

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JACOB MILLER AND MARION MILLER : DETERMINATION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1974. :

Petitioners, Jacob Miller and Marion Miller, 10090 SW 67th Avenue, Miami, Florida 33156, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 800077).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on March 26, 1990 at 2:45 P.M., with all briefs to be submitted by June 15, 1990. Petitioner Marion Miller appeared by Sheldon G. Kall, Esq. The Division of Tax Appeals appeared by William F. Collins, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether petitioner Marion Miller is entitled to relief, as an innocent spouse, from income tax due on the 1974 joint Federal income tax return filed by petitioners.

FINDINGS OF FACT

Petitioners, Jacob Miller and Marion Miller, timely filed a joint 1974 New York State resident income tax return. The Division of Taxation ("Division") audited this return and determined unreported income in the amount of \$171,943.00. Based upon this understatement of income, the Division calculated income tax due on the 1974 joint income tax return of \$23,898.70. Consequently, on November 13, 1978, the Division issued to petitioners a Notice of Deficiency for the year 1974, asserting a personal income tax deficiency of \$23,898.70 plus penalty and interest.

On April 8, 1978, petitioners executed a consent which extended the period of limitation for fixing personal income tax for the year ended December 31, 1974 to April 15, 1979.

At the time of the audit, Mr. Miller was the sole shareholder of Moto-Tech, Inc., a closely held corporation which owned a Honda Motorcycle sales dealership. The Division audited this business using the bank deposit analysis method. The Division determined that the business had unreported gross receipts in 1974 of approximately \$172,000.00. Most of this amount was determined to be loans made by Mr. Miller to the corporation. These loans then were attributed to Mr. Miller as personal income in 1974.

After the issuance of the notice of deficiency, petitioners provided documentation sufficient to substantiate that \$16,800.00 of the unreported receipts were attributable to loans received in 1974 from the Solvay Bank and that \$25,666.00 of the understatement was attributable to loans made to Moto-Tech, Inc., before January 1, 1974. The Division therefore agreed to recalculate the tax due on the basis of an understatement of income in the amount of \$129,477.00.

Before the commencement of this administrative hearing, Mr. Jacob Miller died. The exact date of his death is unknown. Although the petition raised a variety of issues regarding the audit method and results, the only issue raised in this proceeding is whether Mrs. Miller is entitled to relief as an innocent spouse.

The audit workpapers state that Mrs. Miller worked in the office of the Honda dealership, but the basis for this information is not in the record.

The only evidence submitted by petitioners was the affidavit of Mrs. Miller in which she alleged the following facts:

- (a) that she had no knowledge of the 1974 tax deficiency until after her husband's death;
- (b) that she had no knowledge of the items included in the 1974 tax return and did not participate in its preparation;
- (c) that she signed the tax return at the direction of her husband and had no reason to question its accuracy;

(d) that the amount of the understatement of income is "an astounding amount" which cannot be accurate;

(e) that she is a 75 year old widow without the resources to pay the tax deficiency.

CONCLUSIONS OF LAW

A. For the period in issue, Tax Law former § 651(b)(5)(i) provided that:

"Under regulations prescribed by the tax commission, if

(A) a joint return has been made...for a taxable year and on such return there was omitted from New York adjusted gross income an amount properly included therein which is attributable to one spouse and which is in excess of twenty-five percent of the amount of New York adjusted gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from New York adjusted gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such omission from New York adjusted gross income."

The regulations adopted by the Tax Commission pursuant to this provision mirror the statutory language (20 NYCRR 145.10[e]).

The Federal innocent spouse rule applicable for the year in issue differs from the New York rule in that it does not include the New York requirement that the non-offending spouse significantly benefit from the items omitted from gross income. The requirement was eliminated retroactively from the Federal law by Public Law 98-369, § 424(a), effective July 18, 1984. The "significant benefit" language was eliminated from Tax Law § 651(b) by Laws of 1985 (ch 65, § 113, eff April 17, 1985).

In any case before the Division of Tax Appeals under article 22, the burden of proof is upon the petitioner, except for several issues not raised here (Tax Law § 689[e]). Accordingly, petitioners have the burden of proving that Mrs. Miller is entitled to relief and meets all of the requirements of section 651(b)(5)(i) (cf., Ratana v. Commissioner, 662 F2d 220, 81-2 USTC ¶ 9691). While Mrs. Miller requests relief as an innocent spouse, the only evidence offered by

petitioners is her own affidavit. Standing alone, the affidavit simply is inadequate to prove that all of the requirements of the innocent spouse provision have been met.

B. The Division concedes that the omission of 1974 income amounted to \$129,477.00. It is directed to recalculate petitioners' tax deficiency accordingly.

C. The petition of Jacob Miller and Marion Miller is granted to the extent indicated in Conclusion of Law "B"; the Notice of Deficiency issued on November 13, 1978 shall be modified accordingly; and, in all other respects, the petition is denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE