STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PATRICIA M. GASS	:	ORDER DTA NO. 819722
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under the Administrative Code of the City of New York for the Years 1999 and 2000.	:	

Petitioner, Patricia M. Gass, 85 Chocolate Drop Mountain, Columbus, North Carolina 28722-9789, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under the Administrative Code of the City of New York for the years 1999 and 2000.

A small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on April 15, 2004 at 10:30 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Jacob Tiwary).

Presiding Officer Barrie issued a determination on May 27, 2004 which granted the petition and directed the Division of Taxation to issue petitioner's claim for refund.

On June 18, 2004, petitioner filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation filed a motion in opposition to petitioner's application for costs on July 22, 2004, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs and attached documentation and the Division of Taxation's motion in opposition and attached documentation, the determination issued May 27, 2004 and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, 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, Patricia M. Gass, was born in Cleveland, Ohio, but raised in Mexico City as the daughter of missionaries. She and her husband, Eric A. Gass, lived and worked in India, as missionaries for the United Church of Christ. From 1960 to 1969, petitioner and her husband lived in Raipur, India. After she and her husband accepted responsibility as "missionaries at large" for the church's missions in India, Sri Lanka and Nepal, they relocated to Bombay, India, where they lived for 14 more years, from 1969 to 1983. In 1983, petitioner's husband accepted the position, within the United Church of Christ, of Executive Secretary for Southern Asia, which resulted in their relocation to New York City, the location of the church's world headquarters at that time.

2. Petitioner's two children were born and raised in India. After attending boarding school in India, the children came to the United States for their college education in the early 1980s, just before petitioner's own return to the United States in 1983.

3. Petitioner's educational background was in the area of literature and nursing, and upon her relocation to New York City, she obtained additional academic degrees, notably a PhD degree in public health from Columbia University. This educational achievement was built upon

petitioner's 20 years of experience working in the area of public health in India. Dr. Gass became a faculty member at Columbia University's School of Public Health and was employed by the university's Center for Population and Family Health. From 1988 until 1995, she served as the director of the international public health internship program of Columbia University's School of Public Health. In 1995, she became the deputy director of the international wing of Planned Parenthood of New York City known as the Margaret Sanger Center International.

4. In 1998, petitioner became a consultant for Columbia University on one project based in New York City related to her expertise. In the spring of 1998, petitioner received and decided to accept a job offer from EngenderHealth which required her return to India. EngenderHealth, formerly known as AVSC International, functioned in India as a United States Cooperating Agency, through which a Family Planning Services project was channeled. On October 1, 1998, petitioner left New York City for her new position as "Country Program Manager" of EngenderHealth's India office located in New Delhi, India, a temporary position which would last until early 2001 when she returned to New York City. In particular, petitioner was responsible for EngenderHealth's programs conducted in the area of family planning with doctors at so-called "district level hospitals." Petitioner received wages and other compensation of $113,773.00 and $98,623.00 in 1999 and 2000, respectively, from her employment in India. Since petitioner's salary, according to the written job offer from EngenderHealth, was "$3,000 semimonthly (equivalent to an annualized salary of $72,000)," these larger amounts as shown on her W-2 forms, included other items of compensation, notably a housing allowance which was paid directly by EngenderHealth to petitioner's landlord in India. Dr. Gass filed tax returns as a nonresident of New York during the years at issue on the basis of the so-called 548-day rule and reported none of her income as subject to New York State and City income taxes.

5. Upon her return to India in the fall of 1998, petitioner first lived in a hotel for approximately a month until her predecessor vacated the house which petitioner would take up as her own residence until the conclusion of her work assignment in India. Petitioner purchased furniture and other household items for this house in addition to the china, flatware, glasses and other household items which she had shipped to India from New York along with all of her clothing. In fact, her personal and household effects, which petitioner shipped back to New York after her assignment in India was completed, amounted to 575 cubic feet of goods according to a shipping invoice in the record.

6. As noted above, from 1983 until 1998, petitioner lived in New York City. Beginning in 1983, petitioner considered her domicile to be New York City. Ms. Gass and her husband resided in an apartment in a building known as Concord Hall located at 468 Riverside Drive, which was provided to her husband, Rev. Eric Gass, as part of his employment with the United Church of Christ. Although the lease for the apartment was on a year-to-year renewable basis and conditioned upon Rev. Gass's continued employment by the United Church Board of World Ministries, petitioner and her husband resided in the apartment for a lengthy period of time.

7. When petitioner returned to India in the fall of 1998, she knew then that this would be her last work assignment since she intended to retire at about the same time that her husband retired from his employment with the United Church of Christ. Furthermore, she was uncertain where she would be living after the completion of her work assignment in India since by such time her husband would, more than likely, be retired or very close to retirement, and with his retirement, petitioner and her husband would no longer be able to continue their tenancy on Riverside Drive. Mr. Gass did, in fact, retire in August of 2000.

8. During the years at issue, Rev. Gass paid all expenses to maintain the apartment at 468 Riverside Drive including rent and utilities. Petitioner returned to New York City for a brief period in the summer of each of the years at issue. She was in the United States for 28 days in 1999 and 23 days in 2000, and several days fewer in New York City in each year since she visited friends and family outside New York during her time in the United States. While in New York City, she stayed in the apartment on Riverside Drive.

9. As noted in Finding of Fact "4", petitioner filed tax returns as a nonresident of New York during the years at issue and reported none of her income as subject to New York State and City income taxes. In April of 2002, the Division of Taxation ("Division") commenced a pre-audit analysis of her nonresident tax returns because petitioner, who used the married filing separate status, was, according to the auditor's log, "married to a New York resident who resided in their NYC home during Mrs. Gass's overseas employment." The auditor determined that petitioner did not qualify to file as a nonresident because she and her husband maintained a permanent place of abode in New York at which her husband was present for more than 90 days. Consequently, the Division issued two statements of personal income tax audit changes, each dated August 29, 2002, against petitioner asserting income tax due of $2,937.73 plus interest and $1,854.97 plus interest for 1999 and 2000, respectively. Shortly thereafter, the Division issued a Notice of Deficiency dated September 16, 2002 against petitioner asserting total tax due for the two years at issue of $4,792.70 plus interest.

10. Petitioner thereupon filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services, and on July 25, 2003, a Conciliation Order (CMS No. 194903) was issued which sustained the statutory notice. On October 22, 2003,

petitioner filed a petition with the Division of Tax Appeals seeking administrative review of the conciliation order. As part of the petition, petitioner elected to proceed at the small claims level.

11. A small claims hearing was held before Frank W. Barrie, Presiding Officer, on April 15, 2004, and on May 27, 2004, a determination was issued by the presiding officer. The determination held as follows with regard to petitioner's status as a resident individual of New York State:

a. A domiciliary of New York State will be considered a resident individual of New York State for tax purposes unless the taxpayer is able to meet each of the following three conditions: (1) she maintains no permanent place of abode in New York, (2) she maintains a permanent place of abode elsewhere, and (3) she spends in the aggregate not more than 30 days of the taxable year in New York *or* that the 548-day rule applies because she is present in a foreign country for at least 450 days of a 548-day period (which equates to a year and a half) and (1) she is not present in New York for more than 90 days during the 548-day period and (2) does not maintain a permanent place of abode in New York at which her spouse is present for more than 90 days.

b. Petitioner did not maintain a permanent place elsewhere, and therefore did not meet the second condition in the first exception contained in Tax Law § 605(b)(1)(A) for an individual who is domiciled in this state but who is not taxable as a "resident individual."

c. Petitioner did satisfy the conditions of the second exception of an individual who is domiciled in this state but not taxed as a "resident individual" in the statutory provision known as the 548-day rule. Specifically, petitioner established that she did not maintain a permanent place of abode in New York during the years at issue at which her spouse was present for more than 90 days.

d. Petitioner established that the Riverside Drive apartment was maintained by her husband as his own place of abode. Petitioner, who was living in India and maintaining a residence there, paid no rent or expenses on the apartment and therefore did not "maintain" the apartment during the years at issue.

12. On June 18, 2004, the Division of Tax Appeals received an application for costs pursuant to Tax Law § 3030 from petitioner, which sought costs in the amount of $2,080.00. These costs consisted of professional services from Marks Paneth & Shron, CPAs, for "tax and advisory services rendered in connection with petitioner's New York State residency examination for the years 1999 and 2000" in the amount of $2,000.00 plus disbursements of $80.00, for a total of $2,080.00. No hourly rate used to compute the $2,000.00 fee was set forth on the invoice.

13. Petitioner submitted a copy of a canceled check made out to Marks Paneth & Shron in the amount of $2,080.00, a copy of her bank statement which indicated payment by the bank of such check and a notarized statement which indicated that petitioner's personal investments and real estate investments total less than $2,000,000.00.

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.

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (***see***, Tax Law § 3030[c][2][B]). Such costs include reasonable fees for the services of attorneys in connection with the administrative proceeding, "except that such fees shall not be in excess of seventy-five dollars per hour unless the [Division of Tax Appeals] determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate" (Tax Law § 3030[c][1][B][iii]; ***see also***, Tax Law § 3030[c][2][B]). Reasonable administrative costs "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" (Tax Law § 3030[c][2][B]). For purposes of this section, "fees for the services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals shall be treated as fees for the services of an attorney" (Tax Law § 3030[c][3]).

> *Prevailing party* is defined for purposes of section 3030(c)(5), in relevant part, as follows:
>
> > (A) In general. The term "prevailing party" means any 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 an individual whose net worth did not exceed two million dollars at the time the civil action was filed , or is an owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, 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 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.
>
> (iv) Applicable published guidance. For purposes of clause (ii) of this subparagraph, the term "applicable published guidance" means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.
>
> (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]; emphasis added.)

B. In order to be granted an award of costs, it must be determined that the taxpayer is the "prevailing party" pursuant to Tax Law § 3030(c)(5)(A). Furthermore, any such grant is subject to the limitation of Tax Law § 3030(c)(5)(B), which provides that a taxpayer may not be treated as a prevailing party, and thus may not be awarded costs, if the Division establishes that its position was "substantially justified." Clearly petitioner has satisfied all the criteria of being the

"prevailing party" in this matter per Tax Law § 3030(c)(5)(A)(i), inasmuch as the notice issued against her was, in fact, canceled. Thus, the critical remaining question is whether the Division's position was "substantially justified" (Tax Law § 3030[c][5][B]), for if it was, then petitioner may not be treated as a prevailing party and is ineligible for an award of costs and fees.

C. Tax Law § 3030 is clearly modeled after Internal Revenue Code § 7430. It is proper, therefore, to use Federal cases for guidance in analyzing this State law (***see***, ***Matter of Levin v. Gallman*** 42 NY2d 32, 396 NYS2d 623; ***Matter of Ilter Sener***, Tax Appeals Tribunal, May 5, 1988). A position is substantially justified if it has a reasonable basis in both fact and law (***see***, ***Information Resources, Inc. v. United States***, 996 F2d 780, 785; 93-2 US Tax Cas ¶ 50,519), with such determination properly based "on all the facts and circumstances surrounding the case, not solely upon the final outcome" (***Phillips v. Commissioner***, 851 F2d 1492, 1499; ***Heasley v. Commissioner***, 967 F2d 116, 120, 92 US Tax Cas ¶ 50,412). This determination of "substantially justified" is properly made in view of what the Division knew at the time the position was taken, i.e., when the notices were issued (Tax Law § 3030[c][8][B]; ***see DeVenney v. Commissioner***, 85 TC 927, 930). The fact that the notice was canceled by the presiding officer is a factor to be considered. However, this action does not preclude a finding that the Division's position was substantially justified at the time the notice was issued (***see***, ***Heasley v. Commr., supra***).

D. The determination of whether an individual domiciled in New York State is subject to the imposition of the personal income tax as a resident individual is a factual one. A resident individual is someone domiciled in this state, unless she maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere and spends in the aggregate not more than 30 days of the taxable year in New York. In the alternative, a domiciliary of New

York State will not be taxable as a resident individual if within any period of 548 consecutive days, she is present in a foreign country for at least 450 days, and during the 548 period, she is not present in this state for more than 90 days and does not maintain a permanent place of abode in this state at which her spouse or minor children are present for more than 90 days. At the time the statutory notice was issued, the auditor determined that petitioner was domiciled in New York and was married to a New York resident who resided in a New York City home during petitioner's overseas employment. It was not until the hearing that petitioner established that she did not *maintain* the apartment with her husband, but that the apartment was solely maintained by her husband. Under the foregoing standard, and in view of all of the facts and circumstances of this case, the Division has established that its position was "substantially justified" (Tax Law § 3030[c][5][B]). Accordingly, petitioner may not be treated as a prevailing party under Tax Law § 3030, and therefore may not recover costs and fees under Tax Law § 3030(c)(5)(B)(i).

E. Because petitioner's application for costs fails for the reasons discussed above, this order does not address the reasonableness or propriety of the specific costs claimed by petitioner in her application. However, it is worth noting that, with regard to the fees sought, Tax Law § 3030(c)(5)(A)(ii)(I) requires the submission of a timely application for fees and other expenses showing, *inter alia*, "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 . . . .*" In this instance, petitioner has submitted simply a summary statement of the services rendered by a CPA firm, including a very cryptic description of the activities engaged in (***see*** Finding of Fact "12"). This statement is not only essentially bereft of detail, but more simply fails to provide any information from which a determination might be made as to the reasonableness of the amount of expense sought for

reimbursement. In fact, the statement provides no indication as to the rate or basis upon which fees were imposed or computed or whether they were incurred after issuance of the notice, requirements specifically listed within Tax Law § 3030.

F. Petitioner's application for costs and fees is hereby denied.

DATED: Troy, New York
October 7, 2004

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE