

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CATHERINE PULEO** : ORDER  
for an Award of Costs Pursuant to § 3030 of the Tax Law : DTA NO. 828374  
for the Year 2014. :  
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Petitioner, Catherine Puleo, appearing by Dean Nasca, CPA, filed a petition on September 14, 2017, seeking administrative costs under section 3030 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Ellen K. Roach, Esq., of counsel), was granted an extension of time within which to file a response to the application for costs by December 8, 2017, and filed its response on November 22, 2017. The 90-day period for issuance of this order commenced on December 8, 2017.

Based upon petitioner's application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, Kevin R. Law, 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. On August 13, 2015, petitioner, Catherine Puleo, and her late husband, Thomas Kenny, filed their 2014 New York State resident income tax return.<sup>1</sup> The return reported New York

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<sup>1</sup>The return indicates that Mr. Kenny passed away on September 10, 2014.

adjusted gross income of \$62,103.00, claimed New York itemized deductions of \$31,056.00 and reported total New York State and New York City tax of \$2,360.00. After claiming credit for tax withheld and for the New York City school tax credit, petitioner and her late husband claimed a refund of \$2,892.00.

2. The Division of Taxation (Division) issued correspondence dated August 31, 2015 to petitioner and her late husband proposing to disallow the itemized deductions claimed on their 2014 return and adjusting the refund claimed on said return by allowing the standard deduction.

3. The August 31, 2015 correspondence stated that an adjusted refund would be issued within 60 days. The correspondence further advised that should petitioner and her late husband want the Division to reconsider, they should submit documentation substantiating the itemized deductions claimed on said return. There is no indication that the Division sent any other correspondence to petitioner and her late husband subsequent to the filing of the return and prior to the August 31, 2015 correspondence.

4. On September 3, 2015, the Division issued an account adjustment notice adjusting the amount of refund claimed by petitioner and her late husband based on allowance of the standard deduction rather than the claimed itemized deductions. The account adjustment notice indicates that of the \$2,892.00 refund originally claimed, only \$1,408.00 was being allowed.

5. Petitioner filed a request for a conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS) on or about March 6, 2017.

6. During proceedings before BCMS, petitioner, by her representative, Dean Nasca, CPA, signed a consent, dated August 16, 2017, wherein the Division agreed to refund \$1,484.00 that represents the balance of the refund originally claimed and denied by the September 3, 2017 account adjustment notice.

7. On September 14, 2017, petitioner filed a petition with the Division of Tax Appeals seeking an award of costs for fees paid to her representative, Mr. Nasca. Attached to the petition is an August 25, 2017 invoice from Mr. Nasca indicating the following dates and charges:

Date	Description	Hours	Hourly Rate	Total Charge
February 27, 2017	Preparation of Request for Conciliation Conference Forms Sent Certified	0.25	\$75.00	\$18.75 plus \$4.45 certified mailing fee
June 19, 2017	Copy required documentation and prepare for Conciliation Conference	1.5	\$75.00	\$112.50
June 21, 2017	Attend Conciliation Conference in Hauppauge, NY	2.5	\$75.00	\$187.50
TOTAL				\$323.20

8. The application for costs also seeks an award for damages for alleged violations of petitioner's due process rights in denying her refund without any basis or without first notifying her of an audit and requesting documentation to substantiate the itemized deductions claimed on her tax return.

9. Included with the Division's response to petitioner's application for costs is an affidavit of Sabrina Furman, dated November 21, 2017. Ms. Furman is a Tax Technician II in the Division's Income/Franchise Desk Audit Bureau and has been in that position since August 2017. Ms. Furman's duties include acting as a BCMS advocate, preparing and coordinating closed files, reviewing cases for quality control, and supervising desk audits. Ms. Furman's affidavit is based upon her review of the Division's files and her personal involvement in the

matter. Ms. Furman 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 and is updated in the ordinary course of business whenever a Division employee works on the taxpayer's account. According to Ms. Furman, 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. Furman affirms that if a taxpayer calls the Division, a case contact would be entered into the events log in the taxpayer's account.

11. Ms. Furman avers that she 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 March 6, 2017. In addition, on March 6, 2017, the Division received a power of attorney form, dated January 20, 2017, granting Mr. Nasca power of attorney for petitioner. Ms. Furman states that prior to the BCMS conference, petitioner 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.”  
(Emphasis added.)

B. To be a prevailing party, the applicant must: (1) substantially prevail with respect to the amount in controversy or the most significant issue or set of issues presented; (2) file the application within 30 days of the final disposition; and (3) meet the net worth requirements (Tax Law § 3030 [a]).

C. Petitioner signed a consent dated August 16, 2017, which rescinded the refund denial and granted her that portion of her refund claim that had been disallowed. Since the consent entered into at BCMS granted petitioner the full refund that she and her late husband had claimed, she substantially prevailed with respect to the amount in controversy and the set of issues presented (*see* Tax Law § 3030 [c] [5] [A] [i]). In addition, since petitioner's application was filed on September 14, 2017, it was within 30 days of the date of the consent filed with BCMS, and therefore timely.

D. A taxpayer will not be treated as the prevailing party if the Division establishes that its position was substantially justified (*see* Tax Law § 3030 [c] [5] [B]). A position is substantially justified if it has a reasonable basis in both fact and law and is justified to a degree that could satisfy a reasonable person (*see Pierce v Underwood*, 487 US 552 [1988]). In this case, the Division offered nothing to explain its basis for disallowing petitioner's claimed itemized deductions. While it is acknowledged that a request for records is not a prerequisite for an income tax audit (*see Matter of Hennekens v State Tax Commn.*, 114 AD2d 599 [3d Dept 1985]), there is nothing in the record that sets forth the Division's justification for proposing to deny deductions without first requesting substantiation from the petitioner and her late husband. The Division's attempt at justifying its actions by alleging that petitioner never responded to the Division's request for substantiation is disingenuous. The statement of account adjustment denying a portion of petitioner's refund claim was issued a mere three days after the

correspondence proposing to deny the same was issued. The Division has not set forth any basis in fact or law justifying the refund denial in this matter. The Division's actions in this case can hardly be seen as reasonable. Accordingly, it is found that petitioner was the prevailing party.

E. To qualify for an award of litigation costs, the prevailing taxpayer cannot have a net worth that exceeded \$2 million at the time the action was filed (*see* Tax Law § 3030[c] [5] [A]). The application for costs states that at the time the action was commenced, petitioner's net worth was less than \$2 million. The application was filed using the Division of Tax Appeals' standard petition form (form TA-100) and was signed by petitioner's representative, Mr. Nasca. The signature line acknowledges that willfully false statements are punishable by the Penal Law. The Division has not raised an issue as to petitioner's net worth nor has the Division offered anything to contradict the statement concerning petitioner's net worth as set forth in the costs application. Accordingly, I am satisfied that petitioner meets the net worth requirement to qualify for reasonable administrative costs and fees.

F. In addition to claiming it was substantially justified in disallowing the itemized deductions claimed by petitioner and her late husband, the Division contends that administrative costs and fees are not recoverable because no statutory notice was ever issued. Specifically, the Division alleges as follows:

“Under Tax Law § 3030 (c) (2) (B), ‘[reasonable administrative costs] shall only include costs incurred on or after the date of the notice of deficiency, notice of determination or other document giving rise to the taxpayer's right to a hearing.’ No Notice of Deficiency giving rise to petitioner's right to a hearing was ever issued . . .”

G. This argument is rejected as the statement of account adjustment denied petitioner's claim for refund and clearly gives rise to a right to a hearing (*see Meyers v Tax Appeals Trib.*, 201 AD2d 185 [3d Dept 1994] *lv denied* 84 NY2d 810 [1994]). In addition, assuming that the

statement of account adjustment is not a document that gives rise to the right to a hearing, hearing rights existed by operation of law based upon the Division's failure to issue a formal notice of disallowance within six months from the date the claim for refund was filed (*see* Tax Law § 689 [c]).

H. Finally, petitioner has also requested an award of damages based upon the Division's denial of her refund claim. Petitioner's request is rejected. The Division of Tax Appeals is a forum of limited jurisdiction (*see* Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Department of Taxation and Fin. v. Tax Appeals Trib.*, 151 Misc 2d 326 [Sup Ct Albany Co, Keniry, June 29, 1991]). Its power to adjudicate disputes is exclusively statutory (*id.*). The Division of Tax Appeals has the power to provide a hearing as a matter of right to any petitioner pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal, unless a right to a hearing is specifically provided for, modified or denied by another provision of law (*see* Tax Law § 2006 [4]). Other than the frivolous petition penalty contained within Tax Law § 2018, the Division of Tax Appeals has no ability to award damages or impose sanctions against a party. Accordingly, petitioner's request for damages is denied.

I. Based upon the foregoing petitioner's application for costs and fees is granted to the extent of the amount charged by Mr. Nasca (i.e., \$323.20) as reflected on the August 25, 2017 invoice.

DATED: Albany, New York  
March 8, 2018

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE