

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOHN B. YOUNG</b>	:	<b>ORDER</b>
for Redetermination of a Deficiency or for Refund of	:	<b>DTA NO. 825365</b>
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2008.	:	

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Petitioner, John B. Young, 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 2008.

On June 12, 2013, the Division of Taxation filed with the Division of Tax Appeals a Notice of Cancellation of Deficiency and Discontinuance of Proceeding canceling the Notice of Deficiency petitioned by petitioner.

By letter dated August 19, 2013, petitioner brought an application for costs under Tax Law § 3030.

The Division of Taxation, appearing by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), filed a response to the motion for costs dated August 26, 2013, which date began the 90-day period for issuance of this order.

Based upon petitioner's application for costs, accompanying documentation, the Division's response to the motion for costs, accompanying affidavit and documentation, the notice of cancellation of deficiency and discontinuance of proceeding and all pleadings and proceedings had herein, Thomas C. Sacca, 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. On March 27, 2012, the Division of Taxation (Division) issued to petitioner, John B. Young, a Notice of Deficiency asserting personal income tax due in the amount of \$10,587.84, plus interest, for the year 2008. The notice stated, in part, that “[t]he New York source wages reported on your return do not agree with the information provided by your employer and your Wage and Tax Statement (W2). The income you earned for services performed in New York State (NYS) must be reported in the NYS column of the IT-203.”

2. Petitioner filed a Request for Conciliation Conference, on August 1, 2012, with the Bureau of Conciliation and Mediation Services (BCMS). On August 17, 2012, BCMS issued to petitioner a Conciliation Order that denied the request on the grounds that it had been filed beyond the 90 day statutory time period. In response, petitioner filed a petition with the Division of Tax Appeals.

3. On April 8, 2013, petitioner was advised that BCMS had rescinded the conciliation order dismissing petitioner’s request as untimely. Petitioner was further advised that the timeliness of his request for a conciliation conference was no longer at issue, and that a BCMS conference would be scheduled on the merits. Petitioner was requested to sign a stipulation for discontinuance of proceedings upon rescission of a conciliation order dismissing a request of the matter presently before the Division of Tax Appeals, and that should the matter not be resolved at BCMS, he would have an opportunity to again bring the matter to the Division of Tax Appeals. Petitioner failed to sign the stipulation for discontinuance.

4. On May 30, 2013, petitioner, by his representative, executed a Withdrawal of Protest with the Division that canceled the Notice of Deficiency issued for the year 2008. The Division, on June 12, 2013, filed with the Division of Tax Appeals a Notice of Cancellation of Deficiency and Discontinuance of Proceeding. An Order of Discontinuance was issued finally determining the above-captioned matter in accordance with the terms of such Cancellation of Assessment. Since the Cancellation of Assessment did not provide for an agreement between the parties as to which (if either) was the prevailing party, petitioner retained the option to make application to the Division of Tax Appeals for costs and fees.

5. Petitioner's August 19, 2013 application seeks an award of costs in the amount of \$3,256.00, consisting specifically of fees paid to Michael J. Knight, CPA. On November 14, 2012, Mr. Knight, a CPA practicing in Fairfield, Connecticut, applied for special permission to represent petitioner in this matter. Special permission was granted by the Tax Appeals Tribunal on December 18, 2012.

6. In support of these fees and expenses, petitioner provided an invoice from Knight Rolleri Sheppard CPAs, LLP. The invoice contains a statement date of "7/8/13," a client number of "1444," a description of services of "Balance Forward" and a current balance of "\$3,256.00." Petitioner's name does not appear on the invoice.

#### ***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][2][B][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. In this case, the Division canceled the assessment issued against petitioner. In light of this result, and notwithstanding the lack of information concerning the substantive basis upon which this resolution was reached, petitioner was clearly the prevailing party with respect to the amount in controversy (Tax Law § 3030[c][5][A][i][I]).

D. However, 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 invoice from Knight Rolleri Sheppard CPAs, LLP (*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), nor does the billing document regarding the CPA firm provide such rate and time information or establish that petitioner was in fact represented in these proceedings by Knight Rolleri Sheppard CPAs, LLP.

E. 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).

F. The application for costs of petitioner, John B. Young, is denied.

DATED: Albany, New York  
November 27, 2013

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE