STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **GREGORY A. SOJKA** **D/B/A GREG'S TREE SERVICE** for an Award of Costs Pursuant to Article 41 of the Tax Law for the Period June 1, 2016 through February 28, 2019.	:	ORDER DTA NO. 850239

Petitioner, Gregory A. Sojka, d/b/a Greg's Tree Service, appearing by Lippes Mathias, LLP (Justin J. Andreozzi, Esq., of counsel), filed an application on June 9, 2025 for an award of costs pursuant to section 3030 of article 41 of the Tax Law for the period June 1, 2016 through February 28, 2019.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), filed a brief in response to the application for costs on August 29, 2025. By permission, petitioner was given until October 17, 2025 to file a reply, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs, the Division of Taxation's response to the application, petitioner's reply and all documents submitted in connection with this matter, Osborne K. Jack, Administrative Law Judge, renders the following order.

ISSUES

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

II. If so, whether the maximum rate should be increased for cost-of-living adjustments or some other special circumstances.

FINDINGS OF FACT

1. On April 17, 2019, the Division of Taxation (Division) initiated an audit of Gregory A. Sojka d/b/a Greg's Tree Service's (petitioner's) sales and use tax returns for the period June 1, 2016, through February 28, 2019 (the audit period).

2. Petitioner operated a business in Lancaster, New York, providing tree cutting, tree trimming and tree removal services to customers in the Western New York area.

3. During the audit, the Division concluded that the records provided by petitioner were insufficient to allow the Division to determine whether petitioner had reported the correct amount of taxes due for the audit period.

4. To compute petitioner's audited sales for the audit period, the Division compared petitioner's fuel purchases to its sales for each month in the audit period and calculated a fuel purchase to sales ratio for each month.

5. The Division then applied the lowest computed ratio - .0201 from August 2017 - to petitioner's reported sales for the audit period to determine audited taxable sales of $1,637,760.73 and additional sales tax due of $82,048.04, for the audit period.

6. The Division also determined that petitioner owed $3,317.22 in additional tax on capital asset purchases, for the audit period.

7. By letter, dated January 27, 2020, petitioner's then representative, Michael J. Tedesco, Esq., of Andreozzi Bluestein LLP,[1] expressed several concerns to the Division about the audit methodology. Mr. Tedesco stated, inter alia, that the Division's audit methodology was not rationally based or reasonably calculated to reflect the correct amount of tax due. Mr. Tedesco

[1] Andreozzi Bluestein LLP later became Lippes Mathias LLP by merger.

specifically stated that the Division improperly selected the ratio that generated the highest amount of audited sales.

8. By letter to the Division, dated February 20, 2020, Mr. Tedesco reiterated the concerns he had expressed in the previous letter. He expounded on his claim that the Division's decision to use the ratio that generated the highest amount of audited sales to determine audited sales was improper.

9. Thereafter, the Division concluded the audit and issued a notice of determination (assessment ID L-051291701), dated March 2, 2020, to petitioner asserting sales and use taxes due in the amount of $85,365.26 ($82,048.04 + $3,317.22), plus penalties and interest, for the period June 1, 2016 through February 28, 2019.

10. The Division also issued a notice of determination (assessment ID L-051292994), dated March 3, 2020, to petitioner asserting penalties in the amount of $51,000.00 based upon petitioner's failure to maintain or provide records for the audit period.

11. On March 4, 2020, the auditor, Tina Jarczewski, noted in the audit log that she and her supervisor, Joseph Logalbo, discussed changing the audit methodology because of the "perceived unreasonableness of the ratio used." On May 7, 2020, Ms. Jarczewski made a log entry noting that she had received an email from Mr. Logalbo advising that they should not change the audit methodology because "it would look bad if [they] suddenly changed [their] approach after the audit was complete."

12. On May 22, 2020, petitioner challenged the notices of determination (notices) by filing a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). BCMS issued a conciliation order (CMS No. 000320448), dated May 20, 2022, sustaining the notices.

13. On August 11, 2022, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

14. At the hearing in this matter, Ms. Jarczewski testified that she used the ratio that yielded the highest amount of gross receipts for the audit period.

15. The Administrative Law Judge ultimately concluded that the audit method used by the Division in this matter lacked a rational basis and was not reasonably calculated to reflect the taxes due.

16. On April 10, 2025, the Administrative Law Judge issued a determination cancelling the Division's assessment of additional tax due on sales in the amount of $82,048.04 and all associated penalties under assessment ID L-051291701. The Administrative Law Judge sustained the $3,317.22 in additional tax asserted on capital asset purchases.

17. Regarding assessment ID L-051292994, the Administrative Law Judge cancelled the $51,000.00 in penalties asserted therein.

18. Because no exception to the Tax Appeals Tribunal (Tribunal) had been filed by either party, the determination became final on May 12, 2025[2] (***see*** Tax Law § 2006 [7]; General Construction Law § 25-a).

19. On June 9, 2025, petitioner filed an application for costs and fees (application). Included with the application was a purported affirmation[3] of Justin J. Andreozzi, Esq., dated June 9, 2025, with a series of attachments including: (i) a copy of the determination and cover letter; (ii) an affidavit of Gregory A. Sojka, sworn to on June 9, 2025; (iii) the January 27, 2020

[2] Any exception filed with the Tribunal was due on May 10, 2025, which fell on a Saturday. Therefore, the due date for filing an exception fell to the next business day, Monday, May 12, 2025. Petitioner's application for costs and fees was due on or before June 11, 2025.

[3] The affirmation does not comport with the requirements of Civil Practice Law and Rules (CPLR) 2106 or State Administrative Procedure Act (SAPA) § 302.

correspondence to the Division; (iv) the February 20, 2020 correspondence to the Division; and (v) an itemized statement that sets forth the time expended and the rate at which fees and other expenses were computed (statement).

20. Petitioner initially hired the law firm of Andreozzi Bluestein LLP to represent it during the audit. Andreozzi Bluestein LLP subsequently merged with Mathias Lippes LLP. All fees at issue were paid to these entities.

21. The statement asserts that petitioner's representatives spent a total of 399.10 hours defending petitioner against the notices. Of the hours spent on the case, petitioner seeks reimbursement for 352.60 hours. The statement also itemized $1,329.84 in other costs and disbursements.

22. The amount of costs incurred by petitioner to defend against the notices for which petitioner seeks reimbursement total $117,937.34.[4] This amount includes attorneys' fees of $116,607.50 and litigation costs of $1,329.84. Petitioner computed attorneys' fees at a rate of $375.00 per hour for services performed by partners and $275.00 per hour for services performed by senior associates or enrolled agents.

23. Petitioner asserts that the Division of Tax Appeals should increase the statutory rate because there has been a substantial increase in the cost of living since Tax Law § 3030 was enacted. Petitioner argues that based on the Consumer Price Index published by the U.S. Bureau of Labor Statistics, the statutory rate would be $151.22 in today's dollars.

24. Petitioner also claims that it is entitled to a higher rate because this case "involved complex and specialized legal and factual issues."

[4] In his purported affirmation, Mr. Andreozzi states, without explanation, that petitioner seeks to recover $112,258.28 in total fees and costs.

25. Petitioner also claims that this case "required the expenditure of substantial professional time, legal research, hearing preparation, evidence review and post-hearing briefing."

26. Petitioner further asserts that this matter was "exacerbated by the Division's unscrupulous tactics." In this regard, petitioner notes that the Administrative Law Judge noted that the Division's auditor was evasive, contradictory and forgetful of material and relevant aspects of the case. He also notes that the auditor claimed that the audit file that she submitted at the hearing was complete when in fact a copy of the file obtained by petitioner through a FOIL request contained documents not included in the file submitted by the auditor.

27. Petitioner also claims the Division's conduct towards petitioner is a special factor warranting an increase in the rate. Petitioner states that the initial Division attorney assigned to this matter made written comments to petitioner, including the following, which justify an increased rate:

"The fact that [Alzheimer's] progresses slowly should have been a blessing . . .

Everyone has a sob story . . .

I will make him look like a fool who kept records open for his sister to throw out.

I will suggest the records were destroyed on purpose once he was notified of the audit.

I have already suggested further audits of your client after reviewing this case . . .

I keep ending my emails with a saying because it really doesn't matter to me.

C'est la vie. See you at the hearing whenever a judge gets assigned."[5]

[5] These statements are presented in Mr. Andreozzi's affirmation which does not comport with the requirements of CPLR 2106 and SAPA § 302. As such, the affirmation, without more, does not provide a basis to accept these allegations as factual. However, in its response to the costs application, the Division does not dispute that these comments were made.

28. Petitioner's net worth was always less than $7 million during the administrative proceedings in this matter.

29. At all times during the administrative proceedings in this matter, petitioner employed fewer than 500 employees.

30. The Division submitted a brief in opposition to petitioner's application for costs.[6] In its brief, the Division argues that petitioner has not established that he paid or incurred the legal costs and that the hours claimed are unreasonable and excessive. In this regard, the Division asserts that "the underlying case was a routine tax matter," and that the fees are unreasonable because the amount at issue was $201,483.53, yet petitioner claims to have spent $117,937.34 protesting the notices. The Division opined that "[o]ne must question whether a taxpayer would commit to paying such an amount and the reasonableness of the charges." The Division points to no evidence establishing what a reasonable cost or amount of time should be in this type of case.

31. The Division asserts that "[p]etitioner's application fails to include any invoices, receipts, retainer agreements, payment instruments, or other documentation evidencing payment or an obligation to pay [p]etitioner's [c]ounsel."

32. The Division highlights four groups of entries in the statement that it claims reflect work on unrelated matters. First, the Division states that entries, dated 9/19/24, 9/24/24, 10/2/24, 11/27/24, 12/2/24 and 12/20/24, relating to "[w]ork on FOIL matters" represent work completed after the record was closed and should not be included. Second, the Division challenged "[i]tems identified as 'IRS FOIL(sic) and appeal computations,'" on 11/20/20 and 11/23/20. Third, the Division highlights entries for "matters related to a subsequent sales tax audit not at issue in this

[6] The Division's brief was submitted by Jennifer L. Hink-Brennan, Esq., Principal Attorney. However, up until the filing of the Division's response, the Division had been represented by Brandon Batch, Esq.

litigation (3/29/22, 4/11/22, 4/26/22)." Finally, the Division challenges, as unnecessary, an entry for "[h]ours related to a bankruptcy proceeding (12/1/21)."

33. Petitioner requested and was given permission to file a reply to the Division's brief in opposition to petitioner's application for costs. As part of its reply, petitioner attached a second affidavit from Mr. Sojka, sworn to on October 15, 2025, wherein Mr. Sojka asserts that he had attached substantiation that he had paid his representatives at least $102,936.00 in fees and costs to represent him during the litigation of this matter. Attached to the second affidavit are: 12 checks payable to Lippes Mathias LLP, for a total of $55,100.00; 22 checks payable to Andreozzi Bluestein LLP for a total of $34,715.00; two checks payable to Frank Minisci (one dated July 17, 2019 and the other dated April 29, 2021, each for $1,000.00; a check payable to Liberty Mutual for $2,621.00; and three statements from a Bank of America credit card showing that during the periods September 26, 2019 to October 25, 2019, November 26, 2019 to December 25, 2019 and January 26, 2020 to February 25, 2020, petitioner paid $2,500.00, $5,000.00 and $1,000.00, respectively, to Andreozzi Bluestein LLP. These amounts total the $102,936.00 that petitioner asserts he paid to his representatives.

CONCLUSIONS OF LAW

A. Tax Law § 3030 (a) provides, generally, as follows:

> "[i]n 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 a 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."

B. To be a prevailing party, the applicant must: (1) substantially prevail with respect to the amount in controversy or the most significant issue or set of issues presented; (2) file the

application within 30 days of the final disposition; and (3) meet the net worth requirements (***see*** Tax Law § 3030 [c] [5] [A]). The Administrative Law Judge cancelled $82,048.04 of the $85,365.26 in taxes asserted under notice number L-051291701, and all penalties asserted under that notice, and cancelled the entire $51,000.00 in penalties asserted under notice number L-051292994. Accordingly, petitioner has substantially prevailed with respect to the amount in controversy and the set of issues presented (***see*** Tax Law § 3030 [c] [5] [A] [i]). In addition, because no exception was filed to the determination of the Administrative Law Judge, this matter became final on May 12, 2025. Thus, petitioner had until June 11, 2025 to file an application for cost and fees. The instant application was filed on June 9, 2025 and is, therefore, timely.

C. To qualify for an award of litigation costs, petitioner must demonstrate that, as a prevailing party, its net worth did not exceed $7 million at the time the action was filed and that the business did not have more than 500 employees at the time the action was filed (***see*** Tax Law § 3030 [c] [5] [A] [ii]). As part of its application, petitioner submitted two affidavits that established its net worth was less than $7 million at the time the action was filed and that it had fewer than 500 employees on the date that it filed its request for conciliation conference protesting the subject notices with BCMS.

D. A taxpayer will not be treated as the prevailing party if the Division establishes that its position was substantially justified (***see*** Tax Law § 3030 [c] [5] [B]). A position is substantially justified if it has a reasonable basis in both fact and law and is justified to a degree that could satisfy a reasonable person (***see Pierce v Underwood***, 487 US 552, 563, 565 [1988]). In this case, the burden is on the Division to establish that its position was reasonable in both fact and law and was justified on the dates the respective notices were issued to petitioner (***see*** Tax Law § 3030 [c] [5] [B] [ii]). The Division did not assert that its position was substantially

justified at the time the notices were issued and presented no facts or legal arguments on this issue. Accordingly, it is concluded that the Division concedes that its position was not substantially justified at the time it issued the notices to petitioner (***see Matter of Clayton Funding Corp.***, Tax Appeals Tribunal, July 8, 1993).

E. The Division asserted that petitioner did not demonstrate that it paid or incurred the costs at issue. The Division cites several federal cases for the proposition that the prevailing party must demonstrate that it has either paid the fees or incurred an obligation to pay such fees. This argument is rejected.

Contrary to the Division's assertions, there is no provision in Tax Law § 3030 that requires anything more than "an itemized statement from an attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed (except to the extent differing procedures are established by rule of court) . . . ." (***see*** Tax Law 3030 [c] [5] [B] [ii]). In this matter, petitioner's attorney provided a statement showing the time expended on this case and the rates at which fees were computed. This statement satisfied the requirements of the statute. Nonetheless, petitioner in its reply, submitted checks detailing payments totaling at least $83,950.00 to his representatives.

F. Next, the Division asserted that petitioner's application for costs should be denied because the time spent by petitioner's representatives defending petitioner's position was excessive given that "the underlying case was a routine tax matter." The Division questions whether it was reasonable for petitioner to spend $117,937.34 challenging assessments totaling $201,483.53. The Division points to no evidence establishing what a reasonable cost or amount of time should be in this type of case.

Moreover, the Division provides no suggestions about alternative solutions available to petitioner to challenge these notices. Before the notices were issued, petitioner's former representative, on at least two separate occasions, notified the auditors that the audit methodology lacked a rational basis and was not reasonably calculated to determine the amount of tax due. Yet the auditors continued with the audit and issued the notices.

Of course, the Division's audit tax compliance efforts would be toothless if it were to abandon every audit when a taxpayer's representative claimed that an audit was unreasonable. However, in this case, the auditors themselves questioned the reasonableness of the audit. On March 4, 2020, one day after the second notice was issued, the auditor noted in her log that she and her supervisor discussed changing the audit methodology because of the perceived unreasonableness of the method chosen. On May 7, 2020, she noted that she was advised by her supervisor that they should not change the audit methodology because it would "look bad" if they changed it after completing the audit. Thus, it appears that for five years, the Division insisted that the audit methodology here was reasonable simply to avoid the embarrassment of changing the methodology after the audit had been completed. The Division is in no position to complain that petitioner spent too much time and money challenging notices that the Division itself spent five years defending only to concede, without explanation, that the Division's position was not substantially justified when it issued the notices.

The documents provided by petitioner with its second affidavit show that it paid at least $83,950.00 to Andreozzi Bluestein LLP and Lippes Mathias LLP for legal services incurred after the notices were issued.

Regarding the specific entries questioned by the Division, petitioner in its reply, states that the entries dated 9/19/24, 9/24/24, 10/2/24, 11/27/24, 12/2/24 and 12/20/24, relating to

"work on FOIL matters," reflect necessary work to supplement the record. Petitioner's explanation is unconvincing. Petitioner does not explain how it could have supplemented the record after it was closed. Accordingly, the number of hours eligible for reimbursement is reduced by 4.1 hours to remove the unsubstantiated time allotted to these entries.

Regarding the entries for time allotted to "IRS FOIL," petitioner fails to explain how these items are relevant to its defense of the notices. Specifically, petitioner fails to address how any "IRS FOIL request" is related to its challenge of New York sales and use tax notices. However, the entries relate to paralegal hours for which petitioner seeks no reimbursement. Hence, no adjustment to the hours eligible for reimbursement is necessary.

As to the entries for "matters related to a subsequent sales tax audit not at issue in this litigation," petitioner explained that it considered the subsequent audit to be relevant to the matter at issue and noted that it presented the outcome of the subsequent audit as evidence in the matter at hand. It also noted that the three entries totaled only 36 minutes. Given petitioner's explanation and the time allotted to these entries, it is determined that these entries reflect reasonable work to challenge the notices.

Finally, regarding the entry for "hours related to a bankruptcy proceeding (12/1/21)," petitioner's attorney sufficiently explained that the bankruptcy consultation was a reasonable attempt to thoroughly represent petitioner. Thus, the time allotted to this entry is deemed reasonable and no adjustment is made to the hours eligible for reimbursement.

G. Section 3030 (c) (1) of the Tax Law defines reasonable litigation costs as:

"(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished:

> (i) the reasonable expenses of expert witnesses in connection with a court proceeding,
>
> (ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and
>
> (iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of seventy-five dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate."

Other than the Division's protestations, the Division has not shown that any of the other fees listed on the statement were unreasonable. Therefore, petitioner has established an entitlement to reasonable litigation costs and fees.

H. In this case, as noted by petitioner, the maximum hourly rate of $75.00 has been the rate since the statute's enactment in 1997 (***see*** L 1997, ch 577, § 31). Here the cost of living has approximately doubled since the statute's enactment in 1997 (***see*** Consumer Price Index Inflation Calculator available at https://www.bls.gov/data/inflation_calculator.htm), therefore, an hourly rate of $151.22 is justified in this matter. Petitioner's claim that he is entitled to an increase in the rate above the cost-of-living adjustment is rejected.

First, petitioner's claim that it is entitled to a higher rate because this case "involved complex and specialized legal and factual issues" is baseless. Mr. Tedesco's letters to the Division before the notices were issued identified exactly what was wrong with the audit – the audit method was not reasonably calculated to reflect the amount of tax due. No special expertise was required to unearth the flaws of the audit methodology.

Second, petitioner claims that this case "required the expenditure of substantial professional time, legal research, hearing preparation, evidence review, and post-hearing

briefing." However, these are all basic requirements for proper representation in any legal matter.

Third, petitioner asserts that this matter was "exacerbated by the Division's unscrupulous tactics." In support of this claim, petitioner points to the Administrative Law Judge's findings of fact that the Division's auditor was evasive, contradictory and forgetful of material and relevant aspects of the case. It also argues that the auditor claimed that the audit file submitted in the record was complete when in fact, a copy of the file obtained through a FOIL request contained documents not included in the one submitted by the auditor. All of this while true, does not amount to special factors requiring a special rate. Petitioner, pursuant to Tax Law § 3030, is allowed to itemize the time spent clarifying the record and obtain appropriate compensation for such time.

Fourth, petitioner's claim that the Division's conduct towards petitioner is a special factor warranting an increase in the rate is also rejected. The allegations against the Division, which the Division did not dispute, are quite unsettling. However, the statute expressly states that "fees shall not be in excess of seventy-five dollars per hour unless the court determine that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate." As discussed above, this is not a case involving the limited availability of qualified attorneys. Nothing in the record provides a compelling reason to increase the $75.00 maximum rate, as adjusted for cost-of-living increases, any further. To the extent that the maximum hourly rate is low, it is for the Legislature to remedy that inadequacy.

I. Based upon the foregoing, the Division is directed to pay petitioner's attorney fees representing (348.50 hours) at the rate of $151.22 hourly, or $52,700.17, plus disbursements of $1,329.84.

J. Gregory A. Sojka, d/b/a Greg's Tree Service's application for an award of costs is granted to the extent set forth in conclusion of law I but otherwise is denied.

DATED: Albany, New York
January 15, 2026

/s/ Osborne K. Jack
ADMINISTRATIVE LAW JUDGE