

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DEAN NASCA AND MICHELLE NASCA : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 850320
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2016. :
_____ :

Petitioners, Dean Nasca 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 2016.

On February 20, 2025, and April 29, 2025, respectively, petitioners, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Stefan Armstrong, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by October 29, 2025, which date commenced the six-month period for the issuance of this determination. After reviewing the evidence and arguments presented, Anita K. Luckina, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division properly asserted a deficiency in personal income tax against petitioners for the year 2016.

FINDINGS OF FACT

1. In 2008, petitioners, Dean Nasca 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 plan) through a financial advisor with Northeast Securities, Inc. (NESI). Mr. Nasca avers that he, his wife and their minor son were the account owners.

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

3. Mr. Nasca avers that, in or about September 2013, he signed paperwork establishing a NY 529 plan with himself as the account owner and petitioners' minor son as the beneficiary. Soon thereafter, petitioners began transferring funds from the RI 529 plan to the NY 529 plan. A copy of the paperwork creating the NY 529 plan was not submitted into the record.

4. In December 2016, petitioners transferred \$10,000.00 from the RI 529 plan to the NY 529 plan.

5. Petitioners filed form IT-201, New York State resident income tax return, married filing joint, for tax year 2016 (2016 return). The 2016 return claimed a NY 529 plan deduction of \$10,000.00 and reported New York adjusted gross income of \$101,841.00. After subtracting an itemized deduction of \$65,846.00 and three dependent exemptions (\$3,000.00), petitioners reported: taxable income of \$32,995.00; after a nonrefundable credit of \$137.00, total New York State tax due of \$1,367.00; and total payments of \$4,430.00, including refundable credits and withholdings. Petitioners claimed a refund of \$3,063.00.

6. Mr. Nasca avers that, after learning the contributions from the RI 529 plan to the NY 529 plan were incorrectly deposited into an account in the name of their minor son, petitioners, in November 2017, transferred the entire balance of the NY 529 plan account from their minor

son, as account owner, to Dean Nasca, as account owner. This transfer included the \$10,000.00 rollover contribution for the year 2016.

7. On January 16, 2018, the Division issued to petitioners a notice of disallowance denying the \$3,063.00 refund claimed on their 2016 return (2016 notice of disallowance).¹

8. On October 10, 2019, the Division issued to petitioners a statement of proposed audit change (assessment number L-050707500) for tax year 2016 (2016 statement). The 2016 statement provides, in relevant part:

“You received this notice because:

We adjusted or disallowed the New York State 529 College Savings Program deduction you claimed on your New York State return.”

Explanation

We reviewed and recomputed your 2016 New York State tax return. You now owe additional tax. Information from the program manager of New York’s 529 College Savings Program did not indicate that you made any contributions to a New York State college savings account during tax year 2016. Therefore, we disallowed the subtraction you claimed on line 30 of your New York State tax return.

Every state sponsors a 529 college savings plan. Many New York residents are invested in non-New York plans. Review your statements carefully. Statements from New York 529 plans specifically indicate that they are New York plans.

Only contributions made to a qualifying New York State 529 college savings account during the tax year can be claimed as a New York subtraction modification.

If your records indicate you made contributions to a New York State 529 college savings plan, provide copies of:

- your 529 account statement, and
- proof of payment, such as your bank statement, or both sides of your canceled checks.

We will review the information and advise you of our determination.

¹ The record does not include a copy of the notice of disallowance issued on January 16, 2018.

Under the provisions of the New York State Tax Law, spouses who file a joint return and who made contributions as the account owner(s) to one or more accounts, established under the New York State 529 College Savings Program, may deduct on line 30 the lesser of \$10,000 or the actual amount contributed to the New York College Savings Program.

You owe interest on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under section 684(a) of the New York State Tax Law.

Computation

To avoid the possibility of additional interest and penalties, be sure to pay the *Current balance due* shown in the *Computation summary*. This amount also appears on page 1 of this notice.

Description	Line number	Computed by NYS
New York adjusted gross income per return	33	+ \$101,841.00
Disallowed 529 college savings program deduction		+ 10,000.00
New York adjusted gross income corrected	33	\$111,841.00
Standard or itemized deduction	34	- 15,950.00
Dependent exemptions	36	- 3,000.00
Taxable Income	37	\$92,891.00
New York State tax on taxable income	39	+ 5,381.00
Other NY State refundable credits	42	- 137.00
NY State taxes after nonrefundable credits	44	\$5,244.00
Total New York State taxes	46	\$5,244.00
Total New York State tax per return		\$4,533.09
Total tax amount due		\$711.00

9. On November 26, 2019, the Division issued to petitioners a notice of deficiency (assessment number L-050707500) that asserted tax due of \$711.00, plus interest, because

petitioners “have not paid the amounts due stated in the notice we previously issued” (2016 notice). The 2016 notice references the 2016 statement for a detailed explanation and computation of the tax due.

10. Petitioners requested a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the 2016 notice of disallowance, which was held on or about June 6, 2020. The record does not indicate the date on which petitioners requested the BCMS conference.

11. On July 21, 2020, petitioners executed a BCMS consent (CMS number 000314281) granting the \$3,063.00 refund claimed on petitioners’ 2016 return as previously disallowed by the 2016 notice of disallowance (BCMS consent).

12. On July 22, 2022, BCMS issued a conciliation order (CMS number 000318910) sustaining the 2016 notice (conciliation order).

13. On October 18, 2022, petitioners timely filed a petition with the Division of Tax Appeals protesting the conciliation order.

14. On January 18, 2023, the Division filed an answer that included the following assertions:

- “1. DENIES each and every factual allegation contained in the petition except as stated otherwise.
2. AFFIRMATIVELY STATES that Dean & Michelle Nasca (‘petitioners’) filed an IT-201 Resident Income Tax Return for the tax year 2016.
3. AFFIRMATIVELY STATES that on September 5, 2017, the Division sent a Request for Additional Information to petitioners regarding the 2016 return requesting documentation of certain items claimed on the 2016 return.
4. AFFIRMATIVELY STATES petitioners failed to provide adequate substantiation in response to the September 5, 2017, Request for Additional Information.

5. AFFIRMATIVELY STATES that on October 10, 2019, the Division sent a Statement of Proposed Audit Changes [sic] to petitioners detailing proposed changes to the 2016 return. Such proposed changes included the disallowance of the New York State 529 College Savings Program deduction claimed by petitioners.

6. AFFIRMATIVELY STATES petitioners failed to provide adequate substantiation for the 529 plan contribution in response to the October 10, 2019, Statement of Proposed Audit Changes [sic].

7. AFFIRMATIVELY STATES that Notice of Deficiency L-050707500, dated November 26, 2019, was issued to petitioners assessing additional tax for tax year 2016 in the amount of \$711.00, plus interest.

8. AFFIRMATIVELY STATES that by Conciliation Order dated July 22, 2022, the petitioners' request was denied, and the statutory notice was sustained.

9. AFFIRMATIVELY STATES that, pursuant to Section 689(e) of the Tax Law, the burden of proof is upon petitioners to show an error in the Notice of Deficiency.”

15. In support of its position, the Division submitted the affidavit of Gregory Tirums, a Tax Technician 3 in the Division's Personal Income Tax Desk Audit Bureau, sworn to on January 14, 2025, with attachments, including petitioners' 2016 return and the 2016 statement. Mr. Tirums' duties include overseeing the NY 529 plan program within the Division and resolving complex audit cases. Mr. Tirums reviewed petitioners' 2016 return, including the \$10,000.00 NY 529 plan deduction. Mr. Tirums' affidavit explains generally the authority for and parameters of the NY 529 plan, including the yearly reports provided to the Division by the two NY 529 plan program managers indicating who made contributions to the NY 529 plan. Mr. Tirums avers that he reviewed all the documentation provided, including the 2016 reporting information from the two NY 529 plan program managers, and that “[b]ased on this information, [on] October 10, 2019, the Division issued a Statement of Proposed Audit Changes [sic] which disallowed the \$10,000 deduction and assessed the New York State tax plus interest.”

16. The Division did not submit the September 5, 2017, request for additional information or petitioners' response thereto or explain the relationship of the 2016 notice of disallowance and subsequent BCMS consent allowing petitioners' claimed refund to the 2016 notice, or detail any adjustments to petitioners' 2016 return asserted by the 2016 notice other than the Division's disallowance of the NY 529 plan deduction. The Division argues that the 2016 notice of disallowance and the 2016 notice are entirely separate and concern different issues with petitioners' 2016 return, and further, petitioners have not demonstrated that they are entitled to the NY 529 plan deduction on their 2016 return.

17. In support of their position, petitioners submitted the affirmation of Dean Nasca, dated August 12, 2025, with attachments, including the BCMS consent. Petitioners argue that the Division challenged the deductions on their 2016 return, including the NY 529 plan deduction, by denying their refund claim and issuing the 2016 notice of disallowance, and that the issues raised by the 2016 notice were resolved by the BCMS consent.

CONCLUSIONS OF LAW

A. A presumption of correctness attaches to a notice of deficiency issued by the Division (*see* Tax Law § 689 [e]; *Matter of Greenfeld*, Tax Appeals Tribunal, March 7, 2019, citing *Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768, 769 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759, 760 [3d Dept 1980]). In *Matter of Atlantic & Hudson Ltd. Partnership* (Tax Appeals Tribunal, January 30, 1992), the Tribunal stated:

“Although a determination of tax must have a rational basis in order to be sustained upon review, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment. Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear on the face of the audit as described by the Division through testimony or

documentation; from factors underlying the audit which are developed by the petitioner at hearing; or in the inability of the Division to identify the bases of the audit methodology in response to questions posed at the hearing (citations omitted).”

It is well established in New York law that a notice of deficiency that has no rational basis must be set aside (*see Matter of Donahue v Chu*, 104 AD2d 523, 526 [3d Dept 1984]; *Matter of Rosenthal v State Tax Commn.*, 102 AD2d 325, 328 [3d Dept 1984]; *Matter of Welch v State Tax Commn.*, 89 AD2d 683, 684 [3d Dept 1982]).

B. 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 modifications. As relevant, Tax Law § 612 (c) (32) provides 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.”

Here, petitioners have not substantiated that either spouse made contributions as an account owner to a qualified NY 529 plan during the 2016 tax year. Notwithstanding, the facts in evidence rebut the presumption of correctness that attached to the issuance of the 2016 notice and establish that it has no rational basis.

C. Petitioners filed their 2016 return claiming a refund of \$3,063.00, calculated based on the items reported thereon, including the \$10,000.00 NY 529 plan deduction and a \$65,846.00 itemized deduction. The Division asserts that, on September 5, 2017, it sent a request for additional information to petitioners requesting documentation of “certain items” claimed on their 2016 return and that petitioners failed to provide adequate documentation in response

Neither the request for additional information nor petitioners' response—the de facto audit of petitioners' 2016 return—are part of the record.

Thereafter, on January 16, 2018, the Division issued to petitioners the 2016 notice of disallowance denying petitioners' \$3,063.00 refund claim. On November 26, 2019, the Division issued the 2016 notice asserting tax due based on the Division's disallowance of the \$10,000.00 NY 529 plan deduction on petitioners' 2016 return. The record does not indicate whether the 2016 notice was issued before petitioners protested the 2016 notice of disallowance. However, on July 21, 2020, after the 2016 notice was issued, petitioners executed the BCMS consent granting the \$3,063.00 refund as calculated on petitioners' 2016 return. In so doing, the Division must have accepted—based on whatever substantiation petitioners provided at that time as part of the BCMS proceeding—petitioners' 2016 return as filed, including the NY 529 plan and itemized deductions. There is no apparent basis to conclude otherwise. Petitioners have offered enough to rebut the presumption of correctness that attached to the issuance of the 2016 notice, and it then fell on the Division to explain otherwise, which it did not. And, without more, it cannot be determined that the issues addressed by the 2016 notice were distinct from the issues addressed by the 2016 notice of disallowance as resolved by the BCMS consent. Any argument that these two notices address separate issues is simply unsupported by the facts in evidence.

D. Moreover, even viewed separately from the 2016 notice of disallowance, the 2016 notice is problematic. The 2016 notice is seemingly premised only on the Division's disallowance of the \$10,000.00 NY 529 plan deduction on petitioners' 2016 return. However, a review of the 2016 statement's computation section indicates that the 2016 notice does more than disallow petitioners' NY 529 plan deduction, it also disallows petitioners' \$65,846.00 itemized deduction and instead computes petitioners' taxable income and tax due using a \$15,950.00

standard deduction—an almost \$50,000,00 adjustment—without explanation or a request for more information. Again, the initial request for additional information was not provided, and the 2016 notice and 2016 statement did not particularize the disallowance of the itemized deduction or request any records related thereto. In sum, there is nothing in the record indicating that the 2016 notice’s computation of petitioners’ 2016 taxable income and tax due properly included the adjustment to petitioners’ itemized deduction; thus, the presumption of correctness attached to the 2016 notice has been rebutted. And the Division has failed to demonstrate that the 2016 notice had a rational basis.

E. Accordingly, based on the facts presented, petitioners have sustained their burden of proving under Tax Law § 689 (e) that the assessment is improper and the tax assessed is erroneous.

F. The petition of Dean Nasca and Michelle Nasca is granted, and the notice of deficiency, dated November 26, 2019, is cancelled.

DATED: Albany, New York
April 23, 2026

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE