

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VISHNI SCHIRO WITHANACHCHI : ORDER
 : DTA NO. 825394
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax :
Law for the Years 2005 through 2009. :

Petitioner, Vishni Schiro Withanachchi, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2005 through 2009.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, on February 26, 2014. Petitioner appeared by Colligan Law, LLP (Frederick J. Gawronski, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

A determination was issued on December 18, 2014 that granted the petition and reversed the Division of Taxation's denial of petitioner's request for innocent spouse relief.

On February 17, 2015, petitioner filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation filed the affirmation of Christopher O'Brien, Esq., in opposition on March 27, 2015, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs and attached documentation and the Division of Taxation's affirmation in opposition, and all pleadings and documents submitted in connection with this matter, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Vishni Schiro Withanachchi, was a New York State resident who filed jointly with her spouse personal income tax returns for the years 2005, 2006, 2007, 2008 and 2009 (the years in issue).

2. Petitioner's spouse, Dominick Withanachchi, owned several restaurant franchises throughout New York City during the years in issue under the names Subway and Mr. Salad.

3. On December 22, 2010, Dominick Withanachchi pled guilty to two counts of offering a false instrument for filing in the second degree for violating Penal Law § 175.35, a class E felony. The plea agreement entered into by Mr. Withanachchi specified that he would pay his outstanding New York State personal income tax of \$38,800.00 plus any additional interest and penalties, as determined by the New York State Department of Taxation and Finance.

4. The Division of Taxation (Division) issued to petitioner and Dominick Withanachchi a Notice and Demand for Payment of Tax Due, dated May 26, 2011, which set forth additional personal income taxes due for the years 2005 through 2009 in the sum of \$38,800.00 plus penalty and interest. The explanation for the notice stated, "This Notice and Demand for Payment of Tax Due is issued based on the Plea Agreement, so ordered by Judge Richard Carruthers on December 22, 2010. This dollar amount reflects the tax agreed to by you, plus applicable penalty and interest."

5. On or about August 25, 2011, petitioner filed a Request for Innocent Spouse Relief, form IT-285, with the Division, requesting relief from liabilities that resulted from jointly filed

personal income tax returns for the years in issue. The returns had been filed jointly with her husband, Dominick Withanachchi, with whom she cohabited during the years in issue in the home they owned at 29-19 218th Street, Flushing (Bayside), New York. Through a letter attached to the form IT-285, her attorney stated that petitioner was not aware of additional tax owed to New York and did not know, or have reason to know, that the returns were incorrect or missing information. Her attorney also stated that at no time was petitioner involved in the operations of the business and was not aware of her spouse's criminal conduct.

6. In a letter to petitioner, dated January 4, 2012, the Division denied petitioner's request for relief citing the following reasons:

"Your marital status at the time of filing your request is not considered qualifying for the relief requested. You must have been divorced, widowed, or legally separated as of the date of the filing, or must have lived apart from your spouse (or former spouse) for 12 months preceding your request for relief.

You did not show in the statement and/or supporting documentation attached to your request for relief, that paying the liability in full would result in economic hardship. Examples of economic hardship include difficulty meeting household expenses, unanticipated medical expenses, child support arrears, or any similar financial distress.

You did not show in the statement and/or supporting documentation attached to your request for relief, that you did not know, or have reason to know, at the time you signed the joint personal income tax return, of the item(s) giving rise to the deficiency or that the liability reported on the return would not be paid."

7. At hearing, petitioner presented extensive evidence of her cultural background to explain that traditional female and male roles prevented her from having access to the family's financial information. She described her educational background and lack of any experience with the Tax Law or filing returns.

8. During the years in issue, petitioner credibly testified that the majority of her income came from her jobs in education while only about 30% was derived from businesses controlled

by Dominick Withanachchi, all of which were substantiated by wage reporting statements. She noted that the adjusted gross incomes for the years in issue were fairly constant, given her husband's change in business ventures and it would have been impossible for her to discern anything unusual about the fluctuations due to his criminal conduct.

9. Petitioner stated that they refinanced their home to establish an equity line of credit that appeared to bolster their net worth.

10. The cultural boundaries that precluded petitioner's scrutiny of her husband's business affairs coupled with the demands on her time from child rearing, household chores and work outside the home during the years in issue, prevented her from taking an active role in the preparation of the couple's New York State personal income tax returns, which were prepared by an accountant. Further, she never reviewed, or asked to review, the returns that were prepared for the years 2005 through 2009. Their accountant prepared the returns and brought them to the couple's home for signature.

11. Based on all the evidence adduced at hearing, petitioner proved that she neither knew nor had reason to know of the understatement of tax on the returns she filed. It was held that petitioner received no benefit from the income imputed to her husband for his criminal actions and there was no other transfer of assets to her during the audit years. Petitioner's credible testimony at hearing and the evidence submitted were held to satisfy the statutory requirements for innocent spouse relief.

12. On February 17, 2015, the Division of Tax Appeals received an application for costs pursuant to Tax Law § 3030 from petitioner, which sought reasonable administrative and litigation costs in the amount of \$16,237.50. These costs consisted of professional fees and disbursements from Cook and Gawronski, P.C. and Colligan Law LLP, rendered in connection

with this matter. The fees and disbursements were set forth on statements from the law firms. In the alternative, petitioner requests \$4,882.50 in legal fees and costs of \$504.00, with attorney fees calculated at \$75.00 per hour for 65.10 hours. As of February 6, 2015, \$9,168.00 in legal fees and disbursements remained unpaid and outstanding.

13. In preparation for sentencing, petitioner's spouse prepared a DTF-5, Statement of Financial Condition, for the New York County District Attorney, the New York State Department of Taxation and Finance and the New York City Department of Finance, which indicated that outstanding mortgages, judgments and tax warrants severely encumbered the couple's assets, leaving petitioner's net worth at the time the civil action commenced limited to the value of her interest in jointly held household furniture and one automobile, a sum stated to be less than \$2,000,000.00 on May 26, 2011.

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.”

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (*see* Tax Law § 3030[c][2][B]). Such costs include reasonable fees for the services of attorneys in connection with the administrative proceeding, “except that such fees shall not be in excess of seventy-five dollars per hour unless the [Division of Tax Appeals] determines that an increase in the cost of living or a special factor, such as the

limited availability of qualified attorneys for such proceeding, justifies a higher rate” (Tax Law § 3030[c][1][B][iii]; *see also*, Tax Law § 3030[c][2][B]). Reasonable administrative costs “only include costs incurred on or after the date of the notice of deficiency, notice of determination or other document giving rise to the taxpayer’s right to a hearing” (Tax Law § 3030[c][2][B]). For purposes of this section, “fees for the services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals shall be treated as fees for the services of an attorney” (Tax Law § 3030[c][3]).

Prevailing party is defined for purposes of section 3030(c)(5), in relevant part, as follows:

“(A) In general. The term ‘prevailing party’ means any 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 on 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 , or is an owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed seven million dollars at the time the civil action was filed, and which had not more than five hundred employees 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 (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.

(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]; emphasis added.)

B. In order to be granted an award of costs, it must be determined that the taxpayer is the "prevailing party" pursuant to Tax Law § 3030(c)(5)(A). Furthermore, any such grant is subject to the limitation of Tax Law § 3030(c)(5)(B), which provides that a taxpayer may not be treated as a prevailing party, and thus may not be awarded costs, if the Division establishes that its position was "substantially justified." Clearly, petitioner has satisfied all the criteria of a "prevailing party" in this matter as provided in Tax Law § 3030(c)(5)(A)(i), inasmuch as the notice, as it pertained to petitioner, was canceled. Thus, the critical question remaining is whether the Division's position was "substantially justified" (Tax Law § 3030[c][5][B]), a finding that would render petitioner ineligible for an award of costs and fees.

C. Tax Law § 3030 is clearly modeled after Internal Revenue Code § 7430. It is proper, therefore, to use Federal cases for guidance in analyzing this State law (*see Matter of Levin v. Gallman* 42 NY2d 32 [1977]; *Matter of Iter Sener*, Tax Appeals Tribunal, May 5, 1988). A position is substantially justified if it has a reasonable basis in both fact and law (*see Information Resources, Inc. v. United States*, 996 F2d 780, 785 [5th Cir 1993]), with such determination properly “based on all the facts and circumstances surrounding the proceeding, not solely upon the final outcome” (*Phillips v. Commissioner*, 851 F2d 1492, 1499 [1988]; *Heasley v. Commissioner*, 967 F2d 116, 120 [5th Cir 1992], 92 US Tax Cas ¶ 50,412). This determination of “substantially justified” is properly made in view of what the Division knew at the time the position was taken, i.e., when the notices were issued (Tax Law § 3030[c][8][B]; *see DeVenney v. Commissioner*, 85 TC 927, 930 [1985]). The fact that the notice was canceled by the administrative law judge is a factor to be considered. However, this action does not preclude a finding that the Division’s position was substantially justified at the time the notice was issued (*see Heasley v. Commr.*).

D. An analysis of the determination reveals that, at the time the Division issued petitioner its denial of her request for innocent spouse relief, it was substantially justified in its position. Petitioner’s request, form IT-285, was filed in October 2011. On the request, petitioner did not provide any information with regard to how she was involved in the household finances and if she was involved in filing her tax returns. On the request, she stated that she was not aware of any amounts owed to New York State when she signed her returns or that the returns were incorrect or missing information. She also stated that she did not file a request for innocent spouse relief with the Internal Revenue Service for any of the years in issue. The request provided no explanations for her answers, instead directing the Division to “see attached.”

E. The attachment to the request was a short letter from petitioner's attorney, Frederick J. Gawronski, explaining that any additional income taxes due were the result of Mr. Withanachchi's criminal conduct, about which petitioner had no knowledge. He stated in his letter that petitioner had no involvement with the operations of Mr. Withanachchi's businesses and was not aware of his criminal conduct.

F. The Division's denial of the request, dated January 4, 2012, stated that the reason therefore was that petitioner failed to demonstrate by statement or documentation that paying the liability would result in economic hardship or that petitioner did not know or have reason to know at the time she signed the joint personal income tax return of the items giving rise to the deficiency. The lack of information provided on the request and the statements of Mr. Gawronski in the attached letter raised numerous questions of fact that could not be resolved in petitioner's favor without further credible evidence, both documentary and testimonial. Based on the deficient evidence provided and the vague answers supplied, the Division was substantially justified in denying the request.

This was especially true given the substantial documentation provided by petitioner after the denial and at hearing, including credible testimony that was accorded significant weight in the determination. Without the additional documentation and testimony, petitioner would not have prevailed at hearing. Since the Division was forced to grant or deny the request without the benefit of that evidence, it was substantially justified in its denial based on the information (or lack thereof) received with the request (Tax Law § 3030[c][5][B]; [c][8][B]). Accordingly, petitioner may not be treated as a prevailing party under Tax Law § 3030, and therefore may not recover costs and fees (Tax Law § 3030[c][5][B][i]).

G. Petitioner's application for costs and fees is hereby denied.

DATED: Albany, New York
June 4, 2015

/s/ Joseph W. Pinto, Jr._____

ADMINISTRATIVE LAW JUDGE