STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MORRIS B. BANILIVI	:	
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 1998.	:	ORDER DTA NO. 819226

Petitioner, Morris B. Banilivi, 146-44 59th Avenue, Flushing, New York 11355, filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") with respect to New York State personal income tax under Article 22 of the Tax Law for the year 1998. Petitioner filed a form DTF-941, Withdrawal of Protest, dated May 5, 2002, waiving his right to a conciliation conference before the Bureau of Conciliation and Mediation Services and a hearing in the Division of Tax Appeals, and consented to the discontinuance of his protest with respect to assessment number L018419989.

On November 20, 2002, petitioner, appearing on his own behalf, filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation, appearing by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel) filed a response to the application on December 20, 2002, which date began the 90-day period for the issuance of this order.

Based on petitioner's application for costs and attached documentation, the Division's affirmation in opposition, the affidavit of Louis Guertin, sworn December 20, 2002, and all the

pleadings and documents submitted in connection with this matter, Joseph W. Pinto, Jr., 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. An audit of petitioner's New York State Resident Income Tax Return for the year 1998 revealed that petitioner did not file a 1998 return. The Division of Taxation issued to petitioner a Notice and Demand for Payment of Tax Due, dated August 11, 2000, setting forth tax due of $8,139.00, penalty of $2,482.34, and interest of $822.45, for a total due of $11,443.79. This assessment was subsequently reduced based on petitioner's 1998, 1999, 2000 and amended 1998 New York resident tax returns which claimed net operating loss carrybacks. Although the Division allowed the 1999 and 2000 net operating loss carrybacks to 1998, reducing the tax due for 1998 to $0.00, penalty and interest remained due on the full amount of the deficiency.

2. By letter dated December 1, 2000, petitioner's former representative, Howard R. Rosenthal, CPA, responded to the Notice and Demand and requested that the penalty and interest be abated due to petitioner's ignorance of the law and his poor financial condition.

3. The Division issued to petitioner a Response to Taxpayer Inquiry, dated October 30, 2001, in which it stated that the tax due for 1998 had been eliminated by the net operating loss carrybacks, but restated petitioner's liability for the late-filing penalty and the interest due. Mr. Rosenthal sent a response to the Division, dated November 9, 2001, in which he again requested abatement of penalty on the basis of ignorance of the law and poor financial condition. By a notice of assessment resolution, dated November 30, 2001, the Division denied the request to waive the penalty, stating that insufficient funds or financial difficulties did not constitute

reasonable cause for abatement of penalty. Petitioner filed a request for conciliation conference dated December 3, 2001.

4. By facsimile transmission, dated April 22, 2002, petitioner submitted a copy of a letter to him from the Internal Revenue Service, dated April 1, 2002, in which he was notified that his account had been changed for the year 1998 eliminating the late-filing penalty and the late-payment penalty and reducing the amount of interest due to the amount owed on the outstanding tax.

5. Upon receiving this communication from petitioner, the Division, by letter, dated April 30, 2002, proposed to cancel the penalty assessed on the Notice and Demand but, consistent with the Federal adjustment, the interest remained due. The Division enclosed a Withdrawal of Protest, Form DTF-941, for petitioner's signature, which proposed that the matter be resolved by petitioner's agreement to pay $686.49 in interest by May 7, 2002 and to waive all rights to a conciliation conference or a hearing in the Division of Tax Appeals in exchange for cancellation of penalties.

6. Petitioner executed the Withdrawal of Protest, dated May 5, 2002, acknowledging his acceptance of the terms set forth in the Withdrawal of Protest. However, the evidence does not contain a fully executed Withdrawal of Protest in that the copy submitted by the Division is not executed by it.

7. On November 20, 2002, petitioner filed this application for costs pursuant to Tax Law § 3030.

STATEMENT OF THE PARTIES' POSITIONS

8. Petitioner contends that he was forced to pay tax professionals to represent him in his communications with the Division prior to resolution of the matter. He believes the

communications were needlessly protracted by the Division, evidenced by the fact that a settlement was not reached until a second auditor examined the facts of his case. For this reason, petitioner argues that he is entitled to costs pursuant to Tax Law § 3030.

9. The Division of Taxation raises several reasons why costs should not be granted in this matter. First, the Division contends that the application is untimely because it was not filed within 30 days of the Withdrawal of Protest. Second, the Division argues that petitioner has not established that he was the prevailing party in this matter, i.e., that he has substantially prevailed with respect to the amount in controversy, and the Division believes that its position was substantially justified. Third, petitioner has not submitted an itemized statement of the actual time expended by his representative on this matter, the fee rate and proof that such fees were incurred in connection with the instant proceeding. Fourth, the Division submits that petitioner has not demonstrated that his net worth is less than two million dollars as required by Tax Law § 3030(c)(5)(A)(ii)(I).

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.

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].) A prevailing party is defined by the statute 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].)

B. As noted above, the application must be brought within 30 days of final judgment in the matter. (Tax Law § 3030[c][5][ii][I].) Unfortunately, the term "final judgment" is not defined by the statute and no regulations have been promulgated pursuant to Tax Law § 3030.

However, Tax Law § 3030 is modeled after Internal Revenue Code § 7430. Therefore, it is proper to look to Federal regulations and cases for guidance in analyzing Tax Law § 3030 ***(see, Matter of Levin v. Gallman***, 42 NY2d 32, 396 NYS2d 623; ***Matter of Sener***, Tax Appeals Tribunal, May 6, 1988).

Internal Revenue Code § 7430(a) provides that:

> IN GENERAL.--In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for--
>
> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service.

Internal Revenue Code § 7430(b)(4) allows for an award of costs to be made by the Internal Revenue Service pursuant to IRC § 7430(a) if the application by the prevailing party is made by the 91st day "after the date on which the *final decision* of the Internal Revenue Service as to the determination of the tax, interest, or penalty is mailed to such party" (emphasis added). The term "final decision" is further delineated in the regulations.

The Federal regulation promulgated pursuant to IRC § 7430 provides, in pertinent part, as follows:

> *Period for requesting costs from the Internal Revenue Service*.--To recover reasonable administrative costs pursuant to section 7430 and this section, the taxpayer must file a request for costs no later than 90 days after the date the final decision of the Internal Revenue Service with respect to all tax, additions to tax and penalties at issue in the administrative proceeding is mailed, or otherwise furnished, to the taxpayer. *The final decision of the Internal Revenue Service for purposes of this section is the document which resolves the tax liability of the taxpayer with regard to all tax, additions to tax and penalties at issue in the administrative proceeding* . . . . (Treas Reg § 301.7430-2[c][3][iii][5]; emphasis added.)

Although the Division's counsel in her affirmation opined that "the date to calculate the running of the thirty day time period must be May 5, 2002, the date petitioner withdrew his protest," that document does not comport with the definition of a "final decision" as that term is defined in Treas Reg § 301.7430-2(c)(3)(iii)(5). The Withdrawal of Protest, Department of Taxation and Finance form 941, requires the dated signature of a Department representative in order to be fully executed.[1] The form in evidence was not executed by the Department and does not acknowledge its agreement to the terms contained therein. Therefore, the document does not constitute a final judgment for purposes of Tax Law § 3030.

This matter presents a unique circumstance. The statute was written to accommodate final orders, determinations and decisions in the administrative setting. In order for the Withdrawal of Protest to constitute a final judgment, it would have to express the agreement by the parties that all issues (other than administrative costs) of tax, penalty and interest have been settled. The Withdrawal of Protest signed by only one of the parties would not, of necessity,

[1]Although not specifically pertinent herein, the Withdrawal of Protest form contains language which requires the taxpayer to acknowledge that any refund claim is subject to the review of the State Comptroller. It is unlikely the State Comptroller would accept this form if not properly executed by the Department as evidence of its agreement to the terms contained therein.

signal the end of proceedings for the party that did not subscribe to the agreement. (***See***, Treas Reg § 301.7430-2[c][3][iii][5].)

This situation is not unlike that described in Rule 231 of the United States Tax Court Rules of Practice, where, in unagreed cases settled by stipulation, the prevailing party may make a motion for administrative costs, but must include a copy of the stipulation as to settled issues signed by the parties or their representatives. (U.S. Tax Court Rule 231[c].) The terms of the Withdrawal of Protest profess to finally dispose of the notice and demand and set forth a recomputation of the tax, penalty and interest. Clearly, it constitutes a bilateral agreement, drafted by the Department and submitted to the taxpayer to effectuate a settlement.[2] The fact that both parties are called upon to execute the agreement is the proof of the thesis that the form constitutes, and was intended to be, a stipulation of settlement. Without proper execution it is not valid and cannot be accepted as a final judgment in this matter.

Consequently, without a validly executed Withdrawal in the record, there is no evidence that a final judgment exists, subject matter jurisdiction does not obtain and the application for costs is deemed premature. If petitioner establishes the existence of a properly executed final judgment, he is free to reapply for the relief sought herein.

C. The application of Morris B. Banilivi for administrative costs pursuant to Tax Law § 3030 is dismissed without prejudice.

DATED: Troy, New York
February 6, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

[2]In his affidavit, Louis Guertin, Division auditor in this matter, stated that he "proposed to settle the matter by abating penalties" and sent the Withdrawal of Protest form to petitioner to memorialize the agreement.