

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MIN SHAN KING	:	
for Revision of a Determination or for Refund of	:	ORDER
Tax on Cigarettes and Tobacco Products under Article 20	:	DTA NO. 819606
of the Tax Law for the Period May 8, 2002.	:	

Petitioner, Min Shan King, 38 Monroe Street, EF8, New York, New York 10002-7728, filed a petition for revision of a determination or for refund of tax on cigarettes and tobacco products under Article 20 of the Tax Law for the period May 8, 2002.

On November 6, 2003, the Division of Tax Appeals issued an Order of Discontinuance in the matter of Min S. King, based upon the Division of Taxation's filing of a cancellation of assessment of Notice of Determination No. L-021717653-8, issued to Min S. King on November 4, 2002.

On December 4, 2003, petitioner, appearing on his own behalf, filed an application for costs pursuant to Tax Law § 3030. The Division of Taxation, appearing by Mark F. Volk, Esq. (Michele M. Helm, Esq., of counsel) filed a response to the application on January 5, 2004, which date began the 90-day period for the issuance of this order.

Based on petitioner's application for costs, the Division of Taxation's affirmation in opposition, the exhibits attached thereto 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. On May 8, 2002, two investigators of the Department of Taxation and Finance's Tax Enforcement Unit were conducting a surveillance on an unrelated matter when they spotted petitioner carrying a plastic bag they believed to contain cartons of cigarettes.

2. The two investigators approached petitioner and identified themselves and proceeded to inspect the plastic bag, which indeed contained seven cartons of cigarettes which petitioner had purchased at the Foxwoods Resort Casino Outpost in Connecticut. The cigarettes bore tax stamps of the State of Connecticut.

3. After informing petitioner that he was only permitted by law to purchase and bring into New York State two cartons of cigarettes, the investigators issued him a summons, charging him with willfully attempting to evade or defeat any tax imposed by Article 20 of the Tax Law, a misdemeanor. The investigators seized all seven cartons of cigarettes and personally brought them to 55 Hanson Place, Brooklyn, New York, where they were placed in the custody of the Department of Taxation and Finance.

4. Upon the return date of the summons, July 30, 2002, the case was dismissed for undisclosed reasons.

5. On November 4, 2002, three months after the summons had been dismissed, the Division of Taxation ("Division") issued to petitioner a Notice of Determination, seeking \$200.00 in penalty for his possession of unstamped or unlawfully stamped or untaxed tobacco

products. Although challenged by petitioner at conference before the Bureau of Conciliation and Mediation Services, an order was issued upholding the notice on May 16, 2003.

6. On August 15, 2003, petitioner filed a petition with the Division of Tax Appeals, challenging the imposition of the \$200.00 penalty. Attached to the petition were receipts for the purchase of cigarettes at the Foxwoods Casino which indicated a tax paid thereon.

7. By Order, dated November 6, 2003, Brian L. Friedman, Administrative Law Judge, granted the Division's motion to cancel the notice of determination and discontinued the proceeding with prejudice. Judge Friedman noted that there had been no agreement between the parties as to the prevailing party and that petitioner was eligible to make application to the Division of Tax Appeals for costs and fees.

8. On December 4, 2003, petitioner filed this application for costs and fees in the sum of \$1,217.93. Petitioner sought \$517.93 to compensate him for the cost of the cigarettes and \$700.00 as compensation for his time in attending the court proceeding and conciliation conference and for "legal consultation."

9. The Division contended that petitioner has not demonstrated that he was the prevailing party within the meaning of Tax Law § 3030(5)(B) and that the Division was substantially justified in issuing the Notice of Determination when petitioner was found in possession of seven cartons of unstamped cigarettes.

In addition, the Division argued that petitioner was not a prevailing party because he has failed to establish that his net worth did not exceed two million dollars pursuant to Tax Law § 3030(c)(5)(A)(ii)(II) and he failed to submit an itemized statement of the time his representative spent on the matter and the rate charged per hour 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].) Since petitioner's request for compensation for the cost of the cigarettes is neither a reasonable administrative cost nor a reasonable litigation cost incurred in connection with the proceeding, the Division of Tax Appeals is without authority to grant the request. However, petitioner's request for the cost of legal consultation requires further analysis.

A prevailing party is defined by the statute as follows:

[A]ny 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.

* * *

(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. It is concluded that petitioner was not the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the Notice of Determination based on petitioner's admitted possession of seven cartons of unstamped cigarettes. In accordance with Tax Law § 481(b)(i), the commissioner may impose a penalty of not more than \$150.00 for each 200 cigarettes (a carton) or fraction thereof in excess of one thousand cigarettes (five cartons) in the possession or under the control of any person. Although petitioner's receipts indicated a tax paid on his purchase of the cigarettes in Connecticut,

“unstamped” cigarettes are defined in the Tax Law as packages of cigarettes bearing the stamp of another state. (Tax Law § 470[13].)

In addition, as argued by the Division, in order to be a prevailing party petitioner needed to establish that his net worth did not exceed two million dollars (Tax Law § 3030[c][5][A][ii][II]) and to provide an itemized statement from an attorney or expert witness representing or appearing for petitioner showing the actual time expended and the rate of fees or other expenses (Tax Law § 3030[c][5][A][ii][I]). Petitioner failed to meet either of these requirements.

Having failed to establish himself as a prevailing party, petitioner’s application for costs must fail. (Tax Law § 3030[a].)

C. The application for costs of petitioner, Min Shan King, filed December 4, 2003, is denied.

DATED: Troy, New York
January 29, 2004

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