STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **QAID M. ALSSARAIMI** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code for the City of New York for the Year 2016.	DETERMINATION DTA NO. 829597

Petitioner, Qaid M. Alssaraimi, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code for the City of New York for the year 2016.

A videoconferencing hearing via CISCO Webex was held on April 30, 2021, with all briefs to be submitted by September 16, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel). After due consideration of the documents and arguments submitted, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claimed dependent exemptions for 2016.

II. Whether the Division of Taxation properly denied petitioner's head of household filing status for 2016.

III. Whether the Division of Taxation properly denied petitioner's claimed New York State and New York City earned income credits.

IV. Whether the Division of Taxation properly denied petitioner's claimed Empire State child credits for 2016.

FINDINGS OF FACT

1. Petitioner, Qaid M. Alssaraimi, electronically filed with the Division of Taxation (Division) a New York State resident income tax return, form IT-201, for the year 2016. On the return, petitioner reported business income of $20,800.00, claimed three children as dependents[1] and New York adjusted income of $19,330.00. After subtracting out his standard deduction and three dependent exemptions, he reported taxable income of $5,180.00, New York State tax due of $102.00, and New York City tax due of $90.00. Against this tax due, he claimed credits including New York State Empire State child credits of $660.00, the New York State earned income credit of $1,704.00, and the New York City earned income credit of $301.00. Petitioner's 2016 tax return ultimately claimed a refund of $2,536.00.

2. The Division paid petitioner $2,536.00, the full amount requested a refund on his 2016 tax return.[2]

3. Commencing an audit of petitioner's 2016 tax return, the Division sent petitioner an audit inquiry letter, dated July 27, 2018, asking for substantiation of the business income earned and for documentation verifying the claimed dependents.

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[1] The names of petitioner's children are omitted in order to protect their privacy.

[2] In its brief filed after the hearing, the Division indicates that the amount requested as a refund on petitioner's 2016 return was not paid; however, information in the record, including the statement of proposed audit change, indicates the refund requested on petitioner's tax return was in fact paid by the Division.

4. Petitioner did not respond to the Division's audit inquiry letter. As a result, the Division issued a statement of proposed audit change dated November 2, 2018, asserting taxes due of $2,473.00 because petitioner did not substantiate his business income, or the dependents claimed on his tax return. The statement of proposed audit change indicated that if petitioner wished to dispute the conclusions of the Division, he could provide the documentation requested in the July 27, 2018 audit inquiry letter.

5. Still not receiving any response from petitioner, the Division issued a notice of deficiency to petitioner, assessment no. L-049050910, dated December 19, 2018, in the amount of $2,473.00 of tax due plus interest.

6. The Division issued petitioner a notice and demand dated April 5, 2019, for assessment no. L-049050910, demanding payment of tax due in the amount of $2,473.00 plus interest.

7. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS).[3]

8. BCMS issued a conciliation order dismissing request for assessment no. L-049050910, dated August 30, 2019. The conciliation order indicated that since the relevant notice of deficiency was issued on December 19, 2018, but petitioner's request for a conciliation conference was not received by BCMS until August 5, 2019, or in excess of 90 days from issuance of the notice, the request was filed late, and therefore dismissed.

9. On September 27, 2019, petitioner filed a petition with the Division of Tax Appeals challenging the BCMS order and the December 19, 2018 notice of deficiency. Included with the

[3] It appears the conciliation conference request was faxed to BCMS on August 5, 2019.

petition, as an attachment, was a federal form 1099-MISC indicating that in 2016 petitioner had earned $20,800.00 in non-employee compensation from a Brooklyn, New York, business.

10. At the hearing, the Division introduced an affidavit, dated April 8, 2021, of Tammy Weinstock, a tax technician II with the Division. Ms. Weinstock represented that she reviewed the Division's "official records" relating to petitioner's 2016 return and the Division's audit of the return. According to her affidavit, because petitioner did not "substantiate business income claimed, and further did not provide information about the dependents claimed" on his 2016 tax return, a balance due was assessed. The affidavit did not indicate what Ms. Weinstock reviewed, other than its broad reference to the Division's "official records," in support of the conclusions she reached in her affidavit.

11. At the hearing, petitioner's tax preparer, Yehad Abdelaziz, testified that he had proof of petitioner's business income and copies of birth certificates and additional documentation as support for petitioner's dependents. The record was left open until May 7, 2021 for petitioner to submit copies of any additional support for his claimed business income and dependents. However, neither petitioner nor Mr. Abdelaziz submitted any additional support or documentation.

12. At the hearing, the Division waived any claim that petitioner's challenge to the relevant notice of deficiency was untimely, and the Division conceded that it lacked sufficient records to establish the date the relevant notice of deficiency was mailed.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (***see*** Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a

conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). Absent a timely protest, a notice of deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (***see Matter of Lukacs***, Tax Appeals Tribunal, November 8, 2007; ***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

B. When timeliness of a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the relevant notice to petitioner's last known address (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of the standard procedures used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in the particular instance at issue (***see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

The Division has conceded that it does not have proof that the standard procedures used for the issuance of statutory notices can be established in this case. An inadequacy in the evidence of mailing may be overcome by evidence of delivery of the notice to the taxpayer (***see Matter of Chin***, Tax Appeals Tribunal, December 3, 2015). In instances of a failure to prove the proper mailing of a notice the 90-day period for filing either a request for a BCMS conference or a petition is tolled until such time as the taxpayer actually receives the notice (***see Matter of Hyatt Equities, LLC***, Tax Appeals Tribunal, May 22, 2008; ***Matter of Riehm v Tax Appeals Trib. of State of N.Y.***, 179 AD2d 970 [3d Dept 1992], ***lv denied*** 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (***see Matter of Stickel***, Tax Appeals Tribunal, April 7, 2011). In this case there is no evidence, and the Division did not

advance the argument, that petitioner received the relevant notice any earlier than the date the request for the BCMS conference was made. Therefore, petitioner's request for a BCMS conference is deemed timely. The petition in this matter was filed within 90 days of the date of issuance of the relevant BCMS order, so the petition is likewise deemed timely filed and the Division of Tax Appeals has jurisdiction to consider the merits of the case.

C. Pursuant to Tax Law § 689 (e), petitioner bears the burden of establishing, by clear and convincing evidence, that the Division's assessment of additional tax or an adjustment of his claimed refund is erroneous (***see Matter of Suburban Restoration Co. v Tax Appeals Trib***, 299 AD2d 751 [3d Dept 2002]). Determinations made in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish, by clear and convincing evidence, that those determinations are erroneous (***see Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***see also*** Tax Law § 689 [e]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (***see Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842 [3d Dept 1986]).

D. Tax Law § 616 (a) provides that a resident individual shall be allowed an exemption of $1,000.00 for each exemption for which the taxpayer is entitled to a deduction for the taxable year under § 151 (c) of the Internal Revenue Code (IRC) (IRC [26 USC] § 151 [c]). IRC (26 USC) § 151 (c), in turn, provides for an exemption for each dependent, as defined by IRC (26 USC) § 152. IRC (26 USC) § 152 defines a dependent, in part, as a qualifying child who has the same principal place of abode as the taxpayer for more than one half of the taxable year (IRC [26 USC] § 152 [a] [1]; [c] [1] [B]).

Petitioner failed to provide any support establishing his relationship to the claimed dependents on his tax return. Accordingly, it is determined that petitioner has failed to meet his

burden of proof to support his claim that he had qualifying dependent children and the Division's denial of the claimed dependents on his 2016 income tax return was appropriate.

E. Regarding petitioner's head of household filing status, Tax Law § 607 provides that the terms used in article 22 of the Tax Law will have the same meaning as when used in a comparable context in the provisions of the IRC unless a different meaning is clearly required. Subsection (b) of Tax Law § 607 further provides that "[a]n individual's marital or other status under section six hundred one, subsection (b) of section six hundred six and section six hundred fourteen (i.e., head of household status) shall be the same as his marital or other status for purposes of establishing the applicable federal income tax rates." Accordingly, it is appropriate to review the applicable provisions of the IRC and regulations to determine if petitioner is entitled to claim head of household filing status under the facts of this case.

Pursuant to IRC (USC) § 2 (b), a "head of household" is defined in part, as relevant here, as an individual who maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, of a qualifying child of the individual. In this case petitioner fails to provide any support for his claimed dependents. Accordingly, it is determined that petitioner has failed to meet his burden of proof to support his claim that he had qualifying dependent children and the Division's denial of his head of household filing status claimed on his 2016 income tax return was appropriate.

F. Tax Law § 606 (d) (1) provides for a New York State earned income credit of 30 percent of the earned income credit allowed under IRC (26 USC) § 32. The New York City earned income credit is equal to five percent of the federal earned income credit under IRC (26 USC) § 32 (***see*** Tax Law § 1310 [f] [1]; Administrative Code of the City of New York § 11-1706 [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. The federal earned income credit, provided in IRC (26 USC) § 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 employee compensation and earnings from self-employment (***see*** IRC [26 USC] § 32 [c] [2] [A]).

The State and City earned income credits require petitioner to prove that he had earned income in 2016, and the amount of that income (***see Matter of Espada***, Tax Appeals Tribunal, January 28, 2016). In this case petitioner provided, as an attachment to his petition, form 1099-MISC from a Brooklyn, New York, business showing income to petitioner in the amount of $20,800.00 for 2016. This amount reconciles with the amount of business income reflected on petitioner's 2016 tax return. The Division's challenge to petitioner's support for his claimed business income is the affidavit of its tax technician, Tammy Weinstock, wherein she asserts that petitioner has not substantiated the business income claimed but otherwise fails to provide any analysis for this conclusion other than she reviewed the Division's "official records" and this is what she concluded. Petitioner has proven by clear and convincing evidence the amount of business income claimed on his tax return and the Division has failed to effectively challenge such.

G. Turning to the claimed Empire State child credit, Tax Law § 606 (c-1) provides for a credit equal to the greater of $100.00 times the number of qualifying children of the taxpayer or the applicable percentage of the child tax credits allowed the taxpayer under IRC (26 USC) § 24 for the same taxable year for each qualifying child. To qualify for the credit, a taxpayer must establish that he has one or more qualifying children. For purposes of the Empire

State child tax credit, a qualifying child must be a child of the taxpayer, a descendent of the taxpayer's child, a sibling or step-sibling of the taxpayer or a descendent of such relative, must have the same principal place of abode as the taxpayer for more than one-half of the taxable year, and must be between four and seventeen years of age (***see*** Tax Law § 606 [c-1]; IRC (26 USC) §§ 24 [c]; 152 [c]).

As noted, in this case, petitioner fails to provide any support for his claimed dependents. Accordingly, it is determined that petitioner has failed to meet his burden of proof to support his claim that he had qualifying children and the Division's denial of the Empire State child credits petitioner claimed on his 2016 income tax return was appropriate.

H. The petition of Quid M. Alssaraimi is granted to the extent indicated in conclusion of law F, and the Division is directed to recompute the December 19, 2018 notice of deficiency in accordance with that conclusion of law, but the petition is otherwise denied.

DATED: Albany, New York
March 10, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE