STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NANCY SCHERER F/K/A NANCY MANDEL	:	ORDER DTA NO. 817550
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1996.	:	

Petitioner, Nancy Scherer f/k/a Nancy Mandel, c/o Sandra Karas, 7030 East Genesee Street, Syracuse, New York 13066, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1996.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York 13202, on June 20, 2001 at 10:00 A.M. Petitioner appeared by Sandra Karas, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mac Wyszomirski).

Presiding Officer Hoefer issued a determination on October 4, 2001 which granted the petition of Nancy Scherer and directed a refund be granted to petitioner.

By correspondence dated October 31, 2001 and filed with the Division of Tax Appeals November 2, 2001, petitioner, appearing *pro se*, brought an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel), filed a motion in opposition and a memorandum of law on December 20, 2001, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs, the Division's motion in opposition and memorandum of law, the determination issued October 4, 2001 and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, 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. Petitioner, Nancy Scherer, f/k/a Nancy Mandel, filed a 1996 New York State resident income tax return as a married individual filing separately, dated April 14, 1997. The timeliness of the filing of such return is not an issue in this case. On the return petitioner reported New York adjusted gross income of $22,031.00, taxable income of $15,856.00 and a tax liability of $870.00. Petitioner's return also claimed that the tax due of $870.00 was partially paid by a $400.00 credit for a payment made to an estimated tax account.

2. The Division of Taxation ("Division") issued a Notice and Demand for Payment of Tax Due ("Notice") to petitioner dated October 27, 1997, for the1996 tax year wherein the entire $400.00 estimated tax payment credit claimed on the return was disallowed. The notice advised petitioner that "the estimated tax paid amount has been adjusted to reflect the payments and credits in your estimated tax account." Inasmuch as petitioner had paid $471.00 when the return was filed as a balance due, the Notice and Demand assessed the remaining $399.00, plus interest and penalty in the amounts of $35.04 and $26.87, respectively, for a total of $460.91. Petitioner questioned the notice and demand and received correspondence dated April 20, 1998, from the Division which informed her of the following:

> The photocopy of your cancelled check #107, dated 6/15/96 for $400.00 under deposit serial number #s1537340 was credited to a 1996 joint estimated tax account under primary SS#187264583, for James and Nancy Mandel.
>
> Since New York State was not notified of any changes in the status of the 1996 estimated tax account, it was allowed on the spouse/ex-spouse James Mandel's 1996 income tax return. This return was filed claiming this $400.00 estimated tax payment, and the remaining balance of tax due was paid in full, upon filing. Therefore, this matter will have to be resolved by the two parties involved and be considered as a civil matter.

3. Petitioner protested the notice by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services. A conciliation conference was held on September 15, 1999, and on November 12, 1999 a Conciliation Order was issued wherein the tax due was recomputed and reduced to $311.00, the penalty canceled and interest calculated to total $26.99. The Conciliation Order also reflected that petitioner had paid a total of $460.91 and that she was therefore entitled to a refund of $122.92. The revised tax due as shown on the Conciliation Order was based on allowing the $400.00 payment to the joint estimated tax account to be prorated between petitioner and her spouse based upon their respective incomes in accordance with regulation 20 NYCRR 151.10(f) ($22,031.00/($78,194.00 + 22,031.00) x $400.00 = $88.00). Petitioner disagreed with the recomputation shown on the Conciliation Order and filed a petition protesting the Order on February 10, 2000.

4. A small claims hearing before a presiding officer was held on June 20, 2001. The presiding officer received notice on July 9, 2001 that a post hearing brief would not be filed, and accordingly the three-month period for the issuance of the determination commenced. On October 4, 2001, the presiding officer issued a determination which granted the petition and directed the Division to refund petitioner the sum of $460.91 plus interest. In reaching this conclusion the presiding officer found that the Division relied on regulation 20 NYCRR 151.10(f) for support that the $400.00 payment that petitioner made into a joint estimated tax

account for the 1996 tax year was to be prorated between petitioner and her former husband. The presiding officer determined that such regulation did not apply in the instant matter, since petitioner and her (then) spouse did not file a joint New York State personal income tax return for 1996. 20 NYCRR 151.10(f)(3) which, when isolated, permitted

> amounts attributable to joint payments of estimated income tax. . .[to] be applied against the separate New York State personal income tax liability of each spouse in such proportion as is agreed upon by both. . .; provided. . .in the absence of any such agreement, such amounts will be applied against the separate New York State personal income tax liability of each spouse in the same proportion which the separate New York State personal income tax liability of each spouse bears to the total New York State personal income tax liability of both spouses.

Even if this subdivision is used merely as guidance, the presiding officer found the Division misapplied it given the facts of this case. The record revealed an Antenuptial Agreement dated October 31, 1994, which established agreement between petitioner and her husband that each could not assert or succeed to any right or privilege in the property of the other during or after their lifetimes. Inasmuch as petitioner established that she made the $400.00 estimated tax payment solely from her funds, over which her husband could assert no right, the presiding officer found the antenuptial agreement extended to the payment of estimated income tax and held that the Division improperly applied any portion of the payment to the husband's separate return. The presiding officer found additional support for his determination in the fact that the Internal Revenue Service had reached the same conclusion when faced with similar or near identical facts concerning petitioner for the same year. Principles of fairness and equity were cited, and accordingly, the presiding officer granted the petition and directed the refund.

5. By letter dated October 31, 2001 petitioner’s representative made an application to the Division of Tax Appeals for costs totaling $1,500.00. Petitioner’s application contains a sworn

statement that petitioner's net worth does not now or at the time the action was filed, exceed two million dollars.

6. To document her claimed legal expenses, petitioner submitted with her application an invoice dated August 3, 2001, addressed to petitioner from Sandra Karas, Esq., of Fayetteville, New York. The invoice references "For Legal Services Rendered-Appeals Process Conciliation Conference, Petition Appeal, Small Claims NYS Redetermination of 1996 Tax Liability (Estimated Tax Credit)." The invoice itemizes services rendered by date and time, with entries commencing on June 10, 1997 and continuing through July 6, 2001. On June 10, 1997, petitioner's attorney provided .50 hours of services with a discussion regarding the estimated payment. Between April 24, 1998 and November 15, 1999, the legal services rendered were 17.75 hours and pertained to solving the legal issues and the steps leading up to and including a Conciliation Conference. The remaining 6.75 hours of legal services took place between November 15, 1999 and July 6, 2001, and centered around the Small Claims proceeding held concerning this case. A total of 25 hours of services was provided at $125.00 per hour in connection with this case. However, the total bill after a courtesy adjustment was reduced to $1,500.00.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner asserts her right to recover costs in the nature of legal fees pursuant to Tax Law § 3030 as the party who prevailed in the administrative proceeding in which she was involved, having a net worth under two million dollars. She argues that the Division's position was not substantially justified inasmuch as it was based upon the erroneous premise that a joint tax return had been filed for 1996 by petitioner and her then husband; that the Division improperly ignored her Antenuptial Agreement; that the Division did not consider relevant the

fact that the IRS, having taken the same action at the Federal level, reversed itself and gave petitioner credit for her Federal estimated payment; and that the Division ignored petitioner's proof that the source of the payment of taxes was solely hers.

8. The Division maintains petitioner is not entitled to costs since petitioner has not demonstrated that she is the prevailing party in this matter within the meaning of Tax Law § 3030 on several grounds:

1) that petitioner's application for costs fails by reason of the fact that the itemized invoice from her attorney applies an hourly rate which exceeds the maximum allowed by Tax Law § 3030;

2) that although petitioner filed a statement that her net worth was less than two million dollars, she did not provide evidence of the same, and therefore, does not satisfy the criteria; and

3) that the Division's position was substantially justified, which would stand to prevent petitioner from being treated as the "prevailing party" and thereby recovering 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 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.

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (***see***, Tax Law § 3030[c][2][B]). Such costs include reasonable fees for the services of attorneys in connection with the administrative

proceeding, "except that such fees shall not be in excess of seventy-five dollars per hour unless the [Division of Tax Appeals] determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate" (Tax Law § 3030[c][1][B][iii]; ***see also*** Tax Law § 3030[c][2][B]). Reasonable administrative costs "only include costs incurred on or after 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][2][B]).

Prevailing party is defined for purposes of section 3030, in relevant part, 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 on 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]; emphasis added.)

B. Tax Law § 3030 became effective September 10, 1997 and applies to "any administrative or court proceeding commenced after the date this act shall have become a law" (***see***, L 1997, ch 577, § 56). Here, petitioner's administrative proceeding before BCMS commenced with the filing of a request for a conciliation conference on or about May 5, 1998. Accordingly, Tax Law § 3030 applies to petitioner's proceeding before BCMS and any reasonable administrative costs incurred in connection with that proceeding, with the exception of .50 hours invoiced to petitioner for services incurred on June 10, 1997, in connection with this matter prior to the effective date of the law, as well as prior to the issuance of the notice which gave rise to petitioner's rights, which are not recoverable (Tax Law § 3030[c][2][B]). Tax Law § 3030 also applies to petitioner's administrative proceeding before the Division of Tax Appeals because that proceeding commenced with the filing of the petition on February 10, 2000.

C. The Division argues that the fees incurred for petitioner's attorney did not meet the requisite "reasonable administrative or litigation costs" (Tax Law § 3030[c][1][B][iii]), since the hourly rate charged exceeded the permissible $75.00 per hour. This argument is without merit.

The gross billing rate for the services rendered was $125.00. However, after a courtesy discount was applied to the bill, the final or net billing for the same 25 hours was $1,500.00, i.e., $60.00 per hour. Accordingly, if petitioner otherwise meets the criteria to be awarded costs, this provision is satisfied.

D. The Division maintains that since petitioner did not provide proof that her net worth did not exceed two million dollars, this criteria has not been met. Petitioner submitted a sworn affidavit that she meets the net worth requirement, and as such, fulfills this criteria (Treas Reg § 301.7430-2[c][3][ii][A]; ***see, Avancena v. Commissioner***, 63 TCM [CCH] 3133).

E. Petitioner is entitled to an award of costs if it is determined that she is the "prevailing party" pursuant to Tax Law § 3030(c)(5)(A), unless it is determined that the exception of Tax Law § 3030(c)(5)(B) applies, i.e., the Division's position was substantially justified. Clearly petitioner has satisfied all the criteria of a "prevailing party" having prevailed on the merits of this case (Tax Law § 3030[c][5][A][i]) and meeting the remainder of the criteria, including those points so challenged (Tax Law § 3030[c][5][A][ii]; ***see***, Conclusions of Law "C" and "D"). However, the critical remaining question is whether petitioner's motion must be denied because the position of the commissioner was "substantially justified" (Tax Law § 3030[c][5][B]).

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; ***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). 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; 92-2 US Tax Cas ¶ 50,412).

F. In this case the presiding officer correctly determined that 20 NYCRR 151.10(f) did not apply, and was not the proper support for the proration of the estimated tax payment by the conciliation conferee. The presiding officer relied upon the Antenuptial Agreement to establish the fact that petitioner and her (then) husband intended to keep such payments separate since petitioner's husband was to assert no rights over her property.

The Division should have relied upon 20 NYCRR former 185.3(g)(2) when applying the estimated tax payment in question. Such regulation, as in effect during 1996, provides:

> The fact that joint installments of estimated tax are made by a husband and wife will not preclude them from filing separate New York State personal income tax returns. Where joint installments of estimated tax are made but joint New York State personal income tax returns are not filed for the same taxable year, the estimated tax installments for such year may be treated as installments on account of the tax . . . liability of either the husband or wife for the tax year or may be divided between them in such a manner as they may agree. In the event the husband and wife fail to agree to a division, the portion of such installments allocated to a spouse will be that portion of the aggregate of all such installments of estimated tax made, as the amount of tax . . .shown on the separate New York State personal income tax return of the taxpayer bears to the sum of the taxes . . . shown on the separate New York State personal income tax returns of the taxpayer and such taxpayer's spouse.

When petitioner submitted the estimated tax payment, she colored the funds as joint. The payment was submitted by a check in her name alone, but with both social security numbers written on it, with a voucher bearing both names and social security numbers. The Division properly deemed this to be a payment to a joint estimated tax account. In addition, when she made such payment, the Division had no knowledge of the source of the funds or the existence and effect of petitioner's Antenuptial Agreement. It was after the Division disallowed any portion of the estimated tax payment to petitioner that she established that the payment was

clearly made from her own funds, with an agreement prohibiting her former husband from asserting any rights over such funds. At the time such payment was made to the Division, it was unaware of the Antenuptial Agreement, or of any other agreement or of any lack of agreement between petitioner and her husband as to how the funds should be divided. Thus, upon receipt of petitioner's husband's return as the first of the two filed separately, the Division could treat the estimated tax payment as a payment toward the liability of either spouse. Accordingly, since the action taken by the Division from the onset was in accordance with its own regulation,[1] which denied petitioner any application of a joint estimated installment which had already been applied to her husband's return, the Division's position is found to be substantially justified.

When petitioner appealed to BCMS for review of this matter, the conferee adjusted the estimated tax payment in petitioner's favor to meet the requirements of the section of the regulation concerning the situation where the husband and wife fail to agree. Clearly, by both taxpayers filing returns claiming a right to the $400.00 payment, it is evident that there was a failure to agree as to who had entitlement to such payment. Once the Division was advised of such disagreement, it had the obligation to make the proration as done by the conciliation conferee (20 NYCRR 185.3[g][2]). Accordingly, at this level as well, the position of the Division was substantially justified. Having determined that both actions taken by the Division were in accordance with its regulations, the Division's position had a reasonable basis in both fact and law, and was therefore substantially justified.

As a final point, it is noted that neither of the actions taken by the Division were upheld by the presiding officer. The presiding officer, as is his discretion, placed value on the equities in

[1] Although it appears that the Division did not apply the correct regulation, the right result was reached in the action taken.

this case. Although the Antenuptial Agreement may not have kept petitioner's payment from becoming a part of a "joint estimated account," accessible by her former husband, clearly the Agreement set forth their intentions as to their separate funds. Further, petitioner has historically made estimated payments, while petitioner's husband was a wage earner with withholding taxes who never made such payments. In addition, the IRS, when faced with the same or similar facts concerning petitioner, corrected the payment and attributed it to her. The fact that the presiding officer found the equities of this matter sufficiently compelling to reach the result he did, does not change the fact that the Division's position, as executed in accordance with the regulations, was substantially justified. Accordingly, petitioner may not be treated as the prevailing party for purposes of Tax Law § 3030 and therefore may not recover costs.

G. Petitioner's application for costs is denied.

DATED: Troy, New York
March 21, 2002

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE