

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SHIQING YUE AND XIAOWEN FENG</b>	:	DETERMINATION
	:	DTA NO. 819259
for Redetermination of a Deficiency or for Refund of	:	
New York State and City Personal Income Tax under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 2001.	:	

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Petitioners, Shiqing Yue and Xiaowen Feng, 134-16 57<sup>th</sup> Avenue, Flushing, New York 11355, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2001.

On July 7 and July 15, 2003, respectively, petitioners, appearing *pro se*, and the Division of Taxation by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by November 7, 2003, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioners are entitled to the claimed earned income credit where Xiaowen Feng and the qualifying children do not have social security numbers.

***FINDINGS OF FACT***

1. Petitioners, Shiqing Yue and Xiaowen Feng, filed a New York State Resident Personal Income Tax Return (Form IT-200), filing status “married filing joint return,” for the year 2001 in which they requested a refund of \$1,678.00. On the return, petitioners claimed an earned income credit (“EIC”) of \$318.00.

2. The income tax return indicates a social security number for petitioner Shiqing Yue, and an individual taxpayer identification number for petitioner Xiaowen Feng. On the attached Claim for Earned Income Credit (Form IT-215), Line 4 lists two qualifying children of petitioners, both of whom are identified by an individual taxpayer identification number.

3. The Division of Taxation (“Division”) issued to petitioners, on May 17, 2002, a Statement of Income Tax Adjustment which reduced the refund claimed to \$1,297.00 by disallowing the EIC of \$318.00 and one-half of the New York City Star Credit.

4. Following a protest by petitioners to the disallowance of the EIC in the Statement of Income Tax Adjustment, the Division issued the following explanation to petitioners on September 17, 2002:

In order to claim the earned income credit, your spouse and any qualifying children MUST have a valid social security number issued by the Social Security Administration. You cannot get the earned income credit if, instead of a social security number, you, your spouse or children have an individual taxpayer identification number (ITIN) which was issued by the Internal Revenue Service to noncitizens who cannot get a social security number.

***CONCLUSIONS OF LAW***

A. As applicable to this proceeding, Tax Law § 606(d) provides that the New York State earned income credit for the 2001 tax year is equal to 25% Aof the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . .” Since the

State earned income credit is determined based solely on a percentage of the Federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code and Federal case law to determine petitioner=s eligibility for the earned income credit.

B. The Federal earned income credit, provided by section 32 of the Internal Revenue Code, is a refundable tax credit for eligible low-income workers. The credit is computed based as a percentage of a taxpayer=s “earned income.” Pursuant to the Internal Revenue Code (“IRC”), an individual and his or her spouse, where the taxpayers are filing a joint income tax return, must have a valid social security number in order to qualify for the EIC (IRC § 32[c][1][F][i], [ii]; [m]). In addition, in order to properly claim the EIC, the qualifying children must also have a valid social security number (IRC § 32 [c][3][D]; [m]). As both Xiaowen Feng and the two qualifying children claimed as part of the EIC do not have valid social security numbers, petitioners are not entitled to the earned income credit.

C. As to petitioners’ equal protection claim, it is true that petitioners have a constitutional right to be treated on an equal footing with those similarly situated. But in the absence of a showing of unequal treatment, there is no equal protection violation (*see, Trump v. Chu*, 65 NY2d 20, 489 NYS2d 455, *appeal dismissed* 474 US 915, 88 L Ed 2d 250). In this case, petitioners have offered no evidence that they have been treated differently from any other taxpayer denied the EIC due to the lack of a social security number of either a spouse filing a joint return or the qualifying children.

G. The petition of Shiqing Yue and Xiaowen Feng is denied.

DATED: Troy, New York  
April 15, 2004

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE