STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **MANUEL SANTOS** for Revision of a Determination or for Refund of Tax on Cigarettes and Tobacco Products under Article 20 of the Tax Law for the Period Ending February 20, 2004.	:	ORDER DTA NO. 820499

Petitioner, Manuel Santos, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ending February 20, 2004.

A hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on November 14, 2006 at 1:15 P.M. Petitioner appeared by McGovern, Connelly & Davidson (William H. McKenna, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Paula Tunkel and Gary M. Keiser).

Presiding Officer Hoefer issued a Small Claims Determination dated June 28, 2007.

On July 27, 2007, petitioner filed a timely application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation filed a timely affirmation in opposition by its due date of August 30, 2007, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs and attached documentation and the Division of Taxation's affirmation in opposition and attached documentation, and all pleadings

and documents submitted in connection with this matter, Catherine M. Bennett, 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. Petitioner, Manuel Santos, was a self-employed routeman for Worldwide Wholesale Trading, Inc. (Worldwide), commencing in March 2003. Both petitioner and Angel Ortiz worked together for Worldwide servicing its clients located on Route 79. When Mr. Ortiz's brief relationship with Worldwide terminated, the job of providing service to Worldwide's Route 79 customers fell solely to petitioner.

2. Worldwide took orders for the sale of tobacco products by telephone from its customers, and as a self-employed routeman, petitioner, using his own transportation, was required to pick up orders at Worldwide's Bronx facility, deliver the product to the customer and collect payment. Petitioner was compensated at the rate of $1.00 for every box of cigars he delivered.

3. Petitioner reported business income in the amount of $3,100.00 on his 2003 New York State personal income tax return, which corresponded with the amount of nonemployee compensation paid to petitioner by Worldwide during that year.

4. Following a regulatory inspection on February 18, 2004 of a deli located in Yonkers, New York, concerning its compliance with the provisions of Article 20 of the Tax Law, which imposes tax on cigarettes and tobacco products, Division of Taxation (Division) investigators connected petitioner to deliveries of tobacco products to the deli. The investigators confronted petitioner with boxes of cigars in his vehicle in plain view. Although petitioner provided the

investigators with numerous invoices from Worldwide showing the purchase of cigars, since petitioner was not a licensed or registered dealer or distributor of tobacco products and the invoices were not in petitioner's name, the Division's investigators thereafter seized over 4,000 cigars found in his possession.

5. Petitioner was charged with the attempt to evade or defeat the tobacco products tax, being an unlicensed wholesaler of tobacco products, being an unregistered distributor of tobacco products, failure to produce tobacco product business records and possession for sale of more than 2,500 cigars. On November 15, 2004, petitioner pled guilty in Yonkers City Court to a charge of disorderly conduct in full satisfaction of all five misdemeanor criminal charges alleged in the summonses and was sentenced to a fine of $250.00, plus a $95.00 surcharge. On March 29, 2004, the Division issued a Notice of Determination to petitioner asserting that as an unregistered and unlicensed tobacco products dealer or distributor in possession of 4,036 untaxed cigars, he was liable for a civil penalty in the sum of $11,583.00, pursuant to Tax Law § 481(1)(b)(i).

6. A hearing was held before James Hoefer, Presiding Officer, on November 14, 2006. From the evidence produced he determined that the cigars found in petitioner's possession on February 18, 2004 were cigars he had received from Worldwide, an entity appointed by the Division as a registered distributor to import, manufacture and sell tobacco products, excluding cigarettes. Additionally, the presiding officer found that although the Division's decision not to accept the invoices or delivery tickets presented to the investigators which bore the name of petitioner's co-worker, Angel Ortiz, was initially a reasonable one, the discrepancy was satisfactorily explained by petitioner. It was concluded that petitioner was not liable for the penalty asserted in that matter, and the notice was canceled.

7. On July 27, 2007, the Division of Tax Appeals received an application for costs pursuant to Tax Law § 3030 from petitioner, which sought costs in the amount of $1,194.44. These costs consisted of the following:

Professional Fees by McGovern, Connelly & Davidson	
15.5 hours (detail provided) at $75 per hour	$ 1,162.50
Disbursements	
Certified mail and Federal Express fees	36.94
Total Costs and Disbursements	$1,194.44

The services rendered were for preparation of conciliation conference documents, legal research, preparation of the petition before the Division of Tax Appeals, representation at the small claims hearing, and preparation of the briefs in this matter.

8. The Division filed a timely Motion in Opposition to Petitioner's Application for Costs.

9. An Affirmation in Reply was filed by petitioner and received by the Division of Tax Appeals on September 28, 2007.[1]

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner maintains he is entitled to an award of costs pursuant to Tax Law § 3030.

11. The Division opposes petitioner's application for costs, arguing that petitioner failed to show that his net worth did not exceed two million dollars and that he is not the prevailing party since the Division's position in this matter was substantially justified.

CONCLUSIONS OF LAW

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

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[1] Inasmuch as a request for permission to file a reply was not made to the administrative law judge assigned to this matter, or to the supervising administrative law judge, pursuant to 20 NYCRR 3000.5(b), petitioner's reply has not been considered.

> 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]). For purposes of this section, "fees for the services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals shall be treated as fees for the services of an attorney" (Tax Law § 3030[c][3]).

Prevailing party is defined for purposes of section 3030(c)(5), 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):
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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

> (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.
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> (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.
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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]).

B. 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) with respect to the amount in controversy or with respect to the most significant issue or set of issues presented. Tax Law § 3030, modeled after the Internal Revenue Code § 7430, may be applied with the guidance of

Federal cases. The courts have stated that the requirements of the statute are not separate but conjunctive and a taxpayer must satisfy all of the conditions of the statute in order to qualify as a "prevailing party"(***Doyle v. Commr.***, 56 TCM 260 [1988]; ***Stieha v. Comm.***, 89 TC 784 [1987]).

Tax Law § 3030(c)(5)(A)(ii)(II) requires that to qualify as a "prevailing party" petitioner must be an individual whose net worth does not exceed two million dollars at the time the civil action is filed. Petitioner failed to even assert this fact, let alone offer some proof of the same. Nor did the hearing record bear evidence of this fact. Inasmuch as petitioner did not fulfill this portion of the statutory criteria, petitioner does not meet the definition of a prevailing party so as to warrant a judgment for costs.

C. Further, the Division asserts that its position was substantially justified at the time of the issuance of the Notice of Determination. As has already been noted, Tax Law § 3030 is modeled after Internal Revenue Code § 7430 and it is thus proper to refer to Federal cases for guidance in analyzing this State law (***see Matter of Levin v. Gallman*** 42 NY2d 32, 396 NYS2d 623 [1977]; ***Matter of Sener***, Tax Appeals Tribunal, May 6, 1988). The Tax Appeals Tribunal recently set forth the following key principles in ***Matter of Stuckless*** (Tax Appeals Tribunal, August 16, 2007):

> A position is substantially justified if it has a reasonable basis in both fact and law (***see***, ***Information Resources v. United States***, 996 F2d 780, 93-2 USTC ¶ 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, 88-2 USTC ¶ 9431, ***Heasley v. Commissioner***, 967 F2d 116, 120, 92-2 USTC ¶ 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). The fact that petitioner prevailed in the final decision. . . is a factor to be considered, but does not preclude a finding that the Division's position was substantially justified at the time the notice was issued.

In determining whether the Division was substantially justified, the Division's position must be examined in light of the law applicable to the particular facts of this case known to the Division. The Division's position at the time of the issuance of the notice was based upon available information which indicated that petitioner was an unregistered and unlicensed tobacco dealer or distributor, potentially subject to the statutory penalty pursuant to Tax Law § 481(1)(b)(i) for the period in issue. Petitioner was a routeman for a company that was delivering tobacco products to a deli under investigation. Petitioner's attempted delivery had been refused and when petitioner was approached, cigars were in plain view, without the proper documentation available. The presiding officer noted the reasonableness of the Division's nonacceptance of the improper documentation at that time, though he found in petitioner's favor once the proper documentation was produced and explanation of the company's practices provided. In this matter, the Division followed its own guidelines in issuing the Notice of Determination and had a reasonable basis in both fact and law, leaving me to conclude that the Division was substantially justified in view of all the facts and circumstances of this case. Accordingly, petitioner cannot be treated as a prevailing party under Tax Law §3030 and is not entitled to recover costs and fees under Tax Law §3030(c)(5)(B)(i).

D. The application of Manuel Santos for costs is denied.

DATED:Troy, New York
November 29, 2007

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE