STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **ANTHONY B. LAWSON** | : | ORDER AND OPINION<br>DTA NO. 816922 |
| for Costs and Certain Fees Pursuant to Section 3030 of the Tax Law. | : | |

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Petitioner Anthony B. Lawson, P.O. Box 64395, Virginia Beach, Virginia 23467-4395, filed an exception to the order of the Administrative Law Judge issued on April 12, 2001. Petitioner appeared *pro se.* The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioner did not file a brief in support but did file a reply brief to the Division of Taxation's brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following order and opinion.

## *ISSUE*

Whether petitioner is entitled to certain administrative costs related to his proceedings with the Division of Taxation pursuant to Tax Law § 3030.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "3" and "4" which have been modified and finding of fact "5" which has been deleted

since it constitutes legal argument. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Anthony B. Lawson, filed a petition with the Division of Tax Appeals challenging a Notice of Deficiency which asserted a deficiency in New York State and City taxes for the years 1992 through 1994.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> On August 31, 2000, a Determination was issued by Administrative Law Judge Frank W. Barrie granting the petition and canceling the Notice of Deficiency. The Determination was served on petitioner by certified mail on August 31, 2000. It was accompanied by a letter and notice to petitioner from Chief Administrative Law Judge Andrew J. Marchese. As pertinent to petitioner's application for costs, the letter states as follows:
>
> > Pursuant to section 2010.4 of the Tax Law, the determination finally decides the matters in controversy unless a party to the hearing, either the petitioner or the Division of Taxation, takes exception by requesting review by the Tax Appeals Tribunal. Within 30 days from the date of this notice, any party may file an exception with the Secretary to the Tax Appeals Tribunal.
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> > * * *
> >
> > If no party to the proceeding files an exception, an application for reasonable administrative costs pursuant to Tax Law § 3030 may be filed with the Division of Tax Appeals by any petitioner who has substantially prevailed with respect to the amount in controversy or with respect to the most significant issue or set of issues presented. Such application must be filed within 60 days of the date of this notice. However, if the time to file an exception was extended for any party by the Tax Appeals Tribunal, then an application for reasonable

> administrative costs must be filed within 30 days from such extended filing date.[1]

We modify finding of fact "3" of the Administrative Law Judge's order to read as follows:

> Petitioner submitted copies of certain documents with his exception, including, as relevant here: 1) A copy of a letter dated September 28, 2000 from the Division's attorney, Mr. Gumaer, to Robert Rivers, Secretary to the Tax Appeals Tribunal (hereinafter "Secretary"), requesting a 30-day extension within which to file an exception; 2) A letter dated October 3, 2000 from the Secretary to Mr. Gumaer, with a copy to petitioner, *granting an extension until November 1, 2000* within which to file an exception; and 3) A letter dated November 10, 2000 from the Secretary to the parties advising them that since no exception had been filed, the ***Matter of Anthony B. Lawson*** (DTA No. 816922) was being closed in the Division of Tax Appeals. Copies of these letters were apparently not submitted to the Administrative Law Judge prior to closing of the record and were late filed.[2]

We modify finding of fact "4" of the Administrative Law Judge's order to read as follows:

> On December 11, 2000, petitioner filed an application for reasonable administrative costs under Tax Law § 3030. The application sets forth six points in support of petitioner's claim for costs and fees. Petitioner states that he is the prevailing party in that he prevailed in all aspects of his petition. He asserts that the application "is filed within 30 days of the date of the closing of this case as noted in the court's notice 10 November 2000." He alleges that his net worth is less than $2 million. He states that his administrative costs were $2,365.35, but he does not list particular costs incurred. Petitioner notes that no expert witnesses were needed and, finally, he states that he received legal advice from an attorney but no bill for services was ever submitted to him.[3]

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[1]We modified finding of fact "2" of the Administrative Law Judge's order to fully set forth the language contained in the Chief Administrative Law Judge's correspondence dated August 31, 2000.

[2]We modified finding of fact "3" of the Administrative Law Judge's order to more accurately reflect the record.

[3]We modified finding of fact "4" of the Administrative Law Judge's order to correct the date on which the application for costs was filed.

## *THE ORDER OF THE ADMINISTRATIVE LAW JUDGE*

The Administrative Law Judge began by noting that in 1997, the New York State Legislature enacted Tax Law § 3030, as part of the "Taxpayer Bill of Rights."[4] Section 3030 is modeled on section 7430 of the Internal Revenue Code, also known as the Federal Taxpayer Bill of Rights 2.[5] As pertinent here, Tax Law § 3030(a) provides that in *any* administrative proceeding which is brought by or against the Commissioner of Taxation and Finance ("Commissioner") in connection with the determination of any tax, the prevailing party may be awarded a judgment or settlement for certain costs and fees, where: (1) the taxpayer is the prevailing party (Tax Law § 3030[a]); (2) the fees are for administrative costs allocable to New York State and not to any other party (Tax Law § 3030[b][2]); (3) the taxpayer did not unreasonably protract the administrative proceeding (Tax Law § 3030[b][3]); and (4) the costs claimed are reasonable (Tax Law § 3030[a]).

The statute defines "Prevailing party" as any party (other than the Commissioner or a creditor of the taxpayer)[6]

> (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 30 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 [section 3030], and the amount sought, including an itemized statement from an attorney or expert witness

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[4] L 1997, ch 577, § 31, eff September 10, 1997.

[5] ***see,*** Legislative Mem, McKinney's Session Laws of NY, at 2549.

[6] Tax Law § 3030(c)(5)(A).

> representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed (except to the extent differing procedures are established by rule of court), and (II) *is* an individual whose net worth did not exceed two million dollars at the time the civil action was filed . . . (Tax Law § 3030[c][5][A], emphasis added).

Any determination as to whether a party is a prevailing party *in the case where the final determination with respect to tax is made at the administrative level, shall be by the Division of Tax Appeals* (Tax Law § 3030[c][5][C]).[7]

The Administrative Law Judge first addressed whether petitioner is the prevailing party with respect to the administrative proceeding to which his application for costs applies. The Division of Taxation ("Division") argued that petitioner is not the prevailing party, because the application was not filed within 30 days of the date the determination became final.

The Administrative Law Judge pointed out that although Tax Law § 3030(c)(5)(C) confers jurisdiction on the Division of Tax Appeals to determine whether a taxpayer is a prevailing party eligible for an award of costs, the statute does not specifically make provision for submitting an application to the Division. In fact, the 30-day statute of limitations, the Administrative Law Judge said, could be read as referring only to applications made to a court. However, the Administrative Law Judge went on to note that ambiguity in taxing statutes are to "be construed in favor of the taxpayer and against the taxing authority, and the burdens they impose are not to be extended by implication" (***Matter of American Cyanamid & Chem. Corp. v. Joseph***, 308 NY 259, 263).

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[7]The statute permits this issue to also be resolved by agreement of the parties or by a Court, where the application for costs is made to the Court.

The Administrative Law Judge concluded that the 30-day period of limitations set forth in Tax Law § 3030(c)(5)(A)(ii)(I) applies with equal force to applications made in the Division of Tax Appeals or a Court.

In view of the conclusion reached above, the Administrative Law Judge found that petitioner's application for costs was not filed within the period of limitations, since it was not filed within 30 days of the date the determination became final in the Division of Tax Appeals.[8] Based on the letter of the Chief Administrative Law Judge dated August 31, 2000, which stated that an application for costs must be filed within 60 days from the date of his August 31, 2000 letter, the Administrative Law Judge computed the last day for filing an application for costs as being October 30, 2000 (30 days from the date the Administrative Law Judge computed that the determination became final). Thereupon, the Administrative Law Judge denied petitioner's application for costs.

***ARGUMENTS ON EXCEPTION***

Petitioner argues that the determination in his case became final on November 10, 2000, the date of the letter from the Secretary advising the parties that the file had been closed in the Division of Tax Appeals. Accordingly, petitioner argues, he had 30 days from November 10, 2000 within which to file his application for costs.

The Division argues, as it did below, that petitioner's application must be denied, since he has not proven that he is a "prevailing party" (Tax Law § 3030). The Division points to the following to establish that petitioner is not the prevailing party for purposes of the statute:

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[8]The Administrative Law Judge also noted that "[p]etitioner submitted no evidence to support his claim that he received a notice from a court [sic] on November 10, 2000 regarding the closing of the administrative proceeding" (Order, conclusion of law "C").

(a) Petitioner's application was late filed as it was not received by the Division of Tax Appeals until December 15, 2000, approximately 45 days after the period for filing an application for costs had expired;

(b) Petitioner's assertion that his net worth is less than $2 million does not constitute sufficient proof of net worth for purposes of Tax Law § 3030;

(c) Petitioner did not submit an itemized statement of administrative costs incurred in the administrative proceeding and did not provide sufficient information to establish that any administrative costs were incurred on or after the date of the issuance of the Notice of Deficiency; and

(d) The period within which to file the application for costs was expressly set forth in the letter of the Chief Administrative Law Judge, i.e., 60 days from the date of his letter.[9]

***OPINION***

As noted above, petitioner submitted copies of certain documents with his exception, including: 1) a copy of a letter dated September 28, 2000 from Mr. Gumaer to the Secretary requesting a 30-day extension within which to file an exception; 2) a letter dated October 3, 2000 from the Secretary to Mr. Gumaer, with a copy to petitioner, granting an extension until November 1, 2000 within which to file an exception; and 3) a letter dated November 10, 2000 from the Secretary to the parties advising them that since no exception had been filed, the ***Matter of Anthony B. Lawson***, (DTA No. 816922) was being closed in the Division of Tax Appeals. Copies of these letters were apparently not submitted to the Administrative Law Judge prior to

[9]The Division's letter brief, p. 1.

closing of the record.[10] Late filed evidence is not considered in rendering a decision or determination (***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). However, we do not treat these documents as an exhibit of petitioner since all of the documents submitted are records of the Division of Tax Appeals. Therefore, we take official notice of these records, since they constitute part of the procedural history of this case and are in the files of the Division of Tax Appeals (State Administrative Procedure Act § 306[4]).[11]

We disagree with both the Division and petitioner as to the last permissible date for filing an application for costs in this case. It was not, as proffered by the Division, October 30, 2000, which is 60 days from the date of the letter of the Chief Administrative Law Judge. Nor was it December 10, 2000, as computed based on the November 10, 2000 letter from the Secretary to the Tax Appeals Tribunal.[12] In reviewing the three letters of correspondence outlined above, we conclude that the extended period for filing an exception to the determination expired on November 1, 2000, based upon the October 3, 2000 letter of the Secretary which extended the time frame within which to file an exception to November 1, 2000. Therefore, the Administrative Law Judge's determination became a final determination on that date (20

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[10]In Mr. Gumaer's letter brief on exception, he admits the existence of these letters, but argues they are not in the record and irrelevant.

[11]Official notice is being taken of documents in the record of this matter before the Division of Tax Appeals pursuant to State Administrative Procedure Act § 306(4) which provides that "official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." Courts of the State of New York may take judicial notice of their own record of the proceeding of the cases before them, the records of cases involving one or more of the same parties or the records of cases involving totally different parties (***Berger v. Dynamic Imports***, 51 Misc 2d 988, 274 NYS2d 537; 57 NY Jur 2d, Evidence and Witnesses, § 47) (***see***, ***Matter of Kolovinas***, Tax Appeals Tribunal, December 28, 1990).

[12]The sending of the letter by the Secretary was a ministerial act notifying the parties that the case was closed in the Division of Tax Appeals. As will be shown herein, the determination in this case had already become final on November 1, 2000.

NYCRR 3000.17[a][1]). Petitioner had 30 days from November 1, 2000 to file an application for costs (Tax Law § 3030[c][5][A][ii][I]) which was December 1, 2000. Thus, the determination became final and not subject to any further administrative review on December 1, 2000. Therefore, petitioner's application for costs was untimely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anthony B. Lawson is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The application of Anthony B. Lawson for administrative costs pursuant to Tax Law § 3030 is denied.

DATED: Troy, New York
October 4, 2001

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner