

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ALBA FRIAS** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 826391  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 2012. :

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Petitioner, Alba Frias, 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 2012.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, on October 29, 2015 at 10:30 A.M., in New York, New York, with all briefs to be submitted by April 1, 2016, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly disallowed the child and dependent care credit claimed by petitioner for the 2012 tax year.

***FINDINGS OF FACT***

1. Petitioner, Alba Frias,<sup>1</sup> filed with the Division of Taxation (Division) a timely New York State Resident Personal Income Tax Return for the 2012 tax year claiming head of

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<sup>1</sup> Ms. Frias has since changed her name to Alba Feliz.

household filing status. Petitioner reported \$22,039.00 in wages from HHH Home Care, Inc., in 2012, for her services as a home attendant. Having claimed a standard deduction and dependent exemptions that are not in dispute, petitioner's total taxable income for 2012 was \$9,539.00, on which total New York State and City taxes was \$559.00.

Petitioner's tax return for 2012 claimed a refund in the amount of \$3,238.00, which amount included \$330.00 for the Empire State child credit, \$63.00 for the New York State child and dependent care credit, \$1,189.00 for the New York State earned income credit, \$210.00 for the New York City earned income credit, \$63.00 for the City of New York school tax credit, New York State and City taxes withheld in the amounts of \$564.00 and \$418.00, respectively, and the Child and Dependent Care (DCC) credit of \$1,023.00.

2. Before allowing the refund claimed on petitioner's 2012 return, the Division sent petitioner an inquiry letter dated March 25, 2013, requesting that petitioner provide documentation to verify information about her children and amounts expended on dependent care for her children for tax year 2012.

3. Petitioner thereafter submitted a Response to Audit Inquiry with a sworn letter dated April 30, 2013, from Yaskara Vargas,<sup>2</sup> the child care provider for Maritza Frias Feliz, petitioner's daughter. Ms. Vargas stated that she provided such services from 3:00 p.m. to 6:00 p.m., Mondays to Fridays, throughout the entire year, and was paid \$70.00 per week by petitioner for her services. Petitioner also provided the social security information, birth certificates listing petitioner as the mother, school records of two of the children, Maritza and Victor, and a letter from Dr. Juan Pilarte confirming that Maritza resides with petitioner. Petitioner's 2012 Form IT-

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<sup>2</sup> Ms. Vargas operates her daycare business as La Nanys Daycare in Bronx, New York, as identified on petitioner's 2012 Form IT-216, Claim for Child and Dependent Care Credit, and confirmed during the hearing. Ms. Vargas's identifying number and the amount paid to her for the care of Maritza Frias in 2012 was listed on Form IT-216.

216, Claim for Child and Dependent Care Credit, listed qualified expenses as \$3,000.00, the maximum amount allowed for one qualifying person.

4. The Division replied to petitioner's submission of documentation in correspondence dated September 25, 2013, stating that the refund requested would not be allowed without further information, based upon the following:

“Please confirm your marital status and if married provide a copy of your marriage certificate. Provided information suggests you are married and resided with your husband and children for more than six months during tax year 2012.

The documentation provided to support the child or dependent care expenses reported on the return was incomplete or insufficient.

To qualify for the child and dependent care credit, you must be able to document that you incurred the child or dependent care expenses. In addition, the day care provider information submitted could not be verified. Therefore, the child and dependent care credit has been disallowed.

Without additional records to substantiate your claimed expenses such as canceled checks and/or verifiable receipts for payment of child or dependent care services issued by the day care service provider that includes the provider's name, address where the services were provided, telephone number, and the amount of payment, we cannot allow your refund.”

Petitioner was additionally advised what to do if she disagreed with the Division's response.

5. The Division issued to petitioner a Notice of Disallowance dated November 21, 2013, denying her claim for refund in the amount of \$3,238.00. The Notice of Disallowance restated the Division's explanation as provided above in Finding of Fact 4, verbatim. It did not state the reasons for denial of the credits claimed other than the dependent care credit, and did not further address the other credits.<sup>3</sup>

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<sup>3</sup> The Division's brief indicated that petitioner was issued the nondependent care credit portion of the refund. This information appeared to be based upon the affidavit of George Rowe, the Division employee who reviewed petitioner's return for 2012, which was submitted into evidence at the hearing.

6. At the hearing, petitioner submitted her judgment of divorce dated September 26, 2008, which dissolved her marriage to Jose Frias on the basis of constructive abandonment by Mr. Frias for a period of more than one year. This is consistent with the information provided by petitioner that she and Mr. Frias had been separated since 2005.

During the hearing, petitioner also provided information concerning the support she provided for her children in 2012. She paid \$800.00 per month for rent, \$300.00 per month for utility, cable and cell phone bills, and food expenses of \$280.00 per month, in addition to the child care expenses of \$70.00 per week. Petitioner was receiving child support from the father of her children in the amount of \$125.00 per week during 2012.<sup>4</sup> On the basis of the information provided at the hearing, the Division withdrew any challenge to petitioner's filing status as head of household for tax year 2012.

7. Petitioner worked as a home attendant for HHH Home Care Inc., a home health agency, in 2012, and her daughter, Maritza, was cared for by Ms. Vargas while petitioner was working. The Form W-2 for 2012, introduced into evidence, confirms petitioner received wages from HHH Home Care, Inc., during that year.

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

A. Tax Law § 606(c) provides that the allowable New York State child and dependent care credit is determined as a percentage of the allowable federal credit. Since the New York State child and dependent care credit is determined based solely on a percentage of the respective federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code and Federal case law to determine petitioner's eligibility for both credits.

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<sup>4</sup> Petitioner's judgment of divorce originally ordered child support in the amount of \$197.75 per week in September 2008, when she had custody of her 4 children, ranging from ages 2 to 13.

B. The amount of the child and dependent care credit allowed pursuant to Internal Revenue Service Code (IRC) § 21 is based on a percentage of the employment related expenses, including expenses for the care of a qualified dependent under age 13, incurred by a taxpayer who is gainfully employed. Petitioner has presented sufficient evidence to show that she had one qualified dependent who was under age 13 during the year at issue, and that petitioner was gainfully employed during that year. The Division does not dispute these facts. The only issue in dispute is whether petitioner provided sufficient documentation to substantiate that she paid child care expenses in 2012 and the amount of expenses paid. The Division argues that the documentation presented by petitioner was not sufficiently verifiable and that it properly denied petitioner the claimed expenses for the year in issue.

C. Petitioner paid the child care expenses claimed on her 2012 Form IT-216 in cash. Although payments in cash do not provide the documentation of a check, there is no prohibition to cash payments for child care, so long as the taxpayer can substantiate such payments. IRC § 21(e)(9) requires that the person claiming the credit provide the name, address and taxpayer identification number of the care provider. Petitioner attached to her 2012 resident return Form IT-216, Claim for Child and Dependent Care Credit, on which she provided the required information for the care provider La Nanys Daycare, and the amount paid to its owner.

Treasury Regulation § 1.21-1(k) provides that “a taxpayer claiming a credit for employment related expenses must maintain adequate records or other sufficient evidence to substantiate the expenses in accordance” with IRC § 6001 and the regulations thereunder. IRC § 6001, in turn, provides that, “[e]very person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe.”

Treasury Regulation § 31.6001-1 provides that records shall be kept accurately, but no particular form is required for the keeping of records. Internal Revenue Services (IRS) Publication 552, Record Keeping for Individuals (2012), states that for proof of payment, “[g]enerally, you prove payment with a cash receipt, financial account statement, credit card statement, canceled check or substitute check. If you make payments in cash, you should get a dated and signed receipt showing the amount and the reason for payment.” Although the regulatory language suggests obtaining receipts to document such cash payments, it is not the sole method of proving that the payments were, in fact, made.

D. Petitioner presented unblemished credible testimony about the care of her child while she is employed as a home attendant, the amount of those payments, to whom the payments were made and the household support she provides for herself and her children. Ms. Vargas, owner of La Nanys Daycare, provided a sworn and notarized statement confirming the services she provided and the payments by petitioner that form the basis for the dependent care credit. Petitioner has met her burden of proof to establish that she is entitled to the child and dependent care credit with respect to payments made to Ms. Vargas in the amount of \$3,000.00. Petitioner has presented satisfactory evidence, by way of the sworn statement signed by Ms. Vargas, and petitioner’s own credible testimony, to support petitioner’s assertion that she paid child care expenses to Ms. Vargas, doing business as La Nanys Daycare, in the amount of \$3,000.00 in 2012. Accordingly, petitioner has established that she is entitled to the child and dependent care credit for the 2012 tax year.

E. The petition of Alba Frias is granted and the Division is directed to issue to petitioner a refund in the amount of \$1,023.00.

DATED: Albany, New York  
September 29, 2016

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE