

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN GLENN BARRY METCALF, SR.	:	SMALL CLAIMS DETERMINATION DTA NO. 820518
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 Administrative Code of the City of New York for the Years 2002 through 2004.	:	

Petitioner, John Glenn Barry Metcalf, Sr., 980 Bergen Street, #6, Brooklyn, New York 11216-2920, 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 Administrative Code of the City of New York for the years 2002 through 2004.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 3, 2006 at 10:45 A.M., with all evidence to be submitted by May 10, 2006, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Susan Parker).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claimed earned income credit for the 2002 tax year.

FINDINGS OF FACT

1. Petitioner, John Glenn Barry Metcalf, Sr., filed his 2002 and 2003 New York State and City resident personal income tax returns on or about January 27, 2005. The record does not indicate the date of filing of petitioner's 2004 New York State and City return. For each of the three years at issue, petitioner filed as "head of household" and claimed three dependent exemptions for his sons, John, born in 1987, Jimi, born in 1988, and Barri, born in 1990.

2. Petitioner's 2002 tax return reported New York adjusted gross income of \$8,974.00, which consisted of business income of \$9,656.00, and a \$682.00 adjustment to income for one-half of his Federal self-employment tax. After allowing for the standard deduction and petitioner's dependent exemptions, there remained no taxable income and thus no State or City tax due. Petitioner's 2002 return claimed a refund of \$1,050.00, which included \$987.00 for the New York State earned income credit and \$63.00 for the New York City school tax credit.

3. On his 2002 Federal schedule C petitioner reported \$16,000.00 in gross income from teaching and playing music. Petitioner also reported \$6,626.00 in expenses attributable to his business and thus reported \$9,374.00 in net profit for 2004. On a second schedule C attached to petitioner's 2002 return, he reported \$282.00 in net income from Nelson Energy, Inc. At the hearing petitioner described such income as an inheritance.

4. The Division of Taxation ("Division") sent a letter to petitioner dated March 4, 2005 requesting documentation to support his 2002 claim for the earned income credit. By letter dated May 20, 2005, the Division denied this claim. The Division did grant petitioner's claimed refund of New York City school tax credit of \$63.00.

5. Petitioner's 2003 tax return reported New York adjusted gross income of \$5,403.00, which consisted of business income of \$5,814.00, and a \$411.00 adjustment to income for one-

half of his Federal self-employment tax. After allowing for the standard deduction and petitioner's dependent exemptions, there remained no taxable income and thus no State or City tax due. Petitioner's 2003 return claimed a refund of \$714.00, which included \$651.00 for the New York State earned income credit and \$63.00 for the New York City school tax credit.

6. On his 2003 Federal schedule C petitioner reported \$16,000.00 in gross income from teaching and playing music. Petitioner also reported \$10,436.00 in expenses attributable to his business and thus reported \$5,564.00 in net profit for 2003.

7. The Division granted petitioner's claimed earned income tax credit and New York City school tax credit for 2003.

8. Petitioner's 2004 tax return reported New York adjusted gross income of \$9,194.00, which consisted of business income of \$9,893.00, and a \$699.00 adjustment to income for one-half of his Federal self-employment tax. After allowing for the standard deduction and petitioner's dependent exemptions, there remained no taxable income and thus no State or City tax due. Petitioner's return claimed a refund of \$1,348.00, which included \$1,101.00 for the New York State earned income credit, \$184.00 in New York City earned income tax credit and \$63.00 for the New York City school tax credit.

9. The record does not include petitioner's 2004 schedule C.

10. The Division granted petitioner's claimed New York State and City earned income tax credits and New York City school tax credit for 2004.

11. The New York City school tax credits for 2002, 2003 and 2004, the New York State earned income credits for 2003 and 2004, and the New York City earned income credit for 2004, all of which were allowed by the Division, were not paid to petitioner, but were forwarded to

CUNY, Manhattan Community College, pursuant to a claim made by that entity in accordance with Tax Law § 171-e.

12. Throughout the years 2002 through 2004 petitioner worked as a self-employed musician. He performed in various public spaces in New York City, such as subway platforms, and accepted donations from the public for his work. He also performed at nightclubs and private parties. In addition, he gave guitar lessons and sold instructional pamphlets for guitar and also sold tapes and CD's of his music.

13. To substantiate his expenses petitioner submitted self-prepared "invoices" which consisted of lists of his expenses for the years at issue as claimed on his returns. Petitioner also submitted undated invoices for printing services which total about \$10.00.

14. Petitioner's wife died in 1995. Petitioner subsequently became involved in a dispute with his former mother-in-law over the custody of his children. Through his testimony and other documentation in the record petitioner established that his children resided with him during the years at issue.

15. Petitioner filed a petition in bankruptcy under chapter 7 of the bankruptcy code on March 17, 2005. Petitioner was granted a discharge and his chapter 7 case was closed pursuant to an Order of Final Decree dated July 25, 2005. Petitioner had previously filed a petition in bankruptcy under chapter 13 of the bankruptcy code in February 1993. The repayment plan under the chapter 13 bankruptcy was for a period of 51 months.

CONCLUSIONS OF LAW

A. 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 petitioner's eligibility for the earned income credit.

B. The Federal earned income credit, provided for pursuant to IRC § 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*, IRC § 32[c][2]). In order to show he was entitled to the earned income credit as claimed on his 2002 return, it was petitioner's burden of proof (*see*, Tax Law § 689[e]) to show that he generated \$8,974.00 of earned income during the 2002 tax year.

Upon review of the record it is clear that petitioner has failed to meet this burden. Petitioner offered no documentation whatsoever to show that he earned \$16,000.00 in gross income as a self-employed musician as reported on his 2002 schedule C. Furthermore, petitioner offered no explanation as to how he kept track of the income he earned during 2002 and thus offered no explanation as to how he determined the amount of income reported on his return. Moreover, the fact that petitioner reported exactly the same amount of income in both 2002 and 2003, and filed his 2002 return about two years late also undermines the credibility of the reported amount. Finally, it is noted that petitioner has failed to substantiate his claimed expenses for 2002 (*see*, Finding of Fact "13"). It is further noted that, similar to 2002, petitioner offered no documentation of his earnings or expenses as a musician for either 2003 or 2004.

The amounts petitioner earned from Nelson Energy, Inc. in 2002 (*see*, Finding of Fact "3") do not constitute "earned income" as defined under IRC § 32(c)(2). Petitioner is therefore not entitled to earned income credit to the extent of such income.

C. Petitioner objected to the diversion of certain of his refunds to CUNY, Manhattan Community College (*see*, Finding of Fact “11”). Petitioner offered no evidence, however, to show that such diversion was improper.

D. The petition of John Glenn Barry Metcalf, Sr. is in all respects denied, and the Division’s Notice of Disallowance dated May 20, 2005 is sustained.

DATED: Troy, New York
June 29, 2006

/s/ Timothy J. Alston
PRESIDING OFFICER