

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL A. AND JANICE L. GOLDSTEIN	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 822632
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1994, 1995, 1996, 1997 and 2004.	:	

Petitioners, Michael A. and Janice L. Goldstein, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1994, 1995, 1996, 1997 and 2004.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Marc A. Strange, Esq., of counsel), brought a motion, filed April 22, 2009, seeking an order pursuant to 20 NYCRR 3000.6(a)(2) vacating a Demand for a Bill of Particulars dated April 2, 2009.

Petitioners appeared in opposition to the motion by their representative, Ray W. Cruz, Esq., who submitted a letter, dated April 22, 2009, received by the Division of Tax Appeals on May 1, 2009.

After due consideration of the motion, the supporting affidavit of Marc A. Strange, Esq., the letter submitted by Mr. Cruz, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners' demand for a bill of particulars should be vacated.

FINDINGS OF FACT

1. Petitioners, Michael A. and Janice L. Goldstein, filed a petition on November 20, 2008 seeking a refund of personal income taxes for the years 1994, 1995, 1996 and 2004 on the basis that the Division of Taxation incorrectly calculated offsets and interest and improperly applied overpayments.

2. In its answer, dated February 18, 2009, the Division of Taxation (Division) denied petitioners' allegations and affirmatively argued that petitioners' claims for refund for the years 1994, 1996 and 2004 were barred by the statute of limitations.

3. On or about April 2, 2009, petitioners served a Demand for a Bill of Particulars on the Division which generally sought information in the following areas: statutory interpretation; statutory application of the Tax Law "Prior," "During" and "After" the years 1989-1998; statute of limitations; New York State Audit; and interest rates.

4. The Division of Taxation brought the instant motion to vacate the demand on the basis that the demand seeks material that is evidentiary in nature, relates to matters of law, is unduly burdensome and constitutes an impermissible request for discovery.

CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure, 20 NYCRR 3000.6(a), provide that a party may seek further details of the allegations in a pleading to prevent surprise at the hearing and limit the scope of proof with a demand for a bill of particulars.

B. An administrative law judge may be guided but not bound by the provisions of the New York Civil Practice Law and Rules (CPLR). (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. As referred to by the Division in its motion, a bill of particulars is a document that amplifies the pleading, limiting the proof and preventing surprise at trial. It is not usable to obtain evidence. (*State of New York v. Horsemen's Benevolent and Protective Assn*, 34 AD2d 769, 311 NYS2d 511[1970].)

A party is only required to serve a bill of particulars of that which the party has the burden of proof, not those matters which it need not prove upon trial. (*Hydromatics, Inc. v. Count Nat. Bank*, 23 AD2d 576, 256 NYS2d 438 [1965].) Further, one should not be required to furnish a bill of particulars where his answer consists solely of denials and admissions. (*L.F. Dommerich & Co. v. Diener & Dorskind, Inc.*, 31 AD2d 516, 294 NYS2d 613 [1968].)

In cases involving personal income tax, the burden of proof is upon the petitioner, with some exceptions, all but one not present herein. (Tax Law § 689[e].) Therefore, with the exception of the Division's affirmative statement that claims for certain of the years protested by petitioners were barred by the statute of limitations, the burden of proof with respect to the remaining issues involving the proper use of offsets, calculation of interest and application of overpayments remains with petitioners, and the Division is not obligated to provide a bill of particulars with regard to them. In addition, the demand in general is overly broad, vague and the information sought irrelevant and immaterial. This includes the "particulars" requested for "Statute of Limitations," where petitioners' demand never once in its eleven questions referenced the Division's Answer or its affirmative statement on that subject.

Given the substantial number of requests for information which is deemed not the proper subject of a demand, "this court will not involve itself in pruning the . . . demand for a bill of particulars . . . but rather will vacate the entire demand" (*Posh Pillows Ltd. v. Hawes*, 138 AD2d 472, 474, 525 NYS2d 877 [1988].)

D. The Division of Taxation's Motion to Vacate the Demand for a Bill of Particulars is granted and the case will be scheduled for hearing forthwith.

DATED: Troy, New York
May 14, 2009

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE