STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEAN LYS JEAN PHITO	:	ORDER DTA NO. 828233
for an Award of Costs Pursuant to § 3030 of the Tax Law for the Period 2011 through 2016.	:	

Petitioner, Jean Lys Jean Phito, appearing by Larry Kars, Esq., filed a petition on December 15, 2017, seeking administrative costs under section 3030 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel), filed a response to the application for costs on January 12, 2018, which commenced the 90-day period for issuance of this order.

Based upon petitioner's application for costs, the Division's response to the application, 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. The Division of Taxation (Division) issued to petitioner the following notices of estimated deficiency (estimated notices) and notice and demands for payment of tax due (notice and demands):

Estimated Notices

Tax Period Ended	Notice Number	Notice Date	Address	Amount
09/30/2014	L-043774022	10/07/2015	Jean Lys Jean Phito 4913 Roosevelt Ave Woodside, NY 11377	Tax $1,374.50 Interest $103.98 Penalty $343.60
12/31/2014	L-047385611	10/13/2015	Jean Lys Jean Phito 4913 Roosevelt Ave Woodside, NY 11377	Tax $1,396.50 Interest $78.45 Penalty $349.10

Notice and Demands

Tax Period Ended	Notice Number	Notice Date	Address	Amount
03/31/2011	L-036470824	07/28/2011	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $1,82.50 Interest $41.29 Penalty $282.36
06/30/2011	L-036918610	11/21/2011	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $1,943.50 Interest $52.12 Penalty $388.68
09/30/2011	L-037280746	02/01/2012	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $1,882.50 Interest $40.66 Penalty $376.48
12/31/2011	L-037851422	05/15/2012	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $1,803.50 Interest $43.12 Penalty $360.68
03/31/2012	L-038677221	10/12/2012	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $1,497.50 Interest $54.82 Penalty $374.35
06/30/2012	L-039097983	02/28/2013	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $1,557.50 Interest $73.02 Penalty $389.35
09/30/2012	L-039220675	04/15/2013	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $2,070.00 Interest $76.66 Penalty $517.50
12/31/2012	L-039565184	06/20/2013	Jean Lys Jean Phito 49-13 Roosevelt Ave Woodside, NY 11377	Tax $1,741.50 Interest $54.88 Penalty $435.35
03/31/2013	L-041346796	06/03/2014	Jean Lys Jean Phito 4913 Roosevelt Ave Woodside, NY 11377	Tax $1,556.00 Interest $136.49 Penalty $389.25

06/30/2013	L-041762131	08/06/2014	Jean Lys Jean Phito 4913 Roosevelt Ave Woodside, NY 11377	Tax $1,762.00 Interest $143.86 Penalty $440.50

The estimated notices and notice and demands indicated that the tax type was a "taxicab fee," and state that according to the Division's records, petitioner had not filed quarterly taxicab trip tax returns for the periods at issue, and further stated that:

> "Medallion owners or their agents must file returns and pay the 50 cent tax on most medallion taxicab trips originating in New York City. The amount due was calculated using information provided from the New York City Tax & Limousine Commission for medallion number(s) 2E19."

2. On June 6, 2017, petitioner filed a petition with the Division of Tax Appeals protesting the above estimated notices and notice and demands.[1]

3. On July 21, 2017, the Division of Tax Appeals issued a notice of intent to dismiss petition stating that the petition to the estimated notices appeared to be untimely and the petition to the notice and demands was insufficient to confer jurisdiction upon the Division of Tax Appeals to consider the merits of the petition. The parties were given 30 days from the date of the notice of intent to dismiss to submit written comments on the proposed dismissal. The parties were subsequently granted a 45-day extension to respond to the notice of intent to dismiss petition.

4. On September 26, 2017, the Division filed a Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding, dated September 20, 2017, with the Division of Tax Appeals for notice numbers L-036470824, L-036918610, L-037280746, L-

[1] The petition also protested notice numbers L-044981709 and L-045423441, which were severed, assigned a separate Division of Tax Appeals case number, and are not at issue here. Attached to the petition were two conciliation orders dated March 24, 2017, CMS numbers 271590 and 271855, pertaining to notice numbers L-044981709 and L-045423441, respectively. The conciliation orders sustained the statutory notices.

037851422, L-038677221, L-039097983, L-039220675, L-039565184, L-041346796, L-041762131, L-043785611, and L-043774022.

5. On November 29, 2017, the Division of Tax Appeals issued an Order of Discontinuance, stating as follows:

> "The Division of Taxation, having filed with the Division of Tax Appeals a Notice of Cancellation of Assessment which provides that Notices of Determination Nos. L-036470824, L-036918610, L-037280746, L-037851422, L-038677221, L-039097983, L-039220675, L-039565184, L-041346796, L-041762131, L-043785611, and L-043774022 issued to Jean Lys Jean Phito on July 28, 2011, November 21, 2011, February 1, 2012, May 15, 2012, October 12, 2012, February 28, 2013, April 15, 2013, June 20, 2013, June 3, 2014, August 6, 2014, October 13, 2015, and January 25, 2016 are hereby cancelled and of no further effect,
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> Furthermore, it is
>
> Ordered, Adjudged and Decreed, that the determination asserted due from Jean Lys Jean Phito by Notices of Determination Nos. L-036470824, L-036918610, L-037280746, L-037851422, L-038677221, L-039097983, L-039220675, L-039565184, L-041346796, L-041762131, L-043785611, and L-043774022 are hereby cancelled and this proceeding is hereby discontinued with prejudice."

6. On December 15, 2017, petitioner filed a petition with the Division of Tax Appeals seeking an award of costs for fees paid to his representative. Attached to the petition is an invoice from Larry Kars, Esq., indicating the following dates and services:

Date	Description	Hours
August 10, 2016	Meeting with T/P to discuss case; review docs. retainer.	1.5
August 18, 2016	Call Collection Agent Eisen and requested that he delay collection until after hearing; sent him documents.	0.50
August 19, 2016	Research on Taxi Surcharge	2.5
August 22, 2016	Request for conciliation conference; meeting with T/P	3.0
November 28, 2016	Preparation for conciliation	1.0

November 29, 2016	Conciliation conference (relevant portions - argument to include older years, request Notices of Deficiency and denied)	1.25
June 5, 2017	Draft petition with older and newer years	2.5
June 20, 2017	Discussion with Rita at NYS DTA; fax documents - NYS demand for payment papers	.50
June 22, 2017	Discussion Rita - sent list of Assessment numbers	.75
August 2, 2017	Call and Email to Pam Rafferty (NYS Tax) requesting Not. of Def.	.50
August 3, 2017	Prepare affidavit with T/P; organize exhibits, tax retns. etc.	3.0
August 7, 2017	Letter to Judge Friedman	.25
August 17, 2017	Follow-up call and email to Pam Rafferty (NYS)	.25
TOTAL HOURS		17.5

Petitioner's representative claimed an hourly rate of $400.00, for a total billable charge of $7,000.00.

7. Included with petitioner's application for costs is an affidavit from petitioner, stating that his address for the last 23 years was 1172 E. 84th Street, Brooklyn, New York 11236. Attached to the affidavit is the first page of petitioner's 2011 and 2015 resident income tax returns reporting the same Brooklyn, New York, address. Petitioner further states that the Woodside, New York, address to which the Division sent the estimated notices and notice and demands was not his address and that he did not have a business at that address. Petitioner avers that the Woodside, New York, address is the address of Woodside Management, Inc. (Woodside Management), a company to which petitioner leased his medallion taxicab in or about 2010. Attached to petitioner's affidavit is a copy of a management agreement between petitioner and

Woodside Management, dated July 10, 2013, and effective from July 15, 2013 to July 14, 2016, wherein petitioner appointed Woodside Management as his exclusive agent for the purpose of managing medallion number 2E19. Petitioner further avers that his net worth is below two million dollars.

8. Included with the Division's response to petitioner's application for costs is an affidavit of Karen Bariteau, dated January 12, 2018. Ms. Bariteau is a Taxpayer Services Specialist I with the Division. Ms. Bariteau states that as part of her employment and within the scope of her job duties, she has access to the Division's records pertinent to the collection of New York State article 29-A tax from New York City taxicab medallion owners and their agents, including electronic article 29-A taxpayer information, article 29-A tax returns filed by taxicab medallion owners or their agents, and medallion taxicab trip information collected, certified, and transmitted to the Division by the Taxi and Limousine Commission.

Ms. Bariteau states that she reviewed the Division's records to determine the address maintained for petitioner on the dates of the issuance of estimated notice numbers L-043774022 and L-043785611, dated October 7, 2015 and October 13, 2015, respectively.[2] According to Ms. Bariteau, the Division's records "show that an Article 29-A taxpayer information profile for Jean Lys Jean Phito was created on 09/08/10 for the filing of tax returns and the remittance of tax pursuant to Article 29-A of the Tax Law" and that "on 09/09/10, the address of 4913 Roosevelt Ave Woodside, NY 11377-4457 was associated with the taxpayer information profile." Ms. Bariteau avers that estimated notice numbers L-043774022 and L-043785611 were issued to this address.

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[2] Ms. Bariteau also references notice numbers L-044981709 and L-045423441, which are not at issue in this proceeding (***see*** Finding of Fact 2). Ms. Bariteau does not reference the notice and demands at issue in this matter.

Ms. Bariteau further states that on May 27, 2016, the address of 1172 E 84th Street, Brooklyn, New York 11236 was added to the taxpayer information profile and that the addition was initiated by a telephone call to the Division's call center. Said address was selected to be used for all mailings.

Ms. Bariteau states that taxpayer information recorded for the collection of article 29-A tax is maintained separately from any personal tax information, such as information recorded for the collection of personal income tax.

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 (***see*** 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 (***see*** 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 (***see*** 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. In order to be granted an award of costs, it must be determined that the taxpayer is the "prevailing party" pursuant to Tax Law § 3030 (c) (5) (A). Furthermore, any such grant is subject to the limitation of Tax Law § 3030 (c) (5) (B), which provides that a taxpayer may not

be treated as a prevailing party, and thus may not be awarded costs, if the Division establishes that its position was "substantially justified." Clearly, petitioner has satisfied all the criteria of being the prevailing party in this matter per Tax Law § 3030 (c) (5) (A) (i), inasmuch as he substantially prevailed with respect to the amount in controversy, since the Division canceled the estimated notices and notice and demands at issue in their entirety. Moreover, petitioner filed a timely application for costs with an itemized statement from his attorney pursuant to Tax Law § 3030 (c) (5) (A) (ii) (I), and provided an undisputed affidavit attesting that his net worth was below two million dollars, as required by Tax Law § 3030 (c) (5) (A) (ii) (II).

Thus, the critical remaining question is whether the Division's position was substantially justified (Tax Law § 3030 [c] [5] [B]), for if it was, then petitioner may not be treated as a prevailing party and is ineligible for an award of costs and fees.

D. In order to prove substantial justification, the Division must show that its position "had a reasonable basis both in fact and law" (***Matter of Grillo***, Tax Appeals Tribunal, August 23, 2012, citing ***Powers v Commissioner***, 100 TC 457, 470 [1993]). While the cancellation of a notice may be considered (***see Heasley v Commissioner***, 967 F2d 116 [199]), 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" (***Matter of Grillo***, citing ***Pierce v Underwood***, 487 US 552, 565 [1988]).

The Division argues that petitioner is not a prevailing party, contending that petitioner was responsible for the collection and payment of tax under article 29-A despite his contract with another party to use his medallion taxicab. There is no dispute that petitioner was the owner of a

taxicab during the periods at issue. Petitioner argues that he leased the medallion taxicab to Woodside Management and Woodside Management had agreed to pay any taxes based on the medallion ownership.

Contrary to petitioner's argument, the mere leasing of the taxicab license to an agent does not relieve the owner of liability (***see*** Tax Law § 1283 [b]). Rather, Tax Law § 1281 imposes a tax of fifty cents per taxicab trip on every taxicab owner, and Tax Law § 1283 (b) provides that if the taxicab owner has designated an agent, then the agent and the taxicab owner are jointly liable for the tax on trips occurring during the period that such designation is in effect. As such, the Division was substantially justified in issuing the subject estimated notices and notice and demands based on the underlying facts.

The remaining question, raised by the petitioner, is whether the Division was substantially justified in mailing the estimated notices and notice and demands to the Woodside, New York, address (***see Matter of Grillo***). Petitioner argues that the Woodside, New York, address was not his home or business address, and was thus not his last known address. Rather, according to petitioner, the Woodside, New York, address was that of Woodside Management.

E. Tax Law § 1290 provides that article 27 of the Tax Law applies for purposes of administration and procedure with respect to the taxicab tax imposed by article 29-A. As such, it is appropriate to look to the provision of article 27 with respect to the proper mailing of statutory notices issued by the Division for the imposition of the tax under article 29-A.

Tax Law § 1081 (a) provides, in relevant part, that "[a] notice of deficiency shall be mailed by certified or registered mail to the taxpayer at its last known address in or out of this state." Tax Law § 1092 (b) provides that a notice and demand for tax "shall be left at the principal office of the taxpayer in this state or shall be sent by mail to such taxpayer's last known

address." The term "last known address" is defined as "the address given in the last return filed by [the taxpayer], unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address" (Tax Law § 1091 [b]).

The record indicates that petitioner filed New York State resident income tax returns for the years 2011 and 2015 reporting his address as 1172 E. 84th Street, Brooklyn, New York. The Division does not dispute that petitioner filed resident income tax returns for the periods at issue reporting his address in Brooklyn, New York. Rather, Ms. Bariteau's affidavit states that, "[t]he Department's records show that an Article 29-A taxpayer information profile for Jean Lys Jean Phito was created on 09/08/10 for the filing of tax returns and the remittance of tax pursuant to Article 29-A of the Tax Law" and further that "[o]n 09/09/10, the address of 4913 Roosevelt Ave Woodside, NY 11377-4457 was associated with the taxpayer information profile." Notably absent from Ms. Bariteau's affidavit is any statement as to whether any returns were filed under article 29-A, the address reported on any such returns, the date of any such returns, and the name of the taxpayer filing such returns. Likewise absent from the record are any returns filed by petitioner reporting the Woodside, New York, address. As such, the Division has failed to provide any evidence showing what address was reported on returns filed in relation to the taxicab owned by petitioner, who filed such returns, and the dates of any such filings. Additionally, while Ms. Bariteau states that a taxpayer information profile was created for petitioner and the Woodside, New York, address was associated with this taxpayer information profile, Ms. Bariteau fails to state who created the taxpayer information profile, the procedures for creating such profile, and on what information (such as returns filed) the profile and associated address were based. As a result, the Division has failed to show that the estimated notices and notice and demands were sent to petitioner's last known address.

Moreover, the Division does not dispute that the Brooklyn, New York, address, rather than the Woodside, New York, address, was reported on petitioner's personal income tax returns, and instead states, through Ms. Bariteau's affidavit, that "[t]axpayer information recorded for the collection (sic) Article 29-A tax is maintained separately from any personal tax information, such as information recorded for the collection of personal income tax." Such statement merely begs the question of what efforts, if any, the Division employed to find petitioner's last known address as "given in the last return filed" (Tax Law § 1091 [b]). The Division provided no information as to its standard mailing procedures or whether the estimated notices and notice and demands were mailed in accordance with such procedures.

Contrary to the Division's argument in its opposition brief that "the cancellation was due to the addresses placed on the Notices at the time of the ministerial acts of mailing," mailing of statutory notices is not merely "ministerial." Rather, the mailing of notices to the taxpayer's last known address is a statutory requisite (***see*** Tax Law §§ 1081 [a], 1091 [b], and 1092 [b]) and the Division bears the burden of proving that it was substantially justified in mailing the estimated notices and notice and demands to the Woodside, New York, address.

The Division has failed to establish substantial justification for mailing the estimated notices and notice and demands to the Woodside, New York, address (***see Matter of Nelloquet Restaurant, Inc.***, Tax Appeals Tribunal, March 14, 1996). In ***Nelloquet***, the Tribunal rejected the Division's argument that mailing notices for responsible officers to the business address listed on the returns filed by the corporation was proper. The Tribunal rejected the Division's argument that because the officers did not file a return in their name, but chose to rely on the return filed on behalf of the corporation, the corporation's return was effectively the return of the officers. The Tribunal noted that, "the principle of separate liability of an officer from that of the

corporation applies equally to the mailing of the notice, the first step by the Division asserting such liability, as it does to consents to extend the period for asserting liability" (***Id.***). The Tribunal concluded that:

> "Where no return is filed or required to be filed, the Division must use its best efforts to obtain the address of the 'person' against whom it seeks to assert liability. Where, as here, the Division has in its own records the address of such individuals [as reported in their personal income tax returns], it seems clear that such address is 'obtainable' in the context of section 1147(a)(1)" (***Id.***).

While ***Nelloquet*** dealt with the mailing of notices for sales tax under article 28, the Tribunal's holding is equally applicable here. It is noted that the language for mailing a statutory notice to the taxpayer's last known address differs slightly between the provisions of article 27 and 28, in that under article 27, § 1091 (b) provides that "a taxpayer's last known address shall be the address given in the last return filed by it," while Tax Law § 1147 (a) (1) states that a notice shall be mailed "to the person for whom it is intended . . . at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."

Although the mailing provisions applicable here under article 27 do not contain the provision for mailing to an address "as may be obtainable," the provisions likewise do not contain the limitation to an address "given in the last return filed by him *pursuant to the provisions of this article*" (***compare*** Tax Law §§ 1091 [b] and 1147 [a] [1]). Accordingly, for purposes of article 27, the definition of last known address includes the address reported in the last filed personal income tax return. Similar to ***Nelloquet***, the Division had in its own records the address of petitioner as obtainable from his personal income tax returns, but failed to use the proper address (***cf. Matter of Grillo***, Tax Appeals Tribunal, August 23, 2012 [finding that the Division was substantially justified in mailing the notice to the corporation's business address,

rather than the individual taxpayer's address, where the Division had no knowledge of the taxpayer's personal address). As such, the Division has failed to meet its burden of proving that its mailing of the estimated notices and notices and demands was substantially justified.

F. The Division further argues that petitioner had no hearing rights for the notice and demands and contends that since Tax Law § 3030 limits an application for costs to those costs incurred on or after the date of a document giving rise to a right to hearing, any application for costs associated with such notice and demands must be denied.

The Tax Appeals Tribunal is authorized "to provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter" (Tax Law § 2006 [4]).

Tax Law § 173-a (2) provides, in part that:

> "With respect to any tax which incorporates or otherwise utilized the procedures set forth in . . . article twenty-seven of this chapter, provisions of law which authorize the issuance of a notice and demand for an amount without the issuance of a notice of deficiency for such amount, including any interest, additions to tax or penalties related thereto, *in cases of mathematical or clerical errors or failure to pay tax shown on a return*, or authorize the issuance of a notice of additional tax due . . . shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand or notice of additional tax due for purposes of subdivision four of section two thousand six of this chapter. Any such notice and demand or notice of additional tax due shall not be construed as a notice which gives a person the right to a hearing under article forty of this chapter" (emphasis added).

Tax Law § 1081, in turn, provides that, "[i]f upon examination of a taxpayer's return . . . the tax commission determines that there is a deficiency of tax, it may mail a notice of deficiency to the taxpayer . . ." (Tax Law § 1081 [a]) and provides an exception to the issuance of a notice of deficiency for mathematical or clerical errors, stating:

> "If a mathematical or clerical error appears on a return (including an overstatement of the amount paid as estimated income tax), the commissioner

> shall notify the taxpayer that an amount of tax in excess of that shown upon the return is due, and that such excess has been assessed. Such notice shall not be considered as a notice of deficiency for the purposes of . . . subsection (b) of section one thousand eighty-nine (authorizing the filing of a petition with the division of tax appeals based on a notice of deficiency), or article forty of this chapter . . . .” (Tax Law § 1081 [d]).

The plain language of Tax Law §§ 173-a (2) and 1081 (d), preventing hearing rights for notices and demands, is clearly limited to such notices that are based on mathematical or clerical errors or failure to pay the tax shown on the return. The notice and demands issued here were not issued on any of those bases. Rather, they were based on the purported non-filing of quarterly taxicab trip tax returns. Since the notice and demands at issue were not based on “mathematical or clerical errors or failure to pay tax shown on a return,” the provisions of Tax Law § 173-a (2) denying the right to a hearing do not apply here. Because the right to a prepayment hearing challenging a notice and demand that is not based merely on mathematical or clerical errors or failure to pay tax shown on a return is not specifically provided for, modified or denied by any other provision of the Tax Law, petitioner had the right to such a hearing pursuant to Tax Law § 2006 (4) (***see Matter of Meyers v Tax Appeals Tribunal*** 201 AD2d 185 [3d Dept. 1994], ***lv denied*** 84 NY2d 810 [1994]). As such, the Division’s argument is rejected.

G. The Division makes two additional arguments in opposition to petitioner’s application for costs. The Division argues that petitioner’s application for costs is overstated in that the itemized statement of petitioner’s representative references work performed in anticipation of and during a conciliation conference that was not conducted in relation to the notices at issue in this matter. A review of the conciliation orders attached to the petition indicate that they pertain to notice numbers L-044981709 and L-045423441, which are not at issue in this proceeding. As such, the total number of hours claimed in the representative’s invoice must be reduced by 5.25,

which is the number of hours designated for preparation and participation in the conciliation conference. As a result, the total number of hours allowed for petitioner's cost application in this matter is reduced to 12.25 (17.5 total hours claimed less 5.25 hours spent on conciliation conference proceedings).

The Division further argues that Tax Law § 3030 (d) prohibits the awarding of costs in this matter because of the separate matter indexed by the Division of Tax Appeals, which has not been resolved. According to the Division, the two matters are to be treated as one under Tax Law § 3030 and the petitioner cannot be deemed to have substantially prevailed on the petition with an outstanding matter before the Division of Tax Appeals.

Tax Law § 3030 (d) provides that for purposes of this section:

> "(1) multiple actions which could have been joined or consolidated, or
>
> (2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single court proceeding in the same court, such actions or cases shall be treated as one court proceeding regardless of whether such joinder or consolidation actually occurs, *unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated*" (emphasis added).

The Division's argument ignores the emphasized language noted above. Specifically, upon receipt of the petition in this matter and the assignment of case numbers, the Division of Tax Appeals determined that it was inappropriate to treat the protest of notice numbers L-044981709 and L-045423441 as joined or consolidated with the protest of the notices at issue in this proceeding, and accordingly assigned two separate case numbers. The treatment of the matters separately, in accordance with the Division of Tax Appeals' discretion, does not prevent petitioner's application for costs on the distinct matter in which he prevails.

However, because petitioner's representative has not distinguished, in his invoice for costs, how many hours were spent for the notices protested in this matter, as opposed to the notices protested in the matter assigned Division of Tax Appeals case number 828219, it is appropriate to further reduce the hours claimed in proportion to the notices associated with this matter. Since the petition protested 14 notices, and only 12 are at issue in this proceeding, the hours claimed by the representative will be proportionately reduced to 10.5 hours (12.25 hours claimed divided by 14 notices protested in petition = .875 x 12 notices at issue in this matter = 10.5).

H. 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 (***see*** Tax Law § 3030 [c] [2] [B]), not to exceed $75.00 per hour (Tax Law § 3030 [c] [1] [B] [iii]). The invoice presented by petitioner's representative shows an hourly rate of $400.00, which exceeds the statutory limit of $75.00. Petitioner's representative contends that a cost of living adjustment should be made to the statutorily allowed amount of $75.00 per hour, based on Internal Revenue Code (IRC) § 7430 and ***Eifert v Commissioner***, TC Memo 1997-214. According to the representative, the amount claimed with the cost of living adjustment amounts to $3,558.27.

IRC § 7430 (c) (1) (B) (3) provides for a cost of living adjustment for reasonable fees paid by the prevailing party for the services of an attorney beginning after 1996. There is no similar provision in Tax Law § 3030 to allow for a cost of living adjustment. The Legislature specifically set the statutory rate for the services of an attorney at $75.00 per hour, and petitioner has presented no special factors in this matter that warrant an increase in the same (***see*** Tax Law § 3030 [c] [1] [B] [iii]). Therefore, applying the statutory rate of $75.00 per hour to the total of

10.5 hours, as found in Conclusion of Law G, results in an award of costs in the amount of $787.50.

I. The application for costs of petitioner, Jean Lys Jean Phito, is granted to the extent indicated in Conclusions of Law G and H, but is in all other respects denied.

DATED: Albany, New York
April 5, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE