

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SIDI O. TIYEB AND : DETERMINATION
LALLA ABDEL WAHAB : DTA NO. 829649
:
for Redetermination of Deficiencies 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 2015, 2016, and 2017. :

Petitioners, Sidi O. Tiyeb and Lalla Abdel Wahab, filed a petition for redetermination of deficiencies 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 2015, 2016, and 2017.

A videoconferencing hearing via CISCO webex was held before Donna M. Gardiner, Administrative Law Judge, on August 18, 2021, with the final brief to be submitted by December 7, 2021, which date commenced the six-month period for issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Trajbar, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly disallowed the earned income credit claimed by petitioners for the years 2015, 2016, and 2017.

II. Whether the Division of Taxation properly disallowed petitioners' claimed Empire State child credit for the year 2017.

FINDINGS OF FACT

1. Petitioner, Sidi O. Tiyeb, timely filed a New York State resident income tax return, form IT-201, for the year 2015 (2015 return), as head of household, reporting one dependent exemption. Petitioner calculated and reported total New York State and City taxes due, in the amount of \$623.00, versus payment and refundable credits in the amount of \$1,276.00, thus resulting in an overpayment in the amount of \$653.00 that was claimed and paid as a refund to petitioner. The \$1,276.00 consisted of a New York State earned income credit in the amount of \$748.00, a New York City school tax credit in the amount of \$63.00, a New York City earned income credit in the amount of \$135.00, and an Empire State child credit in the amount of \$330.00.

2. Attached to petitioner's 2015 return was schedule C, Profit or Loss from Business, reporting petitioner's business as "taxi and limousine service" and reporting gross receipts in the amount of \$118,683.00, reported total expenses in the amount of \$94,736.00, resulting in net profit in the amount of \$23,947.00. The schedule C lists the business name as Unter LLC with an address in San Francisco, California.

3. Also attached to petitioner's 2015 return was form IT-215, claim for earned income credit, and form IT-213, claim for Empire State child credit, listing the claimed dependent, with a date of birth as December 16, 2010.

4. Petitioners, Sidi O. Tiyeb and Lalla Abdel Wahab, timely filed a New York State resident income tax return, form IT-201, for the year 2016 (2016 return) as married joint return, reporting two dependent exemptions. Petitioners calculated and reported total New York State

and City taxes due in the amount of \$295.00, versus payment and refundable credits in the amount of \$2,656.00, thus resulting in an overpayment in the amount of \$2,361.00 that was claimed and paid as a refund to petitioners. The \$2,656.00 consisted of a New York State earned income credit in the amount of \$1,592.00, a New York City school tax credit in the amount of \$125.00, a New York City earned income credit in the amount of \$279.00, and an Empire State child credit in the amount of \$660.00.

5. Attached to petitioners' 2016 return was schedule C, Profit or Loss from Business, reporting petitioner's business as "taxi and limousine service" and reporting gross receipts in the amount of \$110,235.00, reported total expenses in the amount of \$85,088.00, resulting in net profit in the amount of \$25,147.00. The schedule C lists the business name as Unter LLC with an address in San Francisco, California.

6. Also attached to petitioners' 2016 return were form IT-215, claim for earned income credit, and form IT-213, claim for Empire State child credit, listing the two claimed dependents, with the dates of birth as December 16, 2010 and February 27, 2004.

7. Petitioners timely filed a New York State resident income tax return, form IT-201, for the year 2017 (2017 return) as married joint return, reporting four dependent exemptions.

Petitioners calculated and reported total New York State and City taxes due in the amount of \$576.00, versus payment and refundable credits in the amount of \$3,224.00, thus resulting in an overpayment in the amount of \$2,648.00 that was claimed and paid as a refund to petitioners. The \$3,224.00 consisted of a New York State earned income credit in the amount of \$1,541.00, a New York City school tax credit in the amount of \$140.00, a New York City earned income credit in the amount of \$264.00, and an Empire State child credit in the amount of \$1,279.00.

8. Attached to petitioners' 2017 return was schedule C, Profit or Loss from Business, reporting petitioner Sidi O. Tiyeb's business as "taxi and limousine service" and reporting gross receipts in the amount of \$115,164.00, reported total expenses in the amount of \$84,143.00, resulting in net profit in the amount of \$31,021.00. The schedule C lists the business name as Uber Technologies Inc., with an address in San Francisco, California.

9. Also attached to petitioners' 2017 return were form IT-215, claim for earned income credit, listing three of the four claimed dependents, and form IT-213, claim for Empire State child credit, listing the four claimed dependents, with the dates of birth as December 16, 2010, September 3, 2008, October 30, 2006, and February 27, 2004. The oldest dependent was not listed on form IT-215.

10. Petitioner's 2015 return and petitioners' 2016 and 2017 returns were selected for a desk audit by the Division after the issuance of the requested refunds. Petitioners were asked to substantiate the credits claimed on their tax returns. Although petitioners substantiated their claimed business income, they were unable to substantiate all their claimed expenses and, thus, the Division disallowed the earned income credits for all three years.

11. On October 10, 2018, the Division issued a statement of proposed audit change for tax year 2015 (2015 statement), that stated, in part, as follows:

"We have reviewed the information you sent in as a response to our audit inquiry letter for tax year 2015.

Based on the available tax department records, you are allowed the business income as claimed on your Federal Schedule C.

You are also allowed \$24,461 in commissions and fees, \$8,478 in taxes and licenses, \$5,404 in tolls, \$2,624 in black car fund, \$27 in drug test fee and \$49 in safe ride split fare.

We disallowed lease of \$33,800 since you did not provide copies of cashed checks along with bank statements to substantiate that you rented the vehicle.

Since you did not provide any documentation, we allowed you \$5,616 (52 weeks x \$108/week) in gas and \$520 (52 weeks x \$10 per week) in car wash.

The rest of the expenses such as DDC, cell phone, device fee, MISC, and parking are disallowed since you did not provide any documentation to substantiate these expenses.

We adjusted your return to allow \$71,504 in net income. You are allowed \$5,049 in one half of self employment tax deduction as federal adjustment to income.”

The Division disallowed the New York State and City earned income credit since petitioner’s federal adjusted gross income was increased. The Division allowed both the Empire State child credit and the New York City school tax credit as claimed.

12. The Division issued a notice of deficiency, assessment number L-048872041, to petitioner, dated November 27, 2018, asserting tax due of \$5,109.00 plus interest for tax year 2015 (2015 notice).

13. On October 10, 2018, the Division issued a statement of proposed audit change for tax year 2016 (2016 statement) to petitioners, that stated, in part, as follows:

“We have reviewed the information you sent in as a response to our audit inquiry letter for tax year 2016.

You are allowed the business income as claimed on your Federal Schedule C based on the copies of Form 1099-K and 1099-MISC provided.

You are also allowed \$26,204 in commissions and fees, \$7,250 in taxes and licenses, \$3,148 in tolls, \$2,247 in black car fund, \$26 in drug test fee and \$33 in safe ride split fare.

We disallowed lease of \$31,200 since you did not provide copies of cashed checks along with bank statements to substantiate that you rented the vehicle.

Since you did not provide any documentation, we allowed you \$4,374 (9 x 4.5 weeks/month x \$108/weeks) in gas and \$405 (9 x 4.5 weeks/month x \$10) in car wash based upon 9 months you worked as a UBER driver which shows on the 1099-K Form you provided.

The rest of the expenses such as DDC, cell phone, device fee, Misc, and parking are disallowed since you did not provide any documentation to substantiate these expenses.

We adjusted your return to allow \$66,548 in net income. You are allowed \$4,699 in one half of self employment tax deduction as federal adjustment to income.”

The Division disallowed the New York State and City earned income credit since petitioner’s federal adjusted gross income was increased. The Division allowed both the Empire State child credit and the New York City school tax credit as claimed.

14. The Division issued a notice of deficiency, assessment number L-048872042, to petitioners, dated November 27, 2018, asserting tax due of \$5,150.00 plus interest and penalty for tax year 2016 (2016 notice).

15. On October 5, 2018, the Division issued a statement of proposed audit change for tax year 2017 (2017 statement) to petitioners, that stated, in part, as follows:

“We have reviewed the information you sent in response to our inquiry letter. Our letter specifically asked that you provide verifiable information to document your earned income and any qualifying dependents claimed. The information you provided was either incomplete or unverifiable.

We have allowed the gross business income of \$115,164.00 as reported on your schedule C.

Based on the receipts provided, you paid \$500.00 - \$550.00 per week for vehicle lease. We have allowed \$27,300.00 for lease expenses.

All other expenses have been disallowed at this time because you did not provide valid proof of payment, or they are not deductible business expenses. The net business income has been adjusted to \$87,864.00. The 1/2 self-employment tax deduction has been adjusted accordingly.

You did not provide valid address verification for the dependents claimed on your return. Therefore, they have been disallowed as qualifying children, and the Empire State child credit has been disallowed.

The earned income credit has been adjusted based on your verified earned income with no qualifying children.

You have been allowed the New York city school tax credit.”

The Division has conceded that petitioners have four qualifying children despite this language contained in the 2017 statement.

16. The Division issued a notice of deficiency, assessment number L-048862724, to petitioners, dated November 21, 2018, asserting tax due of \$5,221.00, plus interest and penalty for the tax year 2017 (2017 notice).

17. Petitioners filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services in protest of the three notices. A conciliation conference was held on June 5, 2019, and a conciliation order, CMS No. 305453, dated August 2, 2019, was issued to petitioners denying their request and sustaining the notices. Thereafter, on October 7, 2019, petitioners filed a timely petition with the Division of Tax Appeals.

18. At the hearing in this matter, petitioner testified that he was not given credit for lease payments made for cars that he used while driving for Uber for the years 2015 and 2016.¹ He requested, and was granted, the opportunity to submit cancelled checks, post hearing, for the years 2015 and 2016 to verify these lease payments. This evidence was received on August 24, 2021.

¹ Petitioners were given credit for lease payments for the 2017 tax year.

For the year 2015, petitioners submitted 47 cancelled checks for payments made to lease a vehicle. All 47 checks can be verified through the Chase checking account bank statements for the year that were attached to their petition. These 47 checks represent payments made in the amount of \$21,291.00.

For the year 2016, petitioners submitted 34 cancelled checks for payments made to lease a vehicle. All 34 checks can be verified through the Chase checking account bank statements for the year that were attached to their petition. These 34 checks represent payments in the amount of \$19,075.00.

CONCLUSIONS OF LAW

A. It is initially noted that, when the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice and the burden of proof is on the taxpayer to show, by clear and convincing evidence, that the proposed deficiency is erroneous (Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; *see Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]).

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 § 11-1706 [d] [1]). Since the New York 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 IRC to determine petitioners' 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 this case, petitioners reported business income derived from driving for Uber. As part of its desk audit of petitioners' tax returns for 2015, 2016 and 2017, the Division requested documentation substantiating the business income and expenses claimed on each of the returns. The Division accepted the business income as reported. However, the Division determined that petitioners were unable to substantiate a portion of the claimed expenses for each of the three years at issue. Therefore, the Division denied petitioners' claims for the earned income credit.

D. The record of this proceeding was held open for petitioners to submit cancelled checks representing lease payments made for vehicles used by petitioner while driving for Uber. For the tax year 2015, petitioner reported that he paid \$33,800.00 in lease payments. After a review of the cancelled checks submitted for 2015 and a review of the bank statements submitted for 2015, it is determined that petitioner has shown that he is entitled to lease payments in the amount of \$21,291.00. No other evidence was presented to substantiate the remainder of the disallowed expenses. Therefore, the Division is directed to adjust petitioner's 2015 tax return to reflect the lease payments in the amount of \$21,291.00.

E. For the tax year 2016, petitioners claimed lease payments in the amount of \$31,200.00. After a review of the cancelled checks submitted for 2016 and a review of the bank statements submitted for 2016, it is determined that petitioners have substantiated lease payments in the amount of \$19,075.00. No other evidence was presented to substantiate the remainder of

the disallowed expenses. Therefore, the Division is directed to adjust petitioners' 2016 tax return to reflect the lease payments in the amount of \$19,075.00

F. For the tax year 2017, petitioners were allowed the lease expenses. Nothing was submitted to substantiate any of the other claimed expenses. However, the Division rejected the four claimed dependents as qualifying children. The Division stated in its brief that it was not disputing that the claimed dependents reported on petitioners' 2017 return were qualifying children, but rather, the Division argues that petitioners are not entitled to the earned income credits because they did not adequately prove their claimed expenses. The Division states that since petitioners' earned income cannot be verified, the earned income credits were properly disallowed.

As with the years 2015 and 2016, petitioners failed to substantiate many of the claimed expenses on their returns. However, the Division denied the claimed Empire State child credit for 2017, although it no longer disputes that petitioners have four qualifying children.

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. Although it has been determined that petitioners have not demonstrated entitlement to the earned income credit, they are entitled to the minimum \$100 per qualifying child. Therefore, the Division is directed to adjust the 2017 return to reflect the minimum Empire State child credit in the amount of \$400.00.

G. The petition of Sidi O. Tiyeb and Lalla Abdel Wahab is granted to the extent indicated in conclusions of law D, E, and F, but is otherwise denied and the notices of

deficiency, dated November 21, 2018, and November 27, 2018, as modified by conclusions of law D, E, and F, are sustained.

DATED: Albany, New York
June 2, 2022

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE