STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THANOS AND DANIELA KAMILIOTIS	:	ORDER DTA NO. 818811
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under the Administrative Code of the City of New York for the Years 1994, 1995 and 1996.	:	

Petitioners, Thanos and Daniela Kamiliotis, 71 Putnam Park Road, Bethel, Connecticut 06801, 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 and New York City personal income tax under the Administrative Code of the City of New York for the years 1994, 1995 and 1996.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York on September 15, 2003 at 12:30 P.M. Petitioners appeared by Paul Scott, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (George Brand).

Presiding Officer Hoefer issued a determination on March 11, 2004 which partially granted the petition and directed the Division of Taxation to recompute the deficiencies in accordance therewith.

On April 7, 2004, petitioners filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. By a letter from the Division of Tax Appeals dated April 9,

2004, the Division of Taxation was granted until May 10, 2004 to file a response to the application (the Division of Taxation failed to file a response), which date began the 90-day period for the issuance of this order.

Based upon petitioners' application for costs and attached documentation, the determination issued March 11, 2004 and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioners, Thanos and Daniela Kamiliotis, are husband and wife who filed timely New York State and New York City personal income tax returns for the years 1994, 1995 and 1996. The returns for all three years at issue were filed on the basis that petitioners were nonresidents of the State and City of New York. An audit of petitioners' returns was completed in the summer of 1999, and on August 5, 1999, the Division of Taxation ("Division") issued statements of personal income tax audit changes to petitioners which asserted the following changes:

ITEM	1994	1995	1996
Audit increases to NYS income			
Disallowed business expenses	$11,017.00	$6,611.00	$3,645.00
Disallowed sub S expenses - commissions	37,155.00	34,000.00	41,000.00
Disallowed alimony paid	15,000.00	15,000.00	15,000.00
Total net adjustments	63,172.00	55,611.00	59,645.00
NYS income per return computed as residents	82,267.00	134,254.00	152,542.00
Corrected NYS adjusted gross income	$145,439.00	$189,865.00	$212,187.00

The statements of personal income tax audit changes contained the following explanation:

> Taxpayers are deemed to be domiciles [sic] and/or statutory residents of NYS & NYC since they failed to prove that they changed their domicile or that they spent less than 183 days in NYS & NYC in each year of the audit period.
>
> If taxpayers prove a change in domicile or statutory resident status allocation of wages is still at issue.
>
> Taxpayers maintained a permanent place of abode in New York City.
>
> Business expenses & sub chapter S corporation expenses (commissions) are disallowed as unsubstantiated. Alimony is disallowed as unsubstantiated.

2. Petitioners' State and City personal income tax returns are not a part of the record herein due to the fact that the returns along with the Division's entire audit file were destroyed in the September 11, 2001 attack on the World Trade Center. However, from the statements of personal income tax audit changes issued by the Division to petitioners, it was determined that petitioners' New York State returns for 1994, 1995 and 1996 reported New York State adjusted gross income (computed as though residents) of $82,267.00, $134,254.00 and $152,542.00, respectively.

While it is unclear as to what portion of their New York State adjusted gross income was reported as having been derived from or connected with New York sources, the statements of personal income tax audit changes indicate that for 1994, petitioners paid New York State tax in the amount of $1,684.00 and New York City tax in the amount of $340.00. Corrected tax liability, pursuant to the statement of personal income tax audit changes for 1994, is $10,561.01 in New York State tax and $5,560.48 in New York City tax.

For 1995, petitioners paid New York State tax of $5,950.00 and New York City tax of $575.00. Corrected tax liability, pursuant to the statement of personal income tax audit changes for 1995, is $13,521.81 in State tax and $7,539.90 in City tax.

For 1996, petitioners paid New York State tax of $7,940.00 and New York City tax of $760.00. Corrected tax liability, pursuant to the statement of personal income tax audit changes for 1996, is $14,220.75 in State tax and $8,576.89 in City tax.

It must be noted that the corrected tax liabilities for the years at issue were based upon the Division's determination that petitioners were taxable as resident individuals of the State and City of New York as well as its disallowance of the claimed deductions for alimony and various business expenses and commissions as set forth in Finding of Fact "1".

3. On November 22, 1999, the Division issued a Notice of Deficiency to petitioners which asserted additional New York State and New York City personal income taxes due in the amount of $42,731.84, plus penalties[1] and interest.

4. Petitioners thereupon filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services, and on August 17, 2001, a Conciliation Order (CMS No. 183541) was issued which sustained the statutory notice. On November 7, 2001, petitioners filed a petition with the Division of Tax Appeals seeking administrative review of the conciliation order. On August 7, 2002, petitioners elected to proceed at the small claims level.

5. A small claims hearing was held before James Hoefer, Presiding Officer, on September 15, 2003, and on March 11, 2004, a determination was issued by the presiding officer. The determination held as follows:

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[1] Penalties were asserted pursuant to Tax Law § 685(b) for negligence and Tax Law § 685(p) for substantial understatement of liability.

a. Petitioners did not meet their burden of proof to establish that they changed their domicile from New York City prior to the years at issue, and accordingly, the Division properly determined that they were domiciled in New York State and New York City for the years 1994, 1995 and 1996 and were taxable as resident individuals for these three years;

b. Even had petitioners established a change of domicile to Connecticut in 1993, they would still be taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) because their New York City apartment was a permanent place of abode (20 NYCRR 105.20[e][1]) and because they failed to meet their burden of proving that they spent fewer than 183 days each year within the State and City of New York;

c. Sufficient evidence was presented to substantiate that petitioner Thanos Kamiliotis made alimony payments of $15,000.00 for each year at issue to his former spouse and, accordingly, petitioners were allowed a deduction for these payments;

d. With respect to commission expenses claimed as paid by Edit, LTD, an S corporation wholly owned by petitioner Thanos Kamiliotis, to petitioner Daniela Kamiliotis's parents, Andrei and Ileana Codarcea, it was determined that such individuals were qualified persons who provided valuable services to the company on a regular and continuous basis, and accordingly, Edit was entitled to claim the payments it made to the Codarceas as deductions on its returns for the years at issue. As to payments allegedly made by Edit, LTD to petitioners' daughters, Evelyn and Dorina Kamiliotis, it was found that these individuals did not provide any services to the corporation during the years at issue, and therefore, the Division properly denied the deductions claimed by Edit, LTD for these payments;

e. As to petitioner Daniela Kamiliotis's Federal Schedule C expenses for her business as a designer under the business name "Designs by Daniela K," substantial evidence was submitted to support the expenses claimed on petitioners' returns for the years at issue and they were therefore entitled to claim these expenses;

f. The presiding officer found that the deficiency found to be due was not the result of negligence or intentional disregard of the Tax Law and, therefore, canceled this penalty. As to the penalty imposed for substantial understatement of liability, the presiding officer concluded that petitioners could reasonably assert that they changed their domicile to Connecticut and that the understatement was due to reasonable cause. The substantial understatement of liability was, therefore, canceled.

6. On April 8, 2004, the Division of Tax Appeals received an application for costs pursuant to Tax Law § 3030 from petitioners' representatives, Scott & Guilfoyle, CPAs (Paul J. Scott, CPA) which sought costs in the amount of $23,329.80. These costs consisted of the following:

a. Accounting services from Scott & Guilfoyle, CPAs rendered from September 1, 2003 through December 12, 2003 in the sum of $8,625.00 (34.5 hours @ $250.00 per hour);

b. Professional services from Morgenthau, Greenes, Goldfarb & Aronauer, P.C., Attorneys at Law, rendered from August 3, 1998 to August 31, 1999 in the amount of $1,690.00 plus disbursements (photocopies) of $2.40, for a total of $1,692.40. No hourly rate used to compute the $1,690.00 fee was set forth on the invoice. In addition, the invoice asserted an amount due of $2,752.80 which indicated that such amount was due from a bill of August 28, 1998;

c. Accounting services from Scott & Guilfoyle, CPAs for "[a]dditional time spent re audit 4/01/01 - - 6/30/01" in the amount of $1,912.00 (no hourly rate was set forth on this invoice);

d. A formalized agreement, in the form of a letter to petitioners from Arthur Pelikow, Esq., indicating that his hourly rate was $225.00 in addition to costs and expenses, with an initial fee payable of $3,000.00 against which the hourly rate was charged. Petitioners were asked to return a signed copy of the agreement together with a check for $3,000.00. The agreement was unsigned and there is no evidence attached to indicate that a check for $3,000.00 was sent to Attorney Pelikow; and

e. An invoice from Deyan Ranko Brashich for professional services rendered for the period from October 8, 2001 to April 28, 2003. This invoice indicated that petitioners owed the sum of $5,347.60 which consisted of 19.40 hours of professional services at an hourly rate of $275.00 ($5,335.00) plus disbursements ($12.60).

7. No additional documentation was submitted along with the application for costs and no assertion of petitioners' net worth at the time the action was commenced was included therein.

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]). For purposes of this section, "fees for the services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals shall be treated as fees for the services of an attorney" (Tax Law § 3030[c][3]).

Prevailing party is defined for purposes of section 3030(c)(5), 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):
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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 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 , or is an owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed seven million dollars at the time the civil action was filed, and which had not more than five hundred employees 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.
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> (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.
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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]; emphasis added.)

B. In the present matter, petitioners' application for costs must fail. Petitioners did not prevail with respect to the most significant issue as required by Tax Law § 3030(c)(5)(A)(i)(II)

which, in this particular matter, was the issue as to whether petitioners were taxable as resident individuals for the years at issue. While petitioners did prevail in substantiating some of their claimed deductions, i.e., alimony payments, some of the commission expenses paid by Edit, LTD, (payments to petitioner Daniela Kamiliotis's parents were sustained, payments to petitioners' daughters were not sustained) and petitioner Daniela Kamiliotis's Federal Schedule C expenses for her business, it is clear that the most significant issue and that which gave rise to most of the additional tax liability for petitioners was the presiding officer's finding that the Division properly taxed petitioners as resident individuals for the years at issue.

In addition, even had petitioners substantially prevailed with respect to the most significant issues presented, Tax Law § 3030(c)(5)(a)(ii)(II) requires that in order to be considered a "prevailing party," petitioners were required to allege and prove that their individual net worth did not exceed two million dollars or that the net worth of their businesses (each petitioner owned a business as evidenced by the expenses and commissions claimed) did not exceed seven million dollars. In their application for costs, no allegations were made as to such net worth and no proof thereof was offered.

C. The application of Thanos and Daniela Kamiliotis for costs is denied.

DATED: Troy, New York
June 3, 2004

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE