

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPH JEFFRIES-EL : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 826103
Personal Income Tax under Article 22 of the Tax Law :
and the Administrative Code of the City of New York :
for the Years 2007 and 2008. :
:

Petitioner, Joseph Jeffries-El, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2007 and 2008.

On December 10, 2015, the Division of Tax Appeals issued a determination granting the petition and cancelling the Notice of Deficiency issued by the Division of Taxation on February 1, 2013, as modified by the conciliation order of November 22, 2013.

By letter postmarked March 4, 2016, petitioner, appearing pro se, brought an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), filed a response to the motion for costs on March 29, 2016. Petitioner filed a reply on April 4, 2016,¹ which date began the 90-day period for issuance of this order.

¹ Petitioner's reply was permitted pursuant to 20 NYCRR 3000.5(b).

Based upon petitioner's application for costs, the Division's response to the motion for costs, and all pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. Petitioner, Joseph Jeffries-El, was a resident of both the state and city of New York during 2007 and 2008, and filed New York State personal income tax returns for those years.
2. Starting in June 1998, and throughout the years at issue, petitioner was the sole shareholder of Tiffany Associates, Inc. (Tiffany), a subchapter S corporation.
3. Tiffany was the owner of two contiguous parcels of real property located at 783 Eldert Lane, Brooklyn, New York (the property). The property was the primary asset owned by Tiffany. The parcels comprising the property were sold in 2007 and 2008 for a combined price of \$7,600,000.00.²
4. Petitioner and Darshan Shah, M.D. (Dr. Shah) executed an agreement, dated October 6, 2003 (Stock Purchase Agreement), calling for petitioner to sell all of his shares in Tiffany to Dr. Shah for \$100,000.00 and the assumption of certain debt. Pursuant to the terms of the Stock Purchase Agreement, petitioner was to deliver all stock certificates of Tiffany to Dr. Shah. As a result of the Stock Purchase Agreement, Dr. Shah believed that, as of October 2003, he was the sole owner of Tiffany and, therefore, the property. The stock certificates were never delivered by petitioner to Dr. Shah.

² The purchase price was apportioned as follows: the 2007 sale (\$5,000,000.00) and the 2008 sale (\$2,600,000.00).

5. In early 2007, Dr. Shah commenced numerous civil actions against petitioner and Tiffany seeking enforcement of the Stock Purchase Agreement and delivery of the stock. In August 2007, prior to the sale of the property, petitioner, Tiffany, and Dr. Shah, entered into a settlement agreement (Settlement Agreement) to globally resolve their disputes. The Settlement Agreement called for payment of \$1,100,000.00 by petitioner and Tiffany to Dr. Shah. In return, Dr. Shah agreed to waive all claims to any ownership interest he may have in Tiffany or the property.

6. In 2011, the Division of Taxation (Division) began an audit of Tiffany's franchise tax returns for the years 2006 through 2008. During the audit, it was discovered that Tiffany failed to report the sales of the two parcels of the property and any gain. It was also discovered that petitioner, likewise, had failed to report the sales or gain on his personal income tax returns. Consequently, at the Division's request, petitioner provided documentation with regard to the sale of the property.

7. At the conclusion of the audit, Tiffany and petitioner agreed with the Division that the amount of total consideration they received for the property was \$7,600,000.00. Tiffany and petitioner, however, maintained that the basis in the property was \$7,635,881.00, resulting in a net loss and no tax liability. Meanwhile, the Division disallowed \$1,822,766.00 of the claimed basis, resulting in a revised basis of \$5,813,115.00, and an unreported capital gain of \$1,175,582.00 for 2007 and \$611,303.00 for 2008.

8. Based on the audit, the Division issued Notice of Deficiency L-039042975-8, dated February 1, 2013, to petitioner as sole shareholder of the S corporation, Tiffany. The statutory notice asserted additional tax due of \$187,951.00, penalty of \$64,684.52, and interest, for a total liability of \$325,583.17 for the years 2007 and 2008.

9. After a conciliation conference, the Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order dated November 22, 2013 recomputing the statutory notice. The conciliation order reduced the tax to \$174,604.00, and sustained penalties and interest to be computed at the applicable rate on the revised tax figure.

10. After the BCMS adjustments, two issues remained. The first was the Division's disallowance of petitioner's inclusion of the settlement payment to Dr. Shah in the basis of the property. The second involved the disallowance by the Division of a prepaid interest payment as having no business purpose.

11. Petitioner filed a petition with the Division of Tax Appeals on February 18, 2014. He did not list a representative on the petition.

12. A hearing was held in this matter before the Division of Tax Appeals on March 16, 2015, wherein the Division and petitioner presented evidence and testimony. Petitioner was unrepresented throughout the administrative proceeding and appeared pro se at the hearing.

13. On December 10, 2015, the Division of Tax Appeals issued a determination granting the petition and cancelling the Notice of Deficiency.

14. Petitioner's March 4, 2016 application seeks an award of costs for fees paid to Colonial Tax Consultants, Inc. (Colonial). Petitioner attached to his application a statement from Colonial, entitled "All transactions from All [sic] dates for Jeffries-El, Joseph." Under that heading, the statement reads as follows:

Date	Type	No.	Due Date	Balance	Total	Status
07/25/2011	Sales Receipt	1729		\$0.00	\$4,000.00	Paid
02/15/2011	Payment		02/15/2011	\$0.00	\$-800.00	Closed
01/03/2011	Payment		01/03/2011	\$0.00	\$-850.00	Closed

11/24/2010	Payment		11/24/2010	\$0.00	\$-850.00	Closed
11/24/2010	Invoice	859	11/24/2010	\$0.00	\$2,500.00	Paid

The statement contains no further information and, in particular, does not identify who performed the services on behalf of petitioner.

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 (*see* 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 (*see* 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 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. It is clear that petitioner has substantially prevailed with the amount in controversy under Tax Law § 3030(c)(5)(A)(i)(I) based on the determination of the Division of Tax Appeals issued on December 10, 2015. Petitioner has failed, however, to establish that he is eligible to receive an award for his expenses for several reasons pursuant to Tax Law § 3030(c)(5)(A)(ii)(I). First, the billing statement from Colonial, attached to petitioner's application, does not meet the

required itemized statement of actual time expended and rate criteria of the statute. It fails to provide the actual time spent on this matter and the rate at which fees and other expenses were computed by Colonial. Also, petitioner has failed to demonstrate that the fees were paid to an attorney (as defined in Tax Law § 3030[c][3]) or expert witness appearing on his behalf. The statement also fails to identify the individual who performed the services and his or her qualifications. In fact, as the Division correctly points out, petitioner did not have a representative throughout the administrative proceeding.³ For these reasons, petitioner fails to meet the definition of prevailing party as stated in Tax Law § 3030(c)(5)(A)(ii)(I).

D. Moreover, petitioner has not demonstrated reasonable administrative costs incurred in connection with the administrative proceeding, as defined by Tax Law § 3030(c)(2)(B). The Colonial statement does not reflect any entry after July 2011, while the notice of deficiency, which begins the administrative proceeding, was issued in February 2013. Thus, petitioner's application fails on this ground as well.

E. Finally, and as an additional independent basis for denying the relief sought, petitioner has not established that his net worth did not exceed two million dollars at the time the action was filed, as required by Tax Law § 3030(c)(5)(A)(ii)(II).

F. As petitioner has failed to meet the requirements of Tax Law § 3030(c)(5)(A)(ii)(I) and (II), it is not necessary to determine whether the Division's position was substantially justified pursuant to Tax Law § 3030(c)(5)(B).

³ In fact, petitioner also appeared pro se at his conciliation conference.

G. The application for costs of petitioner, Joseph Jeffries-El, is denied.

DATED: Albany, New York
May 26, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE