

1 Linda Frenklak
2 Tax Counsel III
3 Board of Equalization, Appeals Division
4 450 N Street, MIC: 85
5 PO Box 942879
6 Sacramento CA 95814
7 Tel: (916) 323-3087
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **MARICEL B. HERNANDEZ**¹) Case No. 521850

14 Year Claim
15 2008 For Refund²
16 \$210

16 Representing the Parties:

18 For Appellant: Maggie Stehn, TAAP³
19 For Franchise Tax Board: Lisa Lawson, Administrator II

21 **QUESTION:** Whether appellant has shown she is entitled to the Child and Dependent Care Expenses
22 (CDC) credit for 2008.

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25 ¹ Appellant resides in Palmdale, Los Angeles County, California.

26 ² This is the amount of Child and Dependent Care Expenses Credit appellant claimed on her 2008 return, which is at issue
27 in this appeal.

28 ³ Appellant submitted the appeal letter. Russell McGeehan, a member of the Tax Appeals Assistance Program (TAAP),
submitted appellant's reply brief and Maggie Stehn of the TAAP, who currently represents appellant, submitted her
supplemental brief.

1 HEARING SUMMARY

2 Background

3 Appellant filed a timely California return for tax year 2008. On this return, appellant
4 claimed head of household (HOH) filing status, a dependent exemption credit for her daughter, Hazel
5 Bustillos, a CDC credit of \$210, and a refund of \$210. (Resp. Opening Br., p. 1, exhibit A.) Attached
6 to the return was the required FTB Form 3506, "Child and Dependent Care Expenses Credit," on which
7 appellant reported that she paid \$1,200 to Xochil De La Cruz ("the provider") for child care for her
8 daughter. (*Id.*) Appellant listed an address on Saigon Avenue in Lancaster, California, a telephone
9 number and a social security number for the provider and indicated that the care was provided at the
10 provider's listed address. (*Id.*) Appellant did not provide the percentage of physical custody she had of
11 her daughter, which was requested on the Form 3506. (*Id.*) Based on the birth date listed on the Form
12 3506, Hazel was eight years old as of December 31, 2008. (*Id.*) The Franchise Tax Board (FTB or
13 respondent) accepted the 2008 return and issued appellant a refund of \$210. (Resp. Opening Br., p. 1.)

14 Respondent subsequently audited appellant's 2008 return. In a CDC Disallowance letter
15 dated September 2, 2009, respondent informed appellant that it was unable to verify the provider
16 information listed on Form 3506 and appellant therefore has a balance due of \$214.07. (Appeal Letter,
17 Attachment.) Respondent further informed appellant in this letter that she could file a formal claim for
18 refund by paying the balance due and sending a letter of explanation and a completed copy of the
19 provided CDC Questionnaire and the documents requested therein.⁴

20 Respondent received a completed CDC Questionnaire dated January 2, 2009, which
21 appellant signed under penalty of perjury. (Appeal Letter, Attachment.) The completed CDC
22 Questionnaire states that appellant paid the provider \$120 per week for care expenses and lists the same
23 provider address and phone number listed on Form 3506 plus an additional phone number; no social
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26 ⁴ The CDC Questionnaire requests the name, address, social security number, and telephone number for the provider, as
27 well as: a copy of the birth certificate and social security card for the listed child(ren), and either copies of proof of
28 payment for services (cash payments without receipts are not acceptable) or a notarized invoice signed under penalty of
perjury by the provider that includes her full name, current address, telephone number, social security or employee
identification number, and the total amount of care expense appellant paid, and photocopies of the provider's social
security card and a valid government-issued picture identification card that includes her signature (acceptable forms
include a driver's license, DMV ID card, and a passport); the notary must be independent of the taxpayer's tax return
preparer or his/her representative.

1 security number or other identifying number is listed for the provider on the completed CDC
2 Questionnaire. Appellant submitted copies of her own California driver's license and social security
3 card, but she did not provide any identity document for her provider or proof of payment of the child
4 care expenses. (Resp. Opening Br., p. 2, Appeal Letter, Attachment.)⁵

5 On November 23, 2009, respondent issued a Denial of Claim for Refund – CDC letter to
6 appellant, which confirms the balance has been paid and states that the additional information provided
7 is insufficient to allow the refundable CDC credit. (Appeal Letter, Attachment.)⁶ This timely appeal
8 followed.

9 Contentions

10 Appellant's Contentions

11 On appeal, appellant contends that she is entitled to the CDC credit for tax year 2008.
12 (Appeal Letter.) She claims the provider refused to give her a letter substantiating her CDC credit.
13 (*Ibid.*) Listing the provider's address on Saigon Avenue in Lancaster plus two telephone numbers,
14 appellant asserts that the provider can be called. (*Ibid.*) Appellant also asserts that she paid the
15 provider in cash. (*Ibid.*) Attached to the appeal letter are copies of appellant's and Hazel's birth
16 certificates and social security cards, the completed CDC Questionnaire, a copy of a Summary of
17 Balance Due from respondent for tax year 2007 plus three copies of the Denial of Claim for Refund –
18 CDC.

19 In her reply brief, appellant argues that she has provided all information available to
20 support her claim for a CDC credit for tax year 2008.⁷ (App. Reply Br., pp. 1-2.) Appellant describes
21 herself as a single mother with adjusted gross income of \$14,293 who needed to employ a provider to
22 enable her to work throughout 2008. (*Id.*, p. 1.) Appellant contends that the provider lived close to
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24 ⁵ Respondent does not mention whether appellant submitted copies of Hazel's birth certificate and social security card with
25 the completed CDC Questionnaire. Staff notes that copies of Hazel's birth certificate and social security card, as well as a
26 copy of appellant's birth certificate, are attached to the Appeal Letter.

27 ⁶ According to respondent, it issued three Denial of Claim for Refund – CDC letters due to a technical error, copies of which
28 are attached to the appeal letter. (Resp. Opening Br., p. 2, n. 2.)

⁷ In her reply brief, appellant refers to a declaration dated August 11, 2010, which is *not* attached thereto, although it is
attached to her supplemental brief. (App. Reply Br., p. 1, fn. 1; App. Suppl. Br., Attachment.)

1 where Hazel went to school and “[t]he convenience and low cost of her service offset [the provider’s]
2 insistence to be paid in cash and refusal to provide a valid social security number.” (*Ibid.*) Appellant
3 asserts, “The need to work superseded [appellant’s] desire to gather all the information the [FTB] has
4 requested.” (*Ibid.*) According to appellant, the provider insisted on receiving payment from appellant
5 in cash and appellant “was not able to convince [the provider] to accept checks or sign a declaration
6 stating that she received the money.” (*Id.*, p. 2.) Appellant argues that, although Internal Revenue
7 Code (IRC) section 21(e)(9) provides a due diligence exception to the provider identification test, (the
8 requirement that a taxpayer provide identifying information for a provider), neither the IRC nor
9 respondent provide any specific guidelines concerning what is required to satisfy the due diligence
10 exception to the provider identification test under IRC section 21(e)(9). (*Ibid.*) Appellant also argues
11 that the law does not require all of the information requested on Form 3506 and that appellant has
12 provided all the available information. (*Ibid.*)

13 In her supplemental brief, appellant argues that she exercised due diligence in
14 attempting to provide the requested information by continuously requesting the provider to give her
15 social security number, which the provider continuously refused to give her. (App. Supp. Brief, p. 2.)
16 Appellant asserts that the provider only accepted cash payments and therefore appellant is unable to
17 provide appropriate records of her 2008 payments. (*Ibid.*) Appellant also asserts that she requested to
18 pay for the child care with checks, but the provider refused to accept checks because she does not have
19 a bank account. (*Ibid.*) Appellant further asserts that she asked the provider to sign a declaration
20 concerning the child care payments appellant gave her in 2008, but the provider refused to sign the
21 declaration. (*Ibid.*) Citing Internal Revenue Service (IRS) Publication 503, “Child and Dependent
22 Care Expenses,” for tax year 2008, appellant argues that she qualifies for the due diligence exception to
23 the provider identification test because she is submitting a statement explaining that she requested the
24 necessary provider information, but the provider refused to give her the information. (*Id.*, pp. 3-4.)
25 Attached to appellant’s supplemental brief is a declaration appellant signed under penalty of perjury
26 under the laws of California on August 11, 2010, which is not notarized. (*Id.*, Attachment.) In the
27 declaration, appellant states, among other things, the following: 1) she asked the provider for her social
28 security number when she first started to provide child care, but the provider’s husband informed

1 appellant that they would not provide her with the social security number; and 2) the provider provided
2 child care to appellant's daughter at the address on Saigon Avenue in Lancaster where the provider
3 lived, appellant regularly saw the provider at this address, and the provider told appellant that she lived
4 there. (*Ibid.*)

5 Respondent's Contentions

6 Respondent argues that appellant has not met her burden of proof to show she is entitled
7 to the claimed CDC credit. (Resp. Opening Br., p. 3.) Respondent contends that the information
8 appellant supplied in support of her claim is insufficient for respondent to allow her the credit.⁸
9 Respondent contends that appellant provided an inaccurate social security number for her provider on
10 the Form 3506. (Resp. Opening Br., p. 2, n. 1, p. 4.) In addition, respondent contends that, although
11 appellant asserts the provider resided at an address on Saigon Avenue in Lancaster where she provided
12 child care to Hazel, public records show that this address is a single family residence owned and
13 occupied by one Pablo Andrade. (*Id.*, p. 4, exhibit B.) Attached to respondent's opening brief is a
14 copy of a Los Angeles County assessment record dated July 1, 2008, for the provider's purported
15 address on Saigon Avenue in Lancaster, which only lists under owner information "Pablo Andrade
16 (owner occupied)." (*Ibid.*)

17 In its opening brief, respondent requested appellant to produce the following:

18 1) provider's California-approved identification card with a photograph, description, signature and
19 identifying number or, alternatively a copy of the provider's United States or foreign passport with her
20 photo and signature; 2) proof of the provider's residence, such as copies of utility bills, rental contract
21 or mortgage statements; and 3) a notarized statement signed under penalty of perjury with the
22 provider's current contact information and social security number attesting to the amount appellant paid
23 her for child care services during 2008. (Resp. Opening Br., p. 4.) Respondent contends that
24 appellant's provider has not indicated that she has an individual taxpayer identification number (ITIN)
25 and neither respondent nor the Department of Motor Vehicles (DMV) has any record of the provider in
26 its files. (*Id.*, pp. 5-6.) For this reason, respondent asserts that, even if the provider had an ITIN, it
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28 ⁸ Respondent also contends that it denied appellant's claimed CDC credit for tax year 2007 and the same facts and law apply to the 2007 tax year, even though this appeal only involves tax year 2008. (Resp. Opening Br., p. 3, n. 3.)

1 would not be able to match it with the identity information in its file or with the DMV files. (*Id.*, p. 6.)
2 Respondent therefore contends that a notarized statement from the provider signed under penalty of
3 perjury would not be credible until the provider’s identity is verified by a proper government-issued
4 identity document. (*Ibid.*)

5 In its reply brief, respondent argues that, although the federal statute and regulations do
6 not define the term due diligence for purposes of the exception to the provider identifying test under
7 IRC section 21(e)(9) or detail what efforts are required to demonstrate due diligence, the term “is
8 commonly understood to refer to a standard of care or actions a reasonable person would take before
9 entering into an agreement with another party.” (Resp. Reply Br., p. 2.) Respondent also refers to the
10 IRS Publication 503 for tax year 2008 for guidance on the due diligence exception for the provider
11 identification test, which instructs taxpayers to provide a statement explaining the requested
12 information that the provider refused to provide. (*Ibid.*) Respondent asserts that appellant has not
13 provided a social security number or a valid address for the provider, and she is not entitled to the due
14 diligence exception to the provider identification test because she has not provided any details of the
15 due diligence efforts she purportedly made to obtain the provider’s address and taxpayer identification
16 number. (*Id.*, pp. 2-3.) Lastly, respondent contends that appellant has not provided any documentation
17 to show she paid the provider the claimed amount for child care during 2008. (*Id.*, p. 3.)

18 Applicable Law

19 R&TC section 17052.6 sets forth the eligibility criteria, by reference to IRC section 21,
20 for a state tax credit for expenses for household and dependant care services necessary for a taxpayer to
21 obtain gainful employment. Among those criteria, there must be a qualifying individual⁹ in relation to
22 the taxpayer, and the credit must be based on a percentage of employment-related expenses that include
23 expenses for the care of the qualifying individual. (Int.Rev. Code, § 21(a) & (b).) No credit shall be
24 allowed for any amount paid to a provider unless the taxpayer includes on his or her return the
25 provider’s name, address and taxpayer identification number (i.e., the provider identification test).
26 (Int.Rev. Code, § 21(e)(9).) A taxpayer shall be relieved of the requirement to provide identifying
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28 ⁹ A qualifying individual means a dependent of the taxpayer (as defined in IRC section 152(a)(1) who is under the age of 13.

1 information with respect to the provider “if it is shown that the taxpayer exercised due diligence in
2 attempting to provide the information so required.” (*Ibid.*)

3 Respondent is required under R&TC section 19501 to administer and enforce the
4 income tax laws of California. This duty includes the responsibility for determining the correctness of
5 any return. (Rev. & Tax. Code, § 19504.) In carrying out this duty with respect to the CDC credit,
6 respondent created the CDC Questionnaire, which requires, among other things, copies of cancelled
7 checks and/or money orders payable to the provider, or a notarized invoice signed under penalty of
8 perjury by the provider and the notary must be independent of the tax practitioner (or their
9 representative) who prepared the taxpayer’s return.

10 Respondent’s determination is presumed correct and appellant bears the burden of proof
11 to show the determination is erroneous. (*Todd v McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of*
12 *Ismael R. Manriquez*, 79-SBE-077, Apr. 10, 1979.)

13 STAFF COMMENTS

14 Appellant maintains that all the information requested on the Form 3506 is not required
15 by law and that she has shown that she exercised due diligence in attempting to provide the identifying
16 information with respect to the provider. (Int. Rev. Code, § 21(e)(9).) At the hearing, appellant should
17 be prepared to describe in greater detail the specific efforts that she has made to obtain the information.

18 Respondent should be prepared to discuss whether it attempted to contact the provider
19 by telephone at any of the telephone numbers listed for the provider on the Form 3506, the completed
20 CDC Questionnaire or appeal letter. Appellant does not dispute that she provided an incorrect social
21 security number for her provider on the Form 3506 attached to her 2008 return, which she signed under
22 penalty of perjury. (Resp. Opening Br., p. 2, n. 1, exhibit A.) Yet, in her August 11, 2010 declaration
23 signed under penalty of perjury, appellant states:

24 When I first started to rely on Ms. De la Cruz I asked her for her social security number.
25 Her husband informed me that they would not provide this information to me.

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27 (App. Supp. Br., exhibit 1.) At the oral hearing, appellant should be prepared to explain the
28 inconsistency between the incorrect provider social security number she reported under penalty of
perjury on the Form 3506 and the representation made under penalty of perjury in her August 11, 2010

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declaration that she always knew that the provider’s social security number would not be made available to her.

Staff notes that the provider’s address on Saigon Avenue in Lancaster is 11 miles from appellant’s address during 2008 on 5th Street East in Palmdale, as shown on maps.google.com. According to appellant, the provider lived close to where Hazel went to school. (App. Supp. Br., p. 1.) If appellant’s daughter was in school during the days that the care was provided, appellant should explain the days and times when the provider cared for her daughter in order for appellant to work, as well as the rate of pay, and how her daughter was transported from her school or her home to the provider’s address. Appellant should also discuss how she determined that she paid the provider a total of \$1,200 for child care for her daughter throughout 2008, as she contends that she paid the provider only in cash at a rate of \$120 per week and she has no receipts for the payments.

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