

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ALEXEI MOSTOVOI : DETERMINATION
DTA NO. 828737
for an Award of Costs pursuant to Article 41, Section 3030 :
of the Tax Law. :

Petitioner, Alexei Mostovoi, filed an application for an award of costs pursuant to article 41, section 3030 of the Tax Law.

On September 21, 2018, the Division of Taxation, by Amanda Hiller, Esq. (David Gannon, Esq., of counsel), filed a notice of cancellation of deficiency and discontinuance of proceeding with the Division of Tax Appeals. On September 28, 2018, petitioner, appearing pro se, sent correspondence by facsimile seeking costs. By letter dated September 28, 2018, the Division of Tax Appeals informed petitioner that the application for costs was premature, since an order of discontinuance had not been issued, and returned his documents to him, stating that he should submit his application for costs within 30 days of the final order.

The order of discontinuance was issued on November 21, 2018. Petitioner filed this application for costs on January 19, 2019. The Division of Taxation, by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel), filed its opposition to the application for costs on February 13, 2019. Thereafter, petitioner filed a reply to the opposition on March 4, 2019, which date began the 90-day period for issuance of this determination. After due consideration of the arguments submitted, Donna M. Gardiner, 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, Alexei Mostovoi, filed a petition with the Division of Tax Appeals on May 25, 2018. The petition protested an account adjustment notice, dated May 16, 2018, for the tax year 2017. The account adjustment notice informed petitioner that a portion of his refund due for the tax year 2017 was applied to a notice of deficiency, assessment number L-042384146, that was outstanding for the tax year 2011. The offset amount was \$1,184.46. The petition sought a refund of this amount plus costs and damages.

2. The Division of Taxation (Division) was granted an extension until August 30, 2018 within which to file its answer. The answer was filed on August 28, 2018.

3. The administrative law judge held a prehearing conference telephone call on September 17, 2018. During this conference call, the Division indicated that it would be cancelling the assessment and would forward a stipulation of discontinuance of proceeding to petitioner. A stipulation of discontinuance was forwarded to petitioner, yet he refused to execute it as drafted. Petitioner made several edits and returned it to the Division. The Division declined to accept the edits made by petitioner.

4. On September 21, 2018, the Division executed a notice of cancellation of deficiency and discontinuance of proceeding.

5. On September 28, 2018, petitioner submitted, by facsimile, an application for costs with the Division of Tax Appeals. By letter dated September 28, 2018, petitioner was informed that such application was premature since an order of discontinuance by the Division of Tax Appeals

had not been issued. The documents were then returned to him. The letter explained that the application for costs was required to be filed within 30 days of issuance of the order of discontinuance.

6. The order of discontinuance was issued on November 21, 2018. Petitioner sent a letter by facsimile on December 28, 2018 addressed to the supervising administrative law judge. In his correspondence, petitioner acknowledged receipt of the order of discontinuance and he presented many questions and concerns that he had regarding the basis for the order of discontinuance. Thereafter, petitioner filed an application for costs on January 16, 2019.

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 (*see* 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 (*see* Tax Law § 3030 [c] [3]).

B. In order to be entitled to an award of costs, a petitioner must, within thirty days of final judgment in the action, submit an application for fees and other expenses which shows that the

party is a prevailing party and is eligible to receive an award under Tax Law § 3030 (*see* Tax Law § 3030 [c] [5] [A] [ii] [I]). The order of discontinuance was issued on November 21, 2018 and the application for costs was submitted on January 16, 2019, or 56 days later. Therefore, the application was not timely filed (*see Matter of Liberatore*, Tax Appeals Tribunal, January 29, 2009).

C. Furthermore, petitioner has not demonstrated entitlement to costs. The notice of account adjustment was issued on May 16, 2018 and the Division cancelled the assessment on September 21, 2018. Petitioner has asserted that he spent \$315.00 in defense of his petition. However, he has not presented an itemized list of expenses for the period May 16, 2018 through September 21, 2018 (*see* Tax Law § 3030 [c] [5] [A] [ii] [I]). Moreover, petitioner has appeared pro se and, necessarily, has not incurred any legal fees in this proceeding.

D. Additionally, in order to be entitled to an award of costs, petitioner was required to demonstrate that his net worth did not exceed two million dollars at the time the action commenced (*see* Tax Law § 3030 [c] [5] [A] [ii] [II]). Petitioner failed to address his net worth in his application. As such, this provides another basis for denying the application.

E. The application for costs by Alexei Mostovoi is dismissed.

DATED: Albany, New York
May 23, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE