

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
AHMAD EKHMAIS AND HADIL IKHMAYES
for Redetermination of Deficiencies or for Refund of
New York State and New York City Personal Income
Tax under Article 22 of the Tax Law and the
Administrative Code of the City of New York for the
Years 2016 and 2017.

DETERMINATION
DTA NO. 829642

Petitioners, Ahmad Ekhmais and Hadil Ikhmayes, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2016 and 2017.

A videoconferencing hearing was held via CISCO Webex before James P. Connolly, Administrative Law Judge, on April 21, 2021, with all briefs due by October 14, 2021, which date began the six-month period for issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel). This matter was reassigned to Winifred M. Maloney, Administrative Law Judge, pursuant to the authority of section 3000.15 (f) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15 [f]), who issues the following determination. The due date for issuance of this determination was extended by three months for good cause, pursuant to section 3000.15 (e) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15 [e] [1]).

ISSUES

I. Whether petitioners filed a timely request for conciliation conference following the issuance of a notice of deficiency for tax year 2016.

II. Whether petitioners have established that the Division of Taxation erred in disallowing their claimed New York State and New York City earned income credits for the years 2016 and 2017.

III. Whether petitioners have established that the Division of Taxation erred in disallowing their claimed Empire State child credit for the years 2016 and 2017.

IV. Whether petitioners are entitled to the New York State and New York City household credits for the years 2016 and 2017.

FINDINGS OF FACT

1. Petitioners, Ahmad Ekhmais and Hadil Ikhmayes, electronically filed with the Division of Taxation (Division) New York State and City resident income tax returns, forms IT-201, for the tax years 2016 (2016 return) and 2017 (2017 return) on February 21, 2017 and January 25, 2018, respectively.

2. On the 2016 return, petitioners claimed married filing jointly as their filing status with three dependents, two children and a parent.¹ Petitioners reported business income of \$24,566.00 and reported New York State and New York City tax of \$155.00 and \$113.00, respectively. Attached to petitioners' 2016 return is a copy of a federal schedule C, profit or loss from business, for Mr. Ekhmais, which reported gross receipts of \$24,566.00 with no corresponding expenses. On the schedule C, Mr. Ekhmais reported his principal business or

¹ For privacy purposes, the claimed dependents are referred to herein as M.E. and I.E. (children), and M.K. (parent).

profession as electrical contractors, his business name as HVAC,² and a cash accounting method. The 2016 return lists petitioner Ahmad Ekhmais' occupation as tech, and petitioner Hadil Ikhmayes' occupation as housewife.

3. On the 2016 return, petitioners reported no tax withheld but claimed a New York State household credit of \$90.00, a New York State earned income credit of \$1,582.00, a New York City earned income credit of \$279.00, an Empire State child credit of \$330.00, and a New York City school tax credit of \$125.00, resulting in a \$2,138.00 refund. Attached to the 2016 return was form IT-215, claim for earned income credit, on which petitioners claimed two qualifying children, M.E. and I.E., with dates of birth of May 2, 2013 and June 24, 2011, respectively. Also attached to the return was form IT-213, claim for Empire State child credit, on which petitioners reported two qualifying children, M.E. and I.E., with dates of birth of May 2, 2013 and June 24, 2011, respectively, for the federal child tax credit. On the 2016 claim for Empire State child credit, petitioners reported one child that was at least 4 but less than 17 years of age on December 31, 2016.

4. On March 2, 2017, the Division paid petitioners \$2,138.00, the full amount requested as a refund on their 2016 return.

5. On July 26, 2018, the Division sent petitioners an audit inquiry letter requesting verification of the dependents claimed and the business income reported on the 2016 return. In response to the audit inquiry letter for tax year 2016, "Yehad Abdelaziz/ Tax Preparer" sent correspondence dated August 23, 2018 to the Division, via fax on August 24, 2018, whereby he requested additional time to submit documents.

² No business address was listed for HVAC on the 2016 schedule C.

6. The Division issued to petitioners a statement of proposed audit change, dated November 7, 2018, that asserted tax due of \$2,013.00 plus interest and penalty for tax year 2016. The statement of proposed audit change denied their representative's request for additional time to respond to the Division's request for information for tax year 2016. It also informed petitioners that because they did not provide any documentation requested in the audit inquiry letter dated July 26, 2018, the Division disallowed the business income claimed on the return, the dependent exemptions claimed, and refundable credits claimed, except for the New York City school tax credit of \$125.00, for tax year 2016.

7. On December 24, 2018, the Division issued a notice of deficiency, assessment ID number L-049056183, asserting tax due of \$2,013.00 plus interest and penalty for tax year 2016 (notice L-049056183). The amount asserted due is based upon the disallowance of the business income claimed on the return, the dependent exemptions claimed, and refundable credits claimed except for the New York City school tax credit of \$125.00. This notice was addressed to petitioners at a "SENATOR STRRET," Brooklyn, New York address. The mailing cover sheet of this notice contains the certified control number 7104 1002 9735 4621 1720.

8. Subsequently, the Division issued to petitioners, at a Staten Island, New York, address, a notice and demand for payment of tax due, assessment ID number L-049056183, dated April 10, 2019, asserting tax due in the amount of \$2,013.00 plus interest and penalty for tax year 2016 (April 10, 2019 notice and demand).

9. Petitioners filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice L-049056183.³ The

³ A copy of the April 10, 2019 notice and demand was included with petitioners' request.

request was signed by Mr. Abdelaziz, petitioners' tax preparer, and was dated August 5, 2019. The request was faxed to and received by BCMS on August 5, 2019.

10. On August 30, 2019, BCMS issued a conciliation order dismissing request (CMS No. 000313687) to petitioners for tax year 2016 (conciliation order for tax year 2016). The conciliation order for tax year 2016 determined that petitioners' protest of notice L-049056183 was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on December 24, 2018, but the request was not received until August 5, 2019, or in excess of 90 days, the request is late filed.”

11. On the 2017 return, petitioners claimed married filing jointly as their filing status with three dependents, M.E., I.E., and M.K. Petitioners reported business income of \$27,500.00 and reported New York State and New York City tax of \$261.00 and \$201.00, respectively. Attached to petitioners' 2017 return is a copy of a federal schedule C, profit or loss from business, for Mr. Ekhmais which reports gross receipts of \$27,500.00 with no corresponding expenses. On the schedule C, Mr. Ekhmais reported his principal business or profession as electrical contractors and his business name as Advanced Refrigeration Heating Corp.⁴ The 2017 return lists Mr. Ekhmais' occupation as tech, and Ms. Ikhmayes' occupation as a housewife. Petitioners listed a “Senator Strret [sic],” Brooklyn, New York, address, on the 2017 return.

12. On the 2017 return, petitioners reported no tax withheld but claimed a New York State household credit of \$60.00, a New York State earned income credit of \$1,521.00, a New York City earned income credit of \$264.00, an Empire State child credit of \$660.00, and a New York City school tax credit of \$125.00, resulting in a \$2,179.00 refund. Attached to the 2017

⁴ No business address was listed for Advanced Refrigeration Heating Corp. on the 2017 schedule C.

return was form IT-215, claim for earned income credit, on which petitioners claimed two qualifying children, M.E. and I.E., with dates of birth of May 2, 2013 and June 24, 2011, respectively. Also attached to the return was form IT-213, claim for Empire State child credit, on which petitioners reported two qualifying children, M.E. and I.E., with dates of birth of May 2, 2013 and June 24, 2011, respectively, for the federal child tax credit. On the 2017 claim for Empire State child credit, petitioners reported two children that were at least 4 but less than 17 years of age on December 31, 2017.

13. The Division paid petitioners \$2,179.00, the full amount requested as a refund on their 2017 return.

14. On July 26, 2018, the Division sent petitioners an audit inquiry letter requesting verification of the dependents claimed and the business income reported on the 2017 return. Petitioners did not respond.

15. Because petitioners did not respond to the July 26, 2018 audit inquiry letter for tax year 2017, a statement of proposed audit change, dated September 26, 2018, was issued to petitioners that asserted tax due of \$2,054.00 plus interest for tax year 2017. The statement of proposed audit change informed petitioners that because they did not provide any documentation requested in the July 26, 2018 audit inquiry letter, the Division disallowed the business income claimed on the return, the dependent exemptions claimed, and refundable credits claimed, except for the New York City school tax credit of \$125.00, for tax year 2017.

16. On November 13, 2018, the Division issued a notice of deficiency, notice number L-048796713, asserting tax due of \$2,054.00 plus interest for tax year 2017 (notice for tax year 2017). The amount asserted due is based upon the disallowance of the business income claimed on the return, the dependent exemptions, and refundable credits claimed except for the New

York City school tax credit of \$125.00. The notice for tax year 2017 was addressed to petitioners at a “Senator Strret [sic],” Brooklyn, New York, address.

17. Following a conciliation conference held by BCMS, the notice for tax year 2017 was sustained by conciliation order (CMS No. 000305247), dated August 23, 2019.

18. On October 5, 2019, petitioners filed a timely petition with the Division of Tax Appeals in protest of the conciliation order for tax year 2016 and the conciliation order for tax year 2017. In their petition, petitioners asserted that they submitted documents with the requests to BCMS, but the Division never responded, and that they attached documents to the petition showing their income, children’s birth certificates, and letters from their doctor and their children’s school. The documents attached to the petition included, in relevant part, copies of the conciliation orders for tax years 2016 and 2017; copies of petitioners’ 2016 federal income tax return, form 1040, listing \$24,566.00 of business income and deductible self-employment tax of \$1,736.00, and their 2016 schedule C, profit or loss from business; copies of petitioners’ 2017 federal income tax return, form 1040, listing \$27,500.00 of business income and deductible self-employment tax of \$1,943.00, and their 2017 schedule C, profit or loss from business; and petitioners’ request filed with BCMS in protest of notice L-049056183 for tax year 2016, along with the communication result report confirming successful facsimile transmission of their request to BCMS on August 5, 2019 at 5:04 p.m.⁵

19. A videoconference hearing via CISCO Webex was held on April 21, 2021, before Administrative Law Judge James P. Connolly. Petitioner Ahmad Ekhmais offered testimony about the work he allegedly performed during the years 2016 and 2017. With respect to the year 2016, Mr. Ekhmais testified that he worked for a company called Economy Refrigeration;

⁵ Attachments to the petition did not include copies of the children’s birth certificates, letters from petitioners’ doctors, or letters from the children’s school.

however, that company did not give him a form 1099 for the year. Mr. Ekhmais admitted that he had no check stubs or any proof of payments that he received from Economy Refrigeration during the year 2016. With respect to the year 2017, Mr. Ekhmais claimed that he opened his own business repairing refrigerators and working on heating, ventilation, and air conditioning systems. According to Mr. Ekhmais, his business, Advanced Refrigeration, opened in “like maybe June 2017,” and relied upon customer referrals from his cousins who were contractors. Mr. Ekhmais estimated that he repaired refrigerators for “10, 15 customers” during 2017. He testified that his bank statements show alleged payments received for work he performed during the years 2016 and 2017. Mr. Ekhmais admitted that he did not have any invoices or billing statements sent to customers for work allegedly done in 2016 and 2017 that would identify incoming payments shown on his bank statements as income from customers.

20. With respect to the year 2016, Mr. Ekhmais testified that on an unidentified date, he provided all documentation requested by the Division to his tax preparer, Yehad Abdelaziz.

21. In addition to the testimony of Mr. Ekhmais, petitioners presented the testimony of Yehad Abdelaziz, the preparer of petitioners’ 2016 and 2017 tax returns. Mr. Abdelaziz testified that he allegedly incorporated the business for Mr. Ekhmais “in December of 2016.” According to Mr. Abdelaziz, he prepared petitioners’ returns for the years 2016 and 2017 strictly based upon bank statements provided by Mr. Ekhmais. Mr. Abdelaziz admitted that he did not see any invoices or billing statements for customers that would tie to money coming into Mr. Ekhmais’ account.

22. At the hearing, the Division submitted the affidavit of Eric L. Preston, a Tax Technician II with the Division’s Income/Franchise Desk Audit Bureau. Mr. Preston’s duties and responsibilities include, among other things, reviewing New York State personal income tax

returns and conducting desk audits of personal income tax returns. Mr. Preston represented that he reviewed the Division's systems, files and records including the personal income tax returns for tax years 2016 and 2017 filed by petitioners. He averred that petitioners' 2016 and 2017 returns were selected for routine desk audits after issuance of the refunds for these years. Mr. Preston stated that the Division sent an audit inquiry letter for tax year 2016 requesting additional information to verify the income and credits claimed on petitioners' 2016 tax return. In response to the audit inquiry letter for tax year 2016, the Division received correspondence from petitioners' tax preparer requesting additional time to submit documents. Because petitioners did not provide any documentation requested in the audit inquiry letter for tax year 2016, the Division issued a statement of proposed audit change for tax year 2016, dated November 7, 2018, that denied the request for additional time to submit documentation and disallowed the business income, the dependent exemptions and refundable credits claimed on petitioners' 2016 tax return. The Division allowed the New York City school tax credit of \$125.00. The statement of proposed audit change for tax year 2016 asserted tax due in the amount of \$2,013.00 plus interest and penalty. Subsequently, the Division issued notice L-049056183 on December 24, 2018 asserting tax due in the amount of \$2,013.00 plus interest and penalty. On April 10, 2019, the Division issued a notice and demand for payment of tax due asserting tax due in the amount of \$2,103.00 plus interest and penalty for tax year 2016. Mr. Preston stated that the Division sent an audit inquiry letter for tax year 2017 requesting additional information to verify the income and credits claimed on petitioners' 2017 tax return. Because petitioners did not provide any documentation requested in the audit inquiry letter for tax year 2017, the Division issued a statement of proposed audit change for tax year 2017, dated September 26, 2018, that disallowed the business income, the dependent exemptions and

refundable credits claimed on petitioners' 2017 tax return. The Division allowed the New York City school tax credit of \$125.00. The statement of proposed audit change for tax year 2017 asserted tax due in the amount of \$2,054.00 plus interest. Subsequently, the Division issued notice L-048796713 on November 13, 2018 asserting tax due in the amount of \$2,054.00 plus interest.

23. Although petitioners did not provide any substantiation for tax years 2016 and 2017, Mr. Preston, in his affidavit, averred that he subsequently reviewed the Division's internal records and found copies of birth certificates for M.E. and I.E. that were previously submitted to the Division for claims in earlier years. Since the two children were allowed as dependents in previous years based upon the birth certificates submitted, Mr. Preston indicated that he would allow the two dependent children, M.E. and I.E., for tax years 2016 and 2017. Because petitioners failed to provide any documentation to substantiate the residence of M.K, petitioner's parent, Mr. Preston stated that she cannot be claimed as a dependent for purposes of the dependent exemption. Even though petitioners had two qualifying children for purposes of the New York State and New York City earned income credits, they failed to substantiate their claimed earned income for tax years 2016 and 2017, and their earned income credits for those years remained disallowed. Based upon Mr. Preston's determination that petitioners had two qualifying dependent children for tax years 2016 and 2017 but no verifiable income for those years, he recomputed the Empire State child credit to allow a minimum credit of \$100.00 in tax year 2016 and \$200.00 in tax year 2017, i.e. one qualifying child in 2016 and two qualifying children in tax year 2017. Mr. Preston, in his affidavit, also averred petitioners are entitled to New York State and New York City household credits for tax years 2016 and 2017.

24. During the hearing, the Division's representative conceded that M.E. and I.E. are petitioners' dependent children for tax years 2016 and 2017. However, the residency of M.K., the parent, and petitioners' earned income for tax years 2016 and 2017 remained at issue.

25. The Division also raised the issue of the timeliness of petitioners' request for conciliation conference following issuance of notice L-049056183 for tax year 2016, during the hearing. To show proof of proper mailing of notice L-049056183, the Division submitted the following: (i) an affidavit, dated January 22, 2021, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record For Presort Mail – DTF-962 – Not of Deficiency DTF-962-F-E – Not of Def Follow Up" (CMR) postmarked December 24, 2018; (iii) an affidavit, dated January 28, 2021, of Susan Saccocio, a manager in the Division's mail room; (iv) the affidavit of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel, involved in reviewing address information in the Division's systems and drafting affidavits; (v) a copy of the notice L-049056183 mailed to petitioners and the associated mailing cover sheet; and (vi) a copy of petitioners' 2017 personal income tax return, electronically filed on January 25, 2018.

26. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is

produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case “20183520635.” Following the Division’s general practice, this date was manually changed on the first and last pages of the CMR in the present case to “12/24/18.” In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

27. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street, and PO Address.”

28. The CMR in the present matter consists of 15 pages and lists 184 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 12 to 14 such entries, with the exception of page 15 which contains 7 entries. Ms. Picard notes that the copy of the CMR attached to her affidavit has been redacted to preserve the

confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a postmark, dated December 24, 2018, to each page of the CMR, initialed each page, wrote and circled the number “184” on the last page next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE.”

29. Page 7 of the CMR indicates that a notice with certified control number 7104 1002 9735 4621 1720, and reference number L-049056183 was mailed to petitioners, “EKHMAIS-AHMAD IKHMAYES-HADIL K” at the “Senator Strret [sic],” Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioners’ name and address as noted.

30. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail

room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each of the 15 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of December 24, 2018. On page 15, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 184 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "184," indicating 184 pieces of mail were received by the USPS. There is a set of initials on page 15.

31. The affidavit of Heidi Corina, a Legal Assistant 2, in the Division's Office of Counsel, sets forth her job duties and responsibilities that include, among others, reviewing address information in the Division's systems and drafting affidavits. Ms. Corina avers that petitioners' electronically filed 2017 tax return was the basis for the last known address used for petitioners on notice L-049056183 for tax year 2016. She further avers that the 2017 tax return was the last return filed before notice L-049056183 was issued on December 24, 2018. According to Ms. Corina, the "Senator Strret [sic]," Brooklyn, New York, address appearing on petitioners' electronically 2017 tax return, was petitioners' last known address when notice L-049056183 was issued to them.

32. Petitioners did not submit any documentation at the hearing. However, Mr. Ekhmais requested time post-hearing to submit bank statements for the years 2016 and 2017, and a letter from M.K.'s doctor regarding her residency during the years 2016 and 2017. Prior to the conclusion of the hearing, Administrative Law Judge Connolly granted Mr. Ekhmais' request to submit post-hearing documentation consisting of bank statements for the years 2016 and 2017, and a letter from a health care provider that reflected M.K.'s residential address for the years 2016 and 2017. The record was left open for petitioners' submission of post-hearing documents

by May 13, 2021, and the Division's submission of a responding affidavit by May 28, 2021. In addition, Administrative Law Judge Connolly set a briefing schedule prior to the conclusion of the hearing.

33. On May 4, 2021, petitioners submitted documents to the Division including bank statements for tax years 2016 and 2017, and a letter from Ramsey Joudeh, M.D., regarding M.K. and her residency during the years 2016 and 2017. However, no post-hearing documents were submitted to Administrative Law Judge Connolly at that time.

34. On May 12, 2021, the Division submitted the post-hearing response affidavit of Eric L. Preston addressing petitioners' post-hearing submission of documents after the review of the same. Mr. Preston averred that he reviewed and analyzed the documentation supplied as petitioners' post-hearing submission and found the documentation to be insufficient to prove an amount of income earned by petitioners during tax years 2016 or 2017. Although petitioners provided bank statements for the years 2016 and 2017, Mr. Preston stated that the bank statements provided were for petitioners' personal bank account, not a bank account set up specifically for a business. He further stated that the total monthly account statement deposits did not match the gross receipts reported by petitioners for the entire year in either 2016 or 2017, and there were no invoices, receipts, sales slips, or other proof that the deposits were from the business in either year. Based upon the additional information provided verifying the residency of M.K., the Division agrees to allow her as petitioners' dependent for tax years 2016 and 2017.

35. Upon Administrative Law Judge Connolly's retirement from state service, this matter was reassigned to Administrative Law Judge Winifred M. Maloney to render a determination in this matter. By letter dated July 23, 2021, Administrative Law Judge Maloney advised petitioners that her office never received copies of the post-hearing documents that they sent to

the Division and requested that they submit copies of their post-hearing documents to her office by August 14, 2021. In the same letter, Administrative Law Judge Maloney also revised the briefing schedule. Petitioners failed to submit any post-hearing documents to Administrative Law Judge Maloney.

CONCLUSIONS OF LAW

A. In this matter, the Division issued two notices of deficiency to petitioners, a notice for tax year 2016 and a notice for tax year 2017. At the hearing, the Division raised the issue of the timeliness of petitioners' protest of the notice for tax year 2016. The Division asserts that petitioners' request for conciliation conference in protest of the notice for tax year 2016 was untimely, and BCMS properly dismissed their request by the August 20, 2019 conciliation order.

B. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioners' last known address on December 24, 2018. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The "Senator Strret," Brooklyn, New York, address listed on the notice, its associated mailing cover sheet, and the CMR is the same "Senator Strret," Brooklyn, New York, address listed on petitioner's electronically filed 2017 tax return, which was the last tax return filed by petitioners prior to the issuance of notice L-049056183 for tax year 2016.

E. It is therefore concluded that the Division properly mailed notice L-049056183 on December 24, 2018, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioners' request for conciliation conference

was filed August 5, 2019. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the August 30, 2019 conciliation order issued by BCMS. As such, the Division of Tax Appeals lacks jurisdiction over the petition for the year 2016, and the substantive arguments regarding notice L-049056183 cannot be addressed.

F. A notice was issued for tax year 2017 that asserted tax based upon the disallowance of the business income, the dependent exemptions, the New York State and New York City earned income credits and the Empire State child credit claimed on petitioners' 2017 tax return. "A tax credit is 'a particularized species of exemption from taxation'" (*Matter of Golub Serv. Sta. v Tax Appeals Trib.*, 181 AD2d 216, 219 [3d Dept 1992], citing *Matter of Grace v State Tax Commn.* 37 NY2d 193, 197 [1975] and a taxpayer carries "the burden of showing 'a clear-cut entitlement' to the statutory benefit" (*Matter of Golub Serv. Sta. v Tax Appeals Trib.*, at 219 [citation omitted]).

G. Addressing petitioners' eligibility for the earned income credits, Tax Law § 606 (d) provides that the New York State earned income credit for tax year 2017 is equal to 30% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . ." Tax Law § 1310 (f) (1) provides for a credit equal to 5% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . ." for New York City residents. Since petitioners' eligibility for the New York State and New York City earned income credits hinges upon their eligibility for the federal credit, their eligibility under federal law is determinative.

The federal earned income credit, provided for pursuant to Internal Revenue Code (IRC) (26 USC) § 32, is a refundable tax credit for eligible low-income earners. To be eligible to claim the credit, a taxpayer must have earned income with an adjusted gross income (AGI) below a

certain level, must have a valid Social Security number, must use a filing status other than married filing separately, must be a U.S. citizen or resident alien, must have no foreign income, and have investment income less than a certain amount. “A small credit is provided to all eligible taxpayers, but the principal feature of the EIC is the more substantial credit available to eligible taxpayers who have one or more ‘qualifying’ children” (*Sherbo v Commr.*, 255 F3d 650, 651 [8th Cir 2001], citing 2 Bittker & Lokken, *Federal Taxation of Income, Estates & Gifts* ¶ 37.1 [3d ed. 2000]). The amount of the credit varies depending upon the number of the taxpayer’s “qualifying children” as defined by IRC (26 USC) § 152 (C) and the taxpayer’s AGI. Since the Division has conceded that petitioners have three dependents,⁶ petitioners’ eligibility for the earned income credits hinges on whether they have established Mr. Ekhmais earned income in 2017, and the amount thereof.

H. Upon review of the record, it is clear that petitioners failed to meet their burden of proof with respect to the amount of income earned by Mr. Ekhmais during tax year 2017. Mr. Ekhmais’ testimony was vague regarding the date in the year 2017 on which he began his business, the refrigeration repair and heating, ventilation, and air conditioning work that he allegedly performed for customers during 2017, and the payments he received for such work. He admitted that he did not have any invoices or billing statements sent to customers for work allegedly performed during 2017 that would substantiate the amount of earned income claimed for 2017. Petitioners’ tax preparer, Mr. Abdeelaziz, testified that he prepared petitioners’ 2017 tax return strictly based upon bank statements provided by Mr. Ekhmais. Mr. Abdelaziz admitted that he did not see any invoices or billing statements for customers that would tie to

⁶ The Division has conceded that petitioners have two dependent children, and one dependent parent for tax years 2016 and 2017. The two dependent children are qualifying children for purposes of the earned income credit.

money coming into Mr. Ekhamis' account. During the audit, petitioners did not provide any documentation regarding their earned income for tax year 2017. Petitioners did not submit any documentation at the hearing. However, Administrative Law Judge Connolly granted them time post-hearing to submit certain documentation consisting of, among other items, bank statements for tax year 2017. Although petitioners provided post-hearing documentation to the Division, they failed to submit such documentation to the Division of Tax Appeals by the deadline established by Administrative Law Judge Connolly. After this matter was reassigned to Administrative Law Judge Maloney, she sent correspondence, dated July 23, 2021, advising petitioners that her office never received copies of the post-hearing documents that they sent to the Division, and requesting submission of their post-hearing documents to her office by August 14, 2021. Petitioners failed to submit copies of their post-hearing documents to Administrative Law Judge Maloney. The record is devoid of any documentation substantiating petitioners claimed earned income for tax year 2017. Mr. Ekhamis' vague testimony regarding his business income for tax year 2017 is insufficient to substantiate petitioners' earned income for tax year 2017. Accordingly, petitioners have not established they are entitled to New York State and New York City earned income credits for tax year 2017.

I. Turning next to petitioners' claimed Empire State child tax credit for 2017, Tax Law § 606 (c-1) provides for a credit equal to the greater of \$100.00 times the number of qualifying children of the taxpayer or the applicable percentage of the child tax credit allowed the taxpayer under IRC (26 USC) § 24 for the same taxable year for each qualifying child. Pursuant to IRC (26 USC) § 24, a taxpayer may claim a child tax credit for an individual who is their "qualifying child" as defined in 26 USC § 152 (c) and has not attained the age of 17 during the taxable year (26 USC § 24 [a], [c]). Although it has been determined that petitioners have not demonstrated

entitlement to the earned income credit for tax year 2017, they are entitled to the minimum \$100.00 per qualifying child. The Division no longer disputes that M.E. and I.E. were qualifying children for tax year 2017. Therefore, the Division is directed to modify L-048796713 for tax year 2017 to allow an Empire State child credit in the amount of \$200.00.

J. Tax Law § 606 (b) provides a nonrefundable New York State household credit. The amount of the credit depends upon the filer's household gross income and phases out at household gross incomes above \$28,000.00 for persons claiming married filing jointly status, as petitioners have (*see* Tax Law § 606 [b] [2] [B]). Similarly, Tax Law § 1310 provides a similar New York City household credit, which, for taxpayers with a filing status of married filing jointly, phases out for household incomes above \$22,500.00 (*see* Tax Law § 1310 [d] [2] [B]). "Household gross income" is defined as "the aggregate federal adjusted gross income of a household" (Tax Law § 606 [b] [3] [A]; Tax Law § 1310 [d] [3] [A]). Allowing three dependents plus petitioners and federal adjusted gross income of \$0.00 for purposes of calculation of the New York State and New York City household credits, the Division, in its brief, agreed that petitioners are entitled to a New York State household credit in the amount of \$150.00 and a New York City household credit in the amount of \$150.00 for tax year 2017. However, because petitioners have not proven that they had any taxable income during tax year 2017, and the New York State and New York City household credits are nonrefundable in nature, there is no change to the tax assessment for the allowance of the New York State and New York City household credits in tax year 2017.

K. The petition of Ahmad Ekhmais and Hadil Ikhmayes is granted in accordance with conclusions of law I and J, but in all other respects is denied; the August 30, 2019 conciliation order dismissing petitioners' request is sustained; notice of deficiency L-049056183 for tax year

2016,⁷ and notice of deficiency L-048796713 for tax year 2017, as modified in accordance with conclusions of law I and J, are sustained.

DATED: Albany, New York
July 14, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

⁷ Although the Division of Tax Appeals lacks jurisdiction over the petition for tax year 2016 (*see* conclusion of law E), the Division, in its brief, conceded that petitioners have one qualifying child in tax year 2016 but no income, and are entitled to an Empire State child credit of \$100.00 for tax year 2016.