STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK S. AND CHRISTINA YERRY	:	DETERMINATION DTA NO. 827291
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2009, 2010, 2011, 2012 and 2013.	:	

Petitioners, Frank S. and Christina Yerry, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2009, 2010, 2011, 2012 and 2013.

A hearing was held before Kevin R. Law, Administrative Law Judge, in Albany, New York, on January 21 and 22, 2016, with all briefs due by June 15, 2016. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined petitioners' tax liability for the years 2009, 2010, 2011, 2012 and 2013.

II. Whether petitioners are subject to a penalty for fraud.

FINDINGS OF FACT

1. On June 26, 2014 the Albany County District Attorney's Office (District Attorney's Office) sent a letter to the Division of Taxation (Division) requesting assistance with an

investigation of petitioner Christina Yerry.[1] At the District Attorney's request, petitioners' tax returns as well as those of Carol LaBoissiere (the victim), a neighbor of petitioners, were reviewed by the Division's auditor. Following the Division's review, the Division referred the matter to the District Attorney's Office for an investigation of possible tax fraud.

2. The District Attorney's Office Assistant District Attorney (ADA) provided petitioners' bank statements[2] for the audit period as well as the victim's bank statements to the Division for audit and for analysis. The criteria for review by the Division's auditor was set forth by the ADA. The auditor was asked to review automatic teller machine withdrawals from the victim's bank accounts, transactions between the victim and petitioners, checks of the victim deposited directly into petitioners' accounts, and payments to SMART, LLC.[3]

3. Based upon the auditor's examination, the ADA identified $208,602.70 of monies stolen from the victim by petitioner during the years 2009 through 2013. In arriving at the amount of theft, cash deposited in the victim's bank accounts and checks from petitioner were netted against the transactions identified as theft by the ADA.

4. On August 1, 2014 the Grand Jury of the County of Albany returned a six-count indictment against petitioner Christina Yerry, to wit: (i) grand larceny in the second degree; (ii) identity theft in the first degree; and (iii) four counts of criminal possession of a forged instrument in the second degree.

5. On January 16, 2015, petitioner pled guilty before the Honorable Roger D. McDonough

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[1]All references to petitioner are to petitioner Christina Yerry whereas all references to petitioners are to Franks S. and Christina Yerry unless otherwise noted.

[2]All of petitioners' accounts were jointly held by petitioners.

[3]The auditor identified SMART, LLC as a tuition payment service.

to one count of attempted grand larceny in the second degree.

6. Before Judge McDonough took the plea he questioned petitioner regarding her age, her competency and general understanding of the charges. The judge specifically asked if she had received adequate time to speak with her lawyer and whether she was "highly satisfied with his representation." Petitioner responded in the affirmative to these questions. The judge, through a series of questions, asked petitioner if she was aware of her right to a trial, of the people's burden to prove her guilt beyond a reasonable doubt in the event of a trial, that it was not necessary for her to testify at a trial, that she was entitled to question the witnesses against her and present her own witnesses. When asked if she understood that pursuant to her plea she gave up all these rights, petitioner again responded in the affirmative. Petitioner, by responding to the judge's questions, indicated that she was not threatened or forced in any way to plead guilty. The judge asked petitioner if she was pleading guilty because she was, in fact, guilty of the crime of attempted grand larceny in the second degree. Petitioner responded in the affirmative. The questioning then went as follows:

> THE COURT: The indictment in this case, as amended for the purposes of the plea, charges as follows: That on or about and between February 25th, 2009 and January 1st, 2014, at various locations in the County of Albany, State of New York, you did steal property. . . valued in excess of $50,000, to wit:
>
> Between the aforesaid dates and at the aforesaid locations, you did attempt to steal in excess of $50,000 from Carol LaBoissiere – am I pronouncing that correctly?
>
> MS. BLAIN-LEWIS: Yes, your Honor.
>
> THE COURT: In the form of United States currency by means of cashing checks belonging to Ms. LaBoissiere, cashing checks drawn on accounts of Ms. LaBoissiere, and withdrawing funds from accounts of Ms. LaBoissiere without permission or authority to do so; is that, in fact, the case, ma'am?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Tell me what happened.

THE DEFENDANT: We were actually very close friends, and I did a lot for the family, and that included banking and –

THE COURT: Did you have authority or permission to withdraw $208,602.70?

THE DEFENDANT: No sir.

THE COURT: Is that acceptable to the People?

MS. BLAIN-LEWIS: It is the People's position, your Honor, that many of the funds that were withdrawn were withdrawn with checks that were forged by the defendant.

THE COURT: All right. Ms. Yerry, did you attempt to access these funds without permission or authority by using checks in which you forged a signature?

THE DEFENDANT: Yes, your Honor.

The COURT: Is that acceptable to the People?

MS. BLAIN-LEWIS: Yes, your Honor.

THE COURT: And again, Ms. Yerry, you understand that you did not have permission or authority to withdraw those funds or conduct those activities; is that correct?

THE DEFENDANT: Yes, sir.

7. Prior to petitioner taking the plea, the ADA indicated that in addition to petitioner's plea of guilty to the charge of attempted grand larceny in the second degree, restitution of $208,602.70 would be sought. The Judge questioned petitioner's lawyer as follows:

THE COURT: Mr. Knox, is that your understanding of the plea offer in this case?

MR. KNOX: That is, your Honor, except to just expand on the restitution, that that number is a cap, and the People are going to allow me to look at their figures to do my due diligence to make sure that I concur with their analysis.

THE COURT: Well, let's assume a worst case scenario, that there's not concurrence.

MR. KNOX: I've informed Ms. Yerry that, ultimately, she's liable under the terms of this plea up to that amount.

THE COURT: All right. Is she waiving her right to a restitution hearing in that regard?

MR. KNOX: Yes, judge.

8. On March 5, 2015, petitioner's defense counsel and the ADA met and came to an agreement on the amount of restitution to be paid by petitioner. Based upon the meeting the amounts originally identified as theft by the ADA were adjusted to remove various checks signed by the victim's husband, checks signed by the victim, a hearing aid payment, and payments for Time Warner Cable, National Grid and the Department of Motor Vehicles. Added to the theft amount were bank fees incurred by the victim resulting in an agreed amount of $195,744.65 in restitution.

9. On March 13, 2015, a restitution order was signed by Judge McDonough, ordering petitioner to pay restitution in the amount of $145,744.65[4] to the victim plus surcharges and fees.

10. On April 3, 2015 the Division issued a Notice of Deficiency, notice number L-042669798-9, asserting tax due of $11,160.00 plus interest and penalty for the 2009 through 2013 tax years. No explanation was provided in the body of the notice for how the tax was determined.

11. On April 29, 2015, the auditor sent petitioner a letter explaining the basis of the Notice of Deficiency. Specifically, the Division assessed tax on the theft proceeds stolen by petitioner from the victim as determined by the restitution order and by petitioner's plea of guilty to attempted grand larceny in the second degree. The unreported income by year is as follows:

2009	$25,545.24
2010	$53,953.05

[4]The restitution order originally provided for restitution of $195,744.65, but was reduced to $145,744.65 to take into account $50,000.00 petitioner paid at sentencing.

2011	$57,517.60
2012	$34,805.76
2013	$23,923.00
TOTAL	**$195,744.65**

The letter also explained that fraud penalty was also assessed.

12. The following table is a comparison of federal adjusted gross income as originally reported on petitioners' jointly filed New York State resident income tax returns during the years at issue and as adjusted by the auditor:

Year	Reported FAGI	Adjusted FAGI
2009	$92,025.00	$117,570.00
2010	$64,351.00	$118,304.00
2011	$17,480.00	$74,998.00
2012	$11,351.00	$46,157.00
2013	($3,072.00)	$20,851.00

13. By letter dated October 29, 2015 the Division adjusted the Notice of Deficiency to remove tax on $3,200.00 of bank fees incurred by the victim that were included in the restitution order. The adjustment resulted in a decrease of tax of $174.00 and corresponding penalties and interest.

14. In addition to the Notice of Deficiency at issue here, the Division issued a Notice of Additional Tax Due to petitioners on April 8, 2015, which asserted a deficiency based upon a federal audit change that petitioners did not report to the Division. The federal audit change was the result of a distribution of $187,194.76 from a retirement account that was not reported on their personal income tax return in 2011. When questioned at the hearing in this matter, Mr. Yerry claimed his wife prepared the couple's tax returns and this was a mere oversight.

15. At the hearing in this matter, petitioners submitted various receipts and cancelled checks evidencing items and services paid for by petitioner but in the victim's name. Some of these receipts were for such things as airline flights, hotel lodging, limousine services, building materials and electronic items. Notations on these receipts allege that petitioner arranged for work done on the victim's house at the victim's request. Likewise, included were checks made out to cash on one of petitioners' checking accounts that paid for a contractor's labor at the victim's house. According to notations accompanying the checks and the testimony of petitioner's daughter, Lauren Yerry, petitioner handled many of the financial dealings of the victim and arranged for a many renovations at the victim's residence during the time encompassing the thefts. In addition, Lauren Yerry testified that she accompanied her mother around 70% of the time ATM withdrawals were made by petitioner at the behest of the victim and such withdrawn funds were always given to the victim. Ms. Yerry confirmed that these receipts and cancelled checks were provided to petitioner's defense attorney but contended the ADA was not cooperating with him in arriving at the restitution amount. When questioned about why her mother took the plea deal, she claimed she did not live at home during this time period so she could not answer the question.

16. Introduced into the record was an unsworn memorandum prepared by petitioner and given to her defense attorney during her criminal prosecution. Mr. Yerry also read this letter into the hearing record in this matter. The letter purportedly describes the relationship petitioner had with the victim and also insinuates that the victim's daughter stole from the victim and that the victim's relationship with her family was "dysfunctional." Mr. Yerry attested to the truth of these statements and maintains that his wife was unjustly prosecuted and the subject of a witch hunt in their community. Mr. Yerry opined that the victim's daughter, and not his wife, is the

guilty party.

17. Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services, a conciliation order sustaining the Notice of Deficiency was issued on October 2, 2015. Thereafter petitioners timely filed a petition with the Division of Tax Appeals and this proceeding ensued. Prior to the hearing in this matter, the Division timely filed an answer to the petition on January 11, 2016, which generally denied the allegations contained in the petition, set forth the basis for the issuance of the Notice of Deficiency, and requested that, as an alternative to the fraud penalties asserted in the Notice of Deficiency, negligence penalties pursuant to Tax Law § 685(b), should be imposed.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioners assert that the deficiency should be cancelled as the calculations determined by the auditor and making up the tax are fraught with error. Petitioners contend that to the extent that tax is owed, any understatements are not the result of willfulness on their part. Petitioners contend that the sole reason petitioner pled guilty to attempted grand larceny in the second degree is because petitioner was backed up against a wall and subject to an unjust prosecution.

19. The Division contends that by virtue of the fact that petitioner pled guilty to attempted grand larceny and admitted stealing from her victim, petitioners are now estopped from contesting petitioner's guilt. Additionally, the amount she stole was determined by a restitution order. The Division contends that penalties for fraud were correctly imposed and that the record indicates petitioner Frank Yerry knew or should have known large sums of monies stolen from the victim by his wife were being marshaled into petitioners' joint bank accounts.

CONCLUSIONS OF LAW

A. IRC § 61(a) defines the term "gross income" to include "income from whatever source derived. . . . " This statutory language has been held to encompass "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" (***Commissioner v. Glenshaw Glass***, 348 US 426, 431 [1955]). It is long settled that monies received through illegal means, such as larceny, may be included in the gross income of the recipient (***see e.g. James v United States***, 366 US 213 [1961]). The Notice of Deficiency in this matter was premised upon petitioner's conviction for attempted grand larceny in the second degree and was computed based upon the amount of court-ordered restitution petitioner is required to repay her victim. Petitioners take issue with the utilization of the restitution amount in determining tax due alleging the restitution amount was a cap set by the court and that the monies alleged to have been taken were actually used by the victim or stolen by the victim's daughter. For the reasons that follow, petitioners' arguments are rejected as collateral estoppel prevents petitioners from disputing that petitioner stole from her neighbor, and the amount thereof, which form the basis of tax in the statutory notice.

B. For the doctrine of collateral estoppel to apply, petitioner must have had a fair opportunity to litigate the issue of her liability for the income tax at issue at the criminal proceeding (***see Kuriansky v. Professional Care***, 158 AD2d 897, 899 [1990]). This means that "the identical issue necessarily must have been decided in the prior action and be decisive of the present action . . . and . . the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." (***Kaufman v. Eli Lilly and Co.***, 65 NY2d 449 [1985] [citations omitted]).

C. An essential issue litigated and decided in the criminal proceeding is the same one

raised by petitioners herein, i.e., the amount that petitioner stole and was required to repay to her victim. The criminal proceeding required such central issue to be decided including the proper amount of restitution (***see*** Penal Law § 60.27). The issue was resolved by petitioner's conviction and the court's ensuing restitution order, which form the basis of the tax. While a cap in the restitution was indeed set, review of the record indicates that amount was reduced after a meeting between petitioner's defense attorney and the ADA. Any monies paid by petitioner were taken into account in determining the amount of restitution. Petitioners' challenge to the tax amounts in this proceeding is essentially an attack on the court-ordered restitution which represents an amount agreed upon and fixed. Having waived her right to a restitution hearing petitioner cannot now be heard to complain about the amount thereof, which she has admitted she stole from her victim. While the receipts and documents proffered may represent amounts petitioner purchased on the victim's behalf, these receipts and checks were taken into account in determining the final amount of restitution ordered by the Court and previously agreed to by the ADA and petitioner. In fact, after the ADA and petitioner's defense counsel met, the amount of restitution was reduced from $208,602.70 to $195,744.65 despite increasing the restitution amount by $3,200.00 for bank fees. Therefore, the Division has demonstrated the identity of issues required for the invocation of collateral estoppel. Furthermore, petitioners' claims that petitioner did not steal from the victim and that petitioner was the subject of a witch hunt are rejected as wild accusations unsupported by any evidence and meriting no further discussion in light of petitioner's guilty plea and admission of guilt in open court.

D. In addition to the tax assessed, the Division assessed a penalty for fraud. Tax Law § 685(e)(1) provides for a penalty of twice the amount of tax if any part of the deficiency to due to fraud (Tax Law § 685[e][1]). In ***Matter of Ellett*** (Tax Appeals Tribunal, December 18, 2003),

the Tax Appeals Tribunal stated:

> "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).
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> 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).
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> Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (***Foster v. Commissioner***, 391 F2d 727, 68-1 USTC ¶ 9256; ***Merritt v. Commissioner***, 301 F2d 484, 62-1 USTC ¶ 9408). Understatement alone is not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud (***see***, ***Foster v. Commissioner***, ***supra***)."

E. In this case the Division has met its burden of proving fraudulent intent to avoid paying tax on the part of petitioner Christina Yerry. Here, the omissions of income over a period of five years from the theft alone totals over $195,000.00. Although substantial understatements alone are not enough to meet the Division's burden, the evidence as a whole leads to a finding of fraud. First, petitioner's criminal conviction is a factor to be taken into consideration in determining whether the Division has met its burden of establishing fraud as to petitioner. As the Court in ***McGee v. Commissioner of Internal Revenue*** (61 TC 249, 260 [1973] ***affd*** 519 F2d 1121 [5th Cir 1975] ***cert denied*** 424 US 967 [1976]) stated:

> "While evidence that a taxpayer was attempting to defraud another in a business transaction may not be direct evidence of fraud with intent to evade tax, . . . the Court is entitled to consider such evidence along with other evidence in determining

> the intent of the taxpayer in doing certain acts, because it is a fair inference that a man who will misappropriate another's funds to his own use through misrepresentation and concealment will not hesitate to misrepresent and conceal his receipt of those same funds from the Government with intent to evade tax. . . . The legal relevancy of such evidence is based upon logical principles which go to negate innocent intent (citations omitted)."

The gravity of petitioner's acts of theft over a five-year period and the failure to report the amounts thereof, coupled with omission of another $187,000.00 from income in the 2011 year alone, all lead to the conclusion that the resulting deficiency is due to fraud on the part of Christina Yerry. Notwithstanding, the Division has failed to meet its burden of proving that any part of the deficiency is due fraud on the part of petitioner Frank Yerry.

F. Tax Law § 685(e)(3) provides that a spouse filing a joint return will not be held liable for fraud penalties unless some part of the deficiency is the result of the fraud on the part of that spouse. In this case, the only factors that the Division relies upon to establish fraud on the part of petitioner's husband are the substantial underreporting of the amount of funds stolen by his spouse and the failure to report a distribution from his retirement account as income in the year 2011. There has been no showing that petitioner's husband was involved with the theft or that he was ever charged with a crime. Although the Division has asserted that the large influx of cash into petitioners' jointly held accounts should have put Mr. Yerry on notice of petitioner's theft and consequential underreporting of tax, this speculation does not rise to the level required to meet the Division's burden of establishing fraud on the part of Mr. Yerry. Accordingly, the fraud penalties as to petitioner Frank Yerry are cancelled.

G. Notwithstanding the cancellation of the fraud penalties as to petitioner Frank Yerry, the Division affirmatively plead for the imposition of negligence penalties on the deficiency. Pursuant to Tax Law § 685(b)(1) and (2), if any part of a deficiency is due to negligence, a

penalty equal to five percent of the deficiency and 50% of the interest payable shall be imposed. In this case, there has been no showing by Mr. Yerry as to why this penalty should not be imposed other than arguing that his wife did not steal any money despite her guilty plea to the contrary. Accordingly, the Notice of Deficiency as to Frank Yerry is modified to include penalty pursuant to Tax Law § 685(b) in lieu of the penalties imposed for fraud pursuant to Tax Law § 685(e).

H. The petition of Frank S. and Christina Yerry is granted to the extent of Conclusions of Law F and G, but is otherwise denied, and the Notice of Deficiency as modified (***see*** Finding of Fact 13) is sustained.

DATED: Albany, New York
December 8, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE