STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EILEEN C. KAPLAN	:	DETERMINATION DTA NO. 817322
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1996.	:	

Petitioner, Eileen C. Kaplan, 2220 Storkspur Way, Las Vegas, Nevada 89117, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1996.

On December 24, 1999 and January 3, 2000, respectively, petitioner, appearing *pro se,* and the Division of Taxation by Barbara G. Billet, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by April 14, 2000, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is liable for the personal income tax and interest as indicated on the notice and demand issued on September 28, 1998.

FINDINGS OF FACT

1. Following notification by the New York State Personal Income Tax Bureau of her failure to file, petitioner filed her 1996 New York State Resident Income Tax Return (Form IT-201) on August 5, 1998. On line 9 of the return, petitioner indicated that she received a taxable amount of individual retirement account ("IRA") distributions in the amount of $83,982.00. Petitioner's address as shown on the return was "2212 Plumb 1st Street, Brooklyn, New York." The return also showed tax due of $5,195.00, which was not remitted.

2. The Division of Taxation ("Division"), on September 28, 1998, issued to petitioner, Eileen C. Kaplan, a Notice and Demand for Payment of Tax Due (L-015590140) in the amount of $8,428.56, plus penalty and interest, for the year 1996. The tax due consists of the amount shown due on petitioner's resident income tax return plus $3,233.56 in New York City resident income tax as the return indicated that petitioner was a resident of New York City.

3. The Conciliation Order of July 30, 1999 issued by the Bureau of Conciliation and Mediation Services following a conference held on July 8, 1999 canceled the penalties originally assessed. There remains at issue in the present matter tax of $8,428.56, plus interest.

4. In 1993, petitioner began divorce proceedings as a result of her husband's continued emotional and physical abuse of both herself and their daughter. Since that time, she has suffered continued financial hardship due to the fact that her ex-husband, who resides in England, has failed to provide either spousal maintenance or child support. Instead, petitioner and her ex-husband were involved in five years of legal battles over the custody of their daughter and his financial obligations. The legal struggles caused petitioner severe emotional strain, resulting in her being placed under a doctor's care with the need for medication for anxiety and depression.

During the initial years of her separation from her husband, petitioner was supported by her mother, who was also paying the legal fees incurred by Ms. Kaplan. Due to the financial drain on her mother, petitioner decided to cash in her IRA in 1996 to provide support for both herself and her daughter, to attempt to repay her mother and also to pay for the legal fees. During most of the five and one-half years beginning in 1993, petitioner has been unemployed and on public assistance. On August 3, 1998, she was forced to file for personal bankruptcy, and she was granted a discharge on November 24, 1998.

Ms. Kaplan is presently employed as an office manager with an income of $24,000.00 per year. She currently lives with her mother and daughter. Her ex-husband's failure to pay child support and spousal maintenance continues, despite a settlement agreement reached in January 1999.

5. Petitioner was advised to file an Offer in Compromise with the Division, but, as of this date, has chosen not to do so.

CONCLUSIONS OF LAW

A. Tax Law § 612(a) defines New York adjusted gross income of a resident individual as Federal adjusted gross income with modifications as specified in that section. Pursuant to Internal Revenue Code ("IRC") § 408, an individual who receives compensation that is includible in gross income may establish and make contributions to an IRA. Under IRC § 408(d)(1), any amount paid or distributed out of an IRA is to be included in Federal gross income. Section 612 of the Tax Law does not contain a modification for IRA distributions, and thus, the distribution of $83,982.00 received by Ms. Kaplan in 1996 is properly subject to New York State personal income tax.

B. Tax Law § 684, entitled "Interest on underpayment," provides that "[I]f any amount of income tax is not paid on or before the last date prescribed in this article for payment [in this case April 15, 1997], interest on such amount . . . shall be paid for the period from such last date to the date paid . . . ."

By requesting that all or a portion of the interest charges be abated, petitioner, in essence, seeks an interest-free loan from the State of New York. As noted by the Tribunal in ***Matter of Rizzo*** (Tax Appeals Tribunal, May 13, 1993):

> Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due . . . . It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds . . . .

The imposition of interest is not meant to penalize petitioner for the late payment of the tax due for 1996. Rather, it is an attempt to make the State whole by having petitioner pay for the costs related to her use of the State's funds, and by compensating the State for the period of time when it was unable to use those funds.

Accordingly, based on the above, the interest, which was asserted against petitioner, is sustained.

C. Petitioner is seeking relief from her tax liabilities by requesting that the Division of Tax Appeals cancel the notice and demand based upon her inability to pay the assessment. This is, in effect, requesting that this forum impose an "Offer in Compromise" solution upon the parties. Although it was suggested to petitioner that she file an Offer in Compromise with the Division, Ms. Kaplan feels that she would not qualify for such a procedure.

D. Tax Law § 171(18-a) gives the Commissioner of Taxation and Finance the authority to compromise civil liability where such liability arises under the Tax Law with certain qualifications and limitations including the following:

> Whenever a compromise is made by the department of any such liability, there shall be placed on file in the office of the commissioner the opinion of the counsel for such department, with his reasons therefor, with a statement of: (a) the amount of tax and any other issues which may be the subject of such compromise, (b) the amount of interest, additions to the tax, or penalty imposed by law on the taxpayer . . . , and (c) the amount actually paid in accordance with the terms of the compromise. . . . [N]o such opinion shall be required with respect to the compromise of any civil liability in which the unpaid amount of tax which was the subject of the administration action (including any interest, additions to tax, or penalty) is less than twenty-five thousand dollars.

E. In ***Matter of Williams*** (September 1, 1994), the Tax Appeals Tribunal noted: "As to petitioner's 'Offer in Compromise', the Tax Appeals Tribunal lacks statutory authority to accept or even consider said offer." As a result, the Division of Tax Appeals does not have the authority to consider Ms. Kaplan's request to cancel the notice and demand based upon the difficult circumstances she has endured and her current financial situation. Furthermore, a "compromise" is an "arrangement arrived at . . . for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together" (Black's Law Dictionary 260 [5th ed 1979]), and an "offer of compromise" is "[a]n offer to settle a dispute or difference amicably for the purpose of avoiding a lawsuit and without admitting liability" (Black's Law Dictionary 976 [5th ed 1979]). For the Division of Tax Appeals to force an offer of compromise by a taxpayer on the Division would be counter to the idea of mutuality of agreement at the heart of the definition of compromise.

Nonetheless, due to the very difficult times which Ms. Kaplan has endured and the unfortunate financial situation she now finds herself in, it is strongly recommend that she follow the advice of the Division's representative and file an Offer in Compromise with the Division.

F. The petition of Eileen C. Kaplan is denied.

DATED: Troy, New York
August 17, 2000

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE