

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DANIEL OLIVA : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827262
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 Year 2013. :

Petitioner, Daniel Oliva, 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 pursuant to the Administrative Code of the City of New York for the year 2013.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, in New York, New York, on July 20, 2018, with all briefs to be submitted by February 15, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared by Jhonatan Mondragon, EA. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner's claimed earned income credit for the 2013 tax year.

II. Whether the Division of Taxation properly disallowed the Empire State child credit claimed by petitioner for the 2013 tax year.

FINDINGS OF FACT

1. On or about March 23, 2014, petitioner, Daniel Oliva, electronically filed his New York State and City resident income tax return, form IT-201, for the year 2013, reporting a Dalny Road, Jamaica Estates, New York, address. On that return, petitioner claimed head of household filing status and two dependent exemptions for two sons, one born in 1997 and the other born in 1998. Petitioner listed his occupation as mechanic on the tax return.

2. Petitioner's 2013 tax return reported New York adjusted gross income of \$13,723.00, which consisted of business income of \$14,766.00, and an \$1,043.00 adjustment to income for one-half of his federal self-employment tax. After claiming a standard deduction of \$10,800.00 and two dependent exemptions totaling \$2,000.00, petitioner determined his New York State taxable income to be \$973.00 and the New York State tax and New York City tax due on that amount to be \$37.00 and \$27.00, respectively. After claiming New York State and New York City household credits, each in the amount of \$90.00, petitioner reported no state and city taxes due. Petitioner's return claimed a refund of \$2,438.00, which amount included \$1,575.00 for the New York State earned income credit, \$269.00 for the New York City earned income credit, \$531.00 for the Empire State child credit, and \$63.00 for the New York City school tax credit.

3. Attached to petitioner's 2013 tax return was schedule C, profit or loss from business, which indicated that his principal business or profession was construction. The schedule reported \$16,000.00 in gross receipts, \$1,234.00 in total expenses¹ and a resulting net profit of \$14,766.00. Petitioner's 2013 return also included form IT-215, claim for earned income credit,

¹ The schedule C expenses reported consisted of: \$150.00 for supplies, \$520.00 for travel, \$144.00 for deductible meals and entertainment, and \$420.00 for other expenses listed as cell phone.

and form IT-213, claim for Empire State child credit, which listed two qualifying children.

4. By its letter dated April 10, 2014, the Division of Taxation's (Division) Income/Franchise Desk Audit Bureau AG-1 (Income/Franchise Desk Audit Bureau) notified petitioner that additional information was needed in order to process his 2013 income tax return and determine the amount of his tax refund. Specifically, the letter requested information about the money petitioner "earned by working for [himself]," and petitioner's children or dependents. Information and documentation requested included the following: a copy of petitioner's federal schedule C: profit or loss from business for 2013; copies of any license, registration, or certification for petitioner's business; copies of summary documents used to calculate the income and expenses reported on petitioner's tax return, such as ledgers, spreadsheets, or income and expense journals for the entire 2013 tax year; copies of detailed documentation, such as sales slips, invoices, bank statements, or receipts supporting the business income for at least two months of 2013; completion of an enclosed self-employed questionnaire; proof of petitioner's relationship to each child or dependent for whom a credit was claimed, consisting of copies of the birth certificate for each child for whom petitioner was claiming a credit, or if not listed on the birth certificate, documentation showing petitioner's relationship to the child or dependent; and proof that the child or dependent lived with petitioner for more than half the year, consisting of a letter from the child's doctor or school showing the child's name, date of birth, address, and the name of the custodial parent.

5. On December 19, 2014, the Division received information from petitioner consisting of public school letters dated May 12, 2014, and undated correspondence from Jhonatan Mondragon, EA, in which Mr. Mondragon offered an explanation as to why petitioner had

estimated the income and expenses reported on his 2013 tax return.

6. Neither the birth certificates for petitioner's qualifying children, nor any documentation pertaining to the income reported on petitioner's 2013 tax return were submitted to the auditor during the desk audit.

7. By an "Account Adjustment Notice - Personal Income Tax" (account adjustment notice), dated April 9, 2015, the Division's Income/Franchise Desk Audit Bureau disallowed the earned income credit and the Empire State child credit claimed by petitioner on his 2013 resident income tax return.² The "Explanation" section of the account adjustment notice contained, in pertinent part, the following paragraphs:

"The following adjustment(s) has been made to your New York State income tax return.

In order to qualify for the earned income credit, you must be able to document that you received earned income during the tax year. For business income, you must be able to provide records that support when the income was earned, to whom services were provided, and the exact amount of compensation received from each transaction. You did not provide the required documentation to verify the business income claimed on your return. . . .

In our previous correspondence, we asked you to provide documentation to verify the relationship of the qualifying child(ren) claimed on your return. You either did not submit birth certificate(s) or we were unable to determine relationship from the birth certificate(s) provided.

Since your response to our inquiry did not include the required documentation to verify the business income reported and the qualifying child(ren) claimed on your return, the earned income credit and the empire state child credit has been disallowed.

You have been allowed the New York City School Tax Credit."

² A refund of the New York City school tax credit in the amount of \$63.00 was allowed by the account adjustment notice.

8. In protest of the account adjustment notice, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A BCMS conciliation conference was held on July 29, 2015. Subsequently, BCMS issued a conciliation order, CMS No. 266087, dated October 23, 2015, denying the request and sustaining the statutory notice, i.e., the account adjustment notice.

9. Petitioner timely filed a petition challenging the conciliation order and the account adjustment notice,³ and seeking a refund of \$2,438.00. The refund amount requested in the petition included the New York City school tax credit in the amount of \$63.00. The representatives, at the beginning of the hearing, agreed that petitioner had received a refund of the New York City school tax credit and such credit was not part of petitioner's challenge of the Division's account adjustment notice. Copies of birth certificates and school records for petitioner's two sons were attached to the petition.

10. At the beginning of the hearing, petitioner's representative raised issues regarding whether the auditor followed the Division's guidelines in conducting the audit of petitioner's 2013 tax return and whether petitioner is entitled to the New York State and City earned income

³ Petitioner filed his petition on September 25, 2015. By letter dated October 2, 2015, addressed to petitioner's representative and petitioner copied, the Division of Tax Appeals advised that the petition could not be processed further until the following items were corrected or provided: missing information regarding the representative's address on page 1 of the petition; and missing information on page 3 of the petition - the conciliation order was not attached. The letter requested the submission of the requested information within 30 days of the date of the same, and advised that the failure to timely provide or correct this information could result in the petition being dismissed. On November 20, 2015, a notice of intent to dismiss petition (NOI) was issued to petitioner because the petition did not contain a legible copy of the statutory notice or the conciliation order. On January 7, 2016, petitioner's representative submitted correspondence and a copy of the conciliation order dated October 23, 2015. By letter dated January 13, 2016, then-Supervising Administrative Law Judge Daniel J. Ranalli notified Mr. Mondragon that the NOI was rescinded. He further advised that the petition was considered timely filed from the date of the conciliation order, and an acknowledgment letter would be issued shortly.

credits, the Empire State child credit and the real property tax credit for the tax year 2013.⁴

11. At the hearing, the Division introduced the testimony of Matthew Roberts, a Tax Technician 2 with the Division. Mr. Roberts was not the auditor assigned to audit petitioner's 2013 return, but he had reviewed the audit file prior to testifying. Because the audit file did not contain any contemporaneous documentation from petitioner regarding his income for the 2013 tax year, Mr. Roberts testified he checked petitioner's Federal Region Income Report, which showed no income for 2013. According to Mr. Roberts, the lack of documentation made it impossible for him to reconstruct petitioner's income for the year at issue.

12. Prior to the hearing, petitioner submitted sufficient documentation to establish that he had two qualifying dependents for purposes of the earned income credit and Empire State child credit.

13. The representatives, at the hearing, agreed that petitioner qualified for an Empire State child credit, but the amount of such credit remained at issue. Mr. Roberts explained that petitioner would qualify for the minimum Empire State child credit of \$100.00 per child for a total of \$200.00, because no substantiating documentation for petitioner's earned income was received by the Division prior to the date of the hearing. Mr. Roberts further testified that the Division will allow an Empire State child credit in the amount of \$200.00.

14. At the hearing, petitioner submitted into the record some pages taken from the Division's "Income Tax Guidelines Part 1 - Field Audit" (field audit guidelines). Specifically, the submitted pages consisted of pages 1, 35, 36 and 37 copied from the field audit guidelines

⁴ The real property tax credit was not claimed on the 2013 income tax return filed electronically by petitioner in March 2014. Rather, the claim for refund of the real property tax credit was first raised at the beginning of the hearing held on July 20, 2018. The record does not include an amended income tax return for the year 2013, on which a claim for refund of the real property tax credit was made.

section entitled "Reconstruction of Income," and pages 1 and 2 copied from the field audit guidelines section entitled "Income Tax Auditor."

15. Petitioner's representative asked Mr. Roberts whether the Division's field audit guidelines regarding reconstruction of income would apply here. Mr. Roberts stated that the account adjustment notice was based upon a desk audit, not a field audit. He further stated that even if the field audit guidelines applied to a desk audit, petitioner had not provided any documentation upon which the Division could reconstruct his income. Mr. Roberts also testified that petitioner was attempting at the hearing to estimate income, not reconstruct it, which the Division was not required to do.

16. Petitioner's representative suggested to Mr. Roberts that the personal living expenses statistical tables referenced on page 36 of the field audit guidelines could be used to reconstruct income. Mr. Roberts stated those tables would not apply, because they cover reconstruction of personal expenditures and do not cover earned income.

17. At the hearing, petitioner testified that in 2013, he worked in construction with Cesar Moreno. He further testified that he worked with Mr. Moreno for almost eight months, from about mid-February 2013 until October 2013. According to petitioner, his 2013 income came solely from his work with Mr. Moreno.

18. Petitioner testified that he was paid \$500.00 every week, or \$100.00 a day, by Mr. Moreno for work, as a labor assistant, picking up and removing construction demolition debris from the interior of buildings. He also testified that he was not paid for holidays on which he did not work. In response to his representative's question regarding the number of holidays on which he did not work in 2013, petitioner could not recall the exact number, only that "there were a

bunch, a lot of them.” He also could not recall the specific months in which he did not work on holidays. Petitioner claimed to have worked on some Saturdays, but could not recall the exact number of Saturdays on which he worked or identify the specific months in which those Saturdays fell.

19. Petitioner acknowledged that he was paid weekly in cash, but did not receive a pay stub or similar document showing his earnings. He could not remember the exact amount of his total earnings for 2013, but thought it was around \$14,000.00 or \$14,400.00.

20. According to petitioner, he begged Mr. Moreno for a statement of income for the year 2013, beginning in December 2013 and continuing through March 2014. However, no such statement was ever provided by Mr. Moreno.

21. To prove the source of his 2013 income, petitioner submitted a 13-page document consisting of colored screen shots of text messages in Spanish that were stored on his phone. Petitioner claimed that he and Mr. Moreno exchanged the text messages on various dates in October 2013, December 2013, January 2014 and March 2014. Review of the screen shots indicates that petitioner and someone named “Tai Cesar Jf” exchanged some text messages over a period of time. The contents of those exchanged text messages have not been verified by the other party involved in the exchange of the same, as that individual did not testify at the hearing.

22. At the hearing, petitioner did not submit any documents regarding the earned income claimed, such as invoices, receipts, a ledger, or bank records.

23. Petitioner’s representative was granted time post-hearing to submit an English translation of the 13 pages of text messages in Spanish. However, no translation was submitted by Mr. Mondragon. Instead, the Division of Tax Appeals had all 13 pages of text messages

translated from Spanish (Latin America) into English by LanguageLine Solutions.⁵ Review of the translation indicates that petitioner requested a 2013 form 1099-misc from “Cesar” a couple of times, but it was not supplied because petitioner was paid in cash. However, the total amount of such cash payments was not stated in any of the translated text messages.

24. Petitioner was granted the opportunity to submit additional documentation post-hearing consisting of a calendar reconstruction of his 2013 income, and copies of Chase bank statements for the year 2013. However, petitioner did not submit any additional documentation.

25. The parties were given the opportunity to file briefs in this matter. Petitioner did not file either a brief in support of the petition or a brief in reply to the Division’s brief in opposition.

CONCLUSIONS OF LAW

A. The account adjustment notice at issue herein denied two credits claimed on petitioner’s 2013 return, the earned income credit (State and City) and the Empire State child credit. Petitioner has established that he had two qualifying dependents for purposes of the earned income credit (State and City) and the Empire State child credit claimed on his 2013 return (*see* finding of fact 12).

B. Tax Law § 606 (d) provides for a New York State earned income credit based upon a percentage of the earned income credit allowed under section 32 of the Internal Revenue Code (IRC). The New York City earned income credit is equal to five percent of the federal earned income credit (*see* Tax Law § 1310 [f] [1]; Administrative Code of the City of New York § 11-

⁵ A copy of the transcript of the English translation of the 13 pages of text messages in Spanish was provided to both representatives.

1706 [d] [1]). Since the New York State and City earned income credits are determined based solely upon 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.

C. 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 upon a determination of a taxpayer's "earned income," which includes earnings from self-employment (*see* IRC § 32 [c] [2]). In the instant matter, petitioner claimed business income from construction on his 2013 return. As part of its desk audit of petitioner's 2013 return, the Division requested documentation substantiating the business income claimed on that return. Petitioner did not provide any receipts, books, records or other documents to substantiate his claimed business income. Rather, his representative sent a letter to the Division that offered an explanation as to why petitioner had estimated his income and expenses for 2013 (*see* finding of fact 5). The Division denied petitioner's claim for the earned income credit because petitioner failed to substantiate his business income as reported on his return. Petitioner bears the burden of proof (*see* Tax Law § 689 [e]) to substantiate the amount of earned income reported on his return.

D. Upon review of the record it is clear that petitioner has failed to meet his burden of substantiating the amount of earned income reported on his return. At the hearing, petitioner testified that his sole source of income for 2013 came from working as a labor assistant with Mr. Moreno. I find petitioner's testimony concerning the specifics of his business relationship with Mr. Moreno to be vague. Petitioner was unable to identify the exact dates on which his work with Mr. Moreno began and ended (*see* finding of fact 17). Petitioner testified that he was not paid for holidays on which he did not work, but he was unable to recall the exact number of non-

working holidays or the months in which such non-working holidays fell (*see* finding of fact 18). He also testified that he worked on some Saturdays, but was unable to recall the exact number of Saturdays on which he worked or identify the specific months in which those Saturdays fell (*id.*). Moreover, petitioner was unable to remember the total amount he earned in 2013, and estimated it to be around \$14,000.00 or \$14,400.00 (*see* finding of fact 19). Petitioner did not produce any books, records, pay stubs, receipts, bank records or any form 1099-misc to show that he received business income, or the amount of such income. To prove the source of his earned income, petitioner at the hearing submitted a 13-page document which he claimed contained text messages exchanged by himself and Mr. Moreno. I afford little weight to that 13-page document. Review of that document indicates petitioner and someone named “Tai Cesar Jf” exchanged some text messages over time (*see* finding of fact 21). Since the other party involved in the exchange of those text messages did not testify, that individual has not verified the contents of the same (*id.*). It is also noted that none of those text messages state the amount of business income that petitioner may have received in 2013. Although petitioner was granted the opportunity to submit additional substantiating documentation post-hearing, he did not submit any additional documentation (*see* finding of fact 24). The record contains nothing beyond petitioner’s estimate of his business income for the year at issue. Without sufficient documentation to substantiate the claimed earned income, petitioner failed to meet his burden of proof and is not entitled to the earned income credit for 2013 (*see Matter of Espada*, Tax Appeals Tribunal, January 28, 2016).

E. Addressing the claimed Empire State child credit, Tax Law § 606 (c-1) provides for a credit equal to the greater of one hundred dollars times the number of qualifying children of the

taxpayer or the applicable percentage of the child tax credit allowed the taxpayer under IRC § 24 for the same taxable year for each qualifying child. On his 2013 return, petitioner claimed an Empire State child credit in the amount of \$531.00 for two qualifying children. At audit, the Division disallowed the Empire State child credit because petitioner failed to provide documentation substantiating his business income and birth certificates to verify the relationship of the two qualifying children claimed on his return. Prior to the hearing, sufficient documentation was presented to establish that petitioner had two qualifying dependents for purposes of the Empire State child credit (*see* finding of fact 12). While the representatives, at the hearing, agreed that petitioner qualified for an Empire State child credit, the amount of such credit remained at issue (*see* finding of fact 13). At the hearing, the Division stated that petitioner was entitled to the minimum Empire State child credit of \$100.00 per child for a total of \$200.00, because the Division had not received any substantiating documentation for the earned income claimed on his 2013 return (*id.*). As petitioner failed to prove that he had any earned income for the year 2013 (*see* conclusion of law D), he is not entitled to an Empire State child credit greater than a total of \$200.00, i.e., the minimum of \$100.00 per child. The Division is directed to grant a refund of the Empire State child credit in the amount of \$200.00.

F. The petition of Daniel Oliva is granted to the extent indicated in conclusion of law E, and in all other respects is denied. The Division of Taxation's account adjustment notice, dated April 9, 2015, as modified by conclusion of law E, is sustained.

DATED: Albany, New York
August 15, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE