

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NASSER MURSHED AND RIM Y. ZAHER	:	DETERMINATION
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 of the City of New York for the Year 2017.	:	DTA NO. 829701

Petitioners, Nasser Murshed and Rim Y. Zaher, 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 of the City of New York for the year 2017.

A videoconferencing hearing via Cisco Webex was held before Kevin R. Law, Administrative Law Judge, on January 19, 2022, with all briefs to be submitted by July 8, 2022, 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. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether petitioners have sustained their burden of proving entitlement to their claims for the New York State and the New York City earned income credits and the Empire State child credit.

FINDINGS OF FACT

1. On February 27, 2018, petitioners, Nasser Murshed¹ and Rim Y. Zaher, filed a New York State and New York City personal income tax return for tax year 2017 (the return) on which they claimed three children as dependents, whose ages ranged from three to six years old as of December 31, 2017. Petitioners reported \$24,000.00 of self-employment income on the return. Attached to the return was a schedule C of Rahaf N. Murshed that reported gross receipts of \$24,000.00, with no corresponding expenses. The name of the business per the schedule C is Nassau Smoke Shop Corp. The principal activity listed on the schedule C is “Grocery Stores.”

2. On the return, petitioners claimed the New York State earned income credit of \$1,805.00, the New York City earned income credit of \$316.00, the New York City school tax credits of \$125.00 and \$6.00, and the Empire State child credit of \$637.00, resulting in a \$2,797.00 refund claim after reporting \$92.00 of New York State and New York City income tax. This refund claim was paid by the Division of Taxation (Division).

3. On July 27, 2018, the Division sent petitioners an audit inquiry letter requesting verification of the dependents claimed and income reported on the return.

4. According to the affidavit of Kathleen A. Loos, petitioners did not provide sufficient substantiation of the income reported, or the dependents claimed, on petitioners’ return. Ms. Loos did not elaborate what specifically was provided by petitioners in their response to the July 27, 2018 audit inquiry letter.

¹ The return is filed in the name of Rahaf N. Murshed and Rim Y. Zaher. The notice of deficiency at issue in this proceeding was issued to Rahaf N. Murshed and Rim Y. Zaher, while the petition filed in this matter lists petitioners as Nasser Murshed and Rim Y. Zaher. It appears that Rahaf N. Murshed and Nasser Murshed are the same individual, and proceeded as such throughout this proceeding.

5. On September 25, 2018, the Division issued a statement of proposed audit changes to petitioners asserting tax in the amount of \$2,672.00 plus interest representing the disallowance of the New York State and New York City earned income credits and the Empire State Child credit.

6. On November 13, 2018, the Division issued notice of deficiency, notice number L-048788627, asserting tax of \$2,672.00 plus interest.

7. Attached to the petition in this matter is a form 1099-Misc from Nassau Smoke Shop Corp., with an address listed in Brooklyn, New York, listing Nasser Murshed as the recipient of \$24,000.00 of nonemployee compensation.

8. Ms. Loos's affidavit indicates that, upon reviewing the petition, the Division performed a search of its databases and could not find a business by the name of Nassau Smoke Shop Corp., having filed tax returns for the 2017 tax year.

9. During the hearing, the Division's representative conceded that petitioners adequately substantiated their dependents for purposes of the Empire State child credit.

10. At the hearing in this matter petitioner, Mr. Murshed, testified that he worked at Nassau Smoke Shop in Brooklyn, New York, and was paid \$500.00 per week in cash. Other than the form 1099-Misc attached to the petition, petitioners did not introduce any evidence to substantiate the amounts reported as self-employment income on their 2017 tax return. Mr. Murshed indicated that because he was paid in cash, he did not have any records such as bank statements to document same. Mr. Murshed also averred that he did not own or operate the Nassau Smoke Shop, but was employed there.

11. At the conclusion of Mr. Murshed's testimony, the administrative law judge asked him if he wanted to present the testimony of any other witnesses. In response, petitioner named

the owner of Nassau Smoke Shop Corp., and its accountant, but neither were present for the virtual hearing.

CONCLUSIONS OF LAW

A. As noted, the notice at issue is a notice of deficiency that denied petitioners' claims for the New York State and New York City earned income credits as well as the Empire State child credit. "A tax credit is 'a particularized species of exemption from taxation'" (*Matter of Golub Serv. Sta. v Tax Appeals Trib.*, 181 AD2d 216, 219 [3d Dept 1992], citing *Matter of Grace v State Tax Commn.*, 37 NY2d 193, 197 [1975]) and a taxpayer carries "the burden of showing 'a clear-cut entitlement' to the statutory benefit" (*Matter of Golub Serv. Sta. v Tax Appeals Trib.*, at 219 [citation omitted]).

B. First, addressing petitioners' eligibility for the earned income credits, Tax Law § 606 (d) (1) provides that the New York State earned income credit for the 2017 tax year is equal to 30% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . ." In addition, Tax Law § 1310 (f) provides for a credit equal to 5% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . ." for New York City residents. Since petitioners' eligibility for the New York State and New York City earned income credits hinges upon their eligibility for the federal credit, their eligibility under federal law is determinative.

C. The federal earned income credit, provided for pursuant to 26 USC § 32, is a refundable tax credit for eligible low-income workers. To be eligible to claim the credit, a taxpayer must have earned income with an adjusted gross income (AGI) below a certain level, must have a valid Social Security number, must use a filing status other than married filing separately, must be a U.S. citizen or resident alien, must have no foreign income, and have

investment income less than a certain amount. “A small credit is provided to all eligible taxpayers, but the principal feature of the EIC is the more substantial credit available to eligible taxpayers who have one or more ‘qualifying’ children” (*Sherbo v Commr.*, 255 F3d 650, 651 [8th Cir 2001], citing to Bittker & Lokken, *Federal Taxation of Income, Estate & Gifts* ¶ 37.1 [3d ed. 2000]). The amount of credit varies depending on the number of the taxpayer’s “qualifying children” as defined by 26 USC § 152 (c) and the taxpayer’s AGI. Because the Division stipulated at hearing that petitioners have verified their qualifying children, their eligibility for the earned income credit hinges on whether they have established their earned income, and the amount thereof.

D. Petitioners’ claim for the New York State and New York City earned income credits is based upon \$24,000.00 of self-employment income. Petitioners have failed to meet their burden of establishing that Mr. Murshed earned such amount during 2017 as he presented no persuasive evidence other than his testimony on this score. Petitioners failed to respond to the audit inquiry letter and presented no documentary evidence at the hearing. Attached to the petition in this matter is a form 1099-Misc from Nassau Smoke Shop Corp. to Mr. Murshed reporting Mr. Murshed’s receipt of \$24,000.00 in non-employee compensation. I have accorded this 1099-Misc form little evidentiary weight. Although the existence of the form 1099-Misc is presumptive evidence that Mr. Murshed earned income from Nassau Smoke Shop Corp., the affidavit of Kathleen Loos indicates that Nassau Smoke Shop Corp., did not exist based on its lack of tax filings. In such case, it was incumbent upon Mr. Murshed to come forward with additional proof that Nassau Smoke Shop Corp., existed and paid him the amount claimed for his services. In addition, Mr. Murshed’s schedule C indicates that his sole proprietorship operated as Nassau Smoke Shop Corp., while his testimony indicates that he was not the owner of Nassau

Smoke Shop Corp., but was employed there. When Mr. Murshed was asked if he wanted to present the testimony of any other witnesses at the conclusion of his testimony, he named the owner of Nassau Smoke Shop Corp., and its accountant, but neither were present at the hearing. Based on these discrepancies and lack of proof, petitioners have failed to show clearcut entitlement to the earned income credits based upon their failure to prove, in a clear and convincing manner, they had earned income in 2017. Based upon the foregoing, petitioners' claim for the New York State earned income credit is denied.

E. Turning next to petitioners' claimed Empire State child tax credit, the Division stipulated that it was no longer questioning petitioners' ability to claim 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. Where the taxpayer does not have any earned income, the taxpayer will not qualify for the child tax credit under IRC § former 24 (d) (1) (B) (i). Since petitioners have not met their burden of establishing they had earned income in 2017, they are only allowed the minimum credit of \$100 per qualifying child, in this case \$300.00. Based upon the Division's concession, the Division is directed to modify the notice of deficiency to allow the Empire State Child Credit in the amount of \$300.00.

F. The petition of Nasser Murshed and Rim Y. Zaher is granted to the extent indicated in conclusion of law E, but it otherwise denied, and the June 24, 2019 notice of deficiency, as modified, is sustained.

DATED: Albany, New York
January 5, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE