STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARMEN CARDENAS	:	DETERMINATION DTA NO. 827862
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 Year 2014.	:	

Petitioner, Carmen Cardenas, 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 year 2014.

A hearing was held before Kevin R. Law, Administrative Law Judge, on November 15, 2018 and continued on December 18, 2018, in New York, New York, with all briefs to be submitted by April 11, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared by Jhonatan Mondragon, EA. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claimed earned income credit.

II. Whether the Division of Taxation properly denied petitioner's child and dependent care credit.

FINDINGS OF FACT

1. On February 1, 2015, petitioner, Carmen Cardenas, filed a 2014 New York State and New York City resident income tax return (form IT-201) on which $7,882.00 of wage income and $6,700.00 of schedule C business income was reported. The schedule C listed the business activity as a cleaning business. No business expenses were claimed by petitioner on the schedule C. Petitioner filed as head of household and did not claim any dependents on her return. The following refundable credits were claimed by petitioner:

CREDITS	AMOUNT CLAIMED
New York State and City Child and Dependent Care Credits	$1,101.00
New York State and City Earned Income Credits	$1,851.00
Real Property Tax Credit	$47.00
New York City School Tax Credit	$63.00
New York City Enhanced Real Property Tax Credit	$18.00

The New York State and City earned income credits were claimed based upon two qualifying children.

2. On March 2, 2015, the Division of Taxation (Division) sent a letter notifying petitioner that additional information was needed in order to process her 2014 income tax return. Specifically, the letter requested information about the money petitioner "earned by working for [herself]," and petitioner's children or dependents. Information and documentation requested included the following: a copy of petitioner's federal schedule C for 2014; copies of any license, registration, or certification for petitioner's business; copies of summary documents used to calculate the income and expenses reported on petitioner's tax return, such as ledgers, spreadsheets, or income and expense journals for the entire 2014 tax year; copies of detailed

documentation, such as sales slips, invoices, bank statements, or receipts supporting the business income for at least two months of 2014; completion of an enclosed self-employed questionnaire; proof of petitioner's relationship to each child or dependent for whom a credit was claimed, consisting of copies of the birth certificate for each child for whom petitioner was claiming a credit, or if not listed on the birth certificate, documentation showing petitioner's relationship to the child or dependent; and, proof that the child or dependent lived with petitioner for more than half the year, consisting of a letter from the child's doctor or school showing the child's name, date of birth, address, and the name of the custodial parent.

3. According to the Division, petitioner responded with some documentation. The record, however, does not indicate specifically what was provided.

4. On June 8, 2015, the Division issued an account adjustment notice to petitioner which allowed a refund of $241.00 and disallowed the earned income credits and the child and dependent care credits. The "Explanation" section of the account adjustment notice contained, in pertinent part, the following paragraphs:

> "The following adjustment(s) has been made to your New York State income tax return.
>
> In order to qualify for the earned income credit, you must be able to document that you received earned income during the tax year. For business income, you must be able to provide records that support when the income was earned, to whom services were provided, and the exact amount of compensation received from each transaction. You did not provide the required documentation to verify the business income claimed on your return. . . .
>
> In our previous correspondence, we asked you to provide a statement on letterhead of a school or physician indicating the child s [sic] name, date of birth, address of record, and the name of parent/ legal guardian with whom the child resided during the tax year stated above. The information provided did not show where your dependents lived for the above tax year.

> Since your response to our inquiry did not include the required documentation to substantiate the business income reported and the qualifying children claimed on your return, the New York State and New York City earned income credits have been disallowed.
>
> You did not provide proof of payment for child care services as claimed on your return, therefore your claim for the child and dependent care expense credit has been disallowed."

5. At the hearing, the Division introduced the affidavit of Matthew Roberts, a Tax Technician 2 with the Division. While Mr. Roberts was not the auditor assigned to audit petitioner's 2014 return, he reviewed the Division's audit file as part of his duties for this matter.

6. Attached to Mr. Roberts' affidavit are petitioner's children's birth certificates. At the end of 2014, petitioner's children were ages 4 and 11, respectively.

7. Mr. Roberts' affidavit states that since petitioner claimed her minor children as qualifying children for purposes of the earned income credit, but did not claim them as dependents on her 2014 return, he checked the Division's records to ascertain whether any other taxpayer claimed the children. Mr. Roberts ascertained that the children's father claimed them as dependents on his 2014 New York State personal income tax return and claimed the empire state child credit. A copy of the father's return was attached to Mr. Roberts' affidavit. Review of this return indicates that the father's filing status was "single," and his home address was different than petitioner's.[1]

8. During Mr. Roberts' review of this matter, Mr. Roberts determined that petitioner failed to report $15,400.00 of income paid to her by Hariworld Travel Group (Hariworld) in 2014 that was reported on a federal form 1099. Mr. Roberts notes that no amended returns have been filed by petitioner to report this income or claim any associated expenses. At the hearing in this

[1] There appears to be no dispute that petitioner and the children's father do not live together.

matter, petitioner acknowledged working for Hariworld in 2014 and receiving $15,400.00 of compensation but claims Hariworld never sent her a federal form 1099 reporting such remuneration. Petitioner also presented the following list of expenses that she claims she incurred while working for Hariworld:

Special Cleaning Carpet	$600.00
Special Floor	$600.00
Supplies	$800.00
Pay 3 people to do special clean	$900.00
Other: Plastic bag for garbage; toilet paper tissue; liquid soap for mop; soap; gallon of Windex; toilet cover	$2,000.00
Cell phone	$1,200.00
TOTAL	$6,100.00

9. Petitioner testified that Hariworld would occasionally request that she perform carpet and floor cleanings at its business location over and above what was normally done, and that she incurred labor and material expenses to perform such cleansing. Petitioner also testified that she incurred costs in providing premium cleaners and soaps at Hariworld's request. Finally, petitioner claimed she used her cellular telephone for business purposes. Petitioner provided no receipts, cancelled checks or any other evidence to substantiate these claimed expenses. Petitioner presented a transcript of her 2014 federal income tax return to show that the Internal Revenue Service (IRS) accepted the foregoing expenses during its examination of her federal filing. The transcript indicates that there were adjustments made to her originally reported income and the federal earned income credit originally claimed. The transcript does not indicate the specific adjustments made nor did petitioner present final federal audit changes detailing the adjustments.

10. During 2014, petitioner's two minor children lived with her. Petitioner's older child attended public school while the younger child attended Head Start.[2] School records for petitioner's older child attached to Mr. Roberts' affidavit indicate that he lived with petitioner. At the hearing in this matter, petitioner submitted a letter from the children's physician wherein the physician stated that he has known the children since birth and that they live with petitioner.

11. Attached to Mr. Robert's affidavit was a notarized letter from Monica Cardenas. Petitioner identified Ms. Cardenas as her sister-in-law. Ms. Cardenas had the same address as the children's father and petitioner acknowledged that Ms. Cardenas lived with the father. The letter states that petitioner paid Ms. Cardenas $2,860.00 to watch her children for two hours every Saturday during 2014. Mr. Roberts noted that the amount paid works out to $55.00 a week, or $27.50 an hour, which, in his opinion, is high considering the familial relationship. No cancelled checks or other contemporaneous documentation was submitted by petitioner to substantiate the amount alleged to have been paid to Ms. Cardenas. At the hearing, petitioner testified that Ms. Cardenas was compensated to pick up her child from daycare on weekdays while she was working and that on weekends petitioner's mother-in-law would watch the children if she was working.

12. The parties were given the opportunity to file briefs in this matter. Petitioner did not file either a brief in support of the petition or a brief in reply to the Division's brief in opposition.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689 (e), petitioner bears the burden of establishing, by clear and convincing evidence, that the Division's adjustment of her claimed refund is erroneous (***see***

[2]According to Mr. Roberts, Head Start is a free preschool program for low income families.

Matter of Suburban Restoration Co. v Tax Appeals Trib, 299 AD2d 751 [3d Dept 2002]). Herein, the question presented is whether petitioner established that the Division improperly disallowed the earned income and child and dependent care credits.

B. Tax Law § 606 (d) provides that the New York State earned income credit for the 2014 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. . . ." In addition, Tax Law § 1310 (f) provides for a credit equal to 5% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . ." for New York City residents. Since petitioner's eligibility for the New York State and City earned income credits hinges upon her eligibility for the federal credit, her eligibility under federal law is determinative.

C. The federal earned income credit, provided for pursuant to 26 USC § 32, is a refundable tax credit for eligible low-income workers. To be eligible to claim the credit, a taxpayer must have earned income with an adjusted gross income (AGI) below a certain level, must have a valid social security number, must use a filing status other than married filing separately, must be a United States citizen or resident alien, must have no foreign income, and have investment income less than a certain amount. "A small credit is provided to all eligible taxpayers, but the principal feature of the EIC is the more substantial credit available to eligible taxpayers who have one or more 'qualifying' children" (***Sherbo v Commr.***, 255 F3d 650, 651 [8th Cir 2001], citing 2 Bittker & Lokken, Federal Taxation of Income, Estate & Gifts ¶ 37.1 [3d ed. 2000]). The amount of credit varies depending on the number of the taxpayer's "qualifying children" as defined by 26 USC § 152 (C) and the taxpayer's AGI. In this case there are two issues present concerning petitioner's eligibility for the earned income credit, to wit: whether petitioner had qualifying children and the amount of petitioner's earned income during 2014.

D. In this instance, the Division has asserted that petitioner is precluded from claiming her children as qualifying children for purposes of the earned income credit because she did not claim them as dependents. The Division's argument is rejected as it does not take into account the special rules for divorced or separated parents who live apart. For purposes of the earned income tax credit, the term "qualifying child" generally means a qualifying child as defined in 26 USC § 152 (C) (***see*** 26 USC § 32 [c] [3]). Generally to be a qualifying child, an individual must: (i) bear a specified relationship to (i.e., be a child of) the taxpayer; (ii) have the same principal place of abode as the taxpayer for more than one-half of the taxable year; (iii) not have attained the age of 19 during or before the taxable year in issue; (iv) not have provided more than one-half of his or her own support for the year; and (v) not have filed a joint return for that year (***see*** 26 USC § 152 [c]). In this case the record establishes that petitioner's two minor children lived exclusively with her during 2014 based upon petitioner's testimony, the children's physician's letter, and the school records. There is no indication or allegation that petitioner's minor children were supported by anyone other than petitioner and their father, nor is there any indication that the children were married and filed joint returns.

E. Although the children's father claimed the children as dependents and claimed the child tax credit on his income tax return, he did not claim the children as qualifying children for purposes of the earned income credit or file as head of household. Petitioner's income tax filing and the children's father's income tax filing are entirely consistent with the children living with petitioner and with petitioner's testimony. 26 USC § 151 (C) allows a taxpayer a dependency exemption deduction for each dependent as defined in 26 USC § 152. The term "dependent" includes certain individuals, such as a son or daughter, "over half of whose support, for the calendar year . . . was received from the taxpayer (or is treated under subsection . . . (e) as

received from the taxpayer)" (26 USC § 152 [a]). 26 USC § 152 (e) provides special rules for a child of parents who have not lived together for the last 6 months of the calendar year. In that situation, the statute provides that if a child receives over one-half of his or her support from his or her parents, the child shall be treated as receiving over one-half of his or her support from the custodial parent, unless, as relevant here, the "custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year," and "the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year" (26 USC §152 [e] [2] [A] and [B]). Under those circumstances the children are treated as receiving over one-half of their support from the noncustodial parent; i.e., the father in this case. This, however, has no bearing on whether the children are qualifying children for earned income credit purposes. For purposes of the earned income credit, the term "qualifying child" means a qualifying child as defined in USC § 152 (C) "without regard to [the special rules for divorced or separated parents or parents who live apart]" (26 USC § 32[c] [3] [A]). Further support is found in IRS Publication 596, wherein it states:

> "If a child is treated as the qualifying child of the noncustodial parent under the special rule . . . for children of divorced or separated parents (or parents who live apart), only the noncustodial parent can claim an exemption and the child tax credit for the child. However, the custodial parent, if eligible, or any other [sic] eligible taxpayer can claim the child as a qualifying child for the EIC and other tax benefits listed earlier in this chapter. If the child is the qualifying child of more than one person for these benefits, then the tiebreaker rules determine which person can treat the child as a qualifying child."

Here, consistent with the above-quoted language, the father claimed the children as dependents and claimed the empire state child credit, but did not claim the children as qualifying

children for purposes of the earned income credit. In addition, petitioner's testimony and other evidence in the record leads to the conclusion that the children were not qualifying children of their father because they did not live with him for more than one-half of the year. Accordingly, petitioner, as the custodial parent, was eligible to claim the children as qualifying children for the earned income credit.[3]

F. Having determined that petitioner may claim the earned income credit with two qualifying children, it must be determined how much income the credit is based upon. As noted, the amount of the earned income credit is dependent on whether the taxpayer had earned income and the amount thereof. In 2014, the earned income credit was completely phased out for taxpayers filing single or as head or household with two qualifying children whose earned income equaled or exceeded $43,756.00 (***see*** Rev. Proc. 2013–35). In this case, as acknowledged by petitioner, she failed to report $15,400.00 of income earned from Hariworld resulting in audited federal AGI of $28,420.00. Petitioner, however, claims that she had expenses that should be used to offset this additional income. Petitioner's assertion is rejected.

G. 26 USC § 162 (a) entitles a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Since deductions are a matter of legislative grace, petitioner bears the burden of proving that she is entitled to any claimed deduction (***see INDOPCO Inc. v Commr***, 503 US 79, 84 [1992]); Tax Law § 689 [e]). In this case, petitioner cannot satisfy this burden with an unverifiable estimate of expenses (***Norgaard v Commr***, 939 F2d 874, 879 [9th Cir. 1991]). At hearing, petitioner did not provide any receipts, cancelled checks or anything else of evidentiary value that would support her

[3] It is also noted that petitioner also properly filed as head of household despite not claiming her children as dependents (***see*** 26 USC § 2[b] [1] [A] [i]).

entitlement to these claimed expenses. Based on this conclusion, it is determined that petitioner's claimed earned income credit should be computed based upon two qualifying children with an adjusted gross income of $28,420.00.

H. Finally, the Division disallowed the child and dependent care credit claimed by petitioner. 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. . . ." Like the earned income credit, since the allowable New York child and dependent care credit is based upon on the corresponding federal credit, petitioner's eligibility under federal law is determinative.

I. The amount of the child and dependent care credit allowed pursuant to 26 USC § 21 is based on a percentage of the employment related expenses, including expenses for the care of a qualified child under age 13, incurred by a taxpayer who is gainfully employed. First, the Division asserts that because petitioner did not claim the children as dependents she is precluded from claiming this credit. As with the earned income credit, only the custodial parent may claim this credit. Thus, although petitioner did not claim dependency exemptions for her children, she may still claim child and dependent care expenses for them (***see*** 26 USC § 21 [e] [4], [5]; Treas Reg § 1.21-1 [b] [5] [ii]). Nonetheless, petitioner has failed to meet her burden of proving entitlement to the dependent and child care credits given the familial relationship of the alleged caregiver, the conflicting testimony of petitioner, and the statements in the notarized letter from petitioner's sister-in-law and, the lack of supporting documentation such as cancelled checks.[4]

[4] The Division also denied petitioner's claim for the New York City child and dependent care credit provided for in section 11-1706 (e) of the Administrative Code of the City of New York. In order to qualify for this credit, a taxpayer must first qualify to claim the New York State child and dependent care credit. Since petitioner has not proven her entitlement to the New York State child and dependent care credit, the New York City credit is likewise denied. In addition, unlike the federal and New York State child and dependent care credits, the New York City child and dependent care credit requires the qualifying child to be under the age of 4 at the close of the taxable

J. The petition of Carmen Cardenas is granted in accordance with conclusions of law E, F and G, but is otherwise denied. The Division of Taxation is directed to modify the June 8, 2015 account adjustment notice in accordance therewith.

DATED: Albany, New York
October 3, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE

year. Since petitioner's children were ages 4 and 11 during 2014, she does not qualify for the New York City child and dependent care credit regardless of whether she had succeeded in proving her entitlement to the New York State credit.