

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AUDREY GIGLIOBIANCO : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 816303
New York State and New York City Personal Income :
Taxes under Article 22 of the Tax Law and the New York :
City Administrative Code for the Year 1990. :
:

Petitioner, Audrey Gigliobianco, 73-12 67th Road, Middle Village, New York 11379, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1990.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 18, 1998 at 10:30 A.M., with all briefs to be submitted by January 8, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Laura J. Witkowski, Esq., of counsel).

ISSUES

- I. Whether petitioner filed a New York resident income tax return for 1990.
- II. Whether the Division of Taxation is prohibited from collecting any taxes owed for 1990 because those taxes were discharged in bankruptcy.

III. Whether petitioner is entitled to relief under the "innocent spouse" provisions of Tax Law § 651(a)(5).

FINDINGS OF FACT

1. Petitioner, Audrey Gigliobianco, and Daniel Gigliobianco were married in New Jersey in 1972. Petitioner was 20 at that time and had known Daniel from the time she was 13 years old. Since 1984, petitioner has lived in a rented home at 73-12 67th Road, Middle Village, New York. Petitioner and Daniel are the parents of two children, a son, Daniel, born in 1974, and a daughter, Cara, born in 1978.

2. Petitioner has no education beyond high school. She worked briefly in clerical positions, but after the birth of her children, she stayed home to raise them and care for the family home. Daniel Gigliobianco works at United Parcel Service ("UPS"). Since the family's income was earned entirely by Daniel, and petitioner had no experience or training in money matters, Daniel took complete control of the family's finances during the first years of their marriage.

3. After seven years of marriage, petitioner learned for certain that Daniel is gay; however, she believed this to be a problem that could be overcome, and they continued living together. When Daniel turned 40, he began to more actively pursue relationships outside of his marriage, spending time away from home, and coming and going sporadically with longer periods away from home as the years went by.

4. Each year Daniel Gigliobianco received stock options from his employer, UPS. He was able to borrow against the value of these options, using the options themselves as collateral (a transaction described as "hypothecating" the stock options). Over a 10-year period, from 1980 to 1990, he borrowed approximately \$300,000.00. Petitioner was aware of one borrowing of approximately \$20,000.00 to purchase a vacation bungalow in Rockaway, New York for the use

of the Gigliobianco family. However, she was ignorant of most of the loans incurred by her husband and still does not know how the vast majority of the money was spent. The family's lifestyle did not benefit as a result of Daniel's borrowing.

5. In 1990, Daniel stopped making interest payments on the loans from the hypothecated stock options, and the creditor sold the stock to satisfy the outstanding loan amount. For tax purposes, Daniel was forced to report a capital gain of \$124,222.00 on the sale of the options in 1990.

6. Petitioner and Daniel Gigliobianco filed a joint 1990 Federal income tax return. Petitioner did not furnish a copy of that return. However, other documents in the record indicate that the return was filed without payment of approximately \$37,000.00 in taxes due.

7. Petitioner discovered that the family's finances were in disarray some time in 1990. In order to cope with her very difficult marital situation, petitioner had begun seeing a therapist. With the therapist's encouragement and the support of her friend and landlord, Daniel Heffernan, petitioner took over responsibility for paying the family's bills. Daniel Gigliobianco kept the family's checkbooks, bills and other financial documents in a desk drawer. With Mr. Heffernan's help, petitioner began sorting through those papers and discovered that she and her husband had enormous debts, consisting primarily of income taxes owed to the Federal and State governments.

8. On May 23, 1991, the Division of Taxation ("Division") filed tax warrants against petitioner and her husband in the Queens County Clerk's Office for taxes owed. As a result, the vacation bungalow in Rockaway was sold and back taxes for 1991 were satisfied with the proceeds in December 1991.

9. On December 23, 1991, the Internal Revenue Service (“IRS”) issued an assessment to petitioner and Daniel for the 1989 and 1990 tax years in the amount of \$45,151.34. The IRS subsequently sent petitioner and her husband a Notice of Federal Tax Lien Under Internal Revenue Laws, dated March 25, 1992. On June 5, 1992, the IRS issued a Notice of Levy to petitioner and her husband with respect to both the 1989 and 1990 tax years. The total balance due for 1990 is shown on that document as \$49,298.41.

10. Daniel’s salary check, in the sum of approximately \$3,200.00 per month, was routinely mailed to the family residence. Petitioner began cashing this check and depositing it in a checking account. She established a budget and began paying the family’s bills, giving Daniel a certain amount for his personal expenses. One of the budget items was a monthly budget payment to the IRS for \$250.00. Petitioner paid this amount regularly from 1992 through 1994.

11. On May 14, 1993, Daniel Gigliobianco executed an Installment Agreement with the IRS for the 1990 tax year. It required the payment of \$250.00 per month plus the payment of \$7,000.00 from Daniel’s stock plan by April 1, 1995. To arrive at a monthly payment, the IRS computed a monthly budget for the Gigliobiancos which included a payment of \$150.00 per month to the Department of Taxation and Finance.

12. Petitioner began making payments of \$150.00 to the Division in April 1992. She submitted copies of six money orders payable to New York State income tax as evidence of these payments. She began making these payments based upon her understanding of the budget computed by the IRS. It appears that there were no outstanding assessments against petitioner or Daniel when she began making the payments, and petitioner did not file an amended return or, in any other way, explain the reason for the payments to the Division. By letter dated May 5, 1993, the Division returned a check dated February 24, 1993, in the amount of \$150.00, stating that

there was no balance due at that time. The letter states "Please provide us with an assessment # and/or ID # so that we can process your payment(s)." With a form letter dated May 17, 1993, the Division returned petitioner's check dated May 25, 1993 and stated: "You do not owe this amount, a refund was computed."

13. Petitioner had earlier attempted to resolve the problem with the Division. In a letter dated February 27, 1993, signed by Daniel Gigliobianco, it states:

Attached is my monthly remittance for my past due taxes. I have begun this program last November. My many efforts to contact someone to administer this program have to date, been futile.

Further, I have been notified that my last payment was accepted as an estimated 1993 payment rather than a prior years tax payment.

Please correct the situation and notify my financial consultant Dan Heffernan if you have any questions."

14. Date stamps on a copy of this letter indicate that it was received by the Division's Tax Compliance Division, but the nature of the Division's response is not known. The last money order made payable to the Division is dated April 23, 1993.

15. By letter dated September 25, 1993, the Division requested information from petitioner and Daniel Gigliobianco regarding their 1990 State income tax return. The Division received no response to this letter. A second request for information, dated December 12, 1993, was sent to Daniel Gigliobianco and Audrey Gigliobianco. It states, in pertinent part:

WE HAVE NOT RECEIVED A REPLY TO OUT LETTER DATED 9/25/93 REQUESTING INFORMATION ABOUT YOUR 1990 NEW YORK STATE INCOME TAX RETURN . . . You filed a 1990 federal income tax return using a New York State address. However, we have been unable to locate your 1990 New York return.

16. In response to this inquiry, petitioner's accountant (Deborah A. Sharpe) requested a transcript of petitioner's and Daniel's joint account for the years 1990 through 1992. Ms. Sharpe's letter to the Division also states that the taxpayers had repeatedly received

correspondence from the State of New York. The correspondence to which she refers has not been identified. By letter dated November 7, 1994, Ms. Sharpe made another inquiry regarding the status of the Gigliobiancos' tax account for 1990 through 1992.

17. In September 1994, Daniel Gigliobianco moved out of the family's residence permanently. Petitioner believes that he was living with, and supporting, another man. She also has reason to believe that her husband was abusing alcohol and other drugs and wasting marital assets as a result.

18. Apparently, Daniel Gigliobianco acceded to petitioner's control of the family finances until the end of November 1994. He then arranged to have his UPS paycheck deposited to an account in his name alone and, other than rent payments, he refused to provide petitioner with any financial support at all. In December 1994, petitioner sued her husband for divorce, and in February 1995, she sued for support, for custody of their children and for a restraining order preventing him from removing any marital property from joint bank accounts or brokerage accounts.

19. Petitioner's testimony regarding events related to the issuance of an assessment against her by the Division was incomplete and somewhat confusing. To some extent this is the result of her ignorance of some of her husband's financial and personal affairs. To piece together a chronology of events, I have relied on petitioner's testimony, the testimony of Daniel Heffernan, various documents which were filed in connection with petitioner's divorce proceeding and two letters written by the attorney who represented her in bankruptcy proceedings, Richard J. Guilbert.¹ It is understood that much of this material was prepared in the course of adversarial

¹Mr. Guilbert's letter was written in connection with a grievance filed against him by petitioner. Although this creates a conflict, I have relied upon it where necessary to establish a chronology of events related to the filing of a bankruptcy petition by petitioner.

proceedings and, therefore, may not provide a complete set of facts. However, the material was deemed reliable enough to establish a chronology of events.

20. In a letter dated May 8, 1995, the Division provided a summary of the Gigliobiancos' tax accounts for 1990, 1991 and 1992 to their accountant. The letter also explained that the Division did not have a New York income tax return for 1990 filed under either Audrey or Daniel's name or under either spouse's social security number. The accountant was asked to file a return for 1990 or, if a return had previously been filed, to furnish a copy of that return. A postscript on the bottom of the letter indicates that a copy was sent to Daniel and Audrey Gigliobianco.

21. The Division did not receive a reply to its letter of May 8, 1995, and it subsequently mailed a follow-up letter, dated June 22, 1995, to Debra Sharpe again requesting information regarding the Gigliobiancos' 1990 tax return. A copy of this letter was submitted into evidence by petitioner. Apparently, it was furnished to petitioner by Ms. Sharpe. A handwritten note on the top of the letter indicates that she telephoned Ms. Sharpe on June 29, 1995 to find out what response was being made to the Division's letter, but she was unable to speak to Ms. Sharpe.

22. The second request failed to produce any information about the 1990 tax year. Consequently, the Division used information taken from the Gigliobiancos' joint Federal 1990 tax return to calculate their State tax liability and issued a Statement of Proposed Audit Changes dated August 4, 1995 to petitioner and Daniel. The Statement contains the following explanation:

We do not have a record of a 1990 New York State income tax return on file for you. You did not reply to our previous letters asking about your New York return.

Section 6103(d) of the Internal Revenue Code allowed us to get information from the Internal Revenue Service. This information shows you filed a 1990 federal income tax return using a New York State address.

Your tax has been computed as a New York resident using the information from your federal return. The starting point for computing your New York tax is federal adjusted gross income. Subtractions to income and any appropriate child care credit have been allowed based on the federal information.

The statement explains that penalties and interest are imposed on tax due, and it then sets forth a calculation of additional State income tax due of \$9,693.74 and City tax due of \$4,898.18.

23. Petitioner does not remember seeing letters from the Division stating that her 1990 State tax return was never filed, and she does not remember receiving the Statement of Proposed Audit Adjustment.

24. On September 28, 1995, the Division issued a Notice of Deficiency to Audrey Gigliobianco and Daniel Gigliobianco asserting a tax deficiency of \$14,591.92 plus penalties and interest for the 1990 tax year. Petitioner filed a timely request for a conciliation conference challenging this notice. The date of her request is not known.

25. At some time in 1995, petitioner learned that her husband had filed a bankruptcy petition listing petitioner and Federal and State tax authorities as creditors. She was concerned that if her husband's tax debts were discharged she would be left with the liabilities for unpaid taxes. To avoid this, she engaged the services of the law firm of Brown & Guilbert to file a petition in bankruptcy on her behalf. At that point, petitioner believed (and, in fact, still believes) that Daniel had filed a timely 1990 New York State income tax return and that there were outstanding tax liabilities as a result of that filing. She so informed her bankruptcy attorneys.

26. It is unclear whether petitioner was aware of the issuance of the Notice of Deficiency against her when she was interviewed by her bankruptcy attorney. The attorneys deny having

knowledge at the time of the filing of the bankruptcy petition of the existence of the Notice of Deficiency.²

27. Following the submission of a request for a conciliation conference, the Division sent a letter to petitioner, dated January 24, 1996, which provided a complete explanation of the assessment.

28. Petitioner's divorce attorney, John J. Hallissey, then submitted a copy of the Gigliobiancos' 1990 joint New York State income tax return by mailing it to the Division by certified mail on February 5, 1996. In a cover letter, he states: "Pursuant to our recent telephone conversation concerning the above named, enclosed please find a copy of the NYS Joint Tax Return for 1990 that my client informs me was filed by their accountant." Attached to the return was an Application for Additional Extension of Time to File. This form indicates that the Gigliobiancos' accountants requested an extension to October 15, 1991 to file their clients' 1990 tax return. Whether the extension request was received by the Division is not known. The Division treated the mailing of the return on February 5, 1996 as the date of filing of the 1990 return.

29. Petitioner testified that the signature on the return identified as "Spouse's signature" is hers, but she could not recall when she signed the return and it is undated.

²The Request for Conciliation Conference was not made a part of the record. Therefore, it is not known whether petitioner separately filed a request or whether Daniel Gigliobianco, having received the Notice of Deficiency, filed a request that was deemed by the Division to be a joint request. Statements made in Mr. Guilbert's letter suggest that petitioner was not aware of the request having been made until she received notice that a conference was scheduled. Without a copy of the request it cannot be determined with certainty whether petitioner received the Notice of Deficiency.

30. Line 79 of the return provides that the amount of tax due is \$14,592.00. The primary source of this tax liability is a capital gain of \$124,222.00 from Daniel Gigliobianco's hypothecation of the UPS stock.

31. Brown & Guilbert filed a bankruptcy petition on petitioner's behalf in the United States Bankruptcy Court, Eastern District of New York on April 24, 1996. The petition included the State of New York as an unsecured priority creditor, and a notice of the bankruptcy proceedings was given to the Division at two separate addresses.

32. By letter dated July 8, 1996, petitioner was advised that a conciliation conference would be held on August 13, 1996 regarding the 1990 Notice of Deficiency. When petitioner informed Brown & Guilbert of the upcoming conference, Mr. Guilbert wrote a letter on her behalf to Sareve Dukat, a conciliation conferee in the Division's Bureau of Conciliation and Mediation Services. In that letter, he states that attempts by the Division to collect the 1990 tax debt are in violation of the Bankruptcy Code and the statutory stay provided relative to all collection proceedings against a debtor with a pending bankruptcy petition. He also requested that the conciliation conference be cancelled.

33. The United States Bankruptcy Court issued a Discharge of Debtor to petitioner on September 10, 1996. As pertinent, it states:

1. The above-named debtor is released from all dischargeable debts.
2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:
 - (a) debts dischargeable under 11 U.S.C. § 523;
 - (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (6) and (15) off 11 U.S.C. § 523 (a);

(c) all debts determined by this court to be discharged.

34. A copy of the Discharge Order was provided to petitioner by Brown & Guilbert on September 17, 1996.

35. During the course of the divorce and bankruptcy proceedings, petitioner developed severe joint pain in her knees and wrists. She underwent arthroscopic surgery on her right knee in July 1995. However, her symptoms progressed, and in August 1996 a diagnosis of rheumatoid arthritis was confirmed. The protocol for treatment included steroid injections, Naprosyn and other aggressive drug therapies. Petitioner's health insurance is provided by her husband's employer UPS. To prevent losing her health insurance, she chose not to actively proceed with the divorce, and she and Daniel remain married.

36. A conciliation conference was held on January 16, 1997 where petitioner appeared *pro se*. After reviewing the evidence, the conciliation conferee sustained the Notice of Deficiency.

SUMMARY OF THE PARTIES' POSITIONS

37. Petitioner contends that the 1990 New York personal income tax return was filed by the Gigliobiancos' accountant at or about the same time that the 1990 Federal income tax return was filed. Although she has no direct proof of mailing of the State return, she argues that filing of the return can be inferred from other evidence. She points to evidence that she paid her accountants for preparing the return. She also argues that her conduct at the time confirms that she believed her 1990 return was filed in 1991. She notes that she made regular monthly payments of \$150.00 to the Division believing that there was an outstanding tax liability for 1990. The Division returned the money orders submitted in 1992 and 1993 stating that she had no tax liabilities outstanding.

Petitioner also contends that any outstanding liabilities for 1990 were, or should have been, discharged in bankruptcy.

Petitioner claims that she is entitled to "innocent spouse" relief because she did not benefit from the income which created the liability, did not know that her husband was borrowing from his stock holdings until she learned of the Federal and State tax liabilities, was not living with her husband on a full-time basis in 1990 and was herself the victim of her husband's dissolute lifestyle.

38. The Division asserts that the 1990 joint New York income tax return was filed on February 5, 1996 and that there is no proof of any previous filing of that return. The Division argues that, without proof of certified mailing of the return, petitioner's surmise regarding the mailing of the return is legally insufficient to establish mailing.

It is the Division's position that the 1990 tax debt was not dischargeable under section 523(a)(1)(B)(ii) of the Bankruptcy Code because the 1990 tax return was not filed more than two years before the filing of the bankruptcy petition.

The Division claims that petitioner is not entitled to "innocent spouse" relief because the conditions for relief set forth in the statute have not been satisfied.

CONCLUSIONS OF LAW

A. Petitioner and her husband filed a joint 1990 Federal income tax return; therefore, they were required to file a joint 1990 New York State personal income tax return and their liabilities for tax were joint and several (*see*, Tax Law § 651[b][2]). From her first contact with the Division, petitioner has maintained that a 1990 New York personal income tax return was filed by her accountant, and it is apparent that she sincerely believes this to be the case. However, there is no evidence that a return was mailed to the Division before February 5, 1996 when her

divorce attorney mailed a copy of the return to the Division. Petitioner has only offered her own belief that a return would have been mailed by her accountant at the same time that a Federal return was filed. This is legally insufficient, without proof of certified mailing, to prove that petitioner's and her husband's 1990 New York State personal income tax return was filed prior to February 5, 1996 (*see, Matter of Schumacher*, Tax Appeals Tribunal, February 9, 1995; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990).

In addition, there are no facts from which the Division's receipt of the return may be inferred. The Division repeatedly asked petitioner and her husband to submit information regarding the 1990 tax return informing them that the Division had no record of receipt of the 1990 State income tax return. The first of these letters was sent on September 25, 1993. At least three more requests for the 1990 tax return were made by the Division culminating with the issuance of a Statement of Proposed Audit Changes on August 4, 1995. Whether petitioner actually saw each of these requests when they were made cannot be determined. However, this evidence establishes that a 1990 tax return was not on file with the Division when it issued its Notice of Deficiency on September 28, 1995.

B. Since no return was filed as of September 28, 1995, the Notice of Deficiency was timely issued by the Division pursuant to Tax Law § 683(c)(1)(A) which states that a tax may be assessed at any time if no return is filed. Furthermore, the assessment was not discharged by the order of the bankruptcy court. Pursuant to section 523(a)(1) of the Bankruptcy Code a discharge under chapters 7 and 13 of the code does not discharge a debtor from any debt

(B) with respect to which a return, if required—

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition

The 1990 joint return was due on April 15, 1991. Assuming that petitioner and Daniel Gigliobianco obtained an extension of time in which to file their 1990 return to October 15, 1991, the return was due on the latter date. In either case, it was filed after the date on which the return was due. The Division did not receive the return until February 7, 1996. This was two and one-half months before the petition in bankruptcy was filed on April 24, 1996. Thus, the exception of section 523(a)(1)(B)(ii) must be applied, and, as a consequence, the discharge issued by the Bankruptcy Court did not discharge the 1990 tax debt.

C. The only remaining issue is whether petitioner is entitled to relief under the innocent spouse provisions of the Tax Law, in particular Tax Law § 651(b)(5)(A) which provides:

Under regulations prescribed by the tax commission, if

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

The innocent spouse provision is meant to protect a spouse where the other spouse has control over and access to the couple's financial records and substantially understates tax due on a joint return. The innocent spouse, in signing the return, must not know or have reason to know of the understatement of tax due.

Since the first requirement of the innocent spouse provision is the filing of a return, the protection afforded by the provision does not cover a situation where no return has been filed at all. Thus, relief under the innocent spouse provision was not available when the Notice of Deficiency was issued on September 28, 1995. Assuming that the filing the 1990 tax return on February 5, 1996 satisfied the first requirement of the statute, petitioner still is not entitled to relief, because the remaining provisions have not been satisfied. The second requirement is not met because the filed tax return does not substantially understate the amount of tax due (Tax Law § 651[b][5][A][ii]). In fact, it accurately states the amount of State income tax due for 1990. The amount of tax shown to be due on line 79 of the return is \$14,592.00. The Division issued a Notice of Deficiency in the amount of \$14,591.92. The asserted tax liability is not based upon substantial understatement of tax but on the failure to pay the tax due. Since there is no understatement of tax on the return, the third and fourth requirements do not apply.

If petitioner's husband had filed Federal and State 1990 tax returns without reporting the capital gain from his hypothecation of the UPS stock, there is no question that the innocent spouse provision would have applied. Petitioner did not know and had no reason to know of her husband's expenditures. The capital gain of over \$124,222.00 was the result of his borrowings, and the loans were made without her knowledge. Her lifestyle did not change as a result of his borrowings, and she did not benefit in any way from the monies. Under those circumstances, it could easily be held that it would be inequitable to hold petitioner liable for the 1990 tax deficiency. However, the tax due was not understated on the tax return. The tax liability is clearly stated on the face of the return, and petitioner signed the return. It is unfortunate, but the innocent spouse provision does not afford relief under these

circumstances. Petitioner's only recourse, should she have to pay tax liabilities, is against Mr. Gigliobianco.

D. The petition of Audrey Gigliobianco is denied, and the Notice of Deficiency dated September 28, 1995 is sustained.

DATED: Troy, New York
June 17, 1999

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE