

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NELSON DE LOS SANTOS	:	SMALL CLAIMS DETERMINATION DTA NO. 821150
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 Administrative Code of the City of New York for the Year 2005.	:	

Petitioner, Nelson De Los Santos, 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 Administrative Code of the City of New York for the year 2005.

A small claims hearing was held before Catherine M. Bennett, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 1, 2007 at 2:45 P.M., the date upon which the three-month period for the issuance of this determination commenced. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Mac Wyszomirski).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's earned income credit for the year 2005 on the grounds that he failed to substantiate the earned income he reported for that year.

FINDINGS OF FACT

1. Petitioner, Nelson De Los Santos, was a self-employed licensed taxi driver, operating a taxi cab in New York City during the year 2005. He was affiliated with The New Brooklyn Car Service, Inc., to whom he paid base fees for radio dispatch services. Petitioner paid all his own expenses, including licenses, insurance, gas, maintenance and repairs.

2. Petitioner filed Form IT-201, New York State Resident Income Tax Return, for 2005, claiming New York State and New York City earned income credits in the amounts of \$754.00 and \$133.00, respectively, for a total of \$887.00.

Petitioner's Form IT-201 for 2005 reported Federal and New York adjusted gross income of \$13,587.00, no tax withheld for the year at issue and sought a refund of \$731.00.

3. Petitioner's Federal Schedule C reported net income of \$14,620.00 consisting of the following items of income and deductions:

ITEM	AMOUNT
Gross Receipts	\$32,550.00
Depreciation	(165.00)
Insurance	(5820.00)
Legal and Professional Services	(175.00)
Taxes and License	(395.00)
Repairs and Maintenance	(1,995.00)
Other Expenses (Base Fees \$3,360.00, Gas \$4,820.00, Telephone \$325.00, Oil Change \$480.00, Car Wash \$375.00, Business Cards \$20.00)	(9,380.00)
Total Expenses	(17,930.00)

Net Profit	\$14,620.00
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4. The Division of Taxation (“Division”) issued to petitioner a Notice of Disallowance dated May 12, 2006, denying New York State and City earned income credits totaling \$887.00 for the year 2005, indicating that petitioner did not supply any acceptable information to verify his business income. The Notice of Disallowance stated the following:

[A] self-employed person must maintain accurate records which clearly document their [*sic*] revenue and expenditures for the year. Examples of acceptable documentation include bank statements, receipts, cancelled checks, ledgers, appointment books, employment contracts, complete client listings (including names, addresses and social security numbers), etc. A letter from an employer is not acceptable income verification.

The additional call sheets that you provided do not verify income. All that they provide are addresses, dates and times.

5. Petitioner’s taxi call sheets for 2005 were submitted as part of the record. The forms indicated the time a call was dispatched to petitioner, but did not indicate whether petitioner actually received a fare associated with each call or what fare was collected, if any.

6. A statement on the letterhead of The New Brooklyn Car Service, Inc., dated April 21, 2006, indicated that petitioner worked as an independent driver for the company, he paid the company a base fee for the services they provided drivers of \$70.00 every week, he had been working for the company for seven years and was earning a weekly salary of \$625.00.

7. Petitioner did not maintain books and records of the business income received from his work as a taxi driver, nor did he submit bank statements, pay stubs or expense receipts as requested by the Division. There was no Form 1099 or similar wage statement issued by The New Brooklyn Car Service, Inc., provided by petitioner. There was no accounting for or reference to income from tips.

8. In the preparation of his return, petitioner estimated his income earned each week and estimated certain expenses paid by cash, such as gasoline, based on his recollection and general work practices.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner maintains that he was granted the earned income credit in prior years and was entitled to it again in 2005. Petitioner maintains that the statement from The New Brooklyn Car Service, Inc., substantiates work as a taxi driver and his business income.

10. The Division maintains that petitioner, although requested to do so, did not submit books and records or other sufficient evidence to substantiate the income he earned as a taxi driver during the year in question, nor did he substantiate his Schedule C expenses, and therefore is not entitled to the earned income credit.

CONCLUSIONS OF LAW

A. As applicable to this proceeding, Tax Law § 606(d) provides that the New York State earned income credit is equal to 30 percent “of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . .” Since the State and City earned income credits are determined based solely on a percentage of the Federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code (“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, among other things, wage income and earnings from

self-employment (IRC § 32[c][2]). In order to be eligible for the earned income credit, the eligible individual must have a qualifying child for the taxable year. A qualifying child is one which meets the statutory requirements of age, relationship and residency (IRC § 32[c][3]). The Division does not dispute the existence of a qualifying child in this matter.

C. Petitioner established that he was a self-employed tax driver affiliated with The New Brooklyn Car Service, Inc., in 2005. However, petitioner admittedly did not maintain or present any income and expense information to substantiate earned income required to claim the credit. The statement provided by The New Brooklyn Car Service, Inc., as to income was merely an estimate by the company.

D. Tax Law § 689(e) places the burden of proof on petitioner to show by clear and convincing evidence that the Division's adjustment of petitioner's requested tax refund is erroneous (*Matter of Suburban Restoration Co., Inc. v. Tax Appeals Tribunal*, 299 AD2d 751, 750 NYS2d 359). Petitioner has not proved by convincing evidence that his earnings and expenses were as reported, such that he was financially qualified for the New York State and City earned income credits. Accordingly, petitioner's record-keeping failure and subsequent inability to prove the income he received in 2005 justified the Division's disallowance of such credits. Earned income is the key element in the calculation of the credits and petitioner's failure to accurately establish that sum is fatal to his claim.

E. The petition of Nelson De Los Santos is denied, and the Notice of Disallowance dated May 12, 2006, is sustained.

DATED: Troy, New York
October 25, 2007

/s/ Catherine M. Bennett
PRESIDING OFFICER