

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CONNIE F. MITCHELL : ORDER
 : DTA NO. 822072
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2003 through February 29, 2004. :

Petitioner, Connie F. Mitchell, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2003 through February 29, 2004.

Administrative Law Judge Winifred M. Maloney issued a determination on February 25, 2010, which granted the petition of Connie F. Mitchell and cancelled the Notice of Determination dated December 1, 2006.

The Division of Taxation requested an extension of time to file an exception on March 25, 2010. On March 26, 2010, petitioner objected to the Division of Taxation's extension request. The Division of Taxation withdrew its request for an extension on March 26, 2010.

On April 27, 2010, petitioner, appearing by White & Case, LLP (Kathleen Pakenham, Esq., of counsel), filed an application for costs pursuant to Tax Law § 3030. The Division of Taxation, appearing by Daniel Smirlock, Esq. (Michael Hall), having been granted an extension of time, filed an affidavit in opposition on June 28, 2010, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs and attached documentation, the Division of Taxation's affidavit in opposition and attached exhibits, the determination issued February 25, 2010, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner, Connie F. Mitchell, is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. A determination was issued on February 25, 2010 that granted the petition of Connie F. Mitchell and cancelled the Notice of Determination dated December 1, 2006.
2. On March 25, 2010, the Division of Taxation (Division) filed a request for a 30-day extension within which to file its Notice of Exception.
3. On March 26, 2010, petitioner filed an objection to the Division's request for an extension.
4. By letter dated March 26, 2010, the Division rescinded its request for an extension and advised that an exception would not be taken.
5. By letter dated March 30, 2010, the Secretary to the Tax Appeals Tribunal acknowledged receipt of both parties' correspondence and stated that "[i]n that the Division will not be filing a Notice of Exception in this matter, the Division of Tax Appeals considers this matter closed."
6. Petitioner's Application for the Award of Administrative Costs, dated April 26, 2010, was received by the Division of Tax Appeals on April 28, 2010. The envelope in which the

application for costs was sent indicates that it was sent by UPS Next Day Air Saver and the envelope further indicates the date of shipment was “4/27/2010.”

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 a 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].) A prevailing party is defined by statute 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 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]).

B. A determination issued by an administrative law judge shall finally decide the matters in controversy unless a party takes exception by timely requesting review by the Tax Appeals Tribunal (Tax Law § 2010[4]; 20 NYCRR 3000.15[e][2]). An exception must be filed within 30 days after the giving of notice of the determination of an administrative law judge or within the time granted by the Tribunal for an extension of time to file an exception (Tax Law § 2006[7]; 20 NYCRR 3000.17[a][1],[2]).

C. The determination in this matter was issued on February 25, 2010. The Division requested an extension of time to file an exception on March 25, 2010. Subsequently, the Division withdrew its request for an extension on March 26, 2010. Therefore, any exception to the determination was due to be filed on or before March 27, 2010 (Tax Law § 2006[7]). Because no exception was filed within 30 days of its issuance, the determination became final on March 27, 2010 (Tax Law § 2010[4]). Petitioner's Application for the Award of Administrative

Costs was filed on April 27, 2010, one day beyond the 30-day limit for applications for costs (Tax Law § 3030[c][5][A][ii]).

D. Petitioner's application for costs is denied.

DATED:Troy, New York
September 23, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE