

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARGARITA M. MARTINEZ</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 820607
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 2004.	:	

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Petitioner, Margarita M. Martinez, 1995 Creston Avenue, #3W, Bronx, New York 10453, 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 2004.

A small claims hearing was held before Winifred M. Maloney, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 25, 2006 at 3:35 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

Since neither party reserved time to submit a post-hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether the Division of Taxation properly disallowed petitioner's claimed earned income credit and dependent care credit for the 2004 tax year because she failed to substantiate her earned income and child care expenses as reported on her 2004 New York State resident income tax return.

***FINDINGS OF FACT***

1. On or before March 4, 2005, petitioner, Margarita M. Martinez, electronically filed her New York State and City resident income tax return for the 2004 tax year. On the return, petitioner claimed head of household filing status and three dependent exemptions, one for her son Johnson Martinez, born in 1987, the second for her daughter, Natalie Martes, born in January 1995 and the third for her son, Wilberto Martes, born in December 1995.

2. Petitioner's 2004 tax return reported New York adjusted gross income of \$12,128.00 which consisted of business income of \$13,050.00 and a \$922.00 adjustment to income for one-half of her Federal self-employment tax. After allowing for the standard deduction and petitioner's three dependent exemptions, there remained no taxable income and thus no State or City tax due. Petitioner's return claimed a refund of \$2,768.00, which included \$1,290.00 for the New York State earned income credit, \$215.00 for the New York City earned income credit, \$1,201.00 for the New York State child and dependent care credit, and \$63.00 for the New York City school tax credit.

3. Attached to petitioner's Federal income tax return for the year 2004 were two schedule C's, each of which indicated that her principal business or profession was beautician. On the first Schedule C, petitioner listed the business name and address as "Your Style," 2085 Jerome Avenue, Bronx, NY 10453 and reported gross receipts in the amount of \$15,190.00, less claimed expenses totaling \$3,115.00 for "work and clean clothes" and "cell phones," for a net profit of \$12,075.00. On the second Schedule C, petitioner listed the business name and address as "Paradiso Unisex," 2056 Jerome Avenue, Bronx, NY 10453 and reported gross receipts of \$975.00, and since no expenses were claimed, her net profit was the same as reported as gross

receipts. The sum of the net profits reported on both schedules C, \$13,050.00, was reported as petitioner's business income on her Federal and state income tax returns.

4. Petitioner also attached a Form 2441, Child and Dependent Care Expenses, to her 2004 Federal income tax return which reported \$3,120.00 in qualified child care expenses in 2004 and identified Maria Lopez as the care provider.

5. The Division of Taxation (the "Division") sent a letter to petitioner dated March 4, 2005 requesting verifiable documentation including, *inter alia*, copies of all business books and records for a two month period and copies of canceled checks or receipts reflecting payments for child care services to substantiate her claims for the earned income and dependent care credits.

6. In response to the Division's letter, petitioner sent the Division a letter dated March 25, 2005 along with the following documents:

a. a notarized letter dated March 23, 2005 from Antonio De Leon, owner of Your Style Barber Shop and Unisex Salon of Bronx, New York, which stated that petitioner worked at his establishment from January 1, 2004 to December 11, 2004 as a nonemployee beautician and was paid a weekly cash salary "around \$300.00;"

b. a notarized letter dated March 23, 2005 from Agustina Rivera, owner/administrator of Paradiso Unisex of Bronx, New York, which stated that petitioner began working at the beauty parlor on December 13, 2004 as a nonemployee who brought her own customers and received a weekly cash salary "around \$487.00 including tips;"

c. a copy of petitioner's cosmetology license;

d. a copy of petitioner's resident alien card, copies of Social Security cards for petitioner and her three children, copies of birth certificates for her three children, verification of pupil

registration for her three children from the New York City Board of Education and a doctor's statement confirming that all three children were his patients;

e. a notarized letter dated March 28, 2005 from Maria Lopez, 1986 Grand Avenue, Apt 3A, Bronx, NY 10453, which stated that during the year 2004 she took care of Wilberto Martes from January 2004 until July 2004 and Natalie Martes throughout the entire year (2004) Monday through Friday after school and on Saturday during the day while petitioner worked and that petitioner paid her \$60.00 a week in cash for the child care services she provided;<sup>1</sup>

f. a copy of apartment lease information pertaining to petitioner's apartment and a letter identifying the individuals living in that apartment;

g. a copy of the New York City Human Resources Administration Welfare Management budget assistance summary for petitioner and copies of New York State Department of Social Services Benefit cards for petitioner and two of her children;

h. a copy of petitioner's Chase checking account statement for the period December 15, 2004 through January 15, 2005; and

I. a copy of petitioner's Federal income tax return and schedules for the tax year 2004.

7. By letter dated April 29, 2005, the Division denied petitioner's claims for the earned income and dependent care credits because she failed to provide acceptable books and records to support the business income reported on her return and also failed to submit copies of canceled checks or receipts showing payment for child care services.<sup>2</sup> The Division did grant petitioner's claimed refund of the \$63.00 New York City school tax credit.

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<sup>1</sup> Although the letter bears the typewritten date of March 28, 2005, the handwritten date "3/25/05" appears beneath Ms. Lopez's signature and above that of the notary public Ubaldo F. Santos.

<sup>2</sup> The Division concedes that petitioner had two qualifying children for earned income credit purposes.

8. The cosmetology license provided by petitioner showed an effective date of April 4, 2003 and an expiration date of April 4, 2005.

9. Petitioner did not maintain books and records of her business income received from her work as a beautician.

### ***SUMMARY OF THE PARTIES' POSITIONS***

10. Petitioner asserts that her testimony, together with the documentary evidence submitted, is sufficient to prove that she had \$13,050.00 of net income during the 2004 tax year from her activities as a self-employed beautician. Petitioner maintains that the weekly cash payments, which she received from the owners of the beauty salons at which she worked during 2004, were based upon unspecified percentages of the fees generated from the shampooing, cutting, styling and hair coloring services which she provided to her customers plus tips. She further asserts that she paid all of her salon-related expenses in cash and did not retain receipts.

11. Petitioner claims that child care services for two of her children were provided by Ms. Lopez who received weekly cash payments of \$60.00. Petitioner further claims that she did not receive receipts from the child care provider for her weekly cash payments.

12. The Division argues that the documentary evidence submitted by petitioner to substantiate her earned income consists of self-serving statements which should be accorded little or no weight. The Division asserts that a self-employed individual is required to maintain books, records, receipts and documents in a manner sufficient to clearly show how much was earned and what the expenses were. The Division also asserts that petitioner did not submit any evidence to substantiate any of the \$3,115.00 of claimed business expenses. It further contends that petitioner's testimony consisted of contradictory statements concerning the income which she allegedly earned as a beautician at the two salons during 2004. In summary, the Division

believes that the evidence presented to support the amount of petitioner's claimed business income falls far short of constituting adequate books and records.

13. With respect to dependent and child care credit, the Division contends that, in addition to failing to prove the amount of income which she earned in 2004, petitioner failed to submit any receipts from the child care provider to substantiate the child care expenses which she claimed were paid that year.

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

A. Tax Law § 606(d) provides that the New York State earned income credit for the 2004 tax year is equal to thirty percent "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year . . . ." With respect to the child and dependent care credit, Tax Law § 606(c) provides that the New York State credit is based upon the Federal child and dependent care credit "allowable under section twenty-one of the internal revenue code." Since the allowable New York State earned income credit and child and dependent care credit are both determined based solely upon the corresponding Federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code ("IRC") and Federal case law to determine petitioner's eligibility for these two credits.

B. The Federal earned income credit, provided for pursuant to IRC § 32, is a refundable tax credit for eligible low-income workers. The credit is computed based upon a determination of a taxpayer's "earned income" which includes, *inter alia*, wage income and earnings from self-employment (*see*, IRC § 32[c][2]). Since the Division has conceded that petitioner had two qualifying children for earned income credit purposes, the issue remaining is whether petitioner has sustained her burden of proof (*see*, Tax Law § 689[e]) to show that she generated \$13,050.00 of earned income as a beautician during the 2004 tax year.

C. In the instant matter, petitioner has failed to meet her burden of proof to show that she had \$13,050.00 of earned income from her activities as a beautician for the 2004 tax year. Petitioner has failed to produce any books, records, receipts and documents to clearly show how much she earned from her activities as a self-employed individual during the 2004 tax year. The notarized statements from Mr. De Leon and Ms. Rivera, owners of Your Style Barber Shop and Unisex Salon and Paradiso Unisex, respectively, have been accorded little or no weight because the statements made in the notarized statements are not subject to cross-examination and therefore, the credibility of both salon owners cannot be assessed. Petitioner's testimony was vague concerning the specifics of her business arrangements with the owners of the two beauty salons at which she worked during 2004. Furthermore, petitioner's recollection of the amounts of income which she earned weekly during 2004 changed during the course of the hearing. Since the earned income credit is computed based upon a percentage of a taxpayer's earned income, it is imperative that the amount of earned income be established in order to determine the taxpayer's allowable credit. In the instant matter, petitioner has failed to substantiate the amount of earned income received in 2004, and therefore she is not entitled to claim the earned income credit (*Blore v. Commr.*, 80 TCM 559).

D. The child and dependent care credit allowed pursuant to IRC § 21 is determined based upon a percentage of employment related expenses, including expenses for the care of a qualified dependent under the age of 13, incurred by a taxpayer to be gainfully employed. IRC § 21(c)(2) places a \$6,000.00 limitation on employment related expenses for two or more qualifying dependents, and IRC § 21(d)(1)(A) further provides that employment related expenses cannot exceed a taxpayer's earned income for the tax year. Accordingly, petitioner was required to

substantiate the amount of her employment related expenses that she paid in 2004 and also to show that she had \$13,050.00 of earned income as a self-employed beautician.

As noted above, petitioner has failed to sustain her burden of proving the amount of earned income which she received from her activities as a self-employed beautician in 2004. Petitioner also failed to sustain her burden of proving that she spent \$3,120.00 on child care during that year. She failed to submit any receipts from the child care provider to support her claim. Petitioner's testimony and the notarized statement from Ms. Lopez are, without credible corroborating documentary evidence, simply not sufficient to sustain her burden of proving that she incurred child care expenses in 2004. Since petitioner has failed to substantiate the amount of earned income received and the child care expenses incurred in 2004, she is not entitled to claim the child and dependent care credit.

E. The petition of Margarita M. Martinez is denied and the Division's Notice of Disallowance dated April 29, 2005 is sustained.

DATED: Troy, New York  
October 23, 2006

/s/ Winifred M. Maloney  
PRESIDING OFFICER