

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GEORGE WRIGHT** : DETERMINATION  
 : DTA NO. 826397  
for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law :  
for the Year 2011. :

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Petitioner, George Wright, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2011.

On, August 10, 2015 and August 31, 2015, respectively, petitioner, appearing pro se, and the Division of Taxation, by Amanda Hiller, Esq. (Linda Jordan, Esq.), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by January 11, 2016, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Kevin R. Law, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly adjusted petitioner's claimed earned income credit and properly disallowed petitioner's claim for the empire state child credit for the year 2011.

***FINDINGS OF FACT***

1. On January 22, 2012, George Wright (petitioner) filed a New York State personal income tax return upon which he claimed a refund of \$1,476.00. A copy of this return is not contained in the record.

2. On March 12, 2012, the Division sent a generic audit letter to petitioner that requested petitioner submit documentation to verify the amount of income he self-reported on his 2011 personal income tax return and also requested documentation to establish his relationship to and the eligibility of the dependent claimed on his return.

3. The record does not specify what information petitioner provided in response to the Division's March 12, 2012 letter.

4. On July 10, 2012, the Division issued a refund of \$140.35 to petitioner. The statement of account adjustment gave the following explanation for adjusting the amount of refund claimed:

“We have reviewed the information sent in response to the above assessment.

In our previous correspondence, we asked you to provide a statement on letterhead of a school or physician indicating the child's name, date of birth, address of record and name of parent/legal guardian with whom the child resided during the tax year stated above. The information provided did not show where your dependents lived for the above tax year.

Based on the information provided, the child(ren) listed is not a qualifying child for the purpose of figuring your New York earned income credit(s). Your credit(s) has been adjusted or disallowed accordingly.

You did not provide copies of all the birth certificates necessary to prove your relationship to the dependent(s) claimed. To claim a child as a Grandchild you have to provide the dependent(s) birth certificate, and the birth certificate of the parent to whom you are related.”

5. On or about July 31, 2013 petitioner filed an amended New York State and City personal income tax return on which he claimed a refund of \$1,413.00. The explanation on the return stated “he never recieved [sic] the other part of the money.”

6. In early August 2012, petitioner submitted a form 1099 and other documentation establishing that the New York City Administration for Children’s Services paid petitioner for providing childcare to his daughter’s three children including the child petitioner claimed as a dependent.

7. On August 17, 2012, the Division issued a Notice of Disallowance to petitioner. The Notice of Disallowance set forth the following explanation:

“We have reviewed the additional information that you have submitted.

You have been allowed the income shown on your 1099-Misc.

You have not provided the documents necessary to verify your relationship to the dependent you claimed.

Your response to our inquiry letter did not include the required documentation to verify the residency of the qualifying child(ren) claimed on your return. In order to verify the address of the qualifying children claimed on your return, a letter from a school or doctor stating the address and the guardian of record for each qualifying child must be provided.

Therefore, the qualifying children claimed on your return have been disallowed.

Based on the information you provided, you are not eligible to claim the Empire State child tax credit. The qualifying child must live with you for more than half of the tax year, unless you meet all of the special rules for divorced or separated parents.

We are disallowing the Empire State Child Credit claimed.

Your New York State/New York City Earned Income Credit was previously adjusted based on your verifiable wages and filing status with no qualifying dependents.

You were previously allowed the New York City School Tax credit as claimed.

The information you submitted did not provide any new information. Since the relationship or residency of the dependent claimed was not established your credits claimed had been adjusted accordingly.”

8. Subsequent to the issuance of the notice of disallowance, petitioner submitted documentation to the Division establishing that the dependent claimed on his return is his grandchild and that she resided with him during 2011.

9. The Division’s records indicate that petitioner’s daughter, who is the mother of the child in question, resided at the same address as petitioner during 2011 and that her adjusted gross income during the year 2011 was greater than that reported by petitioner in 2011.

10. The Division issued a letter on September 19, 2012, that stated, in pertinent part, as follows:

“You meet the requirements for claiming [petitioner’s grandchild] as a qualifying child for the purpose of claiming the Earned Income Credit. However, since another taxpayer also meets the requirements, you must use the tie-breaker rule to determine who can claim the child.

According to the Internal Revenue Services rules, if the child’s parent does not claim the child, even though the child meets the test to be the parent’s qualifying child, you can only use the child as your qualifying child for the Earned Income Credit if your federal adjusted gross income is higher than that of the parent.”

11. Petitioner’s daughter claimed two dependents on her 2011 New York State personal income tax return. The record does not indicate whether the child claimed by petitioner on his return was also claimed by his daughter on her 2011 return.

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

A. There are two credits that are at issue here, the earned income credit and the empire state child credit. Petitioner’s eligibility for both depends upon whether his grandchild qualifies as his qualifying child as that term is defined. For the reasons that follow, it is determined that the Division properly adjusted the amount of earned income credit claimed by petitioner and

properly disallowed the empire state child credit claimed by petitioner because petitioner's grandchild is not a qualifying child.

B. Tax Law § 606(d) provides that the New York State earned income credit (EIC) for the 2011 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. . . .” Since the state EIC is determined based solely on a percentage of the federal EIC, it is appropriate to refer to the provisions of the Internal Revenue Code (IRC) and federal case law to determine petitioner's eligibility for the credit determined with a qualifying child.

C. The federal EIC, provided for pursuant to IRC § 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 U.S. citizen or resident alien, must have no foreign income, and 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. Commissioner*, 255 F3d 650, 651 [8th Cir 2001] *citing* 2 Bittker & Lokken, *Federal Taxation of Income, Estate & Gifts* ¶ 37.1 [3d ed. 2000]). The amount of credit varies depending on the number of the taxpayer's “qualifying children” as defined by IRC § 152(c) and the taxpayer's adjusted gross income level. For tax year 2011, the credit began to phase out at an AGI of \$16,690 for taxpayers with one or more qualifying children and at \$7,590 for taxpayers with no qualifying children (Rev Proc 2011-12, 1 RB 2011-2). In this case, the matter turns on whether petitioner may claim the EIC computed with a qualifying child or whether the Division properly computed the credit without a qualifying child.

D. Pursuant to IRC § 152(c)(2)(A) a qualifying child includes a daughter of the taxpayer or a descendant of a daughter. The qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the tax year (IRC § 152[c][1][B]), and the child must not have attained the age of 19 (IRC § 152[c][3][A][i]). Pursuant to IRC § 152(c)(4), the so-called tie breaker rule, if there are two or more eligible individuals who could receive the EIC with respect to a qualifying child, only the individual with the highest adjusted gross income for such taxable years shall be treated as the eligible individual with respect to the qualifying child. In this case, petitioner is not eligible to compute his credit with a qualifying child, as the child's mother, who lives with petitioner, has a higher income (IRC § 152[c][4][C]).

E. Likewise, Tax Law § 606(c-1)(1) provides for a refundable credit, known as the Empire State child credit, which is generally equal to the greater of \$100 times the number of qualifying children or 33% of the child tax credit allowed under IRC § 24 for the same taxable year for each qualifying child. IRC § 24 utilizes the same eligibility criteria with respect to a qualifying child as set forth above under IRC § 32. Therefore, since it has been determined that petitioner's grandchild is not a qualifying child for EIC purposes, she also does not qualify as a qualifying child for purposes of the child tax credit.

F. The petition of George Wright is denied and the notice of disallowance dated August 17, 2012 is sustained.

DATED: Albany, New York  
June 16, 2016

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE