

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARIA ARNJAS : DETERMINATION
 : DTA NO. 824505
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax :
Law for the Year 2006. :

Petitioner, Maria Arnjas, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2006.

On September 24, 2012 and October 2, 2012, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by March 25, 2013, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined additional personal income tax due for the year 2006.

II. Whether the Division of Taxation properly asserted fraud penalty.

FINDINGS OF FACT

1. Petitioner, Maria Arnjas, filed a 2006 New York State resident income tax return under the name “Maria Arnas” and her social security number on or about April 7, 2007. She filed this return under the status of married filing jointly.¹

2. On the return, the only two items of income listed were wages of \$48,476.00 and taxable refunds, credits or offsets of state and local income taxes of \$1,628.00. The wage income was substantiated with a form W-2 issued by West Harbor Yacht Service, Inc., to Pavel Arnas, petitioner’s spouse.

3. Petitioner was a bookkeeper for fashion designer Naeem Khan, Ltd., between October 2004 through February 2007. During the year 2006, petitioner embezzled \$405,330.47, funds she failed to report on her 2006 New York State personal income tax return, as evident from her joint filing for 2006, which indicated no income attributable to her.

4. Petitioner appeared before the Honorable Michael J. Obus, Justice, Supreme Court, New York County, Criminal Term, on September 5, 2008, concerning indictment No. 5437/07, ***People v. Maria Arnjas***, and pled guilty to grand larceny in the second degree. The basis of the charge was petitioner’s theft of \$405,330.47 from her employer Naeem Khan between September 26, 2005 and January 30, 2007, and two other thefts not relevant to the year in issue. Petitioner also pled guilty to violating Tax Law § 1804(b) by intentionally evading the tax imposed by the Tax Law, in that she filed a false and fraudulent tax return and with that intent substantially understated her tax liability. Petitioner received a sentence of 8 to 17 years in prison and was ordered to make restitution of the monies she stole in the sum of \$541,560.35. However, there

¹The social security number petitioner provided on her petition is the same as the one listed on the 2006 New York personal income tax return. The discrepancy in the spelling of her last name was not explained or raised as an issue, i.e., petitioner did not deny it was her return or that she signed it.

was no provision for restitution of taxes provided for in the plea agreement and no statement or intimation that the plea agreement encompassed the issue of taxes or precluded a determination of tax due on the funds stolen by petitioner.

5. Armed with the plea agreement and petitioner's admission that she stole \$405,330.47 in 2006, the Division attributed the stolen funds to her, recalculated her income for 2006 and issued her a consent to field audit adjustment, in which it asserted additional tax of \$28,487.00, plus fraud penalty, additional interest due to fraud and interest for a total amount due of \$51,147.00. The Division subsequently issued to petitioner a Notice of Deficiency, dated October 12, 2010, which asserted the same tax as the consent plus additional, updated penalties and interest.

6. A corporation known as Lighthouse Point Entertainment, Inc. (Lighthouse Point) shared the same home address with petitioner in 2006. After a search of its records, the Division determined that Lighthouse Point was inactive and had never filed New York corporation franchise tax returns, including those for the periods April 1, 2005 through March 31, 2006 and April 1, 2006 through March 31, 2007.

SUMMARY OF PETITIONER'S POSITION

7. Petitioner argues that during the investigation of the grand larceny and other charges against her, detectives removed records from her home that made it difficult to defend herself herein. She alleges that the Division's assertion that she did not file returns for 2005 and 2006 was false, but she does not have the records to dispute it.²

8. Petitioner contends that Lighthouse Point declared the embezzled income on its New York corporation franchise tax return and, therefore, she owes no additional tax to the Division

²Petitioner submitted three pages that she loosely described and relied upon to show that she had filed federal and New York income tax returns for 2006, but the returns were for individuals with no apparent connection to this matter.

for 2006. She maintains that Lighthouse Point's federal return bears out the truth of her contentions and asks that the federal return of Lighthouse Point be used to recreate the New York corporation franchise tax return and suffice to show that the embezzled funds were reported as income upon which tax was paid. To this end, petitioner submitted correspondence with the IRS, dated March 17, 2009, that indicated an assessment against Lighthouse Point in the sum of \$4,796.06.

CONCLUSIONS OF LAW

A. A properly issued notice of deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383 [1992], *lv denied* 81 NY2d 704, 595 NYS2d 398 [1993]; *Matter of O'Reilly* [Tax Appeals Tribunal, May 17, 2004]). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner. Accordingly, it is necessary to ascertain whether petitioner has sustained her burden of proof in showing that there is no additional personal income tax due for the year 2006.

B. There is no dispute that petitioner stole \$405,330.47 from her employer, which, as an ill-gotten gain, was properly treated as income to her in the year 2006 (Internal Revenue Code § 61; *James v. United States*, 366 US 213, 218 [1961]). Petitioner admitted in open court that she took the money, pled to a charge of grand larceny, and was convicted and sentenced to prison therefor.

Petitioner's argument that detectives removed documents from her home in investigating her grand larceny charges that hampered her ability to defend herself herein is unavailing. The Division produced her New York personal income tax return for 2006, which demonstrates that she did not include the embezzled funds in her reported income.

____ Although petitioner claims that the funds were included in income of a corporation, Lighthouse Point Entertainment, she has not submitted any evidence to support the claim or explained how income to Lighthouse Point was relevant to her tax deficiency. First, petitioner admitted that she took the money from her employer, underscoring the fact that the income was hers and not that of a third party. Second, there is no evidence in the record of any relationship between petitioner and Lighthouse Point Entertainment other than the fact that the corporation's address of record is the same as her home address in 2006. Third, the Division performed a search of its records for returns filed by Lighthouse Entertainment and found that it was "inactive" and had never filed New York corporation tax returns for 2006 or any other year. Finally, although petitioner submitted correspondence from the IRS with regard to the tax liability of Lighthouse Point Entertainment for the year 2006 that indicated a tax assessment of \$4,796.06, there is nothing in the record that explains its relevance.

____ C. In contrast to the burden on petitioner to demonstrate by clear and convincing evidence that she did not owe the additional tax asserted in the notice of deficiency, in order to impose the fraud penalty pursuant to Tax Law § 685(e) with respect to the asserted deficiencies for the year at issue herein, the Division has the burden of establishing fraud by petitioner.

The Tax Appeals Tribunal explained the standard for the determination of fraud on the part of a taxpayer 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 Sona Appliances*, Tax Appeals Tribunal, March 16, 2000).

Nonetheless, where a taxpayer has been convicted of criminal tax fraud for the same year at issue in the civil tax fraud proceeding, she is estopped from contesting the imposition of civil fraud

penalties (*Matter of Drebin*, Tax Appeals Tribunal, February 20, 1997, *confirmed* 249 AD2d 716, 671 NYS2d 565[1998]).

____D. Here, as noted in Finding of Fact 4, petitioner entered a guilty plea to violating Tax Law § 1804(b) by intentionally evading the tax imposed by the Tax Law, in that she filed a false and fraudulent tax return and with that intent substantially understated her tax liability. Consequently, petitioner's "conviction for fraudulently filing false tax returns collaterally estops the taxpayer from challenging the civil fraud penalty" (*Matter of Drebin*). Therefore, with its proof of petitioner's guilty plea, the Division of Taxation has established that petitioner received additional income for the relevant year, 2006, failed to report such additional income on her New York personal income tax return and such failure was with an intent to evade tax.

E. Although restitution was provided for by the plea agreement to those companies from which petitioner stole funds, there was no provision for restitution of taxes. Therefore, petitioner is liable for the full amount of the tax, penalty, penalty interest and interest determined to be due.

F. The petition of Maria Arnjas is denied and the Notice of Deficiency, dated October 12, 2010, is sustained.

DATED: Albany, New York
September 12, 2013

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