STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 820606
NANCY E. SCHIFFERLE	:	
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, 2000 through August 31, 2003.	:	

Petitioner, Nancy E. Schifferle, filed an exception to the order of the Administrative Law Judge issued on November 22, 2006. Petitioner appeared by Hodgson Russ, LLP (Jack Trachtenberg, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of her exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument, at petitioner's request, was heard on October 24, 2007 in Troy, New York. Supplemental briefs addressing the question whether the Tax Appeals Tribunal has jurisdiction to hear this appeal were filed pursuant to an order issued by the Tribunal on April 10, 2008.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") conducted an audit of Tuxedo Junction, Inc. ("Tuxedo") for the period September 1, 2000 through August 31, 2003. The audit led to an assessment of sales and use taxes on Tuxedo's purchase of solvents that were used to dry-clean and press tuxedos prior to their sale or rental. The company was also assessed tax on its purchases of dry-cleaning and pressing machines that were installed at the company's facilities. The amount of the assessment against Tuxedo was $9,522.68 plus interest.

The Division also issued a Notice of Determination, dated March 11, 2004, to petitioner, Nancy E. Schifferle, (assessment number L-023578396-6) in the amount of $9,050.29, plus interest, on the basis that she was a responsible officer of Tuxedo during the periods in issue. The amount assessed against petitioner was less than the amount assessed against the corporation because the assessment against petitioner omitted one sales tax period.

According to the Division's field audit report, the company refused to provide information to the auditor regarding who was a responsible person. The field audit report further states that "Officer Assessments were prepared because part of the audit was disagreed." (Emphasis in original.)

The Division issued a responsible officer assessment to petitioner as a responsible officer of the corporation because it found numerous indicia of responsibility including petitioner's status as an officer of the corporation, the fact that she signed tax returns on behalf of the corporation, she was an authorized signatory on corporate checks and she signed other documents on behalf of the corporation. The Division's papers include numerous forms bearing petitioner's signature including: a Test Period Audit Method Election dated November 4, 2002, a consent form to extend the statute of limitations dated November 4, 2003, and a Statement of Proposed Audit Change for Sales and Use Tax dated December 8, 2003. Each of the forms listed

petitioner's title as "V.P." The answering papers also include three checks in payment of sales tax which were signed by petitioner and drawn on the account of Tuxedo. Lastly, the answering papers include a group of part-quarterly sales and use tax returns for Tuxedo. The returns for the tax periods ending September 30, 2000 and October 31, 2000 were signed by petitioner as "V.P." The return for the period ending November 30, 2000 was signed by petitioner as "SR. V.P."

On November 17, 2004, a conference was held by the Bureau of Conciliation and Mediation Services. At the conference, it became clear to petitioner's representative that the Division did not conduct an investigation of petitioner's status as a responsible person. The auditor and her supervisor indicated that they had not communicated with petitioner regarding her role in the company.

The conciliation conferee sustained the notice issued to petitioner. Petitioner, in turn, filed a petition for an administrative hearing. Thereafter, the matter was converted to a small claims hearing.

A small claims hearing was scheduled on June 12, 2006. On this date, petitioner's representative again requested a cancellation of the responsible officer assessment. Without attempting to explain the assessment and before the introduction of any evidence or testimony, the Division's representative agreed to cancel the notice issued to petitioner. At this time, the parties executed a stipulation discontinuing the proceeding commenced by petitioner. Petitioner did not waive her right to seek reimbursement of litigation costs in the stipulation.

On June 29, 2006, the presiding officer issued an Order of Discontinuance, which stated that there was no agreement between the parties as to the prevailing party and that "petitioner may make application to the Division of Tax Appeals for such costs and fees as may be allowed by law."

In an affidavit, petitioner states that she has been employed by Tuxedo Junction as its senior vice president since approximately 1998. In July 2002, she took a leave of absence from the company due to a back injury that required an extensive operation to correct. As of July 31, 2006, petitioner has been on disability and has not resumed any of her duties as senior vice president of the company. She has been completely uninvolved in the daily operations of the business. Petitioner states "It is my understanding that the Company was audited by the Buffalo District Office of the New York State Department of Taxation and Finance . . . for the 09/01/00 through 08/31/03 tax period." To the extent pertinent to this application, petitioner states:

> To my recollection, the auditors made this determination without ever having communicated with me regarding my role at the company. The auditors never questioned me regarding my day-to-day responsibilities. For example, they never asked me whether I was an owner of the Company, whether I decided which creditors to pay, whether I hired and fired employees, or whether I knowingly failed to pay any applicable taxes. If they had asked, I would have told them that I did none of these things. In fact, I would have been able to inform them that I was not even working at the Company (due to my back injury) for a good portion of the audit period.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the requirements of Tax Law § 3030 and concluded that petitioner was not a "prevailing party" within the meaning of the statute because the Division was substantially justified in issuing the Notice of Determination to petitioner. This finding was supported by the facts that petitioner was an executive officer of Tuxedo Junction, Inc., signed the corporation's tax returns and participated in the audit. In view of this conclusion, he found it unnecessary to address petitioner's other arguments.

ARGUMENTS ON EXCEPTION

In support of her exception, petitioner argues that the Administrative Law Judge erred in failing to conduct a hearing to determine whether petitioner was a responsible person and in

failing to accept petitioner's reply papers in the record. Petitioner also asserts that the Division's position was not substantially justified because it contravenes well established case law and the Division's regulations and audit guidelines. Moreover, it is argued that petitioner has established that she was the prevailing party as to the issues contested in the underlying case and has established the reasonableness of the attorney's fees she seeks to recover.

In her supplemental brief, petitioner argues that the Tribunal has jurisdiction to hear the appeal of the Administrative Law Judge's order denying the application for costs based on petitioner's analysis of the words of section 3030(e)(2) and distinguishes the Federal cases interpreting similar language in the Internal Revenue Code.

The Division argues in opposition that it was substantially justified in asserting that petitioner was a responsible person based on her designation as the corporate executive in charge of the tax audit who also signed tax returns and checks for the payment of sales tax. The Division also rejects the assertion that its position was inconsistent with its regulations or audit guidelines. In addition, the Division submits that the Administrative Law Judge properly rejected as untimely, petitioner's filing of papers in reply to the Division's Affirmation in Opposition. With respect to the issue of the jurisdiction of the Tribunal to hear this appeal, the Division argues that Tax Law § 3030 clearly provides that the determination of costs is subject to review only to the extent that the original substantive determination was subject to review.

OPINION

As a threshold matter, we must decide whether the Tax Appeals Tribunal has subject matter jurisdiction to hear petitioner's appeal from the order of the Administrative Law Judge. If we do not have such jurisdiction, it cannot be conferred on the Tribunal by the parties' waiver or

failure to object to the Tribunal's acceptance of the appeal. Thus, we must reject on our own motion an appeal that we do not have the authority to entertain.

Tax Law § 3030(a) provides, generally, as follows:

> In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or settlement for:
>
> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and
>
> (2) reasonable litigation costs incurred in connection with such court proceeding.

Administrative proceeding and court proceeding are defined in section 3030(c) as follows:

> (6) The term "administrative proceeding" means any procedure or other action before the division of taxation (such as the bureau of conciliation and mediation services) or the division of tax appeals.
>
> (7) the term "court proceeding" means any civil action brought in a court of the state of new york (including proceedings before the surrogate's courts under section nine hundred ninety-eight of this chapter).

Appeals with respect to proceedings for the award of costs are subject to the following limitations in section 3030(e):

> (e) Right of appeal.
>
> (1) Court proceedings. An order granting or denying (in whole or in part) an award for reasonable litigation or administrative costs under subdivision (a) of this section in a court proceeding, may be incorporated as a part of the decision or judgment in the court proceeding and shall be subject to appeal in the same manner as the decision or judgment.
>
> (2) Administrative proceedings. A determination or decision granting or denying (in whole or in part) an award for reasonable administrative costs under subdivision (a) of this section by the division of tax appeals or the tax appeals tribunal shall be subject to exception or review in the same manner as the determination or decision.

In the present case, the underlying matter involved a petition for redetermination of sales and use taxes that was conducted before the small claims unit of the Division of Tax Appeals, which is provided for in Tax Law § 2012 (***see, Matter of Tuxedo Junction***, Small Claims Determination, DTA No. 820604, March 29, 2007). The small claims provisions contemplate an informal and simplified procedure before a presiding officer from whose decision there is generally no right of appeal. The statute states in this regard, "The final determination of the presiding officer in the small claims unit shall be conclusive upon all parties and shall not be subject to review by any other unit in the division of tax appeals, by the tax appeals tribunal or by any court of the state (Tax Law § 2012 [ninth sentence])."

Since no appeal of the determination of the presiding officer in a small claims matter is permitted and section 3030(e)(2) states that a determination denying an award for costs is "subject to exception or review in the same manner as the determination," the issue is presented whether we have the authority to entertain an exception where as here the underlying matter was a small claims proceeding.

Section 3030 is based in significant part on section 7430 of the Internal Revenue Code with certain differences in wording that may or may not have substantive significance in the present case. First, in section 7430(c)(5) and (6) of the Internal Revenue Code the definition of "administrative proceedings" is limited to matters before the Internal Revenue Service while "court proceeding" includes matters before the United States Tax Court. In section 3030, the Division of Tax Appeals and the Tax Appeals Tribunal are included in the definition of administrative proceedings although, like the Tax Court, they are adjudicative bodies outside the judicial branch of government. Second, with respect to appeals in court proceedings, section 7430(f)(1) of the Internal Revenue Code, like section 3030(e)(1) of the Tax Law, states that an

order granting or denying an award of costs "may be incorporated as a part of the decision or judgement in the court proceeding and shall be subject to appeal in the same manner as the decision or judgement." With respect to administrative proceedings, section 7430(f)(2) and (3) provide that a decision of the Internal Revenue Service granting or denying an award of costs may be appealed by filing a petition for review with the Tax Court and that an order of the Tax Court disposing of such a petition "shall be reviewable in the same manner as a decision of the Tax Court." The parallel provision in the Tax Law, section 3030(e)(2), which is quoted above, states that a determination or decision on costs "shall be subject to review in the same manner as the determination or decision."

The provision governing small claims proceedings in the Tax Court, like section 2012 of the Tax Law, provides that decisions in such cases are not appealable (***see,*** IRC § 7463[b]). While we are aware of no Federal cases that address the appealability of a Tax Court decision granting or denying costs in a small claims proceeding, there are two Federal appellate decisions interpreting similar language in section 7429 of the Internal Revenue Code governing review of jeopardy assessments by Federal district courts and the Tax Court. Section 7429(f) provides that any determination made by a court under section 7429 "shall be final and conclusive and shall not be reviewed by any other court."

In ***Randazzo v. United States***, 751 F2d 145 (3d Cir 1984), the taxpayer successfully challenged a jeopardy assessment in the district court but his motion for costs was denied. The United States Court of Appeals for the Third Circuit held that it was without jurisdiction to hear an appeal of the denial because section 7430(e) states clearly and unambiguously that the determination "shall be subject to appeal in the same manner as the decision or judgement" and an appeal of the district court's determination with respect to the assessment would have been

barred by section 7429(f). ***Stites v. United States***, 978 F2d 1091 (9th Cir 1992), reached the same conclusion and stated as follows:

> The plain language of Section 7430 compels us to treat an appeal of the district court's attorneys fees determination arising out of a Section 7429 action "in the same manner" as we would treat an appeal of the Section 7429 action itself. The district court's judgement abating the jeopardy assessment against Stites is not subject to appellate review; therefore, the district court's refusal to award attorney's fees to Stites [is] not subject to appellate review (978 F2d, at 1092-1093).

In her supplemental brief, petitioner makes several arguments in favor of finding jurisdiction in the Tribunal to hear this appeal. First, it is asserted that "the Tribunal is permitted, under Tax Law § 3030(e)(2) to review an administrative determination denying costs if the determination that denied the costs is itself a 'determination' that is subject to review." In other words petitioner is reading the phrase "determination or decision" that both begins and ends the text of section 3030(e)(2) as referring to the same decision or determination, namely the decision or determination granting or denying costs. This would reduce the provision to tautological triviality–*viz.* the order is appealable in the manner in which it is appealable. This interpretation is also inconsistent with the parallel phrasing of section 3030(e)(1), the otherwise symmetrical provision dealing with court proceedings, which clearly ties the appealability of the cost order to the appealability of the decision in the underlying case.

Second, as discussed above, the Tax Law treats cases before the Division of Tax Appeals as "administrative proceedings" --a category that in the Federal statute comprises only matters before the Internal Revenue Service. Accordingly, petitioner argues that Tax Law § 3030(e)(2) should be interpreted consistently with section 7430(f)(2) and (3), which governs Tax Court proceedings to review an administrative denial of costs, and asserts further that proceedings "are

appealable even though they are governed by the rules for 'small tax cases' under IRC § 7463, which are (like New York's small claims proceedings) typically not subject to review."

Section 7430(f) of the Internal Revenue Code is similar to Tax Law § 3030(e). The Federal provision reads in pertinent part as follows:

> (f) Right of Appeal.--
>
> (1) Court proceedings. – An order granting or denying (in whole or in part) an award for reasonable litigation or administrative costs . . . in the court proceeding, may be incorporated as a part of the decision or judgment in the court proceeding and shall be subject to appeal in the same manner as the decision or judgment.
>
> (2) Administrative proceedings. – A decision granting or denying (in whole or in part) an award for reasonable administrative costs . . . by the Internal Revenue Service shall be subject to the filing of a petition for review with the Tax Court . . .
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> (3) Appeal of Tax Court Decision. – An order of the Tax Court disposing of a petition under paragraph (2) shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

By referring to "a decision of the Tax Court," section 7430(f)(3) can be read to provide a more liberal rule governing appeals to the Federal courts of appeal of Tax Court orders reviewing of decisions of the Internal Revenue Service on costs than would be applicable under section 7430(f)(1), which refers to "the decision or judgment," in the case of Tax Court orders on costs following a small claims decision of the Tax Court. The use of the indefinite article-- "a" decision, rather than "the" decision–appears to mean simply a generic Tax Court case rather than the case at hand.

A comparison of the language of section 7430(f) of the Internal Revenue Code and section 3030(e) of the Tax Law does not support the conclusion that petitioner advances here. Instead it suggests that the New York Legislature, in drafting section 3030(e)(2), purposely chose the more

restrictive language as is found in section 7430(f)(1) and rejected the apparently more liberal rule for administrative costs found in section 7430(f)(3) on which petitioner urges us to rely. Moreover, the application of the statutory rules produces the same result in cases resolved before the Division of Taxation and those before the Internal Revenue Service. Since prior to filing a petition with Tax Court or the Division of Tax Appeals there is no small claims case governed respectively by section 7463 of the Internal Revenue Code or section 2012 of the Tax Law, the statutory prohibition on appeals of such cases does not apply. Once that prohibition attaches to the underlying case, it applies to the cost adjudication as well.

Petitioner's third argument is as follows: Under the practice and procedure regulations of the Division of Tax Appeals, motion practice is not permitted in the small claims unit (***see,*** 20 NYCRR § 3000.13[c][3]). Motions must be made before an Administrative Law Judge (***see,*** 20 NYCRR § 3000.5[b]). Accordingly, if the application for costs is properly viewed as a motion before an Administrative Law Judge, the resulting order is not a final nonappealable determination of the small claims unit but instead should be subject to appeal in the same manner as any other order issued by an Administrative Law Judge. Petitioner draws support for this argument from ***Keeffe v. Tax Appeals Tribunal***, 216 AD2d 692 (3d Dept 1995), ***appeal dismissed***, 86 NY2d 884 (1995), ***confirming***, ***Matter of Keeffe***, Tax Appeals Tribunal, January 20, 1994. In that case, the petitioner was unsuccessful in a personal income tax matter conducted before a presiding officer in the small claims unit and subsequently brought a motion before the Division of Tax Appeals to reopen the hearing. The Chief Administrative Law Judge issued an order denying the motion on the grounds that motions pursuant to 20 NYCRR § 3000.5 are prohibited in small claims matters by the provision of the regulation now found in 20 NYCRR § 3000.13(c)(3). We affirmed that order because the Tribunal's authority to review a

determination of a presiding officer is limited by section 2012 of the Tax Law to those instances where there are allegations of proof of misconduct by the presiding officer. The Appellate Division confirmed that decision stating in part as follows:

> In confirming the Tribunal's determination, we are guided by the provisions of Tax Law § 2012. That statute specifically prohibits both administrative and judicial review of a small claims decision with one exception. Under that exception, the Tribunal "may order a rehearing upon proof or allegation of misconduct by the presiding officer of the small claims proceeding" (Tax Law § 2012). Here, however, in making their motion before the ALJ, petitioners never alleged any misconduct on the part of the Presiding Officer and, as the ALJ noted, review of a small claims hearing was precluded absent proof of misconduct by the Presiding Officer.
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> * * *
>
> The Legislature manifestly intended for small claims matters to be conclusive (*see*, Tax Law § 2012) and such proceedings are plainly meant to provide an expeditious and informal resolution of tax controversies. The Legislature could have provided greater protections but chose not to do so. If petitioners desired the same protections as more formal agency proceedings, they had the right, and were so informed, to have the matter transferred to an ALJ (*see*, Tax Law § 2012) (216 AD2d, at 693).

Petitioner asserts that if motions arising from a small claims matter were not reviewable, the Tribunal would not have heard the exception filed in ***Keeffe***. In that case, the Chief Administrative Law Judge, the Tribunal and the Appellate Division addressed a statutory prohibition on appeals that provides that the Tribunal may nevertheless "order a rehearing upon proof or allegation of misconduct by the presiding officer of the claims proceeding." It was thus appropriate to consider whether the terms of the exception were met. Here, we address a statutory limitation on appeals, section 3030(e)(2), which provides no exception requiring such an inquiry.

We also find support for the conclusion reached today in the Appellate Division's finding of legislative intention quoted above. It would be inconsistent with a purpose of making small claims matters conclusive, expeditious and informal if appeals of applications for costs in such cases could be pursued before the Tribunal and the courts.[1]

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Nancy E. Schifferle is denied;

2. The order of the Administrative Law Judge is sustained; and

3. The application for costs of Nancy E. Schifferle is dismissed with prejudice.

DATED:Troy, New York
August 7, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner

[1]In ***Matter of RAC for Women***, Tax Appeals Tribunal, June 23, 2005, we entertained an appeal from an Administrative Law Judge's order denying an award of costs under section 3030 with respect to a small claims case. To the extent that decision is inconsistent with the result reached here, it is overruled.