

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AMERICAN AIRLINES, INC. : ORDER
 : DTA NO. 823358
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 December 1, 1998 through December 31, 2004. :
:

Petitioner, American Airlines, 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 December 1, 1998 through December 31, 2004.

The Division of Taxation (Division), by its representative, Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel), filed a Demand for a Bill of Particulars dated February 5, 2010. Petitioner, appearing by Deloitte Tax LLP (William Ault, Esq., of counsel), brought a motion, filed March 23, 2010, seeking an order pursuant to 20 NYCRR 3000.6(a)(2) vacating the demand for a bill of particulars. In opposition to petitioner's motion to vacate the demand for the bill of particulars, the Division filed the affirmation of Robert A. Maslyn, Esq., dated April 20, 2010, and annexed exhibits, 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.

FINDINGS OF FACT

1. While petitioner, American Airlines, was undergoing a general sales and use tax audit with New York State, it submitted sales tax refund requests 2007-03-0688 and 2007-12-0626 to

the Division. Those refund requests were denied by the Division on March 3, 2008. In conjunction with petitioner's request for conciliation conference on an issue unrelated to the facts at issue in this proceeding, a conciliation conference was also held regarding the denial of the refund claims on September 10, 2008. The Bureau of Conciliation and Mediation Services sustained the refund denials on August 21, 2009.

2. Petitioner filed a petition on November 17, 2009 challenging the Division's denials of its claims for refund of sales tax in the amount of \$1,082,167.00 paid on charges for rooms in four specific New York hotels (hotel room charges) for the period December 1, 1998 through December 31, 2004. In its petition, petitioner asserted that it was a permanent resident because it continuously occupied rooms in the hotels for more than 90 days and was exempt from sales tax on such room charges pursuant to Tax Law § 1105(e). Petitioner further asserted, among other things, that the Division erroneously relied upon 20 NYCRR 527.9(b)(8) in denying the claims for refund. In support of those assertions, the petition contained 26 detailed statements of alleged facts and 4 paragraphs of alleged errors of law.

3. The Division's answer, dated January 13, 2010, set forth 12 affirmative statements. The allegations of fact, as opposed to assertions of law, may be summarized as follows:

(a) During the period December 1, 1998 through August 31, 2005, petitioner contracted for hotel rooms that were subject to sales tax.

(b) On or about March 15, 2007, petitioner filed a Claim for Refund (Claim # 2007-03-0688) with the Division, claiming a refund due in the amount of \$2,436,269.77 for the period December 1, 1998 through May 31, 2003, on the ground that it paid tax on hotel rooms and services that were excluded from tax.

(c) On or about December 21, 2007, petitioner filed a Claim for Refund (Claim # 2007-12-0626) with the Division, claiming a refund due in the amount of \$249,836.00 for the period December 1, 1998 through August 31, 2005, on the ground that it paid tax on hotel rooms and services that were excluded from tax.

(d) In a letter dated March 3, 2008 concerning Claim # 2007-03-0688, the Division denied the refund claim at issue (\$1,734,754.03) because the sales tax was properly paid and petitioner failed to substantiate any right to an exemption.

(e) In a letter dated March 3, 2008 concerning Claim # 2007-12-0626, the Division denied the refund claim at issue (\$249,836.00) because the sales tax was properly paid and petitioner failed to substantiate any right to an exemption.

(f) The Bureau of Conciliation and Mediation Services sustained the Division's refund denials.

4. The Division served a Demand for a Bill of Particulars (Demand) dated February 5, 2010 upon petitioner. The Division's Demand consisted of seven paragraphs. Demand paragraph 1 requested the following:

1. Identify each and every agreement under which rooms were rented during the periods in issue, setting forth:
 - a. the particular hotel with which petitioner contracted;
 - b. the date of the agreement;
 - c. the duration of the agreement;
 - d. the number of rooms, if any, required by each agreement for each hotel and for each month during the periods in issue;
 - e. the price for each room.

Demand paragraph 2 requested the following:

2. Set forth the number of rooms requested by petitioner under each of the agreements identified above for each month during the period in issue, and the date each such request was made.

Demand paragraph 3 requested the following:

3. a. Set forth the number of additional rooms (meaning rooms requested that were in addition to the rooms required under the prior advance monthly request) for each hotel for each particular month of the period in issue;

b. State the dates on which additional rooms were requested, and the period of time for which the additional rooms were requested.

Demand paragraph 4 requested the following:

4. State the amount paid for each room at each hotel during the period in issue, under each agreement, further specifying the amount of sales tax paid for such rooms.

Demand paragraph 5 requested the following:

5. Specify the number of rooms and total amount paid in sales tax at each particular hotel for which refund is sought.

Demand paragraph 6 requested the following:

6. a. Specify the amount of sales tax already refunded for the period in issue;

b. Set forth the time period to which each refund relates;

c. Identify the amount refunded by [the] Department of Taxation and Finance;

Demand paragraph 7 requested the following:

7. a. Specify the amount petitioner contends is due from the Department of Taxation and Finance as a refund; and

b. Set forth the manner and method of computation as well as the factors used in this computation.

5. Petitioner brought the instant motion to vacate the Demand on the following grounds:

(1) petitioner previously provided substantial information, which has sufficiently informed the Division of the nature of the allegations as to prevent surprise at the hearing; (2) the Demand

calls for information substantially beyond what is necessary to satisfy the purpose of a bill of particulars; and (3) the Division seeks to discover evidence petitioner intends to produce at the hearing.

6. The Division, in its affirmation in opposition to petitioner's motion to vacate the demand for the bill of particulars, asserts that the Demand was prepared based upon the broad allegations in the petition and sought specificity concerning the variety of claims made in that petition, particularly concerning the details of room occupancy for particular periods of time and the method of computation of the refund amount sought. It further asserts that since the Demand requests specific information directly related to petitioner's refund claim, it should be in no way burdensome for petitioner to set forth what tax was paid, on which rooms, at which hotels and for what periods of time. Because this is a threshold issue, the Division claims that petitioner should be required to amplify its pleadings. It further claims that the disclosure of the particulars is necessary to enable the Division to know the claims it must address at the hearing, to assist in streamlining the hearing to legitimate issues and to avoid prejudicial surprise.

CONCLUSIONS OF LAW

A. The regulations setting forth the Rules of Practice and Procedure before the New York State Tax Appeals Tribunal provide for bills of particular 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. The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claim which he or she must defend against (*Johnson, Drake and Piper v. State of New York*, 43 Misc 2d 513, 251 NYS2d 500, 503 [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 on to prove their claim (*Bassett v. Bondo Sangsa Co., Ltd.*, 94 AD2d 358, 464 NYS2d 500, 501 [1983], *lv dismissed* 60 NY2d 962, 471 NYS2d 84 [1983]; *State of New York v. Horsemen's Benevolent and Protective Assn.*, 34 AD2d 769, 311 NYS2d 511 [1970]). The petition adequately informs the Division of both the scope of the issues to be addressed at hearing and of petitioner's position with regard to those issues. The Division's Demand requests excessively detailed information of an evidentiary nature. Clearly, the Division seeks information for purposes of trial preparation, not information to limit the issues and assist in their crystallization. Therefore, its Demand must be vacated.

C. Petitioner's motion to vacate the Division of Taxation's Demand for a Bill of Particulars is granted.

DATED: Troy, New York
June 17, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE