

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ALITALIA SOCIETÀ</b>	:	<b>ORDER</b>
<b>AEREA ITALIANA S.P.A.</b>	:	<b>DTA NO. 850676</b>
	:	
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period December 1, 2016 through May 31, 2019.	:	

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Petitioner, Alitalia Società Aerea Italiana S.p.A., filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2016 through May 31, 2019.

Petitioner, appearing by KMA Zuckert LLC (Jolyon A. Silversmith, Esq.), filed a demand for a bill of particulars pursuant to 20 NYCRR 3000.6 (a) (1), dated February 6, 2024. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary Humphrey, Esq., of counsel), brought a motion on February 15, 2024, seeking an order pursuant to 20 NYCRR 3000.6 (a) (2) vacating the demand for a bill of particulars. Petitioner filed a response with attached exhibits, dated March 18, 2024, which date began the 90-day period for the issuance of this order.

Based upon the pleadings, motion papers, and other documents filed by the parties, Alexander Chu-Fong, 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 October 2, 2023, petitioner, Alitalia Società Aerea Italiana S.p.A., timely filed a petition with the Division of Tax Appeals.
2. This petition protests a conciliation order, CMS No. 000329390, issued by the Bureau of Conciliation and Mediation Services (BCMS), dated July 7, 2023, which sustained notices of determination L-052806575, L-052806563, and L-052806558 (notices), issued by the Division of Taxation (Division).
3. The notices asserted additional tax due based upon payments made by petitioner to another airline, or another airline to petitioner, to enable certain passengers the right to utilize airport lounges at New York's John F. Kennedy International Airport.
4. Through the BCMS process, the Division represented that it assessed additional tax based upon its application of Tax Law § 1105 (d) (i) to these transactions to and from petitioner.
5. Petitioner then, as it does now, disagrees with the Division's interpretation and application of Tax Law § 1105 (d) (i). These reasons include, among others, the incidental nature of the food and drink available in the lounges, application of the federal Anti-Head Tax Act, as well as double taxation.
6. On January 10, 2024, the Division served an answer. This document, in its entirety, is reproduced below:

“The Division of Taxation (Division) as and for its Answer to the Petition, states the following:

1. DENIES the allegations set forth in the Petition except as otherwise set forth herein.
2. AFFIRMATIVELY STATES that at all times relevant hereto, Petitioner, Alitalia Società Aerea Italiana S.P.A., operated a business that is subject to sales tax in New York State.

3. AFFIRMATIVELY STATES that at all times relevant hereto, Alitalia Societa Aerea Italiana S.P.A. (Petitioner) made purchases and sales of tangible personal property and/or services subject to tax under Articles 28 and 29 in New York State.

4. 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 § 1132[c]), and it is the Petitioner's burden to prove by clear and convincing evidence that the assessments are erroneous and/or improper.

5. AFFIRMATIVELY STATES that the Division conducted an audit of Petitioner which resulted in the determination that additional sales tax was due.

6. AFFIRMATIVELY STATES that the Division issued to Petitioner Notice and Determination L-052806558 dated February 1, 2021, assessing sales tax due of \$5,766.74 plus interest and penalties, for the period December 1, 2016 through May 31, 2019, Notice and Determination L-052806563 dated February 1, 2021, assessing sales tax due of \$156,303.21, plus interest and penalties, for the period December 1, 2016 through May 31, 2019 and Notice and Determination L-052806575 dated February 1, 2021, assessing sales tax due of \$458,039.21, plus interest and penalties, for the period December 1, 2016 through May 31, 2019.

7. AFFIRMATIVELY STATES that the Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) and that by BCMS Conciliation Order dated July 7, 2023, the notices were sustained.

8. AFFIRMATIVELY STATES that the burden of proof is upon the Petitioner to establish by clear and convincing evidence that the Notices at issue are erroneous or otherwise improper.

9. AFFIRMATIVELY STATES that there has been no showing that the failure to timely report and/or pay the tax was due to reasonable cause and not due to willful neglect.

WHEREFORE, the Division of Taxation respectfully requests that the Petition in this matter be denied, the statutory notice [sic] be sustained, and requests for further relief that the Division of Tax Appeals deems just and proper.”

7. On February 6, 2024, pursuant to Section 3000.6 (a) of Tax Appeals Tribunal (Tribunal) Rules of Practice and Procedure (Rules or 20 NYCRR), petitioner served a Demand for Bill of Particulars (demand) on the Division. It contains six items, each of which

substantively disagrees with the Division's position and probes its legal posture. Each item contains the language "identify and provide all documents and information," and seeks production from the Division.

### ***SUMMARY OF THE PARTIES' POSITIONS***

8. The Division brought the instant motion to vacate the demand on the basis that it seeks evidentiary material rather than an amplification of the answer, requests attorney work product, and aims to particularize issues upon which petitioner bears the burden of proof. Therefore, the Division submits that the motion should be granted, and the demand vacated.

9. Petitioner defends its demand by arguing that the Division offers no elaboration of its legal theory supporting the liability. It complains that the Division has been nonresponsive to its submissions and arguments. Supporting its position by citing to a Division of Tax Appeals determination,<sup>1</sup> petitioner argues that greater specificity is required to determine the theory that the Division will advance at hearing.

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

A. The purpose of the Division of Tax Appeals is to provide the public with "a just system of resolving controversies with [the Division] and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). To provide parties with a fair and orderly system, the Tribunal promulgated the Rules, which require both parties to file pleadings that give "fair notice of the matters in controversy and the basis for the parties' respective positions" (20 NYCRR 3000.4 [a]).

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<sup>1</sup> Petitioner cited to the order in *Matter of Woodner*, Division of Tax Appeals, January 11, 2018, which addressed another demand for a bill of particulars. Administrative Law Judge determinations lack precedential value and will not be referenced herein (*see* Tax Law § 2010 [5]).

B. Section 3000.6 (a) of the Rules permit the use of a bill of particulars in proceedings in the Division of Tax Appeals, in pertinent 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.”

Through the Rules, the Tribunal firmly establishes that the purpose of a demand for a bill of particulars is “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.6 [a] [1]). This accords with the same vehicle’s use in court.

C. In the New York courts, the function of a demand for a bill of particulars “is ‘to amplify the pleadings, limit the proof and prevent surprise at the trial’” (*Bouton v County of Suffolk*, 125 AD2d 620, 621 [2d Dept 1986], citing *Medaris v Vosburgh*, 93 AD2d 882 [2d Dept 1983], citing *Patterson v Jewish Hosp. & Med. Ctr. Of Brooklyn*, 94 Misc 2d 680, 682 [Sup Ct, Kings County 1978], *affd* 65 AD2d 553 [2d Dept 1978]). It enables the demanding party to know, definitively, the claims to be defended against (*Johnson, Drake & Piper v State of New York*, 43 Misc 2d 513, 515 [Ct Cl, 1964]). The demand must be narrowly tailored because the “disclosure of evidentiary detail is not the office of a bill of particulars” (*State of New York v Horsemen's Benev. & Protective Assn. (N.Y. Div.)*, 34 AD2d 769, 770 [1st Dept 1970]). So often, the courts have restated that demands are “of limited scope and may not be used to obtain evidentiary material” (*Bouton v County of Suffolk*, 125 AD2d at 621, citing *Ginsberg v*

*Ginsberg*, 104 AD2d 482, 484 [2d Dept 1984]). They have vacated various demands, determining them “palpably improper,” including those seeking evidentiary material, and those relating to matters of law (*State of New York v General Elec. Co.*, 173 AD2d 939, 941 [3d Dept 1991]).

D. Parties to matters both in the courts and at the Division of Tax Appeals must particularize their pleadings only on issues that the party possesses the burden of proof (*see e.g. Holland v St. Paul Fire & Mar. Ins. Co.*, 101 AD2d 625 [3d Dept 1984]). Petitioners in this forum, in order to be successful, must carry the burden because they must overcome the presumption of correctness that attaches to a notice of determination (*see e.g. Matter of Estate of Gucci*, Tax Appeals Tribunal, July 10, 1997, citing *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). The Rules further reiterate this point: except as otherwise provided by law, “[t]he burden of proof shall be upon the petitioner” (20 NYCRR 3000.15 [d] [5]). Having observed these principles, it is now appropriate to analyze whether the instant motion should be granted.

E. Here, each item of the demand violates the established principles guiding bills of particulars. Insofar as it probes the Division’s legal posture, it is improper (*Morell v Saratoga Harness Racing*, 44 AD2d 884, 885 [3d Dept 1974]). By seeking “all documents and information,” the demand attempts “to gain disclosure of evidentiary material [which] is improper” (*Bassett v Bando Sangsa Co.*, 94 AD2d 358, 359 [1st Dept 1983], *appeal dismissed* 60 NY2d 962 [1983]). Each item meets the “palpably improper” standard set forth by the courts. Therefore, the demand, in its entirety, cannot stand, and the instant motion must be granted.

F. It is noted that, in reaching this conclusion, the Division’s answer only minimally meets the standard set forth in the Rules (20 NYCRR 3000.4 [b]). A reasonable reading of the

notice and the Division's answer bears out that, at this stage of the proceedings, petitioner has been apprised of the existence of the assessed determinations, the periods in question, and the Division's legal basis for its determination. There is no question that petitioner has been apprised of the Division's basic premise for its assessments. Further, the detail and clarity of the manner that petitioner sets forth its allegations of error, and its position, establishes the conclusion that petitioner fully comprehends – and disagrees with – what it knows of the Division's position. At the hearing in this matter, petitioner and the Division will be given the opportunity to fully present their cases and to argue the law and facts supporting their respective positions.

G. The Division of Taxation's motion to vacate the demand for a bill of particulars is granted, and this matter shall proceed to hearing in due course.

DATED: Albany, New York  
May 23, 2024

/s/ Alexander Chu-Fong  
ADMINISTRATIVE LAW JUDGE