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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY



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JUDGE

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May 23, 2015

BY ELECTRONIC AND FIRST-CLASS MAIL

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Hamilton, New Jersey

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Re: Nnebe v. Director, Div. of Taxation
Docket No. 000024-2015

Dear Mr. Nnebe and Deputy Attorney General Uger:

This is the court's opinion in connection with the trial of the above-captioned matter wherein plaintiff challenged defendant's final determination, which denied plaintiff New Jersey earned income tax credit of \$600 for tax year 2012 and required him to refund this amount plus interest. For the reasons stated below, the defendant's determination is affirmed.

FACTS

Plaintiff is a New York licensed attorney. He conducts his law practice at his office located at 225 Livingston Street, 3rd Floor, Brooklyn, New York. The office has a kitchen, bathroom and an extra room, and he uses the space to live and sleep. He does not practice law in New Jersey,

nor does he have an office in this State for his law practice.

Plaintiff is married to Ebere Nnebe. They currently have three children born in 2006, 2008 and June 2010 respectively. They used to own a home in Hamilton, New Jersey. On November 14, 2009 the couple entered into a “Separation/Property Settlement Agreement” (“Agreement”) which listed the wife’s residence as the house in Hamilton and plaintiff’s residence as his New York address. The Agreement stated that the couple had decided to separate and live apart but not divorce in the best interests of the two children. The third child was unborn at this time.

Among other terms, the parties agreed that the wife would have “sole and exclusive use, occupancy and possession” of the home in Hamilton (which the couple owned “as tenants by the entirety”). Plaintiff had to pay the mortgage, tax, insurance and repairs/maintenance expenses and the wife was to pay utility expenses. Plaintiff and his wife would share joint custody of both children with the latter being “the primary residential parent” and plaintiff being entitled to unrestricted “visitation/access.” In order “to effectuate [plaintiff’s] visitation rights” he could use and occupy the furnished basement of the Hamilton house, which had a kitchen, bathroom and a separate entrance. Plaintiff agreed to pay monthly child support of \$250 per child for the two children until a certain period. The couple agreed to file either joint or separate income tax returns “as may be beneficial to them.”

On his 2012 federal and New Jersey income tax returns, plaintiff showed his filing status as head-of-household, his address as Hamilton, New Jersey, and claimed his mother and the third child as his dependents for purposes of personal exemptions. He reported \$9,496 income from his law practice (showing the Hamilton address as his “business” address), which he offset fully with losses from two pass-through entities (Nnebe & Associates, P.C. and Iroko Consortium, L.L.C.). He claimed \$3,001 as Earned Income Credit (“EIC”) for the third child on grounds the child was

his son who had lived only with him for over seven months in 2012. The Internal Revenue Service (“IRS”) apparently granted the EIC since there was no audit or denial of this claim or of the refund as a result of the EIC (and additional child tax credit) exceeding his self-employment tax.

For New Jersey purposes, plaintiff reported \$9,496 as income from his law practice, and claimed \$600 as Earned Income Tax Credit (“EITC”). Since the EITC exceeded the zero tax due, it was refunded by defendant (“Taxation”).

Plaintiff never filed income tax returns in New York although his reported income was from his law practice in New York.

Pursuant to an audit sometime in February 2014, Taxation denied the EITC and disregarded his head-of-household status. Plaintiff protested the denial claiming he was entitled to the EITC since he qualified for, and received, the EIC from the IRS. He also maintained that he resided with his brother in Ewing, New Jersey, and that the Hamilton house was his wife’s residence, which she maintained as the “principal place of abode” for “two children in 2012” and for which she paid “over 90% of the cost of maintaining the household.” Thus, his wife was “deemed unmarried” under I.R.C. §7703(B) and qualified as head-of-household for the Hamilton house.

In response to Taxation’s request for documentation proving plaintiff’s residence in Ewing, New Jersey (such as utility bills, driver license, rental agreement, voter registration), and the third child’s residence there (school records for 2012), plaintiff stated that his brother owned the house in Ewing, and paid the house expenses. He stated that while he used the Hamilton address for receipt of his mail, he stayed and slept at his brother’s house when he visited his children every weekend. He asserted that he did not reside in Hamilton, but lived “principally” in New York as evidenced by documents such as the lease agreement for the New York office dated 10/25/10, telephone bills, and bank statements. As to the third child’s proof of residency in Ewing, plaintiff

stated that “this child does not reside” there, “rather he resided at” the house in Hamilton. He stated that he paid \$250 in child support for this third child also, and the couple had “agreed” that he could claim the child as his dependent.

Based on the above information, Taxation concluded that plaintiff did not maintain a New Jersey residence for his dependents for more than six months, and that his principle residence was in New York. He therefore did not qualify for head-of-household filing status. This then left him with a married-filing-separate status, which disqualified him from being entitled to the EITC since an EIC is not permitted for married-filing-separate filers. See I.R.S. Pub. 596 p.2 (Jan. 6, 2016). Taxation issued a final determination on October 17, 2014 upholding the EITC denial.¹

At trial, plaintiff testified that he lived in New York during the week, visited his children every weekend, used only the furnished basement at the house in Hamilton during his visits, and stayed in his brother’s house in Ewing, New Jersey.² He conceded that all three children stayed with their mother every night. He claimed that when his wife attended day classes some days during the week, plaintiff’s mother, who lived with the brother in Ewing, babysat the third child. He stated that he paid his brother about \$800 a month for using his house and for taking care of his mother and the third child.

¹ In a separate proceeding, Taxation denied plaintiff’s wife an EITC for 2011 and 2012. Its final determination noted that since she was married she could not file as head-of-household, and did not qualify for the EITC (citing to www.irs.gov). She filed a complaint in this court challenging the denial (Docket No. 012409-2014). The matter was then reported settled and scheduled for a stipulation calendar. Taxation issued her a letter that it would accept her filing status as head-of-household for 2011 and 2012, and grant her the EITC for these two years. Currently before the court is the wife’s motion to enforce this settlement although there is no judgment yet since the court has not received formal settlement documents.

² In his post-trial brief, plaintiff asserted that he never shared meals with his wife at the house in Hamilton and never entered the first and second floors of the house since 2010, thus, cannot have resided in the same “household” as the wife. He also stated that the house in Ewing was his cousin’s.

ANALYSIS

New Jersey provides EITC to “resident” individuals. N.J.S.A. 54A:4-7(a). Whether plaintiff was a New Jersey resident in 2012 was not seriously contested by Taxation.³

The statute grants an EITC if the resident individual would be eligible for, and would be allowed, an EIC under I.R.C. §32. N.J.S.A. 54A:4-7(a). See also N.J.A.C. 18:35-4.3(g)(1) (“to qualify for” the EITC, the claimant “must claim and be allowed” the federal EIC “for the same taxable year”). If married, the EITC is allowed only for joint filers. N.J.S.A. 54A:4-7(a)(3). However, if a married individual files a return as head-of-household, the joint filing requirement does not bar entitlement to the EITC. Ibid.; N.J.A.C. 18:35-4.3(g)(3) (same).

Plaintiff argues that since he maintained a separate household for the third child in his brother’s house in Ewing, he qualifies to file as head-of-[that]-household, and is therefore entitled to the EITC, especially when the IRS granted him the EIC. He argues that Taxation’s final determination is incorrect as it was based on his being the head-of-household of the house in Hamilton, when in fact, that was his wife. Taxation posits that it has the authority and discretion to deny the EITC, and since plaintiff’s proofs do not establish he qualifies to file as head-of-household, he is not entitled to the EITC. The court finds Taxation’s arguments more persuasive.

First, that the IRC did not deny the EIC for 2012 does not bar Taxation’s discretion or authority to challenge and deny a claim for the EITC. As Taxation points out, the Legislature established the EITC program in Taxation, and delegated it the responsibility and “discretion” to administer the same “for the distribution of” the EITC. N.J.S.A. 54A:4-7, 4-7(d). See also

³ Plaintiff maintained that he uses a New Jersey driver’s license (but did not provide a copy as proof), and in 2012, owned the Hamilton house. Regardless, he could qualify as a resident under N.J.S.A. 54A:1-2 which includes someone who, even if he maintains a “permanent place of abode” outside the State, spends a total of 30 days or more in the State. Given his un-contradicted testimony of spending every weekend in New Jersey, plaintiff would have spent more than 30 days in the State.

N.J.A.C. 18:35-4.3(m) (“If an individual or married/civil union couple receives” the EITC but are “not qualified” for the same, then Taxation “shall recover the amount” as if it were an “erroneous refunds of gross income tax” and can also impose “sanctions and penalties”).

Since the tax return filing status is generally the same as it is for federal income tax purposes, see N.J.S.A. 54A:2-1; 8-3.1, Taxation can resort to the federal income tax definitions and interpretations of filing status to accept or deny a filing status. This means that if federal law could reject a head-of-household status, Taxation can too, regardless of a lack of challenge by the IRS in this regard. Similarly, since the EITC depends on whether the claimant would qualify for the federal EIC, a failure to qualify under federal law would permit Taxation to deny the EITC regardless of a lack of challenge by the IRS in this regard.

Second, the facts here show that plaintiff did not qualify for the EIC, thus, for the EITC. Under I.R.C. §32, an EIC is available to one who has a “qualifying child.” I.R.C. §32(c)(1)(A). See also I.R.S. Pub. 596, supra, at p.2 (Table 1 listing the requirements for eligibility to an EIC). If the claimant is seeking the EIC based on a qualifying child, then, he or she must show that the child qualifies as a dependent. I.R.C. §32(c)(3)(A). Under I.R.C. §152(c), which is the applicable statute for purposes of the EIC (but not I.R.C. §152(c)(1)(D) or I.R.C. §152(e)⁴), a “qualifying child” includes a taxpayer’s child “who has the same principal place of abode as the taxpayer for more than” six months of the tax year, who meets certain age requirements, and who does not file a joint tax return. All these requirements must be satisfied as the conditions are in the conjunctive.

⁴ I.R.C. §152(e) has certain special rules for divorced or separated parents whereby a non-custodial parent can claim the child as a dependent for personal exemption purposes if certain conditions are met, regardless of the requirement in I.R.C. §152(c)(1)(B) that the child must have the “same principal place of abode” as the claimant parent for more than six months of a tax year.

Since plaintiff's third child is under the age limit and does not file a tax return, the only unmet requirement is "principal place of abode." This term is undefined. See I.R.C. §32(c)(3)(C) (simply requiring that the "principal place of abode" be in the United States).

Federal cases have construed the term "analogous" to the term's interpretation in the "head-of-household filing status." See Wilson v. Commissioner, T.C. Summary Opinion 2005-82 (U.S. Tax Ct. 2005). The Code defines head-of-household as an unmarried person who "maintains as his home a household" which is the "principal place of abode" of a "qualifying child" (as defined in I.R.C. §152(c)) for over six months of a tax year. I.R.C. §2(b)(1)(A)(i).⁵ The regulations require the claimant's household "actually constitute [his] home" which "home must also constitute the principal place of abode of" the qualifying child), and the home must be occupied by the claimant "for the entire taxable year of the taxpayer." Treas. Reg. §1.2-2(c)(1). Cf. Treas. Reg. §1.2-2(c)(2) (taxpayer will be deemed to be maintaining a household for his dependent parent/s if they occupy that home and it is their principal place of abode, but it is not "necessary . . . for the taxpayer also to reside in such place of abode").

Cases deciding head-of-household filing status focus on the principal place of abode of the dependent, and whether that place is the "same" as the EIC claimant. Prendergast v. Commissioner, 483 F.2d 970, 971 (9th Cir. 1973). Thus, while a claimant "may well have more than one home" and there are no statutory "restrictions on the manner in which he divides his occupancy between them," the dependent child's "principal place of abode" must be that of the claimant. Ibid. The term "[p]rincipal" for purposes of place of abode, "does not permit of multiplicity." Ibid.

⁵ The "cost of maintaining a household" are expenses necessary to maintain a home, such as "property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance, and food consumed on the premises" but not "clothing, education, medical treatment, vacations, life insurance, and transportation." Treas. Reg. §1.2-2(d).

Plaintiff's claim that he maintained a household in his brother's house in Ewing because his third child resided there, and he paid his brother for the child's and his mother's expenses, is not credible. The position directly contradicts all his prior representations including his tax returns and the EIC schedule where he showed his residence as the house in Hamilton. He initially argued that the basement of the house in Hamilton qualified as his "household" which he maintained for his children, and where the children resided. Now, he contends that only his wife qualified as head-of-household of the house in Hamilton. See supra n.2. He consistently told Taxation that the third child resided with the mother in Hamilton, and conceded at trial that the child stayed there with the wife every night. Now, he contends that the child lived with his brother.

Moreover, plaintiff stayed with his brother only during the weekends he was in New Jersey to visit it children. He did not pay the utility or maintenance expenses for the house in Ewing, his brother did. His federal tax return does not show any itemized deductions for payment of mortgage interest or local property taxes. His New Jersey income tax return similarly does not report any local property taxes being paid, thus, there was no claim for property tax deduction. As such the facts do not lend credibility to his claim that his brother's house was his home for purposes of the head-of-household requirement.

His testimony that he allegedly paid his brother about \$800 a month is self-serving and unsubstantiated. He pays \$250 in child support to his wife for the third child although the child was not addressed in the Agreement. Such payment would mean that the wife is incurring necessary expenses for the child such as food and clothing. When cross-examined as to how he could afford to pay \$750 a month in child support per month in addition to paying the alleged \$800 a month to his brother, given that his annual reported income was only \$9,500, plaintiff was evasive and then stated that he had assets (real property) in, and income from, Africa. Yet the tax

returns are bereft of such income disclosure. That his mother babysat the third child when his wife attended day classes (his testimony was evasive and unclear as to whether the wife was attending college full-time or part-time in 2012 when the child was 2 years old) does not equate to maintaining a household or furnishing costs for the same. See e.g. Treas. Reg. §1.2-2(d) (“cost of maintaining a household” does not include “value of services rendered in the household by the taxpayer or by a person qualifying the taxpayer as a head of a household”). See also I.R.S. Pub. 596, supra, at p.11 (cannot claim EIC for a child who did not “live with” the claimant for over six months “even if” the claimant paid “most of the child’s living expenses”).

For the above reasons, the court finds that plaintiff is not entitled to EITC because he failed to meet the requirements of an eligible individual with a qualifying child.⁶

It is true that a claimant could obtain an EIC even in the absence of a qualifying child, if that person lives in the United States, is 25 but not yet 65 years old, and is not a dependent or a qualifying child of any other taxpayer. I.R.C. §32(c)(1)(A)(ii). However, such an individual cannot qualify for an EIC if the earned income is higher than \$5,280. I.R.C. §32(a)(2). Plaintiff’s earned income (self-employment from his law practice) was higher than this amount, thus, he would not qualify for the EIC, and therefore, for the EITC.

Finally, if a person is married within the meaning of I.R.C. §7703, then the EIC is only available if joint income tax returns are filed. I.R.C. §32(d). However, a married person is deemed unmarried if he or she qualifies as head-of-household, and the spouse does not live with him for the last six months of the taxable year. I.R.C. §7703(b)(3). If so, grant of the EIC, or EITC, is not


⁶ Under I.R.C. §152(c)(4), which applies for purposes of eligibility for the EIC, where a child is claimed as qualifying by parents who do not file a joint income tax return, the EIC is allowed to the parent “with whom the child resided the longest period of time during the taxable year.” From the proof adduced here, the third child could not have resided with plaintiff for the “longest” period since plaintiff visited the child (actually, all three children) in New Jersey only during the weekends or holidays.

prohibited for failure to file joint income tax returns. Here, and for the reasons stated above, plaintiff was not head-of-household of his brother's house in Ewing even though his wife never resided there. Nor does he claim to be head-of-household of the Hamilton house.

In sum, Taxation properly determined that plaintiff does not qualify for the EITC. In so concluding, the court notes that tax credits are a matter of legislative grace. Therefore, the burden is upon the claimant to prove entitlement to the same. Plaintiff has failed to meet this burden.

CONCLUSION

For the aforementioned reasons, plaintiff's complaint is dismissed and Taxation's final determination is affirmed. An Order and final Judgment in accordance with this opinion is attached herewith.

Very truly yours,

Mala Sundar, J.T.C.