STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RAC FOR WOMEN, INC.	:	
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law and Personal Income Tax under Article 22 of the Tax Law for the Year 2001.	:	DECISION DTA NO. 819698

Petitioner RAC for Women, Inc., 21 Goodway Drive, Rochester, New York 14623-3029, filed an exception to the order of the Administrative Law Judge issued on December 16, 2004. Petitioner appeared by Anthony J. Priore, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Nicholas A. Behuniak, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUE

Whether petitioner is 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 "4" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

During the year in issue, 2001, petitioner was a Federal S corporation which elected to be treated as a New York S corporation. The corporation operated a health and fitness club for women in Rochester, New York.

On or about March 5, 2001, petitioner filed a request for a six-month extension to file its initial New York S Corporation Franchise Tax Return for the period January 7, 2000 through December 31, 2000. It estimated its tax liability to be $225.00 and included a check for this amount with its return.

On or about March 15, 2002, petitioner filed a request for a six-month extension to file its return for 2001. With the request it paid the sum of $100.00. On June 20, 2002, petitioner filed its franchise tax return for 2001 and remitted a payment of $7,709.00.

We modify finding of fact "4" of the Administrative Law Judge's order to read as follows:

> The Division deemed the extension filed for 2001 to be invalid because the amount remitted with the extension request was not 90% of the 2001 tax liability or 100% of the prior year's liability. On July 15, 2002 the Division of Taxation ("Division") issued a Notice of Demand for Payment of Tax Due asserting that petitioner was liable for penalties for late filing, late payment and underpayment with respect to its 2001 return pursuant to Tax Law § 1085(a)(1), (2); (c). In addition, the Division also assessed petitioner penalty for failing to timely file an S corporation return pursuant to Tax Law § 685(h)(2).[1]

At hearing, petitioner's representative argued that his tax preparation software was the reason for the underpayment. It appears the software did not pick up the prior year's tax payment and defaulted to a $100.00 figure, thus causing a $125.00 shortfall. Petitioner argued

[1]We modified finding of fact "4" of the Administrative Law Judge's order to more accurately reflect the record.

that it was grossly unfair to assess penalties in excess of $1,500.00 for failing to remit an extra $125.00 with its extension request for 2001.

In the determination of October 14, 2004, the Presiding Officer noted that petitioner did not remit the proper tax with its extension request for 2001 and that the Division "properly concluded that the request for an extension of time was invalid and the return and payment . . . were late." However, citing the regulation at 20 NYCRR 2392.1(d)(5), the Presiding Officer found that the software glitch constituted a reasonable ground for delinquency and indicated an absence of willful neglect. As a consequence, the Presiding Officer canceled the penalties.

Mr. Priore's letter of October 19, 2004, constituting the application for costs herein, contained an unsworn statement asserting that petitioner was a corporation with a net worth of less than seven million dollars and having less than five hundred employees. In addition, attached to the letter was a summary of work performed by Dolce, Dolce & Priore, CPA's, the date services were rendered, the time expended on each date, disbursements for postage, faxes, photocopies, telephone charges and mileage. Total time spent on the matter was set forth as 22.75 hours at $150.00 per hour, for a total fee of $3,412.50. Disbursements totaled $63.82.

The Division argues that it was substantially justified in issuing the Notice and Demand in issue, and therefore, petitioner cannot be deemed a prevailing party for purposes of Tax Law § 3030. The basis for this assertion is that petitioner never disputed that it failed to pay the proper amount of tax with its extension request for the year 2001, did not timely file its S corporation return for 2001 and never raised the argument that it had experienced software problems.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge noted the provisions of Tax Law § 3030(a) which provide for an award of reasonable administrative and litigation costs to a taxpayer who is a prevailing party in an administrative or court proceeding with the Division. The Administrative Law Judge also set forth the applicable portions of Tax Law § 3030(a) regarding the definition of a "prevailing party." The Administrative Law Judge found that the Division was substantially justified in issuing the Notice and Demand based upon petitioner's underestimation of tax, its consequent late filing of its extension request, and its failure to file an information return for an S corporation. Therefore, the Administrative Law Judge concluded that petitioner was not the prevailing party within the meaning and intent of Tax Law § 3030.

The Administrative Law Judge pointed out that although petitioner argued successfully at the hearing that its tax preparation software did not operate correctly, that is irrelevant to the issue of entitlement to costs. The Administrative Law Judge also found that even if the Division's position was not substantially justified, petitioner's motion was properly denied because petitioner failed to provide adequate proof, other than unsworn and unsupported assertions, to show that it was a corporation, the net worth of which did not exceed seven million dollars and which had not more than 500 employees when the proceeding was commenced, as required by Tax Law § 3030(c)(5)(A). As a result, the Administrative Law Judge denied petitioner's application for costs.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that in response to the Notice and Demand for Payment issued by the Division on July 15, 2002, petitioner requested an abatement of the penalty imposed due to reasonable cause, mentioning the software problem that caused an underpayment of tax. Petitioner maintains that this argument was presented throughout its proceeding until the Small Claims Presiding Officer held that this constituted reasonable cause and abated the penalty. Petitioner claims that the issue to be determined on its motion is not whether the Division was correct in initially asserting the penalty but whether the Division was correct in not canceling the penalty after petitioner demonstrated reasonable cause for its action. As part of its exception, petitioner included evidence of its corporate status, net worth and number of employees.

In opposition, the Division argues that it is inappropriate for petitioner to submit evidence in support of its position on exception. However, the Division maintains that even if petitioner's additional evidence was considered, it is still not entitled to an award of costs. The Division asserts that petitioner conceded that it did not comply with the requirements for filing an appropriate extension, thus confirming that the Division's position was substantially justified. Further, contrary to petitioner's argument, it is the Division's position at the time that the notice was issued that is relevant.

The Division disputes that petitioner presented its argument that a software error caused it to underpay its tax throughout the proceeding. Rather, the Division claims that petitioner presented a variety of explanations for its error and never properly explained its software defense.

OPINION

We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (***see***, ***Matter of Purvin***, Tax Appeals Tribunal, October 9, 1997; ***see also***, ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). As a result, we reject petitioner's attempt on exception to introduce evidence which was not a part of its application for costs presented to the Administrative Law Judge.

For purposes of an award of administrative and litigation costs, the "position of the Commissioner" in an administrative proceeding means that which is taken "as of the date of the notice of deficiency, notice of determination or other document giving rise to the taxpayer's right to a hearing" (Tax Law § 3030[c][8][B]). Thus, in determining whether the Commissioner's position was substantially justified, it is necessary to look at the Division's actions at the time that the Notice and Demand was issued to petitioner on July 15, 2002. As the Presiding Officer concluded, petitioner did not remit the proper tax with its extension request for 2001 and the Division was entitled to conclude that the request for an extension of time was invalid and that the return and payment were late. Thus, we agree with the conclusion of the Administrative Law Judge that the Division was substantially justified in issuing the Notice and Demand based upon petitioner's underestimation of tax, its consequent late filing of its extension request, and its failure to file an information return for an S corporation. As a result, we affirm the order of the Administrative Law Judge denying petitioner an award of administrative or litigation costs.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of RAC for Women, Inc. is denied;

2. The order of the Administrative Law Judge is affirmed; and

3. The application by RAC for Women, Inc. for costs is denied.

DATED: Troy, New York
June 23, 2005

/s/Donald C. DeWitt
Donald C. DeWitt
President

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