STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
FERNANDEZ AUTOGROUP, INC., MARC'S AUTOGROUP, INC., CATHERINE FERNANDEZ AND MARC FERNANDEZ	:	ORDER DTA NOS. 824445, 824446, 824447& 824448
for the Awarding of Costs and Fees in an Administrative Proceeding pursuant to Tax Law § 3030.	:	

Petitioners, Fernandez Autogroup, Inc., Marc's Autogroup, Inc., Marc Fernandez and Catherine Fernandez, filed petitions for the awarding of costs and fees in an administrative proceeding pursuant to Tax Law § 3030 on June 28, 2011. Petitioners appeared by F. J. Pompo & Company, P.C. (James M. Pompo, CPA, PFS). The Division of Taxation, appearing by Mark F. Volk, Esq. (David Gannon, Esq., of counsel), having been granted an extension of time until September 1, 2011, filed an affirmation with exhibits in opposition.

Based upon the petition for costs and exhibits attached thereto, the Division of Taxation's affirmation in opposition and accompanying exhibits, Arthur S. Bray, 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. On the basis of a field audit, the Division of Taxation (Division) issued a Notice of Determination, dated November 27, 2009, to petitioner Fernandez Autogroup, Inc. (Fernandez Autogroup), which assessed sales and use tax for the period December 1, 2005 through August 31, 2008 in the amount of $104,772.49 plus penalty and interest for a balance due of $183,306.21. The Division also issued a Notice of Determination to petitioner Marc's Autogroup, Inc. (Marc's Autogroup), dated November 27, 2009, which assessed sales and use tax for the period December 1, 2005 through May 31, 2008 in the amount of $175,710.38 plus

penalty and interest less payments or credits for a balance due of $317,715.91.

2. On November 30, 2009, the Division also issued two notices of determination to Marc Fernandez. The first notice asserted that Mr. Fernandez was an officer or responsible person of Fernandez Autogroup for the period December 1, 2005 through August 31, 2008 and assessed tax in the amount of $104,772.49 plus penalty and interest for a balance due of $183,487.30. The second notice stated that Mr. Fernandez was an officer or responsible person of Marc's Autogroup for the period December 1, 2005 through May 31, 2008 and assessed tax in the amount of $175,710.38 plus penalty and interest for a balance due of $318,031.80.

3. On November 30, 2009, the Division issued two notices of determination to petitioner Catherine M. Fernandez. The first notice asserted that Ms. Fernandez was an officer or responsible person of Fernandez Autogroup for the period December 1, 2005 through August 31, 2008 and assessed tax in the amount of $104,772.49 plus penalty and interest for a balance due of $183,487.30. The second notice stated that Ms. Fernandez was an officer or responsible person of Marc's Autogroup for the period December 1, 2005 through May 31, 2008 and assessed tax in the amount of $175,710.38 plus penalty and interest for a balance due of $318,031.80.

4. The audit of Fernandez Autogroup and Marc's Autogroup began on November 26, 2007 and originated in the Division's Rochester District Office. It was transferred at the request of petitioners' representative to the Division's Syracuse District Office.

5. Marc's Autogroup ceased doing business as of June 20, 2008. On or about October 21, 2008, Fernandez Autogroup ceased doing business.

6. Marc and Catherine Fernandez were asked on at least two occasions during the audit to complete responsible officer questionnaires. However, these requests were never honored. An examination of the relevant New York S corporation shareholders' information schedules revealed that Marc and Catherine Fernandez each owned 50 percent of the stock of Fernandez Autogroup and Marc's Autogroup.

7. On November 26, 2007, the Division requested records from Fernandez Autogroup and Marc's Autogroup. This request was repeated on several subsequent occasions in order to extend

the scope of the audit.

8. In response to the request, Fernandez Autogroup and Marc's Autogroup presented approximately 50 boxes of records. On or about October 21, 2008, the Division began its review and found that the records of Fernandez Autogroup and the records of Marc's Autogroup were comingled and incomplete.

9. Two test period Audit Method Election agreements regarding sales and recurring expense purchases was signed on October 22, 2008. Extensions of the statute of limitations regarding Fernandez Autogroup and Marc's Autogroup were executed on several occasions. The last extensions, which were executed on August 7, 2009, extended the period for issuing an assessment for the period December 1, 2005 through November 30, 2006 to December 20, 2009.

10. Subsequent to the issuance of the notices of determinations to petitioners, the Division's audit staff continued to work with petitioners' representative and consider relevant assertions, information and documentation. During the Bureau of Conciliation and Mediation (BCMS) process the audit staff continued to work with petitioners' representative.

11. The audit staff analyzed the audits for issues that would provide a reasonable basis for a reduction of the assessments. The analysis was based upon a review of the audit files as well as the professional experience of the auditor, the auditor's supervisor and the section head. The relevant facts considered by the Audit Division included: the Fernandez Autogroup ceased doing business in August 2008 and Marc's Autogroup ceased doing business in June 2008; the last quarter of the audit period had not been set forth in the initial request for records; and, the responsible persons' assessments included periods beyond the three-year statute of limitations set forth in Tax Law § 1147(b). The Division also considered the input contributed by the BCMS conferee. The forgoing led the Division to agree to reduce, for settlement purposes, the assessments to the amounts set forth in the BCMS consent forms.

12. As indicated above, petitioners filed requests for conciliation conferences that resulted in the execution of consents resolving each of the assessments involved with this application for costs as follows:

(a.) On June 2, 2011, petitioner Marc Fernandez executed a Consent that resolved the assessment that had been issued to Fernandez Autogroup, Inc. (L-033065464). The Consent stated that tax was due in the amount of $22,241.25 plus interest in the amount of $10,204.95 for a balance due of $32,446.20.

(b.) On June 2, 2011, petitioner Marc Fernandez executed a Consent that resolved the assessment that had been issued to Marc's Autogroup, Inc. (L-033068837). The Consent stated that tax was due in the amount of $16,694.97 plus interest in the amount of $7,652.28 for a total amount due of $24,347.25.

(c.) On June 2, 2011, petitioner Marc Fernandez executed a Consent that resolved the two assessments that had been issued to him. The Consent set forth the amounts due as follows:

	L-033075083	L-033075084
Tax	$6,436.56	$9,307.69
Penalty	-0-	-0-
Interest	$2,209.48	$3,187.33
Total	$8,646.04	$12,495.02

(d.) On June 1, 2011, petitioner Catherine Fernandez executed a Consent that cancelled the two assessments that had been issued to her (L-033075082 and L-033075085).

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioners' representative states that, as a result of their being the prevailing parties, they are requesting an award of $30,581.68 for administrative costs and fees incurred on or after the notices of determination were issued on November 30, 2009. Petitioners' application included an itemized statement with the actual time expended and the rate at which the fees and expenses were computed. The expenses were associated with the audits of Marc's Autogroup and Fernandez Autogroup for the period December 1, 2005 through August 31, 2008. Mr. Pompo also included a financial statement for the individual petitioners showing that their net worth did not exceed $2,000,000.00. He further explained that the corporate petitioners have no assets and are not in operation and, therefore, do not have any net worth.

14. Petitioners' representative presents the following arguments with respect to each particular taxpayer:

(a.) Ms. Fernandez substantially prevailed with respect to the two notices of determination issued to her since it was found that she was not a responsible officer of Marc's Autogroup or Fernandez Autogroup.

(b.) Marc Fernandez substantially prevailed because the amount of tax assessed was decreased by 94.39 percent from that assessed in the original notices of determination.

(c.) Fernandez Autogroup substantially prevailed with respect to the amount in controversy because the agreed upon result was a 78.77 percent decrease in the assessment.

(d.) Marc's Autogroup substantially prevailed with respect to the amount in controversy because the amount of tax assessed was decreased by 90.50 percent.

15. In response to the forgoing, the Division asserts that the Division determined that petitioners' books and records were inadequate and petitioners have neither alleged nor offered evidence that this finding was erroneous. Further, petitioners have neither alleged nor offered evidence that the methodologies utilized by the Division were erroneous. The Division submits that it issued assessments based on the information available because extensions of the statute of limitations could not be secured, and it felt that it needed to protect the state's interest. Subsequent to the issuance of the assessments, the Division continued to work with petitioners and recognize that adjustments to the assessments were warranted. The Division submits that the "slip listings"[1] attached to petitioners' application for costs reflects the post-assessment production and exchange of documentary evidence, analysis and explanations. In addition, the conciliation conferee contributed to the analysis and discussion. It is submitted that the additional evidence, continued discussions and involvement of the conferee resulted in the matters being resolved via settlements.

16. The Division also maintains that neither party substantially prevailed and that neither

[1] The "slip listings" set forth, among other things, a chronological listing of the time and hourly rate attributed to a particular matter.

party was a prevailing party. In the alternative, the Division submits that its position was substantially justified, given the need to protect the state's interest, based upon the incomplete information that had been provided at the time the assessments were issued.

17. The Division also contends that petitioners have not provided adequate evidence of the expenses they incurred because they have not provided a sworn statement attesting to the veracity and relevance of the slip listings. The Division posits that the evidence presented is lacking because there is no evidence of the financial agreement between petitioners and their representative. In addition, there is no evidence that petitioners were billed and, if so, for what amount. Thus, there is no indication that petitioners realized any costs for the services rendered by their representative. According to the Division, the slip listings are just raw data and not a bill that indicates the final amount due.

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.
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> * * *
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> (C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court. (Tax Law § 3030[c][5]).

C. Petitioners' application is denied because the Division has established that its position was "substantially justified" within the meaning of Tax Law § 3030[c][5][B]. Accordingly, petitioner may not be treated as the prevailing party for purposes of Tax Law § 3030 and therefore may not recover costs.

D. Tax Law § 3030 is 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 [1977]; ***Matter of Sener***, Tax Appeals Tribunal, May 6, 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 [1993]). The fact that the Division lost the case on the merits does not preclude a finding that its position was substantially

justified (***see Heasley v. Commr.***, 967 F2d 116, 120).

E. The record shows that the Division made at least two requests to the individual petitioners for responsible officer questionnaires. However, for some unexplained reason these forms were not provided. The record also shows that the corporations involved in this matter were closely held and that each of the officers held 50 percent of the outstanding stock.

The law on issue of responsible officer status is settled. Responsible officer determinations are based on the facts and made on a case-by-case basis (***see Cohen v. State Commn.***, 128 AD2d 1022, 513 NYS2d 564; ***Vogel v. New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222, 413 NYS2d 862). The case law has identified a variety of factors to be considered in determining whether an individual had sufficient control over a corporation to be considered a responsible officer for sales tax purposes (***see Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990). Here, each of the individual petitioners owned 50 percent of the outstanding stock of the corporations under audit. Further, they declined to answer the responsible officer questionnaires presented by the Division. Clearly, the reluctance to answer questions coupled with the ownership of one-half of the outstanding stock, provides a reasonable basis to conclude that the individual petitioners were responsible for the taxes due from the corporations in question at the time the notices of determination were issued.

F. Petitioners' position is that they are entitled to an award of costs because the final amount that was agreed upon was substantially less than the amounts asserted in the notices. Under the circumstances presented here, this argument is without merit. First, the Division found that petitioners' books and records were inadequate. The inadequacy of the records permitted the Division to use an estimation methodology (***see Matter of New York Trading Corporation***, Tax Appeals Tribunal, May 5, 2011; ***Matter of AGDN, Inc.***, Tax Appeals Tribunal, February 6, 1997). Petitioners have not offered any argument or evidence that this conclusion was erroneous. When the Division is required to use estimation methodologies, precision in the amount of the assessments is not required (***Matter of Meyer v. State Tax Commn***., 61 AD2d 223, 402 NYS2d 74 [1978], ***lv denied*** 44 NY2d 645, 406 NYS2d 1025

[1978]; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176 [1976], ***affd*** 44 NY2d 684, 405 NYS2d 454 [1978]). Second, the purpose of the conciliation process is to provide a forum that enables the parties to resolve their disagreements (20 NYCRR 4000.5[c][1]). It is noteworthy that through the production of additional evidence, continued discussions and the involvement of the conferee, the conciliation process performed as envisioned by the Legislature. The effect of accepting petitioners' argument would be to sanction the Division for performing its duties. Such a result would be contrary to public policy.

G. Petitioners' application for costs and fees is denied.

DATED:Troy, New York
December 1, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE