STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID AND LISA LANGSTON	:	DETERMINATION DTA NO. 829187
for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Year 2016.	:	
	:	

Petitioners, David and Lisa Langston, appearing by Dean Nasca, CPA, filed a petition on January 30, 2019, seeking administrative costs under section 3030 of article 41 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel), was given until June 5, 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, Jessica DiFiore, 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 filed a joint resident income tax return (form IT-201) (return) for the tax year 2016 requesting a refund of $1,895.00.

2. The Division of Taxation (Division) issued correspondence to petitioners, dated April 3, 2017, requesting information regarding itemized deductions reported on petitioners' return that

resulted in petitioners' refund request. This correspondence indicated that the Division was unable to verify amounts claimed by petitioners as itemized deductions. Therefore, the Division recomputed petitioners' return using the allowable standard deduction, which reduced the requested refund amount to $718.31. The correspondence requested that petitioners provide a copy of their schedule A attached to their filed federal return and a copy of documents substantiating the amounts listed on that schedule. The Division indicated that a refund check would be issued within 60 days based upon its recomputation of petitioners' return. However, the Division suggested that petitioners should submit any documents they had to substantiate the itemized deductions claimed.

3. In response to the Division's correspondence, petitioners submitted an undated letter entitled "STATEMENT TO AUDIT DEMAND," in which they argued that they were entitled to a field audit. This correspondence stated, in pertinent part, that:

> "[T]he State of New York's demand to audit the taxpayers' return without allowing the taxpayer, or the taxpayers' representative, to be present violates 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 needed notice of a time and place so that they could be present for the "audit process." Otherwise, petitioners intended to file a lawsuit in the New York State Supreme Court for the balance of the refund, damages for violation of their due process rights, and costs pursuant to Tax Law § 3030.

4. In response, the Division issued a notice of disallowance dated March 5, 2018, stating that the Division was disallowing petitioners' claim for a refund and that the notice of disallowance was being sent to provide petitioners with an opportunity to present their

documentation in response to the Division's request that they verify the itemized deductions claimed on their 2016 tax return.

5. Thereafter, petitioners filed a request for conciliation conference with the Bureau of Mediation and Conciliation Services. The conference was held on November 29, 2018. At this conference, petitioners provided documentation, for the first time, that substantiated the itemized deductions, including the job expenses, claimed on the return. In response, a consent was issued to petitioners on January 7, 2019, allowing the remaining balance of their refund. Therefore, petitioners proved that they were entitled to the full $1,895.00 as originally reported on their return.

6. On January 30, 2019, petitioners filed a 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
Dec. 6, 2017	Respond to NYS Audit Demand Letter	0.75	$75.00	$56.25 plus $5.17 certified mailing fee
Jul. 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	2.0	$75.00	$150.00
Nov. 29, 2018	Attend Conciliation Conference	1.75	$75.00	$131.25

TOTAL				$385.25

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

8. Included with the Division's response to petitioners' application for costs is an affidavit of Kathleen A. Loos, dated May 29, 2019. Ms. Loos is a Tax Technician III in the Division's Income/Franchise Desk Audit Bureau and she has been in that position since February 2019. During the audit of petitioners' income tax return, Ms. Loos was a Tax Technician II. As a Tax Technician II, Ms. Loos's duties included supervising Tax Technicians performing desk audits of personal income tax returns, including itemized deductions audits. Ms. Loos's affidavit is based upon her review of the Division's files and her personal involvement with this audit.

9. 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. Loos, if a taxpayer or representative submits documentation to the Division at the fax number indicated on the notice issued to petitioners, it would be imaged into the taxpayer's account upon receipt. Documentation submitted by mail will be imaged into the taxpayer's account in the ordinary course of business. Additionally, Ms. Loos 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.

10. Ms. Loos avers that she reviewed petitioners' accounts and that they did not submit any documentation in response 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, and petitioners' request for a refund was denied. Ms. Loos states 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:
>
> (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] [I]). 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 (IRC) (26 USC) § 7430. Therefore, it is proper to look to federal regulations and cases for guidance in analyzing Tax Law § 3030 (***see Matter of Levin v Gallman***, 42 NY2d 32, 33-34 [1977]; ***Matter of Doyle***, Tax Appeals Tribunal, May 9, 2019).

IRC § 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 dated January 7, 2019, which granted their refund in full. Thus, the consent 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 30, 2019 and, thus, was timely filed.

D. The next issue is whether the Division has met its burden of proving that its position was substantially justified (***see*** Tax Law § 3030 [c] [5] [B]). The commissioner's position is the position taken by the Division as of the date it issues the notice giving rise to the taxpayer's right to a hearing (***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 (***see Matter of March***, Tax Appeals Tribunal, November 26, 2018, quoting ***Phillips v Commr.***, 851 F2d 1492 [1988]). The Division must show that its position "had a reasonable basis both in fact and law" (***Matter of March***; ***Matter of Grillo***, Tax Appeals Tribunal, August 23, 2012, citing ***Powers v Commr.***, 100 TC 457, 470 [1993]; ***Pierce v Underwood***, 487 US 552, 558-60 [1988]).

E. Taxpayers must keep and, upon request, make available to the Division, such records as are sufficient to establish the deductions claimed by such taxpayers in any New York State income tax return (***see*** Tax Law § 658 [a]; 20 NYCRR 158.1 [a], 158.7). The Division has

produced proof, through the affidavit of Ms. Loos, 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 sent them multiple requests for such information. Rather than supply the substantiation for the claimed expenses, petitioners demanded a field audit at a specified time and place. As petitioners were required to provide the information necessary to substantiate their claimed deductions upon request, but failed to do so until the conciliation conference, the Division was substantially justified in issuing petitioners a notice of disallowance, adjusting their refund amount by initially disallowing the claimed itemized deductions.

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

F. While not raised by the Division, even if the Division's position was not substantially justified, petitioners have not demonstrated they are entitled to costs because they failed to adequately show that they are individuals whose net worth was less than $2 million when the proceeding was commenced. Petitioners made only the bare statement in their application that such was the case. This statement was not made by affidavit, subject to the penalties of perjury (***see Avancena v Commr***., 63 TCM 3133 [1992]; 26 CFR 301.7430-2 [c] [3] [ii] [A]). Petitioners' application also did not include any evidence from which a conclusion could be reached concerning the accuracy of the claim of petitioners' net worth.

G. The petition of David and Lisa Langston for costs is denied.

DATED: Albany, New York
August 29, 2019

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE