0STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALI ZAIDAN	:	ORDER DTA NO. 827721
for Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2014.	:	

Petitioner, Ali Zaidan, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), brought a motion dated October 7, 2017, seeking an order granting the Division summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Linda A. Jordan, Esq., dated October 6, 2017, with annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond to the motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, James P. Connolly, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation is entitled to summary determination as to whether it properly denied the Empire State child credit and the New York City earned income credit claimed by petitioner on his New York State and New York City personal income tax return for 2014.

FINDINGS OF FACT

1. Petitioner, Ali Zaidan, filed a New York State Resident Income Tax Return, Form IT-201, for the year 2014, claiming head of household filing status for the year, and listing three dependents. As is relevant to this proceeding, his return reported business income of $18,522.00, reduced by one-half the self-employment tax ($1,309.00), thus arriving at federal and New York State adjusted gross income of $17,213.00. The return requested a refund in the amount of $2,503.00, consisting of an Empire State child credit ($660.00), an earned income credit of $1,806.00 (New York State amount of $1,533.00 plus New York City amount of $273.00), and a New York City school tax credit of $63.00. Petitioner's return included a Schedule C-EZ, showing $18,522.00 in business income from 1690 Flatbush Food Corp., which was listed on the schedule as being in the grocery business.

2. On February 23, 2015, the Division of Taxation (Division) sent a letter to petitioner requesting additional information regarding the above return. The letter requested further proof of petitioner's self-employment, including the filling out of a questionnaire about petitioner's business. The questionnaire requested the business's name, social security or employment identification number, a description of the business, copies of any 1099-MISC forms issued to the business, and copies of accounting records, invoices, and bank account records. The letter

also requested additional information about petitioner's dependents, including, for each, proof of petitioner's relationship to the dependent (such as birth certificates), and proof that the dependent lived with petitioner (such as a letter from the dependent's doctor or school showing the dependent's name, date of birth, address, and name of the custodial parent).

3. On May 15, 2015, the Division issued an account adjustment notice to petitioner, which granted him a partial refund in the amount of $63.00 for 2014. The letter explained that, after reviewing information submitted by petitioner in response to the Division's February 23, 2015 letter, the Division was allowing petitioner the New York City school tax credit claimed on the 2014 return, but was denying the other credits sought on that return because the information submitted by petitioner was insufficient to establish his entitlement to those credits. More specifically, with regard to the Empire State child credit, the letter asserted that, while petitioner had provided birth certificates for his dependents, he had not submitted proof of the dependents' required residency. With regard to petitioner's claimed self-employment income, the letter asserted that the Division had not been able to verify, "via various agencies/departments and independent sources," the 1099-MISC statement that petitioner had provided in response to the Division's February 23, 2015 inquiry letter.

4. Petitioner challenged the partial refund disallowance for 2014 by filing a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS).

5. By a Conciliation Order (Order) dated March 18, 2016, BCMS sustained the partial denial of the refund sought by petitioner's 2014 return.

6. On June 10, 2016, petitioner filed a petition with the Division of Tax Appeals, protesting the Order. The petition claimed that petitioner had submitted sufficient information to

substantiate the refund sought by his 2014 return. Attached to the petition is a disorganized group of several different documents, including duplicate copies of several pages. Many of the pages appear to be a copy of petitioner's response to the Division's February 23, 2015 letter, consisting of a 22-page fax, along with a fax "result page" dated March 24, 2015, as they bear the audit number referenced in the Division's February 23, 2015 letter ("X005366611") and provide documentation requested by the Division's May 15, 2015 letter to petitioner. Included in this group of pages are birth certificates for the dependents claimed on petitioner's 2014 return, a letter dated March 21, 2015, on the letterhead of "1690 Flatbush Food Corp.," certifying petitioner's employment in that business, a Form 1099-MISC from Flatbush Food Corp. to petitioner for 2014, reporting wages of $18,522.00, and residency-related documents, such as a New York City Department of Education "Parent Affidavit of Residency" (***see*** Finding of Fact 3).

7. Also attached to the petition are two letters from the Internal Revenue Service (IRS) to petitioner.[1] The first, dated August 3, 2015, asks for more information about the income petitioner reported on Schedule C of his 2014 Federal income tax return, including additional documents to substantiate the earned income credit reported on the return. The second letter, dated September 28, 2015, states that the IRS is auditing petitioner's 2014 income tax return and that it determined that petitioner was not due a refund and did not owe a tax balance. The letter's "Explanation of Items" page showed that the IRS disallowed the three dependents claimed on the return, and disallowed the claimed self-employment income reported on the return of $2,617.00, along with the "self-employment adjustment" of $1,309.00. Attached to that letter is a Form

[1]The two letters, each consisting of multiple pages, are intermingled as attached to the petition. In addition, some pages of the letters appear in duplicate. However, most pages of the letters bear a document identification number on the left-hand margin, which can be used to separate the two letters.

4549, entitled "Income Tax Examination Changes," which shows changes consistent with the "Explanation of Items" page. Page 2 of that form shows a decrease in the earned income credit of $5,460.00 and the "Addnl Child Tax Credit" of $2,000.00. The letter invites petitioner to write the IRS if he does not agree with the changes and refers to Publication 3498-A for an explanation of "the audit process and other rights, including your appeal rights." The letter warns petitioner that if the IRS does not hear from him, "we'll send you a Notice of Deficiency, which will state the amount you owe with penalties and explain your right to file a petition in the United States Tax Court." The Division's affidavit is silent whether petitioner agreed to the September 28, 2015 notice, protested it, or, if petitioner did protest it, the outcome of such a protest.

8. Attached to the affidavit of Linda Jordan in support of the Division's motion is a federal transcript, dated October 3, 2017, of petitioner's Form 1040 for 2014 obtained from the IRS. The "Transactions" part of the transcript shows that an "Earned income credit"of $5,460.00 and an unnamed type of credit in the amount $2,000.00 were claimed on the return. That page also shows an IRS examination of the tax return started on July 2, 2015, which resulted in both credits being disallowed. The transcript includes a line by line analysis of the return and adjustments made to that return, with the following caveat:

> "The following items reflect the amount as shown on the return (PR), and the amount as adjusted (PC), if applicable. They do not show subsequent activity on the account."

The "payments" part of this line by line analysis indicates that the $2,000.00 credit taken by the return was an additional child tax credit, pursuant to section 24 of the Internal Revenue Code (IRC), as it refers to a "Schedule 8812 Additional Child Tax Credit" and shows an amount of $2,000.00.

CONCLUSIONS OF LAW

A. The Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure (Rules).

B. A motion for summary determination may be granted,

> "if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]).

C. A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). It is well established that, as the procedural equivalent of a trial, summary judgment is a drastic remedy that should be denied if there is any doubt as to the existence of a triable issue or where a material issue of fact is arguable (***see Glick & Dolleck v Tri-Pac Export Corp.***, 22 NY2d 439 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]). Consistent with this principle, the party bringing such a motion bears the following burden:

> "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***see Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]; ***Sillman v Twentieth Century-Fox Film Corp***., 3 NY2d 395, 404 [1957]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Matter of Redemption Church of Christ v Williams***, 84 AD2d 648, 649 [1981]; ***Greenberg v Manlon Realty***, 43 AD2d 968, 969 [1974])" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985]).

D. Tax Law § 606 (d) provides for a New York State earned income credit based on a percentage of the earned income credit "allowed" under section 32 of the 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]).

E. 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 on a determination of a taxpayer's "earned income, " which includes earnings from self-employment (***see*** IRC § 32 [c] [2]). In order to be eligible for the earned income credit, the individual must have a qualifying child for the taxable year. A qualifying child is one that meets the statutory requirements of age, relationship and residency (IRC §§ 32 [c] [3]; 152 [c]).

F. Here, petitioner, on his federal form 1040, claimed an earned income credit in the amount of $5,460.00, which the IRS, after audit, disallowed (s***ee*** Findings of Fact 6-7). The Division argues that, because the amount of the State earned income credit is a percentage of the amount of the Federal earned income credit, and the IRS disallowed the credit on audit, the Division is entitled to summary determination, "as a matter of law," in regard to petitioner's protest of the denial of the earned income credit claimed on his State return. The Division cites to no case law authority in support of its position. The personal income tax regulations provide that a final federal change is not binding on the Division, but are silent regarding whether such changes are binding on the taxpayer ***(see*** 20 NYCRR 159.4). Acceptance of the Division's argument that a taxpayer is bound by a Federal audit change would mean that this forum would be required to accept the IRS determination on the earned income credit issue, notwithstanding that a taxpayer could show that he or she had newly-discovered evidence not considered by the IRS or merely that the IRS determination represented an erroneous weighing of the evidence in regard to the earned income credit issue. Moreover, the Division's argument that the Division of Tax Appeals is bound by the IRS's disallowance of petitioner's federal earned income credit in determining whether petitioner is entitled to a State earned income credit is out of keeping with the treatment of federal changes under the article 22 of the Tax Law. Tax Law § 659 requires a

taxpayer to report to the Division any federal disallowance of the taxpayer's claim for credit or refund of federal income tax within 90 days of the change becoming final, requiring the taxpayer to concede the accuracy of the change or "state wherein it is erroneous." Where a taxpayer timely reports the federal changes and states wherein the change is erroneous, the Division must issue a notice of deficiency to assess the tax resulting from the federal change, which the taxpayer can challenge in the Division of Tax Appeals (***see*** Tax Law §§ 659; 681 [a]; 682 [a]; 689 [b]; ***Matter of Barry Yampol***, Tax Appeals Tribunal, August 28, 1997 [the Division is not entitled to issue a notice and demand asserting personal income tax due based on the taxpayer's filing of federal changes with respect to which the taxpayer has indicated his disagreement]). Thus, even if the IRS's disallowance of petitioner's federal earned income credit was final, which the Division has not shown here (***see*** Finding of Fact 7), petitioner would still be free to challenge it, assuming petitioner timely reported the change and stated wherein it was erroneous. The Division's argument that the taxpayer and this forum are bound by the IRS's disallowance of petitioner's federal earned income credit in determining whether petitioner is due a State earned income credit for 2014 is, therefore, rejected as inconsistent with the overall treatment of federal changes under article 22. Accordingly, the Division is not entitled to summary determination on the issue of its disallowance of petitioner's earned income credit for 2014.

G. The Empire State child tax credit is a refundable credit, which is generally equal to the greater of $100.00 multiplied by the number of qualifying children, or 33% of the child tax credit allowed under IRC § 24 for the same taxable year for each qualifying child (***see*** Tax Law § 606 [c-1] [1]). IRC § 24 utilizes the same eligibility criteria with respect to a qualifying child as set forth above under IRC § 32. To qualify for the credit, a taxpayer must establish the existence of a qualifying child (Tax Law § 606 [c-1]). For purposes of the Empire State child tax credit, a

qualifying child is one that meets the definition of a qualified child under IRC § 24 (c) – he or she 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 §§ 24 [c]; 152 [c]).

H. With regard to the petition's argument that the Division wrongly denied his claim for an Empire State child tax credit refund, the Division seeks summary determination on the same theory advanced above in regard to petitioner's earned income credit claim – that because petitioner's right to the credit depends on what is allowed under the parallel federal child tax credit in IRC § 24, and the IRS has determined that petitioner is not entitled to any credit under that IRC section, petitioner's claim to an Empire State child tax credit must fail. For the reasons discussed in Conclusion of Law F, that argument is rejected, and, accordingly, does not entitle the Division to summary determination on the issue of petitioner's right to an Empire State child credit.

I. In sum, because the Division's motion relies exclusively on the results from the federal audit, and that evidence is insufficient to prove the lack of any questions of fact in this matter, the Division's motion is denied (***see Matter of William J. Jones,*** Tax Appeals Tribunal, December 20, 2016 [Tribunal concludes that petitioner's submission in response to the Division's motion for summary determination is insufficient to raise an issue of fact, but holds that the Division's motion must still be denied because the Division failed to establish its prima facie case]).

J. The Division's motion for summary determination is hereby denied and a hearing will be scheduled in due course.

DATED: Albany, New York
January 25, 2018

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE