

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL WHITTEN	:	ORDER
		DTA NO. 824541
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 March 1, 2007 through November 30, 2008.	:	

Petitioner, Michael Whitten, 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 March 1, 2007 through November 30, 2008.

On September 16, 2011, the Division of Taxation, appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), filed with the Division of Tax Appeals a Notice of Cancellation of Deficiency / Determination and Discontinuance of Proceeding. On October 6, 2011, Administrative Law Judge Daniel J. Ranalli issued an Order of Discontinuance cancelling the Notice of Determination and discontinuing the proceedings with prejudice.

By letter dated November 4, 2011, petitioner, appearing by Benjamin Gadon, CPA, filed an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), timely responded to petitioner's application by filing an affidavit and documentation in opposition to the application. The due date for the Division's response was January 4, 2012, and it is this date which began the 90-day period for issuance of this order.

Based upon petitioner's application for costs and attached documentation, the Division of Taxation's affidavit in opposition and attached exhibits, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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. The Division of Taxation (Division) conducted an audit of Corners, Inc. (Corners) for the period December 1, 2003 through May 31, 2009. As a result of the audit, additional sales tax was determined to be due on Corners' unsubstantiated nontaxable sales. The corporation was also assessed tax on unreported capital asset purchases, i.e., fixtures and equipment, and additional recurring expense purchases. The amount of the assessment against Corners was \$73,979.55 plus interest.

2. The Division issued to petitioner, Michael Whitten, a Notice of Determination (number L-033515131-9) dated April 12, 2010 assessing sales and use taxes due for the period March 1, 2007 through November 30, 2008 in the amount of \$29,373.57, plus interest. This notice advised that petitioner was being assessed as an officer or person responsible for taxes determined to be due from Corners, pursuant to Tax Law § 1138(a); § 1131(1) and § 1133. The foregoing notice was issued to petitioner at 177 Highway 6 West, Batesville, Mississippi 38606-2508.

3. Incorporated in Delaware on March 18, 1998, Corners began doing business in New York State on December 30, 2000. Corners sold ready-made picture frames and provided custom framing.

4. On or about February 13, 2003, Corners became a wholly-owned subsidiary of FPE Holdings, Inc. (FPE Holdings). A statement, included with the consolidated U.S. Corporation Income Tax Return filed by “FPE Holdings, Inc. And Subsidiaries” for the fiscal year ended January 31, 2004 (tax year 2003), indicated that as a result of the merger of FPE Acquisition, Inc., a wholly-owned subsidiary of FPE Holdings, with Corners, the surviving corporation was Corners. This statement further indicated that the merger qualified as a B reorganization because it was accomplished by an exchange of 100% of Corners’ shares for a percentage of FPE Holdings’ voting shares. FPE Holdings listed an address of 177 Highway 6 West, Batesville, Mississippi 38606, on the consolidated U. S. Corporation Income Tax Return that it filed for the fiscal year ended January 31, 2004.

5. The Division’s answering papers include a document that indicates petitioner was one of four officers of “FPE Holdings, Inc. And Subsidiaries” who received a six-figure salary in tax year 2006.

6. Corners reported tax due in the amount of \$6,776.95 on its New York State and Local Sales and Use Tax Return for Part-Quarterly Filers (Form ST-809) filed for the tax period October 1, 2005 through October 31, 2005. Both petitioner and Ruth Brucker signed the accompanying check drawn on Framed Picture Enterprises, Inc.’s First Security Bank checking account.

7. On its part-quarterly sales and use tax return filed for the tax period April 1, 2008 through April 30, 2008, Corners reported tax due in the amount of \$5,038.79. Petitioner signed the accompanying check drawn on Framed Picture Enterprise’s Wells Fargo checking account. It is noted that the address listed on the part-quarterly sales and use tax return filed by Corners for the tax period ended April 30, 2008, i.e., 1905 Troyer Ave BLG 649, Memphis, TN 38114, was

also the address listed for Framed Picture Enterprise on its check submitted in payment of Corners' sales tax liability for that tax period.

8. The field audit of Corners was assigned to an auditor in the Division's Midwestern Regional Office, Sales Tax Section, on January 3, 2007. According to the Division's Tax Field Audit Record (audit log), the auditor set up the case file, and prepared a Consent Extending Period of Limitations for Assessment of Sales and Use Taxes Under Article 28 and 29 of the Tax Law that was faxed and mailed to Corners, a vendor located at Memphis, Tennessee, on October 31, 2007. This consent form extending the period to assess sales and use taxes due for the period December 1, 2003 through August 31, 2005 to September 20, 2008 was signed by petitioner as "CFO & Secretary" on October 31, 2007. This executed consent form was received by the Division's Midwestern Regional Office on November 1, 2007.

9. The audit log entry for July 23, 2008 indicates that the auditor left a message for Ms. M. J. Becker regarding the scheduling of Corners' audit appointment and the need to extend the statute of limitations for assessment of sales and use taxes due for the period December 1, 2003 through May 31, 2006 to June 20, 2009. This audit log entry further indicates that a consent form to extend the statute of limitations was faxed to Corners on the same date.

10. According to the audit log, the auditor left a voice mail message for Ms. Becker, regarding the scheduling of an audit appointment and the status of the consent form, on August 6, 2008. A subsequent audit log entry for August 8, 2008 indicates that the auditor called Corners and opted to speak with an operator who advised that Ms. Becker no longer worked for the company, and transferred the auditor to the tax department. The auditor further noted in the audit log that he spoke with a tax department employee who referred him to the chief financial officer (CFO), Michael Whitten. The tax department employee advised that she spoke with petitioner

who confirmed that he received the faxed consent form and requested the auditor's telephone number because he was leaving for the day.

11. The audit log entry for August 13, 2008 indicates that the auditor spoke with petitioner regarding the status of a consent form to extend the statute of limitations previously faxed to Corners, and the scheduling of an audit appointment. During that August 13, 2008 telephone conversation, petitioner indicated that Corners was acquired in February 2003 and had two or three stores in New York State. Petitioner advised that limited records were available for review because a collapsed ceiling had destroyed many of them, and that after reviewing the consent form, he would get back to the auditor by the end of the week. Petitioner also indicated that he did not want to schedule the audit appointment at that time. The consent form to extend the statute of limitations was signed by petitioner, whose title was listed as "CFO," on August 15, 2008.

12. During the course of the audit, a Sales Tax Examination Questionnaire, dated December 29, 2008, was completed by Billy Boone as "COO / CFO." In this questionnaire, petitioner, who bore the title of "CFO" from 2005 to 2008, was listed as a principal officer of Corners, along with other named individuals including Mr. Boone, during the past three years. This questionnaire also identified an affiliated company, Framed Picture Enterprise, along with its tax identification number.

13. According to the Division's field audit report, the company supplied limited books and records, and failed to fill out the responsible person questionnaire. The field audit report further states that "Officer Assessments were prepared because there was an [sic] sale of the companies [sic] assets, but after the audit period in November 2009.

14. The Division issued a responsible officer assessment to petitioner as a responsible officer of the corporation because it found numerous indicia of responsibility including petitioner's status as an officer of the corporation, the fact that he signed tax returns on behalf of the corporation, and he signed other documents on behalf of the corporation. In addition to the consent forms bearing petitioner's signature, discussed above, the Division's answering papers also include the first and last pages of the 2005 and 2007 New York State business corporation franchise tax returns for Corners, which were signed by petitioner as "CFO " on September 8, 2006 and September 26, 2008, respectively. It is noted that Corners listed the following mailing name and address on the 2007 New York State corporation franchise tax return that it filed: Michael D. Whitten, 483 Highway 6 West, Batesville, MS 38606.

15. As noted above, a Notice of Determination (number L-033515131-9) was issued to petitioner on April 12, 2010. A warrant was docketed in respect of assessment number L-0335151131-9 on February 16, 2011. Subsequently, a tax compliance levy, regarding the docketed warrant, was issued against petitioner's brokerage account. By his request for conciliation conference filed on April 27, 2011, petitioner protested the docketed warrant and the underlying Notice of Determination.

16. On May 13, 2011, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing request to petitioner. The order determined that petitioner's protest of the Notice of Determination was untimely because the notice was issued on April 12, 2010, but the request was not mailed until April 27, 2011, or in excess of 90 days.

17. On August 12, 2011, the Division of Tax Appeals received a petition challenging the determination that petitioner was a responsible person or officer of Corners for the period March 1, 2007 through November 30, 2008. In his petition, petitioner asserted that he was hired by

Alan Brucker, president and CEO of Framed Picture Enterprises, Inc. (Framed Picture Enterprises) on November 29, 2004, to improve the accounting records and directly related financial controls of the company, and was referred to by Mr. Brucker at various times as CFO, controller, and chief accounting officer. Petitioner further asserted that he was never a corporate officer, member of the board of directors, or a shareholder of Framed Picture Enterprises or any related entity. He claimed that Framed Picture Enterprises acquired the assets of Corners Framing Superstore (CFS) out of bankruptcy through Corners, a newly formed Delaware corporation that operated the retail operations formerly owned by CFS, and that the retail operations of Framed Picture Enterprises and Corners were under the direct control of Edward Brucker, from his office in Memphis, Tennessee. Petitioner further claimed that the retail operations had two separate controllers, one in Memphis and one in Boston, until February 2007, when all retail accounting functions were consolidated into the Memphis controller's office. He also asserted that Corners ceased to exist as a separate entity after it was merged into Framed Picture Enterprises effective February 7, 2007. Although he was one of several signatories on the Framed Picture Enterprises' bank account, petitioner claimed that he had no independent authority to prepare or sign a check or to direct payments of any bills. Petitioner maintained that on November 6, 2008, prior to any field visit by the Division's auditor, he was terminated by Edward Brucker. He further maintained that he had no involvement in the audit, and that until he received a mailing from his investment broker, he was unaware that an audit liability had been determined. Petitioner contends that the true "responsible parties" are Framed Picture Enterprises, Edward Brucker, Isidore Brucker and Billy Boone.

18. Among the supporting documents attached to the petition are the Articles of Merger or Share Exchange Profit Corporation filed on February 2, 2007 in the Office of the Mississippi

Secretary of State by Framed Pictures Enterprise, Inc. (Framed Pictures Enterprise), regarding its merger with Corners, effective as of February 4, 2007; State of Mississippi Secretary of State 2007, 2008 and 2009 corporate annual reports for Framed Pictures Enterprise; and a letter dated April 26, 2011 from Dennis F. Erb, Framed Pictures Enterprise's former HR director.

19. Under the terms of the Agreement and Plan of Merger, Corners merged with and into Framed Pictures Enterprise, with Framed Pictures Enterprise being the surviving entity. Review of Framed Pictures Enterprise's 2007 and 2008 corporate annual reports indicates that Messrs. Alan Brucker, Edward Brucker and Billy R. Boone were listed as the current principal officers, and that petitioner signed each report, listing his title as "Other."

20. Mr. Erb's letter stated that he was present in Edward Brucker's office on November 6, 2008 when petitioner was terminated from the company because his position was eliminated. He further stated that the accounting responsibilities were given to Billy Boone, the chief operating officer (COO). Mr. Erb, in his letter, also stated that based upon his experience with the company, all disbursements could only be made with approval of either Edward Brucker or Isidore Brucker, and that petitioner did not have the authority to independently disburse funds for the payment of any company liabilities.

21. On September 16, 2011, the Division filed a Notice of Cancellation of Deficiency / Determination and Discontinuance of Proceeding with respect to assessment number L-033515131. Subsequently, on October 6, 2011, Administrative Law Judge Daniel J. Ranalli issued an Order of Discontinuance cancelling the Notice of Determination and discontinuing the proceedings with prejudice.

22. By his letter dated November 4, 2011, petitioner filed an application for costs under Tax Law §3030. Petitioner, in his letter, stated in pertinent part that:

It was and is my position that I should never have been named as a responsible party in this matter, and that because I was never properly noticed by the State of New York, I was required to engage expert professional assistance to present my case and to substantiate my claim of no responsibility in this matter.

To date, I have been billed \$9,279 by Mr. Gadon and his firm, as supported by the attached document.

23. Among the documents attached to petitioner's application for costs is a bill dated November 4, 2011 from CBIZ MHM, LLC (CBIZ) in the amount of \$9,279.00. This bill contains the following breakdown of professional tax services rendered from July 1, 2011 through October 31, 2011:

Partner	12.9 hours	\$7,834.00	
Manager	15.5 hours	4,902.00	
Staff	<u>3.9 hours</u>	<u>443.00</u>	
	32.3 hours		\$13,179.00
Less: Progress Billing			(3,900.00)
FEE FOR SERVICES			<u>\$9,279.00</u>

24. Petitioner did not include any evidence of his net worth with his application for 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 a 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 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][2][B][3]), with the dollar amount of such fees capped at \$75.00 per hour, unless there are special factors that justify a higher amount (Tax Law § 3030[c][1][B][iii]).

B. A prevailing party is defined by statute 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 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.

(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]).

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, petitioner has satisfied all the criteria of being the “prevailing party” in this matter per Tax Law § 3030(c)(5)(A)(i), inasmuch as the Notice of Determination issued against him was, in fact, cancelled. 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.

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 [1977]; *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

[1993]), with such determination properly based “on all the facts and circumstances surrounding the case, not solely upon the final outcome” (*Heasley v. Commissioner*, 967 F2d 116, 120, 92 US Tax Cas ¶ 50,412 [1992]; *Phillips v. Commissioner*, 851 F2d 1492, 1499, 88-2 US Tax Cas ¶ 9431 [1988]). 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 [1985]). The fact that the notice was cancelled by the Division of Taxation’s representative 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*). Under the foregoing standards, and in view of the facts and circumstances of this case, the Division has established that its position was “substantially justified” (Tax Law § 3030[c][5][B]).

E. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. Tax Law § 1131(1) provides, in pertinent part, as follows:

‘Persons required to collect tax’ or ‘person required to collect any tax imposed by this article’ shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company, or individual proprietorship in complying with any requirement of this article; and any member of a partnership or limited liability company.

The determination that an individual is a responsible person depends upon the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564, 565 [1987]; *Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451 [1975]). The relevant

factors to consider when determining whether a person has such a duty to act for the corporation include, inter alia, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (*Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538 [1986], *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027 [1987]; *Matter of Cohen v. State Tax Commn.*; *Matter of Rosenblatt v. State Tax Commn.*, 114 AD2d 127, 498 NYS2d 529 [1986], *vevd in part on dissenting opn below* 68 NY2d 775, 506 NYS2d 675 [1986]).

The Division's regulations define a person under a duty to act on behalf of a corporation as follows:

[g]enerally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act. (20 NYCRR 526.11[b][2].)

F. Here, the papers presented on the motion show that, during the period in issue, petitioner held the position of chief financial officer. He signed a few of the corporation's New York State tax returns. Petitioner participated in the audit by speaking with the auditor regarding, among other things, the limited records available for review, and his unwillingness to schedule an audit appointment at that time. Petitioner's participation in the audit is further demonstrated by his signing two consents to extend the statute of limitations. Given the foregoing facts, it is evident that the Division's assessment of petitioner was completely consistent with the applicable published guidance set forth in the Division's regulations at 20 NYCRR 526.11[b][2]. As such, the Division's position was substantially justified. Accordingly, petitioner may not be treated as a prevailing party under Tax Law § 3030, and therefore, may not recover costs and fees under Tax Law § 3030(c)(5)(B)(i).

G. In addition, even had the Division of Taxation's position not been substantially justified, 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 his individual net worth did not exceed two million dollars. In his application for costs, no allegations were made as to such net worth and no proof thereof was offered. (*See Avancena v. Commissioner*, 63 TCM 3133 [1992].)

H. Since a determination has been made that the Division was substantially justified in its position, and thus, petitioner is not entitled to an award of costs, it is unnecessary to determine whether the costs claimed are reasonable.

I. The application of Michael Whitten for costs is denied.

DATED: Albany, New York
March 29, 2012

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE