STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAC FOR WOMEN, INC.	:	
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law and Personal Income Tax under Article 22 of the Tax Law for the Year 2001.	:	ORDER DTA NO. 819698

Petitioner, RAC for Women, Inc., 21 Goodway Drive, Rochester, New York 14623, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law and personal income tax under Article 22 of the Tax Law for the year 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York on July 27, 2004 at 9:15 A.M. Petitioner appeared by Dolce, Dolce & Priore, CPA's (Anthony J. Priore, CPA). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Greg Cerkiewicz).

The presiding officer issued a determination on October 14, 2004 which granted the petition of RAC for Women, Inc., in part and modified the Notice and Demand for Payment of Tax Due, dated July 15, 2002.

By letter dated October 19, 2004, petitioner, by its representative, Anthony J. Priore, CPA, brought an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Nicholas A. Behuniak, Esq., of counsel), filed a memorandum of

law in opposition on November 8, 2004, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs, the Division's memorandum of law in opposition, the determination issued October 14, 2004, and all pleadings and proceedings had herein, Joseph W. Pinto, Jr., 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. During the year in issue, 2001, petitioner was a Federal S corporation which elected to be treated as a New York S corporation. The corporation operated a health and fitness club for women in Rochester, New York.

2. On or about March 5, 2001, petitioner filed a request for a six-month extension to file its initial New York S Corporation Franchise Tax Return for the period January 7, 2000 through December 31, 2000. It estimated its tax liability to be $225.00 and included a check for this amount with its return.

3. On or about March 15, 2002, petitioner filed a request for a six-month extension to file its return for 2001. With the request it paid the sum of $100.00. On June 20, 2002, petitioner filed its franchise tax return for 2001 and remitted a payment of $7,709.00.

4. The Division deemed the extension filed for 2001 to be invalid because the amount remitted with the extension request was not 90% of the 2001 tax liability or 100% of the prior year's liability. As such, petitioner was liable for penalties for late filing, late payment and underpayment with respect to its 2001 return pursuant to Tax Law § 1085(a)(1), (2); (c). In

addition, the Division also assessed petitioner penalty for failing to timely file an S corporation return pursuant to Tax Law § 685(h)(2).

5. At hearing, petitioner's representative argued that his tax preparation software was the reason for the underpayment. It appears the software did not pick up the prior year's tax payment and defaulted to a $100.00 figure, thus causing a $125.00 shortfall. Petitioner argued that it was grossly unfair to assess penalties in excess of $1,500.00 for failing to remit an extra $125.00 with its extension request for 2001.

6. In the determination of October 14, 2004, the presiding officer noted that petitioner did not remit the proper tax with its extension request for 2001 and that the Division "properly concluded that the request for an extension of time was invalid and the return and payment . . . were late." However, citing the regulation at 20 NYCRR 2392.1(d)(5), the presiding officer found that the software glitch constituted a reasonable ground for delinquency and indicated an absence of willful neglect. As a consequence, the presiding officer canceled the penalties.

7. Mr. Priore's letter of October 19, 2004, constituting the application for costs herein, contained an unsworn statement asserting that petitioner was a corporation with a net worth of less than seven million dollars and having less than five hundred employees. In addition, attached to the letter was a summary of work performed by Dolce, Dolce & Priore, CPA's, the date services were rendered, the time expended on each date, disbursements for postage, faxes, photocopies, telephone charges and mileage. Total time spent on the matter was set forth as 22.75 hours at $150.00 per hour, for a total fee of $3,412.50. Disbursements totaled $63.82.

8. The Division argues that it was substantially justified in issuing the Notice and Demand in issue, and therefore, petitioner cannot be deemed a prevailing party for purposes of Tax Law § 3030. The basis for this assertion is that petitioner never disputed that it failed to pay the proper

amount of tax with its extension request for the year 2001, did not timely file its S corporation return for 2001 and never raised the argument that it had experienced software problems.

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 also 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].)

B. A prevailing party is defined by the statute 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 on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is . . . any corporation . . ., the net worth of which

> did not exceed seven million dollars at the time the civil action was filed, and which had not more than five hundred employees. . . .
>
> (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.
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> * * *
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> (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. It is concluded that petitioner was not the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the Notice and Demand based upon petitioner's underestimation of tax and consequent late filing of its extension request, and petitioner's failure to file an information return for an S corporation.

Tax Law § 211(1) and the regulation at 20 NYCRR 6-4.4(a) required that petitioner file its request for a six-month extension to file its 2001 New York S Corporation Franchise Tax Return before March 15, 2002. With said report, petitioner was required to pay an estimated tax of not

less than 90% of the tax as finally determined or not less than the tax shown on petitioner's report for the preceding taxable year. (Tax Law § 213[2][a]; 20 NYCRR 7-1.3.) After receiving the late-filed return for the year 2001 sometime after June 20, 2002, the Division issued the Notice and Demand on July 15, 2002. Petitioner has conceded that it did not comply with these requirements, confirming that the Division's position was substantially justified in issuing its notice. The fact that Mr. Priore argued at hearing that his tax preparation software did not operate correctly is irrelevant to the issue of costs. Without discussing the basis of that claim, suffice it to say that the argument was not raised for the first time until two years after the notice was issued.

D. Even if the Division's position was not substantially justified, the instant motion is properly denied because petitioner failed to show that it was a corporation, the net worth of which did not exceed seven million dollars and which had not more than 500 employees when the proceeding was commenced (Tax Law § 3030[c][5][A][ii][II]).

Although Mr. Priore mentioned these prerequisites, unsworn and unsupported assertions in a letter do not constitute adequate proof of these critical elements.

E. The application for costs of petitioner, RAC for Women, Inc., filed October 21, 2004, is denied.

DATED: Troy, New York
December 16, 2004

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE