STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ARTURO AND SARAH TOBAR** for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Year 2018.	:	DETERMINATION DTA NO. 831032

Petitioners, Arturo and Sarah Tobar, appearing by Dean Nasca, CPA, filed a petition on June 24, 2022, seeking administrative costs under section 3030 of article 41 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Stefan Armstrong, Esq., of counsel), was given until December 12, 2022 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, Winifred M. Maloney, 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. On October 12, 2019, petitioners electronically filed a joint resident income tax return (form IT-201) for the tax year 2018 (2018 return) requesting a refund of $3,965.00. On their return, petitioners claimed itemized deductions of $42,411.00, including $20,407.00 in job expenses.

2. Based upon the itemized deductions reported on their return, petitioners' return was selected for a routine desk audit by the Division of Taxation (Division). The Division's "Audit Division-Income/Franchise Desk AG2" (Desk Audit Bureau - Audit Group 2) issued correspondence to petitioners, dated October 23, 2019, requesting information regarding the itemized deductions reported on petitioners' return that resulted in petitioners' refund request. The correspondence indicated that the Division needed additional information about the itemized deductions claimed by petitioners. The correspondence requested that petitioners provide, to the Division's Desk Audit Bureau - Audit Group 2 located in Albany, New York, copies of all New York State itemized deduction worksheets for the year 2018, and copies of documentation substantiating the claimed itemized deductions, i.e. real property taxes, home mortgage interest, cash and noncash gifts to charity, job expenses, and miscellaneous deductions. The correspondence indicated that if petitioners did not respond within 45 days, the Division would recalculate petitioners' return using the standard deduction and disallow all itemized deductions. The correspondence also provided petitioners with a phone number, fax number, and website address in order to reach the Division.

3. By an account adjustment notice – personal income tax (account adjustment notice), dated March 13, 2020, the Division's Income/Franchise Desk Audit Bureau disallowed the itemized deductions claimed on petitioners' 2018 return, recomputed their return using the standard deduction, and allowed a partial refund in the amount of $1,368.07, consisting of tax of $1,335.33 plus interest of $32.74. The "Explanation" section of the account adjustment notice indicated that petitioners had not responded to the Division's "letter asking for copies of cancelled checks, receipts and other documentation to substantiate the itemized deductions reported" on their 2018 return and, therefore, the itemized deductions had been disallowed. The

account adjustment notice's explanation section further indicated that the Division's adjustment resulted in an adjusted refund; however, petitioners could "mail or fax additional information for further consideration." The account adjustment notice listed the documents needed to substantiate petitioners' itemized deductions, consisting of real estate taxes paid, mortgage interest paid, cash and noncash gifts to charity, job expenses and miscellaneous deductions claimed on their 2018 return.

4. Thereafter, petitioners filed a request for conciliation conference with the Bureau of Mediation and Conciliation Services (BCMS). The conciliation conference was held on May 25, 2022. 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 allowing the remaining balance of their refund, as reflected in the consent executed by petitioners' representative on May 25, 2022. Therefore, petitioners proved that they were entitled to the full $3,965.00 as originally reported on their 2018 return.

5. On June 24, 2022, petitioners filed the instant petition with the Division of Tax Appeals seeking an award of costs pursuant to Tax Law § 3030. They asserted that the Division was not substantially justified in disallowing their itemized deductions because the Division's implementation of the case identification and selection system (CISS) was not in accordance with its regulations. Petitioners argued that CISS "changed the procedures or practice requirements" of the Division "for calculating and collecting taxes and issuing personal income tax refunds." They further argued that the Division's portrayal of CISS "as an analytical tool used to identify certain tax returns" is inaccurate. Rather, if CISS "selects a tax return, that tax return is recalculated" and the New York State standard deduction "is substituted for the

itemized deductions claimed on the tax return, thus increasing the tax liability on the return." Petitioners claim that the "recalculation of a taxpayer's tax return prior to any correspondence being sent to the taxpayer is not an analytical aid, but a change in the *procedure or practice requirements* (emphasis added)" of the Division "for calculating and collecting taxes and issuing personal income tax refunds." Petitioners asserted that based upon its use of CISS, the Division substituted the New York standard deduction in place of their itemized deductions and refunded only $1,368.07 of the $3,965.00 claimed on their 2018 return.

6. In support their arguments related to the Division's implementation and use of CISS in its partial denial of their refund, petitioners submitted a two-page excerpt of an interview of the Division's former Tax Commissioner Nonie Manion.[1]

7. Attached to the petition is an invoice, dated June 15, 2022, from Dean Nasca, CPA, indicating the following dates and charges:

Date	Description	Hours	Hourly Rate	Total Charge
Dec. 6, 2019	Respond to NYS Audit Demand Letter	0.50	$75.00	$37.50 plus $5.17 certified mailing fee
Aug. 20, 2020	Preparation of Request for Conciliation Conference Forms	0.50	$75.00	$37.50 plus $5.08 certified mailing fee
May 24, 2022	Copy required documentation and prepare for Conciliation Conference	1.5	$75.00	$112.50
May 25, 2022	Attend Conciliation Conference	1.75	$75.00	$131.25
Total				$329.00

[1] The record does not include any source information regarding these excerpted pages such as the date of the interview, the identity of the interviewer/author, and the date and manner of publication of same.

8. Petitioners also submitted a joint affidavit, dated June 13, 2022, in which they asserted their net worth did not exceed $2 million at the time the civil action was filed.

9. In response to petitioners' application for costs, the Division submitted an affirmation in opposition to petitioners' application for costs, dated December 8, 2022, of Stefan M. Armstrong, Esq., with supporting papers. Mr. Armstrong, in his affirmation, avers that the Division was substantially justified in its position because petitioners failed to submit any documents in response to the Division's desk audit letter request for documentation of their itemized deductions prior to the BCMS conciliation conference. Included with the Division's response to petitioners' application for costs is an affidavit of Yasmin A. Sayed, dated December 2, 2022. Ms. Sayed is a Tax Technician II in the Division's Income/Franchise Desk Audit Bureau and is currently assigned to Audit Group 2 that performed the desk audit of petitioners' 2018 return. She began working for the Division in 2009 and has held the position of Tax Technician II since August 2022. Ms. Sayed's duties include supervising tax technicians in performing desk audits of personal income tax returns, including itemized deduction audits. Ms. Sayed's affidavit is based upon her review of the Division's entire audit file related to its desk audit of petitioners' 2018 return.

10. 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. Sayed, if a taxpayer or representative submitted documentation to the Division at the fax number or address indicated on the notice issued to petitioners, it was imaged into the taxpayer's account in the ordinary course of business. Additionally, Ms. Sayed affirms 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.

11. Ms. Sayed averred that she reviewed petitioners' accounts and that on February 4, 2020, petitioners contacted the Division and informed the Division that they had given their documentation to their representative. However, neither petitioners nor their representative submitted 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. Sayed averred that petitioners finally submitted documentation substantiating their claimed deductions, for the first time, at the conciliation conference held on May 25, 2022. After the conference, the documentation was reviewed and a consent was issued to petitioners allowing the remaining balance of their refund.

12. In his affirmation in opposition to petitioners' application for costs, Mr. Armstrong argued that the Division of Tax Appeals should impose a frivolous petition penalty in the amount of $500.00 against petitioners pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

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 a 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.

> (iv) Applicable published guidance. For purposes of clause (ii) of this subparagraph, the term 'applicable published guidance' means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and
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> (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.
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> (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 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 (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 (26 USC) § 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 settlement for-
>
> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and
>
> (2) reasonable litigation costs incurred in connection with such court proceeding."

D. Petitioners entered into a consent on May 25, 2022, 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 May 25, 2022, the date of the consent. The petition herein seeking administrative costs was filed on June 24, 2022 and, thus, was timely filed.

E. 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 upon "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).

F. The Division's position as of the day it issued the account adjustment notice partially denying petitioners' refund, which gave rise to petitioners' right to a BCMS conciliation 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. Sayed, to establish that the Division did not receive any documentation to support petitioners' claimed

itemized deductions until the conciliation conference held on May 25, 2022, despite the fact that the Division had requested, by letter dated October 23, 2019, such information from petitioners. Rather, on February 4, 2020, petitioners contacted the Division via telephone and informed the Division that they had given their documentation to their representative. However, neither petitioners nor their representative supplied any substantiation for the claimed expenses during the course of the audit. Accordingly, it is concluded that petitioners did not provide any documentation substantiating the claimed deductions until the time of the conciliation conference. Therefore, the Division was substantially justified in adjusting petitioners' refund amount by initially disallowing the claimed itemized deductions.

G. Petitioners claim that the Division failed to follow its regulations when it implemented CISS and that CISS changed the Division's procedures or practice requirements for calculating and collecting taxes and issuing personal income tax refunds. They argue that if CISS selects a tax return, it is recalculated by substituting the New York State standard deduction for the reported itemized deductions that results in an increased tax liability on the return. They further argue that the Division's use of CISS in recalculating a taxpayer's return prior to any correspondence being sent to the taxpayer is a change in the Division's procedures or practice requirements for calculating and collecting taxes and issuing personal income tax refunds. Petitioners' arguments are without merit. There is no evidence that the Division recalculated petitioners' 2018 return prior to its issuance of the desk audit letter to them. Rather, the record indicates that the Division recalculated petitioners' return only after they failed to submit documentation in response to the Division's desk audit letter requesting substantiation of the claimed deductions. Pursuant to Tax Law § 697 (b) (1), the Division has the power to examine books, records or memoranda of a taxpayer for the purpose of "ascertaining the

correctness of any return." When petitioners failed to submit documents in response to the Division's request for supporting documentation, they were issued an account adjustment notice partially denying their refund. Additionally, petitioners have offered no evidence as to when the Division implemented CISS or whether such implementation had any impact on the Division's procedures or practice requirements with respect to the public. Even if the implementation of CISS did change its procedures, the Division has discretion to determine the procedures it employs in examining a given return (***see Matter of Mayo v New York State Division of Tax Appeals***, 172 AD3d 1554, 1555 [3d Dept 2019], ***lv denied*** 34 NY3d 1140 [2020], ***rearg denied*** 35 NY3d 1005 [2020]).

H. As part of its response to petitioners' application for costs, the Division argues that the Division of Tax Appeals should impose a frivolous petition penalty in the amount of $500.00 against petitioners pursuant to Tax Law § 2018 and 20 NYCRR 3000.31. Although in its response to petitioners' application for costs, the Division noted that the frivolous petition penalty can be imposed based upon the motion of the office of counsel (***see*** 20 NYCRR 3000.21), it failed to file proper motion papers as required by 20 NYCRR 3000.5.
Even if the Division's responding papers could be construed as papers supporting a motion for imposition of a frivolous petition penalty, the Division's failure to include a notice of motion required under 20 NYCRR 3000.5 would render the motion invalid (***see Matter of Silvestri***, Tax Appeals Tribunal, March 17, 2022 [where the Tax Appeals Tribunal found that the absence of a notice of motion rendered the Division's motion for summary determination invalid]).

I. The petition of Arturo and Sarah Tobar for costs is denied.

DATED: Albany, New York
March 09, 2023

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE