STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH SCHRETTNER	:	DETERMINATION DTA NO. 830244
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 2019.	:	

Petitioner, Joseph Schrettner, filed a petition 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 2019.

A hearing was held before Alexander Chu-Fong, Administrative Law Judge, on June 29, 2023, in Brooklyn, New York, with all briefs to be submitted by October 18, 2023, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner's motions and request for subpoenas should be granted, and whether his objection to use of an affidavit at hearing should be sustained.

II. Whether petitioner established clear entitlement to the child and dependent care credit for the year 2019.

III. Whether petitioner established clear entitlement to the college tuition credit for the year 2019.

FINDINGS OF FACT

1. On April 23, 2020, petitioner, Joseph Schrettner, filed a 2019 New York State resident

income tax return (form IT-201), requesting a refund in the amount of $1,848.00.

2. Petitioner has three children, identified herein as KZ, JMS, and TZ.[1] For the year 2019, petitioner claimed child and dependent care and college tuition credits for his children.

3. On May 28, 2020, the Division of Taxation (Division) requested additional information from petitioner. It asked for information regarding his dependents, including proof of his relationship to them, of their residence, and information about the daycare expenses. The Division also asked for information regarding the college tuition credit, specifically, "[a] copy of federal Form 1098-T" and "[c]opies of itemized tuition bills or account statements that support the amount paid."

4. Regarding the claimed child and dependent care credit, petitioner provided 2 birth certificates for "Christina Schrettner" and none for Joseph Schrettner and a copy of a May 25, 2012, "civil action order" (CAO). Petitioner explained that under the CAO, he was entitled to claim certain credits and exemptions for his children. He also explained that his children suffered from partial disabilities. To support the alleged child and dependent care payments, petitioner submitted checks, which were payable to an individual. This individual bore the same name as his ex-wife, and there is no information identifying her as a care provider. The record does not contain documentation that connected these checks to actual costs of caring for any of his children in 2019. It also does not contain information that definitively identifies petitioner's children's residence during that year.

5. Regarding his claimed college tuition credits, petitioner credibly testified that in 2019, his children, KZ and TZ, attended Franciscan University of Steubenville (Franciscan), and his child, JMS, attended The Ohio State University (Ohio State). The record contains copies of

[1] Petitioner requested that his children's names be used sparingly to protect their privacy. The Division did not object to this request. As such, their full names will not be used herein.

cancelled checks, both during and outside of the period at issue, that petitioner made to these institutions.

6. For KZ, petitioner provided the following copies of cancelled checks, payable to Franciscan:

Issue Date	Check No.	Amount
05/02/2019	210	$1,000.00
09/02/2019	108	$1,000.00
12/19/2019	713	$2,490.00

7. For JMS, petitioner provided a copy of a cancelled check, payable to Ohio State:

Issue Date	Check No.	Amount
08/20/2018	153	$2,000.00

8. For TZ, petitioner provided a copy of a cancelled check, payable to Franciscan:

Issue Date	Check No.	Amount
09/02/2019	109	$1,000.00

9. On October 9, 2020, the Division issued to petitioner an audit adjustment correspondence with explanation and computation, granting a partial refund of $81.00. This document provided the following:

> "We have reviewed the additional information you sent in response to our letter. We were not able to verify the daycare provider and expenses paid. The receipts provided could not be verified as payment. Without copies of bank statement[sic] showing payment paid to a verified provider, cashed checks or money orders to support your claim for daycare expenses, your request for the child and dependent care credit has been disallowed.
> The college and tuition credit has been disallowed. You must provide a copy of the federal form 1098-T for each child attending college."

10. On February 16, 2021, the Division issued a notice of disallowance, case ID X-188982824, in the amount of $1,767.00 (notice). Of the disallowed amount, the dependent care credit constituted $567.00, while the college tuition credit constituted the remaining $1,200.00, i.e., $400.00 per child.

11. Subsequently, petitioner contacted Franciscan to request forms 1098-T to substantiate tuition payments on behalf of KZ and TZ. The university informed him that because TZ and KZ had set their accounts to "full privacy," its procedures, promulgated under the Family Educational Rights and Privacy Act (FERPA or 20 USC § 1232g), prevented the disclosure of this information without his children's consent.

12. Franciscan, however, did provide him with a letter from its Executive Director Enrollment Services, John Herrmann (Herrmann letter), which indicates that petitioner made, in part, the following payments:

Received Date	Check No.	Amount
05/03/2019	210	$1,000.00
09/19/2019	108	$1,000.00
09/19/2019	109	$1,000.00
01/08/2020	713	$2,490.00

13. The Herrmann letter ties petitioner's checks to college tuition payments made on behalf of his children, KZ and TZ (***see*** findings of fact 6 and 8).

14. Petitioner provided a 2019 form 1098-T for his child, JMS. This indicates that JMS attended Ohio State during the year at issue. In box 1, the form indicates payments received for qualified tuition and related expenses, and lists $7,582.70, received for that year.

15. Petitioner provided several "Statement of Account" documents, for his child, JMS,

from Ohio State that pertain to 2019 as well as years outside of this period. As is relevant, the record includes a 2018 Spring Semester Statement of Account that, on the twelfth line, indicates that a "Check Payment" was received, with a transaction date of "08/23/2018" in the amount of $2,000.00. This appears to correlate with August 20, 2018, check (***see*** finding of fact 7).

16. Petitioner credibly testified that he possesses a background in financial matters and tax, and that he has been a tax preparer since 1985. He earned a bachelor's degree in accounting, a master's in business administration, and is a certified financial planner.

Procedural History

17. This matter originally had been set for a hearing, to be held through video conferencing, on March 9, 2023. The Administrative Law Judge (ALJ), who was originally assigned to this matter, set a schedule, with February 27, 2023, being the final date by which the parties were to file a hearing memorandum and exhibits with the Division of Tax Appeals. The original ALJ also instructed the parties to exchange said documents with the opposing party.

18. On February 14, 2023, the Division filed its hearing memorandum and exhibits with the Division of Tax Appeals. The cover letter accompanying the Division's submission provided the following: "As directed, attached are the Division's documents and hearing memo in the above referenced matter. On this date a true and accurate copy was provided to Petitioner." These same documents were introduced at the June 29, 2023, hearing.

19. The Division's submission included a February 6, 2023, affidavit of Angela Pettes (Pettes Affidavit). Ms. Pettes was employed as a Tax Technician IV by the Division in its Audit Division – Income / Franchise Desk Audit Group 1. The Pettes affidavit explains that she reviewed the audit file and workpapers, which were attached, and she described the Division's position on audit.

20. On February 21, 2023, petitioner filed a letter memorandum and exhibits with the Division of Tax Appeals. A copy of a cover letter addressed to the Division accompanied the documents, and indicated that petitioner had copied them on his submission.

21. By letter dated February 8, 2023, petitioner requested an adjournment of the hearing and guidance on how to obtain a subpoena duces tecum for: (i) a Division employee, identified as "employee #64331 Sidney," to appear at the hearing and produce documentation regarding a July 10, 2020, telephone conversation with petitioner and (ii) Bernan Pergi, the "VP of Operations" at Franciscan, to produce petitioner's children's forms 1098-T for the period of 2018 through 2022.

22. In a February 14, 2023, letter, the original ALJ denied the request for an adjournment because petitioner failed to provide good cause. Regarding subpoenas, the original ALJ denied the request and referred petitioner to section 3000.7 of the Tax Appeals Tribunal's Rules of Practice and Procedure (20 NYCRR or Rules).

23. In a February 15, 2023, letter, the original ALJ further stressed that petitioner review section 3000.7 and specifically noted, regarding the production of his children's records, petitioner needed to provide their written consent for that information. Insofar as petitioner sought records pertaining to periods outside of the years at issue, the original ALJ stressed that he had to explain the relevance to this matter.

24. In a March 22, 2023, letter, the Division of Tax Appeals informed petitioner that the matter had been transferred from the original ALJ to the undersigned.

25. By letter dated April 4, 2023, petitioner requested that this matter be reassigned to the original ALJ and, again, made a request for subpoenas. The provided reason for the subpoena for the Division employee was: "Testimony necessary to back up Plaintiff's assertions."

Regarding the requested subpoenas to Franciscan and Ohio State, petitioner explained that "FERPA prohibits colleges from releasing [students'] T-1098's [sic] to anyone other than the student if those students have their accounts set to 'privacy'… The Division of Taxation is demanding T-1098 forms [sic]." Petitioner did not provide his children's written consent.

26. In an April 6, 2023, letter, the Acting Supervising ALJ (ASALJ) rejected petitioner's request for the matter to be re-assigned back to the original ALJ. Petitioner's request for subpoenas was also denied and, in so doing, the ASALJ echoed the original ALJ's message, referring petitioner to section 3000.7 of the Rules, and reiterating that to acquire the subpoena for his children's records, petitioner must provide their written consent.

27. By letter dated May 4, 2023, petitioner requested that the undersigned compel the Division to reveal the last name of the employee for which he sought a subpoena in his February 8, 2023, letter. He reiterated the request for subpoenas to be issued for the same Division employee and for the production his children's forms 1098-T. Petitioner again provided arguments for the subpoena, but neither conformed to section 3000.7 of the Rules, nor provided his children's consent.

28. In a May 8, 2023, letter, the undersigned construed petitioner's request as a motion to compel and rejected same because it was not apparent that petitioner complied with the filing requirements under section 3000.5 (b) of the Rules. The request for subpoenas was denied because petitioner failed to conform to, among other things, section 3000.7 of the Rules, and he did not provide the necessary written consent from his children to access their information. Petitioner elected not to re-file a motion to compel.

29. On June 20, 2023, petitioner filed a motion "to quash Department of Taxation's documentation arguments and testimony" on the ground that he did not receive the Division's

hearing memorandum.

30. On June 23, 2023, petitioner filed a motion "to issue subpoena and adjourn/continue case." Petitioner again requested and argued for the subpoena, but neither conformed to section 3000.7 of the Rules, nor provided his required consent from his children. The adjournment request was denied.

31. At the June 29, 2023, hearing, petitioner submitted an "emergent motion for summary judgment in original." Petitioner's attached affidavit, dated June 28, 2023, provides his reasons as follows:

> "1. The Petitioner has satisfied all of the requirements for payment and receipt of expenses for both tax credits involved – tuition credits for my three children.
> 2. I have proven the children are mine and have provided additional documentation requested by the Division but wasn't necessary.
> 3. I provided additional documentation to the Division for tax years outside the year being audited.
> 4. The Petitioner satisfied the additional requirements (T-1098 [sic] form) for college credit for his son ($400) and all the requirements demanded by the Division for the child care credit ($648).
> 5. The additional documents that the Division has demanded – most notably the T-1098 [sic] is burdensome and not required – the information has been provided in an alternative way."

Also at the hearing, petitioner renewed his June 20, 2023, motion to quash and his June 23, 2023, request for subpoenas.

SUMMARY OF THE PARTIES' POSITIONS

32. Petitioner argues that he is entitled to the entirety of the disallowed child and dependent care and college tuition credits. Regarding the child and dependent care credit, he cites the CAO as the basis for his entitlement to the credit for his children. Petitioner contends that he satisfied the Division's requirements by submission of the checks that he alleges were for childcare. Regarding the college tuition credit, he argues two points: first, that the submitted cancelled checks and documentation constitute sufficient proof that in 2019, he made payments

that qualify him for the deduction of at least two of his children; second, he contends that the Division's "demand" for the form 1098-T is unnecessarily burdensome for an individual in his position. Petitioner also objects to the Division's reliance upon the Pettes affidavit because it constituted hearsay and did not provide him with the opportunity to cross-examine her. As such, petitioner submits that he should be granted the entirety of the disallowed refund as well as recompense for his efforts and personal anguish.

33. The Division argues that petitioner failed to substantiate entitlement to either the child and dependent care credit or the college tuition credit. Therefore, it contends that the notice should be sustained, and the petition denied.

CONCLUSIONS OF LAW

A. In matters before the Division of Tax Appeals, taxpayers, generally, bear the burden of proof (***see*** Tax Law § 689 [e]), and to carry it, they must produce evidence showing that the notice is incorrect (***see e.g. Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]).

B. When the Division issues a notice to a taxpayer, a presumption of correctness attaches, and the burden of proof is on the taxpayer to demonstrate, by clear and convincing evidence, that the disallowance is erroneous (***Matter of O'Reilly***, Tax Appeals Tribunal, May 17, 2004; Tax Law § 689 [e]). If there are any facts or reasonable factual inferences supporting the notice, then it should be sustained (***Levin v Gallman***, 42 NY2d 32, 34 [1977]). The burden does not rest with the Division to demonstrate the propriety of its position (***Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842, 843 [3d Dept 1986]). Rather, it falls upon taxpayers because the Tax Law requires them to maintain adequate records of their items of income, credits, expenses, and deductions for the years at issue (***see*** Tax Law § 658 [a]; ***see also*** 20 NYCRR 158.1 [a]). As is

relevant herein, 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 to prevail over a disallowance, the taxpayer must carry "the burden of showing 'a clear-cut entitlement' to the statutory benefit" (***id.***).

Petitioner's Motions, Request for Subpoenas, and Objection

C. The initial issue to be addressed is petitioner's motion for summary determination that was filed in person on the day of the hearing. The Rules permit motion practice to expedite the resolution of controversies (***see*** 20 NYCRR 3000.5 [a]), including motions for summary determination (***see*** 20 NYCRR 3000.9 [b]). Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. 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]).

Thus, the movant "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" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]).

D. Petitioner's motion for summary determination fails on procedural and substantive grounds. Procedurally, by virtue of the hearing being held, this motion for accelerated judgment was rendered moot. Substantively, petitioner's motion papers failed to establish either that no material triable issues existed, or that, as a matter of law, petitioner was entitled to judgment.

Due to the procedural and substantive flaws, petitioner's motion for summary determination must be denied.

E. Petitioner's June 20, 2023, motion to quash fails on substantive grounds because the Division provided him, and the Division of Tax Appeals, with its hearing memorandum on February 14, 2023. Therefore, petitioner's position on this motion lacks a factual basis and lacks any seriousness or legal merit. Petitioner's motion to quash must be denied.

F. On the request for subpoenas, Tax Law § 2006 (10) authorizes the Tax Appeals Tribunal to subpoena and require the attendance of witnesses at hearing and the production of books, papers, and documents pertinent to its proceedings and the power to delegate its power to subpoena to its administrative law judges and other employees (***see*** 20 NYCRR 3000.7). The Rules provide that, upon request of any party, a subpoena may be issued by an administrative law judge to require the attendance of witnesses or to require the production of documentary evidence (20 NYCRR 3000.7 [a]). "The Rules require the requesting party to demonstrate the general relevance and reasonable scope of the subpoena. If these conditions are not met, or the request is unduly burdensome, the ALJ possesses discretionary authority to condition or refuse to issue the subpoena (***id.***)." Further, section 3000.7 (b) requires that requests for subpoena be filed at least 20 days in advance of a hearing.

G. The June 23, 2023, subpoena request fails on both procedural and substantive grounds. As observed above, the Rules establish that all subpoena requests must be filed 20 days prior to the hearing date. In this matter, the hearing date was set for June 29, 2023, and petitioner filed this request only six days prior. It is, therefore, defective under the Rules and on this procedural basis, the request must be denied.

H. Turning to the substance, petitioner's request for subpoena for a certain Division employee to appear fails because the request did not establish sufficient relevance or a reasonable scope. The offered rationale of "to backup Plaintiff's assertions" constitutes an insufficient basis for a subpoena. It is not clear what these assertions might have been, much less what relevancy they have to this matter, or how testimony regarding a July 10, 2020, telephone conversation would have aided in showing entitlement to claimed deductions (***see*** conclusion of law B). This appears, very plainly, to be an improper attempt to shift the burden onto the Division when, under the law, it must be carried by petitioner (***see*** Tax Law § 658 [a]; 20 NYCRR 158.1 [a]). Petitioner's subpoena request for this Division employee, therefore, must also be rejected for these substantive deficiencies.

I. Petitioner requested subpoenas to be issued to Franciscan and Ohio State to acquire his children's 2019 forms 1098-T. Regarding the latter, petitioner acquired JMS's 2019 form 1098-T and submitted it into the record (***see*** finding of fact 14), which rendered this request moot. Turning to Franciscan, the university deemed KZ and TZ's forms 1098-T to be educational documents covered by FERPA (20 USC § 1232g). This legislation protects parents of students' "right to inspect and review the education records of their children" (20 USC § 1232g [1] [A]), and it requires educational institutions to adopt procedures to allow for such requests (***id.***).[2]

The Rules permit ALJs with discretionary authority to condition the grant of subpoenas (20 NYCRR 3000.7 [a]). Giving respect to Franciscan's FERPA procedures, the undersigned, as well as multiple other ALJs, conditioned the grant of the subpoena on the provision of his children's written consent to access their 2019 forms 1098-T. Petitioner, despite knowing this condition, made the June 23, 2023, subpoena request – as well as multiple prior requests – while

[2] The undersigned defers to Franciscan's interpretation and application of FERPA, reaching no conclusion about their legality and propriety.

willfully ignoring judicial instructions to include the consent. As such, the June 23, 2023, request to issue a subpoena to Franciscan fails on substantive grounds because the condition for the grant was never met.

J. Petitioner's objection to the Division's use of an affidavit must fail because this challenge lacks merit. The Rules specifically permit the use of affidavits (***see*** 20 NYCRR 3000.15 [d] [1]), a practice that has been affirmed by the New York courts (***see e.g. Matter of Orvis Co. v Tax Appeals Trib.***, 86 NY2d 165 [1995], ***cert denied*** 516 US 989 [1995]). Petitioner also appeared to object on the grounds that the Pettes affidavit constituted hearsay; however, "relevant and probative hearsay evidence is admissible in administrative proceedings; moreover, it may… constitute substantial evidence to support the administrative agency's determination" (***Matter of Flanagan v New York State Tax Commn.***, 154 AD2d 758 [3d Dept 1989]; State Administrative Procedure Act § 306 [1]; ***see also Matter of Callicutt***, Tax Appeals Tribunal, February 8, 1996 [discussing the use of affidavits], ***confirmed*** 241 AD2d 778 [3d Dept 1997]). Therefore, petitioner's objection to the entry of Pettes Affidavit into the record is overruled.

The Child and Dependent Care Credit

K. Petitioner references the CAO as his basis for claiming the child and dependent care credit. No party disputes his ability to claim the credit. In fact, petitioner could and did claim this credit for 2019. However, merely claiming the credit does not relieve him of his responsibility, under the Tax Law, to maintain records establishing his entitlement to it (***see*** Tax Law § 658 [a]; 20 NYCRR 158.1 [a]).

L. Tax Law § 606 (c) (1) provides that the New York State child and dependent care credit is based on the federal child and dependent care credit "allowable under section twenty-

one of the internal revenue code." Since the allowable New York child and dependent care credit is determined based solely on the corresponding federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code (IRC) to determine petitioner's eligibility for this credit. IRC (26 USC) § 21 provides a tax credit for expenses a taxpayer incurs for the care of a dependent so that the taxpayer is free to work or actively search for a job. The Division denied petitioner's claimed 2019 child and dependent care credit claimed on several grounds. These include petitioner's failure to establish that: (i) any of his children lived with him; (ii) the payments were to a care provider for dependent care expenses; and (iii) the amount of the alleged child and dependent care expenses incurred during 2019.

M. The record fails to establish that petitioner was clearly entitled to the claimed child and dependent care credit for 2019. The record contains no evidence addressing the issues raised by the Division as its basis for the disallowance. There is no proof of petitioner's children's residences during 2019. No evidence affirmatively establishes that the payments to petitioner's ex-wife were made for child and dependent care services. In fact, the record contains no evidence that ties the alleged child and dependent care payments to expenses or costs related to the care of petitioner's children during the year 2019. Given the dearth of proof, it must be concluded that petitioner failed to meet his burden of proving entitlement to the claimed 2019 child and dependent care credit (***see Matter of Carroll***, Tax Appeals Tribunal, May 18, 2018; ***see also*** Tax Law § 689 [e]). The Division's disallowance of this credit is sustained.

The College Tuition Credit

N. Tax Law § 606 (t) allows taxpayers an itemized deduction or a refundable credit for "allowable college tuition expenses." Tax Law § 606 (t) (2) (A) defines "allowable college tuition expenses" as "the amount of qualified college tuition expenses of eligible students paid by

the taxpayer during the taxable year." Tax Law § 606 (t) (2) (C) defines "qualified college tuition expenses" as:

> "[T]he tuition required for the enrollment or attendance of an eligible student at an institution of higher education. Provided, however, tuition payments made pursuant to the receipt of any scholarships or financial aid, or tuition required for the enrollment or attendance in a course of study leading to the granting of a post baccalaureate or other graduate degree, shall be excluded from the definition of 'qualified college tuition expenses'."

O. Petitioner established that he made payments on behalf of his daughters to Franciscan. Specifically, the Herrmann letter establishes that checks 210, 108, 109, and 713 constituted payments from petitioner to that institution on behalf of his children KZ and TZ. However, the record lacks affirmative statements from Franciscan indicating that these payments were for the children's undergraduate education and went to qualified expenses, e.g., tuition. Without this itemization, petitioner failed to establish that the payments for KZ and TZ were for qualified college tuition expenses under Tax Law § 606 (t) (2) (C). Petitioner's payment on behalf of JMS correlates to tuition paid to Ohio State for spring 2018 and, therefore, is not eligible for the claimed 2019 credit. Therefore, it must be concluded that petitioner failed to establish entitlement to the 2019 college tuition credit claimed for his children, KZ, JMS, and TZ. Accordingly, this portion of the disallowance is sustained.

P. The petition of Joseph Schrettner is denied and the notice of disallowance, dated February 16, 2021, is sustained.

DATED: Albany, New York
April 18, 2024

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE