

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SHARI McNULTY</b>	:	ORDER
	:	DTA NO. 822715
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1994 and 1995.	:	

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Petitioner, Shari McNulty,<sup>1</sup> filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for years 1994 and 1995.

Pursuant to 20 NYCRR 3000.6(a)(2), by a motion dated April 21, 2009, the Division of Taxation (Division), by its representative, Daniel Smirlock, Esq. (Mark A. Strange, Esq., of counsel) moved for an order vacating petitioner's Demand for Bill of Particulars dated April 2, 2009. The Division, with its Notice of Motion dated April 21, 2009, submitted the affidavit dated April 21, 2009 of Mark A. Strange, Esq. Petitioner's response, consisting of the affidavit dated May 21, 2009 of Ray W. Cruz, Esq., was served on May 21, 2009, which date commenced the 90-day period for the issuance of this order. Upon review of the pleadings, the affidavit in support of the motion and the affidavit in response, Frank W. Barrie, Administrative Law Judge, renders the following order.

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<sup>1</sup> The petition dated December 24, 2008 by Ray W. Cruz, CPA, petitioner's representative, who is also an attorney, also named James McNulty (deceased) as an additional petitioner. Upon inquiry by the Division of Tax Appeals whether there is an estate for the deceased, petitioner's representative advised that there was no estate. Consequently, Shari McNulty was advised to proceed as the petitioner in her name only.

### ***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued a notice of deficiency dated September 10, 2007 against petitioner and her husband, James McNulty, now deceased, asserting personal income tax due under Article 22 of the Tax Law for the year 1995 in the amount of \$37,720.00 plus interest of \$31,506.95. This notice also indicated that no additional personal income tax or interest was due for the year 1994. The notice further stated that “The original notice<sup>2</sup> sent to you on 04/02/07 showed the detailed computation of the additional amount due.”

2. Petitioner filed a petition dated December 24, 2008 which set forth the basis for petitioner’s disagreement with the Division’s assertion of tax plus interest due for 1995. She alleged that she and her husband for the years 1996 and 1997 had refunds due to them which were offset against tax due for 1995 in an improper fashion. Although the petition is not clearly drafted, it appears that petitioner’s complaint is that the Division “did not provide the interest required on the refund claim[s]” for 1996 and 1997 because petitioner was entitled to interest on the refund claims for 1996 and 1997 “from the original due date of the return[s].” According to the petition, because interest was allegedly not properly computed by the Division on the refund claims for 1996 and 1997, which were used to offset tax due for 1995, “taxpayer is requesting abatement of interest charged” on the taxes asserted due for 1995. It appears that petitioner filed a report of federal income tax changes for the years of 1994, 1995, 1996 and 1997 with the

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<sup>2</sup> This earlier notice has not yet been made part of the administrative record in this matter. Pursuant to 20 NYCRR 3000.14, hearing memorandums will be due for filing with the administrative law judge no later than October 19, 2009. Parties are required to list the documents they intend to introduce at the hearing to be held on October 27, 2009. They will also be required to exchange their documents no later than October 19, 2009 which should include this earlier notice which seems extremely relevant for purposes of the Division establishing a *rational basis* for its assertion of tax and interest due (*see e.g. Matter of Russo*, Tax Appeals Tribunal, August 8, 1991).

Division, and the Division determined that she owed additional New York State<sup>3</sup> personal income tax for 1995 as noted above.

3. The Division's answer dated March 4, 2009 includes one affirmative statement, that "the statute of limitations for refund or credit claims [*sic*] bars petitioner's refund claims for New York City tax paid on its New York State Income Tax returns for the years 1994 and 1995," in addition to responding to the various allegations in the petition. While admitting that petitioner filed "the required information of the federal change report within the 90 day period," the Division denies (1) that it offset refund claims for 1996 and 1997 against the balance due for 1995, (2) that it improperly computed interest due on refund claims for 1996 and 1997, or (3) that it "overcharged" the taxpayer interest on tax asserted due for 1995.

4. Approximately one month after receiving the answer, petitioner served a Demand for a Bill of Particulars dated April 2, 2009 upon the Division consisting of 71 separately numbered paragraphs. Petitioner sought information in the following areas: (1) statutory interpretation, including many demands requesting information on how the Division goes about interpreting statutes and the Division's opinion concerning the "intent, purpose and reason" for various statutory provisions; (2) application of statutory provisions to taxpayers, including how the Division calculates interest on refund claims by taxpayers; (3) changing statutory provisions, including demands that ask the Division to interpret certain statutory provisions "prior," "during," and "after" the years 1989-1998; (4) the Division's interpretation of the statute of limitations and its application of the statute of limitations to various hypothetical situations; (5)

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<sup>3</sup> The caption of this matter also refers to New York City personal income tax since the petition referenced Tax Law Article 30 which pertains to city personal income tax. However, the notice of deficiency at issue does not indicate that New York City personal income tax is at issue.

policies concerning the calculation of interest on refund claims and deficiencies determined in the course of an audit; and (6) interest rates used by the Division on refunds and deficiencies.

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

A. The Rules of Practice and Procedure, 20 NYCRR 3000.6(a), provide that a party may, by the use of a demand for a bill of particulars, seek further details of the allegations in a pleading to prevent surprise at the hearing and limit the scope of proof (*see State of New York v. Horsemen's Benevolent and Protective Assn.*, 34 AD2d 769, 311 NYS2d 511 [1970]). It is intended to enable the party demanding the particulars to know definitely the claims to be defended against (*Johnson, Drake and Piper v. State of New York*, 43 Misc2d 513, 251 NYS2d 500, 503 [1964]). Consequently, demands for particulars should be restricted to those which are clearly intended to limit and crystallize the issues which will be raised at hearing and not to probe into your adversary's legal interpretations or used to obtain disclosure of evidence (*see e.g. Bassett v. Bando Sangsa Co., Ltd.*, 94 AD2d 358, 464 NYS2d 500 [1983], *appeal dismissed* 60 NY2d 962, 471 NYS2d 84 [1983]). As detailed in Finding of Fact 4, petitioner's demand is a far reaching document which attempts to obtain the Division's interpretation of various statutory provisions related to the calculation of interest and how the Division applies its interpretation of such statutory provisions to taxpayers. Such focus is simply not the proper subject of a demand for a bill of particulars. At hearing, the parties will have the opportunity to cite statutory provisions concerning the proper way for the calculation of interest on refunds and assessment. The administrative law judge will then review relevant statutory provisions and make a determination whether the calculation of interest at issue in this proceeding was done in conformance with relevant law.

B. Although among the 71 paragraphs requesting particulars, there may, perhaps, be a very few which arguably are appropriate, given the substantial number of requests for information which are not the proper subject of a demand, the entire demand is properly vacated (*see Posh Pillows Ltd. v. Hawes*, 138 AD2d 472, 474, 525 NYS2d 877 [1988]).

C. Further, given the unique nature of petitioner's demand for particulars, it is worth emphasizing that the Division of Tax Appeals lacks authority to declare statutory provisions, in this case provisions governing the calculation of interest on refunds and deficiencies, unconstitutional (*Matter of Lunding*, Tax Appeals Tribunal, February 23, 1995, *annulled on other grounds* 218 AD2d 268 [1996], *revd* 89 NY2d 283 [1996], *revd* 522 US 287 [1998]).

D. In addition, although the statute of limitations is an affirmative defense that must be pleaded by the Division of Taxation if it chooses to argue that certain refund claims were untimely made, as it apparently maintains in this matter, the burden of proof, to show that any refund claims at issue were timely filed, is upon petitioner (*see Matter of Pittman*, Tax Appeals Tribunal, February 20, 1992). In contrast, the burden of proof is placed upon the Division to establish timely mailing of a statutory notice only when the Division has asserted that the statutory notice has become an unchallengeable assessment because of the filing of an untimely petition (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This is *not* the situation in this matter. Consequently, since a party is only required to serve a bill of particulars of that which the party has the burden of proof, and not of those matters which it need not prove upon trial, petitioner's requests for information concerning the Division's position that certain refund claims were untimely are also properly vacated on such additional basis (*see Hydromatics, Inc. v. Count Nat. Bank*, 23 AD2d 576, 256 NYS2d 438 [1965]).

E. At the hearing in this matter to be held on October 27, 2009, petitioner and the Division will be given a full opportunity to present their cases and to argue the law and facts which support their position that interest was improperly, or, from the Division's perspective, correctly computed on taxes asserted due.

F. The Division of Taxation's Motion to Vacate the Demand for a Bill of Particulars is granted.

DATED: Troy, New York  
July 16, 2009

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE