

NEW YORK STATE

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of : ORDER  
**BENTLEY BLUM** : DTA NO. 825455  
for Redetermination of a Deficiency or for Refund of New :  
York State and New York City Personal Income Taxes :  
under Article 22 of the Tax Law and the Administrative :  
Code of the City of New York for the Year 1996. :  
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Petitioner, Bentley Blum, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1996.

Petitioner, by its representative, Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel), filed an application for costs pursuant to Tax Law § 3030. The Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), timely responded to petitioner's application by filing a memorandum in opposition thereto. The due date for the Division of Taxation's response was July 17, 2015, and it is this date which began the 90-day period for issuance of this order. Based upon petitioner's application for costs and the Division's affirmation in opposition, and all pleadings and proceedings had herein, Arthur S. Bray, 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. The Division of Taxation (Division) issued a Notice of Deficiency, dated May 22, 2012, which explained that petitioner had a deficiency of New York State and New York City personal income tax in the amount of \$159,561.02 plus interest for a balance due of \$473,208.56. The notice was based on an unreported federal audit change for 1996. The Division reached the conclusion that there was an unreported federal audit change on the basis of a “Flat Sum Settlement” of \$510,000.00 with the Internal Revenue Service.

2. The Division calculated the New York State and New York City tax on the income base that resulted in the \$510,000.00 federal tax amount due. The calculation resulted in an income base of \$1,378,343.00. This amount, in turn, was used as the federal adjusted gross income in the Division’s adjustment.

3. The federal adjustment was a “Flat Sum Settlement” that constituted an agreed upon sum in satisfaction of the liability of petitioner and other parties. It was not a change in petitioner’s taxable income.

4. In a determination dated April 16, 2015, the Division of Tax Appeals concluded that the Notice of Deficiency was barred by the statute of limitations because there had not been the type of federal change contemplated by Tax Law § 659.

5. In support of his motion for an award of litigation expenses, petitioner’s representative contends that since early in mid-2010 he has tried to convince the Division’s representative that his position was correct. According to petitioner, all of the information originally provided to the Division of Tax Appeals was provided to the Division’s agent, who erroneously determined that there was a federal change that kept the statute of limitations open. Petitioner continued to press his argument to the Bureau of Conciliation and Mediation Services and to the Division of

Taxation's counsel. Petitioner then notes that on April 16, 2015, the Division of Tax Appeals issued a determination that found that the Notice of Deficiency, dated May 22, 2013, was barred by the statute of limitations and that the notice should be cancelled.

6. Petitioner submits that "as a party seeking an award of legal fees, [he] satisfied the net worth requirements of Tax Law § 3030(c)(5)(ii) at the time of the filing of the petition in this matter." Petitioner also states that he expended \$5,200.00 in legal fees during the administrative proceeding.

7. In response to the motion, the Division submits that petitioner does not qualify as a prevailing party because the Division's position was substantially justified and because the Division did not fail to adhere to existing statutes, guidelines and other governing provisions.

#### ***CONCLUSIONS OF LAW***

A. A prevailing party is entitled to reasonable administrative costs, including 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]). A prevailing party is defined as follows:

*"Prevailing party* is defined for purposes of section 3030, 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. . . .

(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. As set forth above, a party shall not be treated as a prevailing party if the Division’s position was substantially justified (Tax Law § 3030[c][5][B][i]). In *Matter of Grillo* (Tax Appeals Tribunal, August 23, 2012), the Tax Appeals Tribunal described the burden of establishing substantial justification as follows:

“In order to prove substantial justification, the Division must show that its position ‘had a reasonable basis both in fact and law’ (*see Powers v. Commissioner*, 100 TC 457, 470 [1993]; *see also Pierce v Underwood*, 487 US 552 [1988]). While the cancellation of a notice may be considered (*Heasley v. Commissioner*, 967 F2d 116 [1992]), this determination must also consider ‘all the facts and circumstances’ surrounding the case, not solely the final outcome (*Phillips v Commissioner*, 851 F2d 1492, 1499 [1988]). The Division has met its burden when it has shown that the issuance of the Notice was ‘justified to a degree that could satisfy a reasonable person’” (*Pierce* at 565).

C. On the basis of the foregoing standard, petitioner’s motion is denied because the Division has satisfied the reasonable person standard. On the basis of Tax Law § 659, the Division reasonably believed that an assessment based on unreported federal audit changes could be made at any time. The Division’s conclusion that there was additional income was simply a logical extrapolation of the changes made by the Internal Revenue Service. It is also noteworthy that there is no controlling precedent to the contrary. Moreover, there is no basis to conclude that the Division failed to follow any applicable published guidance regarding the treatment of a “Flat Sum Settlement.” Under the circumstances, the position of the commissioner was “substantially justified” (Tax Law § 3030[c][5][B][i]). Consequently, petitioner may not recover costs because petitioner may not be treated as the prevailing party for purposes of Tax Law § 3030.

DATED: Albany, New York  
October 1, 2015

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE