STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **JOEL WEINBERGER** 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 2015.	DETERMINATION DTA NO. 850488

Petitioner, Joel Weinberger, 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 2015.

A formal hearing by videoconference was held before Winifred M. Maloney, Administrative Law Judge, on September 10, 2024, with all briefs to be submitted by January 10, 2025, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Maria Matos, Esq., of counsel).

ISSUE

Whether petitioner has established that the Division of Taxation erred in denying his claimed credits on his 2015 New York State personal income tax return.

FINDINGS OF FACT

1. Petitioner, Joel Weinberger, electronically filed a form IT-201, New York State resident income tax return, for the year 2015 (return), on June 15, 2018. Petitioner listed a

Division Avenue, Brooklyn, New York, address on his return. On the return, petitioner claimed head of household as his filing status with one dependent child, L.W., whose date of birth was listed as August 1, 2006.[1] Petitioner reported wages in the amount of $11,040.00, federal and New York State adjusted gross income of the same amount, no tax due, no tax withheld, a New York State household credit of $75.00 and a New York City household credit of $60.00, and requested a refund of $3,796.00.

2. The refund consisted of an Empire State child credit of $330.00, a child and dependent care credit of $2,156.00, a New York State earned income credit of $1,008.00, a real property tax credit of $53.00, a New York City school tax credit of $63.00,[2] a New York City earned income credit of $168.00 and a New York City enhanced real property tax credit of $18.00.

3. With the return, petitioner also filed a form IT-215, claim for earned income credit, a form IT-213, claim for Empire State child credit, a form IT-216, claim for child and dependent care credit, a form IT-214, claim for real property tax credit, form W-2 information from AB Famous Gefilte Fish, Paterson, New Jersey, reflecting wages of $11,040.00 and New Jersey income tax withheld of $121.00 and a form NYC-208, claim for New York City enhanced real property tax credit.

4. On the claim for earned income credit, petitioner listed L.W. as a qualifying child on his federal schedule earned income credit (EIC). He also listed $3,359.00 as the amount of federal EIC claimed. On the claim for Empire State child credit, petitioner claimed the federal

[1] For privacy purposes, the claimed dependent is referred to herein as L.W.

[2] On page 1 of the return, petitioner reported that he lived 12 months in New York City in 2015. He also reported Kings as his New York State county of residence and Brooklyn as his school district, school district code number 71, on page 1 of the return.

child tax credit or additional child tax credit for one qualifying child and listed L.W. as the child that was at least 4 but less than 17 years of age on December 31, 2015.

5. On the claim for child and dependent care credit, petitioner listed two qualifying children: L.W. and R.W.[3] Petitioner reported the United Talmudical Academy (UTA) as the care provider and the amount paid to the same of $5,300.00. Petitioner also reported qualified expenses paid to UTA in the amounts of $5,300.00 and $300.00 for L.W. and R.W., respectively.

6. On the claim for real property tax credit, petitioner checked boxes marked "Yes" to indicate that he was a New York State resident for all of 2015 and occupied the same residence for at least six months during 2015. He also indicated that he: (i) did not own real property with a current market value of more than $85,000.00 during 2015; (ii) was not claimed as a dependent on another taxpayer's 2015 federal return; (iii) did not reside in public housing or other residence completely exempted from real property taxes in 2015; and (iv) did not live in a nursing home during 2015. In addition to himself, petitioner listed L.W. as a household member, a total amount of rent that he and all members of his household paid during 2015 of $5,400.00, an average monthly adjusted rent of $450.00 and, after computing the credit amount, a credit limit of $53.00, which amount petitioner claimed as his real property tax credit. On the claim for New York City enhanced real property tax credit, petitioner checked boxes marked "Yes" to indicate that he was a New York City resident for all of 2015 and occupied the same residence for at least six months during 2015. In addition to himself, petitioner listed L.W. as a household member. Petitioner also reported a household gross income of $11,040.00, a total amount of rent he and all household members paid during 2015 of $5,400.00 and, after computing the credit amount, a New York City enhanced real property tax credit of $18.00.

[3] For privacy purposes, petitioner's other child is referred to herein as R.W. Petitioner listed R.W.'s date of birth as November 16, 2004, on the claim for child and dependent care credit form.

7. The Division of Taxation (Division) conducted a desk audit review of petitioner's return. As part of its review, the Division's Income/Franchise Desk Audit Bureau issued a letter, dated June 26, 2018, to petitioner requesting additional information for it to process his return and determine the amount of his tax refund (audit inquiry letter). The Division requested proof of petitioner's wages and taxes his employer withheld, such as a copy of petitioner's form W-2 or the last paycheck he received from his employer. The Division requested information about petitioner's children or dependents, including copies of each child's birth certificate, and a "letter from the child's doctor or school showing the child's name, date of birth, address, and name of the custodial parent" to prove the residence of such child. The Division also requested proof of petitioner's payment of childcare expenses for tax year 2015.

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

9. On December 27, 2018, the Division issued to petitioner a notice of disallowance for tax year 2015, denying his claim for refund in the amount of $3,796.00. The notice stated that the refund was denied because petitioner did not respond to the Division's audit inquiry letter.

10. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice of disallowance. The request was faxed to and received by BCMS on January 18, 2023. Along with the request, petitioner submitted 15 pages of documentation.

11. On February 3, 2023, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's request was untimely because such request was not faxed to BCMS within two years of the date of issuance of the notice of disallowance.

12. On March 15, 2023, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

13. The Division filed a motion, dated September 5, 2023, seeking an order dismissing the petition or, in the alternative, summary determination in its favor. The subject of the Division's motion was the timeliness of the request filed with BCMS by petitioner. By order, dated December 21, 2023, the undersigned Administrative Law Judge concluded that the Division of Tax Appeals has subject matter jurisdiction over the issue of the timely filing of petitioner's request, and treated the Division's motion as one for summary determination. After reviewing the documents submitted by the Division to prove proper mailing of the notice of disallowance, the undersigned concluded that the Division failed to produce any evidence of its standard procedure for the issuance of notices of disallowance and failed to prove such standard procedure was followed in the issuance of the notice of disallowance to petitioner at his last known address. Based upon those conclusions, the undersigned denied the Division's motion for summary determination and directed that a hearing be scheduled in due course.

14. At the commencement of the hearing, the Division stated the issues as "whether petitioner provided sufficient proof to establish that he qualified for credits claimed in his return which include the Dependent Care Credit [sic] the Empire State Child Credit, the New York State and New York City Earned Income Credit, and that's [sic] tax year 2015."

15. At the hearing, the Division introduced its audit file in this matter that contained documents submitted by petitioner on January 18, 2023, along with his faxed request to BCMS.[4] Documents faxed to BCMS included: (i) a copy of the request; (ii) a copy of form W-2 issued by

[4] The audit file also included copies of a "Request for Assistance from the Office of Taxpayer Rights Advocate," form DTF-911, and 15 pages of documentation that were faxed to "15184358532," on January 18, 2023. A review of those 15 pages indicates that they are duplicate copies of the supporting documentation faxed with the request to BCMS.

A&B Famous Gefilte Fish, Inc., to petitioner for tax year 2015; (iii) copies of the City of New York certifications of birth (birth certificates) for L.W. and R.W.; (iv) a copy of a letter, dated June 12, 2019, from UTA; (v) a copy of a "Statement of Account" issued by UTA (UTA statement of account); and (vi) copies of 10 pages taken from "American Express Platinum Delta SkyMiles Credit Card" (Am Ex credit card) statements listing charge transactions made during certain months in 2015.

16. Form W-2 issued by A&B Famous Gefilte Fish, Inc., Paterson, New Jersey, to petitioner listed the same Division Avenue, Brooklyn, New York, address as listed on petitioner's return, reported wages of $11,040.00 and New Jersey state income tax withheld of $120.60.

17. The birth certificate for L.W. lists a date of birth of August 1, 2006, and the birth certificate for R.W. lists a date of birth of November 16, 2004. Both birth certificates identify petitioner as the father.

18. The letter, dated June 12, 2019, from UTA's secretary, S. Jacobowitz, (UTA letter) stated the following:

"To Whom It May Concern:

> This is to certify that [R.W. and L.W.] residing at . . . Division Ave., Brooklyn, N.Y. 11211 were enrolled in our academy as full time [sic] students for the year [sic] of 2015 and 2016.
>
> Any courtesy extended towards this matter will be greatly appreciated."

19. The UTA statement of account stated, in part, as follows:

"Dear parents / guardians:
WEINB00
Yoel Hillel Weinberger
(XXX) Division Ave.
(XXX) XXX-XXXX

Following are the payments we received from your funds that were paid towards childcare and were not reimbursed in any way

Date	Amount	Payment Method	Receipt
01/12/2015	500.00	Credit Card ***2044	U79145
04/28/2015	500.00	Credit Card ***2044	U85234
06/11/2015	2,130.00	Credit Card ***2044	U87727
09/21/2015	1,000.00	Credit Card ***	U94280
11/09/2015	640.00	Credit Card ***1053	U96908
12/09/2015	350.00	Credit Card ***2044	R35706
12/24/2015	530.00	Credit Card ***1053	U99625"

20. Review of the 10 pages taken from the Am Ex credit card statements indicates that they are duplicate copies of pages taken from statements for a credit card account ending 3000 issued in the name of David Nutovics, a friend of petitioner, that detailed transaction charges made during various months in the year 2015. Further review of the Am Ex credit card statements indicates that there were at least five additional credit card account numbers associated with Mr. Nutovics' Am Ex credit card account during those various months, including a credit card issued in the name of Joel H. Weinberger (JHW), card number ending 2044, a credit card issued in the name of Yoel Weinberger (YW), card number ending 1053, and a credit card issued in the name of JHW, card number ending 3042. The details of charges made on JHW's card number ending 2044 include a charge made at UTA in the amount of $500.00 on January 12, 2015, listed as "EDUCATION/SCHOOL." The details of JHW's card number ending 2044 include a charge made at UTA in the amount of $500.00 on April 28, 2015, listed as "EDUCATION/SCHOOL." The details of JHW's card number ending 2044 include a charge made at UTA in the amount of $2,130.00 on June 11, 2015, listed as "EDUCATION/SCHOOL." The details of YW's card number ending 1053 include a charge made at UTA in the amount of $640.00 on November 9, 2015. The details of JHW's card number ending 3042 consist of a sole charge made at UTA in the amount of $350.00 on December 9, 2015.

21. At the hearing, the Division presented the testimony of Vincent Fisher, a Tax Technician 3 in the Division's Income/Franchise audit unit. Mr. Fisher was asked to review petitioner's return and testify in this matter by the Division's Office of Counsel. Mr. Fisher testified that he thoroughly reviewed the Division's file and return correspondence, work papers and other documents, in preparation for the hearing. Mr. Fisher testified that petitioner's return was due on April 15, 2016, however, it was electronically filed on June 15, 2018. He further testified that petitioner's return seeking a refund in the amount of $3,796.00 was filed with the Division within the three-year statutory period to file for such refund. Mr. Fisher explained that petitioner's return was selected for audit because the Division needed to verify his income, his dependents including their relationship and their residency and the dependent care credit claimed. He further explained that the audit inquiry letter sent to petitioner requested documentation regarding petitioner's income, his dependents and childcare expenses for the year 2015. Mr. Fisher testified that because petitioner failed to respond to the audit inquiry letter, the Division was unable to verify the information on petitioner's return and the notice of disallowance was issued.

22. As noted in finding of fact 15, the Division's audit file included documents that petitioner submitted to BCMS along with his request. Mr. Fisher testified that the income reported on petitioner's return was verified by petitioner's form W-2. He also testified that the two birth certificates verified petitioner's relationship to his two children, L.W. and R.W. Based upon the Division's verification of petitioner's wage income, Mr. Fisher admitted that petitioner was entitled to small amounts of the New York State and New York City earned income credits. However, Mr. Fisher testified that petitioner would not be entitled to the amounts of the New

York State and New York City earned income credits claimed unless he proved that he had a qualifying child residing with him in the year 2015.

23. Mr. Fisher pointed out that petitioner, on his return, claimed L.W. as his dependent and the qualifying child for purposes of the Empire State child credit, the New York State and New York City earned income credits but claimed both L.W. and R.W. as qualifying children for purposes of the child and dependent care credit. Mr. Fisher noted that another person claimed R.W. as a dependent. With respect to the UTA letter, Mr. Fisher testified that the letter does not state who the parent or legal guardian of L.W. and R.W. was during 2015 and was not sufficient to prove the residency of the children for such year. Although the Division verified the relationship of the children to petitioner, Mr. Fisher testified that petitioner would not qualify for the Empire State child credit because the residency of L.W. could not be verified based upon the UTA letter. With respect to the UTA statement of account, Mr. Fisher testified that the statement does not "indicate what dependents the payments were for." He further testified that this statement was inconsistent with other documents issued by UTA concerning childcare expenses that he reviewed. Based upon his recollection of other UTA statements, Mr. Fisher explained that the statement "would state the year, it would state the dependent's name and it would state the amount paid for that dependent." Mr. Fisher also explained that the other statements showed "how it's paid." Mr. Fisher pointed out that the Am Ex credit card statements indicated multiple people made charge transactions on associated credit card numbers, and the Division could not verify that "the funds were coming out of [petitioner's] own money to pay for the daycare expenses." He further testified that the documents submitted by petitioner did not substantiate the dependent care expenses reported on his claim for child and dependent care credit for 2015.

24. At the hearing, petitioner submitted a group of documents received into evidence as petitioner's exhibit 5. This exhibit consisted of the following documentation: (i) copies of the same documents that petitioner submitted to BCMS, i.e., the form W-2, two birth certificates, the UTA letter, the UTA statement of account, and 10 pages of Am Ex credit card statements; (ii) a page containing copies of the front side of 5 American Express credit cards; (iii) a sworn letter from "David Nutawitz;" and (iv) a copy of the Request for Assistance from the Office of the Taxpayer Rights Advocate, form DTF-911.

25. The front side of the American Express credit cards include the Am Ex Delta SkyMiles card number ending 1053 issued in the name of JW, the Am Ex Delta SkyMiles card number ending 3042 issued in the name of JHW, an illegible Am Ex Delta SkyMiles credit card, an Am Ex Delta SkyMiles card number ending 1053, and an American Express BUSINESS credit card number ending 1009 issued to Joel Weinberger, "BEAUTY AND MORE."

26. The typewritten letter from "David Nutawitz" bears a street address in Brooklyn, New York, and states as follows: "[t]o whom it may concern, I affirm that Joel Weinberger did pay me all the balances on his credit card that he had as additional by me for the year of 2015." The sworn letter bears an illegible signature, directly beneath of which is the handwritten name "David Nutovics," the handwritten date of "5/6/2024" and the illegible signature of the notary public, along with a notary public stamp bearing the name Chaim M. Adler "NOTARY PUBLIC STATE OF NEW YORK."

27. Petitioner testified at the hearing. Petitioner explained that he has two children, an older daughter R.W. and a younger daughter L.W., and that he is divorced from the children's mother. He testified that, as part of their divorce agreement, petitioner and his ex-spouse each take one child as a dependent because they have shared custody of the children. Petitioner

further testified that his ex-spouse took R.W. as a dependent and he took L.W. as a dependent. Petitioner explained that the reason he did not claim R.W. as a regular dependent for any year was the terms of the divorce agreement provide that petitioner's ex-spouse takes R.W. as a dependent. Petitioner testified that the agreement provided that the children attend a religious school, and he was "solely responsible for anything and everything it costs for them," including clothing, schooling, daycare and any other activity that they wanted to engage in or learn. He further testified that he and his ex-spouse agreed that he would claim R.W. as a qualifying child for purposes of the child and dependent care credit. Petitioner explained that UTA has an afterschool program. Petitioner testified that UTA billed him monthly for childcare provided to his children, but he "used to go around like once like every two or three months and make some kind of payment." He explained that the UTA statement of account lists his Yiddish name Yoel, but his English name is Joel. With respect to the UTA letter, petitioner explained that he provided the letter to the Division as proof of the address and residency of his children in 2015. Petitioner explained that he initially provided to the Division the UTA statement of account and the Am Ex credit card statements to prove the daycare expenses that he paid in 2015 and in support of his child and dependent care claim for such year. However, as part of his discussions with the Division's representative prior to the hearing, petitioner was asked to provide further proof that he actually used his own funds to pay the credit card charges listed on the UTA statement of account and reflected on the Am Ex statements. Petitioner explained that, in preparation for the hearing, he asked Mr. Nutovics to write a letter regarding petitioner's payments to Mr. Nutovics related to petitioner's credit card charges reflected on the Am Ex statements. Petitioner testified that he did not know who wrote or typed the letter, but he was with Mr. Nutovics when Mr. Nutovics signed the letter in front of the notary. Petitioner further

testified that Mr. Nutovics is a friend who allowed petitioner to be associated with Mr. Nutovics' credit card account.

28. At the conclusion of the hearing, petitioner requested and was granted additional time to file a copy of his executed divorce decree or agreement by September 30, 2024. In addition, the Division was granted the right to submit a post-hearing rebuttal document by October 10, 2024.

29. Petitioner timely submitted a copy of the "AMENDMENT TO THE JULY 6, 2010 DIVORCE AGREEMENT" (AMENDMENT) made and entered into on August 11, 2014 between petitioner and his ex-spouse.

30. In rebuttal to the AMENDMENT, the Division timely submitted the purported affidavit of Vincent Fisher.[5] The record in this matter closed on October 10, 2024.

31. On November 14, 2024, along with his "l[e]tter or brief," petitioner submitted a copy of a letter from UTA, dated November 29, 2023. As the record in this matter closed on October 10, 2024 (***see*** finding of fact 30), this document will not be taken into consideration in this determination (***see Matter of March***, Tax Appeals Tribunal, November 26, 2018).

32. The AMENDMENT by its express terms modified a judgment of divorce, entered on October 29, 2010, that incorporated a comprehensive divorce agreement, dated July 6, 2010 (divorce agreement). Petitioner's residential address is listed as XXX Division Ave., Brooklyn, New York, in the AMENDMENT. According to the terms of the AMENDMENT, petitioner and his ex-spouse "shall continue to have joint legal custody, control and decision-making powers over the Children of this marriage during their respective minorities, to wit, [R.W.] and [L.W.],

[5] On page 2 of the purported affidavit, the notary public indicated that Mr. Fisher was sworn before the notary public on October 8th -- no year was specified.

with their primary residence being with the Mother." In addition, the AMENDMENT provides that petitioner and his ex-spouse "shall have equal guardianship over the Children," and "both shall share parenting responsibilities as equally as possible." With each parent pledging "to the other to try to keep the best interests of the Children in mind when jointly planning custodial time with each parent." The terms of the AMENDMENT require petitioner to pay a specific amount of monthly child support directly to his ex-spouse. The terms also provide that petitioner is "responsible for the tuition related to the Children's attendance" at the religious school selected by petitioner. The provisions for insurance are also set forth in the AMENDMENT. Under the terms of a miscellaneous provision in the AMENDMENT, petitioner is entitled "to the exemptions and deductions (and all other tax benefits)" on his tax returns for L.W.[6]

CONCLUSIONS OF LAW

A. When the Division issues a notice of disallowance, petitioner bears the burden of proof in a case before the Division of Tax Appeals, except where the burden has been specifically allocated to the Division (***see Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***see also Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842, 843 [3d Dept 1986]).

B. First, addressing petitioner's eligibility for the earned income credits, Tax Law § 606 (d) (1) provides that the New York State earned income credit for the 2015 tax year is equal to 30 percent "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year[.]" The New York City earned income credit is equal to five percent of the federal EIC under Internal Revenue Code (IRC) (26 USC) § 32 (***see*** Tax Law §

[6] Petitioner's ex-spouse is entitled to the exemptions and deductions (and all other tax benefits) on her tax returns for R.W.

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 New York City earned income credits is 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).

C. The EIC, 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 United States citizen or resident alien, must have no foreign income, and must 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, Estates & Gifts*** ¶ 37.1 [3d ed 2000]). The amount of the credit varies depending upon the number of the taxpayer's "qualifying children" as defined by IRC (26 USC) § 152 (c) and the taxpayer's AGI.

D. For purposes of the EIC, IRC (26 USC) § 32 (c) (3) (A) provides that a "qualifying child" of the taxpayer means a qualifying child as defined in IRC (26 USC) § 152 (c) "determined without regard to paragraph (1) (D) thereof" and IRC (26 USC) § 152 (e).[7] As relevant here, IRC (26 USC) § 152 (c) provides that a "qualifying child" means an individual "who bears a relationship to a taxpayer described in paragraph (2)" (IRC [26 USC] § 152 [c] [1] [A]). An individual bears a relationship to a taxpayer for purposes of IRC (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,

[7] IRC (26 USC) § 152 (e) provides a special rule for divorced parents.

sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative" (IRC [26 USC] § 152 [c] [2] [A], [B]) (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 (IRC [26 USC] § 152 [c] [1] [B]), the child must not have attained the age of 19 or must be a full-time student under the age of 24 (IRC [26 USC] § 152 [c] [3] [A] [i], [ii]), the child must not have provided over one-half of his or her own support for the taxable year (IRC [26 USC] § 152 [c] [1] [D]), and the child must not have filed a joint return with a spouse for that taxable year (IRC [26 USC] § 152 [c] [1] [E]).

E. In its brief, the Division argues that the documentation submitted by petitioner fails to establish his reported income for the year 2015 and that a qualifying child resided with him during such year. Therefore, it claims that petitioner is not entitled to the New York State and New York City earned income credits claimed on his return. Petitioner submitted his form W-2 for the year 2015, the birth certificates for L.W. and R.W., and the UTA letter (***see*** findings of fact 15 [ii], [iii] and [iv] and 24 [i]), in support of his claimed New York State and New York City earned income credits. Post-hearing, petitioner submitted the AMENDMENT of his divorce agreement (***see*** finding of fact 29).

As noted in conclusion of law D, for purposes of the EIC, a qualifying child means a qualifying child as defined in IRC (26 USC) § 152 (c) without regard to the divorce exception provided in IRC (26 USC) § 152 (e) (***see*** IRC [26 USC] § 32 [c] [3]). Although the AMENDMENT entitles petitioner to exemptions and deductions on his tax returns for L.W. (***see*** finding of fact 32), petitioner must prove that L.W., the claimed qualifying child for purposes of the EIC, resided with him for more than one-half of the year 2015 (***see*** IRC [26 USC] § 32 [c] [3]). The terms of the AMENDMENT provide that petitioner and his ex-spouse continue to have

joint custody of R.W. and L.W., with their primary residence with their mother (***see*** finding of fact 32). The UTA letter stated that L.W. and R.W., residing at a Division Avenue, Brooklyn, New York address, were enrolled in its academy for the years 2015 and 2016 (***see*** finding of fact 18). However, the UTA letter failed to state who the parent or legal guardian of L.W. and R.W. was during the years 2015 and 2016. The UTA letter does not establish that L.W. resided with petitioner for more than one-half of the year 2015. As such, petitioner failed to prove that he had a qualifying child for purposes of the New York State and New York City earned income credits for the year 2015.

F. Although petitioner failed to prove that he had a qualifying child for purposes of the EIC, he did prove his wage income in the amount of $11,040.00 for the year 2015, and would be entitled to an earned income credit for the year 2015. At the hearing, Mr. Fisher admitted that based upon petitioner's verified income, petitioner would be entitled to a smaller earned income credit than was claimed on petitioner's return (***see*** finding of fact 22). Therefore, the Division is directed to recompute petitioner's New York State and New York City earned income credits based upon his verified income.

G. Notwithstanding the requirements of IRC (26 USC) § 152 (c), IRC (26 USC) § 152 (e) provides a special rule for divorced parents. If a child receives over one-half of the child's support during the calendar year from the child's parents who are divorced and such child is in the custody of one or both of the child's parents for more than one-half of the year, the child shall be treated as being the qualifying child of the noncustodial parent for a calendar year if the custodial parent signs a written declaration that such a custodial parent will not claim such child as a dependent for any taxable year beginning with such calendar year and the noncustodial parent attaches such written declaration to the noncustodial parent's return for such year (***see***

IRC [26 USC] § 152 [e] [1] [A] [i], [1] [B], [2] [A], [2] [B]). For purposes of IRC (26 USC) § 152 (e), the "custodial parent" means the parent having custody for the greater portion of the calendar year (***see*** IRC [26 USC] § 152 [e] [4] [A]), and the "noncustodial parent" means the parent who is not the custodial parent (***see*** IRC [26 USC] § 152 [e] [4] [B]).

H. The Division disallowed the child and dependent care credit claimed by petitioner. Tax Law § 606 (c) (1) provides that the New York State child and dependent care credit is determined as a percentage of the federal child and dependent care credit "allowable under section twenty-one of the internal revenue code . . ." Since the allowable New York State child and dependent care credit is based upon the corresponding federal credit, it is appropriate to refer to the provisions of the IRC to determine petitioner's eligibility for the New York State child and dependent care credit (***see Matter of Espada)***.

I. The amount of the child and dependent care credit allowed pursuant to IRC (26 USC) § 21 is based upon a percentage of employment related expenses, including expenses for the care of a qualifying child under the age 13, incurred to enable a taxpayer to be gainfully employed. IRC (26 USC) § 21 (d) (1) (A) provides that employment related expenses cannot exceed a taxpayer's earned income for the tax year. In the case of divorced parents, IRC (26 USC) § 21 (e) (5) provides a special dependency test. Where IRC (26 USC) § 152 (e) applies to any child with respect to any calendar year and such child is under the age of 13, such child shall be treated as a qualifying individual as defined in IRC (26 USC) § 152 (a) (1) with respect to the custodial parent, and shall not be treated as a qualifying individual with respect to the noncustodial parent (***see*** IRC [26 USC] § 21 [e] [5]). The child to whom IRC (26 USC) § 21 (e) (5) applies is the qualifying child of the custodial parent even if the noncustodial parent may claim the dependency exemption for that child for the taxable year (***see*** Treas Reg [26 CFR] § 1.21-1 [b]

[5] [ii]). The custodial parent is the parent having custody for the greater portion of the calendar year (***see id.***).

J. On his claim for child and dependent care credit, petitioner listed L.W. and R.W. as his qualifying children and reported qualified expenses paid to UTA, as care provider, in the amounts of $5,300.00 and $300.00 for L.W. and R.W., respectively (***see*** finding of fact 5). Petitioner requested a refund of the child and dependent care credit in the amount of $2,158.00. In support of his claim for the child and dependent care credit, petitioner submitted some documentation. Although petitioner has verified his wage income for 2015 and his relationship to the claimed qualified children L.W. and R.W., petitioner has failed to prove the residency of the two children in 2015. While the UTA letter stated that the two children resided at the Division Avenue, Brooklyn, New York, address and were enrolled in its academy, it does not state who the parent or legal guardian of L.W. and R.W. was during the years 2015 and 2016 (***see*** finding of fact 18). Although the terms of the AMENDMENT provide that petitioner and his ex-spouse continue to share joint custody of L.W. and R.W., the terms further provide that the two children will primarily reside with their mother (***see*** finding of fact 32). As such, petitioner has failed to prove that he had custody of L.W. and R.W. for a greater portion of the year 2015 and, therefore, L.W. and R.W. are not petitioner's qualifying children for purposes of the child and dependent care credit (***see*** IRC [26 USC] § 21 [e] [5]; ***see also*** Treas Reg [26 CFR] § 1.21-1 [b] [5] [ii]). In addition, the UTA statement of account does not identify for whom UTA provided care, and the specific expense amount charged by UTA for the care provided to such individual. It is impossible to confirm that UTA provided childcare to L.W. and R.W. in the amounts that petitioner sought on the claim for child and dependent care credit submitted with his return. Since petitioner failed to prove that he had qualifying children and the amount of

childcare expenses incurred for such qualified children, he is not entitled to a child and dependent care credit for the year 2015.

K. The Division disallowed the Empire State child credit claimed by petitioner. 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 IRC (26 USC) § 152 (c) and has not attained the age of 17 during the taxable year (IRC [26 USC] § 24 [a], [c] [1]). As noted in conclusion of law G, in the case of divorced parents, IRC (26 USC) § 152 (e) provides a special rule. If a child receives over one-half of the child's support during the calendar year from the child's parents who are divorced, and such child is in the custody of one or both of the child's parents for more than one-half of the year, the child shall be treated as being the qualifying child of the noncustodial parent for a calendar year if the custodial parent signs a written declaration that such custodial parent will not claim such child as a dependent for any taxable year beginning with such calendar year and the noncustodial parent attaches such written declaration to the noncustodial parent's return for such year (***see*** IRC [26 USC] § 152 [e] [1] [A] [i], [1] [B], [2] [A], [2] [B]).

L. Petitioner testified that he is divorced and that he and his ex-spouse share custody of their two daughters, L.W. and R.W. (***see*** finding of fact 27). Petitioner further testified that as part of the AMENDMENT to their divorce agreement, he and his ex-spouse each take one child as a dependent - his ex-spouse takes R.W. as a dependent and he takes L.W. as a dependent (***id.***). The AMENDMENT corroborates petitioner's testimony regarding his divorce, the shared custody of the two children with his ex-spouse, his child support obligations, and their agreement

to each take one child as a dependent (***see*** finding of fact 32). Specifically, the terms of the AMENDMENT provide that petitioner and his ex-spouse continue to have joint custody of the two children, L.W. and R.W. Under the terms of a miscellaneous provision in the AMENDMENT, petitioner is entitled to the exemptions and deductions on his tax returns for L.W. and his ex-spouse is entitled to the exemptions and deductions on her tax returns for R.W. (***id.***). In keeping with the terms of the AMENDMENT, petitioner claimed L.W. as dependent on his return (***see*** finding of fact 1) and claimed L.W. as the qualifying child for the Empire State child credit (***see*** finding of fact 4). At the hearing, Mr. Fisher confirmed that another person took R.W. as a dependent (***see*** finding of fact 23). It is noted that the AMENDMENT was made and entered into by petitioner and his ex-spouse on August 11, 2014 (***see*** finding of fact 29). The combination of the testimony of both petitioner and Mr. Fisher and the AMENDMENT establish that L.W. was petitioner's dependent and qualifying child for purposes of the Empire State child credit (***see Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994). Accordingly, petitioner is entitled to the claimed credit of $330.00.

M. In this matter, petitioner claimed a refund in the amount of $3,796.00 that consisted of an Empire State child credit, a child and dependent care credit, New York State and New York City earned income credits, a real property tax credit, a New York City school tax credit and a New York City enhanced real property tax credit (***see*** findings of fact 1 and 2). As a result of petitioner's failure to respond to an audit inquiry letter sent to him, the Division issued a notice of disallowance denying petitioner's claimed refund in the amount of $3,796.00 (***see*** findings of fact 8 and 9). At the commencement of the hearing, the Division identified the issues as whether petitioner provided sufficient proof that he qualified for the following credits claimed on his return for the year 2015: an Empire State child credit, a dependent and childcare credit,

and New York State and New York City earned income credits (***see*** finding of fact 14). The Division never mentioned the additional three credits, to wit, the real property tax credit, New York City school tax credit and the New York City enhanced property tax credit, that petitioner claimed on his return and were denied by the Division in the notice of disallowance. Accordingly, the Division is deemed to have abandoned any issues regarding the propriety of those three claimed credits (***see Matter of Bello v Tax Appeals Trib.***, 213 AD2d 754, 755 [3d Dept 1995]; ***Gibeault v Home Ins. Co.***, 221 AD2d 826, 827 [3d Dept 1995]). Therefore, petitioner is entitled to: (i) a real property tax credit of $53.00; (ii) a New York City school tax credit of $63.00; and (iii) a New York City enhanced real property tax credit of $18.00.

N. The petition of Joel Weinberger is granted in accordance with conclusions of law F, K and L, but in all other respects is denied. The notice of disallowance, dated December 27, 2018, is modified in accordance with conclusions of law F, L and M, but is otherwise sustained. The Division of Taxation is ordered to recompute the refund, plus any applicable interest, in accordance with conclusions of law F, L and M.

DATED: Albany, New York
July 10, 2025

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE