STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **ROBERT AND JULIE KRAUSE** | : | DETERMINATION<br>DTA NO. 829181 |
| for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Year 2016. | : | |

Petitioners, Robert and Julie Krause, appearing by Dean Nasca, CPA, filed a petition on January 25, 2019, seeking administrative costs under section 3030, article 41 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel), was given until May 24, 2019 within which to file a response to the application for costs, which date commenced the 90-day period for issuance of this determination.

Based upon petitioners' application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, Nicholas A. Behuniak, 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. The Division of Taxation (Division) issued correspondence to petitioners, dated April 10, 2017, requesting information regarding itemized deductions reported on their 2016 New York State resident income tax return (form NYS IT-201) that resulted in petitioners seeking a refund of $2,295.00. The correspondence indicated that the Division was unable to verify

amounts claimed by petitioners as itemized deductions. The correspondence requested that petitioners provide, to the Division's Desk Audit Bureau located in Albany, New York, a copy of schedule A from their federal tax return, a copy of certain documents substantiating certain itemized deductions taken, and copies of documentation supporting any claimed federal adjustments to income. The correspondence indicated that if petitioners were able to substantiate their claimed itemized deductions, the Division would recompute the amount of refund that was approved and send petitioners a check for the appropriate balance. The correspondence also provided petitioners with a phone number, fax number, and website address in order to reach the Division.

2. In response to the Division's inquiry, on December 8, 2017, the Division received a letter from petitioners entitled "STATEMENT TO AUDIT DEMAND," in which they argued that they were entitled to a field audit and for the petitioners (or presumably their representatives) to "be present during the audit." This correspondence stated, in pertinent part, that:

> "The State of New York's demand to audit the taxpayers' return without allowing the taxpayer, or the taxpayers' representative, to be present violated the taxpayers' due process rights secured by the Fourteenth Amendment to the United States Constitution."

Petitioners stated that if New York State wanted to conduct an audit of their return, they need notice of a time and place so that they could be present for the "audit process." Otherwise, petitioners intend to file a lawsuit in New York State Supreme Court for the balance of their refund, the violation of their constitutional rights, and costs pursuant to New York State Tax Law § 3030.

3. In response, by correspondence dated March 1, 2018, the Division notified petitioners that the Division had received their response to the Division's request for additional

documentation; $2,198.06 of petitioners' claim for a refund was being disallowed; and, the Division was recalculating their return using the standard deduction. The March 1, 2018 correspondence noted that if petitioners disagreed with the Division, they could either forward any additional documentation to Division for further consideration or file a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition for a tax appeals hearing with the Division of Tax Appeals. Therefore, the Division recomputed petitioners' return using the allowable standard deduction which reduced the amount to $96.94.

4. Thereafter, petitioners filed a request for conciliation conference with BCMS. The conference was held on November 29, 2018. At this conference, petitioners provided documentation, for the first time, that substantiated the itemized deductions claimed on the return. After submitting documentation at the conference, petitioners established that they were entitled to the full $2,295.00 deduction as originally reported on their 2016 personal income tax return. A consent was issued to petitioners allowing the remaining balance of their refund. Petitioners signed the consent on January 7, 2019.

5. On January 25, 2019, petitioners filed this petition with the Division of Tax Appeals seeking an award of costs for fees paid to their representative. Attached to the petition is an invoice from Dean Nasca, CPA, indicating the following dates and charges:

| Date | Description | Hours | Hourly Rate | Total Charge |
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| Dec. 6, 2017 | Respond to NYS Audit Demand Letter | 0.75 | $75.00 | $56.25 plus $5.17 certified mailing fee |

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| July 19, 2018 | Preparation of Request for Conciliation Conference Forms | 0.50 | $75.00 | $37.50 plus $5.08 certified mailing fee |
| Nov. 28, 2018 | Copy required documentation and prepare for conciliation conference | 2.5 | $75.00 | $187.50 |
| Nov. 29, 2018 | Attend conciliation conference | 1.75 | $75.00 | $131.25 |
| TOTAL | | | | $422.75 |

6. Petitioners submitted an unsworn statement that asserts that their net worth did not exceed $2 million at the time the civil action was filed.

7. Included with the Division's response to petitioners' application for costs is an affidavit of Trude R. Wilson, dated May 14, 2019. Ms. Wilson is a Tax Technician I in the Division's Income/Franchise Desk Audit Bureau and has been a Tax Technician I since May 2012. Ms. Wilson's duties include performing desk audits of personal income tax returns, including itemized deductions audits. Ms. Wilson's affidavit is based upon her review of the Division's files and her personal involvement with this audit.

8. The Division maintains an e-MPIRE account for each taxpayer which, among other things, tracks all correspondence between the Division and that taxpayer and is updated in the ordinary course of business whenever a Division employee works on the taxpayer's account. According to Ms. Wilson, if a taxpayer or representative submits documentation to the Division at the fax number or address indicated on the notice issued to petitioners, it would be imaged into the taxpayer's account in the ordinary course of business. Additionally, Ms. Wilson affirms that

if a taxpayer calls the Division, a case contact would be entered into the events log in the taxpayer's account documenting who called and what was discussed.

9. Ms. Wilson represents that she reviewed petitioners' accounts and that petitioners did not submit any documentation to the Division's request for substantiation of their itemized deductions during the course of the audit. Therefore, all claimed deductions were disallowed, as unsubstantiated, which was the basis for the refund denial. Additionally, Ms. Wilson represents that petitioners finally submitted documentation substantiating their claimed deductions, for the first time, at the conciliation conference held on November 29, 2018.

## ***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:
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> (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 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]), with the dollar amount of such fees capped at $75.00 per hour, unless there are special factors that justify a higher amount (***see*** Tax Law § 3030 [c] [1] [B] [iii]).

B. A prevailing party is defined by the statute, in pertinent part, 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]).

C. As noted above, the application must be brought within 30 days of final judgment in the matter (***see*** Tax Law § 3030 [c] [5] [A] [ii]). An administrative proceeding includes any procedure or action before BCMS (***see*** Tax Law § 3030 [c] [6]). The term "final judgment" is not defined by the statute and no regulations have been promulgated pursuant to Tax Law § 3030. However, Tax Law § 3030 is modeled after Internal Revenue Code § 7430. Therefore, it is proper to look to federal regulations and cases for guidance in analyzing Tax Law § 3030 ***(see Matter of Michael and Suzanne Doyle***, Tax Appeals Tribunal, May 9, 2019, citing ***Matter of Levin v Gallman***, 42 NY2d 32 [1977]; ***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988).

Internal Revenue Code § 7430 (a) provides that:

> "In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for–
>
> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service."

Petitioners entered into a consent on January 7, 2019, which granted their refund in full. The consent, thus, resolved the tax liability of petitioners in the administrative proceeding. As such, the consent is deemed the final judgment for purposes of Tax Law § 3030. The statute of limitations for filing an application for costs commenced on January 7, 2019, the date of the consent. The petition herein seeking administrative costs was filed on January 25, 2019 and, thus, was timely filed.

D. The Division's position as of the day it issued the notice giving rise to the hearing is operative for purposes of determining whether its position was substantially justified (***see*** Tax Law § 3030 [c] [8]). The determination of whether the Division's position was substantially justified is based on "all the facts and circumstances" surrounding the case, not solely the final

outcome (***Matter of Doyle***, citing ***Matter of March***, Tax Appeals Tribunal, November 26, 2018, quoting ***Phillips v Commr.***, 851 F2d 1492 [1988]). In deciding whether the Division's position was substantially justified, the Tax Appeals Tribunal (Tribunal) has held that the Division must show that its position "had a reasonable basis both in fact and law" (***Matter of Doyle***, citing ***Matter of March***; ***Matter of Grillo***, Tax Appeals Tribunal, August 23, 2012, citing ***Powers v Commr.***, 100 TC 457 [1993]; ***Pierce v Underwood***, 487 US 552 [1988]).

E. Thus, it must be determined whether the Division has met its burden of proving that its position was substantially justified (***see*** Tax Law § 3030 [c] [5] [B]). The Division has produced proof, through the affidavit of Ms. Wilson, to establish that the Division did not receive any documentation to support petitioners' claimed itemized deductions until the conciliation conference held on November 29, 2018, despite the fact that the Division had requested, by letter, appropriate supporting information from petitioners. Rather than supply the substantiation for the claimed expenses at that time, petitioners demanded a field audit at a specified time and place. Since the petitioners had not provided any documentation substantiating the claimed deductions at the time the Division issued the relevant notice, the Division was substantially justified in adjusting petitioners' refund amount by initially disallowing the claimed itemized deductions. As the Tribunal has held, it is "incumbent on [taxpayers] to provide the requested information in order to substantiate their claimed deductions in response to the desk audit letter (citations omitted)" (***Matter of Doyle***).

F. Petitioners argue that the Division cannot prove that it was substantially justified because it failed to follow its applicable published guidance that mandates a field audit regarding the claimed itemized deductions. This argument is without merit. Petitioners have pointed to no regulation or case law that mandates that a field audit is required in order to request additional

information regarding a filed tax return. Furthermore, the Division's Publication 131[1] (Your Rights and Obligations Under the Tax Law) specifically notes that "[a] desk audit is a review of tax returns, refund requests, or other documents that rarely involves any face-to-face contact between the desk auditor (technician) and the taxpayer." Publication 131 goes on to provide that if a taxpayer disagrees with the Division's findings, the Division will issue a statutory notice at which point the taxpayer "may formally appeal the audit findings through either the Bureau of Conciliation and Mediation Services, or the Division of Tax Appeals." Petitioners were advised of their right to submit supporting documentation before the statutory notice denying the refund claim was issued, and were thereafter afforded the opportunity to engage in conciliation proceedings and a hearing before the Division of Tax Appeals. These procedures provided petitioners, and their representative, the opportunity to directly address and challenge the audit findings and "to be heard in a meaningful manner at a meaningful time" (***Matter of Mayo v New York State Div. of Tax Appeals, Tax Appeals Trib.***, 172 AD3d 1554 [3d Dept 2019], citing ***Matter of Kaur v New York State Urban Dev. Corp.,*** 15 NY3d 235, 260 [2010], ***cert denied*** 562 US 1108 [2010]; ***Matter of Mulderig v New York State Dept. of Taxation & Fin.,*** 55 AD3d 1159, 1160–1161 [3d Dept 2008]; ***see also Matter of Arthur G. Jr. and Amanda Nevins***, Tax Appeals Tribunal, June 7, 2018).

G. Petitioners also do not qualify as the prevailing party here for the additional reason that they have not adequately established that their net worth did not exceed two million dollars at the time the action was filed, as required by Tax Law § 3030 (c) (5) (A) (ii) (II). While the petition in this matter included an unsworn signed statement that petitioners' "net worth did not

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[1] Publication 131 (Your Rights and Obligations Under the Tax Law), was published in May, 2018, whereas the publication petitioners cite to in their petition (Publication 130-D [The New York State Tax Audit - Your Rights and Responsibilities]), was published in October, 2013.

exceed two million dollars at the time the action was filed," petitioners have provided insufficient proof in evidentiary form establishing this fact (***see*** Treas Reg § 301.7430-2 [c] [3] [ii] [A] [requiring a request for costs pursuant to IRC § 7430 to include a sworn affidavit to show that the requester meets the net worth requirement]; ***see also Avancena v Commr.***, 63 TCM 3133 [1992]). Petitioners' statement was not made through a sworn affidavit which would be subject to the penalties of perjury. Unsworn factual claims are accorded limited evidentiary weight (***see Matter of Café Europa***, Tax Appeals Tribunal, July 13, 1989).

H. The petition of Robert and Julie Krause for costs is denied.

DATED: Albany, New York
August 22, 2019

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE