STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL AND SUZANNE DOYLE	:	ORDER DTA NO. 828084
for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Year 2014.	:	

Petitioners, Michael and Suzanne Doyle, appearing by Dean Nasca, CPA, filed a petition on February 13, 2017, seeking administrative costs under section 3030, Article 41 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Jordan, Esq.), was granted an extension of time within which to file a response to the application for costs by April 17, 2017, and filed its response on April 14, 2017. The 90-day period for issuance of this order commenced on April 17, 2017.

Based upon petitioners' application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, Barbara J. Russo, 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. The Division of Taxation (Division) issued correspondence to petitioners, dated November 9, 2015, requesting information regarding itemized deductions reported on

petitioners' 2014 resident income tax return. The correspondence requested that petitioners respond to the Division's request for information within 60 days.

2. On March 8, 2016, the Division issued a statement of proposed audit changes (Statement) to petitioners, stating that petitioners did not respond to the Division's earlier request for information and, as a result, the Division disallowed the itemized deductions claimed for 2014. The Statement informed petitioners that if they did not respond by April 7, 2016, a notice of deficiency would be issued.

3. The Division did not receive a response from petitioners within the time provided.

4. The Division issued a notice of deficiency, dated April 25, 2016, to petitioners asserting tax due in the amount of $343.43 plus interest for tax year 2014.

5. Petitioners filed a request for a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) on July 18, 2016.

6. During proceedings before BCMS, petitioners, by their representative, signed a consent with the Division, dated January 11, 2017, wherein petitioners agreed to a cancellation of the deficiency and a credit or refund in the amount of $1,222.00 for tax year 2014. The consent states, in part, "I hearby agree to waive any right to a hearing in the Division of Tax Appeals concerning the above notice(s)."

7. On February 13, 2017, petitioners filed a petition with the Division of Tax Appeals seeking an award of costs for fees paid to their representative. Attached to the petition is an invoice from Dean Nasca, CPA, indicating the following dates and charges:

Date	Description	Hours	Hourly Rate	Total Charge
December 14, 2015	Copy and fax documentation requested in NYS Audit Demand Letter	1.0	$100.00	$100.00
July 15, 2016	Preparation of Request for Conciliation Conference Forms	0.25	$100.00	$25.00 plus $4.45 certified mailing fee
December 5, 2015	Copy required documentation and prepare for Conciliation Conference	1.0	$100.00	$100.00
December 6, 2016	Attend Conciliation Conference in Hauppauge, NY	1/5	$100.00	$150.00
TOTAL				$379.45

8. Included with the Division's response to petitioners' application for costs is an affidavit of Karen Norray, dated April 10, 2017. Ms. Norray is a Tax Technician II in the Division's Income/Franchise Desk Audit Bureau and has been in that position since September 2010. Ms. Norray's duties include acting as a BCMS advocate, preparing and coordinating closed files, reviewing cases for quality control, and supervising desk audits. Ms. Norray's affidavit is based upon her review of the Division's files and her personal involvement in the matter. Ms. Norray was assigned as the Division's advocate during the BCMS proceedings in this matter and reviewed the entire audit file.

9. The Division maintains an e-MPIRE account for each taxpayer which, among other things, tracks all correspondence between the Division and that taxpayer and is updated in the ordinary course of business whenever a Division employee works on the taxpayer's account. According to Ms. Norray, if a taxpayer or representative submits documentation to the Division

at the fax number or address indicated on the notice issued to petitioners, it would be imaged into the taxpayers' account upon receipt. Additionally, Ms. Norray affirms that if a taxpayer calls the Division, a case contact would be entered into the events log in the taxpayer's account.

10. Ms. Norray avers that she reviewed petitioners' accounts and that no correspondence or telephone calls were received from petitioners or their representative prior to a request for conciliation conference received on July 18, 2016. In addition, on July 18, 2016, the Division received a power of attorney form, dated May 2, 2016, granting Dean Nasca, CPA, power of attorney for petitioners. Ms. Norray states that prior to the BCMS conference, petitioners did not respond to the audit inquiry or provide any information to substantiate the claimed deductions.

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, in part, 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. As noted above, the application must be brought 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 § 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 Sener***, Tax Appeals Tribunal, May 5, 1988).

Internal Revenue Code § 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."

Internal Revenue Code § 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.

The Federal regulation promulgated pursuant to IRC § 7430 provides, 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 entered into a consent dated January 11, 2017, canceling the deficiency, agreeing to a refund in the amount of $1,222.00, and waiving any right to a hearing before the Division of Tax Appeals related to the matter. The consent thus resolves the tax liability of petitioners in the administrative proceeding. As such, the consent is deemed the final judgment for purposes of Tax Law § 3030 (***see*** Treas Reg § 301.7430-2[c][3][iii][5]). The statute of limitations for filing an application for costs commenced on January 11, 2017, the date of the consent. The petition herein seeking administrative costs was filed on February 13, 2017. As the application for costs was filed more than 30 days after the final judgment in the action, petitioners' application for costs is untimely.

E. Moreover, the Division has met its burden of proving that its position was substantially justified (***see*** Tax Law § 3030[c][5][B]). The Division has presented sufficient evidence, via the affidavit of Ms. Norray and documents attached thereto, to establish that the Division did not receive a response to its audit inquiry or any documents substantiating petitioners' claimed deductions until the BCMS conference, after the issuance of the notice of deficiency. Although the invoice submitted from petitioners' representative includes claimed charges for a date prior to the issuance of the notice for an alleged response to the audit letter, said invoice is not a sworn statement and petitioners did not include any affidavits or other evidence to support a claim that they responded to the initial audit inquiry. Because petitioners failed to respond to the Division's initial request for information in support of the claimed itemized deductions, and failed to respond to the subsequently issued Statement, the Division was substantially justified in issuing the subject notice of deficiency.

F. As noted above, 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]), not to exceed $75.00 per hour (Tax Law § 3030[c][1][B][iii]). As such, even if 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. Specifically, costs claimed for services on December 14, 2015, precede the date of the subject notice of deficiency, dated April 25, 2016, and the fee of $100.00 per hour exceeds the statutory limit of $75.00.

G. Finally, as an additional independent basis for denying the relief sought, petitioners 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).

H. The application of Michael and Suzanne Doyle for costs is denied.

DATED: Albany, New York
July 6, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE