STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERIE LINKS MANAGEMENT, INC.,	:	ORDER DTA NO. 820998
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 September 1, 2000 through November 30, 2000.	:	

Petitioner, Erie Links Management, Inc., 5900 N. Burdick Street, East Syracuse, New York 13059-9462, 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 September 1, 2000 through November 30, 2000. In addition, Robert D. Hall, 4892 Canterbury Drive, Manlius, New York 13104, and Thomas M. Oot, 4968 North Eagle Village Road, Manlius, New York 13104, each 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 September 1, 2000 through November 30, 2000.

A consolidated small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on June 15, 2006 at 9:15 A.M. Petitioners Robert D. Hall and Thomas M. Oot appeared *pro se* and also for petitioner Erie Links Management, Inc. The Division of Taxation appeared by Mark F. Volk, Esq. (Bruce C. Van Schaick, CPA and Laura J. Liberio).

Presiding Officer Hoefer issued a determination on September 14, 2006 which partially granted the petition of Erie Links Management and directed the Division of Taxation to delete $4,160.13 of tax asserted due on the bulk sales transaction from the Notice of Determination

dated November 4, 2004. This determination also granted the petitions of Robert D. Hall and Thomas M. Oot and cancelled in full the January 10, 2005 Notice of Determination issued to each of them.

By letter dated October 11, 2006, petitioner Erie Links Management, Inc., by its treasurer, Robert D. Hall, brought an application for costs pursuant to Tax Law § 3030. The Division of Taxation was granted an extension of time to respond until November 27, 2006. The Division of Taxation, appearing by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel) filed a timely affirmation in opposition on November 22, 2006, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs and attached documentation, the Division of Taxation's affirmation in opposition, the determination issued September 14, 2006, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner, Erie Links Management, Inc., is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. Pursuant to a Bulk Sales Agreement dated April 6, 2000, petitioner, Erie Links Management, Inc. ("ELMI"), acquired, *inter alia*, all of the assets of Erie Village Golf Course, Inc. ("the seller"). The Bulk Sales Agreement provided, in pertinent part, that:

> It is hereby agreed between the parties that the Transferee [ELMI] shall pay to the Transferor [the seller] the sum of $120,000.00, in Escrow, on execution of this Agreement and in full compliance with New York State's Sales Law for the acquisition of all of the inventory, equipment and business accessories set forth on Schedules. . . .

> The Transferor shall be responsible for satisfying all of the vendors and creditors set forth within the Bulk Sales Affidavit being delivered by the Transferor to the Transferee, as of this date. The Transferee shall provide notice to the creditors in order to comply with the statutory requirements of a Bulk Sale. . . .
>
> All cash monies paid pursuant to this Agreement shall be held in Escrow by Attorney Vaughn Lang, Esq., pending compliance with New York State's Bulk Sales Law and proper notice to all creditors.

2. A Bill of Sale executed by the seller's president, also dated April 6, 2000, provided that the seller "does further indemnify and hold harmless [ELMI] from any loss, claim or liability pertaining to said transfer."

3. On or before April 14, 2000, ELMI prepared and mailed to approximately 200 creditors of the seller a document entitled "NOTICE OF BULK SALE." The notice stated the following:

> Please be advised that you are hereby given notice that a bulk transfer is about to be made pertaining to the assets, inventory and equipment presently owned by Erie Village Golf Course, Inc., hereafter referred to as "Transferor", located at 5900 North Burdick Street, East Syracuse, New York 13057, to Erie Links Management, Inc., hereafter referred to as "Transferee", located at 5912 North Burdick Street, East Syracuse, New York 13057.
>
> The Transferee has offered to purchase the remaining assets of the Transferor and honor existing paid memberships and scheduled events for the 2000 Golf Season (in the sum of approximately $90,000.00) and make a cash payment to the Transferor in the sum of $120,000.00.
>
> The location of the property to be conveyed pursuant to this bulk transfer is at the Erie Village Golf Course, located at 5900 North Burdick Street, East Syracuse, New York, and the general description of the property is golf course equipment, office equipment, Pro Shop inventory, and other related goods.
>
> The estimated total of the Transferor's debt, as of this date, is the sum of $1,200,000.00. The assets, inventory and equipment being conveyed to the Transferee as a result of this bulk sale have a fair market value of approximately $200,000.00. A list of the creditors and the amount claimed due by each of the creditors may be inspected at 5912 North Burdick Street, East Syracuse, New York 13057, Attention: Gretchen Goodfellow, (315) 656-7251 ext. 152.

> This transfer is in part for new consideration and the payment of all monies relating thereto shall take place on the 28th day of April, 2000, at 10:00am, at the office of Vaughn D. Lang, Esq., 6883 East Genesee Street, Fayetteville, New York, 13066.
>
> In order to discuss your claim and any monies that may be available to pay your outstanding claim, you should contact James Frank, CPA, 5900 North Burdick Street, East Syracuse, New York 13057, (315) 656-4653 ext. 20.
>
> This notice is intended to comply with Section 6-107 of New York's Uniform Commercial Code.

4. ELMI mailed, by certified mail return receipt requested, a copy of the above described Notice of Bulk Sale to "New York State Dept of Taxation, 333 East Washington Street, Syracuse, NY 13202." The return receipt from the United States Postal Service indicated that ELMI had a piece of certified mail delivered to the New York State Dept of Taxation, 333 East Washington Street, Syracuse, NY 13202 on April 14, 2000. The first name of the person who signed for certified mail was either Gay or Gary G. and, while the last name is mostly illegible, the first three letters of the last name appear to begin with the letters P-O-S.

5. The New York State Department of Taxation and Finance, Division of Taxation ("Division"), maintains a District Office at 333 East Washington Street, Syracuse, NY 13202. The two individuals who appeared on behalf of the Division at the small claims hearing are both auditors from the Syracuse District Office and their testimony was that in the year 2000 there was no Division employee assigned to the Syracuse District Office by the name of Gay or Gary G. P-O-S. The auditors also testified that a comprehensive search of the Syracuse District Office and the Division's computer records concerning bulk sales failed to reveal that the Division ever received the Notice of Bulk Sale which was signed for on April 14, 2000.

6. Pursuant to the terms of the Bulk Sales Agreement, Notice of Bulk Sale and Bill of Sale, the $120,000.00 cash payment ELMI was required to pay the seller was held in escrow until April 28, 2000. ELMI, believing that it had given the Division timely and proper notification of the bulk sale on April 14, 2000, released the $120,000.00 to the seller on April 28, 2000 since it had not received a notice from the Division within five business days of the Division's receipt of the Notice of Bulk Sale. There is no dispute in this matter that ELMI took possession and control of the tangible personal property which it acquired in the bulk sale in question on or about April 6, 2000, and payment was made to the seller on April 28, 2000.

7. In May 2003, the Division's Syracuse District Office initiated a field audit of the seller for the period June 1, 2000 through May 31, 2003. When the auditor learned that the seller had sold the business prior to the proposed audit period, she ceased all audit action with respect to the seller. Instead, the Division, in September 2003, commenced an audit of ELMI and the audit period stated in the appointment letter was September 1, 2000 to August 31, 2003. ELMI, like the seller, was also a registered vendor. The Tax Field Audit Record indicates that the Division's auditor became aware of the bulk sale in October 2003, at the earliest, or January 2004, at the latest.

8. During the course of the audit, the Division obtained from ELMI two consents extending the period of limitations for assessment. The first consent extended the period of limitations for assessment for the period September 1, 2000 through May 31, 2001 to June 20, 2004. The second consent extended the period of limitations for assessment for the period September 1, 2000 through November 30, 2001 to December 20, 2004. There is no evidence in the record that consents extending the period of limitations for assessment were obtained from Robert D. Hall or Thomas M. Oot.

9. Upon completion of the audit, the Division determined that ELMI had properly reported gross and taxable sales and that it collected and remitted the proper tax on sales. The Division, however, concluded that ELMI had not paid the proper sales taxes on all of its taxable purchases. Specifically, the Division determined that ELMI owed $4,160.13 of tax for the quarter ending November 30, 2000 on the assets, valued at $59,430.43, it had acquired from the seller in the bulk sales transaction. The Division also concluded that $230.65 of tax was due for the quarter ending August 31, 2002 for nonrecurring expense purchases. Finally, the Division found that $201.15 of tax was due on recurring expense purchases for each of the eight quarters ending November 30, 2000 to August 31, 2002. In the small claims proceeding, Erie Links Management, Inc. and Messrs. Hall and Oot did not dispute the Division's calculation of the tax due. They did, however, argue that the assessments asserting that $4,160.13 of tax was due on ELMI's acquisition of the seller's assets pursuant to the bulk sale transaction were issued beyond the applicable statute of limitations for assessment.

10. On November 4, 2004, the Division issued a Notice of Determination to ELMI asserting that $4,361.28 ($4,160.13 + $201.15) of tax, plus interest, was due for the quarter ending November 30, 2000. On January 10, 2005, the Division issued separate notices of determination to Robert D. Hall and Thomas M. Oot, asserting that they were each personally liable for the $4,361.28 of tax, plus interest, due from ELMI for the quarter ending November 30, 2000. As noted previously, ELMI concedes that it is liable for the $201.15 of tax due on recurring expense purchases for the quarter ending November 30, 2000. The tax due on recurring expense purchases for the other seven quarters included in the audit, plus the $230.65 of tax due on nonrecurring expense purchases, has been paid and was not at issue in the small claims proceeding.

11. The auditor's work papers, specifically Schedule E, detail her computation of the tax due on ELMI's acquisition of the seller's assets in the bulk sale transaction. On Schedule E, the auditor recorded the "Invoice Date" for the bulk sale as "09/01/2000." No invoice number was listed on Schedule E. The record herein contains no explanation why an invoice date of September 1, 2000 was used by the auditor when all of the relevant documents reflect that the bulk sale occurred in April 2000 and that ELMI also took possession and control of the tangible personal property purchased in the bulk sale in April 2000. There is no documentary evidence in the record to support that possession and control of the tangible personal property acquired by ELMI in the bulk sales transaction occurred on September 1, 2000 as asserted by the Division.

12. The seller was a registered vendor for sales tax purposes, and it filed a sales and use tax return for the quarter ending May 31, 2000. From its records the Division was unable to verify that the seller collected sales tax from ELMI on the value of the taxable tangible personal property acquired by ELMI in the bulk sales transaction. Petitioners were unable to produce any documentary evidence to show that the seller charged and collected sales tax on the taxable assets transferred to ELMI in the bulk sale transaction.

13. ELMI was also a registered vendor for sales tax purposes. ELMI filed a sales and use tax return for the quarter ending May 31, 2000 on or about the June 20, 2000 due date. On its sales and use tax return for the quarter ending May 31, 2000, ELMI reported $142,657.00 in gross sales, $41,979.00 in taxable sales and that there were no purchases subject to use tax. Since ELMI reported that there were no purchases subject to use tax on its return for the quarter ending May 31, 2000, it is clear that it did not include the sales tax due on the assets acquired from the seller in the bulk sale transaction on said return.

14. In the determination of September 14, 2006, the presiding officer concluded that the Division did not properly or timely issue assessments to Erie Links Management, Inc. and Messrs. Hall and Oot, for the $4,160.13 of tax due on ELMI's acquisition of the seller's assets in the bulk sale transaction. The presiding officer deleted the $4,160.13 of tax asserted due on the bulk sale transaction from the November 4, 2004 Notice of Determination issued to Erie Links Management, Inc. and cancelled the January 10, 2005 notices of determination issued to Messrs. Hall and Oot.

15. In support of its motion, petitioner submitted a letter dated October 11, 2006 from Robert D. Hall, which referenced the final determination issued to Erie Links Management, Inc., Robert D. Hall and Thomas M. Oot, and stated, in pertinent part:

> I have examined my time in regards to the New York State Sales Tax audit of [Erie Links Management, Inc.] and the resulting appeals thereon, which total over 48 hours. Given the fact over 29 hours was unnecessarily caused by the appeals and the requests for conferences, etc., I am requesting a reimbursement of $90 per hour for 25 hours or $2,250.
>
> I have attached a bill from Hall and Dettor, LLP, being the CPA firm I am associated with, stating this is a reasonable administrative cost pursuant to Tax Law § 3030.

It is noted that Mr. Hall wrote his October 11, 2006 letter to the Division of Tax Appeals on Hale and Dettor, LLP stationery, on which Robert D. Hall, CPA's, name appears as one of the accountants listed in the letterhead.

16. Petitioner attached to the October 11, 2006 letter an invoice of Hall and Dettor, LLP, certified public accountants, addressed to NYS Tax Department, W.A. Harriman Campus, Building 9, Room 340, Albany, NY 12227 and dated October 5, 2006, which indicated that a charge of $2,250.00 was due upon receipt for "Professional Services: RE: Erie Links Management, Inc. Reasonable administrative costs of appeals."

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]). 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):

(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 an 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.

(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. 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, petitioner Erie Links Management, Inc. has satisfied all the criteria of being the "prevailing party" in this matter per Tax Law § 3030(c)(5)(A)(i), inasmuch as it substantially prevailed on the most significant issue presented, the expiration of the statute of imitations for assessment for sales tax due on tangible personal property which Erie Links Management, Inc. acquired as purchaser in a bulk sales transaction. 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 petitioner may not be treated as a prevailing party and is ineligible for an award of costs and fees.

C. 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 Ilter 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, 88-2 US Tax Cas ¶ 9431; ***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 notice was issued (Tax Law § 3030[c][8][B]; ***see, DeVenney v. Commissioner***, 85 TC 927, 930). The fact that the notice was modified by the presiding officer 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 notice was issued (***see, Heasley v. Commissioner, supra***).

D. The issue in this matter was whether the statute of limitations for assessment expired before the Division issued assessments to ELMI and Messrs. Hall and Oot, as alleged responsible persons, for sales tax due on tangible personal property which ELMI acquired as purchaser in a bulk sales transaction. The assessment at issue asserted that $4,160.13 of tax was due on ELMI's acquisition of the seller's assets in the bulk sale transaction for the quarter ending November 30, 2000. As noted in the Findings of Fact, all relevant documents reflect that ELMI took possession and control of the tangible personal property which it acquired in the bulk sale in question on or about April 6, 2000 and payment was made to the seller on April 28, 2000. In September 2003, the Division commenced a field audit of ELMI for the period September 1, 2000 through August 31, 2003. The Division's Tax Field Audit Record indicates that the auditor became aware of the bulk sale in October 2003 at the earliest, or January 2004, at the latest. The seller in the bulk sale transaction at issue was a registered vendor, which was required to collect from ELMI the sales tax due on the value of the taxable tangible personal property which was transferred via the April 2000 bulk sale. From its records the Division was unable to verify that the seller collected sales tax from ELMI on the value of the taxable tangible personal property in the bulk sale transaction. Neither ELMI nor Messrs. Hall and Oot was able to provide the auditor with any documentary evidence which showed that the seller charged and collected sales

tax on the taxable assets transferred to ELMI in the bulk sale transaction. Since the seller failed to collect the proper tax due on the bulk sale, ELMI, as a registered vendor, was required to report the tax due on its return. The Division's Form ST-130, Business Purchaser's Report of Sales and Use Tax, advises taxpayers who are registered vendors not to use Form ST-130, but instead to use their periodic sales tax return to report and remit the tax due. ELMI filed a sales and use tax return for the quarter ending May 31, 2000 on or about the June 20, 2000 due date. On that sales and use tax return, ELMI reported $142,657.00 in gross sales, $41,979.00 in taxable sales and that there were no purchases subject to use tax. Clearly, ELMI did not include the sales tax due on the assets acquired from the seller in the bulk sale transaction on its return for the quarter ending May 31, 2000. While ELMI did execute two waivers to extend the statute of limitations for assessment, the quarter ending May 31, 2000 was not included in either waiver. Therefore, since the $4,160.13 of tax due on the bulk sale transaction in question was due for the quarter ending May 31, 2000 and ELMI filed a sales and use tax return for the quarter ending May 31, 2000 on or about June 20, 2000, the three-year statute of limitations for assessment (Tax Law § 1147[b]) commenced as of this date and the Division had until June 20, 2003 to assess this tax due. The presiding officer properly determined that the Division issued the November 4, 2004 assessment to petitioner for the $4,160.13 of tax due on its purchase of the seller's assets in the bulk sale transaction after the three-year statute of limitations for assessment had expired. It is clear that the Division's position was not substantially justified.

E. The instant motion is denied for the following reasons. Tax Law § 3030(c)(5)(a)(ii)(II) requires that in order to be considered a "prevailing party," petitioner was required to allege and prove 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. In petitioner's

application for costs, no allegations were made as to its net worth or the number of employees in its employ and no proof thereof was offered. 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, petitioner submitted a blanket statement of services rendered by a CPA firm addressed to the Division (***see*** Finding of Fact "16"). Petitioner failed to submit any statement issued to it for services rendered by the CPA firm. In addition, the letter from petitioner's representative, Mr. Hall, does not contain an itemized statement as to the dates and type of services provided or the amount of time expended on each service (***see*** Finding of Fact "15"). Given the absence of detail, it is impossible to determine whether the claimed expenses were incurred after issuance of the notice. Furthermore, petitioner seeks reimbursement for 25 hours of services at $90.00 per hour or $2,250.00.[1] Tax Law § 3030(c)(1)(B)(iii) limits legal fees to $75.00 per hour unless the Division of Tax Appeals determines that an increase in the cost of living or a special factor justifies a higher rate. Petitioner made no such request for any such higher rate.

[1] Statutory references to "Attorney's fees" include "fees for services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals . . ." (Tax Law § 3030[c][3]). Certified public accountants, licensed by New York State, are among those authorized to practice before the Division of Tax Appeals (Tax Law § 2014).

F. The application for costs of petitioner, Erie Links Management, Inc., filed October 13, 2006 is denied.

DATED: Troy, New York
February 15, 2007

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE