

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LORETTA McCOY	:	DETERMINATION
		DTA NO. 824166
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 2009.	:	

Petitioner, Loretta McCoy, 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 2009.

On September 13, 2011, petitioner, appearing pro se, and the Division of Taxation, appearing by Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs submitted by March 13, 2012, which date commenced the six-month period for the issuance of this determination. After review of the documents and arguments submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claimed child and dependent care credit for the 2009 tax year.

FINDINGS OF FACT

1. Petitioner, Loretta McCoy, timely filed her 2009 New York State Resident Personal Income Tax Return. Petitioner filed as "head of household" and attached to the return were a

form IT-215, Claim for Earned Income Credit, and a form IT-216, Claim for Child and Dependent Care Credit. The address set forth on the return was 44 Arlberg Circle, Dover, Delaware 19904.

2. On her return, petitioner reported federal adjusted gross income of \$12,520.00, New York adjusted gross income of \$12,520.00, and New York State tax withheld of \$116.00. After allowing for the standard deduction and petitioner's three dependent exemptions, there remained no taxable income and, thus, no state tax due. Her total payments and credits were \$3,557.00, which consisted of the taxes withheld (\$116.00), the claimed child and dependent care credit (\$2,310.00) and the earned income credit (\$1,131.00). Accordingly, a refund in the amount of \$3,557.00 was claimed by petitioner on her return.

3. On the Claim for Earned Income Credit, petitioner indicated that she had three qualifying children whom she claimed on her 2009 federal schedule EIC: Karleas McCoy, born in 1988; "S Y McCoy," born in 1986; and "Michel D McCoy," born in 1984. Petitioner listed all three children's social security numbers on the form.

4. On the Claim for Child and Dependent Care Credit, petitioner indicated that she had two qualifying children, (S Y McCoy and Michel D McCoy), and that "Lisa D McCoy" had provided care for the others and had been paid \$6,000.00 during the year for providing such child care. The social security number listed by petitioner for Lisa D McCoy on this form was different from the one listed for Karleas McCoy on the form referenced in Finding of Fact 3.

5. The Division of Taxation (Division) sent a questionnaire to petitioner in response to her refund claim requesting information and documentation to support her claim for the child and dependent care credit. Petitioner promptly replied with the requested information on March 6, 2010. Included in the materials provided were a series of 12 handwritten receipts for childcare

payments from petitioner to Karleasa McCoy. The receipts indicated a \$500 payment for each month of 2009.

6. As part of its case, the Division submitted the affidavit of Cindy Gemmett, an Income Tax Technician II. Ms. Gemmett's responsibilities include the review of tax returns and processing of refund claims. In her affidavit, Ms. Gemmett stated that she reviewed petitioner's file and is familiar with the refund claim at issue. Ms. Gemmett averred that as a follow up to the March 2010 questionnaire, and prior to the refund denial, she spoke with petitioner telephonically about the child and dependent care credit. During this conversation, petitioner confirmed that she paid her daughter \$500 per month to care for her other two daughters, both of whom are disabled. Ms. Gemmett stated to petitioner that the Division was concerned about the legitimacy of the submitted receipts as they were not in sequential order; moreover, the Division determined that petitioner did not work the entire year at issue, as required to obtain the dependent care credit. Additionally, according to Ms. Gemmett, during the conversation, petitioner informed the Division that she was married throughout the entire year at issue. At that point, petitioner was informed that she must file with the status of married filing joint or married filing separate, instead of head of household, as she had. According to Ms. Gemmett, for all of these reasons, petitioner's refund claim was denied.

7. On June 8, 2010, the Division issued to petitioner a Notice of Disallowance, which disallowed her refund claim of \$3,557.00 for the tax year 2009. The notice did not provide an explanation for the denial. The notice was sustained by a conciliation order dated November 26, 2010.

8. The petition filed with the Division of Tax Appeals identified the amount of tax determined as "\$3,557.00" and the amount contested as "(2,310.00) year 2009" [*sic*], or the

amount of the refund arising from the child and dependent care credit. The petition goes on to dispute only the Division's disregard of petitioner's dependent care receipts in denying her refund claim. The Division's answer admits that it could not accept the receipts. Hence, based on the pleadings, only the disallowance of petitioner's child and dependent care credit in the amount of \$2,310 is at issue in this proceeding.¹

9. Included in petitioner's letter brief dated December 8, 2011, provided as part of her submission, is the following statement regarding her living arrangement with her husband Henry during the year at issue: "We sold our house in Sept of 2009, and because of Henry's declining health, we decided to get a place together, because he wasn't able to live alone anymore. That's why we moved to Delaware in Sept of 2009 [*sic*]."

10. Included in the Division's documents is a letter originally submitted by petitioner from Richard S. Schechner, M.D., dated March 5, 2010, attesting to the disability of petitioner's daughters, Michel and Stephanie McCoy. In this letter, Dr. Schechner states that "[b]oth girls live at home with there [*sic*] parents"

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner maintains that she is entitled to the child and dependent care credit that was disallowed by the Division. She states that she provided legitimate receipts for the dependent care expenses, and that such care was necessary as she was either working, or looking for

¹ On or about December 10, 2010, petitioner filed an amended New York State resident income tax return for 2009. In the amended return, petitioner increased her claim for the earned income credit based on additional business income of \$2,630.00. Although the record does not contain a formal notice of disallowance for the additional claim, Ms. Gemmett's affidavit states that the additional credit was denied. Nonetheless, the amended return and its additional claimed earned income credit is not included in the statutory notice, nor is it raised by petitioner in her petition and, therefore, will not be part of this determination.

employment throughout all of 2009. She asserts that her filing status as head of household was correct because she and Henry lived apart for nine months in 2009.

12. The Division asserts that the statutory notice should be sustained for several reasons. First, it maintains that the receipts provided by petitioner to substantiate her dependent care expenses are handwritten and not in sequential order. As a result, this casts doubt as to their status as actual proof of a legitimate dependent care services transaction. Additionally, the Division states that petitioner's filing status was incorrect and does not permit the claimed credit. Finally, the Division points to the totality of the evidence as support for its refund denial.

CONCLUSIONS OF LAW

A. A presumption of correctness attaches to a properly issued statutory notice to a taxpayer (*see Matter of Jarvis*, Tax Appeals Tribunal, July 22, 2010; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). In proceedings for review of a properly issued notice of disallowance, such as here, the burden of proof is on the taxpayer to demonstrate that the notice is erroneous (Tax Law § 689[e]). The standard to be met is clear and convincing evidence (*see Matter of Beckman*, Tax Appeals Tribunal, February 11, 2010).

B. The Division takes issue with petitioner's receipts offered in substantiation of her dependent care expenses. In response to a request from the Division, petitioner provided a receipt for dependent care payments for each month of 2009. There are several concerns with these receipts based on the record as a whole. First, the receipts are from Karleasa McCoy; meanwhile, on both petitioner's claim for child and dependent care credit and amended claim for child and dependent care credit (*see* Footnote 1), she states that the dependent care was provided by "Lisa D McCoy," a person identified as having an entirely different social security number than Karleasa McCoy. These discrepancies are enough to make it unclear as to the actual person

providing the care during the year at issue. Contrary to the Division's assertions, the mere fact that the receipts are handwritten and may not be in numerical order does not automatically render them invalid as substantiation. The significant differences in names and social security numbers for the caregiver do, however. These discrepancies were never addressed by petitioner. Consequently, petitioner has not met her burden of proof with regards to substantiation of the dependent care expenses she claims she paid in 2009.

C. With respect to eligibility for the child and dependent care credit, Tax Law § 606(c) provides that the New York State credit is based on the federal child and dependent care credit "allowable under section twenty-one of the internal revenue code." Therefore, it is appropriate to refer to the provisions of the Internal Revenue Code (IRC) to determine petitioner's eligibility for this credit.

IRC § 21 sets forth the requirements for the federal child and dependent care credit. This credit is determined based upon a percentage of employment related expenses, including expenses for the care of a qualified dependent, incurred by a taxpayer to be gainfully employed, while maintaining a household that includes the qualified dependent.

IRC § 21(e)(2) provides that if the taxpayer claiming the credit is married at the close of the taxable year, the credit will be allowed only if the taxpayer and his or her spouse file a joint return for the taxable year. It is uncontroverted that petitioner and her husband were married at the close of 2009 and did not file a joint return for that year. Instead, petitioner filed a separate return under the filing status "head of household." Thus, petitioner's claim plainly cannot be allowed under this provision.

D. If petitioner was considered unmarried pursuant to the statute, however, she can claim the credit as filed. A taxpayer legally separated from his or her spouse pursuant to a decree of

divorce or of separate maintenance shall be deemed unmarried (IRC § 21(e)(3)). Here, though, the parties agree that petitioner and her husband were married and not legally separated throughout the year in issue. Alternatively, IRC § 21(e)(4) further provides that married individuals, for the purposes of the child and dependent care credit, can be considered as unmarried if:

- (A) an individual who is married and who files a separate return -
 - (i) maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode of a qualifying individual, and
 - (ii) furnishes over half of the cost of maintaining such household during the taxable year, and
- (B) during the last 6 months of such taxable year such individual's spouse is not a member of such household

Petitioner fails to meet her burden of proof by clear and convincing evidence with regard to the last requirement. By her own admission, petitioner's husband was a member of her household from September 2009 through the end of that year (*see* Finding of Fact 9).

Additionally, Dr. Schechner's letter, originally provided by petitioner to the Division, appears to confirm her admission regarding cohabitation with her husband (*see* Finding of Fact 10). There is no clear and convincing evidence in the record to contradict this fact. Based on this record, petitioner cannot be considered under the statute to have been unmarried for the year 2009 and, thus, was required by IRC § 21 to have filed a joint return in order to claim the credit. Therefore, the Division properly denied petitioner's claim for the New York State child and dependent care credit for the 2009 tax year.

E. In sum, the conflicting evidence regarding petitioner's dependent care payee, as well as her incorrect filing status do not allow her to receive the child and dependent care credit for the 2009 tax year.

F. The petition of Loretta McCoy is denied and the Notice of Disallowance issued by the Division of Taxation on June 8, 2010 is hereby sustained.

DATED: Albany, New York
May 24, 2012

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE