STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH AND SUSAN LEFRAK	:	DETERMINATION DTA NO. 818639
for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1990 and 1991.	:	

Petitioners, Joseph and Susan Lefrak, 983 Park Avenue, New York, New York 10028, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1990 and 1991.

On March 11, 2002 and March 15, 2002, respectively, petitioners, appearing by Evan S. Cowit, Esq., and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by August 7, 2002, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner Susan Lefrak is entitled to relief from New York State and New York City personal income taxes for the years 1990 and 1991 as an innocent spouse pursuant to Tax

Law § 651(b)(former [5][A]) and Administrative Code of the City of New York former § 11-1751(b)(4).

FINDINGS OF FACT

1. Petitioners filed a 1990 New York Resident Income Tax Return, IT- 201, on or about October 10, 1991. The 1990 IT-201 indicated New York taxable income of $185,154.00, with State tax due thereon of $6,291.00 and City of New York tax of $3,089.00, or a total of $9,380.00. The return also stated that petitioners had paid $9,000.00 with the Form IT-370, Application for Automatic Extension of Time to File, leaving an amount due per the return of $380.00.

Petitioners had applied for and received an extension of time to file their return from the Division of Taxation ("Division") for the year 1990 on August 9, 1991. The application for the extension set forth an estimated State and City tax liability of $9,000.00, indicated that $5,000.00 had been paid, and that $4,000.00 was payable with the extension application.

2. Petitioners filed a 1991 New York Resident Income Tax Return, IT- 201, on or about October 15, 1992. The return stated that petitioners had $214,432.00 in New York taxable income, on which there was due $16,887.00 in State tax and $9,106.00 in City tax. The 1991 return stated that $7,500.00 was paid with the Form IT-370, Application for Automatic Extension of Time to File, leaving an amount due per the return of $18,493.00.

Petitioners had applied for and received an extension of time to file their return from the Division for the year 1991 on August 7, 1992. The application for the extension set forth an estimated State and City tax liability of $7,500.00, indicated that $7,000.00 had been paid, and that $500.00 was payable with the extension application.

3. With respect to the 1990 return, petitioners correctly stated their taxable income and the correct tax due thereon but incorrectly stated that they had paid $9,000.00 with the Form IT-370, including $5,000.00 in estimated payments. In fact, petitioners had not paid $5,000.00 in estimated payments and therefore it remained outstanding. The Division issued a Notice and Demand for Payment of Tax Due on January 28, 1992, demanding payment of $5,000.53 in tax due together with penalty and interest thereon. In addition, on August 16, 1993 the Division issued a second notice and demand for payment of penalty due in the sum of $242.71 plus interest, representing penalty on petitioners' underpayment of estimated tax for the year 1990.

4. With respect to the 1991 return, petitioners correctly stated their taxable income and the State and City taxes owed thereon. However, the return stated that petitioners had paid $7,500.00 of the liability with their Form IT-370, Request for Extension to File. In fact, only $500.00 had been paid, leaving a balance due and owing of $7,000.00. On May 3, 1993, the Division issued to petitioners a Notice and Demand for Payment of Tax Due in the sum of $7,000.00, together with penalty and interest.

5. Petitioners do not dispute the validity of the assessments or the amounts set forth thereon, only Susan Lefrak's liability for the tax, penalty and interest.

6. After a conciliation conference held on October 18, 2000, a conciliation order was issued on April 27, 2001 in which the statutory notices were sustained in their entirety.

7. On July 19, 2001, petitioner Joseph Lefrak filed a petition with the Division of Tax Appeals, seeking review of the conferee's order.

SUMMARY OF PETITIONERS' POSITION

Petitioners contend that Susan Lefrak should be relieved of liability for the taxes due and owing for the years 1990 and 1991 on the basis that she qualifies for the exception specified in

Tax Law § 651(b)(former[5][A][i]) and Administrative Code former § 11-1751(b)(4), sometimes referred to as the "innocent spouse" rule.

Petitioners concede that the assessments herein were for underpayment of income tax rather than understatement of income; they believe the same inequities abide and that petitioner Susan Lefrak should not be held liable. Petitioners reason that since Susan Lefrak had no background in tax preparation or finance, did not work during the years in issue, never managed the couple's finances or banking, and had no reason to doubt her husband's financial and tax decisions, she meets the statutory requirements for "innocent spouse" status and should be relieved of any liability for the taxes due herein.

CONCLUSIONS OF LAW

A. Tax Law § 651(b)(former[5][A][i]) provided that if a husband and wife filed a joint return for the taxable year, and there was a substantial understatement of tax attributable to grossly erroneous items of one spouse, and the other spouse established that in signing the return he or she did not know, and had no reason to know, of the substantial understatement, then the other spouse is relieved of his or her liability for the tax, together with any penalty and interest thereon. However, the statute specifically limited the relief from tax to only that amount which is attributable to the substantial understatement.

The New York City Administrative Code in effect during the years in issue set forth the same requirements for "innocent spouse" relief (Administrative Code former § 11-1751[b][4]).

B. Based solely on the language of Tax Law § 651(b)(former[5][A][i]), it is apparent that petitioners have not established an entitlement to the relief requested. In further support of that conclusion, consider the definitions set forth in Tax Law § 651(b)(former [5][B]):

> For purposes of this paragraph, (i) the term "grossly erroneous items" means, with respect to any spouse, any item of New York adjusted gross income attributable to

> such spouse which is omitted from New York adjusted gross income and any claim of a New York deduction, exemption, credit or basis by such spouse in an amount for which there is no basis in fact or law; (ii) the term "substantial understatement" means any understatement . . . which exceeds one hundred dollars....(Tax Law § 651[b][former (5)(B)(i), (ii)]).

It is amply clear that petitioners' circumstances bear no resemblance to those contemplated by the statute. The statute requires substantial understatement of tax due to grossly erroneous items of one spouse. Petitioners have demonstrated an *underpayment* of tax, not an understatement of tax. They fully disclosed and accurately reported all items of income and the Division has accepted the returns and not challenged their accuracy. The liability assessed was based on the failure of petitioners to remit the tax stated as due and owing on the returns as filed by them. The innocent spouse relief requested is not available to petitioners given their failure to establish the required elements set forth in Tax Law § 651(b)(former[5][A]). Further, petitioners have offered no support for their argument that the statutory relief should be extended to underpayment of tax.

Petitioners' reliance on ***Matter of Sabatine*** (Tax Appeals Tribunal, August 25, 1988) is misplaced. Unlike Mrs. Lefrak, petitioner in ***Sabatine*** established that income was omitted by her husband from the tax returns in issue, that she had no knowledge of same, and that she did not directly or indirectly benefit from the omitted income.

C. The petition of Joseph and Susan Lefrak is denied and the three notices and demands for payment of tax due, dated January 16, 1992, August 5, 1993 and April 22, 1993, are sustained.

DATED: Troy, New York
January 9, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE