

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ROSEMARIE ROSENDO	:	DETERMINATION
	:	DTA NO. 829406
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2017.	:	

Petitioner, Rosemarie Rosendo, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2017.

A videoconferencing hearing via Cisco Webex was held before Kevin R. Law, Administrative Law Judge, on February 24, 2021, with all briefs to be submitted by June 11, 2021, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether petitioner has met her burden of proving entitlement to claim her nephew as a dependent for purposes of computing the earned income credit and the empire state child credit.

FINDINGS OF FACT

1. Petitioner, Rosemarie Rosendo, filed a New York State and New York City personal income tax return for tax year 2017, claiming a refund in the amount of \$2,012.00. In her return,

petitioner claimed the New York State earned income credit of \$945.00, the New York City earned income credit of \$170.00 and the empire state child credit of \$330.00.

2. Petitioner's return was selected for a routine desk audit by the Division of Taxation (the Division) prior to the issuance of the requested refund. On February 27, 2018, the Division sent petitioner a letter requesting verification of her relationship with the dependent she claimed on her return.

3. At the hearing, the Division introduced the affidavit of Matthew Roberts, a Tax Technician 2 with the Division. Mr. Roberts explained that during the audit, petitioner provided a birth certificate for the claimed dependent, the dependent's father, and herself. According to Mr. Roberts, the Division was unable to determine the relationship between petitioner and the claimed dependent. Mr. Robert's affidavit also noted that petitioner failed to provide requested information from the claimed dependent's school or physician stating petitioner was the parent or guardian. A notice of disallowance was issued to petitioner on August 24, 2018 disallowing the credits claimed. As a result, petitioner received an adjusted refund of \$571.15.

4. At the hearing in this matter, petitioner testified that she is the claimed dependent's aunt by marriage; her ex-husband's brother is the child's father. Petitioner explained that during 2017, her brother-in-law and his son lived with her and her then-husband. During the 2017 tax year, petitioner's nephew was between 9 and 10 years old. Petitioner explained that she fed and clothed her nephew, and that her brother-in-law allowed her to claim the child as a dependent.

5. The record was left open for petitioner to provide documentation establishing her nephew's residence in 2017, such as school records and/or a statement from the child's physician, and other documentation that would establish her entitlement to the credits claimed. To that end, petitioner provided: a copy of the child's birth certificate indicating a June 2008 date

of birth; his social security card; an undated statement from the child's health insurer addressed to him at the same address as petitioner; and a statement from the New York City Public Schools, dated May 9, 2019, addressed to the Bureau of Income Maintenance. The statement indicates that the child's father is his guardian. The address listed for the child is the same address as petitioner.

CONCLUSIONS OF LAW

A. As noted, the notice at issue is a notice of disallowance denying petitioner's claims for the New York State and New York City earned income credits as well as her claim for the empire state child credit. "A tax credit is 'a particularized species of exemption from taxation'" (*Matter of Golub Serv. Sta. v Tax Appeals Trib.*, 181 AD2d 216, 219 [3d Dept 1992], citing *Matter of Grace v State Tax Commn.*, 37 NY2d 193, 197 [1975]) and a taxpayer carries "the burden of showing 'a clear-cut entitlement' to the statutory benefit" (*Matter of Golub Serv. Sta. v Tax Appeals Trib.*, at 219 [[citation omitted]]).

B. First, addressing petitioner's eligibility for the earned income credits, Tax Law § 606 (d) provides that the New York State earned income credit for the 2017 tax year is equal to 30% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . ." In addition, Tax Law § 1310 (f) provides for a credit equal to 5% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . ." for New York City residents. Since petitioner's eligibility for the New York State and New York City earned income credits hinges upon her eligibility for the federal credit, her eligibility under federal law is determinative.

C. The federal earned income credit, provided for pursuant to 26 USC § 32, is a refundable tax credit for eligible low-income workers. To be eligible to claim the credit, a

taxpayer must have earned income with an adjusted gross income (AGI) below a certain level, must have a valid Social Security number, must use a filing status other than married filing separately, must be a U.S. citizen or resident alien, must have no foreign income, and have investment income less than a certain amount. “A small credit is provided to all eligible taxpayers, but the principal feature of the EIC is the more substantial credit available to eligible taxpayers who have one or more ‘qualifying’ children” (*Sherbo v Commr.*, 255 F3d 650, 651 [8th Cir 2001], citing 2 Bittker & Lokken, *Federal Taxation of Income, Estate & Gifts* ¶ 37.1 [3d ed. 2000]). An individual must meet the following tests in order to be the qualifying child of a taxpayer: (1) relationship test; (2) residency test; (3) age test; and (4) support test (26 USC § 152 [c] [1]). Notwithstanding these requirements, 26 USC § 152 (c) (4) (C) provides that if the parents of an individual may claim the individual as a qualifying child, but no parent does so, such individual may be claimed as the qualifying child of another taxpayer but only if the AGI of such taxpayer is higher than the highest AGI of either parent of the individual. Specifically, as relevant herein, 26 USC § 152 (c) provides that a “qualifying child” means an individual “who bears a relationship to the taxpayer described in paragraph (2)” (26 USC § 152 [c] [1] [A]). An individual bears a relationship to a taxpayer for purposes of 26 USC § 152(c) (1) (A) if the individual is “a child of the taxpayer or a descendant of such a child” or “a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative” (26 USC § 152 [c] [2]). The qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the tax year (26 USC § 152 [c] [1] [B]) (residency test), the child must not have attained the age of 19 or be a full-time college student under the age of 24 (IRC § 152 [c] [3] [A] [i]) (age test); and not have provided over one-half of his or her own support for the taxable year (support test). In this case, petitioner’s nephew satisfies the relationship, residency and age tests

because the documentary evidence coupled with her testimony establishes that the child was her nephew, lived with her and was less than age 19 in 2017. The only evidence in the record addressing the child's support was petitioner's uncorroborated and vague testimony that she fed and clothed her nephew. The record contains no indication as to whether the child's father, who the child also lived with, could have claimed the child as his dependent, and the amount of his adjusted gross income (*see* 26 USC § 152 [c] [4] [C]). The statement from the New York City Schools indicates that the father, and not petitioner, was his guardian. Without more, it is concluded that petitioner has not met her burden of establishing a clear-cut entitlement to the earned income credits.

D. Turning next to petitioner's claimed empire state child tax credit for 2017, petitioner has also failed to sustain her burden of proof to establish that she is entitled to this credit. Tax Law § 606 (c-1) provides for a credit equal to the greater of \$100 times the number of qualifying children of the taxpayer or the applicable percentage of the child tax credit allowed the taxpayer under 26 USC § 24 for the same taxable year for each qualifying child. Pursuant to 26 USC § 24, a taxpayer may claim a child tax credit for an individual who is her "qualifying child" as defined in 26 USC § 152 (c) and has not attained the age of 17 during the taxable year (26 USC § 24 [a], [c]). Since it has been determined that petitioner has not met her burden of proving that her nephew was her qualifying child for purposes of the earned income credit, she has likewise not carried her burden of proving he was her qualifying child for purposes of the empire state child credit.

E. The petition of Rosemarie Rosendo is denied, and the August 24, 2018 notice of disallowance is sustained.

DATED: Albany, New York
December 09, 2021

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE