

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EMMA FLOREZ : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 817673
Personal Income Tax under Article 22 of the Tax Law and :
the New York City Administrative Code for the Year :
1990. :
:

Petitioner, Emma Florez, 30 Marie Drive, Huntington, New York 11743, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1990.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York on February 27, 2001, at 10:00 A.M. with all briefs to be submitted by May 15, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUES

I. Whether petitioner, Emma Florez, is entitled to relief under the “innocent spouse” provisions of Tax Law former § 651(b)(5).

II. Whether the penalties and interest asserted to be due from petitioner may be canceled and, if so, whether petitioner has established that the penalties and interest should be canceled.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Statement of Proposed Audit Changes, dated December 21, 1998, to petitioner, Emma Florez, and her husband, Norman Robles, which stated that New York State and New York City personal income taxes were due in the amount of \$38,377.65 plus interest in the amount of \$29,627.28 and penalty in the amount of \$29,982.32 for a balance due of \$97,987.25. The statement explained that information from the Internal Revenue Service indicated that there was sufficient income to require the filing of a New York State income tax return. However, the Division did not have a record of a personal income tax return being filed under petitioner's or her husband's names or social security numbers. Therefore, it computed the New York tax that was due on the basis of the information obtained from the Internal Revenue Service. In addition to the tax asserted to be due, the Division imposed a penalty of 25 percent for not filing a New York State tax return within 5 months of its due date pursuant to Tax Law § 685(a)(1). It also imposed a negligence penalty of 5 percent under Tax Law § 685(b)(1) and a penalty equal to 50 percent of the interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law pursuant to Tax Law § 685(b)(2). Lastly, the Division imposed a penalty for underestimation of New York State income tax in accordance with Tax Law § 685(c).

2. On the basis of the explanation set forth above, the Division issued a Notice of Deficiency to petitioner, Emma Florez, and her husband, Norman Robles, dated March 8, 1999, which asserted a deficiency of New York State and New York City personal income tax for the year 1990 as follows:

	Tax	Interest	Penalty	Balance
NYS	\$23,223.91	\$18,464.27	\$18,702.67	\$60,390.85
NYC	\$11,653.74	\$9,265.36	\$9,364.59	\$30,283.69
Total	\$34,877.65	\$27,729.63	\$28,067.26	\$90,674.54

3. Petitioner filed a request for a conciliation conference. In a conciliation order dated February 4, 2000, the request was denied and the Notice was sustained. In the course of the conference, petitioner gave the conferee an unsigned copy of her and her husband's New York State return.

4. Petitioner, Emma Florez, is a licensed physician. In 1960, she married Norman Robles and they established adjoining but independent firms. Petitioner established a medical practice on Avenue D in New York City. Norman Robles set up a pharmacy in an adjoining building in which he and a third party were partners. Petitioner never had any role in the pharmacy.

5. Petitioner and her husband divided their responsibilities. Petitioner's time was consumed with her medical practice and household responsibilities. Petitioner's husband handled all of the business finances and served as the manager of the medical office. Although petitioner worked six days a week, her husband received all of the receipts of the medical practice and gave petitioner a "salary" of \$250.00 a week. Petitioner used the money she received each week to pay for her children's education and household expenses. From the time they were married in 1960 until 1989, petitioner's husband filed all of the Federal and State tax returns.

6. Petitioner relied upon her husband to file the tax returns and pay all of the bills. Petitioner's husband would have the tax returns prepared and just give petitioner a sheet to sign.

7. In April 1990, petitioners sold their home. Petitioner used some of the money to pay for her children's college costs. However, most of the money disappeared. Petitioner does not know what her husband did with most of the funds.

8. In 1991, petitioner and her husband separated. At the time, she believed that her husband filed both the Federal and New York State tax returns for 1990.

9. Petitioner's medical practice suffered financial losses. Prior to their separation, petitioner's husband closed the medical practice because it was not profitable. As a result, she was unemployed for nearly a year. Her husband's pharmacy business reported income, but she did not have access to these funds.

10. Before he left, petitioner's husband took most of the family's assets. In the process, he sold their corporate stock and cashed in the life insurance policies on the children. Her husband had left her with five children to care for. Further, petitioner learned that there were four lawsuits pending against her. She had been unaware of these matters, in part, because she trusted that they would be handled by her husband. During this period, petitioner suffered a stroke.

11. Petitioner discovered that her husband did not file the 1990 Federal return. Thereafter, petitioner's accountants prepared the 1990 Federal tax return with information from the Internal Revenue Service. A joint Federal income tax return was filed in 1993. Since that time, she has been negotiating with the IRS over the 1990 deficiency. Petitioner has paid approximately \$60,000.00 to the Internal Revenue Service.

12. A New York State return was also prepared. However, unbeknownst to petitioner, it was not filed. Petitioner did not make attempts to find out if it had been filed.

13. At the time of the hearing, petitioner was 70 years old and her assets had been taken by

the Internal Revenue Service. Her eyesight has deteriorated to the point where she can only work part time.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner argues that it would be unfair to hold her responsible for the deficiency because her medical practice did not earn any money. Petitioner notes that although her husband's pharmacy reported income, she did not receive these funds. Second, petitioner contends that she was unaware that there was a deficiency until 1999. Therefore, petitioner contends that it would be unfair to hold her liable for the accrued penalties and interest. Next, petitioner contends that her husband should be liable for at least half of the tax deficiency since the tax deficiency is the result of money that he made and of which she was unaware. Lastly, petitioner wishes to note that she has lived in and paid taxes to New York State since 1960 and that the taxes for 1990 are the only taxes which have been unpaid. Petitioner asks that she be found to be an innocent spouse, that she be held to be only partially liable for the deficiency or that all penalties and interest be canceled.

15. The Division argues that petitioner had an unequivocal obligation to file a New York State tax return and pay the tax due. It asserts that her failure to file a return caused her to be jointly and severally liable for the tax deficiency. The Division contends petitioner may not be treated as an innocent spouse because this provision is available only when a joint return has been filed. The Division also contends that there is no provision for the waiver of the negligence penalties or interest. With respect to the penalties imposed pursuant to Tax Law § 685(a), the Division argues that petitioner has not shown that she acted with ordinary business care and prudence in attempting to ascertain her tax liabilities or that she established reasonable cause.

CONCLUSIONS OF LAW

A. Tax Law § 651(a)(1) requires every resident individual who is required to file a Federal income tax return for the taxable year to make and file a New York State individual income tax return on or before the 15th day of the fourth month following the close of the taxable year.

B. During the year in issue, Tax Law former § 651(b)(2) provided that:

If the federal income tax liabilities of husband and wife . . . are determined on a joint federal return, they shall file a joint New York income tax return, and their tax liabilities shall be joint and several except as provided in paragraphs five and six of this subsection and in subsection (e) of section six hundred eighty-five.

C. In this case, petitioner filed a joint Federal income tax return with her husband for the year 1990. As a result, petitioner and her husband were required to file a joint New York income tax return. According to the section of the Tax Law quoted above, petitioner and her husband's New York tax liabilities are joint and several. Except for the three exceptions set forth therein, the Tax Law prohibits apportioning the tax liability. Paragraph six, which is referred to above, concerns liabilities, such as spousal support or a past-due legally enforceable debt, which are not pertinent to this matter. Subsection (e) of Tax Law § 685 pertains to a situation where the deficiency is due to fraud which is also not relevant. Therefore, petitioner may only prevail if she satisfies the "innocent spouse" provisions of Tax Law former § 651(b)(5).

D. Tax Law former § 651(b)(5), provided:

Under regulations prescribed by the tax commission, if

(i) a joint return has been made under this subsection for a taxable year, (ii) and on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse, (iii) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there

was such substantial understatement, and (iv) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement, 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 substantial understatement.

E. The “innocent spouse” provision is meant to protect a spouse where the other spouse has control over and access to the financial records and substantially understates income on a joint return. In signing the return the “innocent spouse” must not know or have reason to know of the underreporting. The first requirement to be met in obtaining relief under this section is the filing of a joint return. Since no return was filed, Ms. Florez does not meet the requirements of Tax Law former § 651(b)(5) and is not entitled to any relief based upon this statutory provision.¹ Furthermore, Ms. Florez’s liability is not based upon substantial underreporting of income, but on failure to file any return. Failure to file a return is not protected by this provision.

F. The liabilities for tax, penalties and interest are joint and several (Tax Law § 651[b][2]). Therefore, they may not be abated as to one spouse unless both parties are absolved. Since there is no basis for reducing the liabilities asserted against petitioner’s husband, the liabilities asserted against petitioner may not be reduced.²

G. During the year in issue, there was no provision in the Tax Law which would permit a

¹ As noted by the Division, the copy of the 1990 return submitted at the conference did not constitute the filing of a return since it was unsigned (Tax Law § 653[a]).

² If the issue were not precluded by the nature of joint and several liability, it would have been found that it was entirely reasonable for petitioner to believe that her husband would have filed the tax returns for 1990 as he had since 1960. Further, under the circumstances presented, the failure was not due to willful neglect or negligence.

waiver of the interest imposed by law (*Matter of Chira*, Tax Appeals Tribunal, March 25, 1999).

H. The petition of Emma Florez is denied.

DATED: Troy, New York
November 1, 2001

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE