STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Application	:	
of	:	
DARLEEN MARCH	:	DECISION DTA NO. 826057
for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Years 2004, 2005, 2006, 2007 and 2008	:	

Petitioner, Darleen March, filed an exception to the order of the Administrative Law Judge issued on November 9, 2017. Petitioner appeared by Roger Gromet, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York, on May 24, 2018, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except finding of fact 19, which we have modified to more accurately reflect the record, and findings of fact 20 and 21, which we have modified for clarity. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. An investigation by the Division of Taxation (Division) into real estate professionals who had not filed personal income tax returns in New York State resulted in an examination of petitioner and her husband, Stanley March, by the Division's Revenue Crimes Bureau concerning tax years 2004, 2005, 2006, 2007 and 2008. In early 2008, petitioner's accountant had just completed or was working on petitioner's personal income tax returns for tax years 2004, 2005 and 2006.

2. The matter was referred to the Albany County District Attorney for prosecution and petitioner and Stanley March appeared in Albany City Court on May 6, 2008, facing a charge of repeated failure to file personal income tax returns pursuant to Tax Law § 1802 (a), a class E felony. Prior to the proceedings, petitioner and Stanley March filed their joint personal income tax returns for the years 2004, 2005 and 2006; therefore, when petitioner and her husband appeared in Court for the first time, taxes for those years had been paid and the returns filed.

The criminal matter was resolved by a plea agreement. The City Court Judge noted on his file that Stanley March agreed to plead to disorderly conduct, pay back taxes and a fraud penalty, and complete 20 hours of community service. Upon satisfaction of these terms, he was to receive a conditional discharge and no fine. Petitioner agreed to plead guilty to disorderly conduct and complete 20 hours of community service, after which she would receive a conditional discharge and no fine. The court noted on both files that proof had been submitted and the cases were closed October 27, 2008. No further mention or provision was made for payment of a fraud penalty in the criminal matter. The report of the criminal proceeding prepared by the Revenue Crimes Bureau indicated that it believed the sentence directed that all further payments be made through the Division. Petitioner submitted no other evidence to explain the failure to pay a fraud penalty as ordered by the court.

3. Petitioner and Mr. March also failed to file timely returns for the years 2007 and 2008. When the returns were filed in 2008 and 2009, respectively, the Division issued notices and demands for the taxes shown due but not remitted with the returns. Included with the notices and demands for 2007 and 2008 were late filing and late payment penalties, along with interest.

4. The Division issued a notice of deficiency for the years 2004, 2005 and 2006, on July 23, 2009. The notice indicated the following: 1) additional tax due for 2004, plus fraud penalty and interest; 2) a fraud penalty and interest for 2005; and 3) a fraud penalty and interest for 2006. This notice of deficiency was not protested and became a fixed and final liability on October 21, 2009.

5. Petitioner was issued a consolidated statement of tax liabilities, dated August 13, 2010, which indicated that she was liable for three fixed and final tax assessments for personal income tax that were ripe for collection.[1] This consolidated statement included petitioner's liabilities for tax years 2004, 2005, 2006, 2007 and 2008, with penalties alone totaling $10,460.73, and a total balance due at that time of $15,439.87.

6. Petitioner and Stanley March were married in 1998 and remained so until he died on July 11, 2009. A contributing cause of death, as listed on his death certificate, was acute alcohol intoxication and cirrhosis. Mr. March suffered from alcoholism for several years prior to his death, a fact attested to by his physician, Dr. Howard Fritz, step-daughter, and petitioner.

7. Following Mr. March's death, petitioner sold their residence in Schroon Lake, Essex County, New York. At that time, the closing statement, dated August 19, 2010, reflected a credit to the purchaser described as "Pay NYDT&F Lien" in the sum of $15,443.04, an amount almost

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[1] In addition, the statement indicated that there was another assessment issued to her for the year 2007 that stated additional interest and penalty due but not yet ripe for collection.

identical to the sum set forth on the consolidated statement of tax liabilities issued to petitioner on August 13, 2010.

8. On or about July 9, 2012, petitioner, through her representative, applied for an income tax refund of $10,460.73. This amount reflected the portion of the payment from the proceeds of the sale of her home in Schroon Lake attributable to the penalties asserted in the three fixed and final assessments subject to collection, as set forth in finding of fact 5. In her second amended petition, petitioner revised the refund request so that she then sought a refund of the full amount paid from the proceeds of the sale of her home in Schroon Lake in the sum of $15,443.04.

9. The refund application was denied by the Division on August 3, 2012. Petitioner requested a conference before the Bureau of Conciliation and Mediation Services (BCMS) dated August 3, 2012, and, by conciliation order dated October 25, 2013, the refund denial was sustained. Petitioner then filed a petition with the Division of Tax Appeals, dated January 20, 2014, challenging the BCMS order.

10. Petitioner and Mr. March filed income tax returns jointly during his lifetime. For the years 2004 through 2006, petitioner received commissions as a licensed real estate broker. Also, the couple reported income and loss from Adirondack Country Homes Realty, Inc., which petitioner owned, and Internet Time Share Resources, Inc., owned by Mr. March. The latter reported income from its operation as an internet company that leased out mainframe computer time. Both companies were profitable during the years in issue.

11. Petitioner established Adirondack Country Homes Realty, Inc., after beginning in the real estate field as an agent. She then formed a partnership with another agent and began operations as Adirondack Country Homes and eventually became the sole owner of the business. At one time, the company had eight offices and was quite lucrative. For a time, Mr. March was

affiliated with the company as an agent.

12. Petitioner provided corporate tax records for her real estate company to the couple's accountant, which were then incorporated into the final tax returns, while Mr. March provided the tax records for his business. During the years in issue, the couple always employed an accountant for the preparation of their tax returns, although several different accountants were employed over the years.

13. Petitioner was aware that the returns in issue were not filed on time and pointed this out to her husband on many occasions. She explained that she was not sure why the returns were not filed, but thought Mr. March may have located additional information necessary for the return preparation. She also conceded that Mr. March's alcoholism and abusive behavior caused her to avoid confrontations with him, and that the filing of tax returns, a job they had hired an accountant to complete, "wasn't the most important issue in the family."

14. The couple's income was deposited into bank accounts over which petitioner had authority. However, even though petitioner had equal authority and control, her husband managed all their accounts. Credit cards were applied for and maintained in petitioner's name, but she was permitted to make payments with credit cards only with her husband's approval. This was explained as part of what she referred to as the "credit card juggle," a scheme Mr. March employed, and in which petitioner concurred, to maintain zero interest balances by using several credit cards. The credit card juggle was utilized throughout the years in issue, notwithstanding Mr. March's alcoholism.

15. Petitioner did have sole control over the checking account for Adirondack Country Homes Realty, Inc., but only used her control to pay routine bills. After Mr. March became involved in her real estate business, he began making "program" decisions on behalf of that

company. Petitioner explained that Mr. March was "smart" and it was "wise to listen to him."

16. By the end of 2008, Mr. March's alcoholism led petitioner to consider a divorce due to his mood swings, lack of mental acuity, disputes and abuse. These issues were echoed by petitioner's daughter, who recalled Mr. March's alcoholism, control of the family's finances and fits of anger and abuse, which began as early as 1999 or 2000. On one occasion, July 5, 2006, petitioner's daughter called the police to report an episode of abuse, to which New York State Police responded, and petitioner reported a verbal altercation with her husband, who was very intoxicated, in which he had threatened to "kill her." Petitioner refused to request that her husband be arrested and the matter was closed with a domestic violence report.

17. Despite his serious condition, Mr. March was never hospitalized and did not seek rehabilitation for his alcoholism. He attempted abstinence from alcohol on his own, without success. Despite the serious and debilitating disease from which he suffered, he was functional in many respects, continuing to drive, operate and manage his company and participate in petitioner's real estate business. He was able to communicate with accountants, successfully juggle credit cards to evade interest payments on outstanding balances and manage the family's finances.

18. In 2008, coinciding with her thoughts of divorce, petitioner approached the couple's accountant to discuss the option of changing her filing status to married filing a separate return. Petitioner could not explain why she had never done this previously, even though she did not know if returns were being filed. She recounted how extensions and returns prepared by the accountant were placed before her and she signed them as directed, but she did not know "what years she signed when."

19. On December 17, 2015, Administrative Law Judge Joseph W. Pinto, Jr., addressed

this matter and issued his determination. He summarized the issue as to whether petitioner established a basis for the refund of penalties assessed to petitioner and her late husband.

The Division's basis for the imposition of the fraud penalty was the discovery that petitioner and Mr. March had not filed their tax returns or paid taxes for several years, including the years in issue, which resulted in charges filed by the Albany County District Attorney's office, which case was later closed by plea deals. Judge Pinto acknowledged that since the returns and taxes for the years before Albany City Court had been filed and paid prior to petitioner's first appearance there, the only requirements to be fulfilled before the cases could be closed were performance of 20 hours of community service and payment of a criminal fraud penalty. Satisfactory proof had been submitted and the criminal cases were closed. He noted that the City Court Judge's notes were silent with respect to any subsequent civil action, much less any constriction of the Division's rights to collect any additional taxes, penalties and interest due from petitioner and her husband. Judge Pinto concluded that the argument that the criminal matter relieved petitioner of her tax liability pursuant to the assessments issued to her must be rejected, and that there was no credible evidence that petitioner's civil liabilities were discharged by the Albany City Court matter. Judge Pinto additionally noted that the fact that the City Court Judge imposed a fraud penalty in the criminal action, which was accepted in the plea agreement with Mr. March, indicates that the Court found fraudulent conduct and penalized it. Judge Pinto stated:

> "It is not disclosed why the Judge ordered only Mr. March to pay the taxes due and the fraud penalty, since the obligation emanated from the couple's jointly filed tax returns. For that reason, petitioner's argument that Judge Kretser's notes shield her from further action by the Division to impose fraud penalty is unwarranted and without any basis in the record. The Judge's notes acknowledge the most important factors supporting the Division's assertion of a fraud penalty: she ordered the taxes and a fraud penalty to be paid based on a repeated failure to file income tax returns and pay the taxes due."

Judge Pinto noted that on or about July 23, 2009, almost nine months after closure of the criminal case, a notice of deficiency was issued to petitioner and Mr. March, who had passed away on July 11, 2009. Such notice included fraud penalties for tax years 2004, 2005 and 2006, and petitioner's failure to protest the deficiency resulted in a fixed and final assessment. He concluded that petitioner's appeal for abatement of the fraud penalty for tax years 2004, 2005, and 2006 was unavailing because reasonable cause is not considered where the Division has established that the failure to file and pay the taxes is due to fraud. For tax years 2007 and 2008, where only a negligence penalty was assessed, reasonable cause based on Mr. March's alcoholism as a serious illness was considered by Judge Pinto, but he reached a conclusion that petitioner had not demonstrated entitlement thereto based upon the fact that, although afflicted with alcoholism, Mr. March was extremely functional, having profitably operated a computer business, managed the family finances and exhibited an adroitness of juggling credit cards to avoid interest charges. Judge Pinto concluded that although the alcoholism had deleterious effects on Mr. March's life, petitioner did not clearly establish a causal connection between the disease and petitioner's failure to file and pay taxes, and thus, he denied abatement of penalties.

20. Petitioner took an exception to Judge Pinto's determination, and on May 10, 2017, the Tribunal issued its decision. Although the Tribunal concluded that the Division was within its authority under article 22 of the Tax Law to assert a fraud penalty, the Tribunal noted that there is a limit to the joint and several liability arising out of the marital relationship and joint return filing as to fraud. The Tribunal stated that fraud could not be asserted with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse. The burden of proof to establish that some part of the underpayment for each of the tax years 2004, 2005 and 2006 was due to fraud by petitioner had not been established according to the Tribunal.

Although the Tribunal agreed with the Administrative Law Judge that "such a consistent and substantial understatement of tax liability may be considered 'strong evidence of fraud'" citing ***Merritt v Commissioner*** (301 F2d 484 [5th Cir 1962]), the understatement of income by itself was not sufficient to prove fraud, and the Tribunal concluded that such additional factors were simply not present for the Division to meet its burden to prove fraud. Likewise, the Tribunal did not find that petitioner's guilty plea in the criminal proceeding supported a finding of fraud. However, agreeing with the Administrative Law Judge, the Tribunal concluded that the plea itself did not relieve petitioner from liability for fraud penalties. Specifically, the Tribunal found that neither the criminal proceeding, the Judge's notes, nor petitioner's plea restricted the Division's right to proceed civilly against petitioner. The Tribunal also concluded that petitioner's avoidance of confrontation with her alcoholic and abusive husband does not give rise to an inference of fraudulent intent on her part and that her conduct, taken as a whole, fell short of the clear and unmistakable standard required to sustain a fraud penalty, citing ***Matter of Sona Appliances*** (Tax Appeals Tribunal, March 16, 2000).

The Tribunal next considered whether the Division could raise alternative penalties, and concluded it could not, as the Division had not provided adequate notice of the same. The Tribunal concluded that, although petitioner established the fact of Mr. March's alcoholism and that he had procrastinated in filing their returns, petitioner had not established that the alcoholism caused the procrastination. Thus, the Tribunal concluded that petitioner was not liable for any fraud penalties for tax years 2004, 2005 and 2006, but was liable for late-filing and late payment penalties for 2007 and 2008. Accordingly, the Division was directed to recompute petitioner's liability for 2004 through 2006.

21. Petitioner filed an application for costs under Tax Law § 3030 with the Division of

Tax Appeals on June 9, 2017, in the amount of $11,914.84, consisting of the following items:

a) $9,875.40 for attorney's fees incurred for 87.2 hours of service by Roger Gromet, Esq.[2] Petitioner submitted hours, including fractional hours, as well as specific details of services performed by Mr. Gromet between December 27, 2011 and January 3, 2017. The chart below reflects all the calculations made by Mr. Gromet and the basis for each is stated, as follows:

No. of hours	Hourly Rate	Total Cost of Attorney fees	Characterization of rate calculated
87.2	$75.00	$6,540.00	$75.00 per hour pursuant to Tax Law § 3030
87.2	$200.00	$17,440.00	$200.00 per hour was Mr. Gromet's regular billing rate
87.2	$113.25	$9,875.40	$113.25 was calculated by Mr. Gromet as including a 151% cost of living increase(s) over the original $75.00 per hour rate, since the enactment of § 3030 in 1997 (citing § 3030 [c] [1] [B] [iii]).

b) $2,039.44 for disbursements incurred between December 27, 2011 and January 3, 2017, also detailed with additional specificity in the evidence as follows:

Expense Category	Total Amount
Preparation of Report by Howard Fritz, MD, 1 hr., 6 minutes at $300.00 per hour	$330.00
AMF Reporting Services for tax hearing transcript; 160 pages at $2.50 per page plus an administrative fee of $10.00	$410.00
Travel mileage and expenses for travel to the Harriman Campus, to Albany City Court for documents, to Division of Tax Appeals and Tax Appeals Tribunal office for appearance at two hearings	$1,068.08

[2] Mr. Gromet employed several calculations of attorney's fees in petitioner's cost application. Each is set forth in the chart. Ultimately, the request was for fees and expenses in the amount of $9,875.40 and $2,039.44, respectively.

Facsimile fees, postage and costs of copies	$231.36
Total Costs	**$2,039.44**

22. Also accompanying petitioner's application for costs is her affidavit, dated June 9, 2017, setting forth, in pertinent part, the following information:

> "4. My net worth is less than Two Million Dollars.
>
> 5. I own a corporation, Adirondack Country Homes, Inc., which has a net worth of less than seven million dollars and less than five hundred employees."

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her order by setting forth Tax Law § 3030 (a), which allows for an award of reasonable costs to a prevailing party in connection with administrative or court proceedings with the Division. The Administrative Law Judge further set forth the meaning of "prevailing party" under the statute. A prevailing party is any party to a proceeding other than the commissioner or creditor of an involved taxpayer: (1) who has substantially prevailed with respect to the amount in controversy or with respect to the most significant issue(s) presented; (2) who submits a timely application for fees and expenses that includes an itemized statement of the amount sought; (3) who had a net worth of less than $2 million at the time the civil action was filed; and (4) who did not own any business that exceeded $7 million in value at the time the civil action was filed. The Administrative Law Judge also set forth the exception under the statute that treats a party as not prevailing where the commissioner's position was substantially justified.

Next, the Administrative Law Judge observed that Tax Law § 3030 is modeled after Internal Revenue Code (26 USC) § 7430, and therefore it would be proper to look to federal case law in analyzing Tax Law § 3030. Federal cases have held that a position is substantially

justified if it is based in fact and law and is properly based on all the facts and circumstances and not solely on the outcome of the case. The inquiry to be resolved, according to the Administrative Law Judge, is whether the Division's position was substantially justified at the time the relevant notice was issued, since that finding is based on what the Division knew at the time its position was taken.

The Administrative Law Judge noted that although petitioner substantially prevailed with respect to the imposition of fraud penalties for the relevant period, petitioner cannot be found to be the prevailing party within the intent and meaning of Tax Law § 3030 because the Division was substantially justified in issuing the notice at the time it was issued. The Administrative Law Judge explained that this was because the Division based its determination to impose fraud penalties on a pattern of nonfiling, underpayments and late payments that led to petitioner's plea agreement following a Revenue Crimes Bureau investigation and the Division's referral of the case to the Albany County District Attorney for prosecution. The Administrative Law Judge concluded that the exception to the prevailing party rule under Tax Law § 3030 (c) (5) (B) applied in such a case.

Finally, the Administrative Law Judge addressed the issue of whether petitioner provided the required information establishing her net worth as less than $2 million and any ownership interest in a business as less than $7 million at the time the action was filed. The Administrative Law Judge found that petitioner's affidavit did not state her net worth or the value of her ownership interest in a business at the time the action was filed on January 20, 2014, but rather her net worth and value of her interest in a business as of June 9, 2017. Therefore, the Administrative Law Judge concluded that petitioner's application for costs must be denied for failing to provide the necessary information needed to establish eligibility under the statute for an

award of reasonable costs.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge erred in determining that petitioner was not the prevailing party within the intent and meaning of Tax Law § 3030. She states that she substantially prevailed with respect to the main issues in controversy, namely that she was ultimately held to not be liable for fraud penalties imposed against her husband. In support thereof, petitioner offers that the issue was fully adjudicated in Albany City Court and her plea agreement did not include pleading guilty to fraud. Petitioner claims that the Division knew that no evidence existed that demonstrated petitioner's tax fraud and thus its position could not be said to have been substantially justified.

The Division recognizes that petitioner prevailed on the question as to whether petitioner was liable for the fraud penalties imposed for tax years 2004 through 2006, but asserts that it was substantially justified in imposing the fraud penalties based on petitioner's failure to file personal income tax returns and underpayment of tax for the tax years in question. Furthermore, the Division argues that petitioner's affidavit regarding her current net worth and the value of her business interests does not meet the statutory requirement that such statement must relate to the time the civil action was filed. The Division states that petitioner's attempt to overcome this flaw for the first time on exception by submitting a new affidavit is not permissible as this would constitute additional evidence submitted after the closing of the record.

OPINION

Tax Law § 3030 provides for a discretionary award of costs to a prevailing party for reasonable administrative costs incurred in connection with an administrative proceeding with the Division (Tax Law § 3030 [a]). "Prevailing party" is defined by the statute, in pertinent part:

> "(5) Prevailing party. (A) In general. The term "prevailing party" means any party in any proceeding to which subdivision (a) of this section 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 (except to the extent differing procedures are established by rule of court), 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 . . ." (Tax Law § 3030 [c] [5] [A]).

However, the statute also provides for an exception to the definition of a prevailing party where the Division establishes that its position was substantially justified (Tax Law § 3030 [c] [5] [B]). If the Division bears its burden of showing by a preponderance of the evidence that its position was substantially justified, a prevailing party is not entitled to a recovery of costs (***City of New York v State of New York***, 94 NY2d 577 [2000]). The Division's position is defined as its position as of the date of the issuance of the document that gives rise to the taxpayer's right to a hearing (Tax Law § 3030 [c] [8]). We have held that in order to prove substantial justification, the Division must show that its position "had a reasonable basis both in fact and law" (***Matter of Grillo***, Tax Appeals Tribunal, August 23, 2012, ***citing Powers v Commissioner***, 100 TC 457 [1993]; ***Pierce v Underwood***, 487 US 552 [1988]). Such a determination considers "all the facts and circumstances" surrounding the case, not solely the final outcome (***Phillips v Commr.***, 851

F2d 1492 [1988]).

In this matter, it is clear that petitioner prevailed with respect to the question of whether she is liable for the fraud penalties jointly imposed on her and her husband for the tax years at issue (***Matter of March***, Tax Appeals Tribunal, May 10, 2017). However, this does not end the inquiry. The question of whether the Division's position was substantially justified remains. The Division issued the notice of deficiency for tax years 2004, 2005 and 2006 on July 23, 2009, based on petitioner's history of nonfiling and underpayment of tax for those tax years, which was resolved by a plea agreement. Despite petitioner's assertion to the contrary, petitioner's guilty plea does not require the inference that there was no evidence of fraud on behalf of petitioner. The Division's position at the time it issued the refund denial here at issue cannot be said to be unreasonable in light of petitioner's return filing and tax payment history for tax years 2004, 2005 and 2006. We thus concur with the Administrative Law Judge that the Division's position was substantially justified at the time it issued the refund denial giving rise to this proceeding.

We also agree with the Administrative Law Judge that petitioner failed to establish her eligibility for an award of costs under the financial eligibility guidelines found in Tax Law § 3030 (c) (5) (A) (ii) (II). A cost applicant must establish her net worth and the value of her business interests as of the date of the filing of the civil action (***id.***, ***see also Matter of Stuckless***, Tax Appeals Tribunal, August 16, 2007). In this case, petitioner's affidavit does not relate back to the time of the filing of her petition, but rather states her net worth at the time of the filing of the cost application. Petitioner's argument that this is merely a "grammatical error" that can be cured via submission of a new affidavit is unavailing. As pointed out by the Division, a new affidavit offered for the first time on exception would constitute additional evidence submitted after the close of the record. We have long held that allowing additional evidence to be

submitted after the close of the record would interfere with a defined and final hearing process, and thus we must follow our policy of not allowing the submission of evidence after the closing of the record (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991; ***Matter of Modern Refractories***, Tax Appeals Tribunal, December 15, 1988).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Darlene March is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The application of Darlene March for an award of costs is denied.

DATED: Albany, New York
November 26, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner