STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
PRISCILLA A. MONTOYA
TO ASSESSMENTS ISSUED UNDER
LETTERS ID NOs. L0097546032 and L1171287856

v. AHO Case Number 19.01-003A, D&O #19-08

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

An administrative hearing on the above-referenced protest was held on February 5, 2019 before Hearing Officer Ignacio V. Gallegos. Mr. Peter Breen Staff Attorney, and Ms. Milagros Bernardo, Auditor appeared on behalf of the Taxation and Revenue Department (Department). Priscilla A. Montoya (Taxpayer) appeared for the hearing representing herself.

Priscilla Montoya, I.M. (a child), and Rose Grassham appeared as witnesses for the Taxpayer. The Department presented Protest Auditor Milagros Bernardo as a witness. Taxpayer presented one exhibit, marked Exhibit 1. The Department presented two different Exhibits labeled A, and Exhibit B. For clarity, the A exhibits are referred to as the following: Exhibits A-1 and A-2 (school registration), Exhibit A-1 through A-5 (Pub. 501), and Exhibit B. The Taxpayer's exhibit and the Department's exhibits were admitted without objection. The Hearing Officer took administrative notice of all documents contained in the administrative file. All exhibits are more fully described in the Administrative Exhibit Log.

The sole issue presented before this tribunal in this protest is whether the Department properly assessed Taxpayer, after rejecting the Taxpayer's claim for two dependent exemptions. After making findings of fact in this matter and discussing the arguments and the pertinent legal authority in more detail, this tribunal ultimately concludes/rules that the Taxpayer prevails in this matter, as the Taxpayer was able to show that she met the federal requirements for claiming two dependent grandchildren for the tax year.

Based on the evidence in the record, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 9, 2018, the Department issued an assessment to the Taxpayer for taxes due for personal income tax reporting period ending December 31, 2017. [L0097546032].

2. On August 9, 2018, the Department issued an assessment to the Taxpayer for taxes due for personal income tax reporting period ending December 31, 2017. [L1171287856].

3. On November 3, 2018, the Taxpayer filed a timely protest. [Administrative file].

4. On November 30, 2018, the Department issued a letter acknowledging the Taxpayer's protest. [L0557027504].

5. On January 16, 2019, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a scheduling hearing. [Administrative file].

6. On January 16, 2019, the Administrative Hearings Office sent notice of a merits hearing to the parties. The Taxpayer and the Department were notified that a hearing would be held on February 5, 2019 at 1:00 PM in Room 269 of the Wendell Chino Building, 1220 S. St. Francis Drive, Santa Fe, New Mexico. [Administrative file].

7. The notice of hearing was mailed by first class mail to the Taxpayer at the address on file in her protest. [Administrative file].

8. At the Merits hearing on February 5, 2019, the Taxpayer appeared in person, and Staff Attorney Peter Breen represented the Department, accompanied by Milagros Bernardo, Protest Auditor.

9. Mrs. Montoya credibly testified that her grandchildren, both minors at the time, were living with her more than half the calendar year of 2017. As part of the living arrangement, Mrs. Montoya provided food, shelter, clothing, transport to and from school, school supplies, afterschool and before-school programs, and other necessities to the children. [Testimony of Mrs. Montoya, Hearing Record (H.R.) 9:40-15:30; 18:45-19:45].

10. Mrs. Montoya's son, the children's father, was incarcerated before the birth of the youngest child. Mrs. Montoya's ex-daughter-in-law, the children's mother, was incarcerated six months after the birth of the youngest child. Since that time, the youngest child has been in the primary custody and care of Mrs. Montoya. The older child came into Mrs. Montoya's care thereafter, several years before the tax year at issue here. [Testimony of Mrs. Montoya, H.R. 9:40-11:50; Testimony of Mrs. Grassham, H.R. 1:02:00-1:07:15].

11. The children, during the first part of 2017, attended the public school in the district zone associated with Mrs. Montoya's address at the time. For the second half of the year, the children attended a different school, because their mother completed the registration forms, using her own address, but the children remained living with Mrs. Montoya. [Administrative file, protest letter; Exhibit A-1, A-2 (school registration); Testimony of Mrs. Montoya, H.R. 26:00-33:30].

12. Mrs. Montoya received assistance from a professional tax preparer when completing her 2017 taxes. [Testimony of Mrs. Montoya, H.R. 21:50-22:30].

13. Mrs. Montoya testified that she believes the children's mother has claimed the children as her own dependents, without providing support or living with them. The children's mother did spend time with the children, visiting the Montoya home, and even taking the children for some overnights and weekends, from time to time. [Testimony of Mrs. Montoya, H.R. 21:25-22:00; 22:35-23:30].

14. I.M., a child, credibly testified in person that he lived with his grandmother, Mrs. Montoya, during the calendar year of 2017 and beyond that time. [Testimony of I.M., H.R. 38:05-38:30].

15. Mrs. Montoya and Mrs. Grassham credibly testified in person that the two grandchildren were living with Mrs. Montoya during 2017. During this time, Mrs. Montoya provided necessities for the children, including all the basics and emotional support. [Testimony of Mrs. Montoya, H.R. 18:45-19:45, 20:00-21:00; Testimony of Mrs. Grassham, H.R. 1:02:00-1:05:00].

16. Mrs. Montoya did not have legal guardianship of the children through court order at the time. [Testimony of Mrs. Montoya, H.R. 16:50-18:30].

17. The Department denied the Taxpayer's claims for dependent exemptions for tax year 2017, and issued a return adjustment notice [not part of the administrative file], and subsequently assessed Taxpayer and initiated collections. [Administrative File, Letter ID #L1762676912; Testimony of Mrs. Montoya, H.R. 20:00-21:00; Testimony of Ms. Bernardo, H.R. 1:15:00-1:19:00].

18. The Department determined that the Taxpayer was ineligible to claim the dependents, because the dependents were claimed by another taxpayer. The department relies on

the five-part dependency test of IRS Publication 501. [Testimony of Ms. Bernardo, H.R.1:15:00-1:18:30; Exhibit A-1 through A-5 (Pub. 501)].

19. The Department relies on self-reporting taxpayers, and could not independently confirm with whom the children lived or who supported them based on what documents were provided. [Testimony of Ms. Bernardo, H.R. 1:24:30-1:26:50].

20. Both assessments hinged on the disallowance of the claimed dependent exemptions. [Testimony of Ms. Bernardo, H.R. 1:21:30-1:24:20].

DISCUSSION

The sole issue in this protest is whether the Taxpayer is entitled to claim two dependent grandchildren on her 2017 Personal Income Tax return. Under NMSA 1978, Section 7-1-17 (C), the underlying assessments of tax issued in this case are presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (Y). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. Therefore, the Taxpayer has the burden to overcome the assessment and show she was entitled to an abatement of tax. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. If Taxpayer can overcome the presumption of correctness in the assessment, the burden shifts to the Department to prove the assessment was justified. *See New Mexico Taxation & Revenue Dep't. v. Whitener*, 1993-NMCA-161, 117 N.M. 130, 869 P.2d 829; *MPC Ltd. v. New Mexico Taxation & Revenue Dep't.*, 2003-NMCA-021, 133 N.M. 217, 62 P.3d 308.

Dependent exemptions.

Under the Regulations issued by the New Mexico Taxation and Revenue Department, New Mexicans claiming dependents as personal exemptions are required to conform with federal law, and the tests for dependency under Section 152 of the Internal Revenue Code, 26 U.S.C. Section 1, *et seq.* *See* Regulation 3.3.1.11 NMAC (12/14/00).

Internal revenue code 26 U.S.C. Section 151 explains that individuals may claim exemptions for themselves, a spouse and other dependents. Internal revenue code 26 U.S.C. Section 152 is the federal statute which defines who qualifies as a dependent. Under the statute,

the dependent must be a "qualifying child" or a "qualifying relative." *See* 26 U.S.C. § 152 (a)(1) and (a)(2). In order to be a qualifying child, the child must have familial bonds, i.e. "be the child of the taxpayer or a descendent of such a child." *See* Section 152 (C)(2)(a).

The federal regulations further explain how the federal law then considers a dependent child as a "qualifying child." *See* 26 C.F.R. §152-1 and §152-2. Under the federal law, there are five requirements for a dependent child: to have a certain familial relationship, to be under 24 years of age (if a student), to have the same principal place of abode, the child does not provide more than half his or her own support, and the child does not file a joint return. *See* IRS Publication 501, page 12 [Exhibit A-2].

The children of a child of a taxpayer are clearly descendents of the child of the taxpayer, and are claimable as qualifying children to this grandparent taxpayer, so they meet the relationship test. The children were under the age of 18 and in school, so they meet the age test. Grandmother lived with grandchildren at her home, despite occasional visits with their mother, so they meet the principal abode test. The children did not file joint returns, and did not provide more than half of their own support. Evidence supports a finding of dependent children under 26 U.S.C. Section 152 (C), so they are claimable as exemptions under 26 U.S.C. 151.

Tiebreaker rules inapplicable.

Both the Taxpayer and the Department presented testimony that they believed another claimant (presumably the children's mother) had claimed the children as dependents, despite the fact that the mother had not resided with the children, but had only occasional visitation. Congress has provided a tiebreaker instruction in the statutes, relating to such a possibility. "In general except as provided in subparagraphs (B) and (C), if (but for this paragraph) an individual may be claimed as a qualifying child by 2 or more taxpayers for a taxable year beginning in the same calendar year, such individual shall be treated as the qualifying child of the taxpayer who is – (i) the parent of the individual, or (ii) if clause (i) does not apply, the taxpayer with the highest adjusted gross income for such taxable year." 26 U.S.C. Section 152 (C)(4)(1)(a). This appears to give the parent of the child an advantage over the grandparent.

Nevertheless, the grandparent can overcome the tiebreaker using other tests. With the facts attested to in this case, the other claimant would fail the residency test (the requirement that the taxpayer claiming the exemption actually live with the claimed dependent) as well as the

support test (the requirement that the taxpayer claiming the exemption actually provide more than half the support for the claimed dependent) as required by 26 U.S.C. 152. *See Blanco v. Comm'r*, 56 T.C. 512 (1971) (a taxpayer who cannot prove support costs paid cannot claim an individual as a dependent); *See Molina v. Commissioner of Internal Revenue*, 86 T.C.M. (CCH) 322, 2003 Tax Ct. Memo. LEXIS 253 (taxpayer may treat certain individuals, i.e., daughter, niece, grandparent, as dependents if taxpayer provided over half of their support, including residence, food, clothing); *See also Poehlein v. Comm'r*, T.C. Summary Opinion 2007-2 2007 Tax Ct. Summary LEXIS 1 (taxpayer must establish that the taxpayer's residence was the children's principal place of abode for more than half the tax year before claiming the children as dependents) (non-precedential).

IRS Publication 501[1] gives the following example, pertinent to this case.

> *Example 10 – child didn't live with a parent.* You and your 7-year-old niece, your sister's child, lived with your mother all year. You are 25 years old, and your AGI is $9,300. Your mother's AGI is $15,000. Your niece's parents file jointly, have an AGI of less than $9,000, and don't live with you or their child. Your niece is a qualifying child of both you and your mother because she meets the relationship, age, residency, support and joint return tests for both you and your mother. However, only your mother can treat her as a qualifying child. This is because your mother's AGI, $15,000, is more than your AGI, $9,300.

The example provides a near-perfect mirror image of the case at hand. The example's conclusion that the grandparent may claim the grandchild whose parent who did not live with the child is the same conclusion reached here.

In New Mexico, the instructions issued by the Secretary of the Taxation and Revenue Department are presumed to be an accurate implementation of the law. NMSA 1978, Section 9-11-6.2 (G) indicates: "[a]ny regulation, ruling, instruction or order issued by the secretary or delegate of the secretary is presumed to be a proper implementation of the provisions of the laws that are charged to the department, the secretary, any division of the department or any director of any division of the department." Likewise, in federal jurisprudence, IRS regulations and interpretations are afforded significant deference. *See Mayo Found. For Med. Educ. & Research*

[1] Although a discrete portion of IRS Publication 501 (2017) was admitted as an exhibit, the entire document is available online at: https://www.irs.gov/pub/irs-prior/p501--2017.pdf

v. United States, 562 U.S. 44, 53-57 (2011) (applying two-part test of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to IRS interpretation of statutes). *See also Nat'l. Muffler Dealers Ass'n. v. United States*, 440 U.S. 472, 99 S.Ct. 1304 (1979) (IRS interpretation given deference as the masters of the subject matter).

Taxpayer presented credible evidence supporting each of the requirements under federal law. Mrs. Montoya is a widowed person who maintained a home in 2017 at her own expense, and provided a home and other necessities, including food, clothing and transportation to and from school for the two minor sons of her son, i.e., her grandchildren. Her grandchildren were under the age of 18 years old and attending public primary schools at the time. The fact that the children's mother did not live with them, and did not provide greater than fifty percent of their support makes it so that the tiebreaker provisions do not effect the outcome of this decision. The Taxpayer rightfully claimed personal exemptions for her dependent grandchildren living with her in 2017.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to the Assessments issued under Letter ID number L0097546032 and L1171287856, and jurisdiction lies over the parties and the subject matter of this protest.

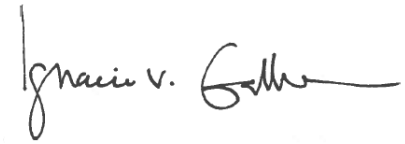
B. The Administrative Hearings Office held a hearing within the 90-day hearing requirement provided in NMSA 1978, Section, 7-1B-8 (A) and Regulation 22.600.3.8 (E).

C. Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the Department's assessment is presumed to be correct, and it is Taxpayer's burden to come forward with evidence and legal argument to establish the assessment was made in error.

D. The Taxpayer has satisfactorily met the burden of establishing she was entitled to the claimed dependent exemptions at issue. *See* 26 U.S.C. Section 151. *See also* 26 U.S.C. Section 152. *See also* 26 C.F.R. 152-1.

For the foregoing reasons, the Taxpayer's protest IS GRANTED and the assessments of tax, penalty and interest should be ABATED in their entirety.

DATED: February 27, 2019.



Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
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Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Decision and Order to the parties listed below this 27nd day of February, 2019 in the following manner:

First Class Mail ***Interoffice Mail***
INTENTIONALLY BLANK

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