

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ALBANIA ESPADA** : DETERMINATION  
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. :  
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Petitioner, Albania Espada, 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 and the New York City Administrative Code for the years 2007, 2010 and 2011.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York City, on September 16, 2014, at 10:30 A.M., with all briefs to be submitted by October 31, 2014, which date commenced the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro E.G. Taylor, Esq., of counsel).

***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***

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:

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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.

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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.

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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 of Taxation (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.<sup>1</sup>

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 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

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<sup>1</sup> 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).

\$316.00 of her \$516.00 claimed Empire State child credit and all of her \$1,726.00 claimed NYS/NYC earned income credits).<sup>2</sup>

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 (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 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

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<sup>2</sup> 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.

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 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 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. In this regard, petitioner argues that payments she makes to child care providers and payments she receives from her employers for services performed are not required to be made by check, and were in fact not made by check. Petitioner acknowledges this as the reason why she is unable to specify any particular amounts of such payments.

14. The Division takes the position that petitioner has not provided evidence substantiating that child care expenses were paid, as claimed, for the years 2007 and 2011, or the amounts of such payments. Similarly, the Division argues that petitioner has not provided evidence substantiating the amount or sources of the income she earned in any of the years at issue, so as to be entitled to the earned income credits she has claimed. In sum, the Division

maintains its denial of petitioner's remaining amounts of claimed refund (based upon claimed child and dependent care credits and earned income credits, as detailed) is proper.

### ***CONCLUSIONS OF LAW***

A. 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 section 32 of the Internal Revenue Code (IRC). Since the state earned income credit is determined based solely on a percentage of the federal credit, it is appropriate to refer to the provisions of the IRC to determine petitioner's eligibility for the earned income credit.

B. The federal earned income credit, provided for pursuant to IRC § 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 earnings from self-employment (*see* IRC § 32[c][2][A][i]). Petitioner bears the burden of proof (*see* Tax Law § 689[e]) to substantiate the amount of earned income reported on her returns.

C. Upon review of the record it is clear that petitioner has failed to meet her burden of substantiating the amounts of earned income reported on her returns. 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.

D. With respect to the New York State child and dependent care credit, Tax Law § 606(c) provides that the allowable New York State credit is determined as a percentage of the federal credit allowable under section 21 of the IRC. 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 that includes the qualified dependent. To be eligible for the credit, petitioner bears the burden of proving that she paid child care expenses in 2007 and 2011, and the burden of substantiating the amount of such expenses she paid. 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.

E. The petition of Albania Espada is granted to the extent set forth in Findings of Fact 9, 10 and 11, but is otherwise denied, and the Notice of Disallowance dated August 31, 2012 plus the deemed disallowances of her claimed refunds for 2007 and 2011, as adjusted in accordance

with the December 13, 2013 Conciliation Order and as further adjusted in accordance herewith,  
are sustained.

DATED: Albany, New York  
April 9, 2015

/s/ Dennis M. Gallier  
ADMINISTRATIVE LAW JUDGE