STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERTO AND ROSA HERNANDEZ	:	DETERMINATION DTA NO. 826629
for an Award of Costs Pursuant to Article 41, Section 3030 of the Tax Law for the Years 2011, 2012 and 2013.	:	

Petitioners, Roberto and Rosa Hernandez, filed a petition for an award of costs pursuant to Article 41, Section 3030 of the Tax Law for the years 2011, 2012 and 2013.

On November 14, 2014, petitioners, appearing by Jhonatan Mondragon, EA, filed a petition making an application for an award of costs pursuant to Tax Law § 3030. By a letter dated December 18, 2014, the date for the Division of Taxation's response to petitioner's application for costs was set at January 20, 2015. The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda Harmonick, Esq., of counsel), filed a letter brief and supporting affidavit in opposition to the application for costs on January 20, 2015, and such date began the 90-day period for issuance of this determination.

Based upon petitioners' application for costs, and the Division's letter brief and affidavit in opposition thereto, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioners, Roberto and Rosa Hernandez, filed various New York State and New York City personal income tax returns, and amended returns, for the years 2011, 2012 and 2013. The Division of Taxation (Division), in turn, conducted audits of petitioners' filings for these years.

2. For the year 2011:

a) Petitioners filed a Resident Income Tax Return (Form IT-201), listing their individual taxpayer identification numbers (as opposed to social security numbers) and claiming a refund in the amount of $955.00.

b) On March 13, 2013, petitioners filed an amended return (Form IT-201-X), reporting additional income of $23,400.00 and a liability in the amount of $321.00.

c) On July 26, 2013, the Division issued to petitioners a Notice and Demand for Payment in the amount of $520.17. This amount reflected an adjustment reducing petitioners' Empire State Child Credit on the basis that another taxpayer had claimed this credit for the same dependents as were listed by petitioners. The amount also included the imposition of interest and penalties for late filing and late payment.

d) On June 5, 2014, petitioner filed another amended return (Form IT-201-X), using their then newly obtained social security numbers and claiming a refund in the amount of $700.00. This amount differed from petitioners' earlier returns in that they now claimed an earned income credit for both New York State and New York City purposes.

e) Correspondence between petitioners and the Division resulted in petitioners' submission of substantiating documents, including verification that they had two qualifying dependents, sufficient to establish their entitlement to the $700.00 refund claimed above. On October 20, 2014, the Division issued the same.

3. For the year 2012:

a) On May 16, 2014, petitioners filed Form IT-201, using their own social security numbers. This filing resulted in a claimed refund in the amount of $1,125.00, based primarily on the Empire State child credit and the earned income credit. Correspondence between petitioner and the Division resulted in petitioners' submission of additional substantiating documents,

and on October 20, 2014, the Division issued the claimed refund to petitioners.

4. For the year 2013:

a) On May 16, 2014, petitioners filed Form IT-201, using their own social security numbers and claiming two dependents. This filing resulted in a claimed refund in the amount of $2,757.00, and the same was issued by the Division to petitioners.

b) On June 4, 2014, petitioners filed an amended return (Form IT-201-X) now claiming four dependents. This filing resulted in a claimed additional refund in the amount of $426.00.

c) On July 25, 2014, the Division issued to petitioners a Notice and Demand for Payment in the amount of $160.29. This amount reflected an adjustment reducing petitioners' claimed refund on the basis that some of the same dependents claimed by petitioners had been listed on another taxpayer's return.

d) Correspondence between petitioners and the Division resulted in petitioners' submission of additional substantiating documents, including verification concerning the claimed dependents. In turn, the foregoing Notice and Demand was cancelled, and on November 3, 2014, the Division issued to petitioners the additional claimed refund for 2013.

5. In sum of the foregoing, petitioners filed returns and amended returns seeking refunds for all three years in question. Those filings were audited, documents in substantiation of petitioners' claims were requested and were eventually provided, and thereafter the requested refunds were issued to petitioners. Petitioners never filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS), or a petition for a hearing before the Division of Tax Appeals, concerning the foregoing filings and audit actions for any of the years 2011, 2012 or 2013.

6. On November 14, 2014, petitioners filed a petition with the Division of Tax Appeals seeking an award of costs in the amount of $1,500.00, apparently concerning the activities outlined above with respect to petitioners' filings for the years 2011, 2012 and 2013. Petitioners

allege that their "representative" helped them file amended returns and dispute the Division's audit actions, explained their litigation options, researched (possible) claims under the Court of Claims Act such that, "thanks to representative" and his "followup," petitioners received all of their claimed refunds.[1] Petitioners claim to have advanced "$500.00 of a $1,500.00 bill," apparently as an initial payment for the foregoing described services. The petition does not include any proof of payment of such advance, does not specify or include any proof as to whether the $1,000.00 balance of the bill was paid, and includes no itemization of the representative's billing rate or actual time expended. Finally, the petition alleges that petitioners' net worth is "negative" and "less than two million dollars."

7. In opposition to petitioners' application for costs, the Division maintains that petitioners did not commence any administrative or court proceeding, as defined under Tax Law § 3030, and are therefore not entitled to recover any costs. The Division further asserts that its position for each of the years in question was at all times substantially justified and thus, notwithstanding that petitioners ultimately provided sufficient support to substantiate entitlement to their claimed refunds, they are barred from recovering any costs. Finally, the Division maintains that petitioners have provided no documentation concerning or specifying the nature of the fees or services provided, or the billing rate or time actually expended by petitioners' representative in providing the same, and thus have failed to establish that the alleged fees qualify as recoverable costs under Tax Law § 3030.

[1] It is not entirely clear from the petition whether the references therein to "representative" pertain to petitioners' current representative (Jhonatan Mondragon, EA) or rather to a previous representative.

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. Tax Law § 3030(c)(6) defines the term "administrative proceeding" to mean "any procedure or other action before the division of taxation (such as the bureau of conciliation and mediation services) or division of tax appeals." Tax Law § 3030(c)(7) defines the term "court proceeding" to mean "any civil action brought in a court of the state of New York."

C. 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."

D. Petitioners' application for an award of costs is denied. In this case, the Division conducted a desk audit of petitioners' returns for each of the years at issue. As part of its audit, the Division sought documentation to substantiate petitioners' entitlement to the refunds claimed on their returns, and amended returns, as filed. The audits were resolved when petitioners, eventually, provided such requested documentation, and the claimed refunds were issued to petitioners. However, there is no evidence that petitioners ever commenced any administrative proceeding, as defined by Tax Law § 3030(c)(6), either by filing a request with BCMS or a petition with the Division of Tax Appeals (prior to filing the subject petition seeking an award of costs). In fact, there is no evidence that the Division ever issued to petitioners any notice of deficiency or any other document giving rise to the right to commence any such administrative proceeding (Tax Law §§ 689[b], 170[3-a][a], 3030[c][8][B]). The Division did issue a notice and demand for payment with respect to the years 2011 and 2013 (***see*** Findings of Fact 2 and 4). However, the Tax Law specifies that a notice and demand for payment is not to be construed as a

document that gives rise to the right to a BCMS conference or a hearing (Tax Law §173-a(2), (3)(c); ***see Matter of Chait***, Tax Appeals Tribunal, April 22, 2010). Accordingly, since petitioners never commenced any proceeding with respect to which an award of costs may be made, their application for such costs is barred as a matter of law.

E. In addition to the foregoing, and as an independent basis for denying the relief sought, petitioners have provided no information concerning the basis for the amount of the award sought beyond the generic statement that their representative helped "file amended returns," "dispute bills," and "follow up." Further, the dollar amount allegedly charged by the representative to "research claims under the Court of Claims Act" and "explain litigation options" was stated simply as a lump sum of $1,500.00, of which $500.00 was required to be paid as an advance. Such general assertions as to the amount sought to be awarded as costs falls far below the requirement to provide an itemized statement of "the actual time expended and the rate at which fees and other expenses were computed," per Tax Law § 3030(c)(5)(A)(ii)(I).

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

DATED: Albany, New York
April 2, 2015

/s/ Dennis M. Galli her
ADMINISTRATIVE LAW JUDGE