

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
O. ARGUETA ISCHOP

) OTA Case No. 22029770
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OPINION

Representing the Parties:

For Appellant: O. Argueta Ischop

For Respondent: Joel M. Smith, Tax Counsel III

For Office of Tax Appeals: Westley Marcelo, Graduate Student Assistant

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, O. Argueta Ischop (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant’s claim for refund of \$1,641 for the 2020 tax year.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant has shown error in respondent’s denial of the Earned Income Tax Credit (EITC) for the 2020 tax year.

FACTUAL FINDINGS

1. Appellant timely filed a 2020 California personal income tax return using the “Head of Household” filing status and claiming an EITC in the amount of \$1,641.
2. Respondent processed the return and sent appellant a Notice of Tax Return Change, denying appellant’s EITC claim because appellant did not provide a valid social security number (SSN) or federal individual taxpayer identification number (ITIN) for appellant on the return.

3. Appellant subsequently submitted to respondent a copy of an IRS notice dated November 9, 2021, indicating that appellant had been assigned an ITIN in response to appellant's ITIN application.
4. Respondent sent a notice informing appellant that respondent was treating appellant's correspondence as a claim for refund. However, respondent found the new information insufficient to allow the claimed EITC, and the claim for refund was denied.
5. This timely appeal followed.

DISCUSSION

In an action for refund, the taxpayer has the burden of proof to show entitlement to a refund by a preponderance of the evidence. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.) Tax credits are a matter of legislative grace, and the taxpayer bears the burden of proving entitlement to any claimed tax credits. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-046P.) Statutes granting tax credits are strictly construed against the taxpayer with any doubts resolved in the respondent's favor. (*Ibid.*)

R&TC section 17052(a)(1) allows an EITC against net tax in an amount determined under Internal Revenue Code (IRC) section 32, with certain modifications. (See generally *Appeal of Akhtar*, 2021-OTA-118P.) Among the numerous requirements to qualify for both the federal and California EITCs, tax returns claiming an EITC must include a taxpayer identification number. (IRC, § 32(c)(1)(E)(i).) IRC section 32(m) defines a taxpayer identification number as an SSN issued to an individual by the Social Security Administration on or before the due date for filing the return for the taxable year. IRC section 32(m) was specifically amended in 2015 to include the language, "on or before the due date for filing the return for the taxable year," to prevent retroactive EITC claims after issuance of an SSN.¹

R&TC section 17052(p) was first added in the 2020 taxable year to expand the availability of the California EITC to state taxpayers.² For each taxable year beginning on or after January 1, 2020, R&TC section 17052(p) modifies IRC section 32(m) by allowing a taxpayer to use either an SSN or ITIN as a taxpayer identification number. (R&TC, § 17052(p)(2).) The IRS may issue an ITIN to an individual who is not eligible to obtain an SSN

¹ See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 204 (Dec. 18, 2015), 129 Stat 2242.

² See Assem. Bill No. 93 (2019-2020 Reg. Sess.) § 1.

but is required to furnish a taxpayer identifying number for filing requirements. (Treas. Reg. § 301.6109-1(d)(3)(ii).) Treasury Regulations state that an individual in need of an ITIN should apply for one far enough in advance of its first required use to permit issuance of the number in time for compliance with such requirement. (*Ibid.*)

Here, appellant contends that she does qualify for the EITC because she has a valid ITIN and qualifying dependents. Appellant provides copies of the following documents as evidence: (1) the IRS notice dated November 9, 2021; (2) progress reports from her children's middle school; (3) a bill from the Los Angeles Department of Water & Power; and (4) U.S. birth certificates for her two children. Respondent asserts that the language from IRC section 32(m), as modified by R&TC section 17052(p), requires that a valid ITIN be issued on or before the return due date for the 2020 tax year, which was postponed to May 17, 2021.³ Respondent therefore denied appellant's EITC claim because the newly assigned ITIN was issued after that date.

While the Office of Tax Appeals is sympathetic to appellant's contentions, strict interpretation of relevant statutes, as well as a plain reading of legislative intent and Treasury Regulations, does not allow for the tax credit to be claimed in this instance. IRC section 32(m) was amended in 2015 to prevent a taxpayer from retroactively claiming a California EITC when he or she was issued a taxpayer identification number after an applicable tax return due date.⁴ Here, appellant provided as evidence an IRS notice showing that the ITIN was assigned to appellant on November 9, 2021, which was after the return due date for the 2020 taxable year. Therefore, appellant's did not timely receive an ITIN for a valid EITC under IRC section 32(m), as modified by R&TC section 17052(p).

Furthermore, Treasury Regulations require individuals in need of an ITIN to apply in anticipation of initial compliance deadlines. (Treas. Reg. § 301.6109-1(d)(3)(ii).) Here, R&TC section 17052(p) first became effective on June 29, 2020.⁵ Appellant had sufficient time

³ Following a similar decision by the IRS, respondent postponed the state filing and payment deadline for 2020 tax returns from April 15, 2021, to May 17, 2021, due to the COVID-19 pandemic. (See R&TC, § 18572; Franchise Tax Board, *State Tax Deadline for Individuals Postponed until May 17, 2021*, news release (Mar. 19, 2021) <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.html>.)

⁴ See Consolidated Appropriations Act, 2016, *supra*.

⁵ See Assem. Bill No. 93 (2019-2020 Reg. Sess.) § 1.

between June 29, 2020, and May 17, 2021, to apply for an ITIN, await processing, and timely file a California income tax return using the newly assigned ITIN.

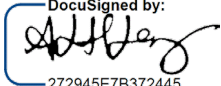
Accordingly, because appellant made a retroactive EITC claim barred by IRC section 32(m), as modified by R&TC section 17052(p), and did not comply with ITIN application procedures outlined in the Treasury Regulations, respondent properly denied appellant’s EITC claim for the 2020 tax year.

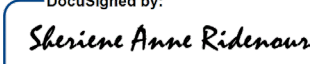
HOLDING

Appellant has not shown error in respondent’s denial of the EITC for the 2020 tax year.

DISPOSITION

Respondent’s action denying appellant’s claim for refund is sustained.

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Andrea L.H. Long
Administrative Law Judge

We concur:
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:

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Huy “Mike” Le
Administrative Law Judge

Date Issued: 11/28/2022