STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK M. GRILLO	:	ORDER DTA NO. 823237
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, 2003 through May 31, 2005.	:	

Petitioner, Frank M. Grillo, 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, 2003 through May 31, 2005.

On April 28, 2011, Administrative Law Judge Dennis M. Galliher issued an Order of Discontinuance finally determining the above-captioned matter in accordance with the parties' Closing Agreement dated November 17, 2010 (petitioner) and December 13, 2010 (Division of Taxation).

On May 31, 2011, petitioner, appearing by Richard W. Bell, LLC (Richard W. Bell, Esq., of counsel), brought an application for costs under Tax Law § 3030, including a memorandum in support, together with affidavits and exhibits. The Division of Taxation, appearing by Mark F. Volk, Esq. (Nicholas A. Behuniak, Esq., of counsel), timely responded to petitioner's application by filing a memorandum in opposition thereto, together with affidavits and exhibits. The due date for the Division's response was July 25, 2011, and it is this date which began the 90-day period for issuance of this order.

Based upon petitioner's application for costs, the Division's affirmation in opposition, the affidavits and exhibits provided by the parties, and all pleadings and proceedings had herein, Dennis M. Galliher, 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) issued to petitioner a Notice of Determination dated March 2, 2007 assessing sales and use taxes due for the sales tax quarterly periods spanning December 1, 2003 through May 31, 2005 in the amount of $646,823.97, plus penalty and interest. This notice advised that petitioner was being assessed as an officer or person responsible for the payment of taxes determined to be due from Trinsic Communications, Inc., pursuant to Tax Law §§ 1138(a); 1131(1) and 1133. The foregoing notice was issued to petitioner at 601 S. Harbour Island Blvd., Tampa, Florida 33602-5735.

2. Trinsic, Inc., originally known as Z-Tel Technologies, Inc., was organized on March 19, 1998 under the laws of the State of Delaware. Trinsic, Inc., provided circuit-switched local and long-distance telephone services in 49 states and the District of Columbia. It is undisputed that the address to which the notice pertaining to petitioner was issued was also the primary business address for Trinsic, Inc., and this address is set forth on the original Certificate of Incorporation as filed with the Secretary of State of Delaware with respect to Trinsic, Inc.

3. Trinsic, Inc., provided its services through a number of wholly-owned affiliates and two principal operating entities, Trinsic Communications, Inc., and Touch 1 Communications, Inc. (Touch 1), an Alabama corporation purchased by Trinsic, Inc., in 2000. While each of these principal operating entities (as well as the other affiliates wholly-owned by Trinsic, Inc.) was a

separately created and distinct entity under state law, the communication services business conducted by these entities was managed from the publically traded entity Trinsic, Inc., as if these entities were one business enterprise with each executive officer reporting on his functional responsibilities to the chief executive officer of Trinsic, Inc. Trinsic, Inc., leased offices at the above-noted Tampa, Florida, address as its principal executive offices, leased offices in Atlanta, Georgia, as its principal engineering offices and facility, and also owned offices in Atmore, Alabama, by virtue of its ownership of Touch 1. Both of Trinsic, Inc.'s principal operating entities (i.e., Trinsic Communications, Inc., and Touch 1) utilized these offices and facilities.[1]

4. In January 1995, petitioner moved to Jackson, Mississippi, to serve as vice-president of marketing for LDDS, a long distance telephone company. His business address was initially 515 Amite Street, Jackson, Mississippi, and later was 100 WorldCom Drive, Clinton, Mississippi. Petitioner initially resided at 110 Woodland Hills Blvd., Madison, Mississippi, and thereafter resided at 4141 Crane Blvd., Jackson, Mississippi.[2] In September 2000, petitioner served as senior vice-president of global business markets for MCI WorldCom, LDDS's successor company, where he was responsible for global marketing strategy. Petitioner continued to reside in Jackson, Mississippi, and continued to work at 100 WorldCom Drive, Clinton, Mississippi.

5. In April 2003, petitioner joined Trinsic, Inc. (Trinsic) as its senior vice-president–business group, and from that point until August 2004 petitioner was solely responsible for Trinsic's business sales and marketing. Petitioner's official business address was at Trinsic's Tampa, Florida, principal executive offices. However, he continued to reside in

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[1] References herein to Trinsic, Inc., its two principal operating entities and to its other wholly-owned affiliates will be by the generic term Trinsic, unless otherwise specifically noted or required by context.

[2] The record does not disclose any prior address information for petitioner.

Jackson, Mississippi, and he worked primarily out of Trinsic's Atmore, Alabama, offices, since he lived near that Trinsic facility. At this same point in time, one Horace Davis served as Trinsic's chief financial officer and treasurer. Mr. Davis had previously served as the chief financial officer for Touch 1 and, after its acquisition by Trinsic he served from January 2001 to June 2001 as Trinsic's senior vice-president of budgeting and financial planning. From June 2001 to July 2005, Mr. Davis served as Trinsic's chief financial officer and treasurer. He, like petitioner, worked primarily out of Trinsic's Atmore, Alabama, offices since he also lived near that facility.

6. On August 24, 2004, Trinsic's board of directors appointed Mr. Davis as acting chief executive officer and executive vice-president. At the same time Trinsic's by-laws were amended to eliminate the requirement that the company have a "president" but could instead utilize the phrase "or chief executive officer" wherever the by-laws referred to "president." Mr. Davis retained his duties as chief financial officer. On the same August 24, 2004 date, Trinsic's board of directors appointed petitioner as Trinsic's acting chief operating officer. These appointments followed the resignations of Trinsic's previous chairman, president and chief executive officer, and its previous senior vice-president and chief technology officer. From August 2004 until August 2005, petitioner continued to work primarily from Trinsic's Atmore, Alabama, offices, and held the positions of acting chief operating officer and vice-president-business services.

7. Effective September 30, 2005, Trinsic reported that petitioner had resigned to pursue other opportunities. Petitioner actually began employment in August 2005 with Cypress Communications, Inc., in Atlanta, Georgia. Trinsic did not appoint a replacement chief operating

officer in petitioner's stead, but rather Mr. Davis assumed petitioner's duties. Petitioner continued to reside in Jackson, Mississippi, until July 2007, at which time he moved to 155 Avery Street, Atlanta, Georgia.

8. Before, during and after the foregoing time frame, the telecommunications industry, in general, and Trinsic, in particular, faced significant changes and challenges. In Trinsic's case, there was a continued decline in business. In February 2007, Trinsic and its affiliates, including its two principal operating entities, Trinsic Communications, Inc., and Touch 1, filed for protection under Chapter 11 of the United States Bankruptcy Code. The bankruptcy petition was filed in the Bankruptcy Court for the Southern District of Alabama, since although Trinsic officially maintained its headquarters in Tampa, Florida, it operated a de facto corporate base in Atmore, Alabama.

9. In connection with the bankruptcy action Trinsic, operating as a debtor-in-possession during the Chapter 11 bankruptcy reorganization, entered into an Asset Purchase Agreement with Tide Acquisition Corporation for the purchase of substantially all of Trinsic's operating assets. On March 23, 2007, the Bankruptcy Court entered its order approving the sale pursuant to the Asset Purchase Agreement, and the transaction closed thereafter when all requisite regulatory approvals were obtained. On April 9, 2007, Trinsic filed a motion to convert its Chapter 11 reorganization proceeding to a Chapter 7 liquidation proceeding, which motion was granted by order of the Bankruptcy Court on April 24, 2007.

10. On October 5, 2007, petitioner submitted a Plan of Reorganization to the Bankruptcy Court to resolve his personal bankruptcy filing. On May 15, 2008, the Bankruptcy Court in petitioner's personal bankruptcy case issued an Agreed Order Confirming Plan, pursuant to

which petitioner was required to make monthly court-determined payments to his creditors in the amount of $7,500.00, plus all after-tax proceeds from petitioner's bonuses, with a balloon payment of the remainder of the amounts owed to his creditors due on May 15, 2013.

11. As noted, on March 2, 2007, the Division issued a Notice of Determination addressed to petitioner at Trinsic's Tampa, Florida, address (***see*** Finding of Fact 1). On June 10, 2009, petitioner received from the Division a recorded message on his mobile phone voice mail referencing a tax liability about which the Division had been attempting to contact petitioner. Petitioner returned the call the next day and, in that call, provided to the Division his Georgia address, to wit, 155 Avery Dr. NE, Atlanta, Georgia 30309-2700. A few days thereafter, during the week of June 15, 2009, petitioner received from the Division a copy of the notice. The envelope in which the copy of the notice was contained was addressed to petitioner at the Atlanta, Georgia, address, while the copy of the notice itself was addressed to him at the Tampa, Florida, address. Petitioner avers that he was unaware of the existence of the notice prior to his receipt of the copy in June 2009.

12. Petitioner filed a petition challenging the notice on September 12, 2009 (i.e., within 90 days after actual receipt of the copy of the notice). The petition was initially rejected as untimely, upon the premise that it had been filed more than two years after the date of issuance of the notice. Accordingly, a Notice of Intent to Dismiss Petition was issued by the Division of Tax Appeals. By a letter dated October 26, 2009, the Division of Taxation's Office of Counsel advised that a timely petition had been filed with respect to an associated assessment issued against the corporation (Trinsic), and that petitioner's protest was therefore also properly considered timely filed (***see*** Tax Law § 1138[a][2][B]). In turn, the Notice of Intent to Dismiss

Petition was rescinded, and the petition was forwarded to the Division's Office of Counsel for the filing of an answer thereto.

13. Petitioner's case was calendared for hearing before the Division of Tax Appeals on November 3 and 4, 2010. In turn, however, the parties entered into a negotiated Closing Agreement that resolved all issues upon petitioner's payment of $17,283.42. The parties' Closing Agreement was executed as dated on November 17, 2010 (by petitioner) and December 13, 2010 (by the Division), and on April 28, 2011, an Order of Discontinuance was issued finally determining the above-captioned matter in accordance with the terms of such Closing Agreement. Since the Closing Agreement did not provide for an agreement between the parties as to which (if either) was the prevailing party, petitioner retained the option to make application to the Division of Tax Appeals for costs and fees.

14. Petitioner's May 31, 2011 application seeks an award of costs in the amount of $44,623.25, consisting specifically of the following items:

a) $44,525.00 for attorneys fees paid to Richard W. Bell, based on a total of 137.00 hours of professional services rendered at the rate of $325.00 per hour.

b) $98.25 for expenses including mailing costs and Pacer charges (obtaining documents filed in connection with Trinsic's bankruptcy proceedings).

15. In support of these fees and expenses, petitioner's counsel provided a copy of the itemized invoice for his services, as detailed on the Timekeeper system, reflecting the date of each service, the ABA code for the service provided, the amount of time spent (hours or portion thereof), the dollar amount charged, and a journal entry type of description of the service provided or expense billed. As part of his affidavit in support, petitioner also provided information specifying his net worth as approximately negative $525,000.00 (assets of less than $25,000.00 and liabilities in excess of $550,000.00). He noted his ongoing court-determined

monthly payment obligation of $7,500.00 (representing the amount of his disposable income as determined by the Bankruptcy Court) plus all post-tax bonus amounts he may receive, and that he owns a car valued at less than $4,000.00 and has zero equity in other assets including his home.

16. The audit of Trinsic, from which the assessment against petitioner was derived, commenced in May 2005, shortly before petitioner left his employment with Trinsic. As part of the Division's audit, the auditor requested the completion of a responsible party questionnaire for a number of Trinsic's executive officers, including petitioner. The information to be provided on this questionnaire includes home address information. Neither Trinsic nor its counsel at the time provided such information or a completed questionnaire with respect to petitioner, despite several requests therefor. In addition, the auditor attempted to find petitioner's home address by searching the database LexisNexis, the result of which search revealed 16 different addresses for petitioner's name and social security number. The auditor was unable to further narrow this information. The auditor also noted that there were no New York State resident or nonresident personal income tax returns, or any other New York State returns or applications filed by petitioner from which the auditor might have found petitioner's home address. Finally, the auditor noted that prior Division audits of Trinsic did not reveal petitioner's home address, and that petitioner was not in the Division's Taxpayer Indicative Data (TID) system.[3]

17. Trinsic's federal corporation income tax return (Form 1120) for 2004 listed the company's Tampa, Florida, principal executive office address as petitioner's address. This return lists addresses for certain other Trinsic officers, including Mr. Davis, which differed from Trinsic's Tampa, Florida, principal executive office address, and presumably represented those

[3] ***See Matter of Estate of Karayannides***, Tax Appeals Tribunal, March 13, 1997.

officers' personal addresses.[4] Ultimately, the Division issued the subject notice to petitioner at the noted Tampa, Florida, principal executive office address of petitioner's former employer, Trinsic, upon the belief that this was the best available address that could be uncovered for petitioner after exhausting the foregoing efforts to determine petitioner's home address.

18. Schedule E of Trinsic, Inc.'s 2004 Form 1120 listed petitioner's title as president and listed petitioner as the highest paid officer of Trinsic, Inc. The aforementioned LexisNexis search listed petitioner's titles with Trinsic as chairman, chief operating officer, director, officer P/D and president. Securities and Exchange Commission Form 8-K shows various documents to be executed therein by petitioner as president.

19. To confirm the date and manner of mailing the notice in question to petitioner, the Division provided affidavits together with the certified mailing log pertaining to the subject notice. Review of these documents confirms that the notice, addressed to petitioner at the Tampa, Florida, address as described, was issued by certified mail on March 2, 2007 in accordance with the Division's regular process for mailing such notices. Petitioner raises no challenge to the fact of such mailing, but rather specifically challenges the propriety of the address to which the notice was mailed.

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioner filed the subject application for costs and other expenses upon the very specific basis that the Division incorrectly used Trinsic's principal executive office address in

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[4] Pursuant to State Administrative Procedure Act § 306(4), notice is taken of the Determination issued in ***Matter of Horace Davis III*** (Division of Tax Appeals, October 12, 2010), specifically at Finding of Fact 31 thereof, wherein the parties to that proceeding stipulated that the Florida address utilized by the Division in mailing certain notices of determination to Mr. Davis as a responsible officer of Trinsic was Mr. Davis's personal address, notwithstanding that Mr. Davis, like petitioner, apparently worked primarily out of Trinsic's Atmore, Alabama, offices since he "lived near that facility" (***see*** Finding of Fact 5).

Tampa, Florida, in mailing the notice to him. Petitioner, citing ***Matter of Nelloquet Restaurant, Inc.*** (Tax Appeals Tribunal, March 14, 1996), posits that the Division is required to mail a responsible officer assessment to the personal address of the individual against whom the Division seeks to impose responsibility rather than to the address of the business whose tax liability is being imposed upon such individual. In simplest terms, petitioner asserts that it is simply wrong to mail a responsible person assessment to the address of that person's former employer some two years after the person has ceased such employment. Petitioner goes on to allege that because of the Division's mailing flaw, he did not receive actual notice of the assessment against him until June 2009, that such date of actual notice of the assessment falls beyond the period of limitations on assessment, and that the notice and its assessment was therefore invalid.

21. Petitioner also maintains that he was the prevailing party in this matter, given the substantially reduced dollar amount upon which the tax assessed per the notice was resolved. Petitioner argues that the Division had no substantial justification for issuing the subject assessment to him at Trinsic's principal executive office address, but rather was required to find and utilize his personal address. In turn, petitioner appears to argue that he should never have had to commence a proceeding to challenge an invalid assessment, or incur the legal costs and other expenses associated with such challenge. In sum, petitioner maintains that he was the prevailing party per Tax Law § 3030(a), that the Division was not substantially justified in its actions, and that he is entitled to an award of the costs and expenses he incurred in challenging the notice.

22. Petitioner further alleges, with regard to the dollar amount of costs sought herein, that the complexity of the circumstances surrounding this matter, including the direct and ancillary

impacts of Trinsic's downturn and ultimate demise via bankruptcy, his own related personal bankruptcy, and the complex and evolving nature of the telecommunications industry during the subject time frame, are special factors that required him to retain counsel with expertise and experience in a broad variety of areas not strictly limited to issues of state taxation in general and officer responsibility in particular, thus justifying attorney's fees in excess of the $75.00 per hour rate set forth in Tax Law § 3030(c)(1)(B)(iii).

23. In opposition, the Division maintains that petitioner's application for costs should be denied because the Division's position in this matter was substantially justified, both on the merits of issuing an assessment against petitioner as an officer responsible for the taxes owed by Trinsic, as well as in the use of Trinsic's address in issuing the notice to petitioner. On this score, the Division maintains that its efforts to find a different address for petitioner were reasonable under the circumstances, as detailed, and the failure to discern such address justified the issuance of the notice addressed to petitioner at Trinsic's Tampa, Florida, offices. Further, the Division asserts that even if the Division's position as to the address utilized was not substantially justified, petitioner has overstated the costs for which he is entitled to reimbursement.

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:
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> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and
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> (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]). The statute provides that fees for the services of an individual who is authorized to practice before the Division of Tax Appeals are treated as fees for the services of an attorney (Tax Law § 3030[c][2][B][3]), with the dollar amount of such fees capped at $75.00 per hour, unless there are special factors that justify a higher amount (Tax Law § 3030[c][1][B][iii]).

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

> (iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.
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> (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. In this case, the parties reached a settlement as to the assessment issued against petitioner. The notice assessed tax in the amount of $646,823.97 (plus penalty and interest), and the same was resolved upon petitioner's payment of $17,283.42 (***see*** Findings of Fact 1, 13). In light of this result, and notwithstanding the lack of information concerning the substantive basis upon which this resolution was reached, petitioner was clearly the prevailing party with respect to the amount in controversy (Tax Law § 3030[c][5][A][i][I]). In turn petitioner, as the prevailing party and as an individual whose net worth did not exceed two million dollars (***see*** Findings of Fact 10, 15), is entitled to bring this application and receive an award of costs, unless the Division meets its burden of proving that its position was substantially justified (Tax Law § 3030[c][5][B][i]). Here, petitioner has honed his argument to be that it is the manner in which the notice was issued (i.e., specifically the address to which it was issued) that was erroneous and thus not substantially justified. It is this argument that the Division must overcome in order to negate petitioner's status as the prevailing party entitled to an award of costs.[5]

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[5] In his application, petitioner provides significant factual detail concerning the history of Trinsic and of petitioner's involvement, role and duties therein. The relevance of this factual detail, for purposes of the subject application for costs, appears to pertain primarily to petitioner's physical location during the periods under consideration, i.e., petitioner's work addresses and his employment duties versus his alleged personal residence addresses, in the context of determining the appropriateness of the mailing address utilized by the Division. This is consistent with the very specific basis upon which petitioner brings this application for costs. There is no apparent argument raised by petitioner that the Division did not have substantial justification, given the various employment titles and responsibilities held by petitioner within Trinsic, for its issuance of an assessment seeking to hold

D. As stated by the Court of Appeals:

> Tax Law § 3030 was enacted to provide taxpayers with additional rights and equitable relief under the Taxpayer Bill of Rights Act of 1997 (Governor's Program Bill Mem, Bill Jacket, L 1997, ch 577). Section 3030 permits a discretionary award of attorneys' fees to the prevailing party in a proceeding in which the Commissioner is a party and which involves the determination, collection or refund of any tax (Tax Law § 3030[a]). A prevailing party is not entitled to recovery attorneys' fees if the Commissioner satisfies his burden of proving, by a preponderance of the evidence, that his position was substantially justified (Tax Law § 3030[c][5][B]) (***City of New York v. State of New York***, 94 NY2d 577, 598 [2000]).

The Legislature modeled Tax Law § 3030 after Internal Revenue Code § 7430 (***see*** Legislative Mem, McKinney's Session Laws of NY, at 2549). Therefore, it is appropriate to use both New York and federal jurisprudence as guidance in applying this statute (***see Matter of Levin v. Gallman***, 42 NY2d 32 [1977]; ***see also Matter of Ilter Sener***, Tax Appeals Tribunal, May 6, 1988).

E. The Division must establish that its position was substantially justified (***see*** Tax Law § 3030 [c][5][B][ii]). This standard requires that the Division show a reasonable basis in both law and fact (***see Powers v. Commissioner***, 100 TC 457 [1993]; ***see also Pierce v. Underwood***, 487 US 552 [1988]), with this showing properly based on all the facts and circumstances surrounding the case, and not solely upon the final outcome (***Phillips v. Commissioner***, 851 F2d 1492, 1499 [1988]). The Division will be said to have met its burden of showing substantial justification when it has shown that the issuance of the notice was "justified to a degree that could satisfy a reasonable person" (***Pierce v. Underwood*** at 565), in view of what the Division

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petitioner responsible for taxes allegedly owed by Trinsic. Since a review of the evidence provided is consistent with such a conclusion, this order will address only the specific premise upon which this application is based, to wit, that the Division's issuance of the subject notice against petitioner, using Trinsic's address rather than petitioner's personal address, was erroneous, improper and not substantially justified.

knew at the time its position was taken (Tax Law § 3030[c][8][B]; ***see DeVenney v. Commissioner***, 85 TC 927, 930 [1985]). As explained hereinafter, the Division was substantially justified as to the manner of issuing the notice to petitioner, based on its efforts to ascertain petitioner's address and the resulting address information in its possession at the time the notice was issued. Accordingly, petitioner is not entitled to an award of costs per Tax Law § 3030(c)(5)(B).

F. The issuance of an assessment of liability for sales and use taxes against a person, including as here an officer or employee of a corporation, is governed by Tax Law § 1138(a)(1) and § 1147(a)(1). Tax Law § 1138(a)(1) provides that a notice of a determination of sales tax due "shall be mailed to the person or persons liable for the collection or payment of the tax . . . ." This section goes on to provide as follows:

> A notice of determination shall be *mailed* by certified or registered mail to the person or persons liable for the collection or payment of the tax *at his last known address in or out of this state*. . . . After ninety days from the *mailing* of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing, or unless the commissioner of his own motion shall redetermine the same (emphasis added).

Tax Law § 1147(a)(1) provides as follows:

> Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person *at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.* The notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by

> the giving of notice shall commence to run from the date of mailing of such notice (emphasis added).[6]

G. The Division bears the burden of going forward to establish that it properly mailed the notice to petitioner pursuant to Tax Law § 1138(a)(1) and § 1147(a)(1) (***see Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). The evidence required of the Division consists of that which establishes (1) the standard procedure for the issuance of such notices by one with knowledge of such procedure, and (2) that such mailing procedure was followed in the particular case at hand (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV***

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[6] The controlling statute on providing notice of an assessment, Tax Law § 1138(a)(1), was amended by Laws of 1996 (ch 267). Such amendment, which became effective for tax years beginning January 1, 1997, provides for and focuses on the "mailing," rather than the former "giving" of notices of determination of tax due (***see*** Tax Law former § 1138[a][1]). The language of this amendment and its legislative history indicate an intent to bring the notice provisions of the sales tax into conformity with those of the personal income tax where receipt of a notice of deficiency is *not* a part of the service requirement (***compare*** Tax Law § 681; ***see Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990; ***see*** June 26, 1996 letter to Governor Pataki in support from Owen Johnson, Vice President Pro Tempore ["The legislation conforms the service requirements for sales tax to those required for income tax."]; ***see also*** Senate Memorandum in Support ["The bill provides that service by proper mailing is sufficient to assess tax."]). However, the legislation did not amend Tax Law § 1147(a)(1), which, as noted above, provides that the mailing of a notice of determination shall be "presumptive evidence of receipt." The Division of Budget's Budget Report on the bill dated June 25, 1996, noted the changes to Tax Law § 1138 and the lack of any amendment to Tax Law §1147 and commented "if this bill were to become law it would be unclear as to which rules apply." In ***Matter of Ruggerite v. State Tax Commn.*** (64 NY2d 688, 485 NYS2d 517 [1984]), a case decided under Tax Law former § 1138[a][1], the Court of Appeals found that the language of Tax Law § 1147(a)(1) "makes 'receipt' part of the procedural equation and by characterizing mailing as only 'presumptive evidence' establishes the taxpayer's right to rebut the presumption" (***id.*** at 690, 485 NYS2d at 518).

The Court in ***Ruggerite*** held that the proper mailing of a notice of determination to a taxpayer at his or her last known address creates a presumption of receipt which may be rebutted with proof that the notice was never received. Under this reasoning, where the presumption of receipt is successfully rebutted, the 90-day time period for requesting a conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) or a hearing before the Division of Tax Appeals is not triggered, and a petitioner would be entitled to a conference or a hearing (***Matter of Ruggerite, Inc. v. State Tax Commn.; Matter of Karolight, Ltd.***, Tax Appeals Tribunal, February 8, 1990). In addition, and under this reasoning, where it cannot be established that the notice was properly given prior to the period of limitations on assessment, the assessment must be canceled as untimely. (***Id***.) However, the amendment to Tax Law § 1138(a)(1) post-dated the decision in ***Ruggerite***, so as to provide for the *mailing* rather than the *giving* of notice to the person liable for the collection or payment of tax to that person's last known address. Given this fact, and in light of the foregoing legislative history accompanying the amendment to Tax Law § 1138(a)(1), where the Division establishes proper *mailing* of the notice the presumption of receipt contained in Tax Law § 1147(a)(1) is now irrebuttable. It is noteworthy that the possible harshness of such a result is ameliorated by the fact that petitioner was accorded the right to a hearing in any event, per Tax Law § 1138(a)(3)(B), based upon the timely filing of a petition concerning the related corporate assessment issued against Trinsic (***see*** Finding of Fact 12).

& Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). Since there is no evidence or argument of fault or flaw with the physical method and fact of mailing (***see*** Finding of Fact 19), this case distills to the simple question of whether the Division's efforts to find petitioner's personal address, though unsuccessful, were reasonable under the circumstances of this case, such that its use of the Tampa, Florida, address was substantially justified.

H. Tax Law § 1138(a)(1) calls for mailing to a person's "last known address in or out of this state," and Tax Law § 1147(a)(1) further calls for mailing to "the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." As a general proposition, the Division may not simply mail a notice assessing tax against an allegedly responsible person to the address of the business for which the allegedly responsible person worked (***see Matter of Nelloquet Restaurant, Inc.***, Tax Appeals Tribunal, March 14, 1996). Rather, the Division must mail the notice to the last known address provided by that person through his own filings or applications or, if no address has been so provided, then to such address as may be obtainable by the Division, and the Division must use its best efforts to obtain the address of the "person" against whom it seeks to assess liability. (***Id.***) In this case, there is no evidence that petitioner ever advised the Division, through his own filings, applications or otherwise, of his personal address in Mississippi, or of his move thereafter to a new personal address in Atlanta, Georgia. While there may have been no reason for him to have done so, this fact alone cannot reasonably be the end point on the address question presented here, for this would negate inquiry based on the additional language of "such address as may be obtainable," per Tax Law § 1147(a)(1). Such language is particularly relevant and apropos to circumstances such as those presented here, i.e., an officer or employee of a corporation with New York tax liability,

employed by that corporation in the capacity of a responsible person but who does not live or work in New York. In fact, there is no evidence that petitioner filed, or was in any manner obliged to file, any New York State tax returns or applications under Article 28, or for that matter under any other article of the Tax Law (such as personal income tax returns) from which his personal address might have been gleaned. Having no personal residence address information for petitioner from the foregoing sources, the Division's auditor conducted database searches that revealed some 16 addresses for petitioner's name and social security number. The auditor was unable to further narrow this field or determine which of such addresses might be petitioner's actual residence address, and it is patently unreasonable to suggest that the Division should be held to the standard of mailing a copy of the notice to each of such 16 addresses. Additional efforts to obtain or determine a personal address for petitioner were unsuccessful (***see*** Finding of Fact 16). In contrast, the listing of Trinsic's Tampa, Florida, principal executive office address as petitioner's address is found in a number of places, including Trinsic's Form 1120. Petitioner, for his part, has not suggested any other reasonable means, methods, or efforts which might have been undertaken and by which the Division, with reasonable diligence, might have found a personal address to which petitioner would require the notice to have been mailed.

I. Petitioner's reliance on ***Matter of Nelloquet***, for the proposition that the Division must find and mail a responsible person assessment to that person's home address is misplaced. In ***Nelloquet***, the Division utilized a corporation's address for its issuance of responsible officer notices against that corporation's officers, notwithstanding the fact that the officers' home addresses were set forth on the Division's sales tax audit report information sheets and on the personal income tax returns filed by such officers for prior years (***Matter of Nelloquet***, at Findings of Fact 9, 13). Those addresses were clearly known to the Division via its own records and were,

as the Tribunal held in ***Nelloquet***, "'obtainable' in the context of section 1147(a)(1)." In the case at hand, the methods employed by the Division to discover petitioner's personal address were clearly reasonable, and yet uncovered no other, more reasonable address for mailing than Trinsic's Tampa, Florida, principal executive office address. In fact, petitioner was one of Trinsic's principal executive officers and, absent discovery of any other address for petitioner despite substantial diligence and effort by the Division, it was reasonable to issue the notice to petitioner at Trinsic's principal executive office address. Tax Law § 1147(a)(1) provides, where no return or application has been filed, for the use of "such address as may be obtainable." Under the circumstances presented in this case, where the Division's best attempts to find a personal address for petitioner as a responsible officer of Trinsic, though reasonable, are unsuccessful, it is concluded that the use of Trinsic's address on the Notice of Determination constituted the use of "such address as may be obtainable", per Tax Law § 1147(a)(1), and was proper for purposes of Tax Law § 1138(a)(1) and § 1147(a)(1). Any other conclusion would serve to effectively negate such statutory language.

J. In light of the evidence of mailing provided by the Division (***see*** Finding of Fact 19), and upon the foregoing conclusion that the use of Trinsic's address for such mailing was reasonable under the circumstances, the Division has established proper mailing of the notice. In turn, petitioner's allegation of nonreceipt is of no moment to the question of substantial justification for issuance of the notice. If follows that since the Division was substantially justified in issuing an assessment against petitioner as a responsible person, and was substantially justified in the manner by which notice of such assessment was issued, the Division has borne its burden of proving that petitioner may not be treated as the prevailing party for purposes of recovering costs and fees under Tax Law § 3030. Further, in view of this conclusion that petitioner is not entitled to an

award of costs, it is unnecessary to determine whether the costs claimed by petitioner are reasonable.

K. Petitioner's application for costs and fees is denied.

DATED:Troy, New York
November 3, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE