

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH AND LINDA ANELLO	:	ORDER
		DTA NO. 822133
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2005.	:	

Petitioners, Joseph and Linda Anello, 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 for the year 2005.

On December 17, 2009, the Presiding Officer issued a determination which granted the petition and cancelled the Notice of Deficiency dated January 16, 2007.

By letter dated January 14, 2010, petitioners brought an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Daniel Smirlock, Esq. (Justine Clarke Caplan, Esq., of counsel), filed an affirmation in opposition to the application on March 19, 2010, which date began the 90-day period for issuance of this order.

Based upon petitioners' application for costs, the Division's affirmation in opposition, the determination issued December 17, 2009, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners are entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. Petitioner Joseph P. Anello filed a New York State resident income tax return for each of the years 1997 through 2001 reporting his address thereon as Hauppauge, New York. Petitioners, Joseph P. Anello and Linda Anello, jointly filed a New York State resident income tax return for the year 2002 reporting the same Hauppauge, New York, address. For the year 2003, petitioners filed a New York State resident income tax return reporting their address as Panama City Beach, Florida. For the year 2004, petitioners jointly filed a New York State nonresident and part-year resident income tax return reporting their address as Panama City Beach, Florida. For the year 2005, petitioners jointly filed a New York State nonresident and part-year resident income tax return reporting their address as the same Hauppauge, New York, address that had been reported for the earlier years, 1997 through 2002.

2. On January 16, 2007, the Division of Taxation (Division) issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the year 2005 in the amount of \$13,386.43, plus interest. The calculation of the amount of additional tax asserted as due was not in dispute and the sole issue presented was whether petitioners were domiciled in New York State and taxable as New York State residents for the year 2005 pursuant to Tax Law § 605(b)(1)(A).

3. A small claims hearing was held on July 16, 2009, at which time petitioners provided testimony and documents explaining the circumstances of their move from Hauppauge, New York, to Panama City Beach, Florida. Petitioners noted their move to Florida was precipitated primarily by Joseph Anello's U.S. Air Force duty reassignment to Tyndall Air Force Base in Florida in 2003, and explained their belief that the same was to be an assignment for an indefinite period as opposed to a temporary assignment. Petitioners provided significant, detailed information concerning their purchase of a home in Panama City Beach, Florida, the manner of their move to Florida, including

the items they moved, their additional reasons for making the move (including health considerations and family circumstances), and their activities and involvement in the community of Panama City Beach, Florida. Petitioners also explained why they retained their house in Hauppauge, New York, as opposed to selling the same upon their move to Florida. Finally, petitioners explained their return to New York in 2006, and the subsequent sale of the home they had purchased in Florida, as a consequence of Joseph Anello's unanticipated required retirement from the U.S. Air Force, his inability to find suitable employment in Florida, and ultimately his acceptance of new employment in New York as a commercial airline pilot.

4. On December 17, 2009, the presiding officer issued her determination holding that by their presentation of evidence detailing and supporting the circumstances and reasons for their move to Florida, petitioners had met their burden of proving that they had changed their domicile to Florida and were not properly subject to tax as residents of New York State for the year 2005, notwithstanding the retention of their house in Hauppauge, New York, and their move back to the same premises in New York State in 2006. Accordingly, the Division's January 16, 2007 Notice of Deficiency was canceled.

5. Petitioners' January 14, 2010 application for costs seeks an award of costs in the amount of \$1,482.47, consisting specifically of the following items:

- a) \$425.00 paid to Karen J. Tenenbaum, PC, a law firm with which petitioners consulted.
- b) \$25.27 for paper, envelopes and certified mailing expenses.
- c) \$607.20 for recovery of lost pay for Joseph Anello resulting from his attendance at the hearing in this matter (calculated as a 230 minute charge against his employment sick leave account at a value at \$2.64 per minute).

d) \$875.00 representing the value of Joseph Anello's time spent to study, analyze and prepare for the hearing in this matter (calculated as 35 hours at the rate of \$25.00 per hour).¹

6. Accompanying petitioners' application for costs was a February 1, 2008 invoice from Karen J. Tenenbaum, PC, reflecting a January 31, 2008 meeting and consultation concerning a "residency matter" between petitioner Joseph Anello, "JC" (presumably Jim Caligure, a staff member with Karen J. Tenenbaum, PC) and "KJT" (presumably Karen J. Tenenbaum). This invoice indicates Mr. Anello's payment of \$425.00 for the one-hour meeting and consultation with Karen J. Tenenbaum, PC.

7. Also accompanying petitioners' application for costs were copies of two receipts for certified mailings to the Division and one receipt for a certified mailing to the Division of Tax Appeals, a "Pay Sheet Detail" from which Joseph Anello calculated the value of his sick leave accruals and charges, and copies of Joseph Anello's personal calendar listing various dates and the number of hours Mr. Anello claims as dedicated to his study, analysis and preparation for the hearing in this matter (March 24 and 25, 2009 [8 hours], April 20 and 21, 2009 [8 hours], May 11 and 12, 2009 [5 hours], June 7 and 8, 2009 [7 hours], and July 15, 2009 [7 hours]).

8. In opposition to petitioners' application, the Division maintains that petitioners have not established that their net worth did not exceed the statutory limit beyond which costs may not be awarded. The Division further asserts that the costs claimed by petitioners are not within those defined as allowable administrative costs, and are not within allowable statutory dollar limits (as to attorneys' fees). Finally, the Division maintains that its position in proceeding with this matter, i.e.,

¹ The sum of the four items of costs sought to be recovered by petitioners (\$425.00 + \$25.27 + \$607.20 + \$875.00) totals \$1,932.47. Petitioners' application for costs does not provide an explanation for the difference between this total and the (lesser) amount shown as claimed on their application (\$1,482.20). It will be assumed that the difference represents an error in addition.

that petitioners had not changed their domicile to Florida and thus were properly subject to tax as New York State residents for 2005, was substantially justified.

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 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]; emphasis added).

C. Petitioners succeeded, based upon their production of extensive testimony and documentary evidence at hearing, in meeting their burden of showing a change of domicile to Florida as of the year in issue (2005) and, consequently, the Notice of Deficiency was canceled. Notwithstanding this result, however, petitioners were not the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the Notice of Deficiency based upon the information in its possession at the time the notice was issued. As detailed in Finding of Fact 1, and as set forth in considerably greater detail in the December 17, 2009 determination issued by the presiding officer, petitioner's tax return filings for a number of consecutive years listed the Hauppauge, New York, historic domicile address, then listed the Florida address for two years, and then returned to listing the same Hauppauge, New York, address. In light of this filing history, and the evident conclusion that petitioners did not sell or otherwise dispose of this Hauppauge, New York, domicile when they moved to Florida, the

Division reasonably raised and pursued, by the issuance of the Notice of Deficiency, the fact-intensive issue of whether petitioners were or were not domiciled in New York State and properly subject to tax as residents thereof. Thus, the Division's position and its actions were substantially justified.

D. In addition to the foregoing, and even if the Division had not been substantially justified in its position, it is further concluded that petitioners have failed to establish that their claimed expenses were among those allowable pursuant to statute. The bill submitted for legal consultation far exceeds the statutory limitation of \$75.00 per hour, with no claim or information provided as to special factors which might support or justify a higher rate for attorneys' services (Tax Law § 3030[c][1][B][iii]). In addition, petitioners' claim for reimbursement of the value of a sick day used to attend the hearing is not a recoverable cost per Tax Law § 3030(c). Likewise, petitioners' claim for reimbursement based upon spending 35 hours of their own personal time in study, analysis and preparation for presenting their case at a claimed value of \$25.00 per hour, as opposed to seeking reimbursement for such expenses incurred as the result of having hired or retained professionals who performed such services, is simply not a recoverable administrative expense per Tax Law § 3030(c)(1)(B)(ii).

E. Finally, and as a third independent basis for denying the relief sought, petitioners have not established that their 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).

F. Petitioners' application for costs and fees is denied.

DATED: Troy, New York
April 29, 2010

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE