

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>LAYNAU J. SERRES</b>	:	DETERMINATION
	:	DTA NO. 817310
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 1996.	:	

---

Petitioner, Laynau J. Serres, 636 Brooklyn Avenue, Apt. 5J, Brooklyn, New York 11203, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1996.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 23, 2000 at 10:30 A.M., with petitioner's reply brief received on July 19, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

***ISSUE***

Whether petitioner was entitled to claim head of household status or an earned income credit on his 1996 New York State Resident Income Tax Return.

***FINDINGS OF FACT***

1. During 1996, petitioner lived in a house at 115-91 217<sup>th</sup> Street, Cambria, New York. Petitioner had purchased this house in 1985 and lived there from 1985 until 1999 when he sold it. Living with petitioner at this address in 1996 were his daughter, Maria C. Serres, and her daughter, Nastasia C. Pollas, petitioner's granddaughter. Petitioner paid the mortgage and the utilities on this house.

2. During 1996, and until at least the date of the hearing in this matter, petitioner was legally married. Although separated from his wife since 1982, they had never obtained a divorce.

3. Petitioner claimed head of household filing status and an earned income credit on his 1995 New York State Resident Income Tax Return. This return was apparently disputed by the Division of Taxation ("Division ") because petitioner filed a request for a conciliation conference. Prior to such a conference being held petitioner received a letter dated April 18, 1997 stating that he had been allowed head of household filing status but that his claimed earned income credit claiming Nastasia C. Pollas as a qualifying child had been disallowed as it had been allowed for Maria C. Serres. Petitioner signed a consent form on September 25, 1997 regarding the proceedings before the Division's Bureau of Conciliation and Mediation Services wherein the tax and interest assessed for the year 1995 were recomputed to be zero.

4. Petitioner claimed head of household filing status and an earned income credit on his 1996 New York State Resident Income Tax Return. On December 1, 1997, a Statement of Proposed Audit Changes was issued to petitioner for the 1996 tax year. The statement explained that only one person per address could claim the head of household status and he would not be allowed to claim this status as someone else in his household had already claimed head of household status for 1996. Furthermore, the statement explained that petitioner's claimed earned

income credit was being disallowed as the qualifying child identified by petitioner on his return was claimed on another return showing a higher income and that this person was thus entitled to the credit. The statement set forth total additional New York State and New York City income taxes due for 1996 of \$644.20 plus interest. No penalties were assessed.

5. On March 16, 1998 the Division issued to petitioner a Notice of Deficiency setting forth total additional New York State and New York City income taxes due for 1996 of \$644.20 plus \$48.08 in interest, with a total current balance due of \$679.12.<sup>1</sup> No penalties were assessed.

6. Petitioner filed a request for a conciliation conference and by Conciliation Order dated August 6, 1999, the conferee denied the request and sustained the statutory notice. Petitioner then filed a petition with the Division of Tax Appeals on August 31, 1999.

7. This Administrative Law Judge conducted an *in camera* review of the 1996 New York State Resident Income Tax Return of the other person claiming petitioner's granddaughter as a qualifying child for purposes of the head of household filing status and the earned income credit. Findings of Fact "1" through "6" are not based in any part on that review. The facts as found are based solely on petitioner's testimony and the documents actually received into evidence at the hearing.

### ***CONCLUSIONS OF LAW***

A. A person's filing status for purposes of filing a New York State Resident Income Tax Return is the same as the person's filing status for Federal purposes (Tax Law § 607[b]). IRC § 2(b) defines a head of household as an unmarried individual who basically maintains a household that is the principal place of abode of, in this case, a granddaughter. A head of

---

<sup>1</sup>Included in the calculation of the total current balance due was a credit or payment in the amount of \$13.16.

household must provide over one-half of the cost of maintaining the household. Therefore, since two different people cannot provide more than one-half the cost of maintaining the household, in no event may a dependent utilized to claim head of household status be used by more than one taxpayer in a tax year (26 CFR 1.2-2[b][2]).

As pointed out by the Division, the Notice of Deficiency issued in this matter is entitled to a presumption of correctness and it is petitioner's burden to prove that the notice is erroneous (Tax Law § 689[e]; *Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398). The notice in this case was explained by the Statement of Proposed Audit Changes. Petitioner has not contested the facts as set forth in this statement that someone other than petitioner had claimed petitioner's granddaughter as a dependent for purposes of qualifying that other person as a head of household. Pursuant to 26 CFR 1.2-2(b)(2) only one person may use petitioner's granddaughter per tax year to qualify as a head of household. Other than petitioner's testimony that he paid the mortgage and utilities at the house where his granddaughter lived during the year in question, petitioner presented no proof that he provided more than half of the cost of maintaining the household or that his daughter provided less than half. Therefore, petitioner has failed to meet his burden of proof on this issue (*Matter of Leogrande v. Tax Appeals Tribunal, supra*).

B. In 1996, a New York State taxpayer was allowed to take an earned income credit for any given year equal to 20% of his Federal earned income credit (Tax Law § 606[d]). Therefore, in determining whether petitioner was entitled to the earned income credit, it is again necessary to refer to the Internal Revenue Code. An earned income credit is allowed to an eligible individual, which is defined by the Internal Revenue Code as an individual who "has a qualifying child for the taxable year" (IRC § 32 [a][1]; [c][1]). Petitioner's granddaughter was a qualifying

child for petitioner during 1996 since she was a descendant of his daughter, had the same principal place of abode as petitioner for more than half of 1996, was under the age of 19 at the time, and petitioner provided the required identification information regarding his granddaughter on his return (IRC § 32[c][3]). Therefore, it appears petitioner should have been entitled to claim an earned income credit for 1996. However, IRC § 32(c)(1)(C) provides that, if two individuals are both eligible to claim the earned income credit based upon the same qualifying child, only one individual may take the credit and that is the individual with the higher adjusted gross income. The notice issued in this matter was based upon another eligible taxpayer with a higher adjusted gross income claiming petitioner's granddaughter as a qualifying child for purposes of the earned income credit for the 1996 tax year. Again, the Notice of Deficiency is entitled to a presumption of correctness and petitioner did not introduce any evidence in support of his position that the Notice of Deficiency was erroneous. Therefore, petitioner has failed to meet his burden of proof on this issue (*Matter of Leogrande v. Tax Appeals Tribunal, supra*).

C. Petitioner argued, both at the hearing and in his written submission, that he should not have to pay for the mistake of the taxing authorities. Petitioner is referring to the fact that when his 1996 New York State Resident Income Tax Return was filed it was processed by the Division without any questions being asked at that time. He then received at a later date the Statement of Proposed Audit Changes and Notice of Deficiency. It was petitioner's mistake to file a return claiming head of household status and an earned income credit when he was entitled to neither for 1996. The fact that the Division processed that return when it was filed does not change petitioner's mistake into the Division's. Furthermore, petitioner's argument that he is entitled to head of household status and an earned income credit for 1996 because these were allowed by the Division in past years, 1995 in particular, is of no assistance to petitioner because a taxpayer's

filing status and the credits he is entitled to are factual determinations which must be reached based upon the circumstances of the particular year in question.

D. The petition of Laynau J. Serres is denied and the Notice of Deficiency is sustained.

DATED: Troy, New York  
January 04, 2001

/s/ Roberta Moseley Nero  
ADMINISTRATIVE LAW JUDGE