

MAINE STATE LEGISLATURE

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121st MAINE LEGISLATURE

FIRST REGULAR SESSION-2003

Legislative Document

No. 782

H.P. 581

House of Representatives, February 18, 2003

**An Act To Require the Payment of Certain Costs Incurred by a
Prevailing Party in Court Proceedings by or against Maine Revenue
Services**

Reference to the Committee on Judiciary suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative MUSE of Fryeburg.
Cosponsored by Senator MAYO of Sagadahoc and
Representatives: ANNIS of Dover-Foxcroft, AUSTIN of Gray, BIERMAN of Sorrento, CARR
of Lincoln, DUNLAP of Old Town, JODREY of Bethel, McKENNEY of Cumberland,
O'NEIL of Saco.

2 **Be it enacted by the People of the State of Maine as follows:**

4 **Sec. 1. 36 MRSA c. 6 is enacted to read:**

6 **CHAPTER 6**

8 **AWARD OF COSTS AND FEES**

10 **§106. Definitions**

12 As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

14 1. **Administrative proceeding.** "Administrative proceeding" means any procedure or other action before the bureau.

16 2. **Applicable published guidance.** "Applicable published guidance" means:

18 A. Rules, bureau rulings, bureau procedures, information releases, notices and announcements; and

20 B. Any of the following issued by the bureau to the taxpayer:

22 (1) Private letter;

24 (2) Rulings;

26 (3) Technical advice memoranda; and

28 (4) Determination letters.

30 3. **Attorney's fees.** "Attorney's fees" means reasonable fees paid or incurred for the services of an attorney in connection with a court proceeding, except that such fees may not be in excess of \$150 per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for such proceeding, the difficulty of the issues presented in the case or the local availability of tax expertise, justifies a higher rate.

32 The bureau shall automatically adjust the attorney's fees referred to in this subsection, beginning in September 2005 and each September thereafter, by any percentage change in the Consumer Price Index from July 1st to June 30th, but only to a maximum annual increase or decrease of 4%.

34 "Attorney's fees" includes fees for the services of an individual, whether or not an attorney, including a certified

2 public accountant, enrolled agent, enrolled actuary or any other
3 person permitted to represent the taxpayer; these fees must be
4 treated as fees for the services of an attorney.

5 4. Court proceeding. "Court proceeding" means any civil
6 action brought in a court of the State, including the Supreme
7 Judicial Court and a Superior Court.

8 5. Net worth. "Net worth" means:

9 A. For an estate, the value of the estate as of the date of
10 the decedent's death; and

11 B. For a trust, the value of the trust as of the last day
12 of the taxable year involved in the proceeding.

13 For purposes of determining net worth, individuals filing a joint
14 return are treated as separate individuals.

15 6. Party. "Party" means a taxpayer who is:

16 A. An individual whose net worth did not exceed \$2,000,000
17 at the time the civil action was filed; or

18 B. An owner of an unincorporated business, partnership,
19 corporation or association; a unit of local government; or
20 an organization, the net worth of which did not exceed
21 \$7,000,000 at the time the civil action was filed and that
22 had not more than 500 employees at the time the civil action
23 was filed; except that an organization described in Section
24 501(c)(3) of the Code that is exempt from taxation under
25 Section 501(a) of that Code or an association as defined in
26 Title 13, section 1774, subsection 3 may be a party
27 regardless of the net worth of that organization or
28 association.

29 7. Position of bureau or State. "Position of the bureau or
30 the State" means:

31 A. The position taken by the State in a judicial proceeding
32 to which this chapter applies; and

33 B. The position taken by the bureau or the State in an
34 administrative proceeding to which this chapter applies as
35 of the earlier of:

36 (1) The date of the receipt by the taxpayer of the
37 notice of the decision of the bureau; or

38 (2) The date of the notice of deficiency.

2 8. Prevailing party. "Prevailing party" means a party in a
3 proceeding to which this chapter applies, other than the United
4 States, the State or the bureau or any creditor of the taxpayer
5 involved, who meets the requirements of section 107 and who has
6 substantially prevailed with respect to the amount in controversy
7 or the most significant issue or set of issues presented.

8 9. Qualified offer. "Qualified offer" means a written
9 offer that:

10 A. Is made by the taxpayer to the State during the
11 qualified offer period;

12 B. Specifies the offered amount of the taxpayer's
13 liability, determined without regard to interest;

14 C. Is designated at the time it is made as a qualified
15 offer for purposes of this chapter; and

16 D. Remains open during the period beginning on the date it
17 is made and ending on the earliest of:

18 (1) The date the offer is rejected;

19 (2) The date the trial begins; or

20 (3) The 90th day after the date the offer is made.

21 10. Qualified offer period. "Qualified offer period" means
22 the period:

23 A. Beginning on the date on which the first letter of
24 proposed deficiency that allows the taxpayer an opportunity
25 for administrative review by the assessor is sent; and

26 B. Ending on the date that is 30 days before the date the
27 case is first set for trial.

28 11. Reasonable administrative costs. "Reasonable
29 administrative costs" includes the costs as described in this
30 subsection.

31 A. "Reasonable administrative costs" includes:

32 (1) Any administrative fee or similar charge imposed
33 by the bureau; and

34 (2) Based upon prevailing market rates for the kind or
35 quality of services furnished;

2 (a) The reasonable expenses of expert witnesses in
3 connection with an administrative proceeding,
4 except that an expert witness may not be
5 compensated at a rate in excess of the highest
6 rate of compensation for expert witnesses paid by
7 the State;

8 (b) The reasonable cost of any study, analysis,
9 engineering report, test or project that is found
10 by the bureau to be necessary for the preparation
11 of the party's case; and

12 (c) Reasonable attorney's fees.

13 The bureau shall determine the amount of the award made
14 under divisions (b) and (c).

15 B. "Reasonable administrative costs" includes only those
16 costs incurred pursuant to paragraph A on or after whichever
17 of the following is the earliest:

18 (1) The date of the receipt by the taxpayer of the
19 notice of the decision of the assessor;

20 (2) The date of the notice of deficiency; or

21 (3) The date on which the first letter of proposed
22 deficiency that allows the taxpayer an opportunity for
23 administrative review by the assessor is sent.

24 12. Reasonable litigation costs. "Reasonable litigation
25 costs" includes:

26 A. Reasonable court costs; and

27 B. Based upon prevailing market rates for the kind or
28 quality of services furnished:

29 (1) The reasonable expenses of expert witnesses in
30 connection with a court proceeding, except that an
31 expert witness may not be compensated at a rate in
32 excess of the highest rate of compensation for expert
33 witnesses paid by the State;

34 (2) The reasonable cost of any study, analysis,
35 engineering report, test or project that is found by
36 the court to be necessary for the preparation of the
37 party's case; and

2 (3) Reasonable attorney's fees paid or incurred for the
3 services of an attorney in connection with the court
4 proceeding.

6 13. Substantially prevails. "Substantially prevails," with
7 reference to the taxpayer, means that the bureau fails to
8 establish that its position in the proceeding was substantially
9 justified. The position of the bureau is presumed not to be
10 substantially justified if the bureau did not follow its
11 applicable published guidance in the administrative proceeding.
12 This presumption may be rebutted. In determining whether the
13 position of the bureau was substantially justified, the court
14 shall take into account whether the bureau has lost in court on
15 substantially similar issues.

16 **§107. Prevailing party awarded costs**

18 In any administrative or court proceeding that is brought by
19 or against the bureau or State in connection with the
20 determination, collection, or refund of any tax, interest or
21 penalty under this Title, the prevailing party may be awarded a
22 judgment or a settlement for reasonable administrative costs and
23 reasonable litigation costs, as limited in this section.

24 1. Administrative remedies must be exhausted. A judgment
25 for reasonable litigation costs may not be awarded in any court
26 proceeding unless the court determines that the prevailing party
27 has exhausted the administrative remedies available to that party
28 within the bureau. A failure to agree to an extension of the time
29 for the assessment of any tax may not be taken into account for
30 purposes of determining whether the prevailing party meets the
31 requirements of this subsection.

34 2. Only costs allocable to State. An award under this
35 section may be made only for reasonable litigation and
36 administrative costs that are allocable to the State and not to
37 any other party.

38 3. Costs denied where party prevailing protracts
39 proceedings. An award for reasonable litigation and
40 administrative costs may not be made with respect to any portion
41 of the administrative or court proceeding during which the
42 prevailing party has unreasonably protracted that proceeding.

44 4. Period for applying to bureau for administrative costs.
45 An award may be made under this section by the bureau for
46 reasonable administrative costs only if the prevailing party
47 files an application with the bureau for those costs before the
48 91st day after the date on which the final decision of the bureau

2 as to the determination of the tax, interest or penalty is mailed
3 to the party.

4 5. Special rules where judgment less than taxpayer's
5 offer. A party to a court proceeding who substantially prevails
6 must be treated as the prevailing party if the liability of the
7 taxpayer pursuant to the judgment in the proceeding, determined
8 without regard to interest, is equal to or less than the
9 liability of the taxpayer that would have been so determined if
10 the bureau had accepted a qualified offer of the party.

12 A. This subsection does not apply to:

14 (1) A judgment issued pursuant to a settlement;

16 (2) A proceeding in which the amount of tax liability
17 is not in issue, including any declaratory judgment
18 proceeding, any proceeding to enforce or quash any
19 summons issued pursuant to this Title and any action to
20 restrain disclosure under section 191; or

22 (3) A party who is a prevailing party under any other
23 provision of this section.

24 B. If this subsection applies to any court proceeding:

26 (1) The determination under this subsection must be
27 made by reference to the last qualified offer made with
28 respect to the tax liability at issue in the
29 proceeding; and

31 (2) Reasonable administrative and litigation costs
32 only include costs incurred on and after the date of
33 such offer.

34 6. Joinder. If a case or cases involving a return or
35 returns of the same taxpayer, including joint returns of married
36 individuals, could have been joined in a single court proceeding
37 in the same court, such actions or cases must be treated as one
38 court proceeding regardless of whether such joinder or
39 consolidation actually occurs, unless the court in which the
40 action is brought determines, in its discretion, that it would be
41 inappropriate to treat such actions or cases as joined or
42 consolidated.

43 7. Additional attorney's fees. The court or the bureau in
44 an administrative hearing may award reasonable attorney's fees in
45 excess of the attorney's fees actually paid or incurred if:
46

2 A. Those fees are less than the reasonable attorney's fees
4 because an individual is representing the prevailing party
for no fee or for a fee that, taking into account all the
facts and circumstances, is no more than a nominal fee; and

6 B. The award is paid to that individual or that
8 individual's employer.

10 **§108. Application for award**

12 A party seeking an award of fees and other expenses shall,
14 within 30 days of final judgment in the action, submit to the
court an application for fees and other expenses that shows:

16 1. Prevailing party. That the party is a prevailing party
and is eligible to receive an award under this chapter; and

18 2. Amount sought. The amount sought, including an itemized
20 statement from any attorney or expert witness representing or
appearing in behalf of the party stating the actual time expended
22 and the rate at which fees and other expenses were computed.

24 The party also shall allege that the position of the bureau
or the State was not substantially justified. The court shall
26 determine whether or not the position of the bureau or State was
substantially justified on the basis of the record, including the
28 record with respect to the action or failure to act by the bureau
upon which the civil action is based, which record was made in
30 the civil action for which fees and other expenses are sought.

32 **§109. Determination as to prevailing party**

34 A determination made under this chapter as to whether a
party is a prevailing party must be made by:

36 1. Parties. Agreement of the taxpayer and the bureau or
38 State;

40 2. Bureau. In the case where the final determination with
respect to the tax, interest or penalty is made at the
42 administrative level, the bureau; or

44 3. Court. In the case where the final determination is
made by a court, the court.

46 **§110. Right of appeal**

48 1. Court proceedings. An order granting or denying, in
50 whole or in part, an award for reasonable litigation or
administrative costs under section 106 in a court proceeding may

2 be incorporated as a part of the decision or judgment in the
3 court proceeding and is subject to appeal in the same manner as
4 the decision or judgment.

6 2. Administrative proceedings. A decision granting or
7 denying, in whole or in part, an award for reasonable
8 administrative costs by the bureau is subject to the filing of a
9 petition for review with the Superior Court under the same
10 conditions as the review allowed under section 151. If the
11 bureau sends by certified or registered mail a notice of such
12 decision to the petitioner, a proceeding in the Superior Court
13 may not be initiated under this subsection unless the petition is
14 filed before the 91st day after the date of the mailing.

16 SUMMARY

18 This bill allows a taxpayer who disputes a tax owed to the
19 State and who prevails in either an administrative hearing before
20 the Department of Administrative and Financial Services, Bureau
21 of Revenue Services or in the Superior Court or Supreme Judicial
22 Court to be awarded reasonable litigation and administrative
23 costs, including attorney's fees, expert witness fees and court
24 costs. The bill applies to both individuals and businesses and
25 to all taxes due to the State. This bill is modeled on federal
26 law.