

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JACOB B. CONSTANTINE	:	ORDER
D/B/A ALLPHASE MASONRY & CHIMNEY	:	DTA NO. 831590
	:	
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 September 1, 2014 through May 31,	:	
2021.	:	

Petitioner, Jacob B. Constantine d/b/a Allphase Masonry & Chimney, 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 September 1, 2014 through May 31, 2021.

Petitioner, appearing by Mark D Witecki CPA CFP(R) CFE (Mark D Witecki, CPA), served a demand for a bill of particulars, dated October 3, 2024, on the Division of Taxation. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), brought a motion on October 21, 2024 seeking an order vacating the demand for a bill of particulars pursuant to sections 3000.5 (b) and 3000.6 (a) (2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response by November 20, 2024, which date commenced the 90-day period for the issuance of this order.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jennifer L. Baldwin, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. On February 28, 2024, petitioner, Jacob B. Constantine d/b/a Allphase Masonry & Chimney, filed a petition with the Division of Tax Appeals. The petition protests a conciliation order, CMS number 000344159, issued by the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS), dated December 8, 2023. The conciliation order sustained a notice of determination, notice number L-056006221, issued by the Division to petitioner, dated May 24, 2022 (notice). The notice asserted additional sales or use tax in the amount of \$212,440.44, plus interest, for the period September 1, 2014 through May 31, 2021.

2. In section VIII of the petition, petitioner alleged the following:

“PLEASE SEE ATTACHED LETTER EXPLAINING TREATMENT OF CHIMNEY STACKS THE DEPARTMENT OF TAXATION AND FINANCE CLASSIFIED AS REPAIRS. PETITIONER DISPUTES THIS TREATMENT AND ATTACHED REPORTS AND ANALYSIS FOR SUPPORT THAT THESE TRANSACTIONS ARE INDEED CAPITAL IMPROVEMENTS. A DETAILED REPORT IS ATTACHED ALLEGING THE ERRORS.”

The attached letter provided, in relevant part, as follows:

“Petition Section VIII Reasons for Dispute:

1) Issue – Is replacing a chimney ‘from the roofline up’ a capital improvement or a repair? The sales tax audit considered such replacement a taxable repair. We disagree with that, and conclude that it is a capital improvement.

New York State Department [of Taxation] and Finance Tax Bulletin TB-ST-104 dated July 27, 2012 describes a capital improvement as such:

[A capital improvement is any addition or alteration to real property that meets ALL THREE of the following conditions:

- (a) ‘It substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property.’
- (b) ‘It becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself.’
- (c) It is intended to become a permanent installation.

It is our position that the chimney stack, that is, the chimney above the roofline is a separate structure and is different from a chimney that is on the outside of the structure . . .”

The first attached report, entitled “ANALYSIS OF CAPITAL IMPROVEMENT QUALIFICATION: MASONRY CHIMNEY STACK REPLACEMENT,” dated February 21, 2024, provides a criterion evaluation of masonry chimney components and distinguishing design differences. The second report allegedly shows “corrections” of the Division’s analysis of taxable sales. The second report references a spreadsheet prepared by the Division that included “every invoice generated by the taxpayer form [sic] 09/01/2014 thru 5/31/2021” and “the Invoice Date, Invoice #, Customer Name, Taxable Sales, Tax Rate, and Sales Tax Due” of each transaction.

3. On August 21, 2024, the Division filed its answer to the petition. Paragraph (1) of the answer denied knowledge or information sufficient to form a belief regarding the allegations in the petition. Paragraphs (2) through (6) contained the Division’s affirmative statements.

Paragraph (2) provided as follows:

“AFFIRMATIVELY STATES that the Division determined that Petitioner owed additional tax for the period of 09/01/2014 through 05/31/2021. The Division made that determination because Petitioner’s repairs to chimney stacks do not qualify as a capital improvement under Tax Law §§ 1105(c)(3), (5) but are considered taxable repairs to existing property.”

Paragraph (6) provided as follows:

“AFFIRMATIVELY STATES that except as otherwise provided all purchases and sales of tangible personal property and enumerated services are presumptively subject to tax (Tax Law Section 1132(c)), and at hearing, it is the Petitioner’s burden to prove and establish by clear and convincing evidence that the assessment is erroneous and/or improper.”

4. On September 5, 2024, petitioner filed a reply to the Division’s answer. Petitioner responded to paragraph (2) of the Division’s answer as follows:

“As to paragraph (2) of the ANSWER, Petitioner AFFIRMATIVELY STATES that the Division determined that Petitioner owe[s] additional tax for the period 09/01/2014 through 05/31/2021 but AFFIRMATIVELY DENES [sic] that the Department correctly evaluated the chimney invoices and disagree[s] with the audit results. There are some that are repairs and many others are capital improvements, according to the data provided to the Department in the Petition. We are referring to complete replacement of above the roof chimney work, which according to the analysis in the petition, is a capital improvement. There are also other areas that were incorrectly considered repairs, but were not specifically addressed in the audit.”

Petitioner responded to paragraph (6) of the Division’s answer as follows:

“As to paragraph (6) of the ANSWER, petitioner AFFIRMATIVE[LY] STATES that the [sic] except as otherwise provided all purchase and sales of tangible personal property and enumerated services are presumptively subject to tax (Tax Law Section 1132(c) , [sic] and at hearing it is the Petitioner’s burden to prove and establish by clear and convincing evidence that the assessment is erroneous and/or improper. PETITIONER has established by CLEAR AND CONVINCING EVIDENCE that the chimney work and other work deemed taxable by the Department was in fact a capital improvement. There are different kinds of chimney work. Chimney repair is taxable, but the type of chimney work involved meets the criteria for capital improvement status, as well as some other work classified by the Department as taxable. Petitioner DENIES that the audit results are correct with respect to the chimney analysis.”

5. On October 3, 2024, petitioner served a demand for a bill of particulars on the Division. The demand included one paragraph, which provided as follows:

“The New York State Department of Taxation and Finance (The department) assessed [petitioner] with tax due (see assessment # L-056006221-7[]). Although a summary of tax owed was provided, upon information and belief there was no detail of how the amount was arrived at. The Department claims many of the items that [petitioner] stated were capital improvements were actually repairs. The Department stated to [petitioner] that they did not do a sample audit but went invoice by invoice. We request a detailed list of the invoices in question. The invoice detail is necessary because one of the largest items of contention is the treatment of above the roof stack replacement. [Petitioner] retained an expert witness to ascertain the classification of the roof stack replacements which qualify as a capital improvement. [Petitioner] is not disputing true repairs, but the items in question represent a significant portion of what The [d]epartment says [petitioner] owes. Attached is the summary of what the audit proposed in assessment, but no detail as to the specific invoices and dates were given. This information is critical to clarify the amounts due. We demand that a detail listing of each invoice and the reason for disallowance or allowance classification be

provided, as it is necessary to determine the accuracy of the audit and will further expedite proceedings in this case.”

6. On October 21, 2024, the Division made a motion to vacate petitioner’s demand for a bill of particulars on the basis that the demand sought evidentiary material rather than an amplification of the Division’s answer and particularization of issues on which the Division does not bear the burden of proof.

7. Petitioner did not file a response to the Division’s motion.

CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) permit the use of a bill of particulars in proceedings in the Division of Tax Appeals. Specifically, section 3000.6 (a) of the Rules provides, in relevant part, as follows:

“(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.”

B. As noted, the Rules permit the use of a bill of particulars in proceedings in the Division of Tax Appeals “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.6 [a] [1]). 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]), therefore, it is helpful to refer to CPLR 3041, “Bill of particulars in any case,” and caselaw arising under that section for guidance.

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 & 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 on to prove their claims (*see Bassett v Bando Sangsa Co.*, 94 AD2d 358, 359 [1st Dept 1983], *appeal dismissed* 60 NY2d 962 [1983]; *State of New York v Horsemen's Benevolent & Protective Assn. [N.Y. Div.]*, 34 AD2d 769, 770 [1st Dept 1970]). Generally, a party need particularize only those matters on which it has the burden of proof (*see Holland v St. Paul Fire & Mar. Ins. Co.*, 101 AD2d 625, 625 [3d Dept 1984]).

D. In proceedings in the Division of Tax Appeals, a presumption of correctness attaches to a notice of determination and petitioner bears the burden of overcoming that presumption (*see Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995, citing *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). Specifically, in matters before the Division of Tax Appeals, petitioner bears the burden of proof except as otherwise provided by law (*see* 20 NYCRR 3000.15 [d] [5]).

E. In this matter, petitioner demands “a detail listing of each invoice and the reason for disallowance or allowance classification.” Initially, it appears that petitioner already received such information from the Division as one of the reports that petitioner relies on to support his position specifically refers to a spreadsheet prepared by the Division that included “every invoice generated by the taxpayer form [sic] 09/01/2014 thru 5/31/2021” and “the Invoice Date, Invoice #, Customer Name, Taxable Sales, Tax Rate, and Sales Tax Due” of each transaction (*see* finding of fact 2). Nevertheless, a demand for a bill of particulars may not be used to obtain the

evidentiary detail petitioner seeks here (*see Bassett v Bando Sangsa Co.*, 94 AD2d at 359; *State of New York v Horsemen's Benevolent & Protective Assn. [N.Y. Div.]*, 34 AD2d at 770).

Therefore, petitioner's demand is properly vacated on this basis.

Furthermore, the Division need not particularize matters on which it does not have the burden of proof (*see Holland v St. Paul Fire & Mar. Ins. Co.*, 101 AD2d at 625). Petitioner bears the burden to overcome the notice (*see* 20 NYCRR 3000.15 [d] [5]). In his reply, petitioner agrees: "it is the Petitioner's burden to prove and establish by clear and convincing evidence that the assessment is erroneous and/or improper" (*see* finding of fact 4). He argues, in response, that he has satisfied that burden. While petitioner clearly disagrees with the Division's conclusion as to the taxability of petitioner's chimney services, there is no question that petitioner is apprised of the Division's basis for its conclusion. Therefore, petitioner's demand is properly vacated on this basis as well. At the hearing in this matter, petitioner and the Division will be given the opportunity to present their cases and to argue the law and facts that support their respective positions.

F. The Division of Taxation's motion to vacate the demand for a bill of particulars is granted, and a hearing will be scheduled in due course.

DATED: Albany, New York
February 13, 2025

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE