

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

DUNN CO SAFETY LLC :

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, 2020 through :
February 28, 2022. :

In the Matter of the Petition :

of :

LI HUA DUNN :

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, 2020 through :
February 28, 2022. :

In the Matter of the Petition :

of :

SHAHID N. MALIK :

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, 2020 through :
February 28, 2022. :

ORDER
DTA NOS. 851099, 851108
AND 851109

Petitioner, Dunn Co Safety LLC, 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, 2020 through February 28, 2022.

Petitioner, Li Hua Dunn, 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, 2020 through February 28, 2022.

Petitioner, Shahid N. Malik, 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, 2020 through February 28, 2022.

On November 27, 2024, petitioners, appearing by Sales Tax Helper, LLC (Gerald J. Donnini II, Esq., and Aleksandr Tsatskin, Esq., of counsel), served three demands for bills of particulars on the Division of Taxation pursuant to 20 NYCRR 3000.6 (a). The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), brought motions on December 23, 2024 seeking orders vacating the demands for bills of particulars pursuant to 20 NYCRR 3000.5 (b) and 3000.6 (a) (2). Petitioners filed responses by January 22, 2025, 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 these matters, Donna M. Gardiner, Supervising Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motions to vacate demands for bills of particulars should be granted.

FINDINGS OF FACT

Dunn Co Safety LLC (DTA No. 851099)

1. On July 18, 2024, petitioner, Dunn Co Safety LLC, filed a petition with the Division of Tax Appeals. The petition protested a conciliation order, CMS number 000349307, issued by the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division), dated April 26, 2024. The conciliation order sustained a notice of determination, notice number L-057221404, issued by the Division to petitioner, dated October 19, 2022 (notice). The notice asserted additional sales and use taxes in the amount of \$215,709.21, plus penalty and interest, for the period December 1, 2020 through February 28, 2022.

2. On October 16, 2024, the Division filed an answer to the petition. Paragraph (1) of the answer denied the allegations set forth in the petition except as otherwise set forth in the answer. Paragraphs (2) through (9) contained the Division's affirmative statements. Paragraph (3) provided as follows:

“AFFIRMATIVELY STATES that at all times relevant hereto Petitioner made purchases and sales of tangible personal property and/or services subject to tax under Articles 28 and/or 29 in New York State.”

Paragraph (4) 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 §1132[c]).”

Paragraph (5) provided as follows:

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

Paragraph (8) provided as follows:

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

Paragraph (9) provided as follows:

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

3. On November 1, 2024, petitioner filed a reply to the Division’s answer. Petitioner responded to paragraph (3) of the Division’s answer as follows:

“In reply to paragraph 3 of the Answer, Petitioner asserts that it did not make purchases and sales of tangible personal property and/or services subject to tax under Article 28 and/or 29 of the Tax Law.”

Petitioner responded to paragraph (4) of the Division’s answer as follows:

“In reply to paragraph 4 of the Answer, Petitioner asserts that its sales and services are not taxable, thus, a presumption of taxability does not arise pursuant to Tax Law Section 1132(c). Petitioner further asserts that as a rule of statutory construction, a statute which levies a tax must be construed most strongly against the taxing authority and in favor of the taxpayer” (citations omitted).

Petitioner responded to paragraph (8) of the Division’s answer as follows:

“In reply to paragraph 8 of the Answer, Petitioner asserts that its burden, by clear and convincing evidence, has been established, as Petitioner does not provide protective and detective services under Section 1105(c)(8) of the Tax Law. Further, Petitioner reasserts that in terms [of] statutory construction, a taxing statute must be construed in favor of Petitioner and ‘[a] tax law should be interpreted as the ordinary person reading it would interpret it[.]’” (citations omitted).

Petitioner responded to paragraph (9) of the Division’s answer as follows:

“In reply to paragraph 9 of the Answer, Petitioner asserts that an abatement of penalties and interest are [sic] warranted, and reasonably [sic] cause has been established, as Petitioner’s services do not fit in within the meaning of protective and detective services under Section 1105(c)(8).”

Li Hua Dunn and Shahid N. Malik (DTA Nos. 851108 and 851109)

4. On July 18, 2024, petitioner, Li Hua Dunn, filed a petition with the Division of Tax Appeals. The petition protested a conciliation order, CMS number 000352017, issued by BCMS, dated April 26, 2024. The conciliation order sustained a notice of determination, notice number L-057536436, issued by the Division to petitioner, dated December 13, 2022 (notice). The notice asserted additional sales or use tax in the amount of \$215,709.21, plus penalty and interest, for the period December 1, 2020 through February 28, 2022. The notice was issued to petitioner because she was determined to be an officer or responsible person of Dunn Co Safety LLC.

5. On July 18, 2024, petitioner, Shahid N. Malik, filed a petition with the Division of Tax Appeals. The petition protested a conciliation order, CMS number 000352015, issued by BCMS, dated April 26, 2024. The conciliation order sustained a notice of determination, notice number L-057536472, issued by the Division to petitioner, dated December 13, 2022 (notice). The notice asserted additional sales or use tax in the amount of \$215,709.21, plus penalty and interest, for the period December 1, 2020 through February 28, 2022. The notice was issued to petitioner because he was determined to be an officer or responsible person of Dunn Co Safety LLC.

6. On October 16, 2024, the Division filed a separate answer to each petition of Li Hua Dunn and Shahid N. Malik. Paragraph (1) of each answer denied the allegations set forth in the petition except as otherwise set forth in the answer. Paragraphs (2) through (11) contained the Division's affirmative statements. Paragraph (3) provided as follows:

“AFFIRMATIVELY STATES that at all times relevant hereto that Dunn Co Safety LLC, made purchases and sales of tangible personal property and/or services subject to tax under Articles 28 and/or 29 in New York State.”

Paragraph (4) 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 §1132[c]).”

Paragraph (5) provided as follows:

“AFFIRMATIVELY STATES that the Division conducted an audit of Dunn Co Safety LLC, that resulted in the determination that additional sales tax was due.”

Paragraph (6) provided as follows:

“AFFIRMATIVELY STATES that Petitioner is a responsible person for Dunn Co Safety LLC, and is personally liable for the tax, interest and penalties due.”

Paragraph (10) provided as follows:

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

Paragraph (11) provided as follows:

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

7. On November 1, 2024, Li Hua Dunn and Shahid N. Malik each separately filed a reply with identical responses to the Division’s answers. Petitioners responded to paragraph (3) of the Division’s answers as follows:

“In reply to paragraph 3 of the Answer, Petitioner asserts that it did not make purchases and sales of tangible personal property and/or services subject to tax under Article 28 and/or 29 of the Tax Law.”

Petitioners responded to paragraph (4) of the Division’s answers as follows:

“In reply to paragraph 4 of the Answer, Petitioner asserts that its sales and services are not taxable, thus, a presumption of taxability does not arise pursuant to Tax Law Section 1132(c). Petitioner further asserts that as a rule of statutory construction, a statute which levies a tax must be construed most strongly against the taxing authority and in favor of the taxpayer” (citations omitted).

Petitioners responded to paragraph (10) of the Division's answers as follows:

"In reply to paragraph 10 of the Answer, Petitioner asserts that its burden, by clear and convincing evidence, has been established, as Petitioner does not provide protective and detective services under Section 1105(c)(8) of the Tax Law. Further, Petitioner reasserts that in terms [of] statutory construction, a taxing statute must be construed in favor of Petitioner and '[a] tax law should be interpreted as the ordinary person reading it would interpret it'" (citations omitted).

Petitioners responded to paragraph (11) of the Division's answers as follows:

"In reply to paragraph 11 of the Answer, Petitioner asserts that an abatement of penalties and interest are [sic] warranted, and reasonably [sic] cause has been established, as Petitioner's services do not fit in within the meaning of protective and detective services under Section 1105(c)(8) of the Tax Law."

8. On December 2, 2024, the Division received identical demands for bills of particulars from Dunn Co Safety LLC, Li Hua Dunn, and Shahid N. Malik, filed on November 27, 2024 (demand), requesting that the Division "answer separately and fully" as follows:

- "1. List the name and address of the person(s) answering and any person assisting in answering these bills of particulars, and, if applicable, the person's official position or relationship with the party to whom the bills of particulars are directed. For each person identified, state which bill of particular or bills of particulars that person assisted.
2. Identify all persons who are believed or known by you, your agents or attorneys, to have any knowledge and/or custody of any documents relating to any of the issues in this lawsuit and specify the subject matter about which each person has knowledge and/or the documents of which each person has custody.
3. Identify each person believed by you to be a witness in this case and as to each person describe what you would expect them to testify about.
4. Identify all documents that you may, will, expect to, or intend to offer as exhibits at the trial or at any hearing in this matter, and describe the substance of each document.
5. Identify all persons (other than expert witnesses) who may have knowledge or information relevant to the Notice of Determination or relevant to any contentions that you will make in opposition to the Petition, and state the substance of each person's knowledge or information.

6. Identify each person that you may, will, expect to, or intend to call as an expert witness at the final hearing, the facts that you claim will qualify each such person as an expert witness, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

7. Identify all material facts the Division relied on in issuing its conclusions of law in the Notice of Determination.

8. Identify all promulgated administrative rules the Division relied on in issuing its conclusions of law in the Notice of Determination.

9. Explain how the Division determined the amount of alleged tax due in the Notice of Determination.

10. Identify all documents that the Division relied upon to determine the amount of alleged tax due in the Notice of Determination.

11. Explain how the Division assessed tax against the Petition[er] by utilizing an error rate as stated in the audit workpapers.

12. Identify when the Division began taxing site safety managers as taxable services under New York Tax Law Section 1105(c)(8).

13. Explain whether the Division believes that consulting services are taxable services under New York Tax Law Section 1105(c)(8).

14. Explain whether the Division believes that inspection services are taxable services under New York Tax Law Section 1105(c)(8).

15. Explain why the Division relied on TSB-A-20(14)S, attached hereto as Exhibit A, to assess sales and use tax against Petitioner.

16. If the Division denies any of Petitioner's Request for Admission served simultaneous[ly] with these Bills of Particulars, please state each reason and basis for the denial."

9. On December 23, 2024, the Division brought separate motions to vacate the demands for bills of particulars. The Division objected on the grounds that each demand was untimely filed since each was served more than 30 days from the filing of the answers. Additionally, the Division objected on the basis that each motion seeks evidentiary material rather than an

amplification of the Division's answers and particularization of issues for which the Division does not bear the burden of proof.

10. On January 10, 2025, each petitioner submitted an identical response in opposition to the Division's motions to vacate the demands for bills of particulars. Petitioners asserted that the Division's motions to vacate were untimely filed since they were served on December 23, 2024, a date that is more than 20 days after the December 2, 2024, date upon which the Division received the demands. Additionally, petitioners objected to the Division's motions to vacate on the basis that, here, the demands for bills of particulars attempt to amplify the pleadings, to limit the proof and to prevent surprise at future hearings.

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. Preliminarily, the Division argues that petitioners' demands were untimely since they were served on November 27, 2024, a date more than 30 days from when the answers were served (*see* 20 NYCRR 3000.6 [a] [1]). However, the Division fails to take into consideration

the last pleadings served which, in these matters, were petitioners' replies to the answers (*see* 20 NYCRR 3000.4 [c]). The replies were served on November 1, 2024. It is this date that commenced the 30-day period by which a party may serve written notice on the adverse party demanding a bill of particulars (*see* 20 NYCRR 3000.6 [a] [1]). Since the demands were served on November 27, 2024, they were timely filed.

C. The Division served its motions to vacate on December 23, 2024. Petitioners argue that the Division's motions were untimely since the motions were served more than 20 days after receipt of the demands (*see* 20 NYCRR 3000.6 [a] [2]). However, petitioners fail to consider that December 22, 2024, fell on a Sunday. Under General Construction Law § 25-a, "[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a . . . Sunday . . . , such act may be done on the next succeeding business day[.]" Therefore, the deadline to serve the motions was extended to the succeeding business day, Monday, December 23, 2024 (*see* General Construction Law § 25-a [1]). Accordingly, the Division's motions were timely.

D. 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.

E. The function of a 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 Cl 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, under the CPLR, 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]).

F. In proceedings before the Division of Tax Appeals, a presumption of correctness attaches to a notice of determination and petitioners bear 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, petitioners bear the burden of proof except as otherwise provided by law (*see* 20 NYCRR 3000.15 [d] [5]).

G. After considering the purpose of a demand for a bill of particulars, and the types of requests that impermissibly go beyond the purpose, it must be concluded that petitioners' demands are generally overbroad: they seek evidentiary detail and witness information; they probe the Division's legal interpretations; and they seek particulars on issues for which the Division does not have the burden of proof. Thus, given the substantial number of requests for information which are 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" (*see Posh Pillows v Hawes*, 138 AD2d 472, 474 [2d Dept 1988] [citations omitted]).

H. The Division of Taxation's motions to vacate petitioners' demands for bills of particulars are granted and these matters will be scheduled for a hearing in due course.

DATED: Albany, New York
April 17, 2025

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE