

POOR
QUALITY
THE FOLLOWING
DOCUMENT (S)
ARE
FADED & BLURRED

PHOTO MICROGRAPHICS INC.

BUREAU OF LAW

MEMORANDUM

Income Tax Determinations
M. S. A-Z
Pearlman, Harry & Rose

TO: Commissioners Murphy, Macduff and Conlon
 FROM: Francis X. Boylan, Hearing Officer
 SUBJECT: HARRY AND ROSE PEARLMAN

*(X - by :
 Unincorp. Bus. Tax
 Determinations A-Z)*

Personal Income Taxes, Article 16 and
 Unincorporated Business Taxes, Article
 16-A of the Tax Law for the Years
 1948, 1949 and 1950

A hearing was held before me on this matter on May 4, 1965. The taxpayers appeared by their attorney, Arthur Pick, Esq., of New York, New York. They were present themselves but did not testify. Max Reisman, Senior Special Tax Investigator of this Department, testified in connection with the report of the Federal audit on which our audit and the additional assessments by this Department were based. There are a number of exhibits including a letter to taxpayers summarizing the Federal audit, which is Exhibit G.

The main question is whether, in the circumstances here, the wife can be held liable under a joint assessment when returns were made which were joint in form but which were not signed by the wife or by anyone in her behalf. The proposed determination holds the wife liable on the joint returns as to normal personal income tax on the grounds the inferences arising from the internal and external evidence require the conclusion that the joint returns were made with the knowledge and implicit consent of the wife. However, the additional assessments for unincorporated business taxes were valid in the circumstances here only against the husband, Harry Pearlman, the proposed determination holds; and the assessments are modified accordingly. Tax Law §§367.1; 386-h; 386-j.

Returns joint in form, that is, in the names of both taxpayers, Harry and Rose Pearlman, were submitted in the years under consideration, 1948, 1949 and 1950. The return for 1948 is missing from the files and the conclusion that it was a joint return, as were the other two, is therefore inferential. The Federal returns, not in evidence and reportedly not available, reportedly were joint; and reportedly there was no indication that the wife did not sign these. The petitioners do not claim that the New York 1948 return, which is missing, was not joint in form.

The 1949 and 1950 returns were signed only by the husband and the space for the wife's signature was left blank; presumably the missing 1948 return was not signed by the wife either.

The issue raised by petitioners is the claim that the assessments were not valid as assessments against the wife, so as to make them jointly and severally liable.

The law on this is essentially that the wife can be held liable on such a return when knowledge and consent to the return in joint form can be arrived at as a matter of factual inference based on the internal evidence of the returns made, and on the external evidence of the patterns of the returns and other external circumstances, and notably that an independent return was not timely made by the wife. (Myra S. Howell, 10 T. C. 859; Howell v. Commissioner of Internal Revenue (1949), 175 F. 2d 240 and other cases cited, *infra*) These facts which cumulatively support the inference drawn, that there was tacit consent, are set forth in the proposed determination.

The provisions of Tax Law Section 367 are not closely in point. The section provides in part that the fact that an individual's name is signed to a filed return shall be *prima facie* evidence for all purposes that the return was signed by him. This language, however, does not carry any negative implications helpful to the petitioner concerning an unsigned return. Although it is true that the implications of a statute go beyond what is logically necessary, to take in also what is intended, even so, this language providing for signed returns clearly is not meant to have any implications on the situation of an unsigned return.

As to the regulations, Regulation 270.2(e)(1) provides in part:

" . . . A joint declaration of husband and wife (if not made by an agent) shall be signed by both spouses" 20 HYCRR §270.2(e)(1).

In *McCord v. Granger*, a Federal case, it was held that an unsigned joint return was an individual return and that a regulation which was the Federal counterpart of the above regulation, was binding on the government as well as on the taxpayer with the consequences that an unsigned return was held not effectual against the person who did not sign it. *McCord v. Granger* (3 Cir. 1952) 201 F. 2d 103. But while the general proposition concerning the

mutuality of the regulations has been endorsed, it remains the law that a joint return unsigned by one person may be effectual as a joint return, if that was the intention and there was knowledge and consent. *Polizzi v. Commissioner*, 347 F. 2d 875.

In the *Myrna S. Howell* case, tacit consent of the wife on an unsigned return was found as a matter of factual inference. In the two terminal years of a three year sequence, she signed returns in blank which were filled in by the accountant; in the middle year, however, the space for her signature was left blank. It was held that the returns for all three years were joint returns, and the Tax Court cited an earlier holding stating that it is presumed that a return is joint as to wife as well as husband, although the wife doesn't sign, unless she filed a separate return. *Myrna S. Howell*, 10 T. C. 859, citing *Joseph Carrero*, 29 B.T.A. 646, 650. This statement of the presumption of tacit consent where the wife fails to file a separate return, and the holding above-stated, was endorsed on appeal to the Circuit Court. *Howell v. Commissioner of Internal Revenue* (1949), 175 F. 2d 240.

Our memorandum in the *Teresa L. Baum* matter, and various memos attached to it, may also be seen. The memos undertake to apply the principle of a factual inference of tacit consent based on the total circumstances, to various combinations of evidentiary factors on the authority of the respective cases cited in the memos. Memo *Teresa L. Baum*, Deputy Commissioner Kessell to Mr. Blume, March 26, 1959.

On the facts as found here and especially in the absence of any direct testimony by the wife denying that she knew joint returns were being made, the conclusion of implicit consent seems here to be well-founded.

As to unincorporated business tax liability, the law (Tax Law Section 386-h) provides for a return by the taxpayer liable for the payment of the tax, or equivalently by the person whose business it is. The provisions for joint returns in Tax Law Section 367.1 (Article 16) are advertently omitted from Tax Law Section 386-j in Article 16-A which adopts for Article 16-A certain enumerated sections of Article 16. Tax Law Sections 386-h; 386-j.

There is no affirmative indication that the wife had a proprietary interest in the business and our report of examination states: "Harry Pearlman has operated the Union Bagel Bakery in Brooklyn for many years". Report dated August 17, 1961, Exhibit F at page 2.

Granting that the return form 201 is held to be a joint return (although not actually signed by the wife), form 201 reports on normal personal income and capital gains tax but only summarizes unincorporated business tax (to be taken from form 202) together with summarizing the normal personal income tax and the capital gains tax. No form 202, the primary return form for unincorporated business tax, was filed and no tax due for unincorporated business tax was put down in the summary on form 201.

Consequently, the form 201, even if it should be judged to be a "return" of unincorporated business tax by the husband, the proprietor, was not a joint return by the wife who was not a proprietor.

Consequently, the tax in the circumstances is assessable against the proprietor only, the husband, who should have filed a return. Tax Law §386ph.

Accordingly, it is recommended that the determination be substantially in the form of the proposed determination submitted.

/s/

FRANCIS X. BOYLAN

Hearing Officer

FXB:rlp

Enc.

October 2, 1967

10-17-67

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION
OF

HARRY AND ROSE PEARLMAN

FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 16 OF THE
TAX LAW, AND UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 16-A, FOR THE
YEARS 1948, 1949 AND 1950

The taxpayer, Rose Pearlman, having filed applications for revision or refund of personal income taxes and of unincorporated business taxes for the years 1948, 1949 and 1950, and such applications having been denied, and a hearing having been held at the offices of the Department of Taxation and Finance of the State of New York, 80 Centre Street, New York, New York before Francis X. Boylan, Hearing Officer, on May 4, 1965, and the taxpayers, Harry Pearlman and Rose Pearlman, having appeared by Arthur Pick, Esq., of New York, New York, and having been present in person, and Max Reisman, Senior Special Tax Investigator of the Department of Taxation and Finance, having appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) By notice of additional assessment B SID 10914, dated August 21, 1961, the State Tax Commission assessed additional normal income tax and additional unincorporated business tax for the year 1948 upon additional income in the amount of \$20,877.62 not reported by the taxpayer, and discovered upon audit to have been derived from unreported sales of goods in a business conducted

by Harry Pearlman. Additional normal income tax in the amount of \$1,080.68 and additional unincorporated business tax in the amount of \$386.40 to a total of \$1,467.08 was assessed. Pursuant to statutory authority in cases of false or fraudulent returns with intent to evade the tax, this amount was doubled as a penalty, and interest at the rate of 1% per month was charged thereon down to the date of computing the said assessment on May 15, 1961, to a total as of that date of taxes, penalties and interest due in the amount of \$7,188.69 for the year 1948.

By notice of additional assessment B SIB 10915, dated August 21, 1961, the State Tax Commission, upon audit, assessed taxes on additional income received by the taxpayer in the amount of \$31,743.28 in the year 1949, assessing additional normal income tax due in the amount of \$1,780.09 and additional unincorporated business tax due in the amount of \$711.84 to a total additional tax due of \$2,491.93 and to a total of taxes, penalties and interest due as of May 15, 1961, in the amount of \$11,612.40 for the year 1949.

By notice of additional assessment, B SIB 10916, dated August 21, 1961, the State Tax Commission assessed additional taxes for the year 1950 on additional income found on audit and not reported by the taxpayers in the amount of \$23,575.58; and, accordingly, assessed additional normal income tax for the year in the amount of \$1,258.10 and additional unincorporated business tax in the amount of \$467.00 to a total of additional taxes due in the amount of \$1,725.10. The addition of penalties and interest to May 15, 1961 gave a total of additional taxes, penalties and interest due as of that date in the amount of

\$7,624.94 for the year 1950.

All three such additional assessments for both normal personal income taxes and unincorporated business taxes were made jointly against the petitioners.

(2) By three applications for revision or refund all sworn to October 30, 1961, the petitioner, Rose Pearlman, applied for the cancellation of the assessment against her, for the years 1948, 1949 and 1950, respectively, stating in each such application that she did not sign a joint return for the year because her "exemption was greater than the income for that year", and that she thought she was not required to sign. No other issues were raised in such applications, nor were the assessments contested at the hearing, except insofar as they were assessed against the petitioners jointly and against the wife, Rose Pearlman. These applications did not contain any explicit denial by Rose Pearlman that she knew that joint returns were filed signed by her husband.

(3) The forms of tax return prescribed and used combined in a single form (Form 201) a report of normal income tax and capital gains tax and a summary of these taxes and also of unincorporated business tax as reported on Form 202. The taxpayer did not file a Form 202, reporting unincorporated business tax, and left blank that space in the "Summary--Total Tax To Be Paid" section of Form 201, on the returns filed for 1949 and 1950.

(4) The income tax return filed by the petitioners for the year 1948 was missing from the files when the assessment

for that year was made and is not available. Records including answers to a question in the petitioners' 1949 return indicate that a return was made. It is found that the 1948 return was a joint return in form, but it is assumed that it was not signed by Rose Pearlman.

The 1949 return was made out in the form of a joint return in the names of Harry and Rose Pearlman with the "residence address" given as 479 Aubrey Street, Brooklyn, New York. In answer to a question on the form, it was indicated that the petitioners had filed a return for the year 1948 and from the same address. The question, "Were you married and living with wife?" was answered yes, with the wife's first name stated. The answers further indicated that she had separate income and that it was included in the return. A personal exemption and credit for two dependents, "son and mother" was taken in the amount of \$3,300.00, an amount that represented a deduction for husband and wife at \$2,500.00, and the two dependents at \$400.00 each. An expense schedule, headed "Harry and Rose Pearlman 1949 Tax Schedule" was annexed to the return. The return included (in Schedule B) net profit from rents in the amount of \$1,687.13 from two buildings, one at Watkins Avenue and one on Hersl Street (Brooklyn). The return was signed Harry Pearlman and the space for the signature for the taxpayer's wife was blank.

The form of return for 1950 was also joint, in the names of Harry and Rose Pearlman, and this return also was signed Harry Pearlman with the space for the wife's signature left blank. The questions were answered in the same way and the same two

dependents claimed with a total personal exemption and credit for dependents in the amount of \$3,300.00. A similar schedule of expenses in the names of both husband and wife was annexed to the return. The income reported in the return included the net income from rentals of the Watkins Avenue and Hersi Street buildings in the amount of \$1,674.45.

(5) On October 28, 1961, (later than the notices of additional assessments herein and at about the same time as the applications for revision and refund were executed), the petitioner, Rose Pearlman, submitted forms of individual resident returns for each of the years 1948, 1949 and 1950.

For the year 1948, she reported as other income and as total income (as an individual) the amount of \$1,687.13 net rentals from the Watkins Avenue and Hersi Street buildings for the year. She claimed charitable contributions of \$50.00 and exemptions in the amounts of \$1,250.00 and \$400.00 to a total of \$1,650.00 with a taxable balance of none.

For the year 1949, in the individual return of Rose Pearlman, net rentals from the said buildings in the amount of \$1,687.13 were reported as the only income with the same claim of charitable contributions of \$50.00 and exemptions aggregating \$1,650.00 to a taxable balance of none.

The individual return for Rose Pearlman for the year 1950 reported net income from the said property in the amount of \$1,674.45 with charitable contributions at \$50.00 and exemptions totaling \$1,650.00, and a taxable balance of none.

(6) No testimony was given by either husband or wife

or by anyone at the hearing that the returns in the form of joint returns were so made without the knowledge and consent of the wife, Rose Pearlman.

(7) The additional assessments for all three years were based on conclusions as to unreported business income and improper deductions which were made in a Federal audit of the taxpayers' Federal returns for those years; these returns were joint.

(8) It is found that the husband, Harry Pearlman, operated the business of a bagel bakery which had the income not reported and on which the additional assessments were made, and that Rose Pearlman was not a proprietor of the business.

(9) It is found that the petitioners filed returns, Forms 201, in the form of joint returns for the years 1948, 1949 and 1950, and that such returns were made by the husband with the knowledge and consent of the wife, Rose Pearlman.

Upon the foregoing facts and findings, and all the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) That the returns in the names of the petitioners, Harry Pearlman and Rose Pearlman for the years 1948, 1949 and 1950 for which additional assessments above set forth were made were joint returns.

However, such returns, on Form 201 only, were returns on normal personal income (and of capital gain if there was any) but, not summarizing any unincorporated business tax reported, and not being associated with any Form 202 which is the primary

report of unincorporated business income, in the circumstances, did not constitute joint returns of unincorporated business income.

(B) That the separate individual returns later made by the petitioner, Rose Pearlman in 1961 were untimely and invalid under Tax Law Sections 371 and 386-h which required generally, and with only limited exceptions not applicable here, that returns in a tax year that corresponds to the calendar year be filed on or before the fifteenth day of April following the close of the year.

(C) That, accordingly, the said assessments were properly made against both petitioners, who are jointly and severally liable, as to the taxes, penalties and interest for the three years under consideration, pursuant to provision of Tax Law Section 367.1 so stating, but only for normal personal income taxes; there is no joint liability or several liability of the wife, for the additional unincorporated business taxes under Article 16-A, or for the penalties and interest thereon, for any of the three years, it is held, pursuant to provisions of Tax Law Section 386-h of Article 16-A, which provides that the taxpayer liable for the tax shall make the return, and of Tax Law Section 386-j of Article 16-A which by advertently omitting mention of paragraph 1 of Tax Law Section 367 of Article 16 has the effect of providing that the provisions of that paragraph of Tax Law Section 367 which provides for joint liability on joint returns of husband and wife, are not adopted for and made applicable to returns of unincorporated business

tax under Article 16-A.

(D) That the additional assessments, except as they improperly imposed liability on the wife for unincorporated business tax as above-stated in paragraph C, were lawfully made by the State Tax Commission pursuant to the authority of Tax Law Section 373 and were based upon adequate information of fraud, adequately proved and not controverted at the hearing.

(E) That the said assessments, except as they improperly assess unincorporated business tax against the wife as above-stated, were lawful and correct in accordance with the provisions of Tax Law Sections 373 and 386-j providing for assessment at any time in the case of willfully false or fraudulent return with intent to evade the tax, and pursuant to Tax Law Section 377.3 providing for the doubling of the tax due and increasing the resultant amount at the rate of 1% monthly while unpaid in cases of such false or fraudulent returns.

(F) The additional assessments as so modified are restated, as of May 15, 1961, as follows:

1948

HARRY AND ROSE PEARLMAN

Additional Normal Personal Income Tax Due	\$1,080.68
Penalty at 100%	1,080.68
Interest at 1% per month to May 15, 1961 from April 15, 1949	<u>1,111.97</u>
Total Additional Normal Personal Income Tax, Penalty and Interest Due to May 15, 1961	<u>\$3,273.33</u>

HARRY PEARLMAN

Additional Unincorporated Business Tax Due	\$ 386.40
Penalty at 100%	386.40
Interest at 1% per month to May 15, 1961 from April 15, 1949	<u>1,120.56</u>
Total Additional Unincorporated Business Tax, Penalty and Interest Due to May 15, 1961	<u>\$1,893.36</u>

1949

HARRY AND ROSE PEARLMAN

Additional Normal Personal Income Tax Due	\$1,780.09
Penalty at 100%	1,780.09
Interest at 1% per month to May 15, 1961 from April 15, 1950	<u>4,735.04</u>
Total Additional Normal Personal Income Tax, Penalty and Interest Due to May 15, 1961	<u>\$8,295.22</u>

HARRY PEARLMAN

Additional Unincorporated Business Tax Due	\$ 711.84
Penalty at 100%	711.84
Interest at 12% per annum to May 15, 1961	<u>1,893.50</u>
Total Additional Unincorporated Business Tax, Penalty and Interest Due to May 15, 1961	<u>\$3,317.18</u>

1970

HARRY AND ROSE PEARLMAN

Additional Normal Personal Income Tax Due	\$1,298.10
Penalty at 100%	1,298.10
Interest at 12% per annum to May 15, 1961	<u>1,044.60</u>
Total Additional Normal Personal Income Tax, Penalty and Interest Due to May 15, 1961	<u>\$3,640.80</u>

HARRY PEARLMAN

Additional Unincorporated Business Tax Due	\$ 467.00
Penalty at 100%	467.00
Interest at 12% per annum to May 15, 1961	<u>1,132.14</u>
Total Additional Unincorporated Business Tax, Penalty and Interest Due to May 15, 1961	<u>\$2,066.14</u>

Said assessments are subject to further interest to the date of payment.

And IT IS SO ORDERED.

Dated: Albany, New York this 20th day of October , 1967.

STATE TAX COMMISSION

/s/

**JOSEPH H. MURPHY
PRESIDENT**

/s/

**JAMES R. MACDUFF
COMMISSIONER**

/s/

**WALTER MACLYN CONLON
COMMISSIONER**