STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **MAX OSHMAN** for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2008 and 2009.	ORDER DTA NO. 825941

Petitioner, Max Oshman, by letter dated October 30, 2013, brought an application for costs under Tax Law § 3030.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), after receiving an extension to file its response, filed a response to the application for costs dated January 2, 2014, which date began the 90-day period for issuance of this order.

Based upon petitioner's application for costs, accompanying documentation, the Division's response to the application for costs, accompanying affidavit and documentation, the Bureau of Conciliation and Mediation Consent and all pleadings and proceedings had herein, Thomas C. Sacca, 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. On July 25, 2011, the Division of Taxation (Division) commenced an audit of Plot Developers LLC for the tax years 2007, 2008 and 2009 for withholding tax. The audit case was based on a notification from the Internal Revenue Service (IRS) of the results of a federal audit

of Plot Developers. Pursuant to Tax Law § 659, federal audit changes are required to be reported to New York State within 90 days of the final federal audit determination. Plot Developers failed to contact the Division to report the federal audit changes as required by law. The filing records of the Division indicated that Plot Developers had filed partnership returns in 2003 and 2004 but had not filed returns in 2007, 2008 and 2009. Plot Developers LLC's partnership return for 2004 indicated the partnership had three partners. Petitioner, Max Oshman, was listed as one of the three partners with a 33.33% interest in the partnership. Petitioner received a Schedule K-1, partner's share of income, deductions, credits, etc., for the tax years 2003 and 2004 from Plot Developers.

2. The Division sent to Plot Developers at its last known address an initial audit letter, dated July 29, 2011, requesting a field audit visit and advising the partnership to contact the Division on or before August 8, 2011. The letter was returned to the Division as undeliverable. The auditor attempted to contact Plot Developers and one of its partners, Yves Darbouze, by telephone on numerous occasions, but despite leaving messages, did not receive any response. In the Tax Field Audit Record that contains the contacts and comments of the auditor, no mention is made of trying to contact petitioner. Yves Darbouze is the only partner that the auditor attempted to contact and is the only individual referred to as a "responsible person."

3. Due to the lack of response or cooperation from Plot Developers and its partner, the Division issued assessments for unpaid withholding taxes against the business and responsible persons based on the information received from the IRS and the returns filed by the partnership in 2003 and 2004. These assessments included notices of deficiency (assessments numbers L-038955735, L-038955736, L-038955737 and L-038955738) issued on December 28, 2012 to petitioner as a responsible person.

4. Petitioner filed a timely request for a BCMS conference. The conference was held on July 8, 2013.

5. Following the BCMS conference, petitioner's representative submitted documentation to the conferee substantiating petitioner's position that he was not a responsible person of Plot Developers during the periods at issue. Included in the documentation was a settlement agreement entered into in March 2008. The settlement agreement indicated that petitioner was no longer a partner in Plot Developers. Subsequently, the Division cancelled the four notices of deficiency issued to petitioner.

6. Petitioner submitted two invoices from Ash & Parsont LLP, certified public accountants, dated May 13, 2013 and August 19, 2013. The first invoice is for the period ended April 30, 2013 and the second is for the period May 1, 2013 through August 15, 2013. The invoices state they are for "tax services rendered" and indicate an hourly rate of $295.00 per hour, total hours worked of 22.75 and total actual time charges and expenses of $6,697.00. A total reduction is provided of $1,507.00, resulting in a total amount due of $5,190.00.

Petitioner submitted three invoices from Hodgson Russ LLP that itemize the services performed for petitioner during the period June 20, 2013 through October 4, 2013. The invoices indicate two different hourly rates of $565.00 and $275.00, total hours worked of 21.75 hours, an amount due for professional services of $6,489.50 and an amount due for disbursements of $25.72 for a total amount due of $6,515.22.

Petitioner submitted powers of attorney authorizing Ash & Parsont LLP and Hodgson Russ LLP to represent him in the administrative proceedings arising from the Division's issuance of the notices of deficiency.

7. Petitioner stated in his affidavit that his net worth has remained below $2,000,000.00 at all times from the date the subject notices were issued to the present. According to petitioner, his assets have consisted of a mortgaged home in Woodstock, New York, cash and marketable securities.

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:
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> (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 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):
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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 . . . .
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> (B) Exception if the commissioner establishes that the commissioner's position was substantially justified.
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> (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.
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> (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.
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> (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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> (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 Division

cancelled the four notices of deficiency issued to petitioner. 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 [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" (***Matter of Stuckless,*** Tax Appeals Tribunal, August 16, 2007, citing ***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 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***).

E. Petitioner was assessed as a responsible person of Plot Developers LLC for unpaid withholding taxes of the corporation. With regard to the withholding tax penalty asserted against petitioner, Tax Law § 685(g) provides:

> Willful failure to collect or pay over tax.–Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n), in turn, furnishes the following definition of "person" subject to the section 685(g) penalty:

> The term person includes an individual, corporation or partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

F. The determination of whether an individual qualifies as a "person" is factual in nature (***Matter of Hopper v. Commr. of Taxation and Finance***, 224 AD2d 733 [1996], ***lv denied*** 88 NY2d 808 [1996]). The relevant factors to be considered include the following: whether the taxpayer signed or had the authority to sign tax returns, owned stock or served as an officer or employee of the corporation, derived a substantial portion of income from the company, possessed a financial interest in the company, possessed the right to hire and fire employees or had authority to pay the corporate obligations (***Matter of Capoccia v. New York State Tax Commn.***, 105 AD2d 528 [1984]; ***Matter of Amengual v. State Tax Commn***., 95 AD2d 949 [1983]; ***Matter of Shah***, Tax Appeals Tribunal, February 25, 1999).

G. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990; ***Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In addition, with respect to withholding tax, and

unlike the sales and use tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in ***Matter of Levin v. Gallman***, the test is:

> whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes . . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (***id.***, 396 NYS2d at 624-625; ***see Matter of Lyon***, Tax Appeals Tribunal, June 3, 1988).

Finally, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (***Matter of Ragonesi v. State Tax Commn.*** 88 AD2d 707 [1982]).

H. The determination of an individual's responsibility for unpaid withholding taxes is based upon the factual relationship of the individual to the entity involved. It requires an analysis of the individual's responsibilities and that person's authority over the affairs of the corporation. This analysis must take place with regard to the period at issue. Here, the Division assessed petitioner as a responsible person of Plot Developers based upon information approximately four years old. Even that information was scarce as it merely named petitioner as a partner of Plot Developers in 2003 and 2004. The Division made no attempt to contact petitioner during the audit to ascertain his relationship to the corporation during the periods at issue, although it was

clearly aware of his whereabouts as evidenced by the issuance of the notices of deficiency to his proper address. By not contacting petitioner during the audit, the Division failed to obtain the existing information that indicated petitioner was not a responsible person during the years 2008 and 2009, as well as any information that reflected petitioner's relationship to Plot Developers during the periods at issue. Under these circumstances, it cannot be found that the Division's position at the time it issued the notices of deficiency was substantially justified as it lacked a reasonable basis (Tax Law § 3030[c][8][B]).

I. Through his affidavit, and given that the record lacks any evidence to contradict his statement, petitioner has established that his net worth did not exceed two million dollars at the time the action was filed, as required by Tax Law § 3030(c)(5)(A)(ii)(II).

J. The certified public accounting firm of Ash & Parsont LLP is qualified to represent petitioner in proceedings in the Division of Tax Appeals (Tax Law § 2014[1]). As such, their fees are treated as fees for the services of an attorney pursuant to Tax Law § 3030(c)(3).

K. Finally, it is concluded that petitioner has failed to establish that his claimed expenses relating to Ash & Parsont LLP and Hodgson Russ LLP at the hourly rates indicated were allowable pursuant to statute. The bills submitted for accounting and legal consultation far exceed the statutory limitation of $75.00 per hour, with no information provided as to special factors which might support or justify a higher rate for attorneys' services (Tax Law § 3030[c][1][B][iii]). Petitioner is therefore limited to attorney fees for 45 hours of services at a rate of $75.00 per hour.

L. Petitioner's application for costs and fees is granted to the extent indicated in Conclusion of Law K. In all other respects, the application for costs is denied.

DATED: Albany, New York
April 3, 2014

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE