

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JANNENE MARIE KETAVONGSA** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New York : DTA NO. 828620  
State Personal Income Tax under Article 22 of the Tax Law for :  
the Year 2016, :

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Petitioner, Jannene Marie Ketavongsa, 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 for the year 2016.

A hearing was held on November 5, 2019 at 10:00 a.m. in Rochester, New York, with all briefs to be submitted by February 21, 2020, 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. (Jennifer L. Hink-Brennan, Esq., of counsel). After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly disallowed petitioner's claim for a child and dependent care credit for the year 2016.

***STATEMENT OF FACTS***

1. Petitioner, Jannene Marie Ketavongsa, electronically filed with the Division of Taxation (Division) a New York State resident income tax return, form IT-201, for the year 2016. On the return, petitioner claimed a head of household filing status with three dependents, reported business income of \$11,540.00, and requested a refund in the amount of \$4,140.00. The refund consisted of a child and dependent care credit (CDC credit) of \$2,310.00, an empire state child credit of \$382.00, and a New York State earned income credit of \$1,448.00. Attached to the return was a form IT-216, claim for child and dependent care credit, on which petitioner reported two children under the age of 12 as qualifying dependents. On the form, she also reported total qualifying expenses of \$10,000.00, and listed Laquanda Johnson as the care provider.

2. Commencing an audit of petitioner's tax return for the year 2016, the Division sent an audit inquiry letter, dated May 15, 2017, to petitioner, asking for additional information to support the CDC credit petitioner claimed on her return, including proof verifying the relationship and residency of the qualifying children claimed, as well as proof of the daycare or childcare expenses claimed.

3. In response to the Division's May 15, 2017 letter, petitioner sent a fax, dated June 1, 2017, to the Division. Included in the fax was a handwritten cover letter, in which petitioner indicated that she was the caretaker for her children. Also included in the fax, as pertinent here, is a copy of an apartment lease for the period May 8, 2017 through May 8, 2018, birth certificates for two of petitioner's children under the age of 13, and a document entitled "Payment Summary," which indicated that petitioner paid a total of \$2,325.00 to the St. John Neumann School in Rochester for "tuition" for the 2016-2017 school year.

4. In reply, the Division sent petitioner an account adjustment notice, dated June 5, 2017, reducing the refund she claimed from \$4,140.00 to \$1,011.90. More specifically, the account adjustment notice reduced petitioner's earned income credit from the \$1,448.00 she claimed to \$1,011.90 and disallowed in full petitioner's claimed CDC and empire state child credits. The notice explained that "we adjusted or disallowed your dependent exemptions since these exemptions were claimed by another taxpayer or the dependent information was incomplete."

5. By letter dated July 28, 2017, the Division denied the refund claimed by petitioner, stating that petitioner's information "was either incomplete or unverifiable." More specifically, the letter asserted that the Division was denying petitioner's claimed CDC credit, explaining that:

(i) some of the documentation submitted by petitioner related to 2017 and therefore did not prove that the children lived with petitioner for more than half of 2016, as required for the CDC credit and that therefore those children were not "qualifying children" for purposes of the credit; and

(ii) expenses to attend kindergarten or a higher grade were not qualifying expenses for purposes of the CDC credit, as they are considered "private tuition payments."

6. Petitioner sent the Division a five-page fax dated August 7, 2017. The handwritten cover page indicated in its subject line that the fax's purpose was to correct previously supplied information. Included in the fax were two letters signed by the principal of the St. John Neumann School, stating that petitioner's two children attended school there during the 2016-2017 school year and that the school's records indicated that they resided with petitioner. The last page of the fax was another "Payment Summary" from the school, which indicated that petitioner paid the school a total of \$840.58 in tuition for her two children for the 2016-2017 school year.

7. By letter dated October 13, 2017, the Division adjusted petitioner's account by granting petitioner the remaining amount of the earned income credit she claimed (\$436.10) and

partially granting the claimed empire state child credit in the amount of \$127.49, while continuing to deny her claimed CDC credit in full, stating in part that:

“You did not provide verifiable proof of payment for child care services as claimed on your return. Examples of acceptable documentation include canceled checks, itemized statements showing the total amount paid (from a verified Daycare Provider), money order receipts along with bank statements.

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There were no cancelled checks or verifiable receipts for payment of childcare services. In addition, the information submitted, about the childcare provider shown, could not be verified. Therefore your claim for Child and Dependent Care Credit has been denied.”

8. Petitioner protested the refund denial to the Bureau of Conciliation and Mediation Services (BCMS). By conciliation order dated February 16, 2018, BCMS granted the remaining portion of petitioner’s empire state child credit in the amount of \$254.51, but otherwise sustained the refund denial.

9. At hearing, prior to either party presenting any testimony, and while the Division’s representative was introducing the jurisdictional documents, petitioner stated that she had other demands on her time and had to leave. The undersigned administrative law judge encouraged her to participate in the hearing, but petitioner left the hearing room, and did not return. Petitioner neither requested nor was granted a continuance. The hearing continued to completion.<sup>1</sup>

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

A. Tax Law § 606 (c) (1) provides that the CDC credit is based on the federal CDC credit “allowable under section twenty-one of the internal revenue code . . . .” Since the

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<sup>1</sup> After the hearing, by letter dated November 7, 2019, the undersigned administrative law judge advised petitioner that the hearing had been completed, explained to her how she could obtain a transcript of the hearing, and gave her the briefing schedule.

allowable New York CDC credit is determined based solely on the corresponding federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code (IRC) to determine petitioner's eligibility for this credit.

B. The amount of the federal CDC credit allowed pursuant to IRC § 21 is based on a percentage of the employment related expenses, including expenses for the care of a qualified dependent under age 13, incurred by a taxpayer who is gainfully employed. To be eligible for the credit, petitioner bears the burden of proving that she paid child care expenses in 2016, and the burden of substantiating the amount of such expenses she paid (*see Matter of Carroll*, Tax Appeals Tribunal, May 18, 2018; Tax Law § 689 [e]). The Division does not dispute that petitioner had qualified dependents and that she was gainfully employed. The only issue in dispute is whether petitioner provided sufficient documentation to substantiate that she paid qualifying childcare expenses in 2016 and the amount of such expenses she paid. Petitioner has not met that burden of proof here.

C. On audit, petitioner did not provide any documentation to support the childcare expense she specified on her 2016 form IT-201, allegedly provided by a Ms. Laquanda Johnson. Rather, petitioner submitted documentation from St. John Neumann School, reporting that petitioner paid “tuition” in amounts significantly less than the childcare expenses she claimed on her 2016 return (*see* findings of fact 1, 3, and 6). Treas Reg (26 CFR) § 1.21-1 (d) (5) provides:

“Expenses for a child in nursery school, pre-school, or similar programs for children below the level of kindergarten are for the care of a qualifying individual and may be employment-related expenses. Expenses for a child in kindergarten or a higher grade are not for the care of a qualifying individual.”

In view of this regulation, it is determined that the tuition payments petitioner made for her children’s education are not qualifying expenses for purposes of the CDC credit.

Petitioner chose to submit no additional evidence at hearing. Accordingly, petitioner has not met her burden of proof in this matter.

D. The petition of Jannene M. Ketavongsa is denied and the conciliation order dated February 16, 2018, is sustained.

DATED: Albany, New York  
August 20, 2020

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE