

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of	)	
	)	DOCKET NO. 25483
[Redacted],	)	
	)	
Petitioner.	)	DECISION
_____	)	

BACKGROUND

On September 19, 2012, the Tax Discovery Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (NODD) to [Redacted] (Petitioner) proposing income tax, penalty, and interest for the taxable year 2007 in the total amount of \$163. On November 28, 2012, the Petitioner filed a timely protest and appointed [Redacted] as her Power of Attorney (POA). The file was transferred to the Tax Policy Division on January 14, 2013, for resolution. On June 4, 2013, the Commission sent a letter explaining the options for redetermining an NODD to the Petitioner, with a copy to the POA. A second letter was sent on July 26, 2013. No response has been received to either letter.

ISSUES

1. The primary issue is whether the Petitioner is entitled to claim two dependent children that were claimed by another parent for the same taxable year.
2. Whether the negligence penalty should apply in this case.

LAW AND DISCUSSION

Regulation §1.152-4. Special rule for a child of divorced or separated parents or parents who live apart.

(a) In general. A taxpayer may claim a dependency deduction for a child (as defined in section 152(f)(1)) only if the child is the qualifying child of the taxpayer under section 152(c) or the qualifying relative of the taxpayer under section 152(d). Section 152(c)(4)(B) provides that a child who is claimed as a qualifying child by parents who do not file a joint return together is treated as the qualifying child of the parent with whom the child resides for a longer period of

time during the taxable year or, if the child resides with both parents for an equal period of time, of the parent with the higher adjusted gross income. However, a child is treated as the qualifying child or qualifying relative of the noncustodial parent if the custodial parent releases a claim to the exemption under section 152(e) and this section...

...

(c) Custody. A child is in the custody of one or both parents for more than one-half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year.

(d) Custodial parent.

(1) In general. The custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year, and the noncustodial parent is the parent who is not the custodial parent. A child is treated as residing with neither parent if the child is emancipated under state law. For purposes of this section, a child resides with a parent for a night if the child sleeps—

(4) Special rule for equal number of nights. If a child is in the custody of one or both parents for more than one-half of the calendar year and the child resides with each parent for an equal number of nights during the calendar year, the parent with the higher adjusted gross income for the calendar year is treated as the custodial parent.

Underline added.

The Petitioner responded to the Bureau with a copy of the couple's divorce decree and a copy of their Supplemental Order regarding Child Support. The divorce decree was signed May 6, 2010, more than four months after the year in question ended. Since 1984, a divorce decree is no longer effective for purposes of qualifying to claim a dependency credit. If a divorce decree is entered into between 1985 and 2009, the non-custodial parent can only claim the dependent if the custodial parent signs a written declaration and attaches that to the tax return. There was no release provided with the tax return. The status of child support payments does not affect who is entitled to claim the dependent children.

As of July 2008, the Treasury Department issued Regulation 1.152-4, that clarifies which parent can claim the dependent children. 1.152-4 defines the custodial parent as the parent with which the child spends the night. Divorce decrees are a civil contract and do not work to change

tax responsibilities. There can be an agreement between the parties as to whom is entitled to claim the dependent, but if there is a breach of that agreement, the parties have to go back to the court to enforce it. Even though the agreement is not controlling, it is informative. The intent was that each parent would have custody half of the time. The address of the children does not reveal where they actually slept.

Treasury Regulation 1.152.4(4) provides a “special rule” in case the children stay with both parents an equal number of nights. With no conclusive information to prove where the children stayed, we are left using the rule covering an equal number of nights.

### CONCLUSION

First issue – Whether the Petitioner is entitled to claim two dependent children that were claimed by another parent for the same taxable year.

A Notice of Deficiency Determination issued by the Idaho State Tax Commission is presumed to be accurate. Parsons v. Idaho State Tax Com’n, 110 Idaho 572 (Ct. App. 1986). The burden is on the taxpayer to show the deficiency is erroneous. Albertson’s, Inc. v. State, Dept. of Revenue, 106 Idaho 810 (1984).

The Petitioner did not respond to correspondence from the Commission, specifically requesting a calendar showing where the children stayed during the year, in keeping with the Treasury Regulations in effect. The information that was provided to the Bureau did not answer the necessary question of where the children actually stayed. The divorce decree provided was not in effect during the taxable year in question and it provided for having each parent having 50 percent of the custody. In a case where the children stay an equal amount of time with each parent, the parent with the higher adjusted gross income is entitled to claim the dependents.

Having presented inadequate information to the Commission in support of her position, the Petitioner did not meet her burden of proving error on the part of the deficiency determination. Absent information to the contrary, the Commission accepts the Bureau's calculation of Idaho income tax and interest for that year.

Second issue - Whether the negligence penalty should apply in this case.

The Commission does not choose to pursue the penalties in this instance.

THEREFORE, the Notice of Deficiency Determination dated September 19, 2012, and directed to [Redacted], modified to remove the penalties, is hereby AFFIRMED.

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
12/31/09	\$120	\$ 13	\$ 133

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the Petitioner's right to appeal this decision is enclosed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2013.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2013, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.

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