

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | ORDER |
| NANCY E. SCHIFFERLE | : | DTA NO. 820606 |
| 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, 274 Presidio Place, Williamsville, New York 14221-3746, 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, 2000 through August 31, 2003.

The Division of Tax Appeals issued an Order of Discontinuance dated June 29, 2006 in this matter canceling a deficiency asserted due from Nancy E. Schifferle by Notice of Determination L-023578396-6.

On July 31, 2006, petitioner, appearing by Hodgson Russ, LLP (Jack Trachtenberg, Esq., of Counsel), filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation, appearing by Mark F. Volk Esq. (Robert A. Maslyn, Esq., of counsel) filed a response to the application on August 29, 2006 which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs and attached documentation, and all pleadings and documents submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. 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.

2. 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.

3. 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.)

4. 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."

5. 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.

6. 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.

7. 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.

8. 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.”

9. 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.

SUMMARY OF THE PARTIES’ POSITIONS

10. In its papers, petitioner argues: that she was a prevailing party; that the Division’s position was not substantially justified; and, that petitioner should be reimbursed for attorney’s fees at a rate that exceeds the statutory \$75.00 per hour because special circumstances justify the higher rate. Petitioner’s papers include, among other things, documentation pertaining to the services provided to petitioner and information regarding the value of petitioner’s assets.

11. In opposition to the requests for costs, the Division asserts that petitioner's application must be denied because: the position of the Commissioner was substantially justified; petitioner failed to establish that her net worth did not exceed the statutory limits; petitioner failed to establish her litigation or administrative costs with sufficient detail to determine if the claimed expenses were reasonable; the costs and expenses sought to be recovered are unauthorized and unreasonable; and, petitioner is equitably estopped from applying for costs and expenses.¹

12. The papers submitted by the parties presented conflicting versions of the events which occurred at the time that the stipulation of discontinuance was executed. According to petitioner, the Division was told that she would not waive litigation costs and that petitioner intended to file a claim for reimbursement under Tax Law § 3030. Thereafter, the parties executed a stipulation of discontinuance which was not conditioned on a waiver of petitioner's reimbursement rights. In contrast, the Division maintains that when discussing the stipulation of discontinuance, the presiding officer made an inquiry regarding costs and petitioner's representative stated that petitioner would waive the right to apply for costs. The Division states that it executed the stipulation in reliance upon petitioner's representation that she would not seek costs.

CONCLUSIONS OF LAW

A. 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

¹ In its motion papers, the Division addresses the issues of whether the purchases of solvents and the installation of dry cleaning machinery were exempt from tax and whether an earlier finding by a conciliation conferee in favor of the corporation is binding on the Division. Although petitioner raised these issues in its petition, they were not raised on this motion and therefore, will not be addressed.

(2) reasonable litigation costs incurred in connection with such court proceeding.

Reasonable administrative costs include reasonable fees paid in connection with the administrative proceeding, but incurred after the issuance of the notice or other document giving rise to the taxpayer's right to a hearing (Tax Law § 3030[c][2][B]).

B. A prevailing party is defined by the statute as follows:

[A]ny party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed. . . .

(B) Exception if the commissioner establishes that the commissioner's position was substantially justified.

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.

(ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.

* * *

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case

where such final determination is made by a court, the court. (Tax Law § 3030[c][5].)

C. It is clear that petitioner is not a prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the Notice of Determination to petitioner. Petitioner's arguments to the contrary are without merit.

D. First, it is undisputed that Tuxedo was uncooperative during the audit. Under the circumstances, petitioner's argument that the Division should have held discussions with her before issuing the notice is disingenuous. Acceptance of this argument would provide an incentive for taxpayers to be uncooperative when the Division is attempting to conduct an audit.

E. Turning to the question of whether the Division's position was substantially justified, Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director, employee or manager . . . is under a duty to act for such corporation . . . in complying with any requirement of [article 28]" (Tax Law § 1131[1]).

The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (*Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Rosenblatt v. State*

Tax Commn., 114 AD2d 127, 498 NYS2d 529, *revd in part on dissenting opn below* 68 NY2d 775, 506 NYS2d 675).

The Division's regulations define a person under a duty to act on behalf of a corporation as follows:

[g]enerally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act. (20 NYCRR 526.11[b][2].)

F. Here, the papers presented on the motion show that, during the period in issue, petitioner held the position of vice president or senior vice president. She made a practice of signing the corporation's tax returns and participated in the audit by signing the audit method election form. Petitioner's participation in the audit is further demonstrated by her signing a consent to extend the statute of limitations and the Statement of Proposed Audit Changes. Given the forgoing facts, it is evident that the Division's assessment of petitioner was completely consistent with the applicable published guidance set forth in the Division's regulations at 20 NYCRR 526.11[b][2]. Further, contrary to petitioner's claims, there is no authority for the proposition that an individual may only be assessed as a responsible officer if the corporation does not have sufficient resources to pay the assessment. Consequently, this claim is completely without merit.

G. Petitioner's reliance upon the Sales and Use Tax Audit Guidelines to support her position that the Division did not follow published guidance is misplaced. Tax Law § 3030 (c)(5)(B)(iii) provides, in pertinent part:

. . . the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow the applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

Clause (iv) further provides:

the term ‘applicable published guidance’ means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and

(II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.

H. It is evident from the forgoing that the Division’s Audit Guidelines do not fall within the definition of “applicable published guidance” set forth in Tax Law § 3030 (c)(5)(B)(iii). Therefore, it is irrelevant whether the Division adhered to its audit guidelines.

I. Since the Division’s position was substantially justified, the remaining arguments regarding petitioner’s net worth, the reasonableness of the expenses claimed, whether the costs and expenses sought to be recovered are authorized or reasonable and whether petitioner is equitably estopped from applying for costs and expenses are moot and will not be addressed.

J. Petitioner’s application for costs and fees is denied.

DATED: Troy, New York
November 22, 2006

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE