

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MAIRA POLANCO : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 821791
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Code and the Administrative :
Code of the City of New York for the Years 2003 and :
2004. :

Petitioner, Maira Polanco, 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 years 2003 and 2004.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 27, 2008 at 11:30 A.M., with all briefs to be submitted by June 30, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly disallowed petitioner's claimed earned income credit on the basis that she failed to substantiate a portion of the earned income she reported as received during the 2003 and 2004 tax years.

II. Whether the disallowance of the City of New York school tax credit for the year 2003 was proper.

FINDINGS OF FACT

The 2003 Tax Year

1. Petitioner, Maira Polanco, filed a New York State Resident Income Tax Return for the year 2003, on which she claimed head of household filing status and that she lived 12 months in New York City. On the return, petitioner reported New York adjusted gross income of \$12,174.00 and that neither New York State nor New York City tax was withheld. Petitioner's return claimed a refund of \$1,324.00 based upon a City of New York school tax credit of \$63.00 and a New York earned income credit of \$1,261.00. Attached to petitioner's return was a Federal Schedule C-EZ, Net Profit from Business, which indicated that her principal business or profession was baby-sitting. The schedule reported gross receipts and net profit of \$13,100.00.¹ Petitioner's income tax return also included a New York Claim for Earned Income Credit, Form IT-215, which showed, among other things, that petitioner's qualifying children were two sons, who were born in 1988 and 1993, respectively. The form also revealed that the amount of the federal earned income credit claimed was \$4,024.00.

2. By letter dated May 24, 2004, petitioner was advised by the Division of Taxation (Division) that her income tax return for the year 2003 had been selected for review in order to "protect the integrity" of the claimed earned income tax credit. The letter requested verifiable documentation of the income and dependents reported on petitioner's 2003 tax return, including, among other things, copies of all business books and records for a two-month period, a copy of petitioner's 2003 federal income tax return, a copy of petitioner's social security card, copies of the dependents' birth certificates and social security cards, and verification of the dependents'

¹ Petitioner's New York income tax return reported business income in the amount of \$13,100.00. This amount was reduced by self-employment tax in the amount of \$926.00, resulting in reported adjusted gross income in the amount of \$12,174.00.

address. The letter further advised that a response was due within 30 days from the date of the letter or the case would be closed and petitioner's refund would be denied. Petitioner did not respond to the Division's letter. However, a notice of refund disallowance was not issued to petitioner for the year 2003. The Division did not grant a refund of the \$63.00 City of New York school tax credit claimed by petitioner on her return for the year 2003.

The 2004 Tax Year

3. Petitioner filed a New York State Resident Income Tax Return for the year 2004 on which she claimed head of household filing status. On the return, petitioner reported New York adjusted gross income of \$9,665.00 and that no New York State tax was withheld. Petitioner's return claimed a refund of \$1,161.00 based upon a New York earned income credit of \$1,161.00. Attached to petitioner's return was a Federal Schedule C, Profit or Loss from Business, which indicated that her principal business or profession was housekeeping. The schedule reported gross receipts and net profit of \$10,400.00.² Petitioner's income tax return also included a New York Claim for Earned Income Credit wherein she reported, as she had for the previous year, that she had two qualifying children. The form also revealed that the amount of the Federal earned income credit claimed was \$3,870.00. Although her reported address was the same as for the previous year, petitioner did not claim either the City of New York school tax credit or the real property tax credit on her income tax return for the year 2004.

4. By letter dated May 31, 2005, petitioner was advised by the Division that her income tax return for the year 2004 had been selected for review. The letter was similar to that sent for 2003 and requested the same documents. The letter further advised that a response was due within 30

² Petitioner's 2004 New York income tax return reported business income in the amount of \$10,400.00. This amount was reduced by self-employment tax in the amount of \$735.00 resulting in reported adjusted gross income in the amount of \$9,665.00.

days from the date of the letter or the case would be closed and petitioner's refund would be denied. Petitioner did not respond to the Division's letter. A notice of refund disallowance was not issued to petitioner for the year 2004.

5. Petitioner appeared pro se at the Bureau of Conciliation and Mediation Services (BCMS) conference held on March 7, 2007 but did not present any documentation to support the income reported for the years 2003 and 2004. The conferee gave petitioner additional time to provide documentation from her employer.

6. Subsequently, petitioner provided correspondence from her employer, Llarly Cabello, concerning her employment as a baby-sitter during the years 2003 and 2004. After reviewing that correspondence and information concerning petitioner's employer in its files, the Division determined that petitioner was paid \$3,000.00 in 2003 and nothing in 2004. The Division further determined that petitioner was entitled to an earned income credit refund in the amount of \$363.00 for the year 2003.

7. On May 4, 2007, BCMS issued a Conciliation Order (CMS No. 216216) to petitioner which allowed a refund in the amount of \$363.00 for the year 2003, sustained the remaining refund denial in the amount of \$961.00 for the year 2003, and sustained the entire refund denial for the year 2004.

8. At the hearing, petitioner submitted an undated sworn statement from Ms. Cabello, which stated that petitioner had worked for her as a baby-sitter for a few years and was paid "\$180.00 a week" in 2003. No additional documentation was submitted concerning the income earned by petitioner in 2003. At the hearing, petitioner indicated that she submitted Ms. Cabello's statement to the BCMS conferee after the conciliation conference.

9. At the hearing, petitioner admitted that she did not possess any documentation concerning her employment during 2004. However, petitioner requested and received additional time post-hearing to submit documentation concerning her employment by Ms. Cabello during the years 2003 and 2004. Petitioner did not submit any additional documentation and the record closed on April 4, 2008.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner contends that the Division's partial disallowance of the refund claimed, i.e., \$961.00, consisting of an earned income credit of \$898.00, plus a New York City school tax credit of \$63.00, on her tax return for the year 2003 was improper. She also contends that the Division improperly denied the entire refund claimed, i.e., \$1,161.00, on her tax return for the year 2004. Petitioner maintains that she earned income, providing baby-sitting and limited house cleaning services at Ms. Cabello's home, in the years 2003 and 2004, which she reported on the tax returns filed for such years. She further maintains that her testimony, along with Ms. Cabello's sworn statement, clearly proves that she worked for Ms. Cabello, who paid her for such services, during the years 2003 and 2004. As such, she claims that refunds should be granted in the amounts \$961.00 and \$1,161.00 for the years 2003 and 2004, respectively.

11. The Division asserts that petitioner's evidentiary submissions are insufficient to warrant further adjustments to the denial of her claimed refunds for the years 2003 and 2004. Therefore, the Division requests its denial of petitioner's claimed refunds for the years 2003 and 2004, as modified by the Conciliation Order, be sustained.

CONCLUSIONS OF LAW

A. Tax Law § 606(d)(1) provides for an earned income credit based upon a percentage of the earned income credit allowed under section 32 of the Internal Revenue Code (IRC). Since

the state earned income credit is determined based solely upon a percentage of the federal credit, it is appropriate to refer to the provisions of the IRC to determine petitioner's eligibility for the credit.

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, earnings from self-employment (IRC § 32[c][2]). In the instant matter, petitioner claims that she earned income, providing baby-sitting and limited house cleaning services at Ms. Cabello's home, in the years 2003 and 2004, which she reported on the tax returns filed for such years.

C. For the year 2003, after reviewing information in its files and Ms. Cabello's correspondence supplied to the conciliation conferee, the Division determined that petitioner received \$3,000.00 of earned income during 2003, and computed the New York State earned income credit based upon that amount. As a result, after the conciliation conference, BCMS issued a Conciliation Order to petitioner allowing a \$363.00 earned income credit for the year 2003, but disallowing the remainder of the claimed earned income credit in the amount of \$898.00 for that year. In order to show that she was entitled to the earned income credit as claimed on her 2003 return, it was petitioner's burden of proof (*see* Tax Law § 689[e]) to show that she received \$13,100.00 in income from her self-employed activities as a baby-sitter during the 2003 tax year.

Petitioner failed to prove that she received an additional \$10,100.00, or a total of \$13,100.00, of income from Ms. Cabello during the year 2003. At the hearing, petitioner offered her own testimony about her business relationship with Ms. Cabello, and the notarized statement of Ms. Cabello. No additional documentary evidence was submitted. Petitioner's testimony was

vague concerning the specifics of her business relationship with Ms. Cabello. Although petitioner testified that Ms. Cabello paid her \$180.00 per week, either in cash or by check, for baby-sitting Ms. Cabello's children at Ms. Cabello's home, she failed to disclose the number of weeks she worked for Ms. Cabello or the total amount she earned from such employment during the year 2003. Additionally, the notarized statement from Ms. Cabello sheds little light on substantiating the amount of petitioner's business income. Ms. Cabello states that she paid petitioner \$180.00 per week for baby-sitting her children during 2003. Unfortunately, this statement is deficient insofar as it omits the number of weeks that petitioner baby-sat Ms. Cabello's children. It also fails to state the total amount paid to petitioner during 2003 or provide a reliable contemporaneous record from which the total amount paid to petitioner could be verified. Petitioner's testimony and the notarized statement from Ms. Cabello are, without credible corroborating documentary evidence, simply not sufficient to sustain her burden of proving that she earned an additional \$10,100.00 of earned income during 2003. As such, petitioner is not entitled to a recomputation of the earned income credit allowed by the Conciliation Order for the year 2003.

D. With respect to tax year 2004, in order to show that she was entitled to the earned income credit as claimed on her 2004 return, it was petitioner's burden of proof (*see* Tax Law § 689[e]) to show that she received \$10,400.00 in income from her self-employed activities as a baby-sitter during the 2004 tax year.

E. Petitioner failed to meet her burden of proof to show that she had received any earned income from her activities as a baby-sitter for the 2004 tax year for the same reasons as for the 2003 tax year. At the hearing, petitioner admitted that she did not have any documentation concerning her employment during 2004, but she requested and received additional time to

submit documentation, concerning her employment by Ms. Cabello, post-hearing. However, she failed to submit any documentation post-hearing. Petitioner's vague testimony is, without credible corroborating documentary evidence, simply not sufficient to sustain her burden of proving that she earned \$10,400.00 of earned income during 2004.

F. On her 2003 tax return, petitioner claimed head of household filing status and that she lived 12 months in New York City. Petitioner's 2003 tax return also claimed a refund of the City of New York school tax credit of \$63.00. As noted above, the Division never issued a notice of disallowance for the year 2003. It also did not grant a refund of the City of New York school tax credit for the year 2003. The Conciliation Order issued in this matter allowed a refund of \$363.00, representing a partial refund of the claimed earned income credit, for the year 2003, and sustained the remaining refund denial of \$961.00, which amount included, among other things, the claimed City of New York school tax credit of \$63.00, for the year 2003.

Based upon a review of the record, it is clear, based on her 12-month residency, that petitioner is entitled to a City of New York school tax credit for the year 2003 (*see* Tax Law § 1310[e][3][B]; Administrative Code of New York City § 11-1706[c][2][B]). The Division is directed to refund the City of New York school tax credit claimed on petitioner's 2003 tax return.

G. The petition of Maira Polanco is granted to the extent indicated in Conclusion of Law F, but in all other respects is denied; and the Division of Taxation's denial of the refunds for the years 2003 and 2004, as modified by the Conciliation Order dated May 4, 2007 is, except as modified by this determination, in all other respects sustained .

DATED: Troy, New York
October 9, 2008

/w/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE