STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of **CLEONE AND BRUCE VON ELTEN** for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Years 2012 and 2013.	:	ORDER DTA NOS. 828257 AND 828258

Petitioners, Cleone and Bruce von Elten, appearing by Dean Nasca, CPA, filed two petitions on July 7, 2017, one pertaining to the year 2012 and the other to the year 2013, both seeking administrative costs under section 3030, article 41 of the Tax Law, "and other damages."

The Division of Taxation, appearing by Amanda Hiller, Esq. (Ellen K. Roach, Esq., of counsel), was granted an extension of time within which to file a response to the application for costs until September 7, 2017, and filed its response on that day. The 90-day period for issuance of this order commenced on September 7, 2017.

Based upon petitioners' application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, James P. Connolly, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners are entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. This matter arose out of the adjustment by the Division of Taxation (Division) of refunds sought by the joint New York State and New York City personal income tax returns that petitioners filed for the years 2012 and 2013.

2012

2. On their New York State and New York City personal income tax return for 2012, petitioners claimed an overpayment of $9,625.00, with $4,125.00 to be refunded and $5,500.00 to be credited towards the next year's tax. On their return, petitioners claimed itemized deductions of $38,957.00, including job expenses/miscellaneous deductions of $14,711.00.

3. The Division issued a letter to petitioners, dated April 13, 2015, stating that:

> "[a]fter reviewing your income tax return, we're unable to verify the amounts you claimed as itemized deductions. We've recomputed your return using the allowable standard deduction. You should receive an adjusted refund in approximately 60 days."

The letter explained further what documents petitioners should produce, based on the itemized deductions that petitioners claimed on their income tax return. For example, in the case of a taxpayer who took the "job expense and miscellaneous deduction," the letter required the taxpayer to produce:

- a letter from the taxpayer's employer verifying that the claimed expenses were necessary for the taxpayer's employment and were not reimbursed or reimbursable;
- a detailed explanation of the nature of each expense and how it relates to the taxpayer's employment;
- canceled checks and receipts that identify the items the taxpayer purchased; and
- with regard to claimed travel expenses, a detailed explanation of the nature of each expense and how it relates to the taxpayer's employment.

The letter requested that petitioners respond to the Division's request for information within 60 days, stating that, otherwise, "we won't take any further action on your claim."

4. On April 16, 2015, the Division issued an account adjustment notice to petitioners, which explained that "[w]e adjusted the amounts reported on your tax return," and showing that petitioners' claimed overpayment to be refunded was reduced from $4,125.00 to $1,721.13, while the amount of the overpayment to be credited to petitioners' estimated tax for the 2013 tax year remained at $5,500.00. The letter explained that the reduction in the refund resulted from changing line 34 of petitioners' income tax return from the $38,957.00 itemized deduction amount that petitioners had used to $15,000.00, the amount of New York's standard deduction for joint filers.

5. On November 22, 2016, petitioners filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). In the box on the request form seeking the basis of the requester's disagreement with the Division's notice, petitioners asserted that "[t]axpayer supplied the appropriate documentation but failed to receive the correct refund."

6. After the BCMS conference, petitioners signed a BCMS consent, dated June 7, 2017, which granted petitioners' refund claim in the amount of $2,403.87, or the difference between the amount originally sought to be refunded by petitioners on their return ($4,125.00) and the amount already granted to petitioners ($1,721.13).

7. On July 7, 2017, petitioners filed the aforementioned application with the Division of Tax Appeals for the 2012 tax year, seeking an award of costs for fees paid to their representative, Dean Nasca. Attached to the petition is an invoice from Mr. Nasca, indicating the following dates and charges:

Date	Description	Hours	Hourly Rate	Total Charge
Nov. 22, 2016	Preparation of Request for Conciliation Conference Forms	0.25	$100.00	$25.00 plus $4.45 certified mailing fee
May 15, 2017	Copy required documentation and prepare for Conciliation Conference	2.5	$100.00	$250.00
May 16, 2017	Attend Conciliation Conference in Hauppauge, NY	1.5	$100.00	$150.00
TOTAL				$429.45

2013

8. Petitioners filed a joint New York State and New York City personal income tax return for 2013, claiming an overpayment of $7,384.00, with $2,384.00 to be refunded and $5,000.00 to be credited to their estimated tax for 2014. On their return, petitioners claimed itemized deductions of $33,026.00, including job expenses/miscellaneous deductions of $10,184.00.

9. On December 7, 2015, the Division issued a letter to petitioners similar to the April 13, 2015 letter described in Finding of Fact 3, advising them that the Division needed more information to verify the accuracy of their itemized deductions and that it was going to recompute their income tax liability for 2013 using the standard deduction. The letter added that the Division would reconsider its decision if it received adequate substantiation of petitioners' claimed itemized deductions. Subsequently, the Division issued a refund check to petitioners dated December 16, 2015 for $619.00.

10. On March 6, 2017, petitioners, by their representative, Mr. Nasca, filed a request for a conciliation conference with BCMS, protesting the Division's failure to grant the full amount

of the refund claim sought on their 2013 return, and inserting the identical explanation of their disagreement with the Division's partial granting of the refund sought as described in Finding of Fact 5.

11. After a conciliation conference with BCMS, petitioners signed a consent on June 7, 2017, which granted them a refund in the amount of $1,765.00, the full amount of the difference between the refund already paid to petitioners for 2013 ($619.00) and the amount originally sought to be refunded by petitioners on their 2013 return ($2,384.00).

12. On July 7, 2017, petitioners filed the aforementioned petition with the Division of Tax Appeals seeking costs for the 2013 tax year. Attached to the petition is an invoice from Mr. Nasca, indicating the following dates and charges:

Date	Description	Hours	Hourly Rate	Total Charge
Feb. 27, 2017	Preparation of Request for Conciliation Conference Forms	0.25	$100.00	$25.00 plus $4.45 certified mailing fee
May 15, 2017	Copy required documentation and prepare for Conciliation Conference	2.5	$100.00	$250.00
May 16, 2017	Attend Conciliation Conference in Hauppauge, NY	1	$100.00	$100.00
TOTAL				$379.45

The Division's Submissions

13. The Division filed separate responsive papers to petitioners' separate petitions herein, including in each an affidavit of Kathy Caruso, dated September 6, 2017. Ms. Caruso is a Tax Technician II in the Division's Income/Franchise Desk Audit Bureau and has been in that position since September 2010. Ms. Caruso's duties include acting as a BCMS advocate,

preparing and coordinating closed files, reviewing cases for quality control, and supervising desk audits. Ms. Caruso's affidavit is based upon her review of the Division's files and her personal involvement in the matter. Ms. Caruso was assigned to be the Division's advocate at the conciliation conferences for petitioners' 2012 and 2013 tax years and reviewed the entire audit file.

14. The Division maintains an e-MPIRE account for each taxpayer which, among other things, tracks all correspondence between the Division and that particular taxpayer and is updated in the ordinary course of business whenever a Division employee works on the taxpayer's account. According to Ms. Caruso, if a taxpayer or representative submitted documentation to the Division via the main desk audit fax number or by mail, it would be imaged into the taxpayer's account upon receipt. Additionally, Ms. Caruso affirms that if a taxpayer calls the Division, a case contact would be entered into the events log in the taxpayer's account.[1]

15. Ms. Caruso avers in her two affidavits that she reviewed petitioners' accounts and that no correspondence or telephone calls were received from petitioners or their representative prior to the requests for conciliation conference. Ms. Caruso also avers that the Division received a power of attorney form, dated October 30, 2016, granting Mr. Nasca power of attorney for petitioners, and that prior to that date petitioners had no power of attorney on file for the years 2012 and 2013. Ms. Caruso states that, prior to the separate conciliation conferences for the

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[1] In Ms. Caruso's affidavit in the proceeding for 2012, Ms. Caruso asserts that the April 16, 2015 notice the Division issued to petitioners included "the main desk audit fax number." In her affidavit for the proceeding relating to the 2013, Ms. Caruso asserts that "the main desk audit fax number" was provided on "the notice mailed to petitioners on December 16. 2015." The Division's response papers for petitioner's motion for the 2013 tax year do not contain any notice dated December 16, 2015; however, a phone number for faxing responses to the Division was provided to petitioners on the letter the Division issued to petitioners dated December 7, 2015.

years 2012 and 2013, petitioners did not provide any documentation to substantiate the claimed deductions.

16. According to Ms. Caruso, at the respective conciliation conferences for the years 2012 and 2013, Mr. Nasca produced documentation to substantiate the itemized deductions claimed on the return, including the job expense deduction, and that, based on that documentation, she informed the conciliation conferee that the Division was granting the full amount of the refunds sought.[2]

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 (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 (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 (Tax Law § 3030 [c] [1] [B] [iii]).

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[2] Ms. Caruso's affidavits also state that, as a result of the documentation provided by Mr. Nasca at the conciliation conferences, she informed the conciliation conferee that the Division was "cancelling the assessment." Since the record in this matter does not refer to any assessment being issued to petitioners for 2012 or 2013, it is unknown to what assessments Ms. Caruso is referring.

B. In order to be entitled to costs under Tax Law § 3030, a taxpayer must be the "prevailing party." Tax Law § 3030 (c) (5) sets forth a number of conditions that a taxpayer must meet in order to qualify as a prevailing party. The taxpayer must have "substantially prevailed" either with respect to the amount in controversy or with respect to the most significant issue or issues presented. The taxpayer must also have submitted "to the court within thirty days of final judgment in the action" an application for fees and other expenses that 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. To be eligible, individual taxpayers must have a net worth that "does not exceed two million dollars at the time the civil action was filed." A taxpayer will not be considered a prevailing party if the "commissioner's decision was substantially justified." The Division has the burden of proof with regard to establishing that its position was substantially justified. If the final determination with respect to tax is made at the administrative level, the Division of Tax Appeals will make the determination of whether the taxpayer is the prevailing party.

C. As noted above, for a taxpayer to qualify as the prevailing party, the taxpayer must file the application for costs within 30 days of "final judgment in the matter" (Tax Law § 3030 [c] [5] [A] [ii] [I]). Unfortunately, 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) § 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 [1977]; ***Matter of Ilter Sener***, Tax Appeals Tribunal, May 5, 1988).

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."

IRC § 7430 (b) (4) allows for an award of costs to be made by the Internal Revenue Service pursuant to IRC § 7430 (a) if the application by the prevailing party is made by the 91st day "after the date on which the *final decision* of the Internal Revenue Service as to the determination of the tax, interest, or penalty is mailed to such party" (emphasis added). The term "final decision" is further delineated in the regulations promulgated pursuant to IRC § 7430, which provide, in pertinent part, as follows:

> "*Period for requesting costs from the Internal Revenue Service*. – To recover reasonable administrative costs pursuant to section 7430 and this section, the taxpayer must file a request for costs no later than 90 days after the date the final decision of the Internal Revenue Service with respect to all tax, additions to tax and penalties at issue in the administrative proceeding is mailed, or otherwise furnished, to the taxpayer. *The final decision of the Internal Revenue Service for purposes of this section is the document which resolves the tax liability of the taxpayer with regard to all tax, additions to tax and penalties at issue in the administrative proceeding* . . . ." (Treas Reg § 301.7430-2 [c] [5]) (emphasis added).

D. Petitioners executed the consents on June 7, 2017, agreeing to refunds in the specified amounts, and waiving any right to a hearing before the Division of Tax Appeals related to the matters for the 2012 and 2013 years. The consents thus resolve the tax liability of petitioners in the administrative proceedings. Therefore, the consents are deemed the final judgments for purposes of Tax Law § 3030 (***see*** Treas Reg § 301.7430-2 [c] [5]). The statute of limitations for filing an application for costs commenced on June 7, 2017, the date the consents were executed.

The petitions herein seeking administrative costs were filed on July 7, 2017. Because the applications for costs were filed within 30 days after the final judgments in the actions, those applications are timely.

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 Division has produced evidence for both the years 2012 and 2013, via the affidavits of Ms. Caruso and documents attached thereto, to establish that the Division did not receive responses to its audit inquiries for either 2012 or 2013, or any documents substantiating petitioners' claimed deductions for those years until the BCMS conferences, notwithstanding that the Division had requested, by letter, such information from petitioners for both 2012 and 2013. While petitioners' requests for conciliation baldly asserted that petitioners "supplied the appropriate documentation but failed to receive the correct refund," their petitions herein make no such assertion, let alone provide proof of such documentation. Accordingly, it is concluded that petitioners did not provide any documentation substantiating the claimed deductions until the time of the BCMS conciliation conference. Because petitioners failed to respond to the Division's requests for information in support of the claimed itemized deductions, the Division was substantially justified in adjusting petitioners' refund amounts by initially disallowing the claimed itemized deductions.

F. Petitioners also do not qualify as the prevailing party here for the additional reason that they have not established that their net worth did not exceed two million dollars at the time the action was filed, as explicitly required by Tax Law § 3030 (c) (5) (A) (ii) (II). While the petitions in this matter assert that petitioners' "net worth was less than $2 million at the time the action was commenced," petitioners have provided no proof in evidentiary form to that effect (***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 Commissioner***, 63 TCM 3133 [1992]).

G. Finally, as noted above, reasonable administrative costs include reasonable fees paid in connection with the administrative proceeding that are incurred after the issuance of the notice or other document giving rise to the taxpayer's right to a hearing (Tax Law § 3030 [c] [2] [B]), not to exceed $75.00 per hour, unless special factors are present (Tax Law § 3030 [c] [1] [B] [iii]). Here, petitioners' have sought to recover amounts paid to their representative, Mr. Nasca, at $125.00 per hour, without showing the existence of any special factors warranting an hour rate exceeding the $75.00 limit. Therefore, even if it were determined that petitioners were entitled to recover costs, which they are not, the amount claimed by petitioners is beyond that authorized by the Tax Law.

H. Petitioner also seeks damages in the amount of $5,000.00 "for the intentional violation of their due process rights" by the Division in this matter. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (***see Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Tribunal***, 151 Misc 2d 326, 573 NYS2d 140 [Sup Ct. 1991, Keniry, J.]). Accordingly, absent legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (***Matter of Hooper***, Tax Appeals Tribunal, July 1, 2010). Tax Law § 2008 (1) provides:

> "All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law."

Because petitioners' complaint of civil damages is not a tax deficiency, determination or refund claim denial, and considering that there is no provision in the Tax Law providing a right to a hearing on the subject of such damage claims, this part of petitioners' protest is beyond the jurisdiction of the Division of Tax Appeals.

I. The applications of Cleone and Bruce Von Elten for costs are denied.

DATED: Albany, New York
November 30, 2017

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE