

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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|---|---|----------------------------|
| In the Matter of the Petition   | : |                            |
| of  | : |                            |
| <b>MICHAEL AND SUZANNE DOYLE</b>  | : | DECISION<br>DTA NO. 828606 |
| for an Award of Costs Pursuant to Article 41,<br>§ 3030 of the Tax Law for the Year 2015. | : |                            |

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Petitioners, Michael and Suzanne Doyle, filed an exception to the determination of the Administrative Law Judge issued on August 2, 2018. Petitioners appeared by Dean Nasca, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on November 16, 2018, the date petitioners' reply brief was received.

***ISSUE***

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

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. Those facts are set forth below.

1. The Division of Taxation (Division) issued correspondence to petitioners, dated December 19, 2016, requesting information regarding itemized deductions reported on

petitioners' 2015 resident income tax return that resulted in petitioners seeking a refund of \$3,172.00. This correspondence indicated that the Division was unable to verify amounts claimed by petitioners as itemized deductions. Therefore, the Division recomputed petitioners' return using the allowable standard deduction, which reduced the requested refund amount to \$1,439.22. The correspondence requested that petitioners provide a copy of their Schedule A attached to their filed federal return and a copy of documents substantiating the amounts listed on their schedule A. The Division indicated that a refund check in the amount of \$1,439.22 would be issued within 60 days based upon its recomputation of petitioners' return. However, the Division suggested that petitioners should submit any documents they had to substantiate the itemized deductions claimed.

2. In response to the Division's correspondence, petitioners submitted a letter that they titled "STATEMENT TO AUDIT DEMAND" in which they argued that they were entitled to a field audit. This correspondence stated, in pertinent part, that:

"The State of New York's demand to audit the taxpayers' return without allowing the taxpayer, or the taxpayers' representative, to be present violated the taxpayers' due process rights secured by the Fourteenth Amendment to the United States Constitution."

Petitioners stated that if New York State wanted to conduct an audit of their return, they need notice of a time and place so that they could be present for the "audit process." Otherwise, petitioners intend to file a lawsuit in federal district court for the violation of their constitutional rights.

3. In response, by correspondence dated March 2, 2017, the Division notified petitioners that it does not meet with taxpayers during a routine desk audit and that an auditor would review any documentation that was submitted by petitioners. Additionally, the correspondence noted

that the power of attorney form received for Dean Nasca, their representative, was incomplete and instructed petitioners to have Mr. Nasca correct the power of attorney form. The correspondence stated that no additional refund would be granted since no further documentation was provided; however, the Division would review anything that petitioners submitted in the future.

4. Thereafter, petitioners filed a request for conciliation conference with the Bureau of Mediation and Conciliation Services (BCMS). The conference was held on December 5, 2017. At the conference, petitioners provided documentation, for the first time, that substantiated the itemized deductions, including the job expenses, claimed on the return. In response, BCMS issued a consent to petitioners allowing the remaining balance of their refund, as reflected in the consent dated January 24, 2018. Therefore, petitioners proved that they were entitled to the full \$3,172.00 as originally reported on their 2015 personal income tax return.

5. On February 21, 2018, petitioners filed a petition with the Division of Tax Appeals seeking an award of costs for fees paid to their representative. Attached to the petition is an invoice from Dean Nasca, CPA, indicating the following dates and charges:

| Date          | Description  | Hours | Hourly Rate | Total Charge                              |
|---------------|--|-------|-------------|---|
| Feb. 14, 2017 | Respond to NYS Audit Demand Letter                       | 0.75  | \$75.00     | \$56.25 plus \$4.45 certified mailing fee |
| Aug. 7, 2017  | Preparation of Request for Conciliation Conference Forms | 0.50  | \$75.00     | \$37.50 plus \$4.45 certified mailing fee |

|              |   |      |         |          |
|--------------|---|------|---------|----------|
| Dec. 4, 2017 | Copy required documentation and prepare for conciliation conference | 2.0  | \$75.00 | \$150.00 |
| Dec. 5, 2017 | Attend conciliation conference                                      | 1.75 | \$75.00 | \$131.25 |
| TOTAL        |   |      |         | \$383.90 |

6. Petitioners submitted a sworn affidavit that states that their net worth did not exceed \$2 million at the time the civil action was filed.

7. Included with the Division's response to petitioners' application for costs is an affidavit of Trude R. Wilson, dated April 25, 2018. Ms. Wilson is a Tax Technician I in the Division's Income/Franchise Desk Audit Bureau and has been in that position since May 2012. Ms. Wilson's duties include performing desk audits of personal income tax returns, including itemized deductions audits. Ms. Wilson's affidavit is based upon her review of the Division's files and her personal involvement with this audit.

8. The Division maintains an e-MPIRE account for each taxpayer that, among other things, tracks all correspondence between the Division and that taxpayer and is updated in the ordinary course of business whenever a Division employee works on the taxpayer's account. According to Ms. Wilson, if a taxpayer or representative submits documentation to the Division at the fax number or address indicated on the notice issued to petitioners, it would be imaged into the taxpayer's account upon receipt. Additionally, Ms. Wilson affirms that if a taxpayer calls the Division, a case contact would be entered into the events log in the taxpayer's account.

9. Ms. Wilson avers that she reviewed petitioners' accounts and that petitioners did not submit any documentation in response to the Division's request for substantiation of their

itemized deductions during the course of the audit. Therefore, all claimed deductions were disallowed, as unsubstantiated, which was the basis for the refund denial. Additionally, Ms. Wilson avers that petitioners finally submitted documentation substantiating their claimed deductions, for the first time, at the conciliation conference held on December 5, 2017.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began her determination in this matter by setting forth the major provisions of Tax Law § 3030, which provides for the award of reasonable administrative and litigation costs to petitioners who substantially prevail in their protests of the Division's proposed assessments. She noted that the statute provides that reasonable administrative costs are costs that are paid in connection to an administrative hearing, but incurred after the issuance of the notice giving rise to the taxpayer's right to a hearing. A prevailing party, according to the Administrative Law Judge, is any party, other than the commissioner or creditor of the taxpayer, who has substantially prevailed with respect to the amount in controversy or with respect to the most significant issues presented. However, such a party is not treated as the prevailing party if the Division bears the burden of proof in showing that its position was substantially justified.

Next, the Administrative Law Judge observed that, although the statute requires a cost application to be made within 30 days of final judgment in the matter, there is no definition of "final judgment" given therein. The Administrative Law Judge reasoned that because Tax Law § 3030 was based on Internal Revenue Code (IRC) (26 USC) § 7430, it was proper to look to the federal statute for guidance. The Administrative Law Judge found that the federal statute provided for a cost award for reasonable administrative costs incurred in connection with the IRS and, based on this, the Administrative Law Judge determined that the BCMS consent issued to petitioners would be deemed the final judgment with respect to petitioners' protest of the

Division's partial disallowance of their refund claim. Because petitioners made a cost application within the limitations period measured from the date of the BCMS consent, the Administrative Law Judge determined that their cost application was timely filed.

The Administrative Law Judge then turned to the question of whether the Division met its burden of showing that its position was substantially justified, which would have the effect of causing petitioners to be deemed a non-prevailing party for purposes of the statute. The Administrative Law Judge found that the facts demonstrated that petitioners failed to submit requested documents to substantiate their claimed deductions until the BCMS conference, and instead answered that request with a demand for a field audit. As such, the Administrative Law Judge concluded that the Division was substantially justified in adjusting petitioners' refund claim. The Administrative Law Judge also concluded that petitioners' argument that the Division's position was not substantially justified because it failed to follow guidance that mandates a field audit to be without merit as petitioners failed to show any regulation or law that would require a field audit in petitioners' circumstance. The Administrative Law Judge then denied the petition for costs in this matter.

#### ***ARGUMENTS ON EXCEPTION***

Petitioners argue on exception that the Administrative Law Judge erred in concluding that the Division bore its burden of showing that its position was substantially justified for the purposes of Tax Law § 3030 and denying their application for costs. Specifically, petitioners argue the Division lacked the legal authority to adjust their claimed refund in lieu of conducting a field audit. They claim that the Division violated their due process rights secured by the United States and New York Constitutions by not conducting a field audit to substantiate their claimed deductions for tax year 2015. They posit that the Division cannot be deemed substantially

justified in its position for the purposes of Tax Law § 3030 because guidance in the Division's publication 130-D guaranteed certain rights and procedures with respect to audits. Petitioners request that this Tribunal award them reasonable administrative costs pursuant to Tax Law § 3030.

The Division argues that the Administrative Law Judge correctly determined that petitioners' application for costs should be denied because it had borne its burden of showing that its position was substantially justified. The Division states that its desk audit process is constitutional and its request for substantiation of petitioners' claimed deductions did not violate petitioners' due process rights under the United States or New York Constitutions. The Division urges this Tribunal to deny petitioners' exception and affirm the determination of the Administrative Law Judge.

### ***OPINION***

Tax Law § 3030 provides for an award of reasonable administrative and litigation costs to a taxpayer who is the prevailing party in an administrative or court proceeding against the Division (Tax Law § 3030 [a]). An administrative proceeding includes any procedure or action before BCMS (Tax Law § 3030 [c] [6]). A prevailing party, as that term is defined under the statute, is a party in a proceeding to which Tax Law § 3030 applies (other than the Division or a creditor of the taxpayer) who has substantially prevailed with respect to the amount in controversy or with respect to the most significant issues presented (Tax Law § 3030 [c] [5] [A]). A taxpayer must submit an application within 30 days of the final judgment in the action demonstrating that the taxpayer meets the eligibility requirements (*see* Tax Law § 3030 [c] [5] [A] [ii]). However, a taxpayer who would otherwise qualify as a prevailing party will not be

deemed as such if the Division bears its burden of showing that its position was substantially justified (Tax Law § 3030 [c] [5] [B]).

We agree with the Administrative Law Judge that where, as in the instant case, a term is undefined under a section of the Tax Law that was modeled after a federal statute (*see* L 1997, ch 577), it is proper to look to federal regulations and cases for guidance (*see Matter of Levin v Gallman*, 42 NY2d 32 [1977]; *Matter of Ilter Sener*, Tax Appeals Tribunal, May 5, 1988).

IRC (26 USC) § 7430 provides that reasonable costs may be awarded for costs incurred in an administrative proceeding within the Internal Revenue Service (IRC [26 USC] § 7430). The consent entered into by petitioners on January 24, 2018, after submitting the requested documentation at the BCMS conference on December 5, 2017, resolved the question of petitioners' tax liability and resulted in a full refund of the amount they claimed. This consent represents the final judgment in this matter for the purposes of Tax Law § 3030 and demonstrates that petitioners ultimately prevailed on the amount in controversy and the most significant issue presented, i.e., whether their claimed deductions could be substantiated.

Tax Law § 3030 also provides that an otherwise prevailing party is not deemed to be the prevailing party where the Division can demonstrate that its position was substantially justified (Tax Law § 3030 [c] [5] [B]; *see also City of New York v State of New York*, 94 NY2d 577 [2000]). The Division's position as of the day it issues the notice giving rise to the hearing is operative for purposes of determining whether its position was substantially justified (Tax Law § 3030 [c] [8]). The determination of whether the Division's position was substantially justified is based on "all the facts and circumstances" surrounding the case, not solely the final outcome (*Matter of March*, Tax Appeals Tribunal, November 26, 2018, *quoting Phillips v Commr.*, 851 F2d 1492 [1988]). In deciding whether the Division's position was substantially justified, we



have held that the Division must show that its position “had a reasonable basis both in fact and law” (*Matter of March*; *Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012, *citing Powers v Commr.*, 100 TC 457 [1993]; *Pierce v Underwood*, 487 US 552 [1988]).

We find that the Division’s position as of the day it partially denied petitioners’ refund claim, thereby giving rise to petitioners’ right to a BCMS conference was reasonable in light of the surrounding facts and circumstances. It was incumbent on petitioners to provide the requested information in order to substantiate their claimed deductions in response to the desk audit letter (Tax Law § 658 [a]; 20 NYCRR 158.1 [a]; *see also Matter of Sperl*, Tax Appeals Tribunal, May 8, 2014; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 197 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975] [holding that the burden is on the taxpayer seeking a deduction to establish his right to it]). The Division’s inference that the information was not forthcoming was not unreasonable given petitioners’ response to the request for further documentation.

We now consider petitioners’ argument that their due process rights guaranteed by the United States and New York Constitutions were violated by the Division’s request for substantiation of their claimed deductions. Petitioner’s argument, in essence, is that a desk audit, whereby the Division asks a taxpayer to submit documentation in support of the taxpayer’s reporting position on a tax return, is a constitutionally invalid audit procedure because it denies petitioners their due process rights. Instead, petitioners maintain that only a field audit would afford them a meaningful place and time for adjudication of their protest.

We note first that our jurisdiction does not encompass challenges to the constitutionality of a statute on its face (*see Matter of A&A Serv. Sta., Inc.*, Tax Appeals Tribunal, October 15, 2009). We are, however, empowered to consider whether the application of a statute to a

particular set of facts violates the constitution (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003). Legislative enactments are presumed to be constitutional at the administrative level (*Matter of Finch, Pruyn & Co.*, Tax Appeals Tribunal, April 22, 2004). Petitioners ultimately bear the burden of proving that a statute, as applied to the specific facts of their case, is unconstitutional (*Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992).

Pursuant to the Tax Law, the Division has the power to examine books, papers, records or memoranda of a taxpayer for the purposes of “ascertaining the correctness of any return” (Tax Law § 697 [b]). The Division may require the attendance of a person rendering the return under examination, but is not mandated by the statute to do so (*id.*). Furthermore, contrary to petitioners’ assertions, the Division’s publication 130-D specifically provides for and discusses desk audits in such instances. Petitioners have not identified how issuing a notice of disallowance and requesting additional information to substantiate the amount of the refund claimed violated their due process rights. Petitioners have thus failed to bear their burden of proving that Tax Law § 697, as applied to the facts of their case, was unconstitutional.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael and Suzanne Doyle is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The application of Michael and Suzanne Doyle for an award of costs is denied.

DATED: Albany, New York  
May 9, 2019

s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner