

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
XUE SHAN WANG AND TZE YAM PUN : DETERMINATION
for an Award of Costs Pursuant to Article 41, § 3030 of : DTA829594
the Tax Law for the Year 2018. :
:

Petitioners, Xue Shan Wang and Tze Yam Pun, filed a petition on May 10, 2021, seeking administrative costs under section 3030 of article 41 of the Tax Law.

Petitioners appeared pro se. The Division of Taxation, appearing by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), was given until June 9, 2021 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, Jessica DiFiore, 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. Petitioners, Xue Shan Wang and Tze Yam Pun, filed a New York State and New York City joint resident income tax return, form IT-201 (return), for 2018 requesting a refund of \$3,195.00. On line 70a of the return, petitioners claimed a New York City enhanced real property tax credit in the amount of \$500.00.¹ On line 63 of the return, petitioners claimed a

¹ In its affirmation in opposition to petitioners' Application for Costs, the Division of Taxation (Division) asserts that with their return, petitioners filed a claim for empire state child credit, form IT-215, and a claim for earned

New York State Empire State child credit (ESCC) in the amount of \$330.00. On line 70 of the return, petitioners claimed a New York City earned income credit (NYC EIC) in the amount of \$88.00, and on line 65, petitioners claimed a New York State earned income credit (EIC) of \$497.00.

2. By letter dated April 25, 2019, the Division of Taxation (Division) advised petitioners that it could not issue them a refund because it could not verify their claim for a real property tax credit. The Division also requested more information about petitioners' income and household. Regarding petitioners' income, the Division requested all documents for any income received from any of the following sources: social security, pensions and annuities, public assistance, unemployment compensation, supplemental security income, or any other income in support of petitioners' claim. The information the Division sought regarding petitioners' household included a utility bill, social security cards for all members in petitioners' household that were over the age of 18, any tax bills or cancelled checks, or any rental agreement.

3. By letter dated July 17, 2019, the Division stated that petitioners refund request could not be allowed because the documentation petitioners submitted did not support their claim and their real property tax was computed incorrectly. The Division instructed petitioners to file an amended resident income tax return (form IT-201-X) for 2018.

4. Petitioners filed an amended resident income tax return for 2018 (amended return) dated August 1, 2019. In the amended return, petitioners requested a refund of \$2,902.00. On line 70a of the amended return, petitioners claimed \$207.00 for the New York City enhanced real property tax credit. On line 63 of the amended return, petitioner claimed \$330.00 for the ESCC.

income credit, form IT- 213. Despite asserting that such forms were attached as part of Exhibit A, only the return was in Exhibit A. Form IT-213 and IT-215 were not provided in the record.

On line 70, petitioners claimed \$88.00 for the NYC EIC. On line 65, petitioners claimed \$497.00 for the EIC.

5. On August 23, 2019, the Division issued petitioners an account adjustment notice (first notice). The first notice referenced petitioners' original income tax return and the refund requested of \$3,195.00, and provided that the refund allowed was \$1,801.08. In the first notice, the Division explained that petitioners' ESCC was disallowed because another taxpayer claimed a credit on at least one of the children listed on petitioners' return and to claim the credit, the child or dependent must be a qualified person. It stated that a qualified person under the Tax Law, generally, is a child that spends more than six months in the taxpayer's home during the tax year. The Division noted that if petitioners believed their child met the definition of a qualified person and that they were entitled to the credit, they could send the Division a copy of the child's birth certificate, detailed records of the number of days and nights each child spent with petitioners, a letter from the child's doctor showing the child's name, date of birth, address of record, and name of the parent or guardian with whom the child resided for the tax year at issue, and a description of petitioners' relationship to each child. Petitioners' EIC and NYC EIC were denied because their earned income or federal adjusted gross income exceeded the maximum allowed. Petitioners claim for the NYC EIC was denied based on information petitioners provided.

6. Four days later, on August 27, 2019, the Division issued petitioners a second account adjustment notice (second notice) regarding their amended income tax return for 2018. This notice gave the same explanations as the first notice for denying petitioners' ESCC, EIC, and NYC EIC. This notice also adjusted the original refund received by petitioners, granting them an additional refund for the real property tax credit of \$207.00 as requested on their amended return.

7. Petitioners then filed a petition with the Division of Tax Appeals dated September 26, 2019, challenging the Division's partial denial of petitioners' refund claim and seeking a refund of \$915.00. Petitioners asserted that their child lived with them, they were not divorced, and that they provided all financial support for their child for all of 2018. They also enclosed a copy of the second notice, their child's birth certificate, a letter from a doctor, and a copy of their child's social security card. The letter from the doctor provided the child's name, date of birth, how long the child had been a patient of the practice, when the child was last seen by the practice, where the child resided according to his insurance company's information, and it listed petitioners as his parents.

8. On November 15, 2019, the Division sent petitioners a third account adjustment notice (third notice) granting petitioner's remaining refund claimed from their amended return for 2018 of \$915.00 for the EIC, NYC EIC and ESCC.

9. On February 5, 2020, the Division sent petitioners a letter in reply to their recent inquiry advising them that the Tax Law does not allow for interest on refundable credits. The Division explained that because petitioners' latest amended return was amended to add credits, no interest accrued on the refund.

10. On May 5, 2020, the Division sent petitioners a notice of disallowance regarding tax year 2018. In the notice, the Division stated that it had reviewed petitioners' correspondence regarding their 2018 refund and that its records indicated that petitioners had received the full refund as claimed in three payments. The Division explained that the original refund contained interest because a portion of that refund was due to withholding taxes paid and the third refund of \$915.00 was for credits and no interest is paid for credits. The Division then stated that petitioners previously received a notice, DTF-160, providing them with the Division's

explanation for the disallowance of the refund they requested on their return and that they have not provided the information and documentation necessary to allow the refund they requested. It also stated in the notice that “[t]his Notice of Disallowance supersedes all prior issued notices for this refund claim period and the amount of your disallowed refund claim is indicated above.”

The amount disallowed in the notice was \$0.00.

11. The Division brought a motion, dated January 27, 2021, seeking to have the petition dismissed or for summary determination granted to the Division. By determination dated April 29, 2021, James P. Connolly, Administrative Law Judge, granted the Division’s motion for summary determination.

12. In their petition for costs, petitioners requested reasonable administrative costs of \$500.00 for the fee they incurred from their accountant for work performed to get their tax refund. Petitioners attached an invoice from Sing Loke Chu CPA P.C. reflecting a description that stated “Reply to NYS Notice- Tax year 2018” for \$500.00 and a rate amount of 1.00. It is not clear whether the 1.00 rate amount is for 1 hour.

CONCLUSIONS OF LAW

A. Tax Law § 3030 (a) (1) permits an award of costs to a prevailing party for reasonable administrative costs incurred in connection with an administrative proceeding with the Division (Tax Law § 3030 [a]). “Prevailing party” is defined by the statute, in pertinent part:

“(5) Prevailing party. (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):

(ii) 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”

However, the statute also provides for an exception to the definition of a prevailing party where the Division establishes that its position was substantially justified (Tax Law § 3030 [c] [5] [B]). To prove substantial justification, the Division must show that its position “had a reasonable basis both in fact and law” (*Matter of March*, Tax Appeals Tribunal, November 26, 2018; *Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012, citing *Powers v Commissioner*, 100 TC 457 [1993]). Such a determination considers the totality of the facts and circumstances surrounding the case, not solely the final outcome (*id.*). The Division’s position is as of the date of the notice or other document giving rise to the taxpayer’s right to a hearing (Tax Law § 3030 [c] [8]).

Here, it is clear that petitioners prevailed with respect to whether they were entitled to a refund for the ESCC, EIC, and the NYC EIC. It must then be determined whether the Division’s position was substantially justified. The Division issued the second notice, granting the refund for the New York City real property tax credit but denying the ESCC, the EIC and the NYC EIC, because petitioners did not provide the documentation necessary to establish their entitlement to those credits. Taxpayers must keep and, upon request, make available to the Division, such records as are sufficient to establish the credits claimed by such taxpayers in any New York State income tax return (*see* Tax Law § 658 [a]; 20 NYCRR 158.1 [a], 158.7). The Division’s position denying those credits because petitioners failed to provide substantiation despite repeated requests for the same cannot be said to lack a rational basis. Additionally, upon receipt of the petition with all attachments, including the child’s birth certificate, the letter from the doctor

providing the child's name, date of birth, time with the practice, the child's address and petitioners' names, and the child's social security card, the Division promptly issued petitioners the refund for those credits. The Division's position denying the ESCC, EIC and NYC EIC was substantially justified at the time it issued the second notice giving rise to this proceeding.

B. While not raised by the Division, even if the Division's position was not substantially justified, petitioners have not demonstrated they are entitled to costs because they failed to adequately show that they are individuals whose net worth was less than \$2 million when the proceeding was commenced. To constitute a "prevailing party" entitled to costs, petitioners must show their net worth did not exceed two million dollars at the time the petition was filed (Tax Law § 3030 [c] [5] [A] [ii]; *Matter of ERW Enters, Inc.*, Tax Appeals Tribunal, November 5, 2020; *Matter of March*). Petitioners produced no evidence to meet this prerequisite.

C. Additionally, a prevailing party must include an itemized statement from the individual authorized to practice before the Division of Tax Appeals representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed (Tax Law § 3030 [c] [5] [ii]). Here, petitioners appeared pro se and did not have an individual authorized to practice before the Division of Tax Appeals represent or appear on their behalf. While petitioners may have been assisted by a CPA, such costs cannot be included in the amount sought as such CPA never appeared on behalf of the party either as their representative or an expert witness.

D. Moreover, reasonable administrative costs are limited to costs incurred on or after the date of the document giving rise to the taxpayer's right to a hearing (Tax Law § 3030 [c] [2] [B]). Here, even assuming the expenses the taxpayers incurred qualified as recoverable costs, the taxpayers have not set forth any affirmations or documentation, such as an itemized invoice,

showing when the costs were incurred to “Reply to NYS Notice- Tax Year 2018.” The invoice attached to the petition merely shows a charge of \$500.00 for one hour of work in replying to a NYS notice for tax year 2018 and is insufficient to establish the amount sought or when the work was performed.

E. The application of Xue Shan Wang and Tze Yam Pun for costs is denied.

DATED: Albany, New York
September 2, 2021

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE