STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **DARLEEN MARCH** | : | DECISION<br>DTA NO. 826057 |
| for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of Tax Law for the Years 2004, 2005, 2006, 2007 and 2008. | : | |

Petitioner, Darleen March, filed an exception to the determination of the Administrative Law Judge issued on December 17, 2015. Petitioner appeared by Roger Gromet, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on November 10, 2016 in Albany, New York, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## *ISSUE*

Whether petitioner has established that she is entitled to a refund of penalties assessed and paid because she is not liable for fraud penalty for the years 2004 through 2006 and because she has established reasonable cause for abatement of penalties for all of the tax years at issue.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 3, 4, 7 and 8 to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. As a result of an investigation of real estate professionals who had not filed personal income tax returns in New York State, the Division of Taxation's (Division) Revenue Crimes Bureau conducted an investigation of Darleen and Stanley March. When they interviewed Darleen March (petitioner) in January of 2008, she admitted that they were behind in payments to the Internal Revenue Service (IRS) and had just sent it a payment of $10,000.00.

In an interview with petitioner's accountant, it was discovered that the Marches' 2004 personal income tax return had been prepared and turned over to petitioner in the summer of 2007, but not filed. In addition, in January, 2008, the accountant stated to the revenue crimes agents that she had just completed the tax returns for 2005 and had received information for preparing the 2006 returns. On January 17, 2008, the Marches' New York State personal income tax return for 2004 was received by the Revenue Crimes Bureau with a payment of $5,861.00, the tax due stated thereon.

2. The matter was referred to the Albany County District Attorney for prosecution and Darleen and Stanley March appeared in Albany City Court on May 6, 2008, facing a charge of repeated failure to file personal income tax returns pursuant to Tax Law § 1802 (a), a class E felony. Prior to the proceedings, petitioner and Stanley March filed their joint personal income tax returns for the years 2005 and 2006 on or about May 3, 2008, with a payment of $10,153.00 drawn on petitioner's checking account, with checks signed by her. Therefore, when petitioner and her husband appeared in Court for the first time, taxes for the years before that Court, 2004, 2005 and 2006, had been paid and the returns filed.

The criminal matter was resolved by a plea agreement. City Court Judge Kretser noted on her file that Stanley March agreed to plead to disorderly conduct, to pay back taxes and a fraud penalty, and complete 20 hours of community service. Upon satisfaction of these terms, he was

to receive a conditional discharge and no fine. Petitioner agreed to plead guilty to disorderly conduct and agreed to complete 20 hours of community service, after which she would receive a conditional discharge and no fine. The Court noted on both files that proof had been submitted and the cases were closed October 27, 2008. No further mention or provision was made for payment of a fraud penalty in the criminal matter. The report of the criminal proceeding prepared by the Revenue Crimes Bureau indicated that it believed Judge Kretser's sentence directed that all further payments be made through the Division. Petitioner submitted no other evidence to explain the failure to pay a fraud penalty as ordered by the Court.

3. Petitioner and Mr. March also failed to file timely returns for the years 2007 and 2008. When the returns were filed in 2008 and 2009, respectively, the Division issued notices and demands for the taxes shown due but not remitted with the returns. The notice and demand for 2007 was issued on October 30, 2008, stating a tax due of $5,643.00 plus late filing and late payment penalties and interest. The notice and demand for 2008 set forth tax due of $585.00 plus late filing and late payment penalties and interest.

The Division issued a notice of deficiency for the years 2004, 2005 and 2006 on July 23, 2009. The notice indicated additional tax due for 2004 of $5,658.00 plus fraud penalty of $3,865.00 and interest, with a payment or credit of $7,096.73, for a balance due of $4,567.47. For 2005, the notice assessed fraud penalty of $3,983.00 and interest, totaling $5,326.15. For 2006, the notice assessed fraud penalty of $1,907.00 and interest, totaling $2,247.69. This notice of deficiency was not protested and became a fixed and final liability on October 21, 2009.

4. Petitioner was issued a consolidated statement of tax liabilities, dated August 13, 2010, which indicated that she was liable for three fixed and final tax assessments for personal income tax that were ripe for collection. In addition, the statement indicated that there was another

assessment issued to her for the year 2007 that stated additional interest and penalty due, but not yet ripe for collection. The following chart illustrates the fixed and final liabilities subject to collection:

| Assessment ID | Tax Year | Tax | Interest | Penalty | Payments | Balance |
|---|---|---|---|---|---|---|
| L-032357432-5 | 2006[1] | $5,658.00 | $4,216.36 | $9,755.00 | $12,096.73 | $7,532.63 |
| L-030866136-9 | 2007 | $5,643.00 | $1,043.24 | $634.09 | $134.47 | $7,185.66 |
| L-033033888-9 | 2008 | $585.00 | $64.94 | $71.64 | $0.00 | $721.58 |
| Total | | | | $10,460.73 | | $15,439.87 |

The following chart indicates an additional assessment for 2007, that was not yet subject to collection on August 13, 2010:

| Assessment ID | Tax Year | Tax | Interest | Penalty | Payments | Balance |
|---|---|---|---|---|---|---|
| L-034165327-9 | 2007 | $0.00 | $2.35 | $196.36 | $0.00 | $198.71 |
| Total | | | | | | $198.71 |

5. The Division issued a warrant against petitioner and Stanley March, dated July 27, 2009, which was filed in the Warren County Clerk's office on August 3, 2009, the basis of which was assessment number L-030866136-9. The tax year covered by this assessment was 2007 and set forth additional tax due of $5,508.33, interest of $276.07 and penalty of $505.88, for a total due of $6,290.28. A Judgment Transcript of the warrant filed in Warren County was entered in Essex County on August 11, 2010.

6. Petitioner and her spouse, Stanley March, were married in 1998 and remained so until Stanley March died on July 11, 2009. A contributing cause of death, as listed on his death certificate, was acute alcohol intoxication and cirrhosis. Mr. March suffered from alcoholism for

[1] Although the consolidated statement of tax liabilities identifies 2006 as the tax year for Assessment ID L-032357432-5, the July 23, 2009 notice of deficiency makes clear that this assessment number includes petitioner's liability for the years 2004 through 2006. The totals in the consolidated statement for this assessment number thus reflect petitioner's liability for those three tax years.

several years prior to his death, a fact attested to by his physician, Dr. Howard P. Fritz, his step-daughter and petitioner.

7. Following Mr. March's death, petitioner sold their residence in Schroon Lake, Essex County, New York. At that time, the closing statement, dated August 19, 2010, reflected a credit to the purchaser described as "Pay NYDT&F Lien" in the sum of $15,443.04, an amount almost identical to the sum set forth on the consolidated statement of tax liabilities issued to petitioner on August 13, 2010. Subsequently, the warrant referenced above in finding of fact 5 was satisfied on October 15, 2010, as noted on the judgment transcript issued by the Warren County Clerk's office on the same date.[2]

8. On or about July 9, 2012, petitioner, through her representative, applied for a refund of $10,460.73. This amount reflected the portion of the payment from the proceeds of the sale of her home in Schroon Lake attributable to the penalties asserted in the three fixed and final assessments subject to collection, as set forth in finding of fact 5. In her second amended petition, petitioner revised the refund request so that she now seeks a refund of the full amount paid from the proceeds of the sale of her home in Schroon Lake in the sum of $15,443.04.[3] The refund application was denied by the Division on August 27, 2012. Petitioner requested a conference in the Bureau of Conciliation and Mediation Services (BCMS) on August 3, 2012 and, by BCMS order, dated October 25, 2013, the refund denial was sustained. Petitioner then filed a petition in the Division of Tax Appeals, dated January 20, 2014, challenging the BCMS order.

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[2] The amount paid out of the proceeds of the sale of the house was for the assessments listed on the consolidated statement of tax liabilities. It is noted that this statement included the unpaid tax, penalty and interest assessed for 2007, covered by the warrant filed in Warren County.

[3] Petitioner did not substantiate this figure with a breakdown of tax, penalties and interest.

9. Petitioner and Mr. March filed jointly during his lifetime. For the years 2004 through 2006, petitioner received commissions as a licensed real estate broker. Also, the couple reported income and loss from Adirondack Country Homes Realty, Inc., which petitioner owned, and Internet Time Share Resources, Inc., owned by Mr. March. The latter reported income from its operation as an internet company that leased out mainframe computer time. Both companies were profitable during the years in issue.

10. Petitioner established Adirondack Country Homes Realty, Inc., after beginning in the real estate field as an agent. She then formed a partnership with another agent and began operations as Adirondack Country Homes and eventually became the sole owner of the business. At one time, the company had eight offices and was quite lucrative. For a time, Mr. March was affiliated with the company as an agent.

11. Petitioner provided corporate tax records for her real estate company to the couple's accountant, which were then incorporated into the final tax returns, while Mr. March provided the tax records for his business. During the years in issue, the couple always employed an accountant for the preparation of their tax returns, although several different accountants were employed over the years.

12. Petitioner was aware that the returns in issue were not filed on time and pointed this out to her husband on many occasions. She explained that she was not sure why the returns were not filed, but thought Mr. March may have located additional information necessary for the return preparation. She also conceded that Mr. March's alcoholism and abusive behavior caused her to avoid confrontations with him, and that the filing of tax returns, a job they had hired an accountant to complete, "wasn't the most important issue in the family."

13. The couple's income was deposited into bank accounts over which petitioner had authority. However, even though petitioner had equal authority and control, her husband managed all of their accounts, even after checks were returned to them in the years 2007, 2008 and 2009. Credit cards were applied for and maintained in petitioner's name, but she was permitted to make payments with credit cards only with her husband's approval. This was explained as part of what she referred to as the "credit card juggle," a scheme Mr. March employed, and in which petitioner concurred, to maintain zero interest balances by using several credit cards. The credit card juggle was utilized throughout the years in issue, notwithstanding Mr. March's alcoholism.

14. Petitioner did have sole control over the checking account for Adirondack Country Homes Realty, Inc., but only used her control to pay routine bills. After Mr. March became involved in her real estate business, he began making "program" decisions on behalf of that company. Petitioner explained that Mr. March was "smart" and it was "wise to listen to him."

15. By the end of 2008, Mr. March's alcoholism led petitioner to consider a divorce due to his mood swings, lack of mental acuity, disputes and abuse. These issues were echoed by petitioner's daughter, who recalled Mr. March's alcoholism, control of the family's finances and fits of anger and abuse, which began as early as 1999 or 2000. On one occasion, July 5, 2006, petitioner's daughter called the police to report an episode of abuse, to which New York State Police responded and reported that petitioner reported a verbal altercation with her husband, who was very intoxicated, and had threatened to "kill her." Petitioner refused to request that her husband be arrested and the matter was closed with a domestic violence report.

16. Despite his serious condition, Mr. March was never hospitalized and did not seek rehabilitation for his alcoholism. He attempted abstinence from alcohol on his own, without

success. Despite the serious and debilitating disease from which he suffered, he was functional in many respects, continuing to drive, operate and manage his company and participate in petitioner's real estate business. He was able to communicate with accountants, successfully juggle credit cards to evade interest payments on outstanding balances and manage the family's finances.

17. In 2008, coinciding with her thoughts of divorce, petitioner approached the couple's accountant to discuss the option of changing her filing status to married filing a separate return. Petitioner could not explain why she had never done this previously, even though she did not know if returns were being filed. She recounted how extensions and returns prepared by the accountant were placed before her and she signed them as directed, but she did not know "what years she signed when."

18. Petitioner submitted IRS account transcripts, which indicate that certain penalties were removed from her account for the years in issue herein. No explanation for the modifications was provided on the account transcripts and petitioner did not know why the penalties had been removed. Further, petitioner recalled that innocent spouse relief had been requested from the IRS for the years in issue, but the request was denied, as noted on the account transcripts. No similar request for innocent spouse relief was made in New York.

## *THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE*

The Administrative Law Judge first addressed the impact of the criminal matter on petitioner's refund claim. He found that there was no credible evidence that the Albany City Court discharged or relieved petitioner of her civil tax liabilities for the years at issue in the criminal matter. The Administrative Law Judge observed that the Judge's notations on the Marches' respective files were silent as to any subsequent civil assessment efforts. The

Administrative Law Judge discounted the fact that the Judge's notes expressly require only Mr. March to pay taxes and fraud penalty. The Administrative Law Judge reasoned that since the obligation to pay taxes and penalties emanated from the Marches' joint returns, the Judge's notations, without more, do not shield petitioner from civil fraud penalties.

The Administrative Law Judge also found that there was no connection between the criminal matter and the warrant and lien filed against Mr. March and petitioner. He noted that the warrant was issued and filed with respect to civil liabilities for 2007, a year that was not before the court.

Next, the Administrative Law Judge found that fraud penalties were properly imposed against petitioner and Mr. March for the years 2004, 2005 and 2006. The Administrative Law Judge noted Mr. March and petitioner failed to timely file returns and to pay tax for each of those years and that such a pattern of substantial underpayment justified the imposition of fraud penalties. The Administrative Law Judge also noted that petitioner did not directly challenge the fraud penalties. He further determined that petitioner's claim that reasonable cause existed for her failure during 2004 through 2006 was unavailing because the Division's regulations preclude the consideration of reasonable cause where fraud penalties are asserted.

For 2007 and 2008, where the Division asserted late filing and late payment penalties, the Administrative Law Judge did consider petitioner's claim of reasonable cause. The Administrative Law Judge determined that petitioner failed to establish a direct causal link between Mr. March's alcoholism and the Marches' failure to timely file returns and pay taxes. He thus determined that Mr. March's alcoholism did not provide reasonable cause for their failure.

The Administrative Law Judge rejected petitioner's arguments that the warrant was not valid because it was filed after Mr. March's death. The Administrative Law Judge found that because petitioner was also liable for the 2007 tax liability underlying the warrant, satisfaction of the warrant as to her was proper.

The Administrative Law Judge also rejected petitioner's claim that the penalties should be abated because the IRS canceled penalties asserted against her for the years 2005, 2006 and 2007. The Administrative Law Judge found no evidence in the record of the Service's reason for this action. The Administrative Law Judge noted further that the IRS did not grant petitioner's request for innocent spouse treatment at the federal level. The Administrative Law Judge thus determined that, accordingly, the Tax Law does not presume that she is entitled to equivalent relief under New York's innocent spouse statute. The Administrative Law Judge also noted that petitioner did not apply for innocent spouse relief under Tax Law § 654. He found, however, that even if she had so applied, she would not have been successful.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner continues to argue that the lack of any notation regarding a fraud penalty in the Judge's notes on petitioner's file, as contrasted with her notes regarding Mr. March, indicates that petitioner was relieved of such liability by the Court and, hence, the Division was precluded from subsequently asserting fraud penalties against petitioner. Petitioner also contends that the Division has failed to meet its burden of proof as to fraud penalties against her. Petitioner asserts that her failure to timely file returns for the years 2004 through 2006 is insufficient to meet this burden.

Petitioner further contends that the Division may not assert negligence penalties with respect to 2004 through 2006 because it did not assert such penalties in any statutory notice or in its answer in this matter.

As to negligence penalties asserted with respect to the years 2007 and 2008, petitioner contends that she has demonstrated reasonable cause for abatement in Mr. March's alcoholism and the consequences thereof as shown in the record. Petitioner asserts that she made reasonable efforts under the circumstances to get Mr. March to file their tax returns.

The Division contends that the Administrative Law Judge correctly determined that the outcome of the criminal proceeding had no effect on the Division's right to assess fraud penalties against petitioner. The Division thus asserts that petitioner's plea agreement did not eliminate her civil liability for taxes and penalties.

The Division also contends that at least some part of the underpayment of tax for 2004 through 2006 was due to the fraud of petitioner. The Division asserts that the Administrative Law Judge correctly found fraudulent conduct in petitioner's and Mr. March's failure to file returns or to pay taxes for those years, which resulted in a pattern of substantial underpayment of their tax liability.

The Division also argues that the Administrative Law Judge correctly found that petitioner failed to establish reasonable cause for abatement of the late filing and late payment penalties asserted herein.

The Division also contends that it need not specifically plead late payment penalties under Tax Law § 685 (a) in its answer to properly assert such penalties as an alternative to fraud.

***OPINION***

Tax Law § 681 (a) authorizes the Division to issue a notice of deficiency for additional tax or penalties due under Article 22. Penalties asserted may include a fraud penalty. During the years at issue, Tax Law § 685 (e) (1) provided for a penalty of 50% of the amount of tax if any part of the deficiency is due to fraud.

Where, as here, a husband and wife file a joint return, their tax liabilities are joint and several (Tax Law § 651 [b] [2]). There is, however, a limit to such joint and several liability for fraud. Specifically, in the case of a joint return, a fraud penalty may not be asserted "with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse" (Tax Law § 685 [e] [3]).

The burden of proof of fraud lies with the Division (Tax Law § 689 [e] [1]). Accordingly, the Division must establish that some part of the underpayment of tax for each of the years 2004 through 2006 was due to fraud by petitioner.

We have explained the standard for the imposition of the fraud penalty under Tax Law § 685 (e) as follows:

> "For the Division to establish fraud by a taxpayer, it must produce 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing'" (***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988; ***see also***, ***Schaffer v. Commissioner***, 779 F2d 849, 86-1 USTC ¶ 9132; ***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).
>
> The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (***Plunkett v. Commissioner***, 465 F2d 299, 72-2 USTC ¶ 9541; ***Biggs v. Commissioner***, 440 F2d 1, 71-1 USTC ¶ 9306; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989, citing ***Korecky v. Commissioner***, 781 F2d 1566, 86-1 USTC ¶ 9232)" (***Matter of Ellett***, Tax Appeals Tribunal, December 18, 2003).

Upon review of the record, we find that the Division has not met its burden to prove that any part of the deficiencies for the years 2004 through 2006 were due to fraud by petitioner.

The Administrative Law Judge justified the imposition of fraud penalties upon the failure by petitioner and Mr. March to file returns or to pay any taxes for the 2004 through 2006 tax years. We agree that such a consistent and substantial understatement of tax liability may be

considered "strong evidence of fraud" (***see Merritt v Commissioner***, 301 F2d 484, 487 [1962]). Understatement of income by itself, however, is insufficient to prove fraud; other factors indicating fraudulent intent must be present for the Division to meet its burden (***Matter of Ellett*** citing ***Foster v Commissioner***, 391 F2d 727, 733 [1968]).

In our view, there are no such other factors here.

Although petitioner entered a guilty plea in connection with her failure to file returns and to pay tax for the years 2004 through 2006, she pled to disorderly conduct, a violation that may be committed by reckless conduct (***see*** Penal Law § 240.20). Fraud requires that a taxpayer act with willfulness, knowledge and the specific intent to evade tax (***see Matter of Cousins Serv. Sta.***). The record lacks any plea allocution or statement indicating that petitioner committed fraudulent acts and the Judge's notations on petitioner's file make no reference to fraud (***cf. Matter of Aqua-Mania, Inc.***, Tax Appeals Tribunal, March 6, 2008 [petitioner's plea statement contains admission that petitioner committed acts that constituted tax fraud]). We thus conclude that petitioner's guilty plea does not support a finding of fraud.[4]

The circumstances surrounding petitioner's failure to file and pay tax for the 2004 through 2006 tax years also do not support a finding of fraud. The record shows that petitioner's failure was, in significant part, the result of her acquiescence to her alcoholic and abusive spouse's procrastination (***see*** findings of fact 12 and 15). Given these circumstances, we find that petitioner's avoidance of confrontation with her husband over their New York State income tax

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[4] Regarding petitioner's guilty plea, we do agree with the Administrative Law Judge that, contrary to petitioner's contention, the plea itself did not relieve petitioner from liability for fraud penalties as asserted herein. We thus disagree with petitioner's contention that the lack of any notation regarding a fraud penalty in the Judge's notes on petitioner's file, as contrasted with her notes regarding Mr. March, indicates that the Court relieved petitioner of such liability. The Judge's notes do not address and thus do not restrict the Division's right to proceed civilly against petitioner. Accordingly, we find that petitioner's plea agreement did not include relief from civil fraud penalties (***see Matter of Miras***, Tax Appeals Tribunal, October 22, 1992 [petitioner must establish the terms of a plea agreement]).

returns does not reasonably give rise to an inference of fraudulent intent on her part. We conclude, therefore, that petitioner's entire course of conduct falls short of the clear, definite and unmistakable standard required to sustain a fraud penalty (***see Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000).

Additionally, we observe that the Division offered no evidence of other common indicators of fraud, such as a failure by petitioner to maintain accurate records of her business (***see Niedringhaus v Commr.***, 99 TC 202 [1992]); a failure to include all of her income in her records (***see Gromacki v Commr.***, 361 F2d 727 [1966]); or a refusal to cooperate and to make her records available (***see Estate of Granat v Commr.***, 298 F2d 397 [1962]).

Having concluded that the Division failed to meet its burden to sustain the fraud penalties, we next turn to the Division's contention that it may assert alternative penalties under Tax Law § 685 (a) for the years 2004 through 2006.

The Division's answer in the present matter does not assert that alternative penalties should be imposed if fraud penalties are canceled. Moreover, the Division did not raise the issue of alternative penalties at any time during the hearing. The Division thus failed to give adequate notice of alternative penalties for the years 2004 through 2006 and, accordingly, may not seek to impose such penalties here (***see Matter of Yel-Bom's Service Center, Inc.***, Tax Appeals Tribunal, May 10, 1990; ***see also Matter of Sener***).

The notices and demands for the 2007 and 2008 tax years assert penalties for failure to timely file a return or failure to pay tax shown on a return pursuant to Tax Law § 685 (a). Such penalties must be imposed unless the failure is due to reasonable cause and not due to willful neglect (Tax Law § 685 [a] [1], [2]). The narrow limitation on joint and several liability for joint filers with respect to fraud penalty under Tax Law § 685 (e) (3) does not apply to late filing or late payment penalties under Tax Law § 685 (a).

As noted, petitioner contends that Mr. March's alcoholism provides reasonable cause for the Marches' failure to timely file returns and to pay tax for 2007 and 2008.

The Division's regulations provide that the serious illness of a taxpayer "which precluded timely compliance" may constitute reasonable cause for purposes of penalties imposed under Tax Law § 685 (a) (***see*** 20 NYCRR 2392.1 [d] [1]).

We agree with the Administrative Law Judge that petitioner has not established that Mr. Marches's alcoholism constitutes reasonable cause for the Marches' failure for 2007 and 2008. Although petitioner established that Mr. March had alcoholism and that he procrastinated in filing his tax returns, petitioner did not establish that the alcoholism caused the procrastination. In terms of the regulation cited above, petitioner did not show that the Marches' timely compliance was precluded by Mr. March's illness. We have reviewed the article submitted by petitioner in evidence that notes the correlation between alcoholism and procrastination. Such a general article, however, is insufficient to establish a direct, causal link in this specific case, especially considering that Mr. March was apparently functional in some areas of his life (***see*** finding of fact 16) (***see Matter of Bernfeld***, 117 AD3d 26 [2014] [attorney's argument in a disciplinary proceeding that his alcoholism caused his failure to file and pay his state taxes was rejected because there was no expert evidence presented to establish a direct, causal connection between his alcoholism and his failure to file and pay taxes]; ***see also McLaine v Commr.***, 138 TC 228, 248 [2012] [no reasonable cause where taxpayer failed to show he was incapacitated by his alcoholism when return was due or thereafter]). We also agree with the Administrative Law Judge that the cancelation of penalties by the IRS for the years at issue is of little significance because there is no evidence in the record as to why such penalties were abated.

As this decision has determined that petitioner is not liable for any penalties for the 2004 through 2006 tax years, the Division is directed to recompute petitioner's liability for those years

accordingly. The Division is further directed to reapply the payments as indicated in the consolidated statement of tax liabilities (***see*** finding of fact 4) to petitioner's liabilities for the years at issue as so recomputed. Next, the Division is directed to reapply the $15,443.04 payment made on or about August 19, 2010 to the remaining liability for the years at issue. The balance, after such application of payments, is the amount overpaid by petitioner for the years 2004 through 2006. The Division is directed to refund such overpayment to petitioner, together with such interest as may be lawfully due.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Darleen March is granted to the extent indicated in paragraph 4 below, but is in all other respects denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph 4 below, but is in all other respects affirmed;

3. The petition of Darleen March is granted to the extent indicated in paragraph 4 below, but is in all other respects denied; and

4. The refund claim of petitioner is granted to the extent that the Division is directed to refund to petitioner her overpayment for the tax years 2004 through 2006, determined in accordance with this decision, plus such interest as may be lawfully due, but is in all other respects denied.

DATED: Albany, New York
May 10, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner