STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **THOMAS J. POWELL** 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 2019.	DETERMINATION DTA NO. 830132

Petitioner, Thomas J. Powell, 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 2019.

A videoconferencing hearing via CISCO Webex was held before Kevin R. Law, Administrative Law Judge, on November 2, 2022, with all briefs to be submitted by March 1, 2023, 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. (Colleen McMahon, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly denied petitioner's head of household filing status for 2019.

II. Whether the Division of Taxation properly denied petitioner's claimed dependent exemption for 2019.

III. Whether the Division of Taxation properly denied petitioner's claimed Empire State child credit for 2019.

FINDINGS OF FACT

1. On or about January 21, 2020, petitioner, Thomas J. Powell, filed a 2019 New York State resident income tax return, form IT-201 (2019 return), on which he reported wage income of $16,435.00, and filed as head of household status with one dependent exemption for his minor child. Petitioner claimed the New York State earned income credit and Empire State child credit and requested a refund of $1,645.00.

2. The Division of Taxation (Division) processed the return and refunded the amount requested.

3. On August 26, 2020, the Division issued a statement of proposed audit changes to petitioner proposing tax of $1,368.00 plus interest. The tax asserted is based upon the disallowance of petitioner's claimed dependent exemption and, as a consequence, denying his claim for the Empire State child credit and switching his filing status from head of household to single. Based upon a single filing status, petitioner was not eligible to claim the earned income credit because he earned too much income to qualify for said credit. The statement of proposed audit changes indicates that someone else claimed petitioner's daughter as a dependent.

4. On October 13, 2020, consistent with the statement of proposed audit changes, the Division issued a notice of deficiency, notice number L-051853722, to petitioner asserting tax of $1,368.00, plus interest.

5. Petitioner attached to the petition a copy of an order of custody and visitation (order) signed by the Honorable Victoria B. Campbell, Family Court Judge, with regard to petitioner's daughter. The order states that petitioner and the child's mother are awarded joint legal custody with primary physical custody awarded to the mother. The custody agreement provides that petitioner was to have visitation each Thursday commencing at 5:00 p.m., until Sunday at 5:00

p.m., except that the mother was entitled to have the child one weekend per month. The custody agreement provided that the child would spend Mother's Day with her mother and Father's Day with petitioner, and petitioner and the child's mother would alternate holidays by agreement. The order stated that the child's birthday would be split between petitioner and the child's mother. Finally, petitioner and the child's mother would each be entitled to one continuous week with the child during summer vacation.[1]

6. At the hearing in this matter, petitioner testified that he has always claimed his daughter as his dependent, and did so in the year in question, but that the child's mother claimed their daughter as her dependent in 2019. Petitioner asserted that he and the child's mother shared custody equally and requested that the dependency exemption be allowed consistent with other tax years.

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 exemption, the head of household filing status, the earned income credit, and the Empire State child credit.

[1] Petitioner also submitted a copy of the order as a separate exhibit at the virtual hearing.

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) 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).

Review of the order indicates that petitioner was the noncustodial parent of his daughter during 2019 based upon the time allocated to him for visitation. However, 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] [A], [3] [i]; ***see also*** IRC [26 USC] § 152 [e] [2]).

C. The Division has not contested that petitioner's daughter has received at least one-half of her support from her parents and that she is 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]).

D. A custodial parent can use part 1 of federal form IRS 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, the child's mother, issued a form 8332 or conforming written declaration to him, releasing her claim to the dependent exemption. In fact, as admitted by petitioner, the mother actually claimed the child on her own tax return. Therefore, petitioner was not eligible to claim his daughter as a dependent on his 2019 return because she was not his qualifying child.

E. Regarding the head of household filing status, Tax Law § 607 (a) 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.

F. 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, petitioner's daughter spent less than half the year with petitioner. 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.

G. Next, the Division denied petitioner's claim for the earned income credit based upon his income level and revised filing status. As a matter of background, Tax Law § 606 (d) (1) provides that the New York State earned income credit for the tax year in issue is equal to 30% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . ." Since petitioner's eligibility for the New York State earned income credit hinges upon his eligibility for the federal credit, his eligibility analyzed under federal law is determinative.

H. The federal earned income credit, provided for pursuant to IRC (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 (***see*** IRC [26 USC] § 32). "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]). The amount of credit varies depending on the number of the taxpayer's "qualifying children" as defined by 26 USC § 152 (c) and the taxpayer's AGI. In this case, it has been determined that petitioner should have filed his 2019 as a single filer with no qualifying children. In 2019, the earned income credit was completely phased out for taxpayers filing single with no qualifying children whose earned income equaled or exceeded $15,570.00. (***see*** Rev. Proc. 2018–57). Since petitioner's wage income exceeded such amount, petitioner was not eligible to claim such credit.

I. Finally, turning next to petitioner's claimed Empire State child credit for 2019, 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 under IRC (26 USC) § 24 for the same taxable year for each qualifying child. Pursuant to IRC (26 USC) § 24, a taxpayer may claim a child credit for an individual who is their "qualifying child" as defined in 26 USC § 152 (c) and has not attained the age of 17 during the taxable year IRC [26 USC] § 24 [a], [c] [1]). Since it has been determined that petitioner's daughter was not his qualifying child, petitioner was not eligible for this credit.

J. The petition of Thomas Powell is denied, and the notice of deficiency, dated October 13, 2020, is sustained.

DATED: Albany, New York
August 31, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE