

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ELISE GANNON : ORDER
for an Award of Costs Pursuant to Article 41, : DTA NO. 828256
§ 3030 of the Tax Law for the Year 2014. :
:

Petitioner, Elise Gannon, appearing by Dean Nasca, CPA, filed a petition on July 5, 2017, seeking administrative costs under article 41, section 3030 of the Tax Law for the year 2014.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Ellen K. Roach, Esq., of counsel), was granted an extension of time, until September 12, 2017, within which to file a response to the application for costs, and filed its response on September 11, 2017. The 90-day period for issuance of this order commenced on September 12, 2017.

Based upon petitioner's application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, 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. The Division of Taxation (Division) issued correspondence to petitioner, dated April 11, 2016, requesting information in substantiation of the itemized deductions reported on her

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

2. On August 9, 2016, the Division issued a statement of proposed audit changes to petitioner, stating that, since she had not responded to the its earlier request for information, the Division disallowed the itemized deductions claimed for 2014. The statement of proposed audit changes informed petitioner that if she did not respond by September 8, 2016, a notice of deficiency would be issued.

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

4. The Division issued a notice of deficiency (L-045329693), dated September 26, 2016, to petitioner asserting tax due for the year 2014 in the amount of \$74.50, plus interest and penalty (for late filing).

5. Petitioner, by her representative, Dean Nasca, CPA, filed a request for a conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS), dated December 5, 2016, and received at BCMS on December 8, 2016.

6. Petitioner did not contact the Division, either by correspondence or telephone, prior to the BCMS conference, other than for the purpose of scheduling that conference. At no time prior to the BCMS conference did petitioner submit any documentation, as requested by the Division, in support of the itemized deductions reported on her resident income tax return for 2014.

7. During proceedings before BCMS, petitioner, by her representative, presented documentation to substantiate the itemized deductions claimed on her 2014 return. Thereafter, upon review, the Division accepted the documents as substantiating such reported deductions, and agreed to cancel the September 26, 2016 notice of deficiency. In turn, petitioner signed a consent with the Division, dated June 5, 2017, wherein she agreed to a cancellation of the

deficiency for tax year 2014. The consent states, in part, “I hereby agree to waive any right to a hearing in the Division of Tax Appeals concerning the above notice(s).”

8. On July 5, 2017, petitioner filed a petition with the Division of Tax Appeals seeking an award of costs for fees paid to her 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 5, 2016	Preparation of Request for Conciliation Conference Forms and filing of same.	0.25	\$100.00	\$25.00 plus \$4.45 certified mailing fee
May 16, 2017	Copy required documentation and prepare for Conciliation Conference	1.0	\$100.00	\$100.00
May 18, 2016	Attend Conciliation Conference in Hauppauge, NY	1/5	\$100.00	\$150.00
TOTAL				\$279.45

9. Included with the Division’s response to petitioner’s application for costs is an affidavit of Donald Bussey, dated September 6, 2017. Mr. Bussey is a Tax Technician II in the Division’s Income/Franchise Desk Audit Bureau, and has been in that position since September 2007. Mr. Bussey’s duties include acting as a BCMS advocate, preparing and coordinating closed files, reviewing cases for quality control, and supervising desk audits. Mr. Bussey’s affidavit is based upon his review of the Division’s files and his personal involvement in this matter. Mr. Bussey was assigned as the Division’s advocate during the BCMS proceedings in this matter and reviewed the entire audit file.

10. The Division maintains an e-MPIRE account for each taxpayer which, among other things, tracks all correspondence between the Division and that taxpayer. It is updated in the ordinary course of business whenever a Division employee works on a taxpayer's account. According to Mr. Bussey, if a taxpayer or representative submits documentation to the Division at the fax number or address indicated on the notice issued to petitioner, it would be imaged into the taxpayer's account upon receipt. Additionally, Mr. Bussey affirms that if a taxpayer calls the Division, a case contact would be entered into the events log in the taxpayer's account.

11. Mr. Bussey avers that he reviewed petitioner's account and that no correspondence or telephone calls were received from petitioner, or her representative, prior to a request for conciliation conference received on December 8, 2016. In addition, on December 8, 2016, the Division received a power of attorney form, dated November 30, 2016, granting Dean Nasca, CPA, power of attorney for petitioner. Mr. Bussey states that prior to the BCMS conference, petitioner did not respond to the audit inquiry or provide any information to substantiate the claimed deductions (*see* Finding of Fact 6).

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. In this case, 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 Mr. Bussey and the documents attached thereto, to establish that prior to the BCMS conference, the Division did not receive any response to its audit inquiry, or any documents substantiating petitioner’s claimed deductions, including before or after the issuance of the statement of proposed audit changes. Because petitioner 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 of proposed audit changes, the Division was substantially justified in issuing the subject notice of deficiency.

D. 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 petitioner was entitled to recover costs, which she is not, the amount claimed by petitioner is beyond that authorized by the Tax Law. Specifically, the fee of \$100.00 per hour exceeds the statutory limit of \$75.00.

E. Finally, as an additional independent basis for denying the relief sought, petitioner has not established that her 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 of Elise Gannon for costs is denied.

DATED: Albany, New York
December 7, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE