STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **NAJWA AND ABDULAH KASEM** 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. 829660

Petitioners, Najwa and Abdulah Kasem, 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 June 10, 2021, with all briefs to be submitted by November 15, 2021, which date began the six-month period for issuance of this determination. Petitioners 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.

ISSUE

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

FINDINGS OF FACT

1. Petitioners, Najwa and Abdulah Kasem, 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, petitioners reported business income of $13,800.00, and New York adjusted gross income of $12,825.00. After subtracting out their standard deduction and one dependent exemption, they reported no taxable income. Petitioners claimed credits including the New York State earned income credit of $1,012.00, and the New York City earned income credit of $169.00. Petitioners' 2016 tax return ultimately claimed a refund of $1,306.00.

2. The Division paid petitioners $1,306.00, the full amount requested as a refund on their 2016 tax return.

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

4. Petitioners did not provide any substantiation in response to the Division's audit inquiry letter. As a result, the Division issued a statement of proposed audit change dated September 19, 2018, asserting taxes due of $1,181.00 because petitioners did not substantiate their income or the dependent claimed on their 2016 tax return. The amount of tax due asserted by the Division was the amount of the previously refunded New York State earned income credit of $1,012.00, and the New York City earned income credit of $169.00. The statement of proposed audit change indicated that if petitioners wished to dispute the conclusions of the Division, they could provide the documentation requested in the July 27, 2018 audit inquiry letter.

5. Still not receiving any response from petitioners, the Division issued a notice of deficiency to petitioners, assessment number L-048766108, dated November 13, 2018, in the amount of $1,181.00 of tax due plus interest.

6. Petitioners filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). It appears the conciliation conference request was faxed to BCMS on August 5, 2019.

7. BCMS issued a conciliation order dismissing request for assessment no. L-048766108, dated August 23, 2019. The conciliation order indicated that since the relevant notice of deficiency was issued on January 3, 2019,[1] but petitioners' 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.

8. On October 11, 2019, petitioners filed a petition with the Division of Tax Appeals challenging the BCMS order and the November 13, 2018 notice of deficiency.

9. At the hearing, the Division introduced the affidavit of Kathleen A. Loos, a Tax Technician III with the Division, dated May 28, 2021. Ms. Loos represented that she reviewed the Division's records relating to petitioners' 2016 return and the Division's audit of the return.[2] According to her affidavit, because petitioners did not substantiate the income claimed and further did not provide information about the dependent claimed on their 2016 tax return, a balance due was assessed.

[1] The date of the relevant notice of deficiency included on the BCMS order appears to be a typographical error and such does not impact the conclusions reached in this determination.

[2] In her affidavit, Ms. Loos incorrectly represented that petitioners' 2016 initial refund claim had not been paid yet. The record indicates otherwise.

10. At the hearing, petitioners failed to testify or offer any documents or witnesses in support of their claim.

11. At the hearing, the Division waived any claim that petitioners' challenge to the relevant notice of deficiency was untimely, as the Division conceded that it lacked sufficient records to establish the date that the notice 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 the 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 a taxpayers' 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 petitioners received the relevant notice any earlier than the date the request for the BCMS conference was made. Therefore, petitioners' 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), petitioners bear 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 petitioners 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 § 606 (d) (1) provides for a New York State earned income credit of 30 percent of the earned income credit allowed under Internal Revenue Code (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 petitioners' 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]). In addition, IRC § 32 (b) prescribes that different percentages and amounts are used to calculate the credit based, in part, on the number of qualifying children a taxpayer has (***see*** IRC [26 USC] § 32; ***Jusino v Commr.***, TC Memo 2018-112 [2018]).

The State and City earned income credits require petitioners to prove that they had earned income in 2016, and the amount of that income (***see Matter of Espada***, Tax Appeals Tribunal, January 28, 2016). In addition, as noted above, the amount of the credit potentially allowed is contingent on petitioners establishing they had a qualifying child.

Petitioners failed to provide any support establishing their income or that they had a qualifying child. Accordingly, it is determined that petitioners have failed to meet their burden of proof to support their claim for the State and City earned income credits sought and the

Division's denial of the claimed earned income credits on their 2016 income tax return was appropriate.

E. The petition of Najwa and Abdulah Kasem is denied and the notice of deficiency, dated November 13, 2018, is sustained.

DATED: Albany, New York
May 12, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE