

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEPTUNE WINES AND LIQUORS, INC. AND THE ESTATE OF DANIEL LEIBEL	:	ORDER DTA NO. 819535
	:	
for Reasonable Administrative and Litigation Costs in Connection with the Administrative Proceedings as a Result of Notices of Determination Issued Against Neptune Wines and Liquors, Inc. and Daniel Leibel for the Period June 1, 1997 through February 29, 2000.	:	
	:	

Petitioners, Neptune Wines and Liquors, Inc. and The Estate of Daniel Leibel, 231 Schenectady Avenue, Brooklyn, New York 11213-3701, filed a petition for reasonable administrative and litigation costs in connection with the administrative proceedings as a result of notices of determination issued against Neptune Wines and Liquors, Inc. and Daniel Leibel for the period June 1, 1997 through February 29, 2000.

On July 1, 2003 petitioners, appearing by DeGraff, Foy, Holt-Harris, Kunz and Devine, LLP (James H. Tully, Esq., of counsel), brought an application (denominated a petition) including attached exhibits, for costs under Tax Law § 3030. The Division of Taxation (“Division”), appearing by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel), filed an affirmation in opposition including attached exhibits, on August 1, 2003. Petitioners sought and were granted permission to file a reply to the Division’s affirmation and did so, including attached exhibits, on August 22, 2003, which date began the 90-day period for the issuance of this order.

Based upon petitioners' application for costs, the Division's affirmation in opposition and petitioners' reply thereto, and upon the exhibits attached and submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners are entitled to an award of costs and fees pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. By a letter dated May 15, 2000, the Division of Taxation ("Division") notified petitioner Neptune Wines & Liquors, Inc. ("Neptune"), the operator of a retail liquor store, that it would be the subject of a sales tax audit for the sales tax quarterly periods spanning June 1, 1997 through February 29, 2000, to commence on May 30, 2000. The audit appointment letter specified, *inter alia*, as follows:

All books and records pertaining to your sales and use tax liability for the period under audit, must be available on the appointment date. This includes financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns, and exemption certificates. Exemption certificates not made available at this appointment may be disallowed. If an exemption certificate is disallowed, you will be held liable for any tax due on related transactions.

During the course of the audit, you may be required to furnish additional records and/or information.

At petitioners' representative's request, the audit appointment date was rescheduled to July 17, 2000.

2. On the July 17, 2000 initial field audit appointment date, held in Manhattan at the offices of one of petitioners' representatives, the auditor was provided with a cash disbursements journal, a daybook of sales for the audit period, Federal corporate income tax returns for 1998

and 1999, and some cash register tapes. The auditor was advised that sales per the daybook were used to prepare Neptune's sales tax returns.

3. The auditor's comparison of purchases to taxable sales, as shown in the documents provided by petitioners, and his comparison of such purchases and sales information to purchase information the Division had obtained from Neptune's suppliers ("third-party purchase information"), revealed the following:

\$3,077,433.00 -- taxable sales reported per Neptune's sales tax returns

\$3,355,819.00 -- purchases per Neptune's cash disbursements journal

\$3,866,670.00 -- purchases per third-party purchase information

The auditor asked petitioners' representatives to explain the dollar discrepancies in purchases (book purchases versus purchases per suppliers), and to explain why taxable sales reported were significantly less than purchases per books and per the third-party information. No explanation was furnished at this initial audit appointment. In addition, petitioners' representatives were not certain, at the time, if cash register tapes were available for the entire audit period.

4. On October 18, 2001, petitioners' representatives proposed to the auditor various adjustments in order to resolve the audit. The auditor was also advised that petitioners would not consent to the use of a markup test based on shelf prices of merchandise at the store premises, and that no audit activity should take place at Neptune's place of business without petitioners' representatives being present. On October 22, 2001, petitioners' representatives advised the auditor, via facsimile, that all cash register tapes, purchase information and other documents for the entire audit period were available for review. However, when the auditor sought an appointment to review such records, petitioners' representative stated that such review could only occur at his Rockland County offices, allegedly on the basis that the location provided

ample space and a comfortable environment to conduct the review, as opposed to the smaller review space at the previously utilized Manhattan office of one of petitioner's representatives. In turn, the auditor was advised by his supervisor not to go to petitioners' representatives' offices in Rockland County.

5. The auditor's log reveals that he reviewed the results of two earlier audits involving Neptune, spanning the respective periods September 1, 1990 through August 31, 1993 and September 1, 1993 through August 31, 1996. His audit report makes specific reference only to the earlier of such audits, which resulted in a tax change (increase) of \$487,707.00 which was, in turn, agreed to by Neptune. The auditor also made an internal referral to the Division's fraud unit.

6. On March 15, 2002, the auditor's supervisor contacted petitioners' representatives and requested the submission of any documentation which would reconcile and support an explanation of why Neptune's purchases, per the third-party information, exceeded purchases per its cash disbursements journal and exceeded its reported sales. No information or satisfactory explanation was forthcoming, and on April 19, 2002, the auditor advised petitioners' representatives of the amounts of tax, civil fraud, omnibus penalties and interest which would be assessed.

7. On May 27, 2002, the Division issued to petitioner Neptune Wines & Liquors, Inc. a Notice of Determination (Notice No. L-020852114-3) assessing additional sales tax due for the period June 1, 1997 through February 29, 2000 in the amount of \$157,201.47, plus civil fraud and omnibus penalties in the amount of \$134,561.00, plus interest in the amount of \$83,480.22, for a total amount due of \$372,242.69.

8. On May 28, 2002, the Division issued to petitioner Daniel Leibel a Notice of Determination (Notice No. L-020875565-9) assessing additional sales tax due for the period June 1, 1997 through February 29, 2000 in the amount of \$157,201.47, plus civil fraud and omnibus penalties in the amount of \$135,423.53, plus interest in the amount of \$82,205.30, for a total amount due of \$374,830.30.¹

9. The issuance of the foregoing notices of determination resulted from the Division's conclusion that Neptune's books and records were inherently unreliable, specifically in that petitioners had offered no documents or acceptable bases to explain the substantial discrepancies between the amount of purchases per third-party information versus purchases per the cash disbursements journal, and the amount of purchases per both of these sources versus the amount of sales per Neptune's sales tax returns (as based on its day book). Faced with these unexplained discrepancies, the Division concluded it was appropriate to proceed to the use of indirect audit methodologies and did so. The calculation of tax due, as assessed on the foregoing notices of determination, results from applying a 28.205 percent markup, taken from a Robert Morris Associates industry study, to the amount of purchases determined from Neptune's suppliers (\$3,866,670.00) to arrive at audited taxable sales of \$4,982,905.00. Comparing such audited taxable sales to reported taxable sales of \$3,077,433.00 results in additional taxable sales of \$1,905,472.00 and additional tax due thereon in the amount of \$157,201.47.

10. The Notice of Determination issued against Daniel Leibel assessed him as a person responsible to collect and remit sales and use taxes on behalf of Neptune. Daniel Leibel died of

¹ The record does not reveal or explain the relatively small differences in the dollar amounts of penalties and interest assessed against the respective petitioners.

natural causes on March 31, 1998, approximately ten months into the audit period.² A Sales Tax Responsible Person Questionnaire is included in the record. This document lists “100%” as the amount of time Daniel Leibel devoted to Neptune’s business, and reflects checkmarks indicating “yes” in response to all of the questions thereon concerning whether Daniel Leibel had authority over and was responsible for all aspects of the operation and management of Neptune’s business. The questionnaire in the record consists of one page, is unsigned, and the record does not reveal who prepared the same or whether there are, as petitioners’ representatives allege, a signature page or any additional pages to such document.

11. The Division was not specifically advised, prior to the issuance of the notices of determination, that Daniel Leibel was deceased. The power of attorney, dated May 25, 2000, which was provided to the Division on audit was executed by “D. Leibel.” The Division later discovered that this power of attorney was executed by Daniel Leibel’s son, Douglas Leibel, who has submitted an affidavit in connection with this application for costs on which he lists himself as an employee, officer, director and shareholder of Neptune.

12. Petitioners challenged the notices of determination by filing a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). A conciliation conference was held on May 13, 2003, after which the conciliation conferee issued a letter dated June 5, 2003 stating, in relevant part, that “[a]fter considering all the evidence submitted, I have decided to grant your request and cancel the Notice of Determination issued by the Department of Taxation and Finance.” On June 6, 2003, a BCMS

² The interests of Daniel Leibel are represented herein as the Estate of Daniel Leibel, via Eleanore Leibel, Executrix. Daniel Leibel and the Estate of Daniel Leibel are referred to generically herein as petitioner or, together with Neptune, as one of the two petitioners.

Consent pertaining to the Notice of Determination issued against Neptune and reflecting the cancellation of such notice was executed by petitioners' representative.³

13. In their application for costs, petitioner Neptune asserted it had fewer than 500 employees and a net worth of less than seven million dollars, while petitioner Daniel Leibel asserted his net worth was less than two million dollars. In their reply to the Division's affirmation in opposition, petitioners submitted affidavits made by Stewart Buxbaum, CPA, and Gary Marcus, CPA (two of petitioners' three representatives), by Douglas Leibel, and by Eleanore Leibel, Executrix of petitioner Daniel Leibel's estate.

14. All three of petitioners' representatives appeared and represented petitioners at the BCMS conference on May 13, 2003, and prior thereto represented petitioners via case preparation, document review, filing of Freedom of Information Law ("FOIL") demands for information, correspondence, and telephone conversations from the time of the audit and the subsequent issuance of the notices of determination through the BCMS conference. A summary time sheet submitted as part of the record reflects a total of 78 hours of such time expended by petitioners' representatives, as follows:

Neptune Wines & Liquors, Inc.

Time Records

<u>Date</u>	<u>Activity</u>	<u>Time</u>	<u>Person</u>
5/13/2003	BCMS Conference	7.5	Stewart Buxbaum, CPA
5/12/2003	Preparation for BCMS Conference	7.5	Stewart Buxbaum, CPA
12/10/2002	Outside Conference	3.5	Stewart Buxbaum, CPA

³ The record does not include a similar consent with respect to the Notice of Determination issued against Daniel Leibel. However, there is no dispute that the benefit of the cancellation of the assessment against the corporate entity Neptune inures equally to petitioner Daniel Leibel (*see* Tax Law § 1138[a][3][B]; *Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, *appeal dismissed in part, denied in part* 72 NY2d 938, 532 NYS2d 845).

<u>Date</u>	<u>Activity</u>	<u>Time</u>	<u>Person</u>
10/18/2001	Outside Conference	<u>7.5</u>	Stewart Buxbaum, CPA
		<u>26</u>	
5/13/2003	BCMS Conference	7.5	Michael Buxbaum, CPA
5/12/2003	Preparation for BCMS Conference	6.5	Michael Buxbaum, CPA
12/10/2002	Outside Conference	<u>3.5</u>	Michael Buxbaum, CPA
		<u>18.5</u>	
5/13/2003	BCMS Conference	7.5	Gary Marcus, CPA
5/12/2003	Preparation for BCMS Conference	7.5	Gary Marcus, CPA
12/10/2002	Outside Conference	3.5	Gary Marcus, CPA
10/18/2001	Outside Conference	7.5	Gary Marcus, CPA
8/15/2001	Preparation of Workpapers	<u>7.5</u>	Gary Marcus, CPA
		<u>33.5</u>	
	Total Hours	<u>78</u>	

Petitioners' representatives assert that only 55.5 hours of such time was expended after the dates of issuance of the notices of determination, and petitioners seek recovery herein for such 55.5 hours at the \$75.00 hourly rate set by statute (*see* Tax Law § 3030[c][1][B][iii]), thus resulting in a claim for costs and fees in the amount of \$4,162.50.⁴

15. Douglas Leibel's affidavit states specifically, and without further elaboration, that he was, during the period in issue, an employee, officer, director and shareholder of Neptune, that Neptune's net worth did not exceed seven million dollars, that Neptune did not have in excess of 500 employees, and that Neptune incurred costs and fees in connection with this matter as reflected on the summary time record submitted by petitioners' representatives.

16. Eleanore Leibel's affidavit states specifically, and without further elaboration, that she is the Executrix of the Estate of Daniel Leibel, that Daniel Leibel's net worth did not exceed

⁴ The record does not reveal the actual rate at which petitioners' representatives billed for their services.

seven million dollars, that Neptune did not have in excess of 500 employees, and that costs and fees were incurred in this matter as reflected on the summary time record submitted by petitioners' representatives.

17. The Division's auditor and his team leader submitted affidavits in this matter. These affidavits, as compared to the auditor's log and his audit report, bear out that, at the July 17, 2000 initial field audit meeting, the auditor noted the discrepancies whereby purchases per third-party (supplier) information exceeded purchases per Neptune's purchases journal by over one-half million dollars, and exceeded reported taxable sales by nearly eight hundred thousand dollars. The auditor sought an explanation and none was provided at that time. Thereafter, at the October 18, 2001 meeting, Neptune's representative offered certain proposed explanations for the noted discrepancies. Handwritten notes from this meeting list such explanations as including the "bill and hold" method of purchasing merchandise allegedly used by Neptune with some of its suppliers, the placement of extra purchases in anticipation of the millennium celebration, the claim that all of Neptune's inventory figures were estimated with the accompanying belief that Neptune's ending inventory as reported for December 1999 was therefore understated, and a belief that one of the third-party supplier confirmations of purchases furnished to the Division could be suspect (inaccurate) based on allegations of some unspecified improper financial activities engaged in by the person signing the confirmation.

18. The October 22, 2001 facsimile from Neptune's representative, stating that the "additional requested information" was available for review but only at his offices, is not included in the record. The "additional requested information" is also not otherwise specified, but presumably concerned the discrepancies described above. Inquiries directed by the auditor to Neptune's suppliers revealed that the suppliers did not operate on a "bill and hold" method,

but rather that all inventory purchases were billed when delivered. With respect to the inventory buildup claim, the auditor made the following observation:

According to the information from suppliers, Neptune purchased approximately \$291,000, \$322,000 and \$439,000 in wine and liquor during November and December of 1997, November and December of 1998 and November and December of 1999. The increase in purchases from November and December 1998 to November and December 1999 does not explain the half million dollars difference between purchases per the third party information and purchases per Neptune's books. Further, if purchases were building in anticipation of Millennium sales, most of these purchases were presumably sold prior to January 1, 2000. If any build up of inventory remained after January 1, 2000 (the cost of goods sold computation on Neptune's federal corporate income tax return for 1999 does not indicate any significant build up inventory: beginning and ending inventory reported on Neptune's federal corporate tax return for 1999 were \$144,000 and \$186,000, respectively), purchases during January and February 2000 would presumably have been reduced. (The third party information does not indicate any significant decrease in purchases for January and February 2000 from January and February 1999: purchases January and February 1999 [\$156,022] are just \$4,677 more than purchases for January and February 2000 [\$151,345]).

19. On March 15, 2002, the auditor's supervisor contacted Neptune's representative and requested the submission by mail of any documentation which would reconcile the differences between the third-party purchase information versus reported taxable sales (per the day book and per sales tax returns) and purchases (per the cash disbursements journal). The auditor's supervisor advised that if such documentation was not provided, a proposed assessment would be issued. The auditor and his supervisor were in turn advised, at that time, that Neptune's representative did not have such documentation and had not been in contact with Neptune's suppliers. Thereafter, the notices of determination were issued as described.

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioners assert their right to recover costs in the nature of legal fees pursuant to Tax Law § 3030 as the parties who prevailed in the administrative proceeding (the conciliation conference) in which they were involved, and that they each meet the other requirements specified in Tax Law § 3030 with regard to each petitioner's net worth and with regard to the number of persons employed by Neptune. Petitioners argue that the Division's position in support of the notices was not substantially justified inasmuch as the assessments were based upon the Division's resort to an indirect audit method without first examining petitioner Neptune's allegedly complete and accurate books and records and determining their adequacy and reliability, or lack thereof. Further, petitioners maintain that the notice issued to petitioner Daniel Leibel as a person responsible to collect and pay over taxes on behalf of Neptune was not justified since Mr. Leibel was not alive during most of the period in question.

21. Petitioners maintain that all records were available for review at the meeting at Mr. Marcus's office, that such space was too small for such review, that the Division's auditor was advised that all records were available for review thereafter at Mr. Buxbaum's offices in Rockland County where adequate space for review was available, and that the auditor was instructed by his supervisor not to go to such offices to review the records. Petitioners argue that the purchases differentials found by the auditor were explained as the result of "bill and hold" inventory practices where Neptune would purchase inventory, allegedly including purchases in anticipation of the millennium celebration, which were not sold and were later returned to Neptune's suppliers. According to petitioners' representatives the differentials would be apparent and could be reconciled upon examination of Neptune's purchases invoices, available at Mr. Buxbaum's offices.

22. The Division maintains, in contrast, that petitioners are not entitled to costs since the Division has established that its position was substantially justified in this matter within the meaning of Tax Law § 3030. Additionally, the Division asserts that petitioners' evidence concerning the number of corporate employees, net worth (both of the corporate petitioner and the individual petitioner), and itemization of expenses incurred, is insufficient to meet the statutory standard to allow an award of 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

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

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (*see*, Tax Law § 3030[c][2][B]). Such costs include reasonable fees for the services of attorneys in connection with the administrative proceeding, “except that such fees shall not be in excess of seventy-five dollars per hour unless the [Division of Tax Appeals] determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate” (Tax Law § 3030[c][1][B][iii]; *see also* Tax Law § 3030[c][2][B]). Reasonable administrative costs “only include costs incurred on or after the date of the notice of deficiency, notice of determination or other document giving rise to the taxpayer’s right to a hearing” (Tax Law § 3030[c][2][B]).

Prevailing party is defined for purposes of section 3030, in relevant part, as follows:

(A) In general. The term “prevailing party” means any 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 on 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 or is the owner of an unincorporated business or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed seven million dollars at the time the civil action was filed and which had not more than five hundred employees 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.

(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.⁵

⁵ While petitioners made the general allegation that the Division failed to follow its own audit guidelines, the same was not further pursued or explained in any detail. As a result, petitioners are not entitled to the benefit of the rebuttable presumption of Tax Law § 3030(c)(5)(B)(iii).

(iv) Applicable published guidance. For purposes of clause (ii) of this subparagraph, 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.

(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]; emphasis added.)

B. Tax Law § 3030 became effective September 10, 1997 and applies to “any administrative or court proceeding commenced after the date this act shall have become a law” (*see*, L 1997, ch 577, § 56). Here, the notices of determination were issued on May 27, 2002 and May 28, 2002, respectively, that is after the effective date of Tax Law § 3030. Accordingly, Tax Law § 3030 applies to petitioners’ circumstances, and reasonable administrative costs incurred in connection with administrative proceedings after such issuance dates may be subject to recovery, provided the requisite additional statutory criteria are met. However, costs incurred prior to the issuance of the notices are not recoverable, and thus any award in this case would be limited to the 55.5 hours listed as having been expended subsequent to the issuance of the subject notices (Tax Law § 3030[c][2][B]). Further, petitioners have not claimed or established any circumstances or special factors which would warrant an hourly award amount in excess of the \$75.00 per hour amount set by statute, and thus any award would likewise be limited to such per hour amount (*Id.*).

C. In order to be granted an award of costs, it must be determined that the taxpayer is the “prevailing party” pursuant to Tax Law § 3030(c)(5)(A). Furthermore, any such grant is subject to the limitation of Tax Law § 3030(c)(5)(B), which provides that a taxpayer may not be treated as a prevailing party, and thus may not be awarded costs, if the Division establishes that its

position was “substantially justified.” Clearly petitioners have satisfied all the criteria of being the “prevailing party” in this matter per Tax Law § 3030(c)(5)(A)(i), inasmuch as the notices issued against them were, in fact, canceled. Thus, the critical remaining question is whether the Division’s position was “substantially justified” (Tax Law § 3030[c][5][B]), for if it was, then petitioners may not be treated as prevailing parties and are ineligible for an award of costs and fees.

D. Tax Law § 3030 is clearly modeled after Internal Revenue Code § 7430. It is proper, therefore, to use Federal cases for guidance in analyzing this State law (*see, Matter of Levin v. Gallman* 42 NY2d 32, 396 NYS2d 623; *Matter of Iiter Sener*, Tax Appeals Tribunal, May 5, 1988). A position is substantially justified if it has a reasonable basis in both fact and law (*see, Information Resources, Inc. v. United States*, 996 F2d 780, 785; 93-2 US Tax Cas ¶ 50,519), with such determination properly based “on all the facts and circumstances surrounding the case, not solely upon the final outcome” (*Phillips v. Commissioner*, 851 F2d 1492, 1499; *Heasley v. Commissioner*, 967 F2d 116, 120; 92 US Tax Cas ¶ 50,412). This determination of “substantially justified” is properly made in view of what the Division knew at the time the position was taken, i.e., when the notices were issued (Tax Law § 3030[c][8][B]; *see DeVenney v. Commissioner*, 85 TC 927, 930). The fact that the notices were canceled by the conciliation conferee is a factor to be considered. However, this action does not preclude a finding that the Division’s position was substantially justified at the time the notices were issued (*see, Heasley v. Commr., supra*). Under the foregoing standard, and in view of all of the facts and circumstances of this case, the Division has established that its position was “substantially justified” (Tax Law § 3030[c][5][B]). Accordingly, petitioners may not be treated as prevailing

parties under Tax Law § 3030, and therefore may not recover costs and fees under Tax Law § 3030(c)(5)(B)(i).

E. As noted above, the standard of “substantially justified” with respect to the issuance of an assessment, viewed at the time of issuance of such assessment, is a lesser standard than that which applies in determining whether the assessment so issued is “ultimately justified,” i.e., whether it is sustained. At the beginning of its audit, the Division was advised that taxable sales, per Neptune’s sales tax returns, were reported based on sales per Neptune’s day book of sales. The Division did not challenge this position and, in fact, observed that sales per Neptune’s day book did tie in to sales as reported on Neptune’s returns. At the same time, however, the Division also observed that purchases recorded in Neptune’s cash disbursements journal (\$3,355,819.00) exceeded Neptune’s reported sales (\$3,077,433.00) by some \$278,386.00. Furthermore, the Division had obtained information from Neptune’s suppliers which reflected that Neptune’s purchases were \$3,866,670.00, a figure which exceeded Neptune’s purchases as recorded in its cash disbursements journal by some \$510,851.00, and which exceeded Neptune’s reported sales by some \$789,237.00. Such substantial discrepancies between third-party purchase information and both purchases and sales, as recorded and reported by Neptune in its own books, as well as the simple fact that Neptune’s books recorded purchases which exceeded its recorded and reported sales, presents a legitimate indication that Neptune’s books and records were unreliable and inaccurate.

F. One obvious implication, under circumstances where a taxpayer is making purchases far in excess of its reported sales (a practice not generally sustainable over the long haul absent some compelling explanation), is that the taxpayer may not be recording and reporting all of its sales. Faced with these circumstances, and this attendant implication, the auditor and his

supervisor requested explanations for such circumstances, as well as supporting documentation to bear out such explanations. Such supporting information, which according to Neptune's representative was available, was not provided to the auditor, despite requests that the same be mailed to the auditor. While Neptune's representative sought to have such information reviewed only at his Rockland County offices, there is no claim or sense that the information was so voluminous or cumbersome to transport that it could not have been mailed or otherwise furnished to the auditor. While certain explanations were offered with regard to the purchases versus sales differences (*see* Finding of Fact "17"), no supporting documentation was provided to bear out these explanations, and the auditor's subsequent inquiries and calculations with respect thereto called the same into question (*see* Findings of Fact "18" and "19"). As a result, the auditor advised Neptune's representatives of the amount of tax, penalties and interest proposed and, thereafter, the notices were issued. Under these circumstances, the Division was substantially justified in its conclusion that Neptune's records were unreliable, that Neptune was not reporting all of its sales, and that additional sales tax was due.

G. Ultimately, the assessments in question were canceled by the BCMS conferee. His letter advising the parties of his decision to cancel the assessments supports the foregoing conclusion that the Division's position at the time of issuance of the notices was substantially justified, and thus is helpful in resolving the issue at hand. Specifically, the conferee wrote that "*after considering all of the evidence submitted, I have decided to grant your request and cancel the Notice . . .*" The conferee's letter does not specify the reasons, or describe or detail the nature or scope of the "evidence submitted," which led him to the decision to cancel the assessment. Presumably, however, such evidence addressed the noted purchases versus sales discrepancies and was sufficient to explain the same. What remains lacking is an explanation of

why such “evidence” was not furnished to the auditor when requested, or any claim or other indication that the same was too difficult to submit via mail or in person, as opposed to only being reviewed at petitioners’ representative’s offices. The fact that such “evidence” was presented at the BCMS conference would tend to support the conclusion that the same could have been supplied prior thereto. Ultimately, since the information was not submitted until the conference, its impact and result there (cancellation of the assessments) does not diminish the conclusion that the Division’s position was substantially justified at the time of issuance of the assessments against petitioners.

H. Having concluded that the Division’s position and action in issuing an assessment to Neptune was substantially justified, leaves only the question of whether its issuance of an assessment to Daniel Leibel as a person responsible to collect and pay over taxes on behalf of Neptune was substantially justified. Given the circumstances as known to the Division at the time of issuance, such position was substantially justified. First, the Division was not aware at the time of issuance of the notice that Daniel Leibel was deceased. On this score, there is no evidence or claim by petitioners that they advised the Division of this fact at any time prior to issuance of the notice against Mr. Leibel, nor is there any evidence or indication that the Division independently learned of this fact at any time prior to issuance of the notice against Mr. Leibel. Given the information shown on the officer questionnaire, it was reasonable for the Division to have assessed Daniel Leibel in the capacity of a person responsible to ensure that taxes were collected and remitted by petitioner Neptune. In sum, at the time of issuance of the assessments against Neptune and Daniel Leibel, the Division’s position that the additional tax assessed was in fact due, and that Daniel Leibel was a person under a duty of responsibility to collect and pay over such tax on Neptune’s behalf, was substantially justified.

I. Because petitioners' application for costs fails for the reasons discussed above, this Order does not address the reasonableness or propriety of the specific costs claimed by petitioners in their application. However it is worth noting that, with regard to the fees sought, Tax Law § 3030(c)(5)(A)(ii)(I) requires the submission of a timely application for fees and other expenses showing, *inter alia*, "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 . . .*" In this instance, petitioners have submitted simply a summary statement of the dates and blocks of hours of service provided by three CPA's, including a very cryptic description of the activities engaged in during such hours (*see* Finding of Fact "14").⁶ This statement is not only essentially bereft of detail, but more simply fails to provide any information from which a determination might be made as to the reasonableness of the amount of expense sought for reimbursement. In fact, the statement provides no indication as to the rate or basis upon which fees were imposed or computed, a requirement specifically listed within Tax Law § 3030.

H. Petitioners' application for costs and fees is hereby denied.

DATED: Troy, New York
October 9, 2003

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

⁶ The summary time statement provided by petitioners includes no claim or itemization of any expenses but rather only lists blocks of hours for each of three CPA's on particular days. Hence, it appears that petitioners seek reimbursement only for professional fees, as opposed to other expenses (telephone, photocopying, postage and the like). Statutory references to "Attorney's fees" include "fees for the services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals . . ." Petitioners' representatives, CPA's licensed by New York State, are among those authorized to practice before the Division of Tax Appeals (Tax Law § 2014).