

1 Taxpayer's refund because it disallowed the Taxpayer's claim of his child as a dependent.
2 [L1868662448].

3 2. On April 21, 2020, the Taxpayer filed a written protest to the return adjustment
4 notice. [Administrative file].

5 3. On May 26, 2020, the Department acknowledged its receipt of the Taxpayer's
6 protest. [Administrative file].

7 4. On November 12, 2020, the Department filed the request for hearing with the
8 Administrative Hearings Office. [Administrative file].

9 5. On December 11, 2020, a telephonic scheduling hearing was conducted. The
10 Taxpayer objected to the scheduling hearing. [Administrative file].

11 6. The hearing on the merits, conducted on January 14, 2021, occurred within 90
12 days of the date of the request for hearing, as required by statute. [Administrative file]. *See*
13 NMSA 1978, § 7-1B-8 (2019).

14 7. The Taxpayer is a resident of New Mexico and is subject to the personal income
15 tax (PIT). [Administrative file, Testimony of the Taxpayer, Testimony of Ms. Tapia].

16 8. The Taxpayer filed a PIT return for the 2019 tax year and claimed an exemption
17 for one of his children as a dependent. [Administrative file, Testimony of Taxpayer, Testimony
18 of Ms. Tapia].

19 9. The Taxpayer is the parent of the child that he claimed as a dependent on his PIT
20 return. [Testimony of Taxpayer, Testimony of Ms. Tapia]

21 10. The Department follows the federal statutes for determining whether someone is a
22 dependent. The Department will also follow a court order that allows the party to claim a
23 dependent. [Testimony of Ms. Tapia].

1 from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the
2 right to the exemption or deduction must be clearly and unambiguously expressed in the statute,
3 and the right must be clearly established by the taxpayer.” *Sec. Escrow Corp. v. State Taxation*
4 *and Revenue Dep’t.*, 1988-NMCA-068, ¶ 8, 107 N.M. 540. *See also Wing Pawn Shop v.*
5 *Taxation and Revenue Dep’t.*, 1991-NMCA-024, ¶ 16, 111 N.M. 735. *See also Chavez v.*
6 *Commissioner of Revenue*, 1970-NMCA-116, ¶ 7, 82 N.M. 97. *See also Pittsburgh and Midway*
7 *Coal Mining Co. v. Revenue Division*, 1983-NMCA-019, 99 N.M. 545.

8 **Deduction for a dependent.**

9 Every resident is subject to a tax on his net income. *See* NMSA 1978, § 7-2-3 (1981).
10 Net income excludes exemptions claimed under the Internal Revenue Code. *See* NMSA 1978, §
11 7-2-2 (N) (2014). The Internal Revenue Code allows for exemptions from income on claimed
12 dependents. *See* 26 USCA § 151. *See also* 26 USCA § 152 (2017) (defining dependent). *See*
13 *also* NMSA 1978, § 7-2-39 (2019) (indicating that a dependent is defined by the Internal
14 Revenue Code). A dependent may be the child of the person claiming the exemption. *See* 26
15 USCA § 152. In general, to claim a child as a dependent, five criteria must be met. *See id.* The
16 dependent must be the taxpayer’s child, the dependent must have “the same principal place of
17 abode as the taxpayer for more than one-half of such taxable year”, the dependent must not be
18 past a certain age, the dependent must not have provided more than one-half of their own
19 support, and the dependent must not have filed a joint return with a spouse for that taxable year.
20 *Id.*

21 The Department concedes that the Taxpayer’s child meets four out of these five criteria.
22 The element that the Taxpayer’s child fails to meet is sharing “the same principal place of abode
23 as the taxpayer for more than one-half” of the taxable year. *Id.* In February 2019, the court

1 ordered that the Taxpayer was to have custody of his children “every other Friday at 6:00 PM
2 until Sunday at 6:00 PM, beginning Friday, January 18, 2018”. [Report 2/5/19, pages 4-5;
3 adopted by Order 2/5/19 and by Order 4/15/19]. This custody arrangement was continued by a
4 later order. [Report 5/24/19, page 4; adopted by Order 6/27/19]. The custody arrangement was
5 then modified to three hours every Friday and eight hours every Saturday until the Taxpayer
6 rehomed his cats and deep cleaned his house, at which time for four months the Taxpayer would
7 have his children one day a week, for four months after that the Taxpayer would have his
8 children every other weekend, and then every other weekend plus the time on Monday until
9 school began or until noon when school was not in session. [Report 8/23/19, page 5; adopted by
10 Order 9/13/19]. Based on the information in the court orders, the Department determined that
11 the Taxpayer had custody of his children and shared a place of abode with them for
12 approximately 52 days of the 2019 year, that is an average of two days every other weekend.
13 [Testimony of Ms. Tapia]. The Taxpayer did not dispute the Department’s finding but argued
14 that he shares custody of his children. The Taxpayer did not present any evidence to show that
15 his children shared his place of abode for more than one-half of the 2019 year. The last order
16 limited the Taxpayer’s custody to 11 hours per week until his cats were rehomed and his home
17 was deep cleaned. The Taxpayer did not provide evidence of when or if those conditions were
18 accomplished. Given the information in the court orders and the lack of evidence given by the
19 Taxpayer, the Department’s determination is reasonable.²

² Even if the Taxpayer accomplished those conditions on the date of the order, the Taxpayer’s custody of his children would still appear to be 52 days of the year, that is 36 days from January to mid-September for two days every other weekend, and 16 days from mid-September to the end of the year for one day per week.

1 A noncustodial parent³ may still claim a child as a dependent when the custodial parent
2 signs a written declaration that the custodial parent will not claim the child as a dependent and
3 the noncustodial parent attaches that written declaration to his tax return. *See* 26 USCA § 152.

4 There was no evidence that this occurred in the Taxpayer's case.

5 The Taxpayer argues that the court allowed him to claim one of his children as a
6 dependent on his tax return. The Department agrees that it would honor a court order that
7 allowed the Taxpayer to claim his child as a dependent. The Taxpayer was given the opportunity
8 during the hearing to review the court orders that he had provided and to point out where in those
9 orders he had been allowed to claim one of his children as a dependent. The Taxpayer admitted
10 that the court orders that he provided and that were in the administrative file did not contain such
11 a provision. The Taxpayer asserts that it must have been in a previous order that was not
12 provided. The Taxpayer's testimony is not persuasive. It is apparent from the documents that
13 the Taxpayer's ability to claim one or more of his children as a dependent was an issue in
14 contention. In two reports, the custodial parent's counsel expressed a belief that the parents were
15 prohibited from making an agreement on who could claim the children as dependents based on
16 changes to IRS regulations and the Taxpayer expressed his desire to claim one of the children or
17 all of the children every other year. [Report 1/7/19, pages 3-4. Report 2/5/19, pages 3-4;
18 adopted by Order 2/5/19]. The Taxpayer and the custodial parent were in conflict over the issue
19 and had applied to the IRS for a determination after the Taxpayer claimed one of the children
20 and the custodial parent was notified that someone else had claimed her child. [Report 5/24/19,
21 page 2]. The court encouraged the parents to resolve their issues in compliance with the IRS

³ Per the Internal Revenue Code, a noncustodial parent is the one who does not have custody of a child for more than one-half of the year. *See* 26 USCA § 152.

1 regulations. [Report 5/24/29, page 5; adopted by Order 6/27/19]. The Taxpayer failed to prove
2 that a court order allowed him to claim one of his children as a dependent.

3 **CONCLUSIONS OF LAW**

4 A. The Taxpayer filed a timely, written protest of the Department's return adjustment
5 notice, and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978,
6 § 7-1B-8 (2019).

7 B. The hearing was timely set and held within 90 days of the request for hearing. *See*
8 *id.*

9 C. The Taxpayer failed to prove that he was entitled to claim his child as a dependent
10 for an exemption on his net income. *See* 26 USCA §§ 151-152. *See* NMSA 1978, § 7-2-2. *See*
11 *Public Services Co.*, 2007-NMCA-050, ¶ 32. *See also* *Till*, 1972-NMCA-046. *See also* *Sec.*
12 *Escrow Corp.*, 1988-NMCA-068, ¶ 8. *See also* *Wing Pawn Shop*, 1991-NMCA-024, ¶ 16. *See*
13 *also* *Chavez*, 1970-NMCA-116, ¶ 7. *See also* *Pittsburgh and Midway Coal Mining Co.*, 1983-
14 NMCA-019.

15 For the foregoing reasons, the Taxpayer's protest **IS DENIED**.

16 DATED: February 1, 2021.

17 *Dee Dee Hoxie*

18 _____
19 Dee Dee Hoxie
20 Hearing Officer
21 Administrative Hearings Office
22 P.O. Box 6400
Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

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

13 **CERTIFICATE OF SERVICE**

14 On February 1, 2021, a copy of the foregoing Decision and Order was submitted to the
15 parties listed below in the following manner:

16 *Email*

Email

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18 _____
19 John Griego
20 Legal Assistant
21 Administrative Hearings Office
22 P.O. Box 6400
Santa Fe, NM 87502