STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YEHAD ABDELAZIZ	:	DETERMINATION DTA NO. 829346
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2014.	:	

Petitioner, Yehad Abdelaziz, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2014.

A hearing was held before Barbara J. Russo, Administrative Law Judge, on December 8, 2020, with all briefs to be submitted by April 20, 2021, 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. (Linda A. Farrington, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claimed dependent exemptions for 2014.

II. Whether the Division of Taxation properly denied petitioner's head of household filing status for 2014.

III. Whether the Division of Taxation properly denied petitioner's claimed Empire State child credit for 2014.

IV. Whether the Division of Taxation properly denied petitioner's claimed noncustodial

earned income credit for 2014.

V. Whether petitioner has shown reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. Petitioner, Yehad Abdelaziz, filed a New York State resident income tax return, form IT-201, dated January 14, 2015, for tax year 2014, claiming head of household filing status and three dependent exemptions. Petitioner reported as dependents his daughters, M**** A********, L**** A********, and J**** A********.[1] Petitioner claimed a New York State and New York City earned income credit, and Empire State child credit, and requested a refund of $2,686.00 for 2014.

2. The Division of Taxation (Division) processed petitioner's 2014 return and with an adjustment to the Empire State child credit, and allowed a refund of $2,431.64. A portion of the refund, in the amount of $522.92 was applied to outstanding New York State tax debts, and the remaining refund of $1,908.72 was issued to petitioner.

3. An account adjustment notice, dated January 29, 2015, was issued to petitioner, detailing the adjustments described in finding of fact 2 and requesting substantiation of petitioner's children claimed as dependents.

4. Petitioner failed to provide adequate substantiation of the claimed dependents in response to the account adjustment notice and his 2014 return was selected for a desk audit.

5. As a result of the audit, the Division issued a statement of proposed audit changes (statement), dated January 31, 2018. The statement denied petitioner's three claimed dependents, head of household filing status, Empire State child credit, and the New York State

[1] The names of petitioner's daughters have been redacted for privacy and will hereinafter be referred to as M.A., L.A., and J.A.

and City earned income credit. After accounting for the refund previously issued, the statement asserted additional tax due in the amount of $3,064.64, plus penalty and interest.

6. The Division issued a notice of deficiency, assessment number L-047668802, dated April 2, 2018 (notice), to petitioner, asserting tax due in the amount of $3,064.64, plus penalty and interest for 2014.

7. In response to the notice, petitioner filed an amended resident income tax return, form IT-201-X, for tax year 2014 (amended return). In the amended return, petitioner no longer claimed the New York State and City earned income credit, and instead claimed a New York State noncustodial parent earned income credit in the amount of $642.00 and attached an explanation stating, "amend the childrens (sic) EIC to not living with me due to the divorce." In the amended return, petitioner continued to claim an Empire State child credit in the amount of $763.00, as well as the three dependents and head of household filing status. The amended return self-assessed tax due in the amount of $1,359.00.

8. The Division reviewed petitioner's amended return and determined that petitioner was not entitled to the head of household filing status, the three dependent exemptions, the empire state child credit, and the noncustodial earned income credit.

9. During the hearing, petitioner testified that he paid child support in 2014. Petitioner did not have records during the hearing to show child support payments and was given additional time following the hearing to submit such documents. Within the time allowed, petitioner submitted an account statement of child support payment history from New York State Child Support Enforcement (account statement). The account statement lists the custodial parent/obligee as Z*******, L****,[2] and the noncustodial parent/obligor as Abdelaziz, Yehad

[2] The name has been redacted for privacy.

M. The account statement shows a payment history from November 15, 2012 through October 19, 2020. For the year at issue, 2014, the account statement shows payments totaling $9,352.00.

10. The Division introduced into the hearing record a copy of the stipulation of settlement and judgment of divorce, dated October 22, 2013 and September 2, 2014, respectively, between petitioner and his ex-wife. Pursuant to the stipulation of settlement and judgment of divorce, petitioner's ex-wife was awarded full custody of the three children, M.A., L.A., and J.A. (the same three children that petitioner claimed as dependents on his 2014 return and amended return). The stipulation of settlement and judgment of divorce further provide that petitioner shall pay $850.00 a month in child support. Although the stipulation of settlement requires petitioner to make support payments, the stipulation states that "[t]he Wife waives her right to receive child support payments through the Support Collection Unit." The stipulation of settlement also provides that for the tax years 2013 (nine months with temporary maintenance), 2014, and 2015 (eight months), petitioner shall be entitled to declare J.A. as a dependent on his tax returns.

11. The Division introduced into the hearing record a copy of petitioner's ex-wife's 2014 resident income tax return. On her 2014 return, petitioner's ex-wife claimed the three children, M.A., L.A., and J.A., as dependents.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689 (e), petitioner bears the burden of establishing, by clear and convincing evidence, that the Division's adjustment of his claimed refund is erroneous (***see Matter of Suburban Restoration Co. v Tax Appeals Trib***, 299 AD2d 751 [3d Dept 2002]). Determinations made in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish, by clear and convincing evidence, that those determinations are

erroneous (***see Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***see also*** Tax Law § 689 [e]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (***see Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842 [3d Dept 1986]). Here, the questions presented are whether petitioner established that the Division improperly disallowed the dependent exemptions, the head of household filing status, the empire state child credit, and the noncustodial earned income credit.

B. Tax Law § 616 (a) provides that a resident individual shall be allowed an exemption of $1,000.00 for each exemption for which the taxpayer is entitled to a deduction for the taxable year under § 151 (c) of the Internal Revenue Code (IRC) ([26 USC]) § 151 [c]). IRC (26 USC) § 151 (c), in turn, provides for an exemption for each dependent, as defined by IRC (26 USC) § 152. IRC (26 USC) § 152 defines a dependent, in part, as a qualifying child who has the same principal place of abode as the taxpayer for more than one half of the taxable year (IRC [26 USC] § 152 [a] [1]; [c] [1] [B]). Where the parents of a dependent child are divorced or legally separated, IRC (26 USC) § 152 (e) (1) generally confers the dependent exemption on the parent having custody of the child for the greater portion of the calendar year (custodial parent). Petitioner has not disputed that he is the noncustodial parent of his daughters. Under certain circumstances the noncustodial parent can claim the dependent exemption. Specifically, under the IRC and regulations, a child of divorced parents is treated as the qualifying child of the noncustodial parent if (i) the parents of the child provide over one-half of the child's support for the calendar year, (ii) the child is in the custody of one or both parents for more than one-half of the calendar year, and (iii) "[t]he custodial parent signs a written declaration that the custodial parent will not claim the child as a dependent for any taxable year beginning in that calendar year and the noncustodial parent attaches the declaration to the noncustodial parent's return for

the taxable year" (Treas Reg [26 CFR] 1.152-4 [b] [2]; ***see also*** IRC [26 USC] § 152 [e] [2]). The Division has not contested that petitioner's daughters have received at least one-half of their support from their parents and the children are in custody of the mother, so the first two requirements are met. Thus, the only issue here is whether petitioner satisfied the third requirement – whether petitioner attached a sufficient declaration to his return, in which the custodial parent released her right to the exemption.

Under the regulations to the IRC, for the written declaration requirement to be satisfied, the declaration:

> "must be an unconditional release of the custodial parent's claim to the child as a dependent for the year or years for which the declaration is effective. A declaration is not unconditional if the custodial parent's release of the right to claim the child as a dependent requires the satisfaction of any condition, including the noncustodial parent's meeting of an obligation such as the payment of support" (Treas Reg [26 CFR] § 1.152-4 [e] [1] [i]).

A custodial parent can use part A of IRS form 8332 to release his or her claim to the exemption or he or she can use a declaration that "conform[s] to the substance of that form" and is "executed for the sole purpose of serving as a written declaration" under the regulation (***see*** Treas Reg § [26 CFR] 1.152-4 [e] [1] [ii]).

Here, petitioner has failed to meet his burden of proof to show that the custodial parent issued a form 8332 or conforming written declaration to him, releasing her claim to the dependent exemptions. Regardless, the important point is that petitioner did not attach any form 8332 or similar declaration to his 2014 return, which defeats his claim to the dependent exemptions (***see*** Treas Reg [26 CFR] 1.152-4 [b] [2]; ***Chamberlain v C.I.R.***, T.C. Memo. 2007-178 [2007]; ***Vokovan v Comm'r***, 105 T.C. Memo 1247 [2013]). As the Tax Court has explained, Congress added the requirement that the custodial parent attach form 8332 or

equivalent declaration to his or her return to claim the dependent exemption in order to bring greater certainty to the "often subjective and . . . difficult problems of proof and substantiation" that accompanied dependency exemption disputes under the prior statute" (***Chamberlain***, citing H. Rept. 98–432 [Part 2], at 1498 [1984]). Thus, allowing a noncustodial parent to claim the exemption without attaching the form or equivalent document would impermissibly contravene Congress's intent (***see id.***).

C. Even assuming that, to the contrary of the above conclusion of law, the law permits petitioner to cure his failure to attach a copy of the form 8332 or equivalent declaration to his return by supplying such proof in this protest of the Division's denial of the dependent exemptions claimed by the return, he has failed to submit sufficient proof in this matter. While the stipulation of settlement between petitioner and his ex-wife provides that petitioner can claim a dependent exemption for one daughter (J.A.), the stipulation of settlement was not "executed for the sole purpose of serving as a written declaration" under the regulation (***see*** Treas Reg § [26 CFR] 1.152-4 [e] [1] [ii]) and also requires petitioner to be current on his support payments (***see*** finding of fact 10). Because the stipulation does not represent an unconditional surrender on the part of the custodial parent of her claim to the dependent exemption, it is not a declaration that satisfies Treas Reg (26 CFR) 1.152-4 (b) (2) (***see Seeliger v Comm'r of Internal Revenue***, 114 T.C.M. 293 [2017] ["Only an unconditional release conforms to the substance of Form 8332 and meets the requirements of" IRC [26 USC] § 152 [e] [2], and a release contingent on the noncustodial parent meeting his or her support obligations is not unconditional]). As such, the stipulation of settlement does not qualify as a declaration that conforms to the substance of form 8332, nor was it attached to petitioner's 2014 return or amended return. Moreover, as further evidence that petitioner's ex-wife did not unconditionally surrender her claim to the dependent

exemptions, the Division introduced her 2014 return on which she claims the three daughters as dependents (***see*** finding of fact 11). Accordingly, the Division properly denied petitioner's claimed dependent exemptions.

D. Regarding the head of household filing status, Tax Law § 607 provides that the terms used in article 22 of the Tax Law will have the same meaning as when used in a comparable context in the provisions of the IRC unless a different meaning is clearly required. Subsection (b) of Tax Law § 607 further provides that "[a]n individual's marital or other status under section six hundred one, subsection (b) of section six hundred six, and section six hundred fourteen [i.e. head of household status] shall be the same as his marital or other status for purposes of establishing the applicable federal income tax rates." Accordingly, it is appropriate to review the applicable provisions of the IRC and regulations to determine if petitioner is entitled to claim head of household filing status under the facts of this case.

Pursuant to IRC § 2 (b), a head of household is defined in part, as relevant here, as an individual who is not married at the close of the taxable year and maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, a qualifying child of the individual. The record here is clear, and petitioner does not dispute, that the three children claimed by petitioner lived with his ex-wife, and not him, during the year at issue. As such, his home was not the principal place of abode for a qualifying child and the Division properly disallowed the head of household filing status.

E. With respect to the Empire State child credit, Tax Law § 606 (c-1) provides that a resident taxpayer is allowed 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

for the taxpayer under IRC (26 USC) § 24. A qualifying child "shall be a child who meets the definition of qualified child under section 24 (c) of the internal revenue code and is at least four years of age" (Tax Law § 606 [c-1] [1]).

IRC (26 USC) § 24 (c) defines a qualifying child as "a qualifying child of the taxpayer (as defined in § 152 [c]) who has not attained age 17." As noted above, IRC (26 USC) § 152 (c) defines a qualifying child, in part, as one who has the same principal place of abode as the taxpayer for more than one-half of the taxable year (IRC [26 USC] § 152 [c] [1] [B]). Since petitioner has failed to present sufficient evidence to meet his burden of proving that the claimed dependents resided with him at the same principal place of abode for more than one-half of the taxable year in 2014, or that his ex-wife signed form 8332 or a substantially similar statement, petitioner has not met his burden of proving that the Division's disallowance of the Empire State child credit was erroneous.

F. In petitioner's amended 2014 resident income tax return, he conceded that he was not entitled to claim the New York State and City earned income credit, and instead claimed a noncustodial earned income credit. Tax Law § 606 (d-1) provides that to be eligible for this credit, the taxpayer must 1) be a resident; 2) have attained the age of 18; 3) be the parent of a minor child or children with whom the taxpayer does not reside; 4) have an order requiring him to make child support payments, which are payable through a support collection unit established pursuant to § 1011-h of the social services law, which order must have been in effect for at least one-half of the taxable year; and 5) have paid an amount in child support in the taxable year at least equal to the amount of current child support due during the taxable year for every order requiring him to make child support payments (Tax Law § 606 [d-1] [2]). Petitioner here fails to meet the last two requirements. Specifically, although the stipulation of settlement between

petitioner and his ex-wife requires petitioner to make support payments, the stipulation states that "[t]he Wife waives her right to receive child support payments through the Support Collection Unit." As the Tax Law clearly requires an order requiring the taxpayer to make child support payments through a support collection unit, petitioner fails the criteria in this regard. Further, petitioner fails the final criteria requiring that he has paid an amount of child support in the taxable year at least equal to the amount of current child support due for that year. Here, pursuant to the stipulation of settlement and judgment of divorce, petitioner was required to make child support payments of $850.00 a month, totaling $10,200.00 for the year 2014. The account statement submitted by petitioner shows that in 2014 he made child support payments totaling $9,352.00. As petitioner's child support payments for 2014 fall short of the amount required pursuant to the stipulation of settlement and judgment of divorce, petitioner has failed to meet the eligibility requirements for the noncustodial earned income credit and the Division properly denied such credit.

G. The Division assessed penalties against petitioner pursuant to Tax Law § 685 (a) (2) and (3) for failure to pay the tax shown or required to be shown on his return. The burden of proof to show reasonable cause is on the petitioner, and in establishing reasonable cause, the taxpayer faces an "onerous task" (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

> "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner' s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]" (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992).

Petitioner here has failed to present any evidence that would constitute reasonable cause.

H. The petition of Yehad Abdelaziz is denied and the notice of deficiency dated April 2, 2018, is sustained.

DATED: Albany, New York
October14, 2021

Barbara J. Russo
ADMINISTRATIVE LAW JUDGE