

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HAROLD JESSOP	:	ORDER DTA NO. 828492
for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law.	:	

Petitioner, Harold Jessop, appearing pro se, filed an application for an award of costs pursuant to article 41, section 3030 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Ellen K. Krejci, Esq.) did not file a timely response to petitioner’s application. The 90-day period for issuance of this order commenced on November 2, 2020.

Based upon petitioner’s application for costs 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. Petitioner filed with the Division of Taxation (Division) a New York State resident personal income tax return for 2014 (2014 return) requesting a refund of \$2,841.00. On the 2014 return, petitioner claimed an Empire State child credit in the amount of \$330.00, a child and dependent care credit of \$1,023.00, and New York State earned income credit of \$1,357.00. Petitioner listed his daughter and grandson as dependents for 2014.

2. Attached to petitioner's 2014 return was form IT-216, claim for child and dependent care credit, wherein petitioner claimed childcare expenses for his grandson paid to M*****
***** Day Care in the amount of \$3,200.00.¹

3. On April 27, 2015, the Division sent to petitioner form DTF-973.54, requesting additional information to support petitioner's refund claim for the year 2014.

4. In response to the Division's request for additional information for the year 2014, petitioner submitted to the Division copies of his 2014 federal income tax return, his daughter's birth certificate, his grandson's birth certificate, form W-10, Dependent Care Provider's Identification and Certification from M***** ***** Day Care, an invoice from Nassau University Med Ctr-Pediatrics for services to petitioner's grandson, listing his address in Franklin Square, New York,² enrollment verification from York College indicating petitioner's daughter was enrolled from August 28, 2014 to December 23, 2014, an application for a post office box for petitioner, his daughter and grandson, and an apartment lease for the term January 1, 2014 through December 31, 2014, listing petitioner, his daughter and grandson as tenants at an address in Franklin Square, New York.

5. After review of the information submitted by petitioner in response to the Division's request for additional information, the Division determined that petitioner did not provide adequate documentation to support his refund claim for 2014. The Division issued an account adjustment notice, dated September 17, 2015, disallowing the Empire State child credit, child and dependent care credit, and earned income credit, and allowing a refund in the amount of \$142.13 for 2014.

¹ The name has been redacted upon petitioner's request based on privacy concerns.

² The typed service date on the invoice appears to be 06/10/2016, however, the copy submitted into the record has been altered with a handwritten 4 over the 6 for the year. There was no explanation for the alteration.

6. On March 17, 2017, the Division issued an account adjustment notice to petitioner, allowing an Empire State child credit in the amount of \$330.00, and an earned income credit of \$1,346.80 for 2014.

7. Petitioner filed with the Division a New York State resident personal income tax return for 2015 (2015 return) requesting a refund of \$1,855.00. On the 2015 return, petitioner claimed an Empire State child credit in the amount of \$330.00, a child and dependent care credit of \$951.00, and New York State earned income credit of \$581.00. Petitioner listed his grandson as a dependent for 2015.

8. Attached to petitioner's 2015 return was form IT-216, claim for child and dependent care credit, wherein petitioner reported childcare expenses for his grandson paid to M*****
***** Day Care in the amount of \$3,200.00.³

9. On May 16, 2016, the Division sent to petitioner form DTF-973.54, requesting additional information to support petitioner's refund claim for the year 2015.

10. In response to the Division's request for additional information for the year 2015, petitioner submitted to the Division a copy of his 2015 federal income tax return; an Internal Revenue Service notice dated May 20, 2016 showing an adjusted refund of \$3,580.33 for 2015; his W-2 wage and tax statement for 2015; his daughter's birth certificate; his grandson's birth certificate; correspondence from Nassau Health Care Corporation indicating that petitioner's grandson received care at Elmont Health Center from February 11, 2013 through June 16, 2016, listing his parent/guardian as petitioner's daughter and listing his address at Franklin Square, New York; copies of MoneyGram money order purchaser's receipts made out to "M***** Daycare" and signed by Harold Jessop with no legible date or amount; and an application for a

³ See footnote 1.

post office box for petitioner, his daughter, and grandson.⁴

11. After review of the information submitted by petitioner in response to the Division's request for information for 2015, the Division determined that petitioner had adequately proved his grandson's residence and relationship. The Division issued an account adjustment notice for tax year 2015, dated August 4, 2016, allowing the Empire State child credit in the amount of \$330.00 and earned income credit in the amount of \$581.00, and disallowing the claimed child and dependent care credit.

12. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) for tax years 2014 and 2015. BCMS issued a conciliation order dated November 10, 2017, sustaining the statutory notices for 2014 and 2015.

13. During the hearing before the undersigned, petitioner presented into the record the following documents: a consumer fee schedule from Jovia Financial Credit Union indicating a \$5.00 fee for copies of bank statements; a notice of intent to change child care benefits and family share payments from New York State Office of Children and Family Services dated February 18, 2014, listing petitioner's daughter as the case name, stating the agency intends to change the child care benefits, and stating that effective February 18, 2014, petitioner's daughter must pay a weekly family share to provider M***** ***** Day Care, totaling \$1,054.80 for 52 weeks; form W-10, dependent care provider's identification and certification from M***** ***** Day Care, dated May 20, 2015; a copy of a business card from Ms. Yvette, Director of M***** ***** Day Care, and a notarized statement from Ms. Yvette dated May 15, 2015 stating that "I provided child care to [petitioner's grandson], [petitioner's daughter's]⁵ son at [an address in] Westbury New York. I was paid in cash by Mr. Jessop." Petitioner also presented

⁴ *Id.*

into the record copies of six MoneyGram money order receipts, dated January 8, 2015, February 9, 2015, March 1, 2015, October 1, 2015, November 8, 2015, and December 8, 2015 in the amount of \$500.00 each, made out to M**** Daycare and signed by Harold Jessop.⁶ The receipts presented at the hearing were the same illegible money order receipts petitioner provided to the Division during the audit. However, the copies of the receipts presented at hearing have legible dates, amounts, payor and payee information. During the hearing petitioner also presented six MoneyGram employee payment stubs for 2015 in the amount of \$205.00 each, with handwriting added to the stubs stating “childcare,” “to Donna Samuels,” and from “Harold Jessop.”

14. During the hearing, the Division’s representative stated that she did not object to allowing a childcare credit for 2014 equating to \$1,054.00 based on the statement from New York State Office of Children and Family Services dated February 18, 2014 (*see* finding of fact 13).

15. The Division of Tax Appeals issued a determination on August 6, 2020, directing the Division to recalculate petitioner’s refund for 2014 to allow a child and dependent care credit based on the amount of \$1,054.80 spent for childcare, directing the Division to recalculate petitioner’s refund for 2015 to allow a child and dependent care credit based on the amount of \$3,000.00 spent for childcare, and in all other respects denying the petition and sustaining the statutory notices as modified.

16. Petitioner filed the instant application for costs on October 3, 2020. In the application, petitioner claimed the following costs:

⁵ The names of petitioner’s grandson and daughter are redacted from this Order upon request of petitioner.

Date	Description	Total Charge
5/13/2015, 6/12/2015, 5/16/2016, 6/5/2016, 12/7/2016	Respond to NYS Audit Demand Letter	Faxes 60 pp \$150, plus \$7.00 certified mailing fees, copies fees \$7.50
4/22/2017	Preparation of Request for Conciliation Conference Forms	\$15
7/31/2017	Copy required documentation and prepare for Conciliation Conference	\$21.00
8/22/2017	Attend Conciliation Conference	\$115.00
11/15/2017	Preparation of request for Tax Appeal forms	Copied fees \$15.50, Mailing fees \$7.50
9/27/2019	Attend Tax Appeals Hearing	Travel expense \$16.00, Copies \$13.00
TOTAL		\$367.50

17. Petitioner did not file an exception to the determination of the administrative law judge or request an extension of time to file an exception with the Tax Appeals Tribunal within 30 days of the issuance of the determination in this matter dated August 6, 2020.

⁶ See footnote 1.

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]). The determination in this matter was issued on August 6, 2020. Petitioner did not file an exception to the determination or request an extension of time to file an exception with the Tax Appeals Tribunal within 30 days of the determination. As such, the August 6, 2020 determination became the final judgment in the matter (see 20 NYCRR 3000.15 [e] [2], 3000.17). Since petitioner's application for costs was filed more than 30 days after the final judgment in the action, the application is untimely and must be denied.

D. Petitioner has also failed to prove that he was a prevailing party. For the year 2014, petitioner claimed childcare expenses in the amount of \$3,200.00. Based on information petitioner provided at the hearing, the Division agreed to allow a credit for the amount of \$1,054.80 and the determination accordingly directed that petitioner's refund for 2014 be

recalculated based on that amount. This amount is less than half of that claimed by petitioner for childcare expenses for 2014, and as such petitioner has not substantially prevailed with the amount in controversy or the most significant issue.

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 did not receive sufficient documents substantiating petitioner's claim during the audit. The documentation from Office of Children and Family Services which supported an allowance of \$1,054.80 paid for childcare was not provided until the time of the hearing. Petitioner did not sustain his burden of proof to establish that he was entitled to any child and dependent care credit over that amount for 2014. For 2015, the receipts provided by petitioner to the Division during audit were not legible. It was not until the hearing that petitioner provided legible receipts showing payments to the daycare provided in the amount of \$3,000.00. As such, the Division was substantially justified in issuing the subject notices.

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 it were determined that petitioner was entitled to recover costs, which he is not, amounts claimed for dates which precede the date of the subject notices would not be allowed. Additionally, petitioner's claims of costs for pro se appearances would not be allowed.

G. Finally, as an additional independent basis for denying the relief sought, petitioner has not established 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).

H. The application of Harold Jessop for costs is denied.

DATED: Albany, New York
January 28, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE