

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SANDRA M. MARTIN : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 821590
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2004. :

Petitioner, Sandra M. Martin, 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 2004.

On November 20, 2007 and November 30, 2007, respectively, petitioner, by Waverly Lane, Jr., Enrolled Agent, and the Division of Taxation, by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by April 18, 2008, which date began the six-month period for the issuance of this determination. After a review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioner was not entitled to claim head of household filing status and, as a result thereof, properly denied petitioner's claimed earned income credit and child and dependent care credit for the year 2004.

FINDINGS OF FACT

1. Sandra M. Martin (petitioner) filed a form IT-201, Resident Income Tax Return, under the filing status "head of household." Attached to the return were a form IT-215, Claim for Earned Income Credit, and a form IT-216, Claim for Child and Dependent Care Credit. The address set forth on the return was 155 Summit Avenue, Mount Vernon, New York 10550-1503.

On her return, petitioner reported federal adjusted gross income of \$21,137.00, New York adjusted gross income of \$21,637.00, New York State tax withheld of \$294.00 and New York City tax withheld of \$200.00. Petitioner computed total state and city taxes due of \$285.00. The total payments and credits were \$2,279.00, which consisted of the taxes withheld (\$494.00) plus the child and dependent care credit claimed (\$1,023.00) and the earned income credit claimed (\$762.00). Accordingly, an overpayment and refund in the amount of \$1,994.00 was claimed by petitioner (\$2,279.00 - \$285.00).

2. On the Claim for Earned Income Credit, petitioner indicated that she had two qualifying children whom she claimed on her 2004 federal schedule EIC: Brittany A. Palmer, born in 1995, and Jeffrey W. Palmer, born in 1986.

On the Claim for Child and Dependent Care Credit, petitioner indicated that she had one qualifying child, Brittany A. Palmer, and that Acmed Acosta had provided care for the child and had been paid \$3,000.00 during the year for providing such child care.

3. Pursuant to the tax return filed by petitioner for the 2004 tax year, the Division of Taxation (Division) issued a refund check dated April 12, 2005 to petitioner in the amount of \$1,994.00.

4. Subsequent to the issuance of the refund check, the Division performed an audit of petitioner's 2004 income tax return. As a result of the audit, the Division determined that

petitioner's filing status of head of household was incorrect because she was married during the tax year 2004 and was living at the same address as her husband.

5. On May 30, 2006, the Division issued to petitioner a Statement of Proposed Audit Changes which asserted a deficiency of New York State personal income tax in the amount of \$2,067.00, plus interest of \$183.94, for a total amount due of \$2,250.94 for the year 2004. The Statement of Proposed Audit Changes contained an explanation which stated as follows:

Based on available information, we have changed your filing status.

Married taxpayers living at the same address, who elect to file separate returns, must each claim the filing status "Married Filing Separate Return" on their New York returns.

Your earned income credit has been disallowed. You cannot claim the Earned Income Credit if your filing status was "married filing separately" UNLESS you filed jointly on your federal return and you were required to file separately because one spouse is a full year resident and the other is a non resident or part year resident.

Married persons filing separate returns generally cannot claim child and dependent care credit. Therefore, your child and dependent care credit has been disallowed.

If you are legally separated or lived apart from your spouse the last six months of the year, you may be able to file a separate return and still claim the credit.

You have been allowed the appropriate New York standard deduction.

Since your filing status is married filing separate returns, and your combined adjusted gross income (federal) is over \$32,000, you are not allowed the household credit.

6. On July 24, 2006, the Division issued a Notice of Deficiency to petitioner which asserted a New York State personal income tax deficiency of \$2,067.00, plus interest, for a total amount due of \$2,279.73.

7. The petition filed with the Division of Tax Appeals stated, in part, as follows:

“Petitioner stated during conference that she is legally married, however, she did not live with her husband in the same domicile during the tax year in question.”

8. For the tax year 2003, petitioner and her husband, Mark A. Martin, filed a form IT-201, Resident Income Tax Return, under the filing status, “Married filing joint return.” They listed their address as Accountancy Lane/100 Elgar Place, Bronx, New York 10475-5025, which is the address of the preparer of the return and petitioner’s representative in this proceeding, Waverly Lane, Jr., whose address is also set forth on the return. Attached to the return were three forms W-2, two of which were issued to petitioner and one which was issued to Mark A. Martin. The address on the W-2s for both petitioner and Mark A. Martin was 493 Mundy Lane, Mount Vernon, New York 10550.

For the 2003 tax year, out of a total of \$36,355.00 earned as wages, salaries or tips by petitioner and her husband (the total New York adjusted gross income of petitioner and her husband was \$37,098.00), petitioner earned wages of \$21,217.48 from the New York State Thruway Authority and \$10,658.25 from the Hudson News Company. Petitioner’s husband earned \$4,479.71 from Somers Manor Nursing Home and \$267.75 from Essey, LLC.

Accordingly, for the 2003 tax year, petitioner earned approximately 88% of the income for the year.

9. After receiving an executed waiver of hearing by which the parties agreed to have the matter determined on submission without hearing, this Administrative Law Judge, by letter dated December 4, 2007, set a schedule for the submission by the parties of documents and briefs. On January 10, 2008, the Division submitted a series of documents with copies provided to petitioner’s representative. Petitioner submitted no documents or brief. On March 7, 2008, the

Division submitted a letter in lieu of a brief. Petitioner had until April 18, 2008 to file a reply brief, but none was submitted.

SUMMARY OF PETITIONER'S POSITION

10. While, as noted in Finding of Fact 9, petitioner failed to submit any documents in support of her position, the documents submitted by the Division included the affidavits of : (a) Annie Cross, a friend of the family, who stated that petitioner's husband, Mark Martin, resided with her for all of calendar year 2004 due to marital difficulties with petitioner (Ms. Cross stated that she did not ask Mr. Martin for any reimbursement for rent or utilities) and who also stated that in order to avoid complications with her landlord, she asked Mr. Martin to have his personal mail directed elsewhere; (b) Mark Martin, the husband of petitioner, who stated that due to mailing problems, he kept his mailing address the same as his wife's despite the fact that they did not live together; and (c) Sandra M. Martin, the petitioner herein, who stated that due to mailing problems, Mark Martin kept the same address as petitioner despite the fact that they did not live together.

CONCLUSIONS OF LAW

A. Tax Law § 606(d)(1) provides that the New York State earned income credit for the 2004 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. . . .” With respect to the child and dependent care credit, Tax Law § 606(c)(1) provides that the New York State credit is based on the federal child and dependent care credit “allowable under section twenty-one of the internal revenue code.” Since both credits are 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 these two credits.

B. The federal earned income credit, as provided pursuant to IRC § 32, is a refundable tax credit for eligible low income workers. The credit is based on a percentage of a taxpayer's "earned income" which includes wage income and earnings from self-employment (IRC § 32[c][2]). Pursuant to IRC § 32(d), in order to be eligible for the earned income credit if married, the claimant must file a joint return. Therefore, to be eligible for the earned income credit, the individual's filing status cannot be "married filing separately." However, if an individual is married, he or she may be able to claim head of household status.

C. Tax Law § 607, entitled "Meaning of terms," provides that terms used in Article 22 of the Tax Law will have the same meaning as when used in a comparable context in the provisions of the IRC unless a different meaning is clearly required. Tax Law § 607(b) provides that "an individual's marital or other status . . . shall be the same as his marital or other status for purposes of establishing the applicable federal income tax rates." Accordingly, it is appropriate to review the applicable provisions of the IRC, regulations and case law to determine if petitioner is entitled to claim head of household filing status herein.

D. In order to be entitled to claim head of household filing status for purposes of this proceeding, petitioner must be unmarried (IRC § 2[b][1]) or considered unmarried (IRC § 7703[b]) on the last day of the 2004 tax year. To be unmarried, a taxpayer must be legally separated from his or her spouse pursuant to a decree of divorce or of separate maintenance (IRC § 2[b][2][B]); § 7703[a][2]). It is clear from the petition filed in this matter with the Division of Tax Appeals (*see* Finding of Fact 7) that petitioner was not divorced or legally separated from her husband in 2004. Certain married individuals can, however, be considered unmarried if they meet the conditions provided in IRC § 7703(b) which sets forth the following three conditions a married person must meet in order to be considered unmarried:

(1) the taxpayer must file a separate return and maintain as her home a household which, for more than one-half of the taxable year, constitutes the principal place of abode of a qualifying dependent;

(2) the taxpayer must furnish over one-half of the cost of maintaining such household during the taxable year; and

(3) during the last six months of the taxable year, the taxpayer's spouse cannot be a member of the household.

E. As conceded by the Division in its letter brief, petitioner did meet the first condition, i.e., she did file a separate return for 2004 and she maintained a household which constituted the principal place of abode for two qualifying dependents, to wit, her daughter, Brittany A. Palmer, and her son, Jeffrey W. Palmer.

As to the second condition, while petitioner failed to offer any evidence as to the amount of her husband's income for the 2004 tax year, it can reasonably be inferred, based upon the respective incomes of petitioner and her husband for the 2003 tax year (*see* Finding of Fact 8), that she furnished over one-half of the cost of maintaining the household for the 2004 tax year. While there has been no evidence presented as to whether Mark A. Martin provided petitioner with any child support, based upon his income in the year immediately preceding the year at issue, it is reasonable to assume that even if child support payments were made, it was petitioner who furnished over one-half of the cost of maintaining the household.

It is as to the third condition, however, where petitioner has failed to meet her burden of proof as set forth in Tax Law § 689(e). Petitioner's husband, Mark A. Martin, admittedly used the same address as petitioner for all of his mail during the 2004 tax year. While their 2003 joint

tax return indicated that they lived together for the entire year, it is unclear if and when petitioner and her husband separated.

The affidavits of Annie Cross, Mark Martin and petitioner, submitted for the purpose of establishing that petitioner and Mark Martin lived apart for all of 2004 cannot be found to be credible. The affidavit of Annie Cross states that Mark Martin resided with her for all of calendar year 2004, without any charge to Mr. Martin for rent or utilities. No date is set forth in the affidavits of petitioner and Mark Martin as to the date on which the parties began living apart. Since, admittedly, Mark Martin continued to use petitioner's address for purposes of receiving mail, more proof is necessary, beyond the very general statements contained in the three affidavits, to show that he failed to live in petitioner's household at any time during the last six months of 2004. Accordingly, it cannot be found that for the year 2004, petitioner can be considered to have been unmarried as required by IRC § 7703(b). Therefore, the Division properly changed petitioner's filing status from head of household to married filing separate return (*see* IRC § 6013) and, in addition, properly denied petitioner's claim for the New York State earned income credit for the 2004 tax year.

F. With respect to the child and dependent care credit, Tax Law § 606(c) provides that the New York State credit is based on the federal child and dependent care credit "allowable under section twenty-one of the internal revenue code." As was the case with the earned income credit, it is appropriate to refer to the provisions of the IRC to determine petitioner's eligibility for this credit.

IRC § 21 sets forth the requirements for the federal child and dependent care credit. This credit is determined based upon a percentage of employment related expenses, including

expenses for the care of a qualified dependent under the age of 13, incurred by a taxpayer to be gainfully employed, while maintaining a household which includes the qualified dependent.

IRC § 21(e)(2) provides that if the taxpayer claiming the credit is married at the close of the taxable year, the credit will be allowed only if the taxpayer and his or her spouse file a joint return for the taxable year. As previously noted, petitioner and her husband did not file a joint return for 2004; petitioner filed a return under the filing status "head of household." As was the case for the earned income credit, IRC § 21(e)(4) provides that married individuals living apart can, for the purposes of the child and dependent care credit, be considered as not married if:

(A) an individual who is married and who files a separate return -

(i) maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode of a qualifying individual, and

(ii) furnishes over half of the cost of maintaining such household during the taxable year, and

(B) during the last 6 months of such taxable year such individual's spouse is not a member of such household. . . .

G. For the same reasons as set forth in Conclusion of Law E, petitioner has failed to sustain her burden of proving that her husband, Mark A. Martin, was not a member of her household during the last six months of the 2004 tax year, and therefore, she cannot be considered as not married.

Petitioner's claim for the child and dependent care credit must also be denied for failure to substantiate payment for such care. While petitioner has alleged on her Claim for Child and Dependent Care Credit that she paid the sum of \$3,000.00 to Acmed Acosta for the care of her daughter, Brittany A. Palmer, the record contains no proof of such payment during the 2004 tax year.

Accordingly, for both failure to substantiate payment of child care expenses and failure to qualify for such credit by not being considered unmarried, the Division properly denied petitioner's claim of the New York State child and dependent care credit.

H. The petition of Sandra M. Martin is denied and the Notice of Deficiency issued by the Division of Taxation on July 24, 2006 is hereby sustained.

DATED: Troy, New York
October 2, 2008

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE