STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
RICHARD T. AND CAROL J. BOURNS	:	ORDER DTA NOS. 821366
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2001 and 2003.	:	AND 821404

Petitioners, Richard T. and Carol J. Bourns, filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2001 and 2003.

On April 28, 2007 and May 2, 2007, respectively, petitioners appearing by Paul H. May, CPA, and the Division of Taxation appearing by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), waived a hearing and submitted the matter for determination without a hearing. On February 21, 2008, Dennis M. Galliher, Administrative Law Judge, issued a determination which granted the petitions and cancelled the notices of deficiency dated April 21, 2005 and September 28, 2006, respectively.

By letter dated April 15, 2008, petitioners filed an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel), filed an affirmation in opposition to the application on May 16, 2008, which date began the 90-day period for issuance of this order.

Based upon petitioners' application for costs, the Division's affirmation in opposition, the determination issued February 21, 2008, and all pleadings and proceedings had herein, Dennis M. Galliher, 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. Petitioner Richard T. Bourns reached the age of 65 on January 22, 1999 and, after some 40 years of employment as an executive with the Eastman Kodak Company (Kodak), retired on February 1, 1999. Mr. Bourns was a participant in the Kodak Unfunded Retirement Income Plan and the Kodak Excess Retirement Income Plan (the Kodak Plans), and as a result was entitled to receive payments thereunder upon his retirement. Mr. Bourns chose to receive an initial lump sum payment plus monthly payments thereafter, commencing with his February 1, 1999 retirement date.

2. Initially, the payments made pursuant to the Kodak Plans were reported via Form 1099R (Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, Etc.). However, following a change in plan administrator, and for the years in issue, the payments were reported via Form W-2 (Wage and Tax Statement), on which the payments appear in box 1 as "wages, tips, other compensation" and in box 11 as "nonqualified plans."

3. Having received a Form W-2, and consistent with the instructions pertaining thereto, petitioners reported the payments from the Kodak Plans on their New York State resident income tax returns for the years in question, 2001 and 2003, as wages on line 1 of such returns. Petitioners did not, as would have been the case had they had received a Form 1999R, make any

entry on their returns to report the income from the Kodak Plans at either line 9 (Taxable amount of IRA distributions) or line 10 (Taxable amount of pensions and annuities). Petitioners did claim a New York subtraction modification pursuant to Tax Law § 612(c)(3-a) in the amount of $20,000.00 for each year at line 28 of their returns.

4. On April 21, 2005, the Division of Taxation (Division) issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the year 2001 in the amount of $1,370.00 plus interest. On September 28, 2006, the Division issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the year 2003 in the amount of $2,486.00 plus interest. The calculation of the amount of additional tax asserted as due for each year is not in dispute and the sole issue presented was whether the Division improperly disallowed petitioners' claimed exclusion of pension or annuity income in the amount of $20,000.00 for each of the years in question.

5. On February 21, 2008, this administrative law judge issued a determination holding that the payments from the Kodak Plans, though denominated and reported as wages on Form W-2, were pension or annuity payments within the terms of Tax Law § 612(c)(3-a) so that petitioners were entitled to the subtraction modification provided thereunder. Accordingly, the notices of deficiency were canceled.

6. Petitioners' application for costs, dated April 15, 2008, seeks an award of costs in the amount of $1,420.00, consisting specifically of $1,125.00 paid to petitioners' representative Paul H. May, CPA, and $285.00 paid as petitioners' share of the legal fees charged by Nixon Peabody, LLP, in connection with contesting the disallowance of the subtraction modification.

7. Accompanying petitioners' application for costs was a March 24, 2008 e-mail communication from petitioner Richard Bourns to Paul H. May, CPA, requesting Mr. May's bill

for services, and Mr. May's responding e-mail on the same date providing, in relevant part, that "[m]y time on our scrolls for the NY pension deduction issue is $1,125. It is impossible for us to ask admin. personnel to prepare bills this time of the year."

8. Also accompanying petitioners' application for costs was a March 31, 2008 e-mail communication from Mr. Bourns to Edwin Przbylowicz, and Mr. Przbylowicz's e-mail response thereto which provides as follows:

> My records show the following. A collective group of ten of us paid Nixon Peabody a total of $2,531.38 for the work they did for us in developing the "white paper" legal opinion on the "Retirement Exclusion" issue. That fee was not distributed equally among all ten participants because some either had lesser or no exposures at the time, but wished to support the development of this information. My records show that I received a check for $285.00 from you for this work."

Included with this e-mail communication were billing documents for professional legal services rendered through May 2006 by Nixon Peabody, LLP, in the amount of $2,531.38, listing Edwin P. Przbylowicz as the client.

9. The billing information described above does not specify the hourly amount or other basis upon which the total amounts charged by Paul H. May, CPA, or by Nixon Peabody, LLP, were calculated.

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].) The statute also provides that fees for the services of an individual who is authorized to practice before the Division of Tax Appeals are treated as fees for the services of an attorney. (Tax Law § 3030[c][3].)

B. 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 in 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]; emphasis added).

C. Based on the foregoing it is concluded that although petitioners succeeded in having the notices of deficiency cancelled, they were not the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the notices of deficiency based upon the information in its possession at the time the notices were issued. As detailed in Findings of Fact 2 and 3, the income for the years in question was reported as wage income, as opposed to pension or annuity income, on petitioners' tax returns and on the accompanying forms W-2 filed with such returns. Hence, the Division had a reasonable basis to consider such income to be wage income, and not pension or annuity income eligible for the exclusion provided at Tax Law § 612(c)(3-a). Thus, the Division's action of denying the claimed exclusion was substantially justified.

D. It is further concluded that petitioners have failed to establish their expenses pursuant to the statute and its requirement that an itemized statement of the actual time expended, and the rate at which fees and other expenses were computed, must be submitted. In this regard, the e-mail communication from Paul H. May, CPA (***see*** Finding of Fact 7) does not meet the itemized statement of actual time and rate criteria of Tax Law § 3030(c)(5)(A)(ii)(I), nor do any of the billing documents regarding the engagement of Nixon Peabody, LLP, provide such rate and time information or establish that petitioners were in fact represented in these proceedings by Nixon Peabody, LLP (***see*** Findings of Fact 8 and 9).

E. Finally, and as a third independent basis for denying the relief sought, petitioners have not established that their net worth did not exceed two million dollars at the time the action was filed, as explicitly required by Tax Law § 3030(c)(5)(A)(ii)(II).

F. Petitioners' application for costs and fees is denied.

DATED: Troy, New York
July 10, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE