

1 Janet Kim
Legal Intern
2 Michelle Laidlaw
Supervising Tax Counsel III
3 Board of Equalization, Appeals Division
450 N Street, MIC: 85
4 PO Box 942879
Sacramento CA 95814
5 Tel: (916) 323-3140
Fax: (916) 324-2618
6

7 Attorney for the Appeals Division

8 **BOARD OF EQUALIZATION**
9 **STATE OF CALIFORNIA**

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11 In the Matter of the Appeal of:) **HEARING SUMMARY**
12) **PERSONAL INCOME TAX APPEAL**
13 **CLAUDIA A. TORRIJOS**¹) Case No. 573718

	<u>Years</u>	<u>Claims For Refund</u>
	2005	\$363
	2006	\$390

17 Representing the Parties:

18 For Appellant: Kellen Furlin, TAAP²
19 For Franchise Tax Board: Jaclyn N. Appleby, Tax Counsel
20

21 **QUESTION:** Whether appellant has shown that the Franchise Tax Board (FTB or respondent)
22 improperly denied her claim for the Child and Dependent Care Expenses (CDC) credit for the 2005 and
23 2006 tax years.

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26 ¹ Appellant is a resident of Santa Clarita, Los Angeles County.

27 ² Appellant sought the assistance from the Tax Appeals Assistance Program (TAAP). Sharon E. Moore, a member of
28 TAAP, assisted in submitting the first brief dated December 1, 2011, and the responsive brief dated July 12, 2012. Kellen Furlin, another member of TAAP, currently represents appellant.

1 HEARING SUMMARY

2 Background

3 Appellant filed timely California resident returns for the 2005 and 2006 tax years. For
4 both tax years, appellant used the head of household (HOH) filing status and claimed one dependent.³

5 Based on respondent's records, for the 2005 tax year, appellant reported California
6 adjusted gross income (AGI) of \$22,710, taxable income of \$16,202, and a tax liability in the amount
7 of \$198.⁴ According to respondent, appellant reported zero tax due after adjusting for her personal and
8 dependent exemption credits. After applying withholding credits in the amount of \$682 and a CDC
9 credit in the amount of \$363, respondent issued appellant a refund in the amount of \$1,045.

10 For the 2006 tax year, appellant reported California AGI of \$32,395, taxable income of
11 \$3,147, and a tax liability in the amount of \$31. Appellant again reported zero tax due after adjusting
12 for her personal and dependent exemption credits. After applying withholding credits in the amount of
13 \$912 and a CDC credit in the amount of \$390, respondent issued a refund to appellant in the amount of
14 \$1,302.

15 After an audit, respondent disallowed appellant's CDC credit for the 2005 and 2006 tax
16 years because it was unable to confirm appellant's provider information on the FTB Form 3506.
17 Respondent advised appellant that she could file a claim for a refund after taking the following steps:
18 paying her remaining 2005 and 2006 tax liabilities, providing an explanation of why the CDC credit
19 disallowances were erroneous, completing the CDC questionnaire and attaching relevant
20 documentation, and, finally, submitting revised Forms 3506 (if the previous ones were inaccurate).
21 Appellant then provided some information but did not include proof of payments made to her childcare
22 provider during the relevant tax years. Lacking any evidence of payments, respondent sent a
23 determination letter affirming the disallowance of the CDC credits. Appellant proceeded as advised by
24 respondent, by paying her remaining 2005 and 2006 tax liabilities and filing refund claims. Appellant
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26
27 ³ Respondent asserts that appellant may not have been entitled to use the HOH filing status for the 2005 and 2006 tax years
28 because she concedes living with Enrique Torrijos and her son from March 31, 2005, through December 31, 2006, in her
opening brief.

⁴ A copy of appellant's 2005 tax return is no longer available due to respondent's data retention policies. Respondent
therefore provided electronic records of appellant's 2005 tax return.

1 submitted statements written by her provider which confirmed child care payments of \$2,500 for 2005
2 and \$3,000 for 2006, but the statements were neither notarized nor signed under penalty of perjury. As
3 a result, respondent issued Denials of Claim for Refund for both the 2005 and 2006 tax years.
4 Appellant responded with the timely submission of this appeal.

5 Contentions

6 Appellant

7 Appellant asserts that she provided the required documentation in compliance with FTB
8 Form 3506. Appellant asserts that she submitted signed statements under penalty of perjury by her
9 child care provider, Ms. Claudina Barragan, showing that Ms. Barragan met the legal requirements and
10 that Ms. Barragan received compensation for giving child care services.⁵ Appellant contends that this
11 evidence was sufficient to meet her burden of proving an entitlement to the CDC credit for the 2005
12 and 2006 tax years. Therefore, appellant contends that she is entitled to a refund in the amount of \$363
13 for the 2005 tax year and a refund in the amount of \$390 for the 2006 tax year.

14 Respondent

15 Respondent argues that appellant is not eligible to claim the CDC credit for the 2005 and
16 2006 tax years. Respondent asserts that Internal Revenue Code (IRC) section 21(e)(2) expressly denies
17 the CDC credit to persons married at the close of the tax year who do not file joint returns with their
18 spouse; in addition, IRC section 21(e)(4) expressly denies the CDC credit to any claimant who lived
19 with a spouse during the final six months of the tax year. Respondent contends that appellant was
20 married during the 2005 and 2006 tax years and also lived with her spouse and her dependent for more
21 than six months during both tax years; therefore, she does not meet the eligibility requirements to claim
22 the CDC credits.

23 In addition, respondent argues that appellant has not met her burden of proving an
24 entitlement to the CDC credit for the relevant tax years. Respondent asserts that this burden of proof
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26 ⁵ Appellant refers to two submissions of evidence. First, appellant provided respondent with two signed affidavits (dated
27 June 6, 2011), in which Ms. Barragan confirms receiving \$2,500 in 2005 and \$3,000 in 2006 for child care services
28 provided to Evan M. Torrijos. Second, appellant provided respondent with a signed affidavit (received by this Board on
January 9, 2012), in which Ms. Barragan confirms the location and the years in which she cared for Evan M. Torrijos.

1 can be met by providing any of the following: checks, receipts, invoices, or notarized statements signed
2 by the childcare provider under penalty of perjury with specific amounts received for each child and the
3 location where the care was provided. However, the original affidavits submitted by appellant's
4 childcare provider were not signed under penalty of perjury and were not notarized. The next affidavit
5 submitted by appellant's childcare provider, though signed and notarized, did not make reference to any
6 payments. Therefore, respondent argues that appellant failed to submit sufficient evidence to show that
7 she is entitled to the CDC credit for the 2005 and 2006 tax years.

8 Applicable Law

9 Respondent's eligibility determination is presumed correct and an appellant bears the
10 burden of proof to show that the determination is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d
11 509, 514; *Appeal of Ismael R. Manriquez*, 79-SBE-077, Apr. 10, 1979.) It is well settled law that
12 deductions are a matter of legislative grace, and an appellant has the burden of proving that she is
13 entitled to the deductions she claims. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435; *Appeal*
14 *of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975.) Unsupported assertions are not
15 sufficient to satisfy an appellant's burden of proof. (*Appeal of Aaron and Eloise Magidow*,
16 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent, and relevant
17 evidence showing that respondent's determinations are incorrect, such assessments must be upheld.
18 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) An appellant's failure to
19 produce evidence that is within her control gives rise to a presumption that such evidence is
20 unfavorable to her case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

21 Revenue and Taxation Code (R&TC) section 17052.6 sets forth the eligibility criteria,
22 by reference to IRC section 21, for a state tax credit for expenses for household and dependent care
23 services necessary for a taxpayer to obtain gainful employment. Among those criteria, the taxpayer
24 must maintain a household that includes a qualifying individual as a member, for over one-half of the
25 calendar year, and the taxpayer must provide over one-half of the costs of maintaining the household
26 for the period that the qualifying individual resides therein. (Int.Rev. Code, § 21(e).) In addition, there
27 must be a qualifying individual in relation to the taxpayer, and the credit must be based on a percentage
28 of employment-related expenses that include expenses for the care of the qualifying individual.

1 (Int.Rev. Code, § 21.) The term “qualifying individual” includes a dependent of the taxpayer (as
2 defined in IRC section 152(a)(1)) under the age of 13. (Int.Rev. Code, § 21(b)(1)(A).) No credit shall
3 be allowed under this section with respect to any qualifying individual unless the taxpayer
4 identification number of such individual is included on the return claiming the credit. (Int.Rev. Code,
5 § 21(e)(10).) If the taxpayer is married, the couple must file jointly unless they live apart and the
6 taxpayer’s household is the principal place of abode for the qualifying individual for over one-half of
7 the taxable year and the taxpayer provides over half of the cost of maintaining the household during
8 that year. (Int.Rev. Code, § 21(e)(4).) With respect to the child care provider, the taxpayer must prove
9 that he paid for, and received, the service that he claimed for the tax year and must identify the party
10 who provided the claimed childcare services, by including on the return the name, address, and
11 taxpayer identification number of the provider unless it has been shown that the taxpayer exercised due
12 diligence in attempting to provide the information. (Int.Rev. Code, § 21(e)(9).)

13 Effective January 1, 2005, Government Code section 8202 requires California notaries
14 to positively identify all document signers for affidavits and other sworn instruments, and specifies new
15 statutory jurat certificate language that must accompany these notarizations.⁶

16 **STAFF COMMENTS**

17 The parties should be prepared to discuss whether the information that appellant
18 provided is sufficient to support her CDC claims for the 2005 and 2006 tax years.

19 For a taxpayer to obtain the CDC credit, IRC section 21(e)(2) expressly states as
20 follows: “If the taxpayer is married at the close of the taxable year, the credit shall be allowed under
21 subsection (a) only if the taxpayer and his spouse file a joint return for the taxable year.” In her
22 opening brief, appellant asserts that she filed joint tax returns in 2005 and 2006 with Enrique Torrijos.

23 _____
24 ⁶ Government Code section 8202, subdivision (b), provides that any affidavit subscribed and sworn to before a notary shall
25 include an attached jurat in the following form:

26 State of California County of _____
27 Subscribed and sworn to (or affirmed) before me on this ____ day of _____, 20__, by
28 _____, personally known to me or proved to me on the basis of satisfactory evidence to
 be the person(s) who appeared before me.
 Seal _____
 Signature _____ [Added 2004 ch. 539.]

1 However, it appears that appellant did not file joint tax returns for the 2005 and 2006 years. Moreover,
2 appellant's assertions suggest that she was married to Enrique Torrijos during these two years because
3 joint returns are filed by taxpayers who are married or in registered domestic partnerships. Under IRC
4 section 21(e)(4), appellant still could have claimed the CDC credit if she lived apart from her spouse
5 during the final six months of the tax year and provided over half of the cost of maintaining the
6 household during that year. However, appellant indicated in her opening brief that her son lived with
7 her and Enrique Torrijos from the time of his birth on March 29, 2005, through the end of 2006. From
8 this assertion, it appears that appellant lived with her spouse for the last six months of both the 2005
9 and 2006 years. If appellant did not file joint tax returns in 2005 and 2006 and lived with her spouse
10 for the last six months of both these years, appellant would not be eligible to receive the CDC credits.
11 Therefore, appellant should attempt to provide evidence to demonstrate that she did file joint tax returns
12 for 2005 and 2006, or alternatively, that she did not live with her spouse for the final six months of the
13 2005 and 2006 tax years and that she bore over half of the cost of maintaining the household during
14 these two years.

15 If she is able to produce such evidence, appellant should also demonstrate her
16 entitlement to the CDC credits by providing necessary documentation relating to the childcare provider
17 and the amounts paid. The original childcare provider statements provided by appellant (one for the
18 2005 tax year and one for the 2006 tax year) are not notarized or signed under penalty of perjury by the
19 childcare provider, Ms. Barragan. The subsequent statement provided by appellant (i.e., received on
20 January 9, 2012) does not include the address, telephone number, social security number, and the total
21 yearly amount paid for a specific child. It appears that both of these submissions do not include the
22 location where the child care was provided and do not identify appellant as the individual who paid for
23 the child care services in 2005 and 2006.

24 To meet her burden of proof, appellant should attempt to provide a notarized statement
25 signed under penalty of perjury by her childcare provider, Ms. Barragan. Ms. Barragan should identify
26 herself by including her full name, address and social security number, state the total amount that was
27 paid to her for each child per tax year, provide the address where child care was provided for that tax
28 year, and finally, indicate that each payment to the provider was made by appellant.

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Pursuant to California Code of Regulations, title 18, section 5523.6, appellant should provide her evidence to the Board Proceedings Division at least 14 days prior to the oral hearing.

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