

STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|--|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| CARLOS E. MORENO AND ANA M. MORENO | : | SMALL CLAIMS DETERMINATION DTA NO. 820959 |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under the New York City Administrative Code for the Year 2004. | : | |

Petitioners, Carlos E. Moreno and Ana M. Moreno, 78 South First Street, Apartment 22, Brooklyn, New York 11211, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under the New York City Administrative Code for the year 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 April 4, 2007 at 1:15 P.M., with all evidence to be submitted by April 25, 2007, which date began the three-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Susan Parker).

ISSUE

Whether the Division of Taxation properly disallowed petitioners' claimed earned income credit for the 2004 tax year.

FINDINGS OF FACT

1. Petitioners, Carlos E. Moreno and Ana M. Moreno, timely filed their joint 2004 New York State and City resident personal income tax return. Petitioners' return reported New York adjusted gross income of \$14,437.00, based on reported business income of \$15,535.00, less an adjustment of \$1,098.00 for one-half of self-employment tax. After allowing for the standard deduction and dependent exemptions petitioners had no taxable income and thus no New York State or City income tax due.

2. Petitioners' return claimed a refund of \$1,290.00 in New York State earned income credit ("EIC") and \$215.00 in New York City EIC. The claim for EIC attached to petitioners' return (Form IT-215) lists two qualifying children, Charlie A. Moreno, born 1997, and Kharla M. Moreno, born 1994. The Division concedes that these children are "qualifying children" for purposes of the EIC.

3. There were two Federal schedules C attached to petitioners' 2004 return which, together, account for the \$15,535.00 in reported business income. The first reported \$25,500.00 in gross receipts, \$14,965.00 in expenses, and thus a net profit of \$10,535.00. The second reported \$5,000.00 in gross receipts with no expenses.

4. The gross receipts reported on both schedule C's were earned by petitioner Carlos E. Moreno as a driver for a car service business known as American United Car Service, Inc. ("the company"). As a driver, Mr. Moreno was an independent contractor. He owned the vehicle in which he drove passengers. He paid for gas, tolls, repairs, maintenance and all other costs, such as license fees and insurance, associated with operating the vehicle and providing the car service to passengers.

5. Most passengers paid Mr. Moreno in cash. The \$25,500.00 in gross receipts reported on the first schedule C represent cash payments for the car service. Some passengers paid for the car service by credit card. Those passengers paid the company by credit card and the company subsequently reimbursed Mr. Moreno. Although described on the second schedule C as “commission sales,” the \$5,000.00 in gross receipts on the second schedule C attached to petitioners’ return represent such credit card payments. The company issued a Form 1099 to Mr. Moreno documenting a \$5,000.00 payment, but did not report such payment to the Internal Revenue Service.

6. During 2004, Mr. Moreno worked five and sometimes six days per week as a driver for eight to nine hours per day. On average he had eight to ten passengers per day. He drove passengers to destinations within Brooklyn, where the company was located, and also from Brooklyn to Manhattan. He was directed to passengers by a dispatcher employed by the company. Mr. Moreno paid a weekly fee of \$130.00 to the dispatcher.

7. In addition to being a driver, Mr. Moreno was also president of the company in 2004.

8. The Division of Taxation (“Division”) sent a letter to petitioners dated April 18, 2005, requesting specific documentation to support their claim for the EIC. By letter dated July 19, 2005, the Division advised petitioners that “the refund requested on your return for [2004] has been disallowed because your response to our letter regarding this refund did not contain all of the required information.”

9. Mr. Moreno provided sufficient documentation to substantiate the expenses claimed on his schedule C.

10. To substantiate his gross receipts from his car service business, Mr. Moreno submitted a three-page computer printout listing daily cash receipt amounts for 2004. The total of such

receipts as listed is \$25,500.00. This document lists no cash receipts for the period June 22, 2004 through August 31, 2004. There is no explanation in the record for the absence of any receipts for this period.

11. At the hearing petitioners testified to the following living expenses in 2004: cable television, phone and internet service \$110.00 per month; apartment rental \$330.00 per month; groceries approximately \$200.00 per week. Such expenses total approximately \$15,560.00 annually.

CONCLUSIONS OF LAW

A. Tax Law § 606(d) and Administrative Code of the City of New York § 11-1706 (d) both provide for an 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 and City earned income credits are both 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.

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 they were entitled to the earned income credit as claimed on their 2004 return, it was petitioners’ burden of proof (*see*, Tax Law § 689[e]) to show that they generated \$14,437.00 of earned income during the 2004 tax year.

C. Upon review of the record it is clear that petitioners have failed to meet this burden. Although petitioners have substantiated the expenses claimed on the schedule C (*see*, Finding of Fact “9”), they have clearly failed to substantiate the gross income as reported on the schedules

C attached to their return. The three-page computer printout upon which petitioners rely to establish their gross receipts is insufficient for several reasons. First, this documentation lacks detail as it contains no information regarding receipts from individual customers for specific trips. It is noted that Mr. Moreno's claim that the company had documentation detailing individual passengers and trips, but would not provide such documentation to him was unconvincing. Second, petitioners have not established that the information on the printout was recorded contemporaneously. At one point in the hearing, petitioner testified that his daughter recorded the daily amounts on the computer each day. Later, however, petitioner testified that the summaries were created at the direction of petitioners' tax return preparer. Such conflicting testimony further undermines the evidentiary value of the computer printouts. Third, the printout appears to be incomplete, as there are no daily receipts for an approximately 10-week period and no explanation in the record for the lack of such records (*see*, Finding of Fact "10"). Additionally, it is noted that the printout does not purport to account for Mr. Moreno's credit card receipts, and there is nothing in the record attesting to the accuracy of the \$5,000 payment purportedly for credit card receipts. Finally, petitioners' living expenses, as testified to at the hearing (*see*, Finding of Fact "11"), even excluding electric, gas, clothing and other living expenses, exceeds their reported business income for the year at issue, thereby calling into question the accuracy of such reported business income.

D. The petition of Carlos E. Moreno and Ana M. Moreno is in all respects denied, and the Division's Notice of Disallowance dated July 19, 2005 is sustained.

DATED: Troy, New York
June 14, 2007

/s/ Timothy J. Alston
PRESIDING OFFICER