

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

NICOLE M. GIBSON,)	
)	
Plaintiff,)	TC-MD 060399C
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiff appeals Defendant’s January 17, 2006, Notice of Refund Denial for tax year 2004. The denial was based on Defendant’s determination that Plaintiff was not entitled to the working family child care credit or the dependent care expense credit. Trial was held by telephone on November 16, 2006. Plaintiff testified on her own behalf. Plaintiff’s mother, Kathy Skiles (Skiles), also testified for Plaintiff. Defendant was represented by Morgan Brown, an employee of the Oregon Department of Revenue (department).

I. STATEMENT OF FACTS

For the year at issue, Plaintiff was a single mother with two children: a son born in June 1998 and a daughter born in February 2000. Calendar year 2004 was a difficult one for Plaintiff. She was separated from her husband and purportedly had obtained a restraining order against him. Plaintiff was also undergoing chemotherapy for a brain tumor. Treatment was expensive, and Plaintiff developed financial problems.

In May or June 2004, Plaintiff obtained a job with Bay City Ambulance in Coos Bay. The job was located approximately 25 miles from Coquille, the town where Plaintiff and her mother were living (and still live). A primary consideration in taking the job was that the employer provided paid health insurance.

Plaintiff's employment required her to put her children in day care. Plaintiff and her mother lived in separate homes on the same property in Coquille. According to the testimony, Plaintiff drove her daughter to a child care provider in Coos Bay, and Skiles took Plaintiff's son to school in Coquille or to a provider in that town when school was not in session. Plaintiff also utilized the services of a child care provider in Myrtle Point when the other providers were not available due to illness, holiday, or planned time off (*e.g.*, vacation). It appears from a review of the evidence that the child care services in Coos Bay did not commence until December 2004, and that the majority of the care before then was provided in Coquille.

Plaintiff did not have a checking or savings account. Plaintiff's mother paid the child care providers by check. Plaintiff reported child care expenses from June through December totaling \$2,590. Plaintiff submitted copies of canceled checks written by Skiles totaling \$2,209. The notation on each of the checks indicates that payment was made for "babysitting." Plaintiff also submitted a receipt from Southwestern Family Center in Coos Bay reflecting a \$245 cash payment on December 1, 2004. (Ptf's Ex 10.) Plaintiff claims an additional payment of \$136 to Robin Ford, a provider in Coquille, on December 17, 2004, for which there is no canceled check.

On July 8, 2005, Defendant issued a Notice of Proposed Refund Adjustment and/or Distribution that disallowed the two child care credits Plaintiff claimed. (Ptf's Exs 3, 4, 5.) Defendant states that the credits were denied because the child care "providers were paid by canceled checks signed by [Plaintiff's] mother" and, therefore, "[P]laintiff did not personally pay for the child care." (Def's Answer at 1.) Plaintiff timely filed a written objection to Defendant's proposed adjustment and enclosed documentation in the form of receipts from the daycare providers, a letter from her mother indicating that she had been reimbursed for the

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checks written, and copies of all the canceled checks. (Ptf's Compl at 2; Ptf's Exs 6-11.) On January 17, 2006, Defendant issued a Notice of Refund Denial. This appeal ensued.

II. ANALYSIS

ORS 315.262¹ provides a refundable credit for certain low-income taxpayers to partially offset the taxpayer's child care costs incurred for the purpose of allowing that the taxpayer to work or attend school. The credit is commonly referred to as the working family child care credit. The statute provides in relevant part:

“A qualified taxpayer shall be allowed a credit against the taxes otherwise due under ORS chapter 316 equal to the applicable percentage of the qualified taxpayer's child care expenses (rounded to the nearest \$50).”

ORS 315.262(2).

ORS 316.078 provides for a nonrefundable credit² for certain employment-related expenses, including child care, paid by a taxpayer for the care of a dependent child or children. This credit is referred to as the dependent care credit. The dependent care credit is specifically tied to Internal Revenue Code (IRC) section 21, the pertinent language being that the amount of the credit is “equal to a percentage of employment-related expenses allowable pursuant to section 21 of the Internal Revenue Code.” ORS 316.078(1). IRC section 21(1) in turn provides for a partial credit for “employment-related expenses * * * paid by such individual during the taxable year.”

Plaintiff claimed both credits, and Defendant disallowed the credits based on a determination that Plaintiff did not actually pay for the child care. Defendant draws a distinction

¹ All references to the Oregon Revised Statutes (ORS) and to the Oregon Revised Statutes (OAR) are to 2003.

² Although the credit is nonrefundable it can be carried forward to offset the taxpayer's tax liability for up to five subsequent tax years. *See* ORS 316.078(5).

between payment by Skiles, with reimbursement by Plaintiff, and a direct payment by Plaintiff to the child care providers. Defendant argues that the indirect nature of the asserted payments precludes Plaintiff from entitlement to the credits. Defendant also argues that there is insufficient proof that Plaintiff actually reimbursed her mother, in which case Plaintiff never paid for the expenses under any definition of the word “paid.”

A. *Did Plaintiff reimburse her mother?*

This is a factual question that ultimately hinges on the credibility of Plaintiff and her mother. Plaintiff must persuade the court by a preponderance of the evidence that she reimbursed her mother. *See* ORS 305.427.

Both Plaintiff and her mother testified under oath that Plaintiff did not have a checking account; that Skiles wrote the checks to the providers; and that Plaintiff reimbursed her after she was paid by her employer. The witnesses, of course, are not disinterested, but there is no independent evidence to contradict their testimony. Moreover, the court pressed the witnesses and found them to be credible. Skiles testified that she wrote checks to the providers because she believed the checks would provide “proper documentation” to prove the expenses. Skiles further testified that her daughter has memory problems, presumably due to the brain tumor, and that it was important that her daughter keep the sitters so that she could continue to work. That statement, coupled with testimony about Plaintiff’s financial difficulties and the fact that Plaintiff repaid her mother after the fact, suggest to the court that Plaintiff, at least at times, did not have the money in her possession to pay the providers when payment was due, and that her mother’s assistance was necessary to keep the arrangements working so that Plaintiff could keep her job. The court found the witnesses credible and believes that Plaintiff did reimburse her mother.

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B. *Is Plaintiff legally entitled to the credit?*

The court is confident that the amount of expenses claimed, \$2,590, were actually paid for child care, and that the payments were made to allow Plaintiff to work. The only question is whether Plaintiff's cash reimbursements to her mother for the otherwise allowable expenses entitle Plaintiff to claim the disputed credits, or whether she was legally required to pay the providers directly in order to claim the credits.

Defendant asserts that Plaintiff technically did not make the payments, and therefore is not entitled to the credit. Defendant relies on OAR 150-315.262(3), promulgated by the department to interpret ORS 315.262. That rule provides in relevant part:

“(3) For purposes of determining the credit, the credit is limited to costs associated with child care. The payments must be *made by the parent* claiming the working family child care credit. *Payments made by an entity or individual other than the parent* claiming the credit are not payments made by the taxpayer.”

OAR 150-315.262(3). (Emphasis added.)

That rule only applies to the working family child care credit provided in ORS 315.262. There is no similar rule for the dependent care expense credit provided in ORS 316.078. The latter credit (ORS 316.078) requires, by virtue of IRC section 21, only that the expenses be “paid” by the taxpayer claiming the credit. *See* IRC § 21(1). Moreover, ORS 315.262 never uses the word “paid.” To qualify, the expenses must only be for “costs associated with providing child care to a qualifying child of a qualified taxpayer.”³ ORS 315.262(1)(b). However, OAR 150-315.262(3) establishes the most stringent standard, and if Plaintiff satisfies the requirements of that rule, she is entitled to both credits and no additional analysis is needed.

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³ A qualifying child is under 13 or disabled. *See* ORS 315.262(1)(e). A qualifying taxpayer is defined in terms of income. *See* ORS 315.262(1)(d).

Turning to the rule, the court disagrees with Defendant's assertion that Skiles "made" the payments. Although Skiles did initially pay the providers, Plaintiff reimbursed her mother, and in the end it was Plaintiff, not her mother, who was out the money. If the legislature intends to lighten the burden of child care costs on low income individuals, an intent the court finds apparent from a plain reading of the statute, Defendant's distinction would subvert that intent. Taxpayers in situations similar to that of Plaintiff, who actually bear the expense of the child care, would, nonetheless, not be allowed to claim the credit. Such a practice would predictably have a disproportionate impact on low income individuals experiencing the most difficult circumstances. That does not mean that substantiation is not required; only that one need not directly pay the provider to claim the credits. Of course, direct payment, by check, is advisable to avoid the very problems Plaintiff here faces.

Several of the examples in OAR 150-315.262 tend to support the court's interpretation, and none support Defendant's position. The examples in the rule focus on whether the individual claiming the credit personally bears the financial burden of the expense. Example 3 clarifies that when two unmarried individuals living together share in the expenses for their son, each may only claim the credit based on the actual payments they make, and neither can include payments made by the other. Example 4 provides that a taxpayer may include in her qualifying child care expenses, the value of her employer's on-site child care services provided to her child, when the benefit was received in lieu of a salary increase and the amount appears in box 10 of her Form W-2, but is not included in taxable wages. The taxpayer in Example 4 clearly never actually pays for the child care under Defendant's view, but the value of the benefit is imputed as an allowable expense because it offsets the cost of care and would otherwise have been paid to the taxpayer as wages, and subsequently paid by the taxpayer to an off-site provider.

The court believes that the language in the rule relied upon by the auditor, OAR 150-315.262 (3), merely precludes a taxpayer from including expenses paid by a third-party individual or organization that are not reimbursed by the taxpayer seeking the credit. Such situations might include public assistance payments on behalf of the taxpayer, and payments by a noncustodial parent pursuant to a decree of divorce. In those situations, the payments would not “be made by the parent claiming the working family child care credit, [but would instead constitute] [p]ayments made by an entity or individual other than the parent claiming the credit.” OAR 150-316.262(3). Such unreimbursed third-party childcare expenses can truly be said to have actually been paid by, and only by, the third-party payor.

There is persuasive evidence that at least \$2,454 was paid for child care in 2004. The canceled checks total \$2,209, and Plaintiff has a contemporaneous receipt from a commercial provider (Southwestern Family Center) reflecting a cash payment of \$245. The court accepts Plaintiff’s representation that the final \$136 was also paid for child care.

III. CONCLUSION

The court finds that Plaintiff did reimburse her mother for the majority of the expenses paid, that she paid a portion directly in cash, and that the amounts so paid total \$2,590, which is the amount claimed in 2004. The court concludes that the fact that Plaintiff reimbursed her mother for many of the payments, rather than paying the providers directly, does not preclude Plaintiff from entitlement to the credits provided in ORS 315.262 and ORS 316.078. Now, therefore,

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IT IS THE DECISION OF THIS COURT that Defendant's January 17, 2006, refund denial is set aside and Plaintiff's appeal is granted.

Dated this _____ day of March 2007.

DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Dan Robinson on March 23, 2007. The Court filed and entered this document on March 23, 2007.