

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROSSETTY PORTES	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 829511
New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the	:	
Administrative Code for the City of New York for the	:	
Years 2017 and 2018.	:	

Petitioner, Rossetty Portes, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code for the City of New York for the years 2017 and 2018.

A videoconferencing hearing via CISCO Webex was held on April 22, 2021, with all briefs to be submitted by December 2, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel). After due consideration of the documents and arguments submitted, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claimed New York State and City earned income credits for the years 2017 and 2018.

II. Whether the Division of Taxation properly denied petitioner's claimed Empire State child credits for the years 2017 and 2018.

FINDINGS OF FACT

1. Petitioner, Rossetty Portes, filed with the Division of Taxation (Division) a New York State resident income tax return, form IT-201, for the year 2017 (2017 return). On her 2017 return, petitioner indicated she lived at a Bronx, New York, address. On her 2017 return, petitioner reported wages and salary income of \$1,895.00, other income of \$12,856.00, and claimed two individuals as dependents. Specifically, petitioner claimed her daughter and nephew as dependents.¹ After subtracting out her standard deduction and two dependent exemptions, she reported taxable income of \$3,843.00, New York State tax due of \$108.00, and New York City tax due of \$118.00. Against this tax due, she claimed credits including the New York State Empire State child credit of \$537.00, the New York State earned income credit of \$1,614.00, and the New York City earned income credit of \$277.00. Petitioner's 2017 tax return ultimately claimed a refund of \$2,272.00.

2. Commencing an audit of petitioner's 2017 tax return, the Division sent petitioner an audit inquiry letter, dated February 22, 2018, asking for substantiation of her income.

3. In response to the February 22, 2018 audit inquiry letter, petitioner sent the Division a W-2 form for 2017 from an Ohio business. The W-2 form indicated that petitioner was paid \$1,894.81 in wages. The W-2 form was sent to petitioner at an Ohio address. Petitioner also sent the Division a 1099-MISC form for 2017 indicating petitioner had earned nonemployee compensation from a New York City business. The 1099-MISC form was sent to petitioner at a Bronx, New York, address. Petitioner also provided her daughter's social security card, birth certificate and documentation from the Girls Prep Bronx Elementary School indicating

¹ The names of petitioner's daughter and nephew are not disclosed in order to protect their identities.

petitioner's daughter had been a student there since 2016, that her address was petitioner's Bronx, New York, address, and that petitioner was her guardian.

4. The Division sent petitioner a letter dated June 22, 2018, indicating that based upon the information petitioner had provided it appears petitioner was a part-year resident or a nonresident of New York for 2017. The letter also informed petitioner that she should provide proof of her New York State residency. The letter indicated that the Division was unable to verify petitioner's earned income on the 2017 return. Finally, the letter informed petitioner that her response to the audit inquiry letter did not include appropriate documentation to verify the residency of her nephew.

5. The Division issued a notice of disallowance, dated December 19, 2018, denying \$2,272.00 of the refund demanded on petitioner's 2017 return. The Division denied petitioner's claimed New York State and City earned income and Empire State child credits for that year.

6. Petitioner filed a New York State resident income tax return, form IT-201, for the year 2018 (2018 return). On her 2018 return, petitioner indicated she lived at the same Bronx, New York, address as reflected on her 2017 return. On her 2018 return, petitioner reported other income of \$15,250.00, and claimed two individuals, her daughter and nephew, as dependents. After subtracting out her standard deduction and two dependent exemptions, she reported taxable income of \$973.00, New York State tax due of \$39.00, and no City tax due. Against this tax due, she claimed credits including the New York State Empire State child credit of \$553.00, the New York State earned income credit of \$1,662.00, and the New York City earned income credit of \$284.00. Petitioner's 2018 tax return ultimately claimed a refund of \$2,564.00.

7. Commencing an audit of petitioner's 2018 tax return, the Division sent petitioner an audit inquiry letter, dated May 22, 2019, asking for substantiation of her income earned and for verification for her claimed dependents.

8. The Division concedes that petitioner provided it sufficient support to substantiate her business income for 2018; however, the Division concluded that petitioner failed to provide sufficient support in order to claim her nephew as a qualifying dependent for the tax credits sought in 2018.

9. The Division issued an account adjustment notice, dated September 10, 2019, decreasing petitioner's 2018 return refund allowed. The Division only allowed petitioner's daughter for use in computing the relevant credits sought and did not allow petitioner's nephew as a qualifying dependent. As a result, the Division reduced petitioner's 2018 New York State Empire State child credit to \$330.00, New York State earned income credit to \$999.30, and New York City earned income credit to \$173.05.

10. Petitioner testified at the hearing that she lived in New York State for 2017 and she went to Ohio for a short vacation for her children to visit family members for five or six weeks and while there she worked in a factory for extra money. Petitioner testified that her nephew first moved in with her in the Bronx on September 29th of 2017, and since that time he has lived with her in the Bronx where she is in charge of his education and has paid his medical and other bills. Petitioner testified that her daughter lived with her during all of 2017 and 2018 and petitioner was in charge of her education and paid her bills during that time. Petitioner's other income for 2017 was from cleaning offices and child support for her daughter. Petitioner testified that the Bronx apartment that she lived in with her daughter and nephew was not in her name but rather was rented by her father's cousin. Petitioner indicated that she does not pay any

of the apartment bills directly (e.g., utility or water, etc.), but rather pays a portion of the monthly rent in cash to her relative. Petitioner testified that she lived in the Bronx apartment during the period at issue.

11. Petitioner's nephew's mother and father were both tragically killed in 2005.

12. The Division submitted the affidavit of Kathleen A. Loos, Tax Technician III, into the record. In her affidavit, Ms. Loos indicated that she reviewed petitioner's file and concluded petitioner had not provided enough support for the credits claimed on her 2017 and 2018 returns.

13. The record was left open until May 17, 2021 for petitioner to submit additional documentation in support of her position. In addition to other documents, petitioner submitted: copies of official records from her healthcare provider which indicated that she lived at her Bronx address during 2017 and 2018 when she received medical care several times throughout those years; the birth certificate for her nephew; a signed statement from the principal of the New York City public school the nephew attended indicating that the nephew lived at petitioner's Bronx address during 2018 and the school recognizes petitioner as his guardian; the signed statement from the principle of the Girls Prep Bronx Elementary School noted; a signed letter by the medical director of the pediatrics practice of which the daughter was a patient, indicating that petitioner's daughter has been a patient of the practice since 2012 and petitioner has been her guardian that entire time.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689 (e), petitioner bears the burden of establishing, by clear and convincing evidence, that the Division's assessment of additional tax or an adjustment of her claimed refund is erroneous (*see Matter of Suburban Restoration Co. v Tax Appeals Trib*, 299 AD2d 751 [3d Dept 2002]). Determinations made in a notice of deficiency are presumed

correct, and the burden of proof is upon petitioner to establish, by clear and convincing evidence, that those determinations are erroneous (*see Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *see also* Tax Law § 689 [e]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (*see Matter of Scarpulla v State Tax Commn.*, 120 AD2d 842 [3d Dept 1986]).

B. Tax Law § 606 (d) (1) provides for a New York State earned income credit of 30 percent of the earned income credit allowed under Internal Revenue Code (IRC) (26 USC) § 32. Generally, the New York City earned income credit is equal to five percent of the federal earned income credit under IRC (26 USC) § 32 (*see* Tax Law § 1310 [f] [1]; Administrative Code of the City of New York § 11-1706 [d] [1]). The amount and eligibility for the New York State and City earned income credit is dependent, in part, on the residency status of taxpayers (*see* Tax Law § 606 [d] [2], [3] and [4]; Administrative Code of the City of New York § 11-1706 [d] [2] and [3]). Since the New York State and City earned income credits are 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 earned income credit. The federal earned income credit, provided in IRC (26 USC) § 32, is a refundable tax credit for eligible low-income workers.

Turning to petitioner's residency during 2017, her medical records and testimony establish that she resided in her Bronx apartment throughout 2017.² Although she spent approximately five to six weeks visiting relatives and working in Ohio during 2017, such does not change the fact that her permanent residency for 2017 was the Bronx, New York (*see Matter of Tamagni v Tax Appeals Trib. of State of N.Y.*, 91 NY2d 530 [1998], *cert denied* 525 US 931 [1998]).

² The Division has conceded that petitioner was a full-time resident of New York State for 2018.

C. IRC (26 USC) § 32 (b) prescribes that different percentages and amounts are used to calculate the earned income credit based, in part, on the number of qualifying children a taxpayer has (*see* IRC [26 USC] § 32; *Jusino v Commr.*, TC Memo 2018-112 [2018]). For purposes of the tax credit, a qualifying child must, in addition to other factors, be a child of the taxpayer, a descendent of the taxpayer's child, a sibling or step-sibling of the taxpayer or a descendent of such relative, and must have the same principal place of abode as the taxpayer for more than one-half of the taxable year, (*see* IRC (26 USC) §§ 24 [c]; 152 [c]).

In the case at hand, the medical records, school records and petitioner's testimony establish that she is the parent and aunt of her daughter and nephew, respectively. In addition, the school records establish that petitioner was the guardian for both her daughter and her nephew for both of the years at issue. The school records and petitioner's testimony establish that her daughter lived with her in the Bronx for all of 2017 and 2018. The school records for petitioner's nephew and petitioner's testimony establish that the nephew lived with petitioner throughout 2018; however, petitioner testified that her nephew did not move in with her until September of 2017.

Therefore, petitioner's daughter is determined to be a qualifying child for both 2017 and 2018; however, since petitioner's nephew did not move in with petitioner until September 2017, and, therefore, the nephew did not live with petitioner for more than one-half of that year, he is determined not to be a qualifying child for 2017. Petitioner's nephew lived with petitioner throughout 2018 and is a qualifying child for that year.

Accordingly, petitioner was eligible for the State and City earned income credit with one qualifying dependent, her daughter, for 2017, and for 2018, petitioner was eligible for the earned income credit with two qualifying dependents.

D. Turning to the claimed Empire State child credit, Tax Law § 606 (c-1) (1) provides for a credit equal to the greater of \$100.00 times the number of qualifying children of the taxpayer or the applicable percentage of the child tax credits allowed the taxpayer under IRC (26 USC) § 24 for the same taxable year for each qualifying child. As noted above, petitioner's daughter was a qualifying child for 2017,³ moreover, since petitioner's nephew lived with petitioner in the Bronx throughout 2018 as noted above, petitioner's nephew also is a qualifying child for that year.

Accordingly, petitioner qualified with one child for the Empire State child credit for 2017, and with two children for 2018.

E. The petition of Rossetty Portes is granted to the extent indicated in conclusions of law B, C and D, and the Division is directed to recompute the issued notice of disallowance dated December 19, 2018, and the account adjustment notice dated September 10, 2019, in accordance with conclusions of law B, C and D, but the petition is otherwise denied.

DATED: Albany, New York
June 02, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE

³ The Division conceded that petitioner's daughter was a qualifying child for 2018.