

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ETHMANE KANE	:	DECISION
	:	DTA NO. 829807
	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2017.	:	

Petitioner, Ethmane Kane, filed an exception to the determination of the Administrative Law Judge issued on November 17, 2022. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O’Brien, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Petitioner’s request for oral argument was denied. The six-month period for issuance of this decision began on April 24, 2023, the date that petitioner’s reply brief was received.

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

ISSUE

Whether petitioner’s claimed New York State and New York City earned income credit, Empire State child credit, enhanced real property tax credit, New York City school tax credit, and request for refund of taxes withheld were properly disallowed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioner, Ethmane Kane, electronically filed with the Division of Taxation (Division) New York State resident income tax return, form IT-201, for 2017 (return) on April 4, 2018. Petitioner listed a Brooklyn, New York, address on his return. On the return, petitioner claimed head of household as his filing status with two dependent children, S. K. and K. H.,¹ reported wages of \$14,315.00, and requested a refund of \$3,061.00. S. K. had a date of birth of December 30, 2010. K. H. had a date of birth of October 17, 2001.

2. The refund consisted of an Empire State child credit of \$560.00, a New York State earned income credit of \$1,640.00, a New York City school tax credit fixed amount of \$63.00 and rate reduction amount of \$2.00, a New York City earned income credit of \$281.00, a New York City enhanced real property tax credit of \$13.00, New York State tax withheld of \$305.00, and New York City tax withheld of \$197.00.

3. With the return, petitioner also filed a claim for earned income credit, form IT-215, a claim for empire state child credit, form IT-213, W-2 information from Allstar Security & Consulting reflecting wages of \$14,315.00, state income tax withheld of \$305.00 and New York City income tax withheld of \$197.00, and a claim for New York City enhanced real property tax credit. On the claim for earned income credit, petitioner listed S. K. and K. H. as qualifying children he claimed on his federal schedule earned income credit (EIC). He also listed \$5,616.00 as the amount of federal EIC he claimed. He listed S. K. and K. H. on the claim for empire state child credit as children that were at least four but less than 17 years of age on December 31,

¹ For privacy purposes, the claimed dependents are referred to herein as S. K. and K. H.

2017. On the claim for New York City enhanced real property tax credit, petitioner checked the box marked “Yes” to indicate that he was a New York City resident for all of 2017.

Additionally, he also marked the “Yes” box, to indicate that he occupied the same residence for at least six months during 2017. At the bottom of the real property tax credit form in addition to himself, petitioner listed S. K. and K. H. as household members.

4. The Division performed a desk audit of petitioner’s 2017 return. On April 18, 2018, the Division sent petitioner an audit inquiry letter requesting verification of information petitioner listed on his income tax return. The information requested included the IRS’s approval of petitioner’s federal EIC, including his federal income tax return with all schedules and any document that indicated that he received the federal EIC and proof of his wages earned and taxes his employer withheld, such as a copy of petitioner’s W-2 or the last paycheck he received from his employer. The Division also requested information about the credits he claimed, such as the required information about his dependents, including a birth certificate or, if no birth certificate, a copy of petitioner’s birth certificate and a copy of the birth certificate of the dependent’s parent to whom petitioner is related. The Division requested proof of where the child lived, such as a letter from the child’s doctor, or school showing the child’s name, date of birth, and address, and name of the child’s custodial parent.

5. Petitioner did not respond to the Division’s audit inquiry letter.

6. The Division determined that petitioner failed to provide adequate documentation to substantiate the amounts claimed.

7. On January 9, 2019, the Division issued petitioner a notice of disallowance for tax year 2017, disallowing his claim for refund. The notice stated that the refund was denied because petitioner did not respond to the Division’s audit inquiry letter.

8. Petitioner timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) protesting the notice. On his request, he listed the same address in Brooklyn, New York, that he listed on his 2017 return. By conciliation order number 000307329, dated September 27, 2019, BCMS allowed a refund of \$188.60.

9. Petitioner timely filed a petition asserting that the Division is wrongfully holding his money for 2017 for funds claimed for his daughter and stepdaughter that he takes care of and has taken care of. Petitioner also claimed that the amount of tax determined was \$188.60 but the amount contested was \$10,767.00.

10. At some point prior to the hearing, petitioner provided documents to the Division, including the following: (i) an undated letter from Brooklyn Select PC located in Brooklyn, New York, signed by a doctor stating that petitioner was S. K.'s father and that S. K., with an address in Big Indian, New York, was a patient in the clinic for her regular physical, immunization, and other medical problems since birth; (ii) the birth certificates for S. K. and K. H.; (iii) a Census Verification Report for S. K.; (iv) an Elementary Emergency Dismissal Form for S. K., listing petitioner as an emergency contact; (v) an invoice from Dish satellite provider to petitioner for the same address in Big Indian, New York; and, (vi) a copy of K. H. and S. K.'s social security cards. S. K.'s birth certificate lists petitioner as the father. It also lists her mother's residence in Big Indian, New York, located in Ulster County. The Census Verification Report (Report) shows that S. K. lives at the same address in Big Indian, New York, as was shown on the letter from Brooklyn Select PC, and the service address for the invoice from Dish. The Report also lists Denedra Harkless, S. K.'s mother, and K. H., as members of the same household and lists petitioner as a non-household relationship.

11. At the hearing, the Division submitted the affidavit of Kathleen Loos, sworn to on June 24, 2021. Ms. Loos has worked for the Division for 13 years. She was a Tax Technician 1, and then a Tax Technician 2, before becoming a Tax Technician 3 in February of 2019. She is the Assistant Manager in the Personal Income Tax Credit Unit. Her responsibilities include reviewing New York State personal income tax returns, conducting audits, and processing refund claims. Her duties also include communicating with taxpayers, preparing administrative reports and forms and supervising unit staff. In performing these responsibilities, Ms. Loos reviewed petitioner's file and his New York State personal income tax return for tax year 2017.

12. In her affidavit, Ms. Loos stated that at the conciliation conference, the conciliation conferee recomputed the statutory notice, recalculating petitioner's 2017 return as a single taxpayer with no qualifying dependents, resulting in a refund of \$188.60, but otherwise sustained the notice. It is not clear from the record how the \$188.60 was determined.

13. Ms. Loos averred that petitioner was unable to substantiate his claimed credits because he did not provide adequate documentation in response to the Division's desk audit inquiries.

14. At the hearing, petitioner submitted a payment history from petitioner to Denedra Harkless as the custodial parent from March 6, 2015 through May 10, 2021. The history does not identify the name of the child. Petitioner also submitted money orders payable to Tony Athakanagos for rent for the Big Indian, New York, address from 2014 and 2018. Some of the money orders listed petitioner as the purchaser and some of them listed Ms. Harkless. Petitioner also submitted forms from the Internal Revenue Service (IRS) stating the documents needed to claim the earned income credit on the basis of a qualifying child for 2017, the documents to prove head of household filing status, and the documents for dependency exemptions.

15. At the hearing, petitioner testified that he was living at the address in Big Indian, New York. He stated that he lived there for more than six months but that he also lived in Brooklyn and used both addresses. He also testified that K. H. and his daughter, S. K., were living in Ulster County, but that S. K. would visit him in Brooklyn.

16. The Administrative Law Judge left the record open for petitioner to submit a Release/Revocation of Release of Claim to Exemption for Child of Custodial Parent (Release), IRS form 8332, that he had brought to the first day of the hearing but did not have on the continued second day, and for a letter from S. K. and K. H.'s mother regarding support provided by petitioner. Petitioner submitted the Release, signed on July 9, 2021, showing that Ms. Harkless agreed not to claim an exemption for K.H. for tax year 2017. The next section of the form provided for a release of claim to exemption for future years and there, Ms. Harkless wrote she agreed not to claim an exemption for S. K. for tax year 2017. Petitioner also submitted an email from Ms. Harkless stating that petitioner helped pay her rent during 2017 and that he provided child support for his daughter. She also stated that petitioner helped with her car payments. The letter does not state that petitioner lived with Ms. Harkless, S. K. and K. H. Both documents were admitted into evidence.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by listing the various claims made by petitioner in disputing the notice of disallowance and set forth the well-established legal authority holding that it was petitioner's burden, by clear and convincing evidence, to establish an entitlement to the claimed refund. In reviewing petitioner's claimed credits, the Administrative Law Judge set forth the requirements that petitioner was obligated to establish to receive each credit and reviewed the evidence (or lack thereof) submitted by petitioner to meet his burden. In each case,

the Administrative Law Judge held that petitioner had submitted insufficient evidence to meet his burden of establishing his entitlement to the claimed credit. Accordingly, the Administrative Law Judge denied the petition and affirmed the notice of disallowance as modified by the conciliation order.

ARGUMENTS ON EXCEPTION

On exception, petitioner reasserts his right to the claimed credits. He also submits a funeral contract purporting to be for his stepdaughter whom he said had passed the previous year. The document cannot be considered, however, because it constitutes an extra-record submission, (*Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991), and, in any event, does not pertain to the applicable tax year. The Division argues generally that petitioner failed to meet his burden.

OPINION

A taxpayer seeking to establish a right to a tax credit bears “the burden of showing ‘a clear-cut entitlement’ to the statutory benefit” (*Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.*, 181 AD2d 216, 219 [3d Dept 1992], citing *Matter of Grace v State Tax Commn.*, 37 NY2d 193, 197 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]). Moreover, a petitioner generally bears the burden of proof in a proceeding in the Division of Tax Appeals (Tax Law § 689 [e], 20 NYCRR 3000.15 [d] [5]). Petitioner here has failed to adduce sufficient evidence to meet this burden.

Petitioner claims a New York State earned income credit pursuant to Tax Law § 606 (d) (1), which provides a credit of 30 percent of the earned income credit allowed under Internal Revenue Code (IRC) (26 USC) § 32. Similarly, he claims the New York City earned income credit which, pursuant to Tax Law § 1310 [f] [1] and Administrative Code of the City of New

York § 11-1706 [d] [1] provides a credit of five percent of the federal earned income credit (EIC) under IRC (26 USC) § 32. Because eligibility for the New York State and City earned income credits is tied to a percentage of the federal calculation under the IRC, it is the IRC's provisions on eligibility that control (*see Matter of Espada*, Tax Appeals Tribunal, January 28, 2016). IRC (26 USC) § 32 requires that a taxpayer must have earned income, which includes employee compensation and earnings from self-employment, with an adjusted gross income (AGI) below a certain level (IRC [26 USC] § 32 [c] [2]).

Contrary to the Administrative Law Judge's determination, it appears from the record that the Division accepted petitioner's income as reported on his return (*see* finding of fact 12). Petitioner did not, however, establish that he had qualifying children for purposes of the earned income credit and thus failed to establish an entitlement to a greater credit based on qualifying children (*see* IRC [26 USC] § 32 [b]). IRC (26 USC) § 152 (c) provides that a "qualifying child" means an individual "who bears a relationship to the taxpayer described in paragraph (2)" (IRC [26 USC] § 152 [c] [1] [A]). An individual bears a relationship to a taxpayer if the individual is "a child of the taxpayer or a descendant of such a child" or "a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative" (IRC [26 USC] § 152 [c] [2]) (relationship test). The qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the tax year (IRC [26 USC] § 152 [c] [1] [B]), the child must not have attained the age of 19 or be a full-time college student under the age of 24 (IRC [26 USC] § 152 [c] [3] [A] [i]), the child must not have provided over one-half of his or her own support for the taxable year (IRC [26 USC] § 152 [c] [1] [D]), and the child must not have filed a joint return with a spouse for that taxable year (IRC [26 USC] § 152 [c] [1] [E]). Even where no parent claims a child, IRC (26 USC) § 152 (c) (4) (C) provides that such individual may be

claimed as the qualifying child of another taxpayer but only if the AGI of such taxpayer is higher than the highest AGI of either parent of the individual.

The calculation required is driven by the calculation of earned income and proof of the relationship and common abode. Petitioner submitted insufficient evidence that either K. H. (who was not his daughter) or his daughter, S. K., had lived with him for more than one-half of the 2017 tax year. Nor did he submit sufficient evidence of whether he lived in Big Indian, New York or Brooklyn. The Dish invoices and the payments to the landlord were insufficient to establish that petitioner lived in Big Indian, New York. To the contrary, as the Administrative Law Judge noted, the Census Verification report, petitioner's request to BCMS, and his claim for New York City enhanced real property tax credit, all suggest that he lived in Brooklyn, New York. Petitioner himself testified that he lived at both addresses, and that S. K. visited him at his residence in Brooklyn. Additionally, while S. K. and K. H.'s mother stated that petitioner helped support all of them, her statement did not establish where petitioner lived or that he lived with his daughter.

K.H., who is not petitioner's daughter, cannot be a qualifying child for whom petitioner can claim an earned income credit pursuant to IRC [26 USC] § 152 [c] [4] [C]) because petitioner has not submitted any evidence that his AGI is higher than the highest AGI of either of K. H.'s parents. Accordingly, petitioner has not met his burden of establishing that he has qualifying children entitling him to the earned income credit.

Petitioner has also failed to establish that he is entitled to his claimed Empire State child credit for 2017 pursuant to Tax Law § 606 (c-1), which provides for a credit equal to the greater of \$100.00 times the number of qualifying children of the taxpayer or the applicable percentage of the child tax credit allowed to the taxpayer pursuant to IRC (26 USC) § 24 for the same

taxable year for each qualifying child. Pursuant to IRC (26 USC) § 24, a taxpayer may claim a child tax credit for an individual who is his “qualifying child” as defined in IRC (26 USC) § 152 (c) and has not attained the age of 17 during the taxable year (IRC [26 USC] § 24 [a], [c]). Since petitioner did not meet his burden of proving that S. K. and K. H. were qualifying children under the same provision for purposes of the earned income credit, he also did not meet his burden of proving them as qualifying children for purposes of the Empire State child credit.

Petitioner has not shown any error by the Division in its recomputation of his liability for the year at issue with respect to any other claimed credits or tax withheld.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ethmane Kane is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Ethmane Kane is denied; and
4. The January 9, 2019 notice of disallowance, as modified by the September 27, 2019 conciliation order, is sustained.

DATED: Albany, New York
October 19, 2023

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner