

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YVETTE SHERRILL	:	SMALL CLAIMS DETERMINATION DTA NO. 820429
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Years 2001, 2002 and 2003.	:	

Petitioner, Yvette Sherrill, 2501 Hoffman Avenue, Apt. #17, Bronx, New York 10458, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the years 2001, 2002 and 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on November 21, 2005 at 1:15 P.M. Petitioner appeared by Waverly Lane, Jr., EA. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

The final brief in this matter was due by August 18, 2006 and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether petitioner has sustained her burden of proof to show that her proper filing status for the three years in question was head of household and not married filing separately.

FINDINGS OF FACT

1. Petitioner, Yvette Sherrill, timely filed her New York State and City resident income tax returns for the years 2001, 2002 and 2003. For all three years in question petitioner utilized the services of a paid tax preparer; however, she used a different tax preparation firm each year.

2. Petitioner's 2001 tax return claimed head of household filing status and two dependent exemptions, one for her son, Desmond Van Duyne, born in 1992, and the other for her daughter, Tywana A. Van Duyne, born in 1981. The 2001 return reported that both children lived with petitioner for the entire tax year and that Tywana A. Van Duyne was a "Person with disability." New York adjusted gross income as reported on petitioner's 2001 return was \$25,818.00, with \$25,009.00 of that total representing wage income. On her 2001 return petitioner claimed an earned income credit of \$282.00, a child and dependent care credit of \$528.00, a household credit of \$50.00 and a standard deduction of \$10,500.00, which is the amount allowed to a person with head of household filing status.

3. Petitioner's 2002 tax return, also filed claiming head of household filing status, reported New York adjusted gross income of \$27,485.00, all of which was wage income. The 2002 return claimed two dependent exemptions for petitioner's two children, New York itemized deductions of \$14,948.00, an earned income credit of \$280.00, a child and dependent care credit of \$546.00 and a household credit of \$50.00. Upon processing petitioner's 2002 tax return, the Division of Taxation ("Division") did not allow the earned income credit of \$280.00 and the child and dependent care credit of \$546.00, thereby reducing petitioner's claimed refund by \$826.00, from \$1,437.00 to \$611.00. The record herein does not disclose why the Division did not allow the earned income credit and child and dependent care credit as claimed on petitioner's 2002 tax return.

4. Petitioner's 2003 tax return was filed claiming a filing status of married filing separate return. Said return listed one Franchot A. Van Duyne Jr.'s social security number as petitioner's spouse's social security number. The 2003 return claimed only one dependent exemption for petitioner's son, Desmond Van Duyne, since her daughter, Tywana A. Van Duyne, had died on an unknown date in 2002. The 2003 return, which reported total income of \$27,990.00, of which \$27,092.00 was wage income, did not claim an earned income credit; however, it did claim a \$726.00 child and dependent care credit. The 2003 return claimed that petitioner was due a refund in the amount of \$512.00.

5. The Division did not grant petitioner the \$512.00 refund as claimed on her 2003 return, but instead issued a Notice and Demand For Payment of Tax Due to petitioner on March 18, 2004 asserting that \$214.00 of additional tax was due for 2003. The Notice and Demand For Payment of Tax Due disallowed petitioner's claimed \$726.00 child and dependent care credit on the basis that she was not "eligible for the credit if you are married filing separately. . . ." By disallowing the \$726.00 claimed child and dependent care credit, the Division turned the \$512.00 refund claimed on petitioner's 2003 return into a tax due of \$214.00.

6. For the 2001 and 2002 tax years, the Division, on October 14, 2003, issued a Statement of Proposed Audit Changes ("Statement") to petitioner asserting that additional tax was due for each year. Each Statement changed petitioner's filing status from head of household to married filing separately for the following reason:

Married taxpayers living at the same address, who elect to file separate returns, must each claim the filing status "Married Filing Separate Return" on their New York returns.

Your correct filing status should be married filing separate.

7. For the 2001 tax year, the Division's proposed change of petitioner's filing status from head of household to married filing separate produced the following four adjustments to her return:

- (a) the standard deduction was reduced by \$6,500.00, from \$10,500.00 to \$4,000.00;
- (b) the \$50.00 household credit was disallowed;
- (c) the earned income credit of \$282.00 was disallowed; and
- (d) the child and dependent care credit of \$578.00 was disallowed.

These four adjustments, all emanating from the change of filing status, resulted in additional New York State and City taxes due of \$1,318.50. On December 8, 2003, the Division issued a Notice of Deficiency to petitioner for the 2001 tax year asserting that \$1,318.50 of tax was due, together with interest of \$129.80.

8. For the 2002 tax year, the Division also made four adjustments to petitioner's return. The four adjustments, the first two of which were the result of the change in her filing status from head of household to married filing separate, are summarized as follows:

- (a) the \$50.00 household credit was disallowed;
- (b) New York itemized deductions of \$14,948.00 were disallowed and the \$6,500.00 standard deduction was allowed in lieu thereof since petitioner's alleged spouse had claimed the standard deduction on his separate return, thereby mandating that petitioner likewise claim the standard deduction;
- (c) one dependent exemption was disallowed and the basis for this adjustment was set forth in the Statement as "You have been allowed the correct exemption amount"; and
- (d) New York adjusted gross income was increased by \$886.00 pursuant to Tax Law § 612(b)(26-a). Petitioner concedes the accuracy of this adjustment.

The above four adjustments resulted in additional tax due of \$1,019.50, which amount, together with interest, was asserted due in a second Notice of Deficiency also dated December 8, 2003.

9. Petitioner protested both notices of deficiency dated December 8, 2003 and the Notice and Demand for Payment of Tax Due dated March 18, 2004 by filing a petition with the Division of Tax Appeals on March 14, 2005. Although the Division initially raised an issue concerning the timeliness of the petition, it subsequently conceded the timeliness issue since “its proof of mailing is not sufficient to prove the date of mailing of the Notices.”

10. In her petition, petitioner annexed an amended return for the 2003 tax year claiming that her proper filing status for said year was head of household and not married filing separate as shown on her original 2003 tax return. The amended return for 2003 proposed the following changes:

(a) an increase in the standard deduction from \$6,500.00 to \$10,500.00 as the result of the change in her filing status to head of household;

(b) the allowance of an earned income credit of \$79.00;

(c) the allowance of a child and dependent care credit of \$908.00. Petitioner’s original return claimed a child and dependent care credit of \$726.00 based on qualified expenses of \$2,400.00. The amended return seeks a greater credit based on the assertion that qualified expenses totaled \$3,000.00 and not \$2,400.00 as claimed on the original return; and

(d) an increase in the household credit from \$23.00 to \$45.00.

11. Although petitioner did not appear at the small claims hearing to offer her testimony, she did provide, post hearing, the following affidavit to explain her relation with Franchot A. Van Duyne Jr.:

I have known Franchot since I was 13 years old. We started going with each other at the age of 15 and 16. I have 3 children with him; Dashay who is 26, my daughter who would have been 24 and my youngest son Desmond who is 13. My daughter passed away in 2002. I have been in a relationship with Franchot for more than 30 odd years on and off. I let him use my address for mailing purposes and to help him get a job in certain areas. In the year 2002, the person that I was using to do my taxes had moved from the location that I had. Since Franchot said that he had a friend that knew someone that could get me more money than I got last year let him take my taxes to that person and I said yes. I had no idea that he would file me as married since we aren't married. Yes we were told a long time ago that if you stay in a relationship with someone for more than 7 years that you are common law married, and I guess Franchot said yes when the person asked him that and he had all my information that is what the person did. We are not married and we do not live with each other at anytime. I see him once in a while when he comes to give me money for Desmond and when I need to get in touch with him I go through his mother. Then in 2003 I sent my taxes to someone else that was referred to me and then they just copied my taxes over from the previous year on to that year. I called that person and told them they made a mistake and that person said that it was ok he would fix it, when in fact he didn't do anything and that is when I ended up getting audited.

10. Petitioner also submitted a signed statement from Franchot A. Van Duyne Jr. which contained the following:

My name is Franchot Van Duyne Jr. My childrens' mother has let me use her address for forwarding mail. I asked her to let me use her address because my mail was being stolen. I use my mother's address from time to time. As far as me living with Ms Sherrill that never happened. I was homeless for a while, then I lived at the Franklin Ave. Armory Shelter for a while and with my mother off and on for a long while, but never with Ms. Sherrill. I've visited my children from time to time at her home, but never lived there.

11. A signed statement was also submitted by Antonia V. Van Duyne, Franchot A. Van Duyne Jr.'s mother, which indicated that he "has lived with us since 1990 to the present time. He pays rent for the room he occupies. He contributes nothing toward my home expenses. He takes care of all his needs, including clothing, food and toiletry."

12. During the three years in question, petitioner was the sole lessee of 3220 Gunther Avenue, Apt. #1, Bronx, New York. This apartment was maintained by petitioner during all three years in dispute and it was the principal place of abode for both petitioner and her minor son, Desmond Van Duyne. During this same three-year period, Franchot A. Van Duyne Jr. and Antonia V. Van Duyne were joint lessees of 2186 Grand Concourse, Apt. 5G, Bronx, New York.

13. Dating back to the 1991 tax year, petitioner, who was born in 1961, and Franchot A. Van Duyne Jr., born in 1962, have filed New York State and City tax returns claiming different filing statuses and the following table details how they filed:

<i>YEAR</i>	<i>FILING STATUS</i>
1991	Joint return
1992	Joint return
1993	Ms. Sherrill - head of household; Mr. Van Duyne no return on file
1994	Ms. Sherrill - head of household; Mr. Van Duyne no return on file
1995-1997	No return on file for either taxpayer
1998	Ms. Sherrill - no return on file; Mr. Van Duyne - head of household
1999	Ms. Sherrill - head of household; Mr. Van Duyne - single
2000	Ms. Sherrill - head of household; Mr. Van Duyne no return on file
2001	Ms. Sherrill - head of household; Mr. Van Duyne - married separate
2002	Ms. Sherrill - head of household; Mr. Van Duyne - married separate
2003	Ms. Sherrill - married separate; Mr. Van Duyne no return on file

14. There are public records which show that in the past petitioner has occasionally used the names Yvette Sherrill Van Duyne or Yvette Van Duyne and that these names were used for voter registration and on a loan from the New York State Higher Education Services Corporation. There is also evidence that Franchot A. Van Duyne Jr. registered a motor vehicle

using petitioner's 3220 Gunther Avenue, Apt. #1, Bronx, New York address and that he has used this address on several occasions, including on his tax returns.

CONCLUSIONS OF LAW

A. Resolution of the controversy at issue herein turns on whether petitioner has demonstrated that she was not married during the tax years in question. While the Division correctly notes that the burden of proof lies with petitioner, (*see*, Tax Law § 689(e)) it must also be noted that petitioner is being asked to prove a negative. Petitioner's burden is further compounded by the fact that she and Mr. Van Duyne, Jr. have, over the years, left a paper trail that would suggest that they were, or are, married.

B. After carefully reviewing all the evidence, I conclude that petitioner has sustained her burden of proof to show that she is, for the years at issue, entitled to claim head of household filing status. This conclusion is reached based on the determination that there is sufficient evidence to prove that (i) petitioner and Mr. Van Duyne, Jr. did not occupy the same residence during the years at issue; (ii) petitioner solely and individually maintained the 3220 Gunther Avenue, Apt. #1, Bronx, New York residence for all three years; (iii) the 3220 Gunther Avenue residence was the principal place of abode of petitioner's minor son; and (iv) petitioner was entitled to claim a deduction for a personal exemption for her minor son. Thus, even if petitioner and Mr. Van Duyne, Jr. were married during the years in question, she is nonetheless entitled to claim head of household filing status pursuant to Internal Revenue Code § 7703(b), which section applies to certain married individuals living apart. While it has been determined that petitioner is, for tax purposes, considered to be unmarried pursuant to Internal Revenue Code § 7703(b), this determination makes no conclusion as to whether petitioner and Mr. Van Duyne, Jr.

were legally married individuals under the laws of the State of New York or any other competent jurisdiction.

C. Since the adjustments proposed by the Division for the 2001 tax year are based solely on the change of petitioner's filing status from head of household to married filing separate and since this determination allows petitioner head of household status, the Notice of Deficiency for 2001, dated December 8, 2003, is canceled.

For the 2002 tax year, the Division's adjustment to the household credit and disallowance of itemized deductions are canceled as these adjustments are premised on the Division's assertion that petitioner's filing status is married filing separate. As noted in Finding of Fact "8(d)", petitioner has conceded the accuracy of the Division's \$886.00 increase to New York adjusted gross income pursuant to Tax Law § 512(b)(26-a). The Division has also disallowed one dependent exemption for the 2002 tax year; however, the record herein contains no explanation or basis for this disallowance. Accordingly, petitioner is entitled to claim the two dependent exemptions as reported on her 2002 tax return. Finally, the Division, upon the processing of petitioner's 2002 tax return, disallowed the claimed earned income credit (\$280.00) and the child and dependent care credit (\$546.00), apparently based on the change in her filing status. Since petitioner is entitled to claim head of household filing status, she is eligible to claim the earned income credit and the child and dependent care credit for the 2002 tax year.

For the 2003 tax year, petitioner is, as shown on the amended return annexed to her petition, entitled to claim a standard deduction of \$10,500.00, an earned income credit of \$79.00, a child and dependent care credit of \$908.00 and a household credit of \$45.00.

D. The petition of Yvette Sherrill is granted to the extent indicated in Conclusions of Law “B” and “C” and the Division of Taxation is directed to recompute petitioner’s New York State and City income tax liability for the three years at issue consistent with this determination and to refund to petitioner any overpayments, together with such interest as may be allowed by law.

DATED: Troy, New York
November 16, 2006

/s/ James Hoefer
PRESIDING OFFICER