

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSEFINA ESTEVEZ** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 827892  
Personal Income Tax under Article 22 of the Tax Law :  
for the Years 2010 through 2014. :

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Petitioner, Josefina Estevez, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the years 2010 through 2014.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on October 23, 2018 in New York, New York, with all briefs to be submitted by April 4, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation properly disallowed petitioner's claimed earned income credits for tax years 2010 through 2014.

II. Whether the Division of Taxation properly disallowed portions of petitioner's claimed empire state child credits for tax years 2010 through 2014.

***FINDINGS OF FACT***

1. Petitioner, Josefina Estevez, electronically filed a New York State and City resident income tax return, form IT-201, for each of the years 2010 through 2014, reporting an address in New York, New York, and claiming head of household filing status for each of such years.

2. Petitioner's 2010 tax return reported business income in the amount of \$11,575.00 and listed petitioner's occupation as "self-employed." Attached to petitioner's 2010 return is schedule C-EZ, net profit from business, reporting petitioner's business as "maintenance," reporting a business name and address of "Estevez Beauty Salon & Bouti," Bronx, New York, and reporting gross receipts and net profit in the amount of \$11,575.00.

3. Petitioner claimed New York State and City earned income credits totaling \$1,697.00, an empire state child credit in the amount of \$384.00, and a New York City school tax credit in the amount of \$63.00 on her 2010 tax return. Petitioner reported no tax due and claimed a refund in the amount of \$2,144.00 for tax year 2010. Attached to the 2010 return is form IT-215, claim for earned income credit, on which petitioner reported three qualifying children: two sons born in 2002 and 2003, respectively, and a third son, Hermes, a full-time student born in 1991. Also attached to the return was form IT-213, claim for empire state child credit, on which petitioner reported two qualifying children: sons born in 2002 and 2003.

4. Petitioner's 2011 tax return reported business income in the amount of \$11,700.00 and listed petitioner's occupation as "self-employed." Attached to petitioner's 2011 return is schedule C-EZ, reporting petitioner's business as "maintenance," reporting a business name and address of "Estevez Beauty Salon & Bouti," Bronx, New York, and gross receipts and net profit in the amount of \$11,700.00.

5. Petitioner claimed New York State and City earned income credits totaling \$1,713.00, an empire state child credit in the amount of \$390.00, and a New York City school tax credit in the amount of \$63.00 on her 2011 tax return. Petitioner reported no tax due and claimed a refund in the amount of \$2,166.00 for tax year 2011. Attached to the 2011 return is form IT-215, on which petitioner reported three qualifying children: two sons born in 2002 and 2003,

respectively, and a third son, Franklin, a full-time student born in 1989. Also attached to the return was form IT-213, on which petitioner reported two qualifying children: sons born in 2002 and 2003.

6. Petitioner's 2012 tax return reported business income in the amount of \$11,700.00 and listed petitioner's occupation as "self-employed." Attached to petitioner's 2012 return is schedule C-EZ, reporting petitioner's business as "maintenance," reporting a business name and address of "Imagen Hair Style Spa LLC," Bronx, New York, and reporting gross receipts and net profit in the amount of \$11,700.00.

7. Petitioner claimed New York State and City earned income credits totaling \$1,713.00, an empire state child credit in the amount of \$390.00, and a New York City school tax credit in the amount of \$63.00 on her 2012 tax return. Petitioner reported no tax due and claimed a refund in the amount of \$2,166.00 for tax year 2012. Attached to the 2012 return is IT-215, on which petitioner reported three qualifying children: two sons born in 2002 and 2003, respectively, and a third son, Franklin, a full-time student born in 1989. Also attached to the return was form IT-213, on which petitioner reported two qualifying children: sons born in 2002 and 2003.

8. Petitioner's 2013 tax return reported business income in the amount of \$12,220.00 and listed petitioner's occupation as "self-employed." Attached to petitioner's 2013 return is schedule C-EZ, reporting petitioner's business as "maintenance," reporting a business name and address of "Imagen Hair Style Spa LLC," Bronx, New York, and reporting gross receipts and net profit in the amount of \$12,220.00.

9. Petitioner claimed New York State and City earned income credits totaling \$1,593.00, an empire state child credit in the amount of \$414.00, and a New York City school tax credit in the amount of \$63.00 on her 2013 tax return. Petitioner reported no tax due and claimed a refund

in the amount of \$2,070.00 for tax year 2013. Attached to the 2013 return is form IT-215 and form IT-213, on which petitioner reported two qualifying children: sons born in 2002 and 2003.

10. Petitioner's 2014 tax return reported business income in the amount of \$11,960.00 and listed petitioner's occupation as "self-employed." Attached to petitioner's 2014 return is schedule C-EZ, reporting petitioner's business as "maintenance," reporting a business name and address of "Imagen Hair Style Spa LLC," Bronx, New York, and gross receipts and net profit in the amount of \$11,960.00.

11. Petitioner claimed New York State and City earned income credits totaling \$1,558.00, an empire state child credit in the amount of \$402.00, and a New York City school tax credit in the amount of \$63.00 on her 2014 tax return. Petitioner reported no tax due and claimed a refund in the amount of \$2,023.00 for tax year 2014. Attached to the 2014 return is form IT-215 and form IT-213, on which petitioner reported two qualifying children: sons born in 2002 and 2003.

12. The Division of Taxation (Division) sent audit inquiry letters to petitioner, dated February 28, 2011 for tax year 2010, March 12, 2012 for tax year 2011, March 12, 2013 for tax year 2012, March 17, 2014 for tax year 2013, and March 9, 2015 for tax year 2014, each requesting documentation to support her refund requests for those years. The letters requested that petitioner provide any license, registration or certification needed for her business, the documents used to calculate the income and expenses reported, such as ledgers, spreadsheets, or income expense journals, and detailed documentation such as sales slips, invoices, bank statements or receipts supporting her business income for the tax years at issue. Included with the letters were questionnaires to be completed by the petitioner. The letters also requested that petitioner provide documentation for the claimed qualifying children, including documentation from schools showing that children between the ages of 19 and 24 were full-time students.

13. At the hearing, the Division submitted the affidavit of Thomas S. Mickiewicz, a Tax Technician 1 with the Division. Mr. Mickiewicz's responsibilities include reviewing and processing New York State personal income tax returns, conducting audits, resolving protests, communicating with taxpayers, and preparing administrative records, reports and forms. In performance of those responsibilities, Mr. Mickiewicz reviewed "the file and filing history for [petitioner] and her personal income tax returns."

14. In his affidavit, Mr. Mickiewicz asserts that "[o]n or about October 30, 2015, petitioner responded via fax" to the Division's desk audit inquiry letters for tax years 2010 through 2014. Mr. Mickiewicz further asserts that after reviewing the information provided in response to the five desk audit inquiry letters, the Division issued an account adjustment notice - personal income tax (account adjustment notice) for each of the years at issue.

15. None of the attachments to Mr. Mickiewicz's affidavit include the information which petitioner provided to and was reviewed by the Division's Income/Franchise Tax Desk Audit Bureau.

16. The Division issued to petitioner an account adjustment notice for tax year 2010, dated December 14, 2015, adjusting petitioner's 2010 return by disallowing the claimed earned income credit and, after recomputing the empire state child credit, allowing an empire state child credit in the amount of \$200.00 and the New York City school tax credit in the amount of \$63.00 for a total refund of \$263.00. The "Explanation" section of the account adjustment notice contained, in pertinent part, the following paragraphs:

"We have reviewed the information you sent in response to our letter dated 2/28/2011.

Our letter specifically asked that you provide verifiable information to document your earned income, any qualifying children claimed and/or dependent care expenses.

The information you provided was either incomplete or unverifiable.

The business income reported on your return has been disallowed. You have not provided sufficient business records to substantiate the amounts reported. New York State Law requires small businesses, and the self employed, to keep records to enable the preparation of accurate tax returns. For business income, or if you are self employed, you must provide the complete set of records used to compute the income claimed on your federal Schedule C. These records must support when the income was earned, to whom services were provided, or goods sold; and the exact amount of compensation received from each transaction. Hand written receipts, or letters, by themselves, even if they are notarized, are not verifiable. Acceptable proof of income includes copies of a general ledger, receipt booklet or signed and dated receipts, along with bank statements showing the deposits of the amount of money you received.

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Since you did not send the requested documentation showing Hermes was a full time student in 2010, he has been disallowed as a qualifying child for purposes of the earned income credit.”

17. The Division issued to petitioner an account adjustment notice for tax year 2011, dated December 14, 2015, adjusting petitioner’s 2011 return by disallowing the claimed earned income credit and, after recomputing the empire state child credit, allowing an empire state child credit in the amount of \$200.00 and the New York City school tax credit in the amount of \$63.00 for a total refund of \$263.00. The “Explanation” section of the account adjustment notice contained, in pertinent part, the following paragraphs:

“We have reviewed the information you sent in response to our letter dated 3/12/2012.

Our letter specifically asked that you provide verifiable information to document your earned income, any qualifying children claimed and/or dependent care expenses.

The information you provided was either incomplete or unverifiable.

The business income reported on your return has been disallowed. You have not provided sufficient business records to substantiate the amounts reported. New York State Law requires small businesses, and the self employed, to keep records to enable the preparation of accurate tax returns. For business income, or if you are self employed, you must provide the complete set of records used to compute the income claimed on your federal Schedule C. These records must support when the income was earned, to whom services were provided, or goods sold; and the exact amount of compensation received from each transaction. Hand written receipts, or letters, by themselves, even if they are notarized, are not verifiable. Acceptable proof of income includes copies of a general ledger, receipt booklet or signed and dated receipts, along with bank statements showing the deposits of the amount of money you received.”

18. The Division issued to petitioner an account adjustment notice for tax year 2012, dated December 14, 2015, adjusting petitioner’s 2012 return by disallowing the claimed earned income credit and, after recomputing the empire state child credit, allowing an empire state child credit in the amount of \$200.00 and the New York City school tax credit in the amount of \$63.00 for a total refund of \$263.00. The “Explanation” section of the account adjustment notice contained, in pertinent part, the following paragraphs:

“We have reviewed the information you sent in response to our letter dated 3/4/2013.

Our letter specifically asked that you provide verifiable information to document your earned income, any qualifying children claimed and/or dependent care expenses.

The information you provided was either incomplete or unverifiable.

The business income reported on your return has been disallowed. You have not provided sufficient business records to substantiate the amounts reported. New York State Law requires small businesses, and the self employed, to keep records to enable the preparation of accurate tax returns. For business income, or if you are self employed, you must provide the complete set of records used to compute the income claimed on your federal Schedule C. These records must support when the income was earned, to whom services were provided, or goods sold; and the exact amount of compensation received from each transaction. Hand written receipts, or letters, by themselves, even if they are notarized, are not verifiable. Acceptable proof of income includes copies of a general ledger, receipt booklet or

signed and dated receipts, along with bank statements showing the deposits of the amount of money you received.”

19. The Division issued to petitioner an account adjustment notice for tax year 2013, dated December 14, 2015, adjusting petitioner’s 2013 return by disallowing the claimed earned income credit and, after recomputing the empire state child credit, allowing an empire state child credit in the amount of \$200.00 and the New York City school tax credit in the amount of \$63.00 for a total refund of \$263.00. The “Explanation” section of the account adjustment notice contained, in pertinent part, the following paragraphs:

“We have reviewed the information you sent in response to our letter dated 3/17/2014.

Our letter specifically asked that you provide verifiable information to document your earned income, any qualifying children claimed and/or dependent care expenses.

The information you provided was either incomplete or unverifiable.

The business income reported on your return has been disallowed. You have not provided sufficient business records to substantiate the amounts reported. New York State Law requires small businesses, and the self employed, to keep records to enable the preparation of accurate tax returns. For business income, or if you are self employed, you must provide the complete set of records used to compute the income claimed on your federal Schedule C. These records must support when the income was earned, to whom services were provided, or goods sold; and the exact amount of compensation received from each transaction. Hand written receipts, or letters, by themselves, even if they are notarized, are not verifiable. Acceptable proof of income includes copies of a general ledger, receipt booklet or signed and dated receipts, along with bank statements showing the deposits of the amount of money you received.”

20. The Division issued to petitioner an account adjustment notice for tax year 2014, dated December 3, 2015, adjusting petitioner’s 2014 return by disallowing the claimed earned income credit and, after recomputing the empire state child credit, allowing an empire state child credit in the amount of \$200.00 and the New York City school tax credit in the amount of \$63.00 for a



total refund of \$263.00. The “Explanation” section of the account adjustment notice contained, in pertinent part, the following paragraphs:

“We have reviewed the information you sent in response to our letter. The information provided was either incomplete or insufficient.

In order to qualify for the New York State and New York City Earned Income Credits, you must be able to provide verifiable documentation to show that income was earned by you during the tax year.

Everyone involved in a business activity must keep records so they can prepare accurate and verifiable tax returns. Business records must be available for review by New York State, if requested. A good recordkeeping system records all business transactions on a daily basis. The records should identify the source of all income received, and the recipient of all expenses paid. The transactions should be recorded when they occur, and summarized in an organized journal or ledger. Each transaction should have supporting documentation. Supporting documentation includes bills, receipts, or some type of identifying slip. For most small businesses, the business checkbook is the main record for transactions. Without canceled checks, you may need statements prepared by businesses or individuals as verification for expenses.

Handwritten letters, whether or not they are notarized, are not considered proof of payment. The letter you provided from Josefina Estevez of Imagen hair Style Spa dated January 9, 2014, does not substantiate the business income and is disallowed.

You must provide documents that you received earned income during the 2014 tax year. Examples of acceptable forms of documentation include business checking account, bank statements showing deposits of earned income, receipts, front and back of canceled checks, ledgers, appointment books, employment contracts, complete client listings, etc. (one or more forms may be required).

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Since your response to our inquiry did not include the required documentation to substantiate the business income reported on your 2014 tax return, the Earned Income Credit has been disallowed.

Your claim for the Empire State Child Credit has been recomputed to allow the minimum credit based on no verifiable income and two qualifying children.

You have been allowed the New York City School Tax Credit as claimed.”

21. In protest of the account adjustment notices for tax years 2010 through 2014, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A BCMS conciliation conference was held on June 7, 2018. Subsequently, BCMS issued a conciliation order, CMS No. 269569, dated July 22, 2016, denying the request and sustaining the statutory notices, i.e., the account adjustment notices for tax years 2010 through 2014.

22. Petitioner timely filed a petition challenging the account adjustment notices and seeking refunds in the amount of \$2,144.00 for tax year 2010, \$2,166.00 for tax year 2011, \$2,166.00 for tax year 2012, \$2,070.00 for tax year 2013, and \$2,023.00 for tax year 2014. In her petition, petitioner asserts that the Division's decision to disallow her claimed refunds was made solely on the basis that she is paid in cash for her "services as a cleaning woman (housekeeper) for a business." She further asserts that she is able to maintain track of what she earns because she receives the same amount every week from the same individual. Petitioner requests a full review of her information. The refund amount sought for each of the years at issue includes a previously refunded amount of \$263.00, which refunded amount is evidenced by a copy of each year's form DTF-160-CK attached to the petition. Among the other documents attached to the petition were copies of: (1) birth certificates and social security cards for petitioner's four sons; (2) New York City Public Schools Verification of Pupil Registration for the sons born in 2002 and 2003; (3) a letter from Beth Israel Medical Center Phillips Ambulatory Care Center (BIMC-PACC) Pediatric Associates; (4) various documents from Technical Career Institutes College of Technology concerning petitioner's son Franklin; (5) five letters, bearing various dates, from Joseline Estevez; and (6) various documents from petitioner's landlord.

23. At the hearing, petitioner testified that beginning in 1999 and continuing through the present day, she has worked for Imagen Hair Style & Spa, LLC (Imagen hair salon) and its owner, Joseline Estevez (Joseline). Each work day, she uses public transportation to make the round trip between her Manhattan apartment and the hair salon located in the Bronx. She also testified that her current rate of pay is \$250.00 per week in cash. Petitioner stated that her job is to clean and maintain the hair salon.

24. Petitioner explained that she worked Monday through Friday from 11:00 a.m. until 5:00 p.m. at Imagen hair salon in the years 2010 through 2014. She acknowledged that her hours were fixed, and she had to ask for the owner's permission to take breaks and vacations. Petitioner's responsibilities included cleaning the stations, the chairs, the floors and the bathroom; emptying the trash cans; and washing the towels. In addition, petitioner washed the salon's windows two or three times a week. Petitioner testified that she was paid \$225.00 per week in cash by the salon owner, and the envelope containing the cash did not include any slip of paper showing her earnings. She further testified that she did not deposit the cash into a bank account because she used the money to pay the expenses of her household, i.e., rent, electricity, cable and other necessities. Petitioner paid her rent using money orders and her electric bills in cash at payment centers. According to petitioner, she did not have any other job during the years at issue.

25. Petitioner receives a federal subsidy towards the monthly rent for her apartment. In order to continue to receive the subsidy, she must be recertified each year. As part of the yearly recertification process, petitioner must submit written proof that she is employed and the amount of her earnings from such employment, along with proof of payment of the electric bills for the apartment. At the hearing, petitioner explained that each year, she submits a letter from the

owner of Imagen hair salon as proof of her employment and her rate of pay. The record includes letters, dated November 23, 2010, March 31, 2011, April 21, 2012, January 3, 2013 and January 9, 2014, from Joseline, the owner of Imagen hair salon (Joseline's letters). Each of Joseline's letters states, in pertinent part, as follows:

“This letter is to inform you that Ms. Josefina Estevez is currently employed with our company, she cleans our facility and her pay is \$225.00 per week. She works Monday through Friday from 11am-5pm. Ms. Estevez has been working with our company since 1999 and is currently in our employment.

Please be informed that Ms. Estevez is a good employee.”

26. Among the attachments to the petition were copies of U. S. Department of Housing and Urban Development (HUD) Office of Housing owner's certifications of compliance with HUD's tenant eligibility (HUD record for landlord) for petitioner for effective periods commencing on March 1, 2011 and ending on February 28, 2015.<sup>1</sup> On each of these HUD records for landlord, petitioner's total employment income was reported as \$11,700.00.

27. At the hearing, petitioner also introduced the testimony of Denise Nunez and Rosangel Lebron, individuals who have been petitioner's friends since 2008 and 2009, respectively.

Ms. Nunez lives in the Bronx near Imagen hair salon and regularly has her hair done by its owner. In addition, Ms. Nunez frequently brings a “food plate” to petitioner at the hair salon. At various times between 11:00 a.m. and 5:00 p.m. during the years at issue, Ms. Nunez saw petitioner cleaning the stations, sweeping the floors, and washing the towels. She observed that petitioner performed “her work with a lot of dedication and a lot of care.” Ms. Nunez testified that she asked the owner about petitioner and was told that petitioner “was always on the lookout so that there was no mess there at the salon, and that she made sure that everything was in place.”

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<sup>1</sup> The next recertification date was March 1, 2015.

Although Ms. Nunez was aware that petitioner was doing her work at the hair salon for wages, she never saw the owner pay petitioner.

In the years 2009 and 2010, Ms. Lebron's business was located in the basement of the same building in which the Imagen hair salon was located. During those years, Ms. Lebron saw petitioner arrive at 11:00 a.m. and begin work in the hair salon. Ms. Lebron also saw petitioner "clean and do her job there." Ms. Lebron never saw the owner of the salon pay petitioner.

28. During the hearing, as rebuttal to petitioner's testimony, the Division submitted an affidavit of McKinley Johnson, a Tax Technician 2 with the Division, copies of Joseline's letters, and copies of federal schedule C forms filed by Joseline as part of her New York State tax filings for the tax years 2010 through 2014.<sup>2</sup>

Joseline's 2010 schedule C for the Imagen hair salon business reports total expenses of \$37,566.00, consisting of insurance, legal and professional services, rent or lease of other business property, taxes and licenses, utilities, and "other expenses" in the amount of \$5,435.00. No detailed breakdown of the "other expenses" was provided on Joseline's 2010 schedule C. The lines for repairs and maintenance, and wages are blank.

Joseline's 2011 schedule C for the Imagen hair salon business reports total expenses of \$43,831.00, consisting of insurance, legal and professional services, rent or lease of other business property, utilities, and "other expenses" in the amount of \$9,412.00. No detailed breakdown of the "other expenses" was provided on Joseline's 2011 schedule C. The lines for repairs and maintenance, and wages are blank.

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<sup>2</sup> All non-pertinent information was redacted on each of Joseline's federal schedule C forms attached to Mr. Johnson's affidavit (*see* Tax Law § 697 [e]).

Joseline's 2012 schedule C for the Imagen hair salon business reports total expenses in the amount of \$43,439.00; however, the amounts reported for insurance, legal and professional services, rent or lease of other business property, taxes and licenses, and utilities total only \$38,867.00. The lines for repairs and maintenance, wages and "other expenses" are blank. There is no explanation for the \$4,572.00 difference in the expenses reported on this schedule C.

Joseline's 2013 schedule C for the Imagen hair salon business reports total expenses in the amount of \$45,441.00; however, the amounts reported for advertising, insurance, legal and professional services, rent or lease of other business property, repairs and maintenance of \$1,455.00, taxes and licenses, and utilities total only \$39,287.00. The lines for wages and "other expenses" are blank. There is no explanation for the \$6,154.00 difference in the expenses reported on this schedule C.

Joseline's 2014 schedule C for the Imagen hair salon business reports total expenses in the amount of \$46,643.00, consisting of advertising, insurance, legal and professional services, rent or lease of other business property, repairs and maintenance of \$519.00, utilities, and "other expenses" in the amount of \$8,308.00. The "other expenses" include, in part, garbage of \$624.00, laundry of \$2,080.00, window cleaning of \$520.00, and cleaning and maintenance in the amount of \$1,950.00. The line for wages is blank.

29. The letter dated May 4, 2011, from BIMC-PACC Pediatric Associates indicates that Hermes, Franklin, and two other boys born in 2002 and 2003, are registered patients in its pediatric practice and according to its records, "all 4" patients have a New York, New York address and petitioner is their "parent/guardian." Petitioner's address is the same as that listed for the four patients.

30. Documents from petitioner's landlord indicate that Hermes and Franklin, as well as other children, resided with petitioner in her New York, New York, apartment during the years 2011 through 2014.

31. At the hearing, petitioner did not present any documentation indicating that Hermes was a full-time student during tax year 2010.

32. Three documents concerning Franklin's status as a full-time student were attached to the petition. The first document is a letter, dated April 15, 2011, from the Technical Career Institutes (TCI) College of Technology Registrar's Office that states Franklin "has been accepted to attend classes at the Technical Career Institutes in the Business Administration - Management Track Program with classes to begin on 3/6/11 and is expected to graduate on 6/25/11." The second document is Franklin's "Student Schedule TCI" for the "2011 - Spring Session 2" academic term that listed his academic program as "(TCI) (BAM) Business Administration Management Track," and bore a print date of "4/15/2011." Review of this student schedule indicates that Franklin, whose status was listed as active, was registered for four courses, a total of 13.00 credits and 13.00 hours. The last document entitled "GRADE POINT AVERAGE INFORMATION," hand-dated and signed on "4/15/11" by a Technical Career Institutes school representative, indicates that Franklin "[h]as not established a grade point average (new student)."

33. Within the time granted post-hearing, petitioner submitted a notarized letter from Joseline Estevez, copies of petitioner's Con Edison billing statements bearing dates within the years 2010 through 2014 that reflect payments made on account, copies of money order receipts for rent payments bearing various dates in the years 2010 through 2014, and a copy of a United

States Postal Service Postal Money Order, dated November 26, 2018, payable to petitioner's landlord (submitted as proof of petitioner's payment towards her November 2018 rent).

34. The letter, dated November 26, 2018, from "Joseline Estevez - Owner Imagen Style Salon" was subscribed and sworn to before a notary on November 27, 2018. The pertinent contents of this notarized letter are as follow:

"I Joseline Estevez certify that Josefina Estevez is my employee since 1999 until present.

Her current rate of pay is \$250.00 weekly in cash, and her title is maintenance worker. She works 30 hours a week. Her schedule is Monday to Friday from 11:00am until 5:00pm.

Her annual income is \$13,000."

35. In rebuttal to petitioner's post-hearing document submissions, the Division timely submitted the affidavit of McKinley Johnson, dated December 12, 2018.

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

A. As noted above, petitioner claimed State and City earned income credits and empire state child credits in each of the tax years 2010 through 2014. As part of her claims for the earned income credit for tax years 2010 through 2014, petitioner reported two sons born in 2002 and 2003. Petitioner also reported an additional qualifying child on each of the claims for earned income credit for tax years 2010 through 2012. Specifically, petitioner reported her son Hermes, a full-time student born in 1991, as a qualifying child for tax year 2010, and her son Franklin, a full-time student born in 1989, as a qualifying child for tax years 2011 and 2012. Each of the account adjustment notices at issue herein denied the claimed earned income credit (State and City), and allowed only the minimum empire state child credit based upon no verifiable income and two qualifying children.



B. Tax Law § 606 (d) provides for a New York State earned income credit based upon a percentage of the earned income credit allowed under section 32 of the Internal Revenue Code (IRC). The New York City earned income credit is equal to five percent of the federal earned income credit (*see* Tax Law § 1310 [f] [1]; Administrative Code of the City of New York § 11-1706 [d] [1]). Since the New York State and City earned income credits are determined based solely upon 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.

C. The federal earned income credit, provided for pursuant to IRC § 32, is a refundable tax credit for eligible low-income workers. The amount of the credit depends upon the number of the taxpayer's "qualifying children" as defined by 26 USC § 152 (C) and the taxpayer's "earned income," which includes wages and earnings from self-employment (*see* IRC § 32 [c] [2]). Petitioner bears the burden of proof (*see* Tax Law § 689 [e]) to establish that Hermes and Franklin were qualifying children, and to substantiate the amount of earned income reported on her returns.

D. For purposes of the earned income tax credit, the term "qualifying child" generally means a qualifying child as defined in IRC § 152 (c) (*see* IRC § 32 [c] [3]). Pursuant to IRC § 152 (c) (2) (A), a qualifying child includes a son of the taxpayer or a descendant of a son (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 (*see* IRC § 152 [c] [1] [B]) (residency test), and the child must not have attained the age of 19 or be a full-time student under the age of 24 (*see* IRC § 152 [c] [3] [A] [i], [ii]) (age test). IRC § 152 (f) (4) defines "student" as an individual who, during each of five calendar months during the calendar year is a "full-time" student at a qualifying educational institution. A full-time student is defined as one who is enrolled for the

number of hours or courses that the educational institution considers full-time attendance (*see* Treas. Reg. § 1.151-3 [b]).

E. At audit, the Division disallowed Hermes as a qualifying child for purposes of the earned income credit because petitioner did not send documentation showing that he was a full-time student during tax year 2010. At the hearing, petitioner did not present any documentation indicating that Hermes was a full-time student during tax year 2010. Since Hermes was 19 years old at the end of 2010 and he was not a full-time student, he does not meet the age test to be considered a qualifying dependent. With respect to Franklin, petitioner reported that he was a qualifying child for purposes of the earned income credit for tax years 2011 and 2012.

Documents submitted by petitioner clearly establish that Franklin meets the relationship test and the residency test for tax years 2011 and 2012. The only evidence submitted concerning Franklin's status as a full-time student, however, indicates that he had been accepted to attend classes at TCI College of Technology in the "Business Administration - Management Track Program" beginning on March 6, 2011 and was expected to graduate on June 25, 2011. At the end of tax year 2011, Franklin was 22 years old, but was a full-time student for only four months during the calendar year. As such, Franklin was not a full-time student and did not meet the age test to be considered a qualifying dependent for tax year 2011. With respect to tax year 2012, there is no evidence that Franklin was a full-time student during the year 2012. Since Franklin was 23 years old at the end of 2012 and he was not a full-time student, he does not meet the age test to be considered a qualifying dependent.

F. As noted, the amount of the earned income credit is dependent upon whether the taxpayer had earned income and the amount thereof. In each of tax years 2010 through 2014, petitioner reported her business as "maintenance" on the schedule C-EZ, claiming income from

Imagen hair salon. The Division denied petitioner's claims for the earned income credit for tax years 2010 through 2014 because she failed to substantiate her business income as reported on her returns for those years.

In order to be entitled to the earned income credits, petitioner must provide proof of her earned income in the years 2010 through 2014 (*see Matter of Espada*, Tax Appeals Tribunal, January 28, 2016). At the hearing, petitioner produced various documents, and presented her own testimony and the testimony of Ms. Nunez and Ms. Lebron to prove her claim that she earned income in each of the years at issue. Petitioner testified credibly that she worked for Imagen hair salon and its owner, Joseline, Monday through Friday from 11:00 a.m. to 5:00 p.m. in the years 2010 through 2014. She provided a detailed explanation of her responsibilities which included cleaning the stations, the chairs, the floors and the bathroom; emptying the trash cans; washing the towels; and regularly washing the salon's windows. Petitioner admitted that the owner set her work hours, rate of pay and manner of payment, i.e., weekly in cash, and that she was required to obtain the owner's permission to take breaks or vacations. Petitioner candidly explained that she was never given statements of her earnings for any of the years at issue, but Joseline did give her letters, as proof of her employment and rate of pay, for use as part of the yearly recertification of her federal housing subsidy for the years 2010 through 2014.

Among the documents produced at the hearing were Joseline's letters, dated November 23, 2010, March 31, 2011, April 21, 2012, January 3, 2013 and January 9, 2014. Petitioner also produced Joseline's notarized letter, dated November 26, 2018, which states that "since 1999 until the present," petitioner has been her employee. Both Ms. Nunez and Ms. Lebron testified credibly to seeing petitioner working in the hair salon at various times during the years 2010 through 2014.

The credible testimony of petitioner and her witnesses, confirms the assertions made by Joseline,

in her letters, that petitioner was employed by the hair salon and cleaned it during the years 2010 through 2014. The Division did not submit any evidence matching the potency of the testimony of petitioner and her witnesses. As an employee, petitioner would have received a salary, wages or similar compensation for personal services rendered during those years.

G. Because it has been determined that petitioner's gross income included "salaries, wages or similar compensation for personal services rendered," she was required "to keep such records (including duplicate copies of wage and tax statements furnished by their employers) as will enable the [Division] to determine the correct amount of New York State income subject to tax" (*see* 20 NYCRR 158.2). However, petitioner was not required to keep the "books of accounts and records" required of other taxpayers by section 158.1 of the Division's regulations (*id.*). It is noted that the personal services which petitioner rendered to Joseline and her hair salon included cleaning and maintenance, laundry, and window cleaning during the years 2010 through 2014 .

On petitioner's 2010 return, she reported income in the amount of \$11,575.00 on her schedule C-EZ. At the hearing, petitioner produced a letter from Joseline, dated November 23, 2010, as proof of the amount of income she earned in the year 2010. While this letter states the amount of petitioner's weekly payment, i.e., \$225.00, for her work at Imagen hair salon, it does not state the total amount paid to petitioner in the year 2010. Review of Joseline's 2010 schedule C for the Imagen hair salon business reveals that reported expenses did not include wage payments, but did include "other expenses" in the amount of \$5,435.00. As no detailed breakdown of the "other expenses" was provided on Joseline's 2010 schedule C, it is impossible to determine whether the amount reported as "other expenses" included expense amounts for cleaning and maintenance, laundry, and window cleaning. As such, petitioner failed to prove she had any earned income in 2010.

On petitioner's 2011 return, she reported income in the amount of \$11,700.00 on her schedule C-EZ. At the hearing, petitioner produced a letter from Joseline, dated March 31, 2011, as proof of the amount of income she earned in the year 2011. While this letter states the amount of petitioner's weekly payment, i.e., \$225.00, for her work at Imagen hair salon, it does not state the total amount paid to petitioner in the year 2011. Review of Joseline's 2011 schedule C for the Imagen hair salon business reveals that reported expenses did not include wage payments, but did include "other expenses" in the amount of \$9,412.00. As no detailed breakdown of the "other expenses" was provided on Joseline's 2011 schedule C, it is impossible to determine whether the amount reported as "other expenses" included expense amounts for cleaning and maintenance, laundry, and window cleaning. As such, petitioner failed to prove she had any earned income in 2011.

On petitioner's 2012 return, she reported income in the amount of \$11,700.00 on her schedule C-EZ. At the hearing, petitioner produced a letter from Joseline, dated April 21, 2012, as proof of the amount of income she earned in the year 2012. While this letter states the amount of petitioner's weekly payment, i.e., \$225.00, for her work at Imagen hair salon, it does not state the total amount paid to petitioner in the year 2012. Review of Joseline's 2012 schedule C for the Imagen hair salon business indicates that she reported total expenses in the amount of \$43,439.00; however, expense amounts reported for insurance, legal and professional services, rent or lease of other business property, taxes and licenses, and utilities totaled only \$38,867.00. No amounts were reported for wages or "other expenses." Since there is no explanation for the \$4,572.00 difference reported on Joseline's 2012 schedule C, it is impossible to determine whether any of the difference included expenses for cleaning and maintenance, laundry, and window cleaning. As such, petitioner failed to prove she had any earned income in 2012.

On petitioner's 2013 return, she reported income in the amount of \$12,200.00 on her schedule C-EZ. At the hearing, petitioner produced a letter from Joseline, dated January 3, 2003 as proof of the amount of income she earned in the year 2013. While this letter states the amount of petitioner's weekly payment, i.e., \$225.00, for her work at Imagen hair salon, it does not state the total amount paid to petitioner in the year 2013. Review of Joseline's 2013 schedule C for the Imagen hair salon business indicates that she reported total expenses in the amount of \$45,441.00; however, expense amounts reported for advertising, insurance, legal and professional services, rent or lease of other business property, repairs and maintenance, taxes and licenses, and utilities totaled only \$39,287.00. No amounts were reported for wages or "other expenses." Since there is no explanation for the \$6,154.00 difference reported on Joseline's 2013 schedule C, it is impossible to determine whether any of the difference included expenses for cleaning and maintenance, laundry, and window cleaning. As such, petitioner failed to prove she had any earned income in 2013.

On petitioner's 2014 return, she reported income in the amount of \$11,960.00 on her schedule C-EZ. At the hearing, petitioner produced a letter from Joseline, dated January 9, 2014, as proof of the amount of income she earned in the year 2014. While this letter states the amount of petitioner's weekly payment, i.e., \$225.00, for her work at Imagen hair salon, it does not state the total amount paid to petitioner in the year 2014. Review of Joseline's 2014 schedule C for the Imagen hair salon business reveals that reported expenses did not include wage payments, but did include "other expenses" in the amount of \$8,308.00. The reported "other expenses" included cleaning and maintenance in the amount of \$1,950.00, laundry in the amount of \$2,080.00, and window cleaning in the amount of \$520.00, which three reported amounts totaled \$4,550.00. Inasmuch as the personal services that petitioner rendered to Joseline included

cleaning and maintenance of the hair salon, laundry, and window washing, the expense amounts reported on Joseline's 2014 schedule C for those services are properly attributable to petitioner. Petitioner's earned income is determined to be \$4,550.00 for tax year 2014. Therefore, petitioner is entitled to an earned income credit for the year 2014.

H. In sum, petitioner failed to prove that she had any earned income in the years 2010 through 2013. Therefore, she is not entitled to the earned income credit for the years 2010 through 2013 (*see* conclusion of law G). With respect to the year 2014, petitioner's earned income is determined to be \$4,550.00, and petitioner is entitled to an earned income credit (*see* conclusion of law G). In 2014, petitioner had two qualifying children for purposes of the earned income credit. Based upon earned income in the amount of \$4,550.00 and two qualifying children, the Division is directed to recompute the earned income credits (State and City) for the year 2014 and grant a refund in accordance therewith.

I. Addressing the claimed empire state child credit, Tax Law § 606 (c-1) provides for a credit equal to the greater of one hundred dollars times the number of qualifying children of the taxpayer or the applicable percentage of the child tax credit allowed the taxpayer under IRC § 24 for the same taxable year for each qualifying child.

On her 2010 return, petitioner claimed an empire state child credit in the amount of \$384.00. At audit, the Division recomputed the empire state child credit to allow a minimum credit of \$200.00, based upon no verifiable income and two qualifying children. An empire state child credit in the amount of \$200.00 for the year 2010 was previously refunded to petitioner. As petitioner failed to prove she had any earned income for the year 2010 (*see* conclusions of law G and H), she is not entitled to an empire state child credit in an amount greater than the previously refunded amount of \$200.00, i.e., the minimum of \$100.00 per child.

On her 2011 return, petitioner claimed an empire state child credit in the amount of \$390.00. At audit, the Division recomputed the empire state child credit to allow a minimum credit of \$200.00, based upon no verifiable income and two qualifying children. An empire state child credit in the amount of \$200.00 for the year 2011 was previously refunded to petitioner. As petitioner failed to prove she had any earned income for the year 2011 (*see* conclusions of law G and H), she is not entitled to an empire state child credit in an amount greater than the previously refunded amount of \$200.00.

On her 2012 return, petitioner claimed an empire state child credit in the amount of \$390.00. At audit, the Division recomputed the empire state child credit to allow a minimum credit of \$200.00, based upon no verifiable income and two qualifying children. An empire state child credit in the amount of \$200.00 for the year 2012 was previously refunded to petitioner. As petitioner failed to prove she had any earned income for the year 2012 (*see* conclusions of law G and H), she is not entitled to an empire state child credit in an amount greater than the previously refunded amount of \$200.00.

On her 2013 return, petitioner claimed an empire state child credit in the amount of \$414.00. At audit, the Division recomputed the empire state child credit to allow a minimum credit of \$200.00, based upon no verifiable income and two qualifying children. An empire state child credit in the amount of \$200.00 for the year 2013 was previously refunded to petitioner. As petitioner failed to prove she had any earned income for the year 2013 (*see* conclusions of law G and H), she is not entitled to an empire state child credit in an amount greater than the previously refunded amount of \$200.00.

On her 2014 return, petitioner claimed an empire state child credit in the amount of \$402.00. At audit, the Division recomputed the empire state child credit to allow a minimum



credit of \$200.00, based upon no verifiable income and two qualifying children. An empire state child credit in the amount of \$200.00 for the year 2014 was previously refunded to petitioner. Petitioner has proven that she earned income in the amount of \$4,550.00 in the year 2014 (*see* conclusions of law G and H). The Division is directed to recompute the empire state child credit for the year 2014, based upon earned income in the amount of \$4,550.00 and two qualifying children. It also directed to refund the difference between the recomputed empire state child credit and the previously issued empire state child credit of \$200.00.

J. The petition of Josefina Estevez is granted to the extent indicated in conclusions of law G, H and I, and in all other respects is denied. The Division of Taxation's account adjustment notices issued for the years 2010 through 2013, dated December 14, 2015, and the account adjustment notice issued for the year 2014, dated December 3, 2015, as modified by conclusions of law G, H and I, are sustained.

DATED: Albany, New York  
October 3, 2019

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE