STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.	:	DETERMINATION DTA NO. 830020

Petitioners, Dean and Michelle Nasca, filed a petition 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.

On June 14, 2022, and June 15, 2022, respectively, petitioners, appearing pro se, and the Division of Taxation, by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel, and Stefan Armstrong, Esq., of counsel, on the brief), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by December 2, 2022, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners established that the Division of Taxation erroneously disallowed a deduction claimed by them for a contribution made by them to a New York State sponsored 529 college savings plan in 2015.

FINDINGS OF FACT

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

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

7. In 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 petitioner 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. Petitioner 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.

CONCLUSIONS OF LAW

A. Tax Law § 612 (a) provides that the New York adjusted gross income of a resident individual is his federal adjusted gross income (AGI) as defined in the laws of the United States for the taxable year, with modifications. One such modification available to reduce federal AGI is as follows:

> "Contributions 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*" (Tax Law § 612 [c] [32] [emphasis added]).

B. The New York State College Choice Tuition Savings Program Act (Act) was signed into law on September 10, 1997, and 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 New York State College Choice Tuition Savings Program (Program), which authorized the creation of family tuition accounts to enable residents of New York and other states to benefit from the tax incentive provided for under section 529 of the Internal Revenue Code (IRC), and to attract students to public and private colleges and universities within the State (***see*** L 1997, ch 546). Education Law § 695-e governs the program requirements for family tuition accounts and characterizes any person who opens an account (or any successor owner) as the "account owner," as defined by Education Law § 695-b. 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 expanded 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).

C. Petitioners contend that the plan administrator erroneously denominated petitioners' son as account owner rather than petitioner Dean Nasca. According to petitioners, upon researching the error, ownership of the account was transferred into Mr. Nasca's name. Pursuant to Tax Law § 689 (e), petitioners bear the burden of establishing, by clear and convincing evidence, that the Division's determination is erroneous (***see Matter of Suburban Restoration Co. v Tax Appeals Trib.***, 299 AD2d 751 [3d Dept 2002]; ***Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (***Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842 [3d Dept 1986]). Petitioners have failed to meet that burden. Here, the documented evidence in the record clearly establishes that, up until November 2017, petitioners' minor child was the account owner and not petitioners. As set forth above, the law is clear that only the account owner can claim the deduction. While petitioners contend that this was an error on the part of the plan administrator, petitioners have presented no evidence other than their own assertion, as set forth in Mr. Nasca's affidavit, that the NY 529

account was originally set up with him as the account owner. Petitioners presented no contemporaneous documentation that would corroborate their claims. It is telling that, rather than have the administrator of the NY 529 Plan correct the alleged error, petitioners caused the account to be transferred from their son as account owner to Mr. Nasca.

D. Petitioners also claim that, relying upon Tax Law § 689 (g),[2] because the Division allowed them the benefit of the exclusion for the 2013 tax year, that result should also apply to the 2015 tax year because the salient facts are identical. This argument is rejected. Here, regardless of whether the Division allowed petitioners the exclusion for the year 2013, it is clear that in 2015, petitioners were not the account owners and were ineligible for the exclusion (***see*** Tax Law § 612 [c] [32]). In addition, even if the Division canceled the 2013 notice after reviewing the same facts as presented herein, the Division is under no obligation to provide the same relief again. "[A]n agency has the power and obligation to rectify what it deems to be an erroneous interpretation of the law or an injudicious policy. A shift in agency position to ensure affecting the statute's purpose serves to indicate heightened agency conscientiousness, not arbitrariness" (***Matter of AT & T Info. Sys. v Donohue***, 113 AD2d 395, 401–402 [3d Dept 1985] [Yesawich Jr., J., dissenting], ***revd on dissenting op below*** 68 NY2d 821 [1986] ***see also Matter of Delese v Tax Appeals Trib.***, 3 AD3d 612, 613 [3d Dept 2004], ***lv dismissed*** NY3d 793 [2004]).

[2] 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 . . ."

E. The petition of Dean and Michelle Nasca is denied and the notice of deficiency, dated November 20, 2018, is sustained.

DATED: Albany, New York
May 18, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE