STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
3152 RESTAURANT, INC.	:	DETERMINATION DTA NO. 827174
for an Award of Costs Pursuant to § 3030 of the Tax Law for the Period December 1, 2008 through August 31, 2011.	:	

Petitioner, 3152 Restaurant, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2008 through August 31, 2011.

Administrative Law Judge Kevin R. Law issued a determination on December 28, 2017, which granted the petition of 3152 Restaurant, Inc., and canceled the notice of determination dated December 20, 2012.

On February 27, 2018, petitioner appearing by Gabor & Marotta, LLC (Richard M. Gabor, Esq., of counsel) filed an application for costs pursuant to Tax Law § 3030. The Division of Taxation appearing by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel), filed an affirmation in opposition on March 27, 2018. The 90-day period for issuance of this determination commenced on March 29, 2018.

Based upon petitioner's application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, 3152 Restaurant, Inc., operated a restaurant and nightclub named Tatiana, located on the boardwalk in Brighton Beach, New York.

2. The Division of Taxation (Division) commenced an audit of petitioner in 2011. On May 25, 2011, prior to an appointment letter being sent to petitioner, the auditor performed a survey of the premises and had lunch there. The auditor observed that petitioner was a large establishment, having approximately 90 tables with seating for 250. Upon receiving her guest check after having lunch, the auditor took a photograph of it. The guest check noted the date and time and listed the menu items purchased, and their respective prices, as well as an itemization for sales tax and an automatic gratuity amount of ten percent added in. The order number appearing on the guest check was 742.

3. At the initial audit appointment, the auditor reviewed sales tax returns and sales summary worksheets, bank statements, credit card sales receipts and purchase invoices for the audit period. Using petitioner's bank statements, the auditor reconciled deposits per the bank statement to the gross sales reported on petitioner's tax returns. After backing out the applicable sales tax rate and a tip amount of ten percent, the auditor determined that the bank deposits totaled less than petitioner's reported sales for the period. Based on this reconciliation the auditor determined that taxable sales had been underreported by at least $758,122.82 for the audit period.

4. Subsequently petitioner provided a CD containing its electronic sales record from its Point of Sale System (the POS system). Upon review, the auditor was unable to locate an entry

corresponding to her lunch on May 25, 2011. After she provided her order number to petitioner, it produced a receipt which did not correspond to her purchase. She then provided her check amount, $37.75, and another receipt was produced. Although the receipt listed the items ordered and had the identical date listed matching what was listed on the auditor's receipt, the produced receipt was not an exact copy. Specifically, the order number appearing on the receipt had changed from "742" to "715." The auditor would not provide a copy of her guest check to petitioner's then-representative, or seek an explanation as to why the order number had changed; nor did she do any further investigation as to whether petitioner was compressing its sales records.

5. Based on the discrepancy in the order numbers, the auditor deemed petitioner's records to be unreliable and proceeded to use an estimated methodology. Specifically, the auditor utilized gross sales petitioner consented to in a proceeding before the Division's Bureau of Conciliation and Mediation Services (BCMS) for a prior audit period. Using the consented to gross sales, she obtained the rent amounts claimed during that prior period to back into a rent factor of 4%. Taking petitioner's rent expense from its federal income tax returns for the current audit period, she applied the 4% rent factor to estimate gross sales. Based on this methodology, the auditor determined that petitioner had under reported its taxable sales by $6,307,267.57 and issued a notice of determination accordingly.

6. A hearing in this matter was held on January 31, 2017 and February 1, 2017.[1] At the hearing, petitioner established that the auditor's lunch order had not been compressed or deleted from the POS system but had been renumbered. It was explained that the order number had

[1] This matter was consolidated with the petitions of On the Boardwalk Café, Inc., DTA#827175, Tatiana Varzar, DTA#827176, and Lev Blinder, DTA#827177. Only 3152 Restaurant, Inc., the petitioner herein, filed an application for costs.

changed because any orders preceding her order could have been cancelled by a server if a customer had changed his or her order and that the order number of all subsequent records would then have been changed when the database containing the electronic sales record was compacted.

7. On December 28, 2017, the undersigned administrative law judge issued a determination cancelling the notice of determination issued to petitioner based upon the audit methodology used. Specifically, it was determined the Division's estimated audit methodology was improper because it used the results of a prior BCMS conference in contravention of Tax Law § 170 (3-a) (f) and the auditor was unable to explain the methodology employed.

8. On February 27, 2018, petitioner filed an application for costs pursuant to Tax Law § 3030. The application seeks legal fees in the amount of $48,800.00, accounting fees in the amount of $12,687.50, expert witness fees in the amount of $7,480.27, and transcript costs of $1,636.25. Included with the application was the following: (i) an invoice from Gabor & Marrotta, LLC for legal services rendered by petitioner's representative, attorney Richard Gabor, detailing 122 hours of legal services billed at a $400.00 hourly rate consisting of "preparation of post trial and reply briefs, meeting with witnesses; preparation for trial; meetings with accountant; research of appropriate case law, attendance at hearing;" (ii) an invoice from Gabor and Associates, Certified Professional Accountants, for 72.5 hours professional services rendered by Robert Martin billed at an hourly rate of $175.00 consisting of "analyzing all business and banking records and performing a sales tax audit of [petitioner]; numerous meetings with [petitioner], its employees, computer expert and lawyer; attendance at hearing;" (iii) an invoice from Marcum, LLP professional services rendered by Gary Rosen for $7,480.27 for his preparation and testimony as an expert witness at the hearing in this matter; (iv) invoices for the

cost of the hearing transcript from the court reporting service totaling $1,671.25;[2] (v) an affidavit from petitioner's president, Tatiana Varzar, attesting that, at the time the petition was filed petitioner had a net worth of less than $7 million dollars and less than 500 employees.

9. In opposition to petitioner's application for costs, the Division takes issue with the timeliness of the application. In addition, the Division contends that the application is deficient alleging that: (i) petitioner has not shown petitioner was the prevailing party; (ii) petitioner has not quantified the amount sought in the application; and (iii) the billing statements are not properly itemized and the legal and accounting fees charged exceed the statutory rate. Finally, the Division contends that its legal position in this case was substantially justified.

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." (Emphasis added.)

B. To be a prevailing party, the applicant must: (1) substantially prevail with respect to the amount in controversy or the most significant issue or set of issues presented; (2) file the application within 30 days of the final disposition; and (3) meet the net worth requirements (Tax Law § 3030 [a], [c] [5]).

[2] The record contains no explanation for the $35 difference between the transcript cost as reflected on the invoices and the amount claimed as the transcript cost by petitioner in its application.

C. The December 28, 2017 determination cancelled the notice of determination as to petitioner so it has substantially prevailed with respect to the amount in controversy and the set of issues presented (***see*** Tax Law § 3030 [c] [5] [A] [i]).

D. The Division has raised an issue as to the timeliness of petitioner's application. As noted in Conclusion of Law B, the application for costs must be filed within 30 days of the final disposition. The determination in this matter was issued on December 28, 2017. The determination became final after the period to file an exception expired. Exceptions must be filed within 30 days after the giving of the notice of the determination of an Administrative Law Judge or within the time granted by the Tribunal for an extension of time to file an exception (***see*** Tax Law § 2006 [7]; 20 NYCRR 3000.17 [a] [1], [2]). Thirty days from December 28, 2017 was January 27, 2018, which was a Saturday. By operation of law either party had until the next business day, January 29, 2018, to file an exception (***see*** General Construction Law § 25-a). Thus, the determination became final on January 30, 2018 and petitioner had 30 days from January 30, 2018, or until March 1, 2018, to file its application for costs. In this case, the envelope containing petitioner's cost application bore an office meter postmark of February 27, 2018, and was received by the Division of Tax Appeals on March 2, 2018. In determining whether petitioner's application was timely mailed, the Tax Appeals Tribunal's Rules of Practice at 20 NYCRR 3000.22 (b) (1) provides:

> " If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e., office metered mail):
>
> (i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extension of time granted for filing the document); and
>
> (ii) the document must be received by the New York State Division of Tax Appeals or the Tax Appeals Tribunal, Agency Building 1, Empire State Plaza,

> Albany, NY 12223, not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document)" (20 NYCRR 3000.22 [b] [1]).

Here, receipt of the application three days after the office metered postmark is within a reasonable time period (20 NYCRR 3000.22 [b] [1] [ii]; ***see Matter of Harron's Elec. Serv.***, Tax Appeals Tribunal, February 19, 1988 [where receipt of petition five days after the date of its meter stamp was held to be receipt not later than the date a document would ordinarily be received when mailed through the United States Postal Service]). Accordingly, it is determined that petitioner's application was filed on February 27, 2018, and is therefore timely.

E. To qualify for an award of costs, the prevailing corporate taxpayer cannot have a net worth that exceeded $7 million at the time the action was filed (***see*** Tax Law § 3030 [c] [5] [A]). In this case, petitioner submitted an affidavit from petitioner's president, Tatiana Varzar, attesting that, at the time the petition was filed petitioner had a net worth of less than $7 million and less than 500 employees. The Division has not taken issue with this statement of net worth. Accordingly, it is determined petitioner meets the net worth requirement to qualify for reasonable administrative costs and fees.

F. A taxpayer will not be treated as the prevailing party if the Division establishes that its position was substantially justified (***see*** Tax Law § 3030 [c] [5] [B]). A position is substantially justified if it has a reasonable basis in both fact and law and is justified to a degree that could satisfy a reasonable person (***see Pierce v Underwood***, 487 US 552 [1988]). Even if the Division's position is incorrect, it may still be substantially justified "if a reasonable person could think it correct" (***Maggie Mgmt. v Commr.***, 108 TC 430, 443 [1997]). In this case, the Division

was entirely justified in issuing a notice of determination to petitioner as a review of the records presented revealed underreporting of sales tax. In addition, as pointed out in the determination, the Division had legitimate reasons to be wary of whether all sales were being inputted into petitioner's point of sale system based upon the auditor's lunch order being renumbered coupled with the underreporting of sales initially found. Petitioner's underreporting of its sales was further evidenced by the sales reflected in its point of sale system and petitioner's concession that sales were underreported. Based on these discrepancies, a reasonable person could find that the Division's use of amounts consented to at a BCMS conference to estimate petitioner's sales tax was correct (***id***). It was only the manner in which the liability was computed that gave rise to its cancellation. In such a case, an award of costs is not warranted (***see Matter of 33 Virginia Place***, Tax Appeals Tribunal, March 31, 2011).[3]

G. Based upon the foregoing petitioner's application for costs and fees is denied.

DATED: Albany, New York
June 21, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE

[3] Even if petitioner was entitled to an award of costs, such award for attorney fees charged by Gabor and Marotta, LLC, and for accounting fees charged by Gabor and Associates Certified Public Accountants, would be limited to an hourly rate of $75.00, rather than the $400.00 and $175.00 hourly rates billed by the respective entities (***see*** Tax Law § 3030 [c] [1] [B] [iii]). With reference to the Division's arguments as to the specificity of the statements, these arguments appear to be boilerplate assertions and merit no further discussion.