STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
E. RANDALL STUCKLESS AND JENNIFER OLSON	:	DECISION DTA NO. 819319
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1997 and 1998.	:	

Petitioners E. Randall Stuckless and Jennifer Olson, 68 Partridge Hill, Honeoye Falls, New York 14472, filed an exception to the order of the Administrative Law Judge issued on December 21, 2006. Petitioners appeared by Petralia, Webb & O'Connell, P.C. (Arnold R. Petralia, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Barbara J. Russo, Esq., of counsel). Petitioners' request for oral argument was denied.

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners are entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "25" which has been modified. We have also made additional findings of fact. The

Administrative Law Judge's findings of fact, the modified finding of fact and the additional findings of fact are set forth below.

On October 21, 2002, following an audit, the Division of Taxation ("Division") issued to petitioners, E. Randall Stuckless and Jennifer Olson,[1] a Notice of Deficiency which asserted additional tax due for the year 1997 of $13,735.73 and for the year 1998 of $35,084.23, for a total amount due of $48,819.96. The Notice of Deficiency also asserted penalty and interest due for each of the years at issue.

The Division's audit of petitioner for the years 1997 and 1998 focused on the difference between petitioner's Federal adjusted gross income (AGI) and New York source income as reported. Specifically, the Division increased the amount of petitioner's income from Microsoft Corporation ("Microsoft") allocable to New York for each of the years at issue. The method used by the auditor to apportion the gain realized on the exercise of incentive stock options ("ISO") to New York was based on the number of New York working days from the option grant date to the exercise date compared to the total number of days worked both in and out of New York for the same period. The Division made no adjustments to petitioner's reported Federal AGI.

The options exercised in 1997 were granted in 1991, when petitioner was a resident of New York. The Division allocated the proceeds from the stock options from the date of grant, November 4, 1991, to the dates of exercise. The options that were exercised in 1998 were granted in 1992, also when petitioner was a resident of New York. The Division allocated the

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[1] Jennifer Olson is a petitioner in this matter solely because she filed a joint New York resident and part-year resident income tax return with her spouse, E. Randall Stuckless, for 1998. All of the income at issue was paid to E. Randall Stuckless. Accordingly, unless otherwise indicated, all references to petitioner herein shall refer to E. Randall Stuckless.

proceeds from the stock options from the date of grant, July 7, 1992, to the dates of exercise. The Division determined petitioner's residency allocation for the relevant years and periods, as follows: 1992, 1993, 1994, 1995, and January 1, 1996 through September 1, 1996, when petitioner moved out of New York State, 100% allocation; September 1, 1996 through December 31, 1996, 1997 and January 1, 1998 through July 5, 1998, 0% allocation; and July 6, 1998, when petitioner moved back to New York State, through December 31, 1998, 100% allocation.

Petitioner did not file a 1997 New York return. On his Federal return for that year petitioner reported $281,141.00 in adjusted gross income, including $292,454.00 in wage income, which corresponds to the amount of wage income reported by Microsoft to have been paid to petitioner in 1997. On audit the Division determined that $202,351.92 of this Microsoft income was allocable to New York and asserted New York tax due of $13,735.73.

On his 1998 New York return petitioner reported New York adjusted gross income of $60,781.00 and Federal adjusted gross income of $709,866.00. During the tax year 1998, Microsoft paid petitioner $739,155.00 in wage income. On audit, the Division determined that $526,799.00 of this Microsoft income was allocable to New York and asserted New York tax due of $39,153.23.

E. Randall Stuckless worked for Microsoft during the period in issue and is currently employed by Microsoft.

Microsoft granted Mr. Stuckless incentive stock options to buy Microsoft stock on November 4, 1991 and July 7, 1992. The Stock Option Plan which granted the ISO's provided as its purpose as follows:

> The purposes of this Stock Option Plan are to attract and retain the best available personnel for positions of substantial responsibility, to provide additional incentive to such individuals and to promote the success of the Company's

> business by aligning employee financial interests with long-term shareholder value.

The plan further provided that options were only to be granted to employees, and directors were not eligible to participate in the plan unless they were full-time employees. The per share exercise price was based upon the number of shares owned by the employee at the time of the grant of the ISO. Where the employee owned shares representing more than 10% of the voting power of all classes of shares of Microsoft, the per share exercise price was not to be less than 110% of the fair market value per share on the date of the grant. For any other employee, the per share exercise price was not to be less than 100% of the fair market value per share on the date of the grant.

In the event of termination of an option holder's continuous status as an employee, the option holder was required to exercise the stock options within three months of termination. However, the plan provided for the increase of the period for exercising the stock option following termination where termination of employment occurred as a result of death (6 months), total and permanent disability (18 months) or under any other circumstances where the Board of Directors deemed an extension to be appropriate, as long as the extension did not exceed the term of the option as originally issued.

In addition, the plan provided that the option could not be sold, pledged, assigned, hypothecated, transferred or disposed of in any manner other than by will or by the laws of descent or distribution and could be exercised, during the lifetime of the option holder only by the option holder, provided that the Board might permit further transferability, on a general or specific basis, and might impose conditions and limitations on any permitted transferability. The

plan further provided that an option holder's right to exercise his or her stock option generally vested in increments over time.

Mr. Stuckless was a New York State resident and worked in New York when the options were granted.

Jennifer Olson was a resident of New York State in 1991 and 1992.

The options were granted under a document entitled "Microsoft Corporation 1991 Stock Option Plan."

Mr. Stuckless moved to Seattle, Washington on September 1, 1996.

Mr. Stuckless resided in Seattle, Washington until he moved back to New York on or about July 4, 1998.

From September 1, 1996 to July 4, 1998, petitioners were nonresidents of New York.

On or after July 5, 1998, petitioners were New York State residents.

At various times while a Washington resident, Mr. Stuckless exercised a portion of the ISO's and sold the option stock. Each ISO exercise was simultaneous with a sale of the underlying stock. Mr. Stuckless also exercised options, and sold stock, while residing in New York, but these transactions are not at issue in this proceeding.

ISO stock sold between September 1, 1996 and July 4, 1998 was sold while Mr. Stuckless was a resident of the State of Washington. Stock sales after July 4, 1998 occurred after he had moved back to New York and was a New York resident.

Petitioners concede that income from the ISO exercise and sales occurring after July 4, 1998 is taxable to New York State.

For the ISO's that were exercised while Mr. Stuckless resided in the State of Washington, the quantity, grant date, grant number, grant price, market price as well as the gain per New York and allocation to New York as determined on audit are as follows:

Exercise and Sales Date	Quantity	Grant Date	Grant #	Grant Price	Market Price	Gain per New York	Alloc. to NY per Audit
1/27/97	1600	11/4/91	014321	1.896	12.0000	16,166.64	15,961.08
4/17/97	3200	11/4/91	014321	1.896	12.3906	32,583.36	32,076.73
4/29/97	2400	11/4/91	014321	1.896	14.8125	30,999.96	29,186.84
5/8/97	1600	11/4/91	014321	1.896	14.3906	19,991.68	18,728.90
6/3/97	1200	11/4/91	014321	1.896	15.2656	16,043.76	14,851.17
7/11/97	1200	11/4/91	014321	1.896	16.1563	17,112.48	15,546.09
7/17/97	1200	11/4/91	014321	1.896	18.5234	19,953.12	18,076.95
9/17/97	800	11/4/91	014321	1.896	17.3046	11,870.84	10,446.34
10/8/97	400	11/4/91	014321	1.896	17.3046	6,163.54	5,370.21
11/4/97	600	11/4/91	014321	1.896	16.7734	8,926.56	7,746.92
11/10/97	400	11/4/91	014321	1.896	16.3906	5,797.92	5,015.24
11/18/97	600	11/4/91	014321	1.896	16.8438	8,968.74	7,727.63
12/2/97	800	11/4/91	014321	1.896	18.0730	12,939.56	11,091.05
12/17/97	800	11/4/91	020478	2.125	17.4765	12,281.24	10,526.78
1/7/98	800	7/7/92	020478	2.125	16.0225	11,118.76	8,313.89
1/12/98	400	7/7/92	020478	2.125	16.1719	5,618.75	4,191.84
1/28/98	800	7/7/92	020478	2.125	18.5406	13,212.52	9,776.08
2/27/98	400	7/7/92	020478	2.125	21.4530	7,731.26	5,632.04
3/10/98	400	7/7/92	020478	2.125	20.1563	7,212.50	5,227.21
3/27/98	400	7/7/92	020478	2.125	22.0313	7,962.50	5,716.37
4/15/98	800	7/7/92	020478	2.125	22.6875	16,450.00	11,699.35
4/28/98	1200	7/7/92	020478	2.125	22.7030	24,693.78	17,449.57
6/26/98	1000	7/7/92	020478	2.125	25.9375	23,812.50	16,337.06

The market price at which each option stock sale was made is based upon a printout from Microsoft entitled "Exercise History for E. Randall Stuckless."

The market price of Microsoft stock when petitioners left New York on September 1, 1996, adjusted for stock splits, was $7.710938 per share. This is based on the NASDAQ Exchange close for September 3, 1996, as September 1, 1996 was a Sunday and September 2, 1996 was Labor Day. As the stock market was closed on both days, the first trading day after September 1, 1996 would have been September 3, 1996.

As the above table indicates, the option price for the 1991 ISO's was $1.896 per share except for the one granted on December 17, 1997, which was $2.125 per share, the same option price for the ISO's granted in 1992. The 1997 ISO's were exercised and stock sold at prices ranging between $12.00 and $18.52 per share. The ISO's exercised between January and July 4, 1998 were at prices ranging between $16.02 and $25.94 per share.

The total amount of appreciation for the stock options exercised in 1997 as of September 1, 1996 was $97,508.00, while the Division's method of allocation resulted in a gain on the exercise of these stock options of $202,352.00. For the stock options exercised in 1998, the amount of appreciation as of September 1, 1996 was $34,633.00, while the Division's method of allocation resulted in a gain of $84,343.00. The cause of the difference in the amounts of the gain between that computed as of September 1, 1996 and the Division's method of allocation is that the appreciation in Microsoft stock after September 1, 1996 was greater than the appreciation of the stock between the date of grant and September 1, 1996.

Petitioners did not file a New York State income tax return for 1997, and filed a joint Nonresident and Part-Year Resident Income Tax Return for the year 1998. During each of the

years at issue, petitioner received income from Microsoft which was reported by Microsoft on form W-2.

On or about October 28, 1997, petitioners separated, and were divorced on or about May 28, 1999.

On July 8, 2004 a determination was issued by Administrative Law Judge Thomas C. Sacca which denied the petition and sustained the notice of deficiency issued by the Division of Taxation.

The Division asserted tax due for the years 1997 and 1998 on income petitioner received from the exercise of stock options, which were granted while petitioner was a New York resident employed in New York, and exercised while petitioner was a nonresident. A portion of the options were also exercised after petitioner returned to New York, and was again a New York resident. Petitioner did not pay any income tax to New York on the income from the exercise of the stock options.

The Division asserted tax due pursuant to Tax Law § 601(e), which imposes a personal income tax on a nonresident individual's taxable income which is derived from sources in New York State. Section 631(b) of the Tax Law provides that the New York source income of a nonresident individual includes the net amount of items of income, gain, loss and deduction entering into the individual's Federal adjusted gross income derived from or connected with New York sources. Section 631(b)(1)(B) of the Tax Law provides that items of income, gain, loss and deduction derived from or connected with New York sources include those items attributable to a business, trade, profession or occupation carried on in New York State. The Division determined that the income from the options was connected to petitioner's New York employment, because the options were granted during petitioner's employment in New York. The Administrative Law

Judge concurred with the position of the Division, finding that the stock options awarded to petitioner under the Stock Option Plan were secured or earned through petitioner's Microsoft employment in New York and were therefore properly considered New York source income for the years at issue.

The Division valued the stock options pursuant to the Court of Appeals decision in ***Matter of Michaelsen v. New York State Tax Commn.***, (67 NY2d 579, 505 NYS2d 585), which held that employee stock options for either past services or incentive for future services are compensation attributable to the employee's "business, trade, profession or occupation carried on in [New York]." Pursuant to ***Michaelsen***, the Division valued the options by subtracting the option price from the fair market value of the stock when the options were exercised.

We modify finding of fact "25" of the Administrative Law Judge's determination to read as follows:

> The Division then allocated the income based on days petitioner worked in and out of New York during the grant to exercise period, ostensibly based on the Department's Technical Services Bureau Memorandum, TSB-M-95(3)I. The TSB-M was issued following the ***Michaelsen*** decision, to provide "guidance on the New York tax treatment of stock options . . . received by nonresidents or part-year residents who are or were employed in New York State." The TSB-M noted that since the Court of Appeals decision in ***Michaelsen*** "determined that compensation constitutes the appreciation in the value of the stock from the date of grant to the date of exercise, that period is considered the period over which the employee's performance of services will be measured (compensable period)." The compensable period in this case exceeded one year. Nevertheless, the Division applied the allocation method as explained in the TSB-M to the stock options at issue to determine the portion of the stock option income taxable to New York.[2]

During the proceedings, petitioner conceded that the portion of the income from the stock options which were exercised after July 4, 1998, when petitioner again became a resident of New

[2]We have modified finding of fact "25" of the Administrative Law Judge to more clearly reflect the record.

York, was taxable to New York. Petitioner did not pay income tax to New York on the income from these options, and the amount was included in the assessment issued by the Division. Pursuant to the Tribunal's decision as revised on October 2, 2006, the Tribunal ordered that the notice be modified to assess tax on the income from the options exercised after July 4, 1998, but was otherwise cancelled. The recomputed notice resulted in a corrected tax liability of $33,693.89, as compared to the amount originally assessed of $48,819.96.

We make the following additional findings of fact:

Petitioner filed an affidavit in support of his motion for costs and attorneys fees pursuant to Tax Law § 3030. This affidavit states, in relevant part, that petitioner is the prevailing party in this matter based on our decision of August 17, 2006. Petitioner also states, "My net worth is less than $2,000,000." Petitioner seeks an award reimbursing him for his costs and expenses as set forth in his affidavit and the affirmation of his attorney.

Petitioners' attorney, Arnold R. Petralia ("the attorney") submitted two affirmations in support of petitioners' application. The first was submitted along with petitioners' original application.

The attorney states that he was retained in this matter on February, 2002 and this affirmation covers work done in this matter until the decision of the Tax Appeals Tribunal on May 12, 2005. He states that under his arrangement with petitioners, he charged an hourly rate of $170.00 per hour. Through the proceedings before the Administrative Law Judge, the attorney states his total fees were $7,338.00 and $33.28 in disbursements. The attorney's affirmation includes attachments showing his time sheets, the dates work was performed, the time spent and the rates at which Mr. Stuckless was billed.

The attorney states that starting with petitioners' appeal to the Tribunal, his agreement with his clients was that he would charge a flat fee of $750.00. He incurred additional expenses for mailing of $13.69.

Mr. Petralia requests, on behalf of his clients, that his time of 48.4 hours be compensated at a rate of $75.00 per hour, or $3,630.00 for his work before the Administrative Law Judge plus $750.00 for his preparation and appearance before the Tax Appeals Tribunal through May 12, 2005. The attorney states that he did not keep time sheets for his work before the Tribunal, since it was a flat fee arrangement, but his affirmation suggests that he spent at least 30 hours on that

appeal. Mr. Petralia requests his clients be awarded attorney fees of $4,380.00 and disbursement costs of $46.97.

Mr. Petralia's second affirmation was a supplemental submission for his work done on the case subsequent to our initial decision in this matter on May 12, 2005 and covers the period ending with our final decision August 17, 2006.[3] The attorney states that he spent 17.7 additional hours on work relating to reargument of the case before the Tribunal, for which he billed $1,700.00. At the allowed statutory rate of $75.00 per hour, he requests his clients be reimbursed for an additional $1,327.50. Mr. Petralia requests that his clients be awarded total attorney fees of $5,707.50 plus disbursements of $46.97. As with his first affirmation, Mr. Petralia attached supporting time sheets showing the date of the work, the rate and the number of hours billed.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the issue in this matter was whether a nonresident's gain from the exercise of stock options in another state was subject to New York personal income tax when, during the year of exercise, the nonresident neither lived nor worked in New York State. The secondary issue concerned the allocation of the stock option income if it was determined to be subject to New York personal income tax. The Administrative Law Judge determined that the ***Michaelsen*** case was controlling as to the first issue, holding that the gain from the stock options was subject to New York personal income tax and, further held, that a Technical Services Bureau Memorandum (TSB-M-95[3]I) could be relied on by the Division to determine how the gain would be allocated.

In our decision of August 17, 2006, the Tribunal held that ***Michaelsen*** did not support an allocation based on a day count ratio over the years from grant to exercise when the facts in that case included an allocation based on a day count ratio for the year in which income was realized.

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[3]Mr. Petralia uses October 1, 2006 as the date of the final decision apparently because we amended a paragraph of the decision October 2, 2006. That amendment was to clarify that the Notice of Deficiency in this case was modified to assess tax on income from the options exercised after July 4, 1998, but was otherwise cancelled. This amendment did not change the issuance date of our decision.

The Tribunal also held that TSB-M-95(3)I was not entitled to deference as it was not adopted in compliance with the requirements of Article IV § 8 of the New York State Constitution, Executive Law § 102(1) and the State Administrative Procedure Act. The Tribunal granted the exception and petition of petitioners and cancelled the notice of deficiency except that portion which assessed tax on income from options exercised after July 4, 1998.

Petitioners now bring this application for costs and attorneys fees pursuant to Tax Law § 3030.

The New York State Legislature enacted Tax Law § 3030, as part of the "Taxpayer Bill of Rights."[4] Section 3030 is modeled on section 7430 of the Internal Revenue Code, also known as the Federal Taxpayer Bill of Rights 2.[5] Tax Law § 3030(a) provides 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 (emphasis added).
>
> *Prevailing party* is defined for purposes of section 3030, in pertinent part, as:
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> . . . any party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):
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> (i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

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[4] L 1997, ch 577, § 31, eff September 10, 1997.

[5] ***see,*** Legislative Mem, McKinney's Session Laws of NY, at 2549.

(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.

The Administrative Law Judge found that petitioners satisfied all the criteria of being a "prevailing party" in this matter pursuant to Tax Law § 3030(c)(5)(A)(i)(I), inasmuch as they prevailed with respect to the most significant issue or set of issues presented. The Administrative Law Judge next addressed the issue of whether the Division's position was substantially justified under the statute.

The Administrative Law Judge pointed out that Tax Law § 3030 is modeled after Internal Revenue Code § 7430. Therefore, the Administrative Law Judge referred to 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 6, 1988). A position is substantially justified if it has a reasonable basis in both fact and law (***see***, ***Information Resources v. United States***, 996 F2d 780, 93-2 USTC ¶ 50,519), with such determination properly based on all the facts and circumstances surrounding the case, not solely upon the final outcome (***Phillips v. Commissioner***, 851 F2d 1492, 88-2 USTC ¶ 9431, ***Heasley v. Commissioner***, 967 F2d 116, 120, 92-2 USTC ¶ 50,412). This determination of "substantially justified" is properly made in view of what the Division knew at the time the position was taken, i.e., when the notices were issued (Tax Law § 3030[c][8][B]; ***see, DeVenney v. Commissioner***, 85 TC 927). The fact that petitioner prevailed in the final decision of the Tax Appeals Tribunal is a factor to be considered, but does not preclude a finding that the Division's position was substantially justified at the time the notice was issued.

The Administrative Law Judge pointed out that in determining whether the Division was substantially justified, the Division's position must be examined in light of the law applicable at the time its position was asserted during litigation before the Division of Tax Appeals. The Division is substantially justified where it pursues litigation in a matter, such as here, which involves close legal questions presented on novel issues (***see, Spriggs v. United States***, 660 F. Supp 789, 87-2 USTC ¶ 9392, ***affd*** 850 F2d 690; ***United States v. Wilkinson*** 628 F. Supp 29, 85-2 USTC ¶ 9825; ***Heasley v. Commissioner***, ***supra***). The Division is entitled to seek judicial guidance in circumstances where the statute gives little direction or where the issue is one of first impression (***Blanco Invs. & Land v. Commissioner***, T.C. Memo 1988-175). The Administrative

Law Judge concluded that in view of all of the facts and circumstances of this case, the Division established that its position was "substantially justified" (Tax Law § 3030[c][5][B]). Therefore, the Administrative Law Judge found that petitioners cannot be treated as a prevailing party under Tax Law § 3030 and is not entitled to recover costs and fees under Tax Law § 3030(c)(5)(B)(i).

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the Administrative Law Judge denied the application for costs without stating any specific grounds. The Administrative Law Judge, petitioners point out, did not address any of the findings and conclusions of the Tribunal to explain why, notwithstanding those findings, the Division's position was still justified.

Petitioners assert that the Tribunal's decision in this matter held that the TSB-M-95(3)I did not address the facts in this case and was not authority for the allocation made in this case. In fact, petitioners urge, the Tribunal's decision of August 17, 2006 held the Division's regulation 20 NYCRR 132.18(b) was properly applicable to the facts in this case and that the Division improperly relied on § 132.18(a) and the TSB memorandum. Therefore, the Division's position could not have been substantially justified.

The Division states that petitioners have failed to show that their net worth did not exceed $2 million and, therefore, cannot be a prevailing party under Tax Law § 3030.

The Division also claims that petitioners cannot be a prevailing party because the Division's position was substantially justified.

OPINION

We agree with the Administrative Law Judge that petitioners satisfied the criteria of being the "prevailing party" under Tax Law § 3030(c)(5)(A)(i)(I), inasmuch as petitioners prevailed with respect to the most significant issue or set of issues presented. The Administrative Law

Judge did not, however, discuss whether petitioners satisfied the remaining requirements of Tax Law § 3030(c)(5)(A)(ii). We do so now.

Tax Law § 3030(c)(5)(A)(ii)(I) requires, *inter alia*, an applicant for costs to show the amount sought, including an itemized statement from an attorney appearing on the party's behalf stating the actual time expended and the rate at which fees and other expenses were computed. We find that the documentation submitted by petitioners and their attorney is sufficient to satisfy this requirement.

Tax Law § 3030(c)(5)(A)(ii)(II) requires, *inter alia*, that the applicant for costs show that he is an individual whose net worth did not exceed $2 million *at the time his petition was filed*. Here petitioner deposes that: "My net worth is less than $2,000,000.00." No regulations have yet been promulgated to put "flesh on the bones" of this requirement so as to provide guidance to an applicant in this situation. We conclude that based on the statute as written, a petitioner's sworn statement as to his net worth must be deemed sufficient where complete, unless rebutted by the Division. In this case, while the Division did not make an evidentiary showing to rebut petitioner, we do not find petitioner's statement complete. There is another element which petitioner has failed to establish to satisfy the statute. Petitioner's affidavit does not state at what point in time he claims his net worth was less than $2,000,000.00. We deem this to be crucial,[6] since the statute specifically requires that the statement of net worth must relate to the time the action was commenced. We conclude that this statement of petitioner's net worth without any reference to when that statement relates to, is insufficient to carry his burden here. We find that petitioners have failed to show that they meet the requirements of Tax Law §3030(c)(5)(A)(ii)(II) that at the time the petition was filed, petitioners' net worth was less than $2 million.

[6]Or could be crucial in another case. We include this as guidance to future petitioners.

As was noted earlier, the Administrative Law Judge concluded that in view of all of the facts and circumstances of this case, the Division established that its position was substantially justified. While the Division lost its case, it was acting on a policy it viewed as reasonable at the time the Notice of Deficiency was issued. We note that it was an intensely litigated case on a close issue of law. The Administrative Law Judge observed that the Division is substantially justified where it pursues litigation in a matter, such as here, which involves close legal questions (***see, Spriggs v. United States***, ***supra***; ***United States v. Wilkinson***, ***supra***). The Division is entitled to seek guidance from the Tribunal and the courts in circumstances where the statute gives little direction or where the issue is one of first impression (***see, Blanco Invs. & Land v. Commissioner***, ***supra)***. We agree with the Administrative Law Judge that, based on all of the facts and circumstances of this case, the Division's position was substantially justified based on what the Division considered to be the law and facts applicable at the time the Notice of Deficiency was issued.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of E. Randall Stuckless and Jennifer Olson is denied;

2. The order of the Administrative Law Judge, dated December 21, 2006, is affirmed; and

3. The application of E. Randall Stuckless and Jennifer Olson seeking reasonable costs and fees is denied.

DATED: Troy, New York
August 16, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner