STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CASE TIRE SERVICE, INC.	:	ORDER DTA NO. 820162
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 June 1, 2000 through May 31, 2003.	:	

Petitioner, Case Tire Service, Inc., 302 Grandview Avenue, Honesdale, Pennsylvania 18431, 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 June 1, 2000 through May 31, 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 44 Hawley Street, Binghamton, New York, on December 15, 2005 at 10:00 A.M. Petitioner appeared by Robert Rossi & Co. (Sean J. Grassi, CPA). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (L. Scott Bensen).

The Presiding Officer issued a determination on March 2, 2006 which granted the petition in part and modified the Notice of Determination, dated December 25, 2003.

By letter dated March 31, 2006, petitioner, by its president, James Tamblyn, filed an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel), filed an Affirmation in Opposition on May 9, 2006, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs, the Division's Affirmation in Opposition, the determination issued March 2, 2006, and all pleadings and proceedings had herein, Joseph W. Pinto, Jr., 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. During the period in issue, June 1, 2000 through May 31, 2003, petitioner was a Federal S corporation which operated a tire service station in Port Jervis, New York.

2. In June 2003, the Division performed an audit of petitioner's business. It was determined that petitioner's sales records were complete and accurate and that gross sales per its books reconciled with its Federal income tax returns and its New York State sales and use tax returns. The Division utilized a test period audit and determined that reported gross and taxable sales were accurately reported for the audit period.

3. The Division's audit of taxable purchases, however, discovered 23 taxable purchases on which no sales or use tax had been paid. Using this information, the Division resorted to an estimated audit methodology and calculated an error rate which it applied to gross sales for the audit period to arrive at additional use tax due for the audit period of $3,644.34.

4. The Division also examined asset acquisitions during the audit period and found only one purchase on which petitioner conceded it owed use tax of $54.30.

5. On December 25, 2003, the Division issued a Notice of Determination to petitioner asserting additional tax due of $3,698.64, plus penalty and interest. At the conference in the Bureau of Conciliation and Mediation Services, the conferee sustained the tax due, canceled the penalty and reduced the interest to the minimum rate.

6. The presiding officer, upon examining the 23 taxable purchases noted that certain purchases were for snow plowing and cleaning services, which he determined were not related to gross sales. In addition, the presiding officer determined that the Division did not include expenses for shop supplies and tools in its test period, despite knowledge of the omissions, and relied upon this flawed test period in issuing its Notice of Determination. He modified the error rate to account for the snow plowing and cleaning services and directed the Division to recompute the Notice of Determination accordingly.

The presiding officer noted that the Division tried to extend the test period at the suggestion of the petitioner, but met with resistance from petitioner who produced very few documents. The Division discovered the expenses for shop supplies and tools at this time, but it decided not to modify its first test period audit to account for these expenses, contending that the results adequately projected petitioner's taxable purchases.

7. Mr. Tamblyn's letter, filed on April 3, 2006, constituting the application for costs herein, contained an unsworn statement asserting that petitioner was a corporation with a net worth of less than seven million dollars and having fewer than five hundred employees. In addition, attached to the letter was a document, the author of which was unspecified but presumably Mr. Tamblyn, which contained an itemization of work performed by Robert Rossi & Co., the date services were rendered, the time expended on each date, the hourly rate for services, the individual from the firm who performed the service, a description of the service and a charge billed. Total time spent on the matter was set forth as 26.25 hours at various rates, for a total fee of $1,593.75. Disbursements for mileage totaled $107.51.

Mr. Tamblyn contends that petitioner was the prevailing party pursuant to Tax Law § 3030 because it prevailed on the most significant issue in the case, largely because the Division

knowingly relied on a flawed test period in coming to its assertion of additional tax, which was modified by the presiding officer.

8. The Division argues that the application for costs was not timely filed, since it was filed beyond 30 days from the issuance of the determination. In addition, it contends that petitioner has not properly established that its net worth was less than seven million dollars, that it employed fewer than 500 people or claimed recoverable costs. In addition, the Division argues that its position was substantially justified and that petitioner has not substantially prevailed with respect to the amount in issue or with respect to the most significant issue or set of issues presented.

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.

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 also 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][3].)

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.

(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.

* * *

(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. First, it is determined that the application for costs herein was timely. In accordance with Tax Law § 3030 (c)(5)(A)(ii)(I), the application must be filed within 30 days of the final judgment in the matter. In this case, the final judgment was the date the determination was issued, or March 2, 2006. (20 NYCRR 3000.13[h][2].) The application was postmarked April 3, 2006, or the 32nd day after the determination was mailed. However, the 30th day following the issuance of the determination fell on a Saturday and the next business day was Monday, April 3, 2006.

Pursuant to General Construction Law § 25-a, when any period of time before which an act is required to be done ends on a Saturday, Sunday or legal holiday, such act may be done on the next succeeding business day. (***See, Matter of American Express Co.,*** Tax Appeals Tribunal, July 3, 1991; ***Matter of Bur-Sul, Ltd.***, Tax Appeals Tribunal, February 13, 1992.) Therefore, petitioner's filing of the motion on Monday, April 3, 2006 was timely.

D. It is further concluded that petitioner was not the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the Notice of Determination based upon its chosen audit methodology.

Petitioner's contention that the audit methodology was critically flawed in that the Division refused to make modifications based on the inclusion of cleaning services and snow plowing in the taxable purchases test period is significantly weakened by its failure to supply supporting documentation for expense purchases that were found to have been purchased without the payment of sales and use tax and its lack of cooperation with the expanded test period, which was initially insisted upon by petitioner. The simple fact is that petitioner owed tax on items discovered on audit by the Division and this amount was then projected across the audit period. Once the sum for the snow plowing and cleaning services was removed from the

test period audit of the expense purchases (and separately assessed and projected for the audit period) the Division's assessment was upheld in all other respects. Given these facts, it is determined that petitioner did not substantially prevail with respect to the amount in controversy or with respect to the most significant issue presented. (Tax Law § 3030[c][5][A][i].)

E. Even if the Division's position was not substantially justified, the instant motion would have failed because petitioner failed to show that it was a corporation the net worth of which did not exceed seven million dollars and which had not more than 500 employees when the proceeding was commenced (Tax Law § 3030[c][5][A][ii][II]).

Although Mr. Tamblyn mentioned these prerequisites, unsworn and unsupported assertions in a letter do not constitute adequate proof of these critical elements.

In addition, petitioner failed to include with its application an itemized statement from its representative stating the actual time expended and the rate at which such fees were computed. (Tax Law § 3030[c][5][A][ii][I].) Although petitioner submitted a summary of unknown origin, the statute is clear that it must be a document prepared by the attorney or expert.

F. The application for costs of petitioner, Case Tire Service, Inc., filed April 3, 2006, is denied.

DATED: Troy, New York
July 13, 2006

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE