

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EMAD G. MOUSA AND : DETERMINATION
SAMAH A. AHMED : DTA NO. 829566
: :
for Redetermination of a Deficiency or for Refund of New
York State and New York City Personal Income Tax under :
Article 22 of the Tax Law and the New York City
Administrative Code for the Year 2017. :

Petitioners, Emad G. Mousa and Samah A. Ahmed, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2017.

A videoconferencing hearing via CISCO webex was held before Donna M. Gardiner, Administrative Law Judge, on June 1, 2021 at 10:30 a.m., with the final brief to be submitted by September 15, 2021, which date commenced the six-month period for issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel).

ISSUE

Whether petitioners have established that the Division of Taxation erred in disallowing their claimed earned income credit for the year 2017.

FINDINGS OF FACT

1. Petitioners, Emad G. Mousa and Samah A. Ahmed, filed a New York State resident income tax return, form IT-201, for the year 2017, reporting three dependent exemptions,

business income of \$19,500.00, and requesting a refund in the amount of \$2,835.00. The refund consisted of a New York State earned income credit in the amount of \$1,895.00, Empire State child credit in the amount of \$499.00, New York City earned income credit of \$316.00, and New York City school tax credit of \$125.00.

2. Attached to petitioners' return was schedule C-EZ, Net Profit from Business, reporting petitioner Emad G. Mousa's business as "limited service eating places" and reporting gross receipts and net profit in the amount of \$19,500.00. The schedule C-EZ lists the business as Brooklyn Bridge Push Cart Inc., located at 26 1st Avenue, New York, New York 10009.

3. Also attached to petitioners' return were forms IT-215, claim for earned income credit, and IT-213, claim for Empire State child credit, listing the three claimed dependents, with dates of birth listed as March 7, 2009, July 15, 2010, and September 30, 2016.

4. Based on petitioners' return, the Division of Taxation (Division) issued a refund in the amount of \$2,835.00 for tax year 2017 on February 9, 2018.

5. Petitioners' return was selected for a desk audit by the Division after the issuance of the requested refund. The Division sent an audit inquiry letter to petitioners, dated July 31, 2018, requesting documentation to support the business income, credits, and claimed refund for 2017.

6. Petitioners did not submit any documentation in response to the audit inquiry letter.

7. The Division issued a statement of proposed audit change for tax year 2017, dated September 21, 2018, stating, in part, as follows:

"Since you did not provide any documentation we requested in our audit inquiry letter dated July 31, 2018, in the specified timeframe, we disallowed the business income claimed on your return. We also disallowed your dependent exemption/s and refundable credits claimed by you.

You are allowed the New York City School Tax Credit of \$125.00."

8. The Division issued a notice of deficiency (notice) to petitioners, dated January 3, 2019, asserting tax due of \$2,710.00 plus interest.

9. Petitioners filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. A conciliation conference was held on July 25, 2019 and, by conciliation order, CMS No. 305745, dated August 30, 2019, BCMS sustained the notice.

10. In protest of the conciliation order, petitioners filed a timely petition with the Division of Tax Appeals on September 20, 2019.

11. At the hearing in this matter, petitioners testified regarding their three children and presented documentation that was subsequently accepted by the Division as sufficient verification of petitioners' relationships to their three claimed dependents.

12. Both petitioners were asked about their employment. Ms. Ahmed stated that she did not work outside the home during 2017. Mr. Mousa claimed that he sometimes worked in a restaurant named Halal Foods and then worked for a company as a food truck vendor. On cross-examination, the Division pointed out that petitioners' schedule C-EZ filed with their return indicated that Mr. Mousa owned the pushcart business. Mr. Mousa denied any ownership of a business and testified that he worked roughly four and one-half days per week, earning \$400.00 per week as a food truck vendor. He testified that he never received any W-2 forms and was always paid in cash. Furthermore, both petitioners explained that since Mr. Mousa suffers from diabetes, it is difficult for him to work long hours.

13. The Division presented its witness, Kathleen Loos, who is a Tax Technician 3 with the personal income tax credit group. She testified as to the review of petitioners' return that is at issue. Ms. Loos explained that the Division requested documentation from petitioners to

establish their income claimed on their return. She testified that petitioners did not submit any income or wage documentation to reflect the amount reported on the return, e.g., no W-2 forms, no bank statements and no copy of a license to serve as a food vendor. Ms. Loos explained that the documentation submitted into evidence at the hearing was the first time that the Division received any documents in response to its requests.

CONCLUSIONS OF LAW

A. It is initially noted that determinations made in a notice of deficiency are presumed correct, and the burden of proof is upon petitioners to establish, by clear and convincing evidence, that those determinations are erroneous (*see Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *see also* Tax Law § 689 [e]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (*see Matter of Scarpulla v State Tax Commn.*, 120 AD2d 842 [3d Dept 1986]). There is a presumption of correctness of a notice of deficiency that has been properly issued under the Tax Law (*see Matter of Tavolacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]). A taxpayer who fails to present any evidence to show that the notice is incorrect surrenders to this presumption (*id.*).

B. Tax Law § 606 (d) provides for a New York State earned income credit based on a percentage of the earned income credit allowed under section 32 of the Internal Revenue Code (IRC). 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 IRC to determine petitioners' eligibility for the earned income credit.

C. The federal earned income credit, provided for pursuant to IRC (26 USC) § 32, is a refundable tax credit for eligible low-income workers. The credit is computed based on a

determination of a taxpayer's "earned income," which includes earnings from self-employment (*see* 26 USC § 32 [c] [2]). Petitioners bear the burden of proof (*see* Tax Law § 689 [e]) to substantiate the amount of earned income reported on their return.

Here, the Division denied petitioners' claim for the earned income credit because they failed to substantiate the business income as reported. Upon review of the record, it is clear that petitioners have failed to prove their income for the year in issue. Petitioners did not produce sufficient records or testimony to clearly establish the income claimed on their return. Therefore, petitioners have failed to meet their burden of proof to show that the Division's denial of the New York State and City earned income credit was erroneous (*see Matter of Espada*, Tax Appeals Tribunal, January 28, 2016).

D. For purposes of the Empire State child tax credit, a taxpayer must establish a qualifying child. A qualifying child must be a child of the taxpayer, a descendent of the taxpayer's child, a sibling or step-sibling of the taxpayer or a descendent of such relative; must have the same principal place of abode as the taxpayer for more than one-half of the taxable year, and must be between four and seventeen years of age (Tax Law § 606 [c-1]; 26 USC §§ 24 [c]; 152 [c]).

As set forth in finding of fact 11, the Division has accepted petitioners' documents to establish their relationship to their three claimed dependents. However, only the two sons met the age requirement to be deemed qualifying children under the statute. Therefore, petitioners are entitled to the Empire State child credit for the two sons claimed on the return and the Division is directed to recompute its notice to reflect the credit.

E. The petition of Emad G. Mousa and Samah A. Ahmed is granted to the extent indicated in conclusion of law D, but is otherwise denied and the notice of deficiency, dated January 3, 2019, as modified, is sustained.

DATED: Albany, New York
March 10, 2022

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE