

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ESTER EDWARDS DRUMMOND	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 827985
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2013 and 2014.	:	

Petitioner, Ester Edwards Drummond, 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 2013 and 2014.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on November 14, 2018, in New York, New York, with all briefs to be submitted by May 7, 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).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claimed child and dependent credits for tax years 2013 and 2014.

FINDINGS OF FACT

1. Petitioner, Ester Edwards Drummond, electronically filed a New York State and City resident income tax return, form IT-201, for each of the years 2013 and 2014, reporting an address in Bronx, New York. On each of the returns for such years, petitioner claimed head of

household filing status and two dependent exemptions for grandsons, Jared Drummond, born in 2002, and Elijah Drummond, born in 2003.

2. On her 2013 tax return, petitioner reported federal adjusted gross income in the amount of \$18,871.00, which consisted of wages of \$10,806.00, business income of \$1,684.00, taxable amount of pensions and annuities of \$5,906.00, taxable amount of social security benefits of \$594.00 and a \$119.00 adjustment to income for one-half of her federal self-employment tax, and after subtracting a total of \$6,500.00, consisting of pensions of New York State and local governments and the federal government of \$5,906.00 and taxable amount of social security benefits of \$594.00, determined her New York State adjusted gross income to be \$12,371.00. After deducting the standard deduction of \$10,800.00 and two dependent exemptions of \$2,000.00, petitioner reported no taxable income. Petitioner's 2013 return claimed a refund in the amount of \$4,371.00, which amount included an empire state child credit of \$464.00, a New York State and City child and dependent care credit of \$2,044.00, a New York State earned income credit of \$1,485.00, a New York City earned income credit of \$248.00, a New York City school tax credit of \$63.00, New York State tax withheld in the amount of \$27.00 and New York City tax withheld in the amount of \$40.00.

3. Petitioner's 2013 return included form IT-215, claim for earned income credit, form IT-216, claim for child and dependent care credit, and form IT-213, claim for empire state child credit, on which petitioner listed two qualifying children: grandsons, Jared and Elijah.

4. In addition to reporting two qualifying children on the claim for child and dependent care credit, petitioner reported the following qualified child and dependent care expenses in 2013:

Care Provide Name	Address	Amount Paid
The Club of Riverdale	Bronx, New York	\$2,200.00
St. Margaret of Cortona	Bronx, New York	\$ 430.00
Ronald Felder	Bronx, New York	\$3,000.00
	Total	\$5,630.00

Each care provider's identifying number (social security number or employer identification number) was also reported on the claim for child and dependent care credit.

5. The Division of Taxation (Division) conducted a desk audit review of petitioner's 2013 tax return. As part of its review of such return, the Division's Income/Franchise Tax Desk Audit Bureau issued a letter, dated February 18, 2014, to petitioner requesting additional information about her claim for the child and dependent care credit. The letter requested documentation regarding the claimed qualifying children, including proof of relationship and proof of residence, and petitioner's payment of child care expenses for tax year 2013. The letter also stated that while it waited for a response to the letter, the Division would recompute petitioner's tax return without the child and dependent care credit, and if a refund was due without the credit, an adjusted refund would be issued in 60 days. The letter further stated that if the documents submitted supported petitioner's claims, an additional refund would be issued to her.

6. On an unknown date, the Division issued to petitioner a partial refund for the year 2013 in the amount of \$2,327.00, consisting of an empire state child credit of \$464.00, a New York State earned income credit of \$1,485.00, a New York City earned income credit of \$248.00, a New York City school tax credit of \$63.00, New York State tax withheld in the amount of \$27.00 and New York City tax withheld in the amount of \$40.00.

7. Subsequently, the Division's Income/Franchise Tax Desk Audit Bureau issued a notice, dated September 16, 2015, to petitioner denying her refund claim for tax year 2013 (notice of refund denial).¹ This notice of refund denial stated, in pertinent part, as follows:

“The documentation provided to support the child or dependent care expenses reported on the return was incomplete or insufficient.

To qualify for the child and dependent care credit, you must be able to document that you incurred the child or dependent care expenses. You must be able to prove that you yourself actually paid someone to care for your child or dependent.

Based on the receipts you submitted, and further review of New York State Tax Department records, we cannot verify your claimed child or dependent care expenses. In addition, the day care provider information you submitted could not be verified. Therefore, the child and dependent care credit has been disallowed.”

8. At the hearing, the Division did not produce the documentation that it reviewed during its desk audit of petitioner's 2013 tax return. However, among the documents attached to petitioner's petition is a copy of a letter, dated June 19, 2015, by which petitioner submitted “school letters (proof of residence), birth certificates, social security information and invoices from child care providers,” in response to the Division's desk audit letter for the year 2013.

9. On her 2014 tax return, petitioner reported federal adjusted gross income in the amount of \$17,515.00, which consisted of wages of \$9,748.00, taxable interest income of \$87.00, business income of \$3,134.00, taxable amount of pensions and annuities of \$5,971.00, taxable amount of social security benefits of \$182.00 and an adjustment to income totaling \$1,607.00, consisting of one-half of her self-employment tax of \$222.00 and self-employment insurance of \$1,385.00, and after subtracting a total of \$6,153.00, consisting of pensions of New York State and local governments and the federal government of \$5,971.00 and taxable amount of social

¹ The notice of refund denial did not list either the dollar amount of the refund claim or the dollar amount denied.

security benefits of \$182.00, determined her New York State adjusted gross income to be \$11,362.00. After deducting the standard deduction of \$10,950.00 and two dependent exemptions of \$2,000.00, petitioner reported no taxable income. Petitioner's 2014 return claimed a refund of \$4,245.00, which amount included an empire state child credit of \$479.00, a New York State and City child and dependent care credit of \$1,779.00, a New York State earned income credit of \$1,521.00, a New York City earned income credit of \$254.00, a New York City school tax credit of \$63.00, New York State tax withheld of \$85.00 and New York City tax withheld of \$64.00.

10. Petitioner's 2014 return included form IT-215, form IT-216, and form IT-213, on which petitioner listed two qualifying children: grandsons, Jared and Elijah.

11. In addition to reporting two qualifying children on form IT-215, claim for child and dependent care credit, petitioner reported the following qualified child and dependent care expenses in 2014:

Care Provide Name	Address	Amount Paid
The Club of Riverdale	Bronx, New York	\$2,000.00
St. Margaret of Cortona	Bronx, New York	\$ 300.00
Ronald Felder	Bronx, New York	\$2,600.00
	Total	\$4,900.00

Each care provider's identifying number (social security number or employer identification number) was also reported on the claim for child and dependent care credit.

12. After its review of petitioner's 2014 tax return, the Division's Office of Processing and Taxpayer Services sent a letter, dated February 17, 2015, to petitioner requesting copies of the "W-2 forms (Wage and Tax Statements) for each employer" for which petitioner worked

during tax year 2014. The record is silent as to when petitioner responded to the Division's February 17, 2015 letter.

13. The Division's OPTS-Liability Correspondence Section-Income issued to petitioner an account adjustment notice for tax year 2014, dated October 21, 2016, adjusting petitioner's 2014 return by disallowing the New York State child and dependent care credit, and allowing an empire state child credit of \$479.00, a New York State earned income credit of \$1,521.00, a New York City earned income credit of \$254.00, a New York City school tax credit of \$63.00, New York State tax withheld in the amount of \$85.00 and New York City tax withheld in the amount of \$64.00 for a total refund of \$2,466.00 plus interest. With regard to the New York State child and dependent care credit, the "Explanation" section of the account adjustment notice contained the following paragraph: "We calculated this value based on available information."

14. Petitioner timely filed a petition challenging the refund denial for tax year 2013 and the account adjustment notice for tax year 2014, and seeking refunds in the amounts of \$2,044.00 and \$1,779.00 for tax years 2013 and 2014, respectively. In her petition, petitioner asserts that she supplied the W-2 information requested for the year 2014 but the "refund was issued without child care credit. There was no other notice and no explanation." Petitioner requests the balance of her refunds for the years 2013 and 2014. Among the documents attached to the petition were copies of: (i) birth certificates and social security cards for petitioner's two grandsons; (ii) a copy of a letter, dated June 17, 2015, from the Greenburgh-Graham Union Free School District regarding Elijah; (iii) a copy of a letter, dated June 5, 2015, from St. Margaret of Cortona School regarding Jared; (iv) a copy of the St. Margaret of Cortona After School Program Statement, dated June 5, 2015, for January through December 2013 for Jared; (v) a copy of The Club of Riverdale "2013 AFTERSCHOOL CARE PAYMENT STATEMENT" for Jared; (vi) a copy of

the notarized letter of Ronald Felder, dated October 17, 20016, regarding after-school care provided to Elijah in the year 2013; (vii) a copy of the notarized letter of Ronald Felder, dated October 26, 2016, regarding after-school care provided to Elijah in the year 2014; and (viii) copies of The Club of Riverdale after-school care payment account statements related to Jared for the year 2014.

15. At the hearing, the Division introduced the testimony of Matthew Roberts, a Tax Technician 2 with the Division. Approximately two months before the hearing in this matter, Mr. Roberts was assigned to testify at the same. In preparation for the hearing, Mr. Roberts reviewed the petition and the attached documentation related to the child and dependent care expenses claimed for the years 2013 and 2014.

16. As noted above, petitioner claimed a total of \$5,630.00 in child and dependent care expenses for two qualifying dependents: her grandsons, Jared and Elijah, for the year 2013. Specifically, petitioner reported expenses paid to The Club of Riverdale in the amount of \$2,200.00 and St. Margaret of Cortona in the amount of \$430.00 for dependent care provided to Jared, and \$3,000.00 in expenses paid to Ronald Felder for dependent care provided to Elijah during the year 2013.

Based upon his review of the documentation provided for those reported child and dependent care expenses, Mr. Roberts stated that such documentation substantiated the following child and dependent care expenses for the year 2013: \$2,000.00 paid to The Club of Riverdale and \$350.00 paid to St. Margaret of Cortona for dependent care provided to Jared. Mr. Roberts stated that The Club of Riverdale statements provided for the year 2013 listed payments totaling only \$2,000.00, and not \$2,200.00 as reported by petitioner, and \$200.00 remained in dispute. Mr. Roberts also stated that the statement from St. Margaret of Cortona indicated that a total of

\$430.00 was paid during the year 2013 for Jared's enrollment in its after school program; however, the detailed monthly breakdown on this statement listed payments totaling only \$350.00, and the difference of \$80.00 remained in dispute. With respect to the \$3,000.00 in expenses claimed to have been paid to Mr. Felder for care provided to Elijah in the year 2013, Mr. Roberts testified that the documentation provided, an October 17, 2016 letter from Mr. Felder, was insufficient to substantiate petitioner's payment of such total amount for the year 2013. Mr. Roberts further testified that he used the identification number provided in Mr. Felder's letter and "could not verify Mr. Felder as a care provider." Mr. Roberts was also unable to verify a tax filing for Mr. Felder for the year 2013. Since petitioner did not submit any contemporaneous documentation, such as receipts or cancelled checks, to show proof of payment from petitioner to Mr. Felder during the year 2013, the entire \$3,000.00 remained in dispute.

17. As noted above, petitioner claimed a total of \$4,900.00 in child and dependent care expenses for two qualifying dependents: her grandsons, Jared and Elijah, for the year 2014. Specifically, petitioner reported expenses paid to The Club of Riverdale in the amount of \$2,000.00 and St. Margaret of Cortona in the amount of \$300.00 for dependent care provided to Jared, and \$2,600.00 in expenses paid to Mr. Felder for dependent care provided to Elijah for the year 2014.

Based upon his review of the documentation provided for those reported child and dependent care expenses, Mr. Roberts stated that the Division accepted a total of \$2,300.00 in expenses claimed to have been paid to The Club of Riverdale and St. Margaret's of Cortona for care provided to Jared in 2014. With respect to the \$2,600.00 in expenses claimed to have been paid to Mr. Felder for care provided to Elijah in 2014, Mr. Roberts testified that the documentation provided, an October 26, 2016 letter from Mr. Felder, was insufficient to

substantiate petitioner's payment of such total amount for the year 2014. Mr. Roberts further testified that he used the identification number provided in Mr. Felder's October 26, 2016 letter and could not verify a tax filing for Mr. Felder for the year 2014. Since petitioner did not submit any contemporaneous documentation, such as receipts or cancelled checks, to show proof of payment from petitioner to Mr. Felder during the year 2014, the entire \$3,000.00 remained in dispute.

18. At the hearing, petitioner explained that her son Kenneth's two sons, Jared and Elijah, began living with her in her Bronx, New York, apartment when they were ages 5 and 4, respectively. Petitioner and her two grandsons resided in her Bronx, New York, three-bedroom apartment beginning in 2007, and continued to do so beyond the years at issue. During the years 2013 and 2014, petitioner and her two grandsons were the only occupants of her Bronx, New York, apartment. In the years 2013 and 2014, petitioner's son resided in Mount Vernon and her daughter-in-law resided in Connecticut and later Ohio.

19. In 2007, petitioner began providing her grandsons with "full care." As their guardian, petitioner, among other things, enrolled both grandsons in school. Petitioner enrolled Jared in the neighborhood Catholic school, St. Margaret of Cortona, which grade school he attended through the eighth grade. Although Elijah was initially enrolled in a neighborhood pre-school and kindergarten, it was later determined that he needed a special education program that the local public grade school could not supply. Petitioner ultimately enrolled Elijah in the Greenburgh-Graham Union Free School District, located in Hastings-on-Hudson, New York.²

² Petitioner testified that Bronx residents such as herself refer to Hastings-on-Hudson as Yonkers.

20. A letter, dated June 5, 2015, from Hugh M. Keenan, Principal of St. Margaret of Cortona School, noted “that Jared Drummond was on the enrolled and active list of students at St. Margaret of Cortona School for the academic school years 2012/2013 and 2013/2014.” The letter was addressed to petitioner, at her Bronx, New York, address, “pursuant to the information provided by the parents/guardians” of Jared Drummond, the student.

A letter, dated June 17, 2015, from Susan Lutz, Assistant Intake and Discharge Coordinator, Greenburgh-Graham Union Free School District, indicated that “Elijah Drummond is a student in good standing attending the Graham School since August 14, 2009.” The letter further indicated that Elijah resides with petitioner, his guardian, at her Bronx, New York, address.

21. Before her retirement in about 2005, petitioner did the finances and ordered supplies for one of the New York City public schools. As a result of her employment by the New York City Department of Education, petitioner received a pension from the New York City employees retirement system. After she retired, petitioner continued doing the finances and ordering supplies for the principal of that New York City public school, either through a direct line item or through a temporary service agency. Post-2005, petitioner also worked for a tax preparation service, and was a registered representative for the sales of annuities and variable annuities.

22. During the years 2013 and 2014, petitioner received social security,³ a pension from the New York City employees retirement system, and wages from Jennifer Temps, a temporary service agency, and NV Tax Service, located in Bronx, New York. Petitioner also had self-

³ Petitioner was born in 1941.

employment income from the sales of annuities and variable annuities for HD Vest Financial Services, Irving, Texas, in the years 2013 and 2014.

23. According to petitioner, she worked Monday through Friday earning wages from her employment by the temporary service agency and the tax preparation service, and self-employment income from her business. Because she was employed, petitioner needed dependent care services for both Jared and Elijah. Petitioner, at the hearing, explained that she made sure that both her grandsons went to after school care, so that she “could be out of the house.” She further explained that she could not let them stay there by themselves. Petitioner did not return home from work until sometime between 5:30 p.m and 6:00 p.m. during the years at issue.

24. During the years at issue, when Jared’s school day ended, he would attend St. Margaret of Cortona’s after-school program or he would be bused to The Club of Riverdale to participate in its after-school program. When she got home from work during the years at issue, petitioner would pick Jared up at one of those care providers. On any weekday that petitioner worked but Jared’s school was closed during the years 2013 and 2014, Jared would spend the day at The Club of Riverdale.

25. As noted above, petitioner attached to her petition after-school program statements issued by The Club of Riverdale and St. Margaret Cortona as substantiation for the expenses she claimed to have paid for Jared’s care in the years 2013 and 2014. Petitioner, at the hearing, testified that she personally obtained those after-school program statements. After reviewing the 2013 after-school care program statement issued by The Club of Riverdale, petitioner, at the hearing, conceded that this statement reported total payments of \$2,000.00 and stated that she was no longer contesting the remaining disputed amount of \$200.00 (*see* finding of fact 16). At the hearing, petitioner also reviewed the after-school program statement issued by St. Margaret of

Cortona for the year 2013. Petitioner, at the hearing, conceded that the detailed monthly breakdown of payment amounts totaled \$350.00 and stated that she was no longer contesting the remaining disputed amount of \$80.00 (*id.*).

26. As noted above, Elijah attended the Graham School located in Yonkers, New York, beginning in August 2009. On school days, the New York City Department of Education provided round trip bus transportation for Elijah. Specifically, each morning, the bus would pick Elijah up in front of petitioner's Bronx apartment building, and take him to the Graham School in Yonkers. At the end of the school day, the bus would pick up Elijah at the Graham School in Yonkers and drop him off in front of petitioner's Bronx apartment building at approximately 3:30 p.m. Petitioner was unable to meet Elijah's bus in the afternoon because she was working. However, due to his young age, petitioner needed someone that Elijah could stay with until she came home. Petitioner found Mr. Felder through a friend. Mr. Felder lived with his aunt in an apartment located on the same side of the Bronx as petitioner. At 3:30 p.m. on school days, Mr. Felder would meet Elijah's bus in front of petitioner's apartment building and take Elijah to his aunt's apartment, where he babysat Elijah. As his one-on-one babysitter, Mr. Felder would engage Elijah in indoor activities, such as playing games and watching television, and weather permitting, outside activities, until petitioner arrived to take him home. During the years at issue, petitioner would pick Elijah up on school days between 5:30 p.m. and 6:00 p.m. On any weekday that petitioner worked but Elijah's school was closed during the years 2013 and 2014, Elijah would spend the day with Mr. Felder.

27. Petitioner had an informal agreement with Mr. Felder regarding the babysitting services he provided for Elijah during the years at issue. According to petitioner, Mr. Felder

babysat Elijah a total of 44 weeks in the each of the years 2013 and 2014.⁴ From the beginning of September through the end of June in each of the years at issue, Mr. Felder babysat Elijah. In weeks where school was in session on Monday through Friday, Mr. Felder would babysit Elijah for two or two and a half hours each day, and petitioner paid him \$50.00 per week in cash. In weeks where Elijah's school was closed for the day and petitioner had to work, Mr. Felder would babysit Elijah for the entire day. During those weeks, petitioner would pay Mr. Felder \$75.00 or \$100.00 for the week in cash, depending upon circumstances. Petitioner always paid Mr. Felder a minimum of \$50.00 per week in cash on Friday for his babysitting services, even if it was a short school and work week. Mr. Felder never gave petitioner a receipt for such payments. Rather, petitioner would list the payments she made to Mr. Felder on tally sheets she maintained during the years at issue. Petitioner candidly admitted that she misplaced those tally sheets for the years 2013 and 2014, sometime after her tax returns were prepared for such years.

28. As a result of the Division's request for documentation substantiating her claimed dependent care expenses, petitioner asked Mr. Felder to provide a letter regarding the care that he provided to Elijah in each of the years 2013 and 2014. Mr. Felder complied with petitioner's request, and copies of those letters are attached to petitioner's petition.

29. The letter from Ronald Felder dated, subscribed and sworn to before a notary on October 17, 2016 stated, in relevant part, that "I Ronald Felder, SS#XXX-XX-XXXX, received \$3000.00 for after school care of Elijah Drummond for the year 2013."

⁴ In the years 2013 and 2014, petitioner and her two grandsons spent the months of July and August vacationing at her family home in Louisiana.

The letter from Ronald Felder dated, subscribed and sworn to before a notary on October 26, 2016 stated, in pertinent part, that “I Ronald Felder, SS#XXX-XX-XXXX, received \$2600.00 for after school care of Elijah Drummond for the year 2014.”

30. Mr. Felder lived with his aunt, and babysat Elijah during the years at issue. According to petitioner, Mr. Felder did not do anything else for employment during those years.

31. At the hearing, Mr. Roberts acknowledged that if Mr. Felder’s income in each of the years 2013 and 2014 was comprised only of the amounts he received from petitioner for babysitting Elijah, Mr. Felder’s income in each of those years would have been below the threshold for filing a personal income tax return for such year.

32. The Division requested documentation supporting the child and dependent care credit claimed on her personal income tax returns for the years 2011 and 2012. After petitioner supplied substantiating documentation, the Division granted a refund of her claimed child and dependent care credit in each of the years 2011 and 2012.

33. Beginning in 2007 and continuing beyond the years at issue, petitioner provided for all her grandsons’ needs. Petitioner used the tax refunds she received to help “take care of the kids throughout the year.”

34. Within the time granted post-hearing, petitioner submitted the affidavit, dated January 2, 2019, of Ronald Felder. In his affidavit, Mr. Felder swore and affirmed that he “performed babysitting services for Ester Edwards Drummond for her grandchild Elijah Drummond over a period of seven (7) years.” Mr. Felder, in his affidavit, further certified “that the amounts [he] received in 2013 and 2014 were **\$3000.00** and **\$2600.00** respectively. All the amounts that [he] received over the years were paid in cash including 2013 and 2014.”

35. In rebuttal to petitioner's post-hearing document submission, the Division timely submitted the affidavit, dated January 11, 2019, of Cindy M. Gemmett, a Tax Technician 2 with the Division. Attached to Ms. Gemmett's affidavit as "exhibit J" is a certification of non-filing sealed and signed by Thomas Engel, Deputy Tax Commissioner, Office of Budget and Management Analysis, Disclosure and Government Exchange, on November 9, 2019. Review of the certification indicates that on November 9, 2019, the Division searched its personal income tax files for Ronald Felder's 2013 and 2014 personal income tax returns and did not locate a return for either year.

CONCLUSIONS OF LAW

A. Petitioner electronically filed a New York State and City resident tax return for each of the years 2013 and 2014 claiming head of household filing status and two dependent exemptions for her grandsons, Jared and Elijah. During the years 2013 and 2014, petitioner received social security, a pension from the New York City employees retirement system, and wages from Jennifer Temps and NV Tax Service. Petitioner also reported self-employment business income on her 2013 and 2014 tax returns. Petitioner reported each of those items of income on her 2013 and 2014 tax returns.

On her 2013 return, petitioner reported no taxable income, and claimed a refund in the amount of \$4,371.00, which amount included an empire state child credit of \$464.00, a New York State and City child and dependent care credit of \$2,044.00, a New York State earned income credit of \$1,485.00, a New York City earned income credit of \$248.00, a New York City school tax credit of \$63.00, New York State tax withheld in the amount of \$27.00 and New York City tax withheld in the amount of \$40.00. Petitioner's 2013 return included form IT-215, form IT-216 and form IT-213, on which petitioner listed two qualifying children: her grandsons, Jared

and Elijah. On an unknown date, the Division issued to petitioner a partial refund for the year 2013 in the amount of \$2,327.00, consisting of an empire state child credit of \$464.00, a New York State earned income credit of \$1,485.00, a New York City earned income credit of \$248.00, a New York City school tax credit of \$63.00, New York State tax withheld in the amount of \$27.00 and New York City tax withheld in the amount of \$40.00. On September 16, 2015, the Division's Income/Franchise Tax Desk Audit Bureau issued a notice of disallowance, denying petitioner's claimed child and dependent care credit for tax year 2013.

On her 2014 return, petitioner reported no taxable income and claimed a refund of \$4,245.00, which amount included an empire state child credit of \$479.00, a New York State and City child and dependent care credit of \$1,779.00, a New York State earned income credit of \$1,521.00, a New York City earned income credit of \$254.00, a New York City school tax credit of \$63.00, New York State tax withheld of \$85.00 and New York City tax withheld of \$64.00. Petitioner's 2014 return included form IT-215, form IT-216, and form IT-213, on which petitioner listed two qualifying children: grandsons, Jared and Elijah. The Division's OPTS-Liability Correspondence Section-Income issued to petitioner an account adjustment notice for tax year 2014, dated October 21, 2016, adjusting petitioner's 2014 return by disallowing the New York State child and dependent care credit, and allowing an empire state child credit of \$479.00, a New York State earned income credit of \$1,521.00, a New York City earned income credit of \$254.00, a New York City school tax credit of \$63.00, New York State tax withheld in the amount of \$85.00 and New York City tax withheld in the amount of \$64.00 for a total refund of \$2,466.00 plus interest.

Petitioner timely filed a petition challenging the disallowance of her claimed child and dependent care credits in the amounts of \$2,044.0 and \$1,779.00 for tax years 2013 and 2014, respectively.

B. Tax Law § 606 (c) provides for a New York State child and dependent care credit based upon a percentage of the federal credit allowable under section 21 of the Internal revenue Code (IRC). Therefore, 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 which includes the qualified dependent.

In order to be entitled to the child and dependent care credits, petitioner must provide proof that she paid dependent care expenses in 2013 and 2014 (*see Matter of Espada*, Tax Appeals Tribunal, January 28, 2016).

C. The record clearly establishes that Jared and Elijah Drummond resided with petitioner, their paternal grandmother, in the Bronx, New York, apartment that she maintained for her use and that of her two grandsons, her qualified dependents, during the years 2013 and 2014. In 2007, Jared and Elijah, then ages 5 and 4, respectively, began living with petitioner, their grandmother and their father Kenneth's mother, in her Bronx, New York, apartment. Beginning in 2007 and continuing beyond the years at issue, petitioner provided her two grandsons with "full care," which included providing for all of their needs. Although she retired from employment with the New York City Department of Education in about 2005, petitioner continued doing the finances and ordering supplies for the principal of a New York City public

school, either through a direct line item or through a temporary service agency. Post-2005, petitioner also worked for a tax preparation service, and was a registered representative for the sales of annuities and variable annuities. I found petitioner's testimony to be extremely credible regarding the home, care and support that she has provided for Jared and Elijah, her son Kenneth's two sons, beginning in 2007 and continuing beyond the years at issue.

In 2013 and 2014, petitioner, a septuagenarian, worked Monday through Friday earning wages from her employment by the temporary service agency and the tax preparation service, and self-employment income from her business. As noted above, Jared attended the local Catholic grade school, St. Margaret of Cortona, and Elijah attended the Graham School, located in Yonkers, New York, in 2013 and 2014. It is noted that the New York City Department of Education provided bus service that enabled Elijah to attend the Graham School in Yonkers. Because she did not get home from work until 5:30 p.m. or 6:00 p.m. during the years 2013 and 2014, petitioner needed dependent care services for both Jared and Elijah in each of those years.

D. On her 2013 return, petitioner reported expenses paid to The Club of Riverdale in the amount of \$2,200.00 and St. Margaret of Cortona in the amount of \$430.00 for care provided to Jared, and \$3,000.00 in expenses paid to Mr. Felder for care provided to Elijah during the year 2013. On her 2014 return, petitioner reported expenses paid to The Club of Riverdale in the amount of \$2,000.00 and St. Margaret of Cortona in the amount of \$300.00 for care provided to Jared, and \$2,600.00 in expenses paid to Mr. Felder for care provided to Elijah during the year 2014. Petitioner, at the hearing, submitted documentation to substantiate her claimed dependent care expenses for the years 2013 and 2014.

To substantiate expenses paid for Jared's care in 2013, petitioner submitted the 2013 after-school care program statement issued by The Club of Riverdale, and the after-school program

statement issued by St. Margaret of Cortona. After its review of The Club of Riverdale 2013 statement, the Division, at the hearing, stated that \$2,000.00 in expenses were substantiated by such statement. Petitioner, at the hearing, conceded that The Club of Riverdale statement reported total payments in the amount of \$2,000.00 for after-school care provided to Jared in 2013. With respect to the after-school program statement issued by St. Margaret of Cortona for the year 2013, the Division, at the hearing, stated that the detailed monthly payments breakdown substantiated total payments in the amount of \$350.00. Petitioner, at the hearing, conceded that the St. Margaret of Cortona after-school program statement listed detailed monthly payments in the amount of \$350.00. For the year 2014, petitioner claimed a total of \$2,300.00 in care expenses paid for Jared. The Division, at the hearing, stated that the documentation submitted substantiated that \$2,300.00 in expenses were paid for Jared's care in 2014.

At the hearing, petitioner produced notarized letters from Mr. Felder, the affidavit of Mr. Felder, and presented her own testimony to substantiate the amount of expenses paid to Mr. Felder for Elijah's care in the years 2013 and 2014. Petitioner credibly testified that Mr. Felder provided much needed babysitting services for Elijah from the beginning of September through the end of June during the years 2013 and 2014. At 3:30 p.m. on each school day during the years at issue, Mr. Felder would meet Elijah's school bus in front of petitioner's Bronx apartment building. Then, Mr. Felder and Elijah would go to the Bronx apartment that Mr. Felder shared with his aunt. Mr. Felder would provide one-on-one babysitting services for Elijah until petitioner came to pick Elijah up at the end of her work day. On any weekday that petitioner worked but Elijah's school was closed during the years 2013 and 2014, Elijah would spend the day with Mr. Felder. Petitioner's agreement with Mr. Felder was informal regarding the babysitting services he provided for Elijah during the years 2013 and 2014. Petitioner

emphatically testified under oath that she always paid Mr. Felder a minimum of \$50.00 per week for 44 weeks in each of the years 2013 and 2014. In the weeks in which Mr. Felder babysat Elijah on Monday through Friday from 3:30 p.m. to about 6:00 p.m., petitioner paid him \$50.00 in cash on Friday. In a week in which petitioner worked but Elijah did not have school on a particular day and spent the day with Mr. Felder, petitioner testified that she would pay Mr. Felder \$75.00 or \$100.00 for the week in cash, depending upon circumstances. Although petitioner maintained tally sheets on which she recorded the weekly payments to Mr. Felder in the years 2013 and 2014, she admitted that she misplaced those tally sheets sometime after her 2013 and 2014 tax returns were prepared. Petitioner candidly explained that Mr. Felder did not give her receipts for her weekly payments, but Mr. Felder did provide her with his social security number, his notarized letters and his affidavit, as proof that he babysat Elijah and was paid for such babysitting services in the years 2013 and 2014. After careful review of the record, I find that petitioner has proven that she paid Mr. Felder \$2,200.00, i.e., \$50.00 per week for 44 weeks, in each of the years 2013 and 2014 for babysitting Elijah.

E. In sum, the record clearly shows that petitioner ensured that both grandsons received care in the years 2013 and 2014, and that she paid the expenses related to the same in both years. Accordingly, petitioner has established that she paid dependent care expenses for the care of her two qualifying dependents: her grandsons, Jared and Elijah, in the years 2013 and 2014.

With respect to the year 2013, petitioner has proven that she paid a total of \$4,550.00 in dependent care expenses, consisting of \$2,350.00 in care expenses paid for Jared and \$2,200.00 in care expenses paid for Elijah. The Division is directed to recompute the child and dependent care credit for the year 2013, based upon dependent care expenses in the amount of \$4,550.00 and two qualifying dependents.

With respect to the year 2014, petitioner has proven that she paid a total of \$4,500.00 in dependent care expenses, consisting of \$2,300.00 in care expenses paid for Jared and \$2,200.00 in care expenses paid for Elijah. The Division is directed to recompute the child and dependent care credit for the year 2014, based upon dependent care expenses in the amount of \$4,500.00 and two qualifying dependents.

F. The petition of Ester Edwards Drummond is granted to the extent indicated in conclusions of law C, D and E, and in all other respects is denied. The Division of Taxation's notice of refund denial issued for the year 2013, dated September 16, 2015, and the account adjustment notice issued for the year 2014, dated October 21, 2016, as modified by conclusions of law C, D and E, are sustained.

DATED: Albany, New York
November 7, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE