

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**ETHMANE KANE**  
for Redetermination of a Deficiency or for Refund of  
Personal Income Tax under Article 22 of the Tax Law  
and the Administrative Code of the City of New York  
for the year 2017.

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DETERMINATION  
DTA NO. 829807

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

A hearing was held in New York, New York, on October 26, 2021 and continued to January 12, 2022, with all briefs to be submitted by May 20, 2022, which date began the six-month period for issuance of this determination. Petitioner appeared pro se and the Division of Taxation appeared by Amanda Hiller, Esq. (Michael Trajbar, Esq., and Christopher O'Brien, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether the Division of Taxation properly disallowed petitioner's New York State and New York City earned income credit for 2017.

II. Whether the Division of Taxation properly disallowed petitioner's Empire State child credit for 2017.

III. Whether the Division of Taxation properly disallowed petitioner's enhanced real property tax credit.

IV. Whether the Division of Taxation properly disallowed petitioner's New York City school tax credit.

V. Whether the Division of Taxation properly disallowed petitioner's request for a refund of New York State and City tax withheld.

***FINDINGS OF FACT***

1. Petitioner, Ethmane Kane, electronically filed with the Division of Taxation (Division) a New York State resident income tax return, form IT-201, for 2017 (return) on April 4, 2018. Petitioner listed a Brooklyn, New York, address on his return. On the return, petitioner claimed head of household as his filing status with two dependent children, S. K. and K. H.,<sup>1</sup> reported wages of \$14,315.00, and requested a refund of \$3,061.00. S. K. had a date of birth of December 30, 2010. K. H. had a date of birth of October 17, 2001.

2. The refund consisted of an Empire State child credit of \$560.00, a New York State earned income credit of \$1,640.00, a New York City school tax credit fixed amount of \$63.00 and rate reduction amount of \$2.00, a New York City earned income credit of \$281.00, a New York City enhanced real property tax credit of \$13.00, New York State tax withheld of \$305.00, and New York City tax withheld of \$197.00.

3. With the return, petitioner also filed a claim for earned income credit, form IT-215, a claim for empire state child credit, form IT-213, W-2 information from Allstar Security & Consulting reflecting wages of \$14,315.00, state income tax withheld of \$305.00 and New York City income tax withheld of \$197.00, and a claim for New York City enhanced real property tax

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<sup>1</sup> For privacy purposes, the claimed dependents are referred to herein as S. K. and K. H.

credit. On the claim for earned income credit, petitioner listed S. K. and K. H. as qualifying children he claimed on his federal schedule earned income credit (EIC). He also listed \$5,616.00 as the amount of federal EIC he claimed. He listed S. K. and K. H. on the claim for empire state child credit as children that were at least 4 but less than 17 years of age on December 31, 2017. On the claim for New York City enhanced real property tax credit, petitioner checked the box marked "Yes" to indicate that he was a New York City resident for all of 2017. Additionally, he also marked the "Yes" box, to indicate that he occupied the same residence for at least six months during 2017. At the bottom of the real property tax credit form in addition to himself, petitioner listed S. K. and K. H. as household members.

4. The Division performed a desk audit of petitioner's 2017 return. On April 18, 2018, the Division sent petitioner an audit inquiry letter requesting verification of information petitioner listed on his income tax return. The information requested included the IRS's approval of petitioner's federal EIC, including his federal income tax return with all schedules and any document that indicated that he received the federal EIC and proof of his wages earned and taxes his employer withheld, such as a copy of petitioner's W-2 or the last paycheck he received from his employer. The Division also requested information about the credits he claimed, such as the required information about his dependents, including a birth certificate or, if no birth certificate, a copy of petitioner's birth certificate and a copy of the birth certificate of the dependent's parent to whom petitioner is related. The Division requested proof of where the child lived, such as a letter from the child's doctor, or school showing the child's name, date of birth, and address, and name of the child's custodial parent.

5. Petitioner did not respond to the Division's audit inquiry letter.

6. The Division determined that petitioner failed to provide adequate documentation to substantiate the amounts claimed.

7. On January 9, 2019, the Division issued petitioner a notice of disallowance for tax year 2017, disallowing his claim for refund. The notice stated the refund was denied because petitioner did not respond to the Division's audit inquiry letter.

8. Petitioner timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) protesting the notice. On his request, he listed the same address in Brooklyn, New York, that he listed on his 2017 return. By conciliation order number 000307329, dated September 27, 2019, BCMS allowed a refund of \$188.60.

9. Petitioner timely filed a petition asserting that the Division is wrongfully holding his money for 2017 for funds claimed for his daughter and stepdaughter that he takes care of and has taken care of. Petitioner also claimed that the amount of tax determined was \$188.60 but the amount contested was \$10,767.00.

10. At some point prior to the hearing, petitioner provided documents to the Division, including the following: (i) an undated letter from Brooklyn Select PC located in Brooklyn, New York, signed by a doctor stating that petitioner was S. K.'s father and that S. K., with an address in Big Indian, New York, was a patient in the clinic for her regular physical, immunization, and other medical problems since birth; (ii) the birth certificates for S. K. and K. H.; (iii) a Census Verification Report for S. K.; (iv) an Elementary Emergency Dismissal Form for S. K., listing petitioner as an emergency contact; (v) an invoice from Dish satellite provider to petitioner for the same address in Big Indian, New York; and, (vi) a copy of K. H. and S. K.'s social security cards. S. K.'s birth certificate lists petitioner as the father. It also lists her mother's residence in Big Indian, New York, located in Ulster County. The Census Verification Report (Report )

shows that S. K. lives at the same address in Big Indian, New York, as was shown on the letter from Brooklyn Select PC, and the service address for the invoice from Dish. The Report also lists Denedra Harkless, S. K.'s mother, and K. H., as members of the same household and lists petitioner as a non-household relationship.

11. At the hearing, the Division submitted the affidavit of Kathleen Loos, sworn to on June 24, 2021. Ms. Loos has worked for the Division for 13 years. She was a Tax Technician 1, and then a Tax Technician 2, before becoming a Tax Technician 3 in February of 2019. She is the Assistant Manager in the Personal Income Tax Credit Unit. Her responsibilities include reviewing New York State personal income tax returns, conducting audits, and processing refund claims. Her duties also include communicating with taxpayers, preparing administrative reports and forms and supervising unit staff. In performing these responsibilities, Ms. Loos reviewed petitioner's file and his New York State personal income tax return for tax year 2017.

12. In her affidavit, Ms. Loos stated that at the conciliation conference, the conciliation conferee recomputed the statutory notice, recalculating petitioner's 2017 return as a single taxpayer with no qualifying dependents, resulting in a refund of \$188.60, but otherwise sustained the notice. It is not clear from the record how the \$188.60 was determined.

13. Ms. Loos averred that petitioner was unable to substantiate his claimed credits because he did not provide adequate documentation in response to the Division's desk audit inquiries.

14. At the hearing, petitioner submitted a payment history from petitioner to Denedra Harkless as the custodial parent from March 6, 2015 through May 10, 2021. The history does not identify the name of the child. Petitioner also submitted money orders payable to Tony Athakanagos for rent for the Big Indian, New York, address from 2014 and 2018. Some of the

money orders listed petitioner as the purchaser and some of them listed Ms. Harkless. Petitioner also submitted forms from the Internal Revenue Service (IRS) stating the documents needed to claim the earned income credit on the basis of a qualifying child for 2017, the documents to prove head of household filing status, and the documents for dependency exemptions.

15. At the hearing, petitioner testified that he was living at the address in Big Indian, New York. He stated that he lived there for more than six months but that he also lived in Brooklyn and used both addresses. He also testified that K. H. and his daughter, S. K., were living in Ulster County, but that S. K. would visit him in Brooklyn.

16. The record was left open for petitioner to submit a Release/Revocation of Release of Claim to Exemption for Child of Custodial Parent (Release), IRS form 8332, that he had brought to the first day of the hearing but did not have on the continued second day, and for a letter from S. K. and K. H.'s mother regarding support provided by petitioner. Petitioner submitted the Release, signed on July 9, 2021, showing that Ms. Harkless agreed not to claim an exemption for K.H. for tax year 2017. The next section of the form provided for a release of claim to exemption for future years and there, Ms. Harkless wrote she agreed not to claim an exemption for S. K. for tax year 2017. Petitioner also submitted an email from Ms. Harkless stating that petitioner helped pay her rent during 2017 and that he provided child support for his daughter. She also stated that petitioner helped with her car payments. The letter does not state that petitioner lived with Ms. Harkless, S. K. and K. H. Both documents were admitted into evidence.

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

A. At issue is a notice of disallowance denying petitioner's claims for the New York State and New York City earned income credits, the Empire State child credit, the New York

City school tax credit and enhanced real property tax credit. 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]). "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 Glub Serv. Sta.*, 181 AD2d at 219 [[citation omitted]]).

B. Tax Law § 606 (d) (1) provides that the New York State earned income credit for the 2017 tax year is equal to 30 percent "of the earned income credit allowed under Internal Revenue Code (IRC) (26 USC) § 32." The New York City earned income credit is equal to five percent of the federal earned income credit (EIC) under IRC (26 USCA) § 32 (*see* Tax Law § 1310 [f] [1]; Administrative Code of the City of New York § 11-1706 [d] [1]). Since petitioner's eligibility for the New York State and City earned income credits are determined based solely upon a percentage of the federal credit, his eligibility under the provisions of the IRC control (*see Matter of Espada*, Tax Appeals Tribunal, January 28, 2016).

The EIC, provided for pursuant to IRC (26 USC) § 32, is a refundable tax credit for eligible low-income workers. Among other criteria not relevant here, to be eligible to claim the credit, a taxpayer must have earned income with an adjusted gross income (AGI) below a certain level (IRC [26 USC] § 32). The credit is computed based on a determination of a taxpayer's "earned income," which includes employee compensation and earnings from self-employment (*see* IRC [26 USC] § 32 [c] [2] [A]). Petitioner bears the burden of proof to substantiate the amount of earned income reported on his return (*see* Tax Law § 689 [e]).

Here, petitioner failed to meet his burden of substantiating the amounts of earned income reported on his 2017 return. He did not produce any books, records, receipts, or other documents, including any documents from any employers, to clearly show that he received employment income. He provided W-2 information on his electronically filed 2017 return. However, he did not provide an actual form W-2, any pay stubs, receipts or deposit slips from any employers. Because he has not provided sufficient documentation to substantiate the claimed earned income for 2017, he has failed to establish his entitlement to the claimed earned income credit.

Even assuming petitioner had earned income, he also failed to establish an entitlement to a larger credit based on qualifying children. “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]). The amount of the credit varies depending on the number of the taxpayer’s “qualifying children” as defined by 26 USC § 152 (c) and the taxpayer’s AGI.

As relevant here, 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]) (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 (26 USC § 152 [c] [1] [B]), 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]), the child must not have provided over one-half of his or her own support for the



taxable year (26 USC § 152 [c] [1] [D]), and the child must not have filed a joint return with a spouse for that taxable year (26 USC § 152 [c] [1] [E]). 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, 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.

In this case, petitioner has failed to submit sufficient evidence that K. H., or his daughter, S. K., lived with him for more than one-half of the 2017 tax year. Petitioner testified that he lived at both addresses, but also testified that S. K. visited him at his residence in Brooklyn. The documentation petitioner submitted showed a history of payments to S. K. and K. H.'s mother but did not establish where petitioner lived. The Dish invoices and the payments to the landlord are not sufficient to establish that petitioner lived in Big Indian, New York. In fact, petitioner's testimony indicates he did not have the same place of abode as S. K. and K. H., stating that he visited S. K. and had her visit him. Additionally, the documentation petitioner submitted to the Division, such as the Census Verification report, petitioner's request to BCMS, and his Claim for New York City Enhanced Real Property Tax Credit, all suggest that he lived in Brooklyn, New York. While petitioner submitted a letter from the dependents' mother stating petitioner supported her, S. K. and K. H., it was an unsworn statement and, thus, it is afforded little weight. It also does not assert that petitioner lived with S. K. and K. H.

Additionally, it is undisputed that K. H. is not a child of the taxpayer. Petitioner has not submitted any evidence that his AGI is higher than the highest AGI of either of K. H.'s parents. Accordingly, she is not a qualifying child for whom petitioner can claim an earned income credit

(IRS [26 USC] § 152 [c] [4] [C]). Without more, petitioner has not met his burden of establishing he has qualifying children entitling him to the earned income credit.

C. Turning next to petitioner's claimed Empire State child credit for 2017, petitioner has also failed to sustain his burden of proof to establish that he is entitled to this credit. Tax Law § 606 (c-1) provides for a credit equal to the greater of \$100.00 times the number of qualifying children of the taxpayer or the applicable percentage of the child tax credit allowed the taxpayer pursuant to IRC (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 his "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 petitioner has not met his burden of proving that S. K. and K. H. were qualifying children under the same provision for purposes of the earned income credit, he also did not meet his burden of proving them as qualifying children for purposes of the Empire State child credit.

D. Tax Law § 606 (ggg) authorizes a school tax credit applicable to full or part time residents of the City of New York with income less than \$250,000.00 who cannot be claimed as a dependent on another taxpayer's federal income tax return. For persons filing as head of household or as a single taxpayer, the credit is \$63.00. Petitioner has established that he is a resident of New York City. However, he did not prove any income for 2017. Additionally, to be entitled to the additional New York City school tax credit "rate reduction" amount, petitioner must have earned income (Tax Law § 606 [ggg] [4-b]). As petitioner has not shown any earned income, he was not entitled to either of these credits.

E. Tax Law former § 606 (e-1) allowed a credit to taxpayers who were full-year New York City residents, who paid either real property taxes or rent for their residence, who occupied

