf of Latz Landscaping, Inc.

e. Whether petitioner was responsible for maintaining or managing the books of Latz Landscaping, Inc.

f. Whether petitioner was involved in the decision making processes of Latz Landscaping, Inc.

g. Whether petitioner had authority to pay creditors of Latz Landscaping, Inc.

h. Whether petitioner had the authority to hire and fire employees of Latz Landscaping, Inc.

i. Whether petitioner had the authority to sign checks on behalf of Latz Landscaping, Inc.

j. Whether petitioner had the authority to make purchase [sic] for Latz Landscaping, Inc.

k. Whether petitioner had authority to sign payroll checks.

l. Whether petitioner had authority to negotiate loans or borrow money for Latz Landscaping, Inc.

6. By letters dated April 18, 2003 which were sent to petitioners by certified mail, return receipt requested (United States Postal Service forms 3811 confirm delivery of these letters), the Division's representative, Paul J. Connolly, Esq., confirmed communications with petitioner Glen Latz and the office manager of Latz Landscaping, Inc. wherein he stated as follows:

On February 14, 2003, I served a notice to admit and a demand for a bill of particulars upon Latz Landscaping, Inc. by mailing them to your attention. On March 14, 2003, your office manager called to request an extension of time to respond to the notice and the demand. In a phone conversation with you the same day, you restated the corporation's request for an extension of time. You also explained that you intended to retain counsel shortly, and would have him contact me. In light of your expressed intent to retain counsel, I did not specify a date when Latz Landscaping's responses to the aforesaid notice and the demand would have to be served.

Subsequently, in a phone conversation with you on March 21, 2003, you advised that you would have counsel contact me within two weeks. Again, in light of your expressed intent to retain counsel, I did not specify a date when Latz Landscaping's responses to the notice and the demand would be required.

In a phone conversation with you on April 9, you advised me that you would retain counsel by April 15 and would have him get in touch with me at once. Again I forbore from specifying a date for responses to the notice and the demand.

As of today, I have not heard from any representative on behalf of Latz Landscaping, Inc. Nor have I received a response to either the notice or the demand. In light of this, I am now specifying that Latz Landscaping's responses to the aforesaid notice and demand must be served by May 2, 2003. If Latz Landscaping's responses are not served by that date, I will seek appropriate relief under the rules of the Division of Tax Appeals.

Please contact me if you have any questions.

7. As of the date of the motion papers, i.e., May 13, 2003, the Division received no response to its demands for bills of particulars. In addition, no further extension of time within which to respond thereto was requested by petitioners. Accordingly, the time within which to respond to the Division's demands has expired.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.6 provides, in relevant 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 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. If no such motion is made, the bill of particulars demanded shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise.

(3) In the event a party fails to furnish a bill of particulars, the administrative law judge designated by the tribunal may, upon motion, issue an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered. A motion for such relief shall be made within 30 days of the expiration of the date specified for compliance with the request.

* * *

(5) A preclusion order may provide that it will be effective unless a proper bill is served within a specified time.

B. A bill of particulars may not be used to obtain disclosure of information that the adverse party will rely on to prove its claim (*Bassett v. Bando Sangsa Co., Ltd.*, 94 AD2d 358, 464 NYS2d 500, 501, *appeal dismissed* 60 NY2d 962, 471 NYS2d 84; *State of New York v. Horsemen's Benevolent and Protective Assn.* 34 AD2d 769, 311 NYS2d 511).

C. In the present matter, the Division's representative granted petitioners several extensions of time within which to respond to its demands for bills of particulars. Finally, when he received no communication from a representative of petitioners, as previously promised, the Division's representative, by letter dated April 18, 2003, gave petitioners until May 2, 2003 to respond to such bills of particulars. However, no responses were received by the Division. Accordingly, it is hereby ordered as follows:

(1) As to the Demand for Bill of Particulars served upon petitioner, Latz Landscaping, Inc., such petitioner is hereby ordered to provide responses to paragraphs "2", "3", "5" and "7" of such demand. Paragraphs "1" and "8" seek specific evidence from petitioner and, as such, are not properly the subject of a demand for a bill of particulars. Paragraphs "4" and "6" seek to have petitioner specify the audit method which should have been utilized by the Division and the resulting proper amount of tax which should have been assessed; since they are beyond the scope of the purpose of a bill of particulars, they, too, are not properly the subject of a demand for a bill of particulars.

(2) As to the Demand for Bill of Particulars served upon petitioner Glen Latz, such petitioner is hereby ordered to provide responses to paragraphs "2", "3", "5", "7" and "9"

of such demand and, for the same reasons as set forth in subparagraph (1) hereinabove, such petitioner shall not be required to provide responses to paragraphs “1”, “4”, “6” and “8” of such demand.

D. The Division of Taxation’s motion for an order, pursuant to 20 NYCRR 3000.6(a)(3), precluding petitioners from offering particulars at hearing in respect of those matters as to which petitioners have been directed to provide responses, is granted to the extent indicated in Conclusion of Law “C”, unless petitioners shall, within 15 days from the date of this order, serve upon the Division of Taxation responses to its Demands for Bill of Particulars as directed in Conclusion of Law “C”.

DATED: Troy, New York
June 19, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE