

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition

of

LISA HUNT

SMALL CLAIMS
DETERMINATION
DTA NO. 820694

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2002.

Petitioner, Lisa Hunt, P.O. Box 6134, Long Island City, New York 11106, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2002.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 4, 2006 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Mac Wyszomirski). All briefs and documents were to be submitted by November 15, 2006 which date began the three-month period for the issuance of this determination.

ISSUE

Whether the Division properly disallowed petitioner's earned income credit.

FINDINGS OF FACT

1. Petitioner, Lisa Hunt, filed a New York State Resident Income Tax Return, Form IT-200, for the year 2002 requesting a refund in the amount of \$947.00. Petitioner's address was listed as P.O. Box 6134, L.I.C., New York 11106. The refund consisted of a New York State earned income credit in the amount of \$689.00, a real property tax credit of \$55.00, a City of New York school tax credit of \$63.00 and New York State tax withheld of \$140.00. Petitioner's return included a form IT-215, Claim for Earned Income Credit, which listed one qualifying child, a daughter named Simone Hunt, who was born in 1982. According

to the form, Simone Hunt resided with petitioner for 12 months in 1982.

2. The Division of Taxation ("Division") conducted an audit of petitioner's tax return for the year 2002. In a letter dated November 28, 2003, petitioner was asked to provide for each qualifying dependent claimed on Form-215:

(1) a copy of both the social security card and birth certificate; AND

(2) verification of address; a statement on school or physician's letterhead indicating the child's name, date of birth, address of record, and name of parent/legal guardian with whom the child resided during the tax year stated above.

3. In response to the foregoing letter, petitioner submitted a Free Application for Federal Student Aid ("FAFSA") form for the 2001-2002 school year, a copy of a TAP 2000-01 Student Change Form; and a life insurance application for Simone Hunt, dated July 19, 2002, listing Lisa Hunt as the beneficiary. The first two documents listed Simone Hunt's address as 34-55 Long Island City, New York 11106. The last form stated that Simone Hunt's address was P.O. Box 6134, Long Island City, New York.

4. In a letter dated March 26, 2004, petitioner was advised by the Division that it could not verify the address of the qualifying child claimed on the tax return. Consequently, the earned income tax credit in the amount of \$689.00 was disallowed, which resulted in an adjusted refund of \$258.00. Specifically, the Division explained:

We could not verify the address of the qualifying child claimed on your 2002 New York State income tax return. The school aid application lists the address as a post office box. Proof of address requires a statement from a school or doctor's office that states the child's address of record of the tax year and the parent/guardian. To serve as proof of residence for 2002, all documentation should be dated from or refer to tax year 2002.

5. Petitioner filed a request for a conciliation conference. In furtherance of her claim for the earned income credit, petitioner submitted additional documentation which included a letter from a physician at Queens Hospital Center dated March 7, 2002. The letter stated, in pertinent part, that Simone Hunt of 34-55 12th Street, Long Island City, New York 11106, had been examined by the writer of the letter and that she resides with her mother for medical reasons.

6. In a Conciliation Order dated July 8, 2005, the statutory notice was sustained. Petitioner filed a petition challenging the denial of her refund. The petition included some

of the documents which had previously been offered as well as a new document from the Career Business Institute showing that Simone Hunt had graduated from a program called Medical Billing. According to the Institute's records, the Medical Billing program began on September 4, 2002 and concluded on June 25, 2003. Further, according to the Institute's records, Ms. Simone Hunt's address was 34-55 12th Street, Apt. 1B, Long Island City, New York 11106.

7. In its answer, the Division asserted that the earned income credit was disallowed because petitioner's address could not be verified.

SUMMARY OF THE PARTIES' POSITIONS

8. At the hearing, the Division maintained that the earned income credit was properly disallowed because Simone Hunt filed a tax return on her own behalf and therefore could not be claimed as a dependent on petitioner's return. In its letter brief, the Division argued that petitioner has not sustained her burden of proof of showing that she had a qualifying child during the 2002 tax year. In particular, the Division contended that petitioner has not shown that Simone Hunt resided with her for more than one-half of the 2002 tax year. The Division also posited that Simone Hunt filed a tax return for the 2002 tax year wherein she stated that she could not be claimed as a dependent on another taxpayer's Federal return for 2002 and further claimed the earned income credit as head of household from a different address.

9. At the hearing, petitioner testified that her daughter did not file the tax return in the Division's possession and that her daughter's identity had been stolen. According to petitioner, someone has taken out credit cards and incurred debts in her daughter's name. The fraudulent use of her daughter's name has been reported to creditors and to the police. At the hearing, petitioner was given a period of time to submit documents in support of her position. However, petitioner submitted the documents after the deadline for offering documents passed and, therefore, they have not been considered.

CONCLUSIONS OF LAW

A. During the year in issue, Tax Law § 606(d) provided that the New York State earned income credit is equal to twenty-seven and one-half percent "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year" Since the State earned income credit is determined based solely on a percentage of the Federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code ("IRC") to determine petitioner's eligibility for the earned income credit. An earned income credit is allowed to an eligible individual, which is defined by the Internal Revenue Code as an individual who "has a qualifying child for the taxable year" (IRC § 32[a][1]; [c][1]).

B. Here, the Division has asserted that there are two reasons why Simone Hunt may not

be considered a qualifying child. Initially, the Division took the position that the address of the qualifying child could not be verified.

C. In order to be eligible for the earned income credit, the qualifying child must share the same place of abode with the taxpayer for more than one-half of the tax year (IRC § 32[c] (3)). The documentation in the record satisfies this burden of proof. A letter from a physician shows that in early March 2002, Simone Hunt was residing with her mother because of a medical condition. Other documentation shows that from early September through the remainder of the year, Simone Hunt was residing at the same address as her mother while attending a program at a business institute. Under the circumstances, the gap in the continuity of the documentation may be cured by the well-established presumption that once a condition is proved to exist, it is presumed to continue (Fisch, New York Evidence § 1122 [2d ed]). Reliance upon the presumption is particularly warranted because Simone Hunt's residence with her mother was necessitated by a medical condition. Accordingly, it is concluded that petitioner has established that Simone Hunt resided with her for the requisite period of time to satisfy the requirements of the earned income credit.

D. The Division also argues that petitioner is not entitled to the earned income credit because Simone Hunt filed an income tax return on her own behalf and reported that she could not be claimed as a dependent on another taxpayer's Federal return. This argument is also rejected. At the hearing, petitioner presented credible testimony explaining that someone stole her daughter's identity and had filed documents and incurred debts in her daughter's name. Petitioner further explained that they reported the identity theft to the creditors who had been defrauded and to the police. Under the circumstances, petitioner's explanation that the return was fraudulently filed by someone other than Simone Hunt is accepted and the Division's receipt of a return by someone purporting to be Simone Hunt does not bar petitioner's right to claim the earned income credit.

E. The petition of Lisa Hunt is granted and the refund denial dated March 26, 2004 is cancelled.

DATED: Troy, New York
February 8, 2007

/s/ Arthur S. Bray
PRESIDING OFFICER
