STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BONNIE RITT A/K/A BONNIE BELLER	:	DETERMINATION DTA NO. 822695
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1995 and 1996.	:	

Petitioner, Bonnie Ritt a/k/a Bonnie Beller, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1995 and 1996.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated May 13, 2009, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with other exhibits and pleadings in support of the motion. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination commenced on June 12, 2009. Based upon the motion papers, the affidavit and documents submitted therewith and all pleadings in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner failed to state a cause of action for which relief may be granted by the Division of Tax Appeals.

FINDINGS OF FACT

1. On December 19, 1996, the Division of Taxation (Division) issued a Notice and Demand to petitioner and her late husband, Barry Beller, demanding payment of New York State and New York City personal income tax in the amount of $19,330.00, plus penalty and interest, for the year 1995.[1]

2. On December 17, 1997, the Division issued a Notice and Demand to petitioner and Barry Beller demanding payment of New York State and New York City personal income tax in the amount of $23,993.00, plus penalty and interest, for a total amount due of $26,774.89 for the year 1996.

3. Each of the aforesaid notices and demands was issued based upon a joint return filed by petitioner and her husband, Barry Beller, without payment of the full amount of tax reported as due on each return.

4. Apparently, after having received relief from federal income tax obligations, petitioner filed a request for innocent spouse relief with the Division. By letter dated April 7, 2008, the Division denied petitioner's request for innocent spouse relief. The Division's letter stated, in relevant part, as follows:

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[1] A memo dated December 29, 2008 from the Division's Income and Franchise Desk Audit Bureau to petitioner indicated that the Notice and Demand for the year 1995 (Assessment No. L-013024870), issued on December 19, 1996, could not be located by the Division. This memo further stated that, as was the case for the Notice and Demand for 1996 (Assessment No. L-014500408), no Notice of Deficiency was ever issued by the Division.

> In order to qualify for innocent spouse relief, all four of the following criteria must be met:
>
> 1. There must be a joint New York State return on file.
>
> 2. There must be a substantial understatement of tax attributable to the non-requesting spouse.
>
> 3. The requesting spouse establishes that in signing the return he/she did not know that there was a substantial understatement of tax.
>
> 4. Taking into account all the facts and circumstances, it would be inequitable to hold the other spouse liable.

5. On December 18, 2008, the Division of Tax Appeals received a petition from petitioner which stated that the Internal Revenue Service had exempted her from tax as an innocent spouse since she was unaware that her late husband had not paid the tax. Petitioner further stated that she was on permanent disability "with no extra cash" and that "it would be impossible for me to pay such a large amount of money." The petition concluded by stating: "I am begging you to exempt this [*sic*] under innocent spouse or what ever language you use."

6. The affidavit of John E. Matthews, Esq., the Division's representative in this matter, asserts that innocent spouse relief cannot be granted to petitioner for years prior to 1999 unless there has been a substantial underreporting of tax due. In the present matter, there is no assertion by the Division that there was an underreporting of tax; there is simply the failure to pay the tax reported as due on each return. As such, the Division argues that the petition should be dismissed for failure to state a cause of action for which relief could be granted in this forum.

Mr. Matthews sent a letter to petitioner, dated March 25, 2009, in which he advised petitioner that no relief was available to her under the innocent spouse provisions, but suggested that she file an offer in compromise which is available to taxpayers based upon an inability to pay. Mr. Matthews enclosed with the letter the forms required for an offer in compromise.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.5(a)(6) provides, in relevant part, that "[t]he appropriate sections of the CPLR regarding motions, where not in conflict with this Part, are applicable to the motion being made." A motion to dismiss for failure to state a cause of action is permitted under CPLR § 3211(a)(7).

> B. Under CPLR, the sufficiency of a pleading to state a cause of action or defense will generally depend upon whether or not there was substantial compliance with Section 3013 providing that 'Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.' (***Foley v. D'Agostino***, 21 AD2d 60, 248 NYS2d 121, 124 [1964].)

Consequently, if a pleading (1) provides sufficient notice of the events out of which the claim arose and (2) notes the material elements of the claim, "it is an acceptable CPLR pleading" (Siegel, NY Prac § 208 [2d ed]) and will withstand a motion to dismiss for failing to state a cause of action.

C. Tax Law § 651(b)(former [5][A]), in effect during the years at issue, provided that if:

> (i) a joint return has been made under this subsection for a taxable year,
>
> (ii) on such a 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.

D. As correctly noted by the Division, petitioner has not stated a cause of action for which relief may be granted by the Division of Tax Appeals. In the present matter, the Division issued notices and demands due to the fact that petitioner and her late husband, on joint returns filed for each of the years at issue, failed to pay the full amount of tax reported as due on each return. The Division has not asserted that petitioner and her husband underreported tax due for either year; the notices and demands were issued by the Division solely because the tax reported on the returns was not paid when the returns were filed. Accordingly, it is clear that petitioner is not eligible for innocent spouse relief pursuant to Tax Law § 651(b)(former [5][A]). Moreover, there is no provision in the Tax Law which would grant relief to petitioner solely on the basis of her inability to pay the amounts set forth on the notices and demands.

E. A motion for summary determination may be granted:

> if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

F. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316, 317 [1985], ***citing Zuckerman v. City of New York*** 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck v. Tri-Pac***

Export Corp., 22 NY2d 439, 293 NYS2d 93, 94 [1968]; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion ***(Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

"To defeat a motion for summary judgment, the opponent must also produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173 [1992] ***citing Zuckerman***).

G. In the instant matter, petitioner did not respond to the Division's motion; she is therefore deemed to have conceded that no question of fact requiring a hearing exists (***see Kuehne & Nagel v. Baiden,*** 36 NY2d 539, 544, 369 NYS2d 667,671 [1975]; ***Costello Assocs. v. Standard Metals***, 99 AD2d 227**,** 472 NYS2d 325, 326 [1984].

H. The Division of Taxation's motion for summary determination is granted and the petition of Bonnie Ritt a/k/a Bonnie Beller is dismissed with prejudice.

DATED: Troy, New York
September 3, 2009

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE