STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRENDA COLLINS	:	DETERMINATION DTA NO. 829379
for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Year 2017.	:	

Petitioner, Brenda Collins, appearing by Dean Nasca, CPA, filed a petition on May 20, 2019, seeking administrative costs under section 3030 of article 41 of the Tax Law.

On July 29, 2019, the Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel), submitted an affirmation and accompanying documents in opposition to petitioner's application and filed a motion for a frivolous petition penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. Petitioner did not respond to the Division of Taxation's motion by the deadline of August 28, 2019, which date commenced the 90-day period for issuance of this determination.

Based upon petitioner's application for costs, the Division of Taxation's motion papers, and documents submitted therewith, and all pleadings and proceedings had herein, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUES

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

II. Whether a penalty should be imposed on petitioner for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. Petitioner filed a resident income tax return (form IT-201) (return) for the tax year 2017 requesting a refund of $1,214.00. On her return, she claimed itemized deductions of $28,266.00, including $13,836.00 in job expenses.

2. The Division of Taxation (Division) issued a letter to petitioner, dated March 23, 2018, requesting information regarding the itemized deductions reported on her return that resulted in her refund request. This correspondence indicated that the Division was unable to verify amounts claimed by petitioner as itemized deductions. It also stated that if petitioner failed to respond to the letter, she would not receive the refund she requested. The correspondence requested that petitioner provide a copy of her schedule A attached to her filed federal return and a copy of documents substantiating the amounts listed on that schedule. The Division indicated, among other things, that if it did not hear from petitioner within 60 days, or the information she submitted did not support her claim, the Division would disallow or adjust the itemized deductions and recompute her return using the information she submitted or using the appropriate standard deduction, and that petitioner may receive a lower refund or owe tax.

3. Petitioner asserted that in response to the Division's correspondence, she submitted an undated, unaddressed letter entitled "STATEMENT TO AUDIT DEMAND," in which she asserted that the correspondence from the Division was generated by a program that denies deductions based on an arbitrary and capricious threshold in violation of the State Administrative Procedure Act. As such, petitioner stated she would not respond to the Division's demand for additional information to substantiate her itemized deductions.

4. On July 24, 2018, the Division issued a statement of proposed audit change to petitioner informing her that the claimed itemized deductions were disallowed because she did not provide

information to substantiate them on her 2017 personal income tax return. The statement also provided that the return was recalculated using the appropriate standard deduction for her filing status, and that using that deduction, she owed additional tax in the amount of $91.26 plus interest and any applicable penalty. The statement further provided that if petitioner did not contact the Division by August 23, 2018, it would send her a notice of deficiency or notice of determination for the amount due.

5. Having not heard from petitioner, on September 10, 2018, the Division issued her a notice of deficiency, L-048595939, assessing additional tax due of $91.26, plus interest.

6. Thereafter, petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The conference was held on April 4, 2019. At this conference, petitioner provided documentation, for the first time, that substantiated her itemized deductions, including the job expenses, claimed on the return. In response, the conciliation conferee sent petitioner a letter dated April 11, 2019, stating that after considering the evidence submitted, he was granting petitioner's request and canceling the notice of deficiency. This correspondence also provided that a refund would be processed in the amount of $1,214.00. With this correspondence, the conferee sent petitioner a consent that her representative signed on April 19, 2019, canceling the notice of deficiency. Therefore, petitioner proved that she was entitled to the $1,214.00 refund originally reported on her return.

7. On May 20, 2019, petitioner filed a petition with the Division of Tax Appeals asserting she was the prevailing party and seeking an award of costs for fees paid to her representative pursuant to Tax Law § 3030. She asserted that the Division was not substantially justified in disallowing her deductions because it did not follow its applicable guidance when it disallowed certain deductions or credits based on an arbitrary and capricious threshold that was never

authorized by the State Administrative Procedure Act. Petitioner also asserted that the Division's demand for substantiation of the deduction requires the taxpayer to waive her statutory rights to seek reimbursement of costs in violation of the taxpayer's due process rights secured by the Fourteenth Amendment to the United States Constitution and New York State Constitution.

8. Attached to the petition was an invoice from Dean Nasca, CPA, indicating the following dates and charges:

Date	Description	Hours	Hourly Rate	Total Charge
Apr. 24, 2018	Respond to NYS Audit Demand Letter	0.75	$75.00	$56.25 plus $4.66 certified mailing fee
Dec. 3, 2018	Preparation of Request for Conciliation Conference Forms	0.50	$75.00	$37.50 plus $4.66 certified mailing fee
Apr. 3, 2019	Copy required documentation and prepare for Conciliation Conference	2.0	$75.00	$150.00
Apr. 4, 2019	Attend Conciliation Conference	1.5	$75.00	$112.50
TOTAL				$365.57

9. Petitioner also submitted an unsworn statement asserting that her net worth did not exceed $2 million at the time the civil action was filed.

10. In its response to petitioner's application for costs, the Division argued that because the petitioner failed to submit any documentation to substantiate her deductions prior to the BCMS conference, the Division was substantially justified in maintaining the refund denial and issuing the notice of deficiency. In support of its position, the Division submitted an affidavit of

Trude R. Wilson, dated July 22, 2019. Ms. Wilson is a Tax Technician I in the Division's Income/Franchise Desk Audit Bureau and she has been in that position since May 2012. As a Tax Technician I, Ms. Wilson's duties included 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.

11. The Division maintained an e-MPIRE account for each taxpayer, which, among other things, tracked 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 submitted documentation to the Division at the fax number indicated on the notice issued to petitioner, it was imaged into the taxpayer's account upon receipt. Documentation submitted by mail was imaged into the taxpayer's account in the ordinary course of business. Additionally, Ms. Wilson affirmed that if a taxpayer called the Division, a case contact was entered into the events log in the taxpayer's account documenting who called and what was discussed.

12. Ms. Wilson averred that she reviewed petitioner's account and that no documentation was submitted in response to the Division's request for substantiation of her itemized deductions during the course of the audit. Therefore, all claimed deductions were disallowed as unsubstantiated, and petitioner's request for a refund was denied. Ms. Wilson stated that petitioner finally submitted documentation substantiating her claimed deductions, for the first time, at the conciliation conference held on April 4, 2019. After the conference, the documentation was reviewed and a consent was issued to petitioner canceling the notice of deficiency. Subsequently, the refund was allowed.

13. With its response papers, the Division moved to have the maximum penalty imposed on petitioner for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

14. Petitioner did not respond to the Division's motion.

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 . . . ."

Petitioner entered into a consent dated April 19, 2019, which cancelled the notice of deficiency issued to petitioner. Thus, the consent resolved the tax liability of petitioner 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 April 19, 2019, the date of the consent. The petition herein seeking administrative costs was filed on May 20, 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*** quoting ***Matter of Grillo***, Tax Appeals Tribunal, August 23, 2012).

E. The Division's position as of the day it issued the notice of deficiency, which gave rise to petitioner's right to a BCMS conference, was reasonable in light of the surrounding facts and circumstances. Taxpayers must keep and provide the Division with requested information to

substantiate their claimed deductions in response to a desk audit letter (***see*** Tax Law § 658 [a]; 20 NYCRR 158.1 [a], 158.7; ***Matter of Doyle***; ***see also Matter of Sperl***, Tax Appeals Tribunal, May 8, 2014). The burden is on the taxpayer to establish his right to a deduction (***see Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 197 [1975], ***rearg denied*** 37 NY2d 816 [1975] ***lv denied*** 338 NE2d 330 [1975]). The Division has produced proof, through the affidavit of Ms. Wilson, to establish that the Division did not receive any documentation to support petitioner's claimed itemized deductions until the conciliation conference held on April 4, 2019, despite the fact that the Division sent her multiple requests for such information. Instead, petitioner claims she sent the Division a "Statement to Audit Demand," in which she stated that she would not respond to the Division's demand. As petitioner was required to provide the information necessary to substantiate her claimed deductions upon request, but failed to do so until the conciliation conference, the Division was substantially justified in issuing petitioner a notice of deficiency for tax due (***see Matter of Doyle***).

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

G. Petitioner's claim that the Division violated the State Administrative Procedure Act by conducting a desk audit and refusing to issue her a refund until she substantiated her claimed

deductions is without merit for the reasons set forth in conclusion of law E. Additionally, the Division has discretion to determine the procedures it employs in examining a given return (***see Mayo v New York State Division of Tax Appeals***, 172 AD3d 1554, 1555 [3d Dept 2019]). Accordingly, even if the Division has a program in place to analyze deductions and credits claimed on an income tax return, and has threshold dollar amounts that trigger a potential desk audit, such practice is within the its discretion (***see id.***).

H. Petitioner also asserted that the Division's rule of requiring a taxpayer to provide substantiation for deductions before a refund is issued required the taxpayer to waive her statutory right to seek reimbursement of costs because an administrative proceeding had not been initiated. She stated that this violated her due process rights secured by the Fourteenth Amendment to the United States Constitution and New York State Constitution. Petitioner essentially argued that if she substantiated her deductions in response to the Division's request for information instead of petitioning for a refund, she was waiving her statutory right to seek reimbursement of costs pursuant to Tax Law § 3030 because responding to the Division's request for information does not constitute an "administrative proceeding" for which petitioner could seek costs (***see*** Tax Law §§ 3030 [a], [c] [6]). However, if petitioner responded to the Division's request for information, she would not have incurred the costs that arose from an administrative proceeding (***see*** finding of fact 8). Petitioner should have provided the Division with the requested information, if available, to substantiate her claimed deductions when she received the audit letter (***see Matter of Doyle***). This would have saved petitioner both time and money.

I. Additionally, pursuant to Tax Law § 697 (b), the Division has the power to examine books, papers, records or memoranda of a taxpayer for the purpose of "ascertaining the correctness of any return." When petitioner failed to respond to the Division's request for

supporting documentation, she was issued a notice of deficiency and thereafter engaged in conciliation proceedings (***see*** findings of fact 4 through 6). By participating in the conciliation proceeding, petitioner was given due process (***see Mayo***, 172 AD3d at 1555). Therefore, the Division's request for information to substantiate her claimed deductions did not violate her due process rights guaranteed by the United States and New York State Constitutions (***see Matter of Doyle***).

J. The Division moved for the imposition of a frivolous petition penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose such a penalty "[i]f any petitioner commences or maintains a proceeding in the division of tax appeals primarily for delay, or if the petitioner's position in such proceeding is frivolous." The maximum penalty allowable under this provision is $500.00 (***see*** Tax Law § 2018). The list of examples of frivolous positions set forth in 20 NYCRR 3000.21 is not exclusive ***(see Matter of John Adrian Van Rossem***, Tax Appeals Tribunal, October 24, 2017). The Tribunal has construed the term frivolous pursuant to Blacks Law Dictionary to mean "[l]acking a legal basis in legal merit; not serious; not reasonably purposeful" (***Matter of Michael A. Goldstein A No. 1. Trust***, Tax Appeals Tribunal, October 11, 2011, ***affd on other grounds*** 101 AD3d 1496 [3d Dept 2012], ***lv denied*** 21 NY3d 860 [2013]).

K. Petitioner's petition for costs, while poorly reasoned, is not so completely without merit as to constitute a "frivolous petition" within the meaning of Tax Law § 2018 and 20 NYCRR 3000.21 (***cf. Matter of Nelson***, Tax Appeals Tribunal, April 21, 2011 [where the Tribunal found petitioner's position to be patently frivolous when he argued that he was not required to file returns reporting his wages for the years at issue after he had been convicted of grand larceny for filing false New York income tax returns for the preceding years]).

Additionally, as petitioner was already issued a refund, there was no dollar amount in controversy so as to delay the conclusion of an audit or stay a collection proceeding (***see*** finding of fact 12). Therefore, petitioner's petition for costs was not commenced primarily for delay pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

L. The petition of Brenda Collins for costs is denied and the Division's motion to impose a frivolous petition penalty is also denied.

DATED: Albany, New York
November 21, 2019

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE