STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **DEAN AND MICHELLE NASCA** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2015.	DECISION DTA NO. 830020

Petitioners, Dean and Michelle Nasca, filed an exception to the determination of the Administrative Law Judge issued on May 18, 2023. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Stefan M. Armstrong, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on October 27, 2023, the date that the reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners met their burden in establishing their entitlement to a deduction for a $10,000.00 contribution to a New York State 529 college savings plan for tax year 2015.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. In 2008, petitioners, Dean and Michelle Nasca, established an Internal Revenue Code (IRC) § 529 tuition plan (529 plan) for the benefit of their minor son, with the State of Rhode Island (RI 529) through a financial advisor with Northeast Securities, Inc. (NESI), located in Uniondale, New York. Mr. Nasca avers that he, his wife, and their minor son were the account owners.

2. In or about 2013, the advisor from NESI suggested that petitioners move the money from the RI 529 plan to a New York State 529 plan, as the rate of return was then comparable, and that petitioners would be entitled to a deduction on their New York State personal income tax returns.

3. According to the affidavit of Mr. Nasca, in or about September of 2013, Mr. Nasca signed paperwork establishing a New York State 529 College Tuition plan (NY 529 plan) with himself as the account owner, and petitioners' minor child as the beneficiary. Copies of this paperwork were not submitted into the record.

4. On or about September 25, 2013, petitioners transferred $10,000.00 from the RI 529 plan to the NY 529 plan and claimed a $10,000.00 529 college savings program deduction on their 2013 New York State personal income tax return.

5. On or about May 29, 2014, petitioners transferred $10,000.00 from the RI 529 plan to the NY 529 plan and claimed a $10,000.00 529 college savings program deduction on their 2014 New York State personal income tax return.

6. On or about December 24, 2015, petitioners transferred $10,000.00 from the RI 529 plan to the NY 529 plan and claimed a $10,000.00 529 college savings program deduction on their 2015 New York State personal income tax return.

7. On or about December 1, 2016, petitioners transferred $10,000.00 from the RI 529 plan to the NY 529 plan and claimed a $10,000.00 529 college savings program deduction on their 2016 New York State personal income tax return.

8. On January 12, 2017, the Division of Taxation (Division) issued a statement of proposed audit changes to petitioners that asserted tax based upon the disallowance of the NY 529 deduction claimed on their 2013 New York State personal income tax return (2013 notice).

9. Petitioners requested a conciliation conference for the 2013 tax year. Prior to a conciliation conference being held, the Division and petitioners executed a withdrawal of protest (form DTF-941) settling this notice for $0.00.[1] Mr. Nasca states in his affidavit that the 2013 notice was canceled because petitioners provided documentation to the Division that established that disallowance of the NY 529 deduction claimed on their 2013 New York State personal income tax return was due to an error on the part of the NY 529 plan's administrator that his son was denominated as the account owner, rather than himself. Petitioners did not submit a copy of the document submitted to the Division that resulted in the cancellation of the 2013 notice.

10. The Division did not audit and/or challenge the $10,000.00 529 college savings deduction claimed on petitioners' 2014 New York State personal income tax return.

11. Following receipt of petitioners' 2015 New York State personal income tax return, the Division performed a search to verify whether petitioner Dean Nasca was entitled to take such deduction. The Division's search of its records from the program manager of New York's 529 College Savings Program indicated that petitioners did not make any contributions to a New York State College Savings account during the year 2015.

[1] There is no indication that a notice of deficiency was issued subsequent to the issuance of the January 12, 2017 statement of proposed audit changes.

12. On October 4, 2018, the Division issued a statement of proposed audit changes that denied the 529 plan deduction claimed by petitioners on their 2015 return and asserted tax due in the amount of $773.00, plus interest.

13. Following issuance of the statement of proposed audit changes, petitioners submitted an account statement for the third quarter of 2015 from New York's Advisor Guided College Savings Program (statement). A review of this statement indicates that there had been a rollover contribution into this account in the amount of $10,000.00 during 2015. The statement lists the account owner as petitioners' minor child, who is also listed as the beneficiary.

14. On November 20, 2018, a notice of deficiency (notice number L-048854747) was issued to petitioners asserting tax due in the amount of $773.00, plus interest for the tax year 2015.

15. In November 2017, petitioners transferred the entire balance in the NY 529 account from their son, as account owner, to Dean Nasca, as account owner. This transfer included the $10,000.00 rollover contributions from the years 2013, 2014, 2015 and 2016. In addition, petitioners made a $10,000.00 contribution to the NY 529 plan in 2017 and claimed the $10,000.00 529 college savings deduction on their 2017 New York State personal income tax return.

16. Following the filing of their 2017 return, the Division issued a statement of proposed audit changes asserting tax based upon the disallowance of the $10,000.00 529 college savings deduction claimed by petitioners on their 2017 NYS personal income tax return, followed by a notice a deficiency dated August 24, 2020 (2017 notice). Following a conciliation conference at BCMS, petitioners executed a consent agreeing to a cancellation of this notice.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge set forth the pertinent statutory authority providing for a deduction for contributions to a New York State 529 college savings plan. The Administrative Law Judge found that during tax year 2015, petitioners were not the record account owners of a New York State 529 college savings plan and accordingly, did not qualify for a deduction for a contribution to such a plan. The Administrative Law Judge addressed petitioners' assertion that but for an error by the plan administrator, the account would have been properly titled in the name of petitioner Dean Nasca. Noting that the record in this matter contained no evidence of such an error except for petitioners' assertion that it had been previously provided in the BCMS process for tax year 2013, the Administrative Law Judge found that petitioners had failed to carry their burden of proving that the notice of deficiency was in error.

The Administrative Law Judge next turned to petitioners' argument that the Division was bound to concede the legitimacy of the 2015 deduction pursuant to Tax Law § 689 (g), because it had previously settled a notice of deficiency on a similar deduction in tax year 2013 for $0.00. Petitioners claim that this was the result of the presentation of the initial account application which now cannot be located. The Administrative Law Judge rejected this argument noting that there is nothing in the law that prevents the Division from issuing a notice of deficiency in a later year after mediation in a prior year.

ARGUMENTS ON EXCEPTION

Petitioners contend that petitioner Dean Nasca was the owner of the New York 529 college savings account in 2015. Petitioners argue that the New York 529 plan administrator erred by establishing the account in the name of their minor son and that the Division conceded this issue when it abandoned its effort to collect a deficiency for tax year 2013 after seeing the

original account application.

The Division contends that the determination of the Administrative Law Judge was correct and that petitioners cannot claim an exclusion because they were not the account owners of a New York State 529 college savings plan during tax year 2015. The Division further contends that its actions in dismissing a notice in 2013 are part of a mediation process that may not be submitted as evidence regarding this matter and that, in any event, petitioners have failed to carry their burden.

OPINION

Tax Law § 612 (a) provides that a New York resident's federal adjusted gross income (AGI) will serve as their New York AGI, subject to several addition and subtraction modifications. The present matter concerns one such modification, a subtraction for certain contributions to a qualified college tuition savings program made in accordance with the New York State College Choice Tuition Savings Program (Program) (***see*** Tax Law § 612 [c] [32]). The Program was enacted as part of The New York State College Choice Tuition Savings Program Act (Act), which was signed into law on September 10, 1997, and made applicable to tax years after December 31, 1997. Section 3 of the Act added article 14-A to the New York Education Law and provided for the establishment of the Program.

Pursuant to this enactment, Tax Law § 612 (c) (32) provides for a subtraction from federal AGI for:

> "[c]ontributions made during the taxable year *by an account owner* to one or more family tuition accounts established under the New York state college choice tuition savings program provided for under article fourteen-A of the education law, to the extent not deductible or eligible for credit for federal income tax purposes, provided, however, the exclusion provided for in this paragraph shall not exceed five thousand dollars for an individual or head of household, and for married couples who file joint tax returns, shall not exceed ten thousand dollars;

> provided, further, that such exclusion shall be available only to the account owner and not to any other person."

The term "account owner" as defined by Education Law § 695-b is any person who opens an account or any successor owner. The account owner is the person who enters into a tuition savings agreement pursuant to the provisions under article 14-A of the Education Law. According to the original enactment of the Program, only the account owner was permitted to make contributions to the account (Education Law former § 695-e [3]), and contributions made by an account owner under the Program qualified as an income tax subtraction modification under Tax Law former § 612 (c) (32), to the extent it was not deductible or eligible for credit for federal income tax purposes, so long as the contribution did not exceed $5,000.00 for the taxable year. This contribution limit was later increased to $10,000.00 for married couples who file joint tax returns (***see*** L 2000, ch 535, § 8; Tax Law § 612 [c] [32]). Education Law § 695-e (3) was amended, effective May 21, 2008, and allowed any person, including the account owner, to make contributions to the account after it was opened (***see*** L 2008, ch 81, § 1), and added that the exclusion of Tax Law § 612 (c) (32) "shall be available only to the account owner and not to any other person" (L 2008, ch 81, § 2).

When the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice, and the burden of proof is on the taxpayer to demonstrate, by clear and convincing evidence, that the deficiency assessment is erroneous (***see Matter of Suburban Restoration Co. v Tax Appeals Trib. of State of N.Y.***, 299 AD2d 751 [3d Dept 2002]; ***Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of O'Reilly***, Tax Appeals Tribunal, May 17, 2004; Tax Law § 689 [e]). The Division does not bear the burden of demonstrating the propriety of the deficiency (***see Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842, 843 [3d Dept 1986]).

Here, petitioners bear the burden of providing evidence that Mr. Nasca was the account owner in tax year 2015 when the contribution was made to the 529 college savings plan. Petitioners' case consists of arguing a plausible scenario for how they find themselves making contributions to a college savings plan that they are being prevented from deducting. They assert that Dean Nasca is an experienced, highly educated tax professional with a masters degree in taxation and certification as a CPA who would not make the error of establishing a 529 college savings plan in his son's name because doing so would defeat the benefit of the deduction for contributions by the parents. Petitioners explain they are the victim of an error by their plan administrator who placed the account in the name of petitioners' son and titled him as account owner instead of titling the rightful owner, petitioner Dean Nasca. According to petitioners, this error was documented in the mediation process in BCMS for the 2013 deficiency and corrected in 2017 when petitioner Dean Nasca was then properly named by the plan administrator as account owner. In short, they say there is no other reason that the 2013 notice of deficiency would be settled for $0.00. It is only because the plan administrator merged with another business entity that they cannot procure an additional copy of the account application which would show the error.

Unfortunately for petitioners, the document that petitioners claim to have provided to the Division establishing an alleged technical error was not provided in this matter. Petitioners contend that the Administrative Law Judge should have considered that the Division was in possession of the plan initiation document and that the Division should have submitted that document in the present matter to refute petitioners' credibility if the facts set forth in his affidavit were incorrect. We disagree. In light of the burden of proof, it was the burden of the petitioners to seek production of the document from the Division. There is no indication in the

record, that petitioners ever requested that the Division produce the document or sought that the Administrative Law Judge compel such a production.

Moreover, even had such a document been provided, it would not alter the undisputed fact that the account to which petitioners had made contributions was not "owned" by them within the meaning of the law during tax year 2015 and therefore was not an eligible vehicle for the deduction. Any purported error by the plan administrator would be a matter to be pursued by petitioners against that third party. The Division is within its authority to disallow the deductions in tax year 2015 for not meeting the legal requirement even in the presence of this alleged account initiating document demonstrating an intention to have petitioner Mr. Nasca own the account.

The petitioners' chief complaint is that the Division is uneven in its use of its discretion to pursue their 529 college plan deductions having settled the 2013 deficiency for no money, but conversely pursuing the 529 deduction deficiency for tax year 2015. The fact that the Division was moved to settle its claims in tax year 2013 for $0, yet will not do so for tax year 2015, is not a basis on which the relief sought can be granted. As the Division notes, there are many reasons why a case may settle. Although Mr. Nasca attributes the 2013 settlement to documented evidence of an account opening error that he submitted, the decision to pursue or settle rested with the Division. The law remained unchanged.

The evidence demonstrates that petitioner's son was the account owner until November 2017 when the funds in that account were transferred to an account in Mr. Nasca's name. Petitioners have thus failed to prove that Mr. Nasca was the account owner in 2015 when the contribution at issue was made and thereby was entitled to the claimed deduction. Petitioners' argument that Tax Law § 689 (g) requires they be granted the modification in tax year 2015

because the Division permitted this same modification for the 2013 tax year is inapposite. Tax Law § 689 (g) provides that "the [Division of Tax Appeals] shall consider such facts with relation to the taxes for other years as may be necessary correctly to determine the tax for the taxable year . . . ." As noted above, the record indicates that the account was in their son's name in 2015. There is no legal basis for the claim that, because a similar and earlier notice of deficiency was settled for zero dollars, the Division is precluded from pursuing deficiencies for other tax years.

Accordingly, it its ORDERED, ADJUGED and DECREED that:

1. The exception of Dean and Michelle Nasca is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The exception of Dean and Michelle Nasca is denied; and
4. The notice of deficiency, dated November 20, 2018 is sustained.

DATED: Albany, New York
April 25, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner