

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID LEE	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 825285
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2010.	:	

Petitioner, David Lee, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2010.

On October 23, 2014, the Division of Tax Appeals issued a determination granting the petition and cancelling the Notice of Disallowance issued by the Division of Taxation on December 20, 2011.

By letter dated October 29, 2014, petitioner brought an application for costs under Tax Law § 3030.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a response to the motion for costs on December 2, 2014, which date began the 90-day period for issuance of this order.

Based upon petitioner's application for costs, the Division's response to the motion for costs, and all pleadings and proceedings had herein, Barbara J. Russo, 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, David Lee, together with his wife, Mayra Lee, timely filed their joint 2010 resident personal income tax return. Petitioner's return claimed a refund of \$915.00 for the New York State earned income credit.

2. The Division of Taxation (Division) issued a Notice of Disallowance dated December 20, 2011, denying the claimed New York State earned income credit refund of \$915.00.

3. A hearing was held in this matter before the Division of Tax Appeals on April 23, 2014, wherein the Division and petitioner presented evidence and testimony.

4. On October 23, 2014, the Division of Tax Appeals issued a determination granting the petition and cancelling the Notice of Disallowance.

5. Petitioner's October 29, 2014 application seeks an award of costs for fees paid to Edwin Rivera. On April 23, 2014, Mr. Rivera, applied for special permission to represent petitioner in this matter. Special permission was granted by the Tax Appeals Tribunal on April 23, 2014.

6. Petitioner's application for costs, set forth in a letter from Mr. Rivera, states:

"In the matter of the Petition of David Lee for Redetermination of a Deficiency or for Refund of New York State Personal Income tax under article 22 of the Tax Law for the 2010, twenty (20) hours were use [sic] up in the preparation and representation. Edwin Rivera, Accountant, is respectfully asking the Hearing Support Unit, Division of Tax Appeals, to consider this application for reasonable administrative costs pursuant to Tax Law § 3030. We normally charge our clients by the hour, \$185.00/hour."

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]).

B. A prevailing party is defined by the statute 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. While it is clear that petitioner has substantially prevailed with the amount in controversy, based on the determination of the Division of Tax Appeals issued on October 23, 2014, petitioner has failed to establish his expenses pursuant to the statute and its requirement that an itemized statement of the actual time expended, and the rate at which fees and other expenses were computed, must be submitted. In this regard, the letter from Edwin Rivera (*see* Finding of Fact 6) does not meet the itemized statement of actual time and rate criteria of Tax Law § 3030(c)(5)(A)(ii)(I) or establish that petitioner was in fact charged \$185.00 per hour, the amount Mr. Rivera merely claims is what he “normally charges” his clients.¹ Also, as the

¹ Additionally petitioner has failed to present any special factors that would justify a higher amount than the statutorily mandated amount of \$75.00 per hour.

Division correctly argues, Mr. Rivera was not granted special permission to represent petitioner until the day of the hearing. As such, no costs could be awarded for any alleged services provided prior to the hearing date.

D. Finally, and as an additional independent basis for denying the relief sought, petitioner has not established that his 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).

E. As petitioner has failed to meet the requirements of Tax Law § 3030(c)(5)(A)(ii)(I) and (II), it is not necessary to determine whether the Division's position was substantially justified pursuant to Tax Law § 3030(c)(5)(B).

F. The application for costs of petitioner, David Lee, is denied.

DATED: Albany, New York
December 31, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE