

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ALBANIA ESPADA : DECISION
for Redetermination of a Deficiency or for Refund : DTA NO. 826098
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Years 2007, :
2010 and 2011. :
:

Petitioner, Albania Espada, filed an exception to the determination of the Administrative Law Judge issued on April 9, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro E.G. Taylor, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on August 6, 2015, the date petitioner's reply letter brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner's claimed earned income credits for the years 2007, 2010 and 2011.

II. Whether the Division of Taxation properly disallowed petitioner's claimed child and dependent care credits for the years 2007 and 2011.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 13 to exclude a summary of petitioner's legal argument. Similarly, we have not included the Administrative Law Judge's finding of fact 14 because that finding is a summary of the position of the Division of Taxation (Division). As so modified, the Administrative Law Judge's findings of fact are set forth below.

1. Petitioner, Albania Espada, filed a New York State resident income tax return, form IT-201, for the each of the years 2007, 2010 and 2011, claiming head of household filing status for each of such years. As is relevant to this proceeding, her returns reported the following information:

_____2007: Petitioner reported business income of \$13,348.00, reduced the same by one-half of the claimed amount of self-employment tax paid (\$943.00), thus arriving at federal and New York State adjusted gross income of \$12,405.00. Petitioner requested a refund in the amount of \$4,649.00, consisting of an empire state child credit (\$100.00), a child and dependent care credit (\$2,753.00), an earned income credit (\$1,651.00 [New York State amount of \$1,415.00 plus New York City amount of \$236.00]), and a New York City school tax credit (\$145.00). Petitioner's return included form IT-215, claim for earned income credit, and form IT-216, claim for child and dependent care credit, which listed two qualifying children.

_____2010: Petitioner reported business income of \$14,450.00, reduced the same by one-half of the claimed amount of self-employment tax paid (\$1,021.00), thus arriving at federal and New York State adjusted gross income of \$13,429.00. Petitioner requested a refund in the amount of \$2,354.00, consisting of an empire state child credit (\$516.00), an earned income credit (\$1,726.00 [New York State amount of \$1,474.00 plus New York City amount of \$252.00]), a

real property tax credit (\$49.00), and a New York City school tax credit (\$63.00). Petitioner's return included form IT-215, claim for earned income credit.

_____2011: Petitioner reported business income of \$13,180.00, reduced the same by one-half of the claimed amount of self-employment tax paid (\$931.00), thus arriving at federal and New York State adjusted gross income of \$12,249.00. Petitioner requested a refund in the amount of \$4,543.00, consisting of an empire state child credit (\$458.00), a child and dependent care credit (\$2,310.00), an earned income credit (\$1,712.00 [New York State amount of \$1,467.00 plus New York City amount of \$245.00]), and a New York City school tax credit (\$63.00). Petitioner's return included form IT-215, claim for earned income credit, and form IT-216, claim for child and dependent care credit, which listed two qualifying children.

2. The Division conducted an audit of petitioner's tax returns for each of the foregoing years. In conducting the audit, the Division reviewed its records, and requested additional information from petitioner regarding the claimed qualifying children, her payment of child care expenses, and proof of her reported business income.

3. On September 30, 2011, following telephone contact with petitioner and review of documents in its possession, the Division determined to allow a partial refund of \$212.00 for the year 2010. On October 18, 2011 the Division issued to petitioner a partial refund for the year 2010 in the amount of \$212.00.¹

4. On November 23, 2011, petitioner submitted documentation to the Division to establish that she had two dependent children, each of whom was under the age of 13 and in her

¹ It would appear the partial refund amount allowed for 2010 consisted of petitioner's claimed school tax credit (\$63.00), claimed real property tax credit (\$49.00) and a portion of her claimed child tax credit (\$100.00 out of \$516.00).

care during the years in issue. Petitioner also submitted an undated letter, bearing a notarial jurat dated December 15, 2009, indicating that she was employed 28 hours per week as a dishwasher by Picardia Latino Bar & Restaurant earning \$7.15 per hour. However, petitioner was unable to furnish any further documentation including substantiation of her claimed earned income and dependent care expenses for any of the subject years under review.

5. After review of the foregoing information, and in response to additional information provided by petitioner in response to the above-noted partial refund, the Division further adjusted petitioner's claimed refund for the year 2010 by increasing the same from \$212.00 to \$312.00, thus leaving \$2,042.00 of her claimed 2010 total refund of \$2,354.00 as disallowed (consisting of \$316.00 of her \$516.00 claimed empire state child credit and all of her \$1,726.00 claimed NYS/NYC earned income credits).²

6. On August 31, 2012, the Division issued to petitioner a notice of disallowance advising that the \$2,042.00 balance of her refund claim for 2010 was disallowed.

7. For the years 2007 and 2011, the Division did not issue to petitioner the refunds she claimed within six months of the dates on which they were claimed, and the same were thus deemed disallowed pursuant to Tax Law § 689 (c) (3).

8. Petitioner challenged the partial refund disallowance for 2010 (*see* finding of fact 5), and the deemed refund denials for 2007 and 2011, by filing a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS).

9. By a conciliation order dated December 13, 2013, the disallowed portions of petitioner's claimed refunds were further adjusted to the extent that a refund was granted in the

² It would appear that the Division simply allowed an additional \$100.00 of petitioner's claimed child tax credit of \$516.00 for the year 2010, leaving \$316.00 of such credit disallowed.

aggregate amount of \$3,310.50. This refund amount consisted of the allowance of one-half of petitioner's claimed earned income credit for each of the years in issue (\$825.50, \$863.00 and \$856.00 for 2007, 2010 and 2011, respectively), plus the child credit amounts of \$100.00 and \$458.00 claimed for 2007 and 2011, respectively, plus the school tax credit amounts of \$145.00 and \$63.00 claimed for 2007 and 2011, respectively.

10. As a consequence of the foregoing allowances, the aggregate amount of petitioner's claimed refund remaining in issue totals \$7,923.50, and is comprised of petitioner's claimed child and dependent care credit amounts for 2007 and 2011 (\$2,753.00 and \$2,310.00, respectively), plus one-half of petitioner's claimed earned income credit amounts for 2007, 2010 and 2011 (\$825.50, \$863.00 and \$856.00, respectively) plus the remaining disallowed portion of petitioner's claimed child credit for 2010 (\$316.00).

11. At the hearing, the Division further specified that the remaining portion of petitioner's claimed child credit for 2010 (\$316.00) was allowed and was thus no longer in issue, leaving only the child and dependent care credit and earned income credit amounts detailed above at issue herein.

12. Petitioner explained at the hearing that she worked assisting the waitstaff at Eurobar in Mount Vernon, New York, in 2007, and at Café 154 in Queens, New York, in 2010 and 2011. She was paid \$7.15 per hour at Eurobar and approximately \$180.00 per week at Café 154, plus tips. Petitioner estimated that, including tips, she received approximately \$1,300.00 per month in each of the years at issue. Petitioner claimed that she, in turn, paid her mother approximately \$150.00 per week to provide care for petitioner's two children on four days per week at her brother's home in the Bronx.

13. Petitioner admits she has no records of either the amounts she paid for child care or

the amounts she received as income.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the relevant state and federal statutes related to the earned income tax credit and the child and dependent care tax credit. He noted that petitioner had the burden of proof to establish her entitlement to these credits.

The Administrative Law Judge found that petitioner did not substantiate the amount of earned income reported on her returns for the years at issue. He explained his rationale as follows:

“Petitioner produced no books, records, receipts or other documents, including any documents from any employers, to clearly show that she received either employment income or business income (as reported), or the actual amounts of such income. Petitioner stated at the hearing that she worked for two different employers. However, she did not present any pay stubs, receipts, deposit slips or any forms W-2 or 1099 from either of such employers. The record contains nothing beyond petitioner’s estimates of her income for the years at issue. Petitioner states that there is no requirement that she had to be paid by check for her services. Unfortunately, the consequence here of being paid in cash results in the absence of any documentary substantiation for the amounts petitioner claims to have received as payment (i.e., earned income). Without sufficient documentation to substantiate the claimed earned income for the years at issue, petitioner has failed to meet her burden of proof of entitlement to the remaining claimed but disallowed earned income credit for the years 2007, 2010 and 2011.”

The Administrative Law Judge also found that petitioner failed to prove that she paid child care expenses or substantiated the amount of such expenses for the years at issue (2007 and 2011):

“Petitioner was unable to provide any receipts or other documentation substantiating the claimed payments made to a dependent care provider in either of such years, including any statement from the person petitioner claimed provided the child care. As such, petitioner has failed to meet her burden of proof of entitlement to the claimed child and dependent care credit for either of the years 2007 or 2011.”

The Administrative Law Judge thus denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that she is entitled to the credits as claimed because she did, in fact, receive the amounts reported as earned income and did, in fact, pay for child care as claimed. Petitioner acknowledges that the payments she received from her employers and the payments that she made for child care during the years at issue were made in cash. She notes that this is why she lacks documentation of these payments. Once again, petitioner asserts that there is no legal requirement that such payments be made by check.

The Division argues that the Administrative Law Judge correctly determined that petitioner failed to carry her burden of substantiating her earned income or the amounts she claimed to have paid to child care providers during the years at issue.

OPINION

Tax Law § 606 (d) (1) provides for a New York State earned income credit based on a percentage of the earned income credit allowed under Internal Revenue Code (IRC) (26 USCA) § 32. Since the state earned income credit is determined based solely on a percentage of the federal credit, it is appropriate to refer to the IRC to determine petitioner's eligibility for the earned income credit. The federal earned income credit, provided for pursuant to IRC (26 USCA) § 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 employee compensation and earnings from self-employment (*see* IRC [26 USCA] § 32 [c] [2] [A]).

Tax Law § 606 (c) provides for a New York State child and dependent care credit determined as a percentage of the federal credit allowable under IRC (26 USCA) § 21. As with the earned income credit, it is appropriate to refer to the IRC to determine petitioner's eligibility for this credit. IRC (26 USCA) § 21 sets forth the requirements for the federal child and

dependent care credit. As relevant here, this credit is determined based upon a percentage of employment-related expenses, including expenses for the care of a qualified dependent under age 13 (i.e. child care expenses), incurred by a taxpayer to be gainfully employed.

Petitioner bears the burden of proof to show a clear entitlement to the tax credits at issue (*see Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.* 181 AD2d 216 [1992]; *see also* Tax Law § 689 [e]). In the present context, this means that petitioner had the burden to establish the amount of her earned income in 2007, 2010 and 2011 and the amount of her child care expenses paid in 2007 and 2011.

Upon review of the record, we find that the Administrative Law Judge fully and correctly addressed the issues presented in this matter and we affirm for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Albania Espada is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. Except as modified pursuant to finding of fact 11, the petition of Albania Espada is denied; and

4. Except as modified by the conciliation order dated December 13, 2013 (*see* findings of fact 9 and 10) and by finding of fact 11, the notice of disallowance dated August 31, 2012 and the deemed disallowances of petitioner's claimed refunds for 2007 and 2011 are sustained.

DATED: Albany, New York
January 28, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner