STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL AND SUZANNE DOYLE	:	DETERMINATION DTA NO. 828606
for an Award of Costs Pursuant to Article 41, § 3030 of the Tax Law for the Year 2015.	:	

Petitioners, Michael and Suzanne Doyle, appearing by Dean Nasca, CPA, filed a petition on February 21, 2018, seeking administrative costs under section 3030, article 41 of the Tax Law.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel), was given until May 10, 2018 within which to file a response to the application for costs, which date commenced the 90-day period for issuance of this determination.

Based upon petitioners' application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

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, named in the correspondence, 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. The conference was held on December 5, 2017. At this conference, petitioners provided documentation, for the first time, that substantiated the itemized deductions, including the job expenses, claimed on the return. In response, a consent was issued 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 which, 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 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.

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 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]), with the dollar amount of such fees capped at $75.00 per hour, unless there are special factors that justify a higher amount (Tax Law § 3030 [c] [1] [B] [iii]).

B. A prevailing party is defined by the statute, in pertinent part, 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]).

C. As noted above, the application must be brought within 30 days of final judgment in the matter (Tax Law § 3030 [c] [5] [A] [ii] [I]). The term "final judgment" is not defined by the statute and no regulations have been promulgated pursuant to Tax Law § 3030. However, Tax Law § 3030 is modeled after Internal Revenue Code § 7430. Therefore, it is proper to look to Federal regulations and cases for guidance in analyzing Tax Law § 3030 (***see Matter of Levin v Gallman***, 42 NY2d 32 [1977]; ***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988).

Internal Revenue Code § 7430 (a) provides that:

> "In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, 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 Internal Revenue Service."

Petitioners entered into a consent dated January 24, 2018, which granted their refund in full. The consent, thus, resolved the tax liability of petitioners in the administrative proceeding. As such, the consent is deemed the final judgment for purposes of Tax Law § 3030. The statute of limitations for filing an application for costs commenced on January 24, 2018, the date of the consent. The petition herein seeking administrative costs was filed on February 21, 2018 and, thus, was timely filed.

D. The next issue is whether the Division has met its burden of proving that its position was substantially justified (***see*** Tax Law § 3030 [c] [5] [B]). The Division has produced proof, through the affidavit of Ms. Wilson, to establish that the Division did not receive any documentation to support petitioners' claimed itemized deductions until the conciliation conference held on December 5, 2017, despite the fact that the Division had requested, by letter, such information from petitioners. Rather than supply the substantiation for the claimed expenses, petitioners demanded a field audit at a specified time and place. Accordingly, it is concluded that petitioners did not provide any documentation substantiating the claimed deductions until the time of the conciliation conference. Therefore, the Division was substantially justified in adjusting petitioners' refund amount by initially disallowing the claimed itemized deductions.

Petitioners argue that the Division cannot prove that it was substantially justified because it failed to follow its applicable published guidance that mandates the Division to conduct a field audit regarding the claimed itemized deductions. This argument is without merit. Petitioners have pointed to no regulation or case law that mandates a field audit is required in order to request additional information regarding a filed tax return.

E. The petition of Michael and Suzanne Doyle for costs is denied.

DATED: Albany, New York
August 2, 2018

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE