STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HASSAN IQBAL	:	ORDER DTA NO. 826285
for an Award of Costs Pursuant to Article 41, § 3030, of the Tax Law for the Year 2012.	:	

Petitioner, Hassan Iqbal, filed a petition for an award of costs pursuant to Article 41, § 3030, of the Tax Law for the year 2012.

On September 2, 2015, petitioner, appearing pro se, filed a petition making an application for an award of costs pursuant to Tax Law § 3030. By a letter dated September 4, 2015, the date for the Division of Taxation's response to petitioner's application for costs was set at October 5, 2015. The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda Harmonick, Esq., of counsel), filed an affirmation, including attached exhibits and a supporting affidavit, in opposition to the application for costs. On October 13, 2015, petitioner submitted a reply to the Division's response to the application for costs, and such date began the 90-day period for issuance of this order.

Based upon petitioner's application for costs, the Division's response in opposition thereto, petitioner's reply, and all pleadings and proceedings had in this matter, Dennis M. Galliher, 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, Hassan Iqbal, filed a New York State and New York City Resident Income Tax Return (Form IT-201) for the year 2012,[1] reporting thereon federal and New York adjusted gross income in the amount of $24,304.00. This amount consisted of wage, salary and tip income of $4,125.00, plus business income of $21,713.00, less federal adjustments to income in the amount of $1,534.00. The business income reported by petitioner reflects the net profit shown on petitioner's Schedule C (Profit of Loss From Business), as filed with his return. On such Schedule C, petitioner reported gross income of $75,881.00, earned from engaging in business as a taxi cab driver (Yellow Cab Driver), and reduced such amount by total claimed expenses of $54,168.00, to arrive at reported business income (net profit) of $21,713.00.

2. Petitioner's New York adjusted gross income ($24,304.00) was reduced by the standard deduction amount ($15,000.00) and by four claimed dependent exemptions ($4,000.00), resulting in taxable income of $5,304.00. Petitioner's resulting New York State tax liability of $213.00 was reduced by a New York State household credit of $100.00, resulting in a New York State tax liability of $113.00. Petitioner's New York City tax liability was $155.00. Thus, petitioner's reported combined New York State and City tax liability totaled $268.00

3. Petitioner's combined tax liability was reduced, in turn, by the Empire State child credit ($1,055.00), New York State earned income credit ($1,539.00), New York City school tax credit ($125.00), New York City earned income credit ($273.00), New York State tax withheld ($173.00) and New York City tax withheld ($60.00). The total of the foregoing payments and

[1] Petitioner's return was filed jointly with his spouse, Sajida Iqbal. Sajida Iqbal is not a party to this proceeding.

refundable credits ($3,225.00) eliminated petitioner's combined tax liability of $268.00, and resulted in a claimed total refund of $2,957.00.

4. On March 21, 2013, the Division of Taxation (Division) opened an audit case and issued a detailed inquiry letter concerning petitioner's return, requesting proof concerning the dependents listed on the return, and proof detailing and substantiating the amounts of income and expenses claimed on such return, including specifically the amounts on Schedule C attached thereto.

5. Petitioner submitted some limited documentation in response to the Division's inquiry letter. On July 23, 2003, after review of petitioner's submission, the Division issued to petitioner a four-page "Account Adjustment Notice - Personal Income Tax" (First Adjustment), detailing numerous adjustments, corrections and recalculations of petitioner's tax liability, as reported, for 2012. In particular, the Division disallowed petitioner's claimed Schedule C business expense deductions and claimed credits for dependents, based on petitioner's failure to provide adequate proof of such claimed items. This First Adjustment allowed a portion ($1,017.05) of petitioner's claimed refund ($2,957.00), thus leaving $1,939.95 of petitioner's claimed refund disallowed for lack of substantiation. A refund check was issued to petitioner in the amount of $1,017.05.

6. Petitioner submitted additional documentation in response to the foregoing First Adjustment. On October 2, 2013, the Division issued to petitioner a second "Account Adjustment Notice - Personal Income Tax" (Second Adjustment). This document consisted of five pages and reflected numerous further adjustments, corrections and recalculations of petitioner's tax liability for 2012. In particular, the Division noted that petitioner had provided sufficient proof concerning his claimed credits for dependents and sufficient substantiation for some, but not all, of his claimed business expenses. Further, the Division noted petitioner's documents revealed that

business income from cash tips had been reported as five percent of cash fares. The Second Adjustment proposed an increase to petitioner's business income based on cash tips as a percentage of cash fares from the 5 percent amount reported by petitioner to 18 percent. The Second Adjustment also included a two-page detailed explanation of the particular changes made, including a detailed list of the remaining items of claimed business expenses disallowed for lack of substantiation. In sum, this Second Adjustment reduced the remaining $1,939.95 disallowed portion of petitioner's claimed refund by $299.00, thus leaving $1,640.95 of petitioner's claimed refund disallowed. A refund check was issued to petitioner in the amount of $299.00.

7. Petitioner submitted additional information in response to the Division's Second Adjustment. After review, the Division determined the same was not sufficient to support any additional adjustments sought by petitioner for claimed but disallowed business expenses, or to eliminate the proposed increase to reported cash tips, or to allow any additional refund. By a letter to petitioner dated November 27, 2013, the Division notified petitioner that the remaining $1,640.95 amount of claimed, but disallowed, refund was denied.

8. Petitioner challenged the foregoing refund denial by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held on April 29, 2014, at which petitioner appeared pro se. By a Conciliation Order dated June 13, 2014 (CMS No. 260311), petitioner's request was denied and the Division's November 27, 2013 denial of his remaining $1,640.95 claim for refund was sustained.

9. Petitioner challenged the foregoing Conciliation Order by filing a petition with the Division of Tax Appeals seeking a refund of $1,640.75.[2] Petitioner elected to proceed via a small claims hearing.

10. A hearing was held on May 21, 2015, and on August 20, 2015, the presiding officer issued his Determination. As detailed in that Determination, the parties resolved some issues prior to the hearing based upon documents submitted by petitioner, including the Division's allowance of petitioner's claimed business expenses for his taxicab lease, gasoline, MCTMT Tax and a portion of his claimed tolls and parking expenses. Further, petitioner conceded and did not continue his challenge with regard to his claimed business deduction for laundry expenses. Thus, at hearing petitioner's challenge specifically concerned $6,646.00 in disallowed business expenses, and the Division's proposed increase to income based upon unreported cash tips.

11. In his Determination, the presiding officer allowed a total of $1,357.00 out of the challenged $6,646.00 in disallowed business expenses. This allowance was based upon petitioner's testimony coupled with some limited documentary substantiation provided by petitioner, and in partial reliance upon ***Cohan v. Commissioner*** (39 F2d 540, 544 [2d Cir 1930]) (the "***Cohan*** rule" whereunder courts may make an approximation of an allowable amount when the taxpayer is unable to fully substantiate claimed business deductions by documentation, as limited however by ***Pfluger v. Commissioner***, 840 F2d 1379 [7th Cir 1988], ***cert denied*** 487 US 1237 [1988]; Internal Revenue Code [IRC] § 274[d]; ***see Sanford v. Commissioner***, 50 TC 823 at 827). The presiding officer further, and in a similar manner, increased petitioner's reported

[2] The 20 cent difference between the amount of claimed but disallowed refund ($1640.95) and the amount sought in the petition ($1,640.75) is unexplained, likely represents a typographical error and is, in any event, inconsequential.

income from cash tips to 12 percent of cash fares noting petitioner's concession that he had underreported cash tips, but at the same time rejecting the Division's proposed increase to 18 percent of cash fares as unsupported. As directed in the Determination, the Division applied the noted adjustments ordered by the presiding officer, and the same resulted in an additional refund in the amount of $437.10, thereby reducing the amount of petitioner's denied refund from $1,640.95 to $1,203.85.

12. Petitioner's application herein, dated September 1, 2015, seeks an award of costs in the amount of $1,050.00, as follows:

Invoice/Bill #	Date	Amount	Hours
3965	8/15/13	$600.00	8
5356	5/11/14	$450.00	6

Petitioner's description of the costs covered by each of the two invoices was similar, as follows:

> "Preparation, filing, BCMS, legal search, call, copy, attend, mail, scan, fax, follow up and etc. by my representative: Anwarul Huque, EA."

Attached to petitioner's application were the two invoices referenced above, together with receipts showing petitioner's payment of the amounts of the invoices. In each instance, the dollar amount is set forth as a total sum, without itemization as to the amount charged per hour by petitioner's representative, Mr. Huque, and without any distinction between such hourly amount versus that charged for other listed services such as copying, mailing, scanning or faxing.

13. In opposition to petitioner's application for costs, the Division maintains that petitioner was not the "prevailing party," for purposes of Tax Law § 3030, alleging that he had not "substantially prevailed with respect to the amount in controversy," and had not

"substantially prevailed with respect to the most significant issue or set of issues presented." (Tax Law § 3030[c][5][A][i][I],[II]). In this regard, the Division points out that petitioner challenged $6,646.00 of disallowed deductions for business expenses within some nine categories of expenses. He prevailed in two of such categories (tax preparation fee and taxes and licenses) in the total amount of $265.00 in expenses, representing approximately four percent of the total amount of expenses sought. The remaining seven categories of expenses represented approximately 96 percent of the total deduction sought but disallowed. Petitioner's claimed deductions in three of these remaining seven categories of expense (travel, telephone and tolls), in the total amount of $3,961.00 were entirely denied. While the deductions sought under the remaining four categories of expense were allowed, in part, the amount allowed in three of such categories (oil changes, flat tire repairs and car washes) was only 50 percent of the amount of deduction claimed, while the amount allowed in the remaining category (supplies) was less than half of the amount sought. Thus, of the $6,646.00 challenged at hearing, petitioner was allowed a total of $1,357.00, or approximately 20 percent thereof ($1,357.00 out of $6,646.00 equals 20.42%). As to the issue of underreported cash tips, while the same were not increased to 18 percent, as sought by the Division, they were increased by some 7 percent, i.e., to 12 percent, or more than double the amount that had been reported by petitioner. In final result, petitioner ultimately received approximately 27 percent of the amount of his refund denied by the Division on November 27, 2013 and challenged thereafter by petitioner ($437.10 out of $1,640.75 equals 26.64%).

14. The Division asserts, in light of the foregoing, that its position was at all times substantially justified, including specifically when viewed as of the date of issuance of the

document (here the November 27, 2013 letter denying petitioner's claimed refund) giving rise to the taxpayer's right to a hearing (Tax Law § 3030[c][5][B][i]; § 3030[c][[8]B]). The Division points out that to the extent a portion of petitioner's claimed deductions were allowed, such partial allowance was premised largely upon petitioner's testimony, bank statements and market data as opposed to "contemporaneously generated documents" (receipts, daily ledgers, and the like), which would have enabled verification of the amounts claimed. The Division also notes that petitioner conceded at hearing that his cash tips were underreported on his return, and that he did not provide records directly verifying such cash tips, thus supporting and justifying the Division's position in increasing the amount of business income petitioner derived from cash tips.

15. Finally, and with respect to the amount of costs sought herein, the Division maintains that petitioner has provided no documentation concerning or specifying the nature of the fees or services provided by Mr. Huque, or the billing rate or time actually expended by petitioner's representative in providing such fees or services, in contrast to any other costs allegedly incurred, and thus has failed to establish that the alleged fees qualify as recoverable costs under Tax Law § 3030.

16. In reply, petitioner maintains that comparing the total amount of refund granted ($1,753.15)[3] to the total refund claimed with the filing of his return ($2,957.00), reveals that he received nearly 60 percent of his claimed refund and thus is the prevailing party in this matter.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

[3] Consisting of $1,017.05 (First Adjustment), $299.00 (Second Adjustment) and $437.10 (Small Claims Determination).

> "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 also 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].)

B. Tax Law § 3030(c)(6) defines the term "administrative proceeding" to mean "any procedure or other action before the division of taxation (such as the bureau of conciliation and mediation services) or division of tax appeals."

C. A prevailing party is defined by 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" (Tax Law § 3030[c][5]; italics added).

D. Petitioner's application for an award of costs is denied. First, petitioner was not the "prevailing party" under Tax Law § 3030 with respect to either "the amount in controversy" or "the most significant issue or set of issues" (Tax Law § 3030[c][5][A][i]). On this score, the Division was clearly and substantially justified in issuing its letter notifying petitioner of the denial of the balance of his claim for refund. This denial letter, pursuant to which petitioner became entitled to seek a hearing, was issued on November 27, 2013. By this point in time, the Division had already requested, received and reviewed both petitioner's initial submission of documents in support of his refund claim as well as his subsequent submission of additional documents. As of the November 27, 2013 date of the denial letter, petitioner had substantiated entitlement to approximately 56 percent of the refund claimed with the filing of his return ($1640.75 divided by $2,957.00 equals 55.49 percent). Without additional records in support of the remaining claimed and disallowed amounts set forth on petitioner's return, the Division was fully justified in issuing its denial letter on November 27, 2013 (Tax Law § 658[a]; ***see Matter of Macaluso***, Tax Appeals Tribunal, September 22, 1997, ***affd Macaluso v. NYS Dept of Taxation and Finance***, 259 AD2d 795 [1999]). Thereafter, as measured from such November 27, 2013 date through the conclusion of petitioner's challenge, petitioner recovered only approximately 20

percent of his remaining claimed, but disallowed, business expenses and approximately 27 percent of the amount of his claimed, but denied, refund. The two issues presented in response to the November 27, 2013 denial letter concerned claimed, but disallowed, deductions for business expenses and an increase to petitioner's reported income from cash tips. As noted, much of the amount allowed for claimed, but disallowed, business expenses was based upon "reasonable approximation" under the ***Cohan*** rule, as opposed to supporting documentation (***see*** Finding of Fact 11). Further, the increase to reported business income (though not allowed to the extent sought by the Division) reflected petitioner's acknowledged concession that he had, in fact, underreported income from cash tips (***see*** Findings of Fact 11, 13 and 14). Given the foregoing, the Division's actions were clearly justified and petitioner did not substantially prevail with respect to either the amount in controversy or with respect to the most significant issues presented (***see Matter of Gerimedix, Inc.***, Tax Appeals Tribunal, May 31, 2007).

E. In addition to the foregoing, and as an additional independent basis for denying the relief sought, petitioner has provided no information itemizing the basis for the amount of the costs award sought. Beyond setting forth the lump sum dollar amount charged by his representative and the generic statement of items covered thereby, via the two invoices submitted with his application, petitioner has provided no information as to the rate charged for such various listed items, including any differentiation among them.[4] Further, and as the Division observes, the first invoice appears to include a charge for petitioner's representative's appearance

[4] It is noted that the total dollar amount shown on each of the invoices divided by the number of hours listed on each of such invoices arrives neatly at the $75.00 maximum recoverable per hour amount (absent other special circumstances) listed in the statute (Tax Law § 3030[c][1][B][iii]). It is further noted that the invoices make no distinctions between such per hour amount regardless of the services allegedly being provided (e.g., representation including research, hearing preparation and attendance versus copying, mailing, scanning and faxing).

(i.e., attendance) at the BCMS conference among the listed items upon which the total fee was based and paid. In contrast, however, the record reflects that petitioner's representative did not accompany petitioner to, or appear at, the conference. In sum, the general presentation of such undifferentiated invoices leaves the amounts set forth thereon, and sought as an award of costs, far short of meeting the requirement to provide an itemized statement of "the actual time expended and the rate at which fees and other expenses were computed," per Tax Law § 3030(c)(5)(A)(ii)(I).

F. Finally, and as a third independent basis for denying the relief sought, petitioner has neither alleged nor provided any information to establish 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).

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

DATED: Albany, New York
January 7, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE