

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KERRY HONG	:	DETERMINATION
	:	DTA NO. 818282
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Year 1993.	:	

Petitioner, Kerry Hong, 5155 S. Torrey Pines Drive, #2016, Las Vegas, Nevada 89118, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1993.

On September 22, 2001 and October 5, 2001, respectively, petitioner, appearing *pro se*, and the Division of Taxation by its representative, Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by February 11, 2002, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner is jointly and severally liable with her former husband for taxes asserted as due and owing to the State of New York for the year 1993.

II. Whether petitioner is entitled to relief under the “innocent spouse” provisions of Tax Law § 651(b)(former [5]).

FINDINGS OF FACT

1. For the year 1993, Kerry Hong a/k/a Ke Li Hung (“petitioner”) filed a timely joint New York State and City of New York Resident Income Tax Return with her then husband, Peter L. Donahue, on which they indicated that they owed New York State personal income tax in the amount of \$3,679.00 and City of New York personal income tax in the amount of \$2,063.00, for a total amount due of \$5,742.00 for that year. Attached to the return were several wage and tax statements (forms W-2) which indicated that State tax of \$2,102.00 and City tax of \$316.00 had been withheld; therefore, the balance due was \$3,324.00. The return was signed both by petitioner and Peter L. Donahue. The sum of \$1,000.00 was remitted with the return, leaving a balance due of \$2,324.00.

2. Because the Division of Taxation no longer has a copy of the Notice and Demand issued to petitioner and Peter L. Donahue, it submitted the affidavit of Vita Gaedje, Tax Technician II, whose responsibilities include the review of personal income tax assessments currently involved in mediation or litigation as well as case coding and computations. Mr. Gaedje is fully familiar with the Division’s Case and Resource Tracking System (“CARTS”) whereby the Division maintains records on returns processing and accounts receivable. Information regarding the issuance of statutory notices is also maintained on CARTS. Attached to Mr. Gaedje’s affidavit was a printout of the CARTS data relating to the assessment at issue herein. The printout indicates that on August 1, 1994, a Notice and Demand for Payment of Tax Due in the amount of \$2,324.00 was sent to petitioner and her then husband, Peter Donahue. Payments of \$331.36 were credited to the assessment. As of the date of Mr. Gaedje’s affidavit (November 7, 2001), the outstanding balance was \$1,992.64, plus penalty of \$562.40 and interest of \$1,883.28, for a total amount due of \$4,438.32.

3. The Federal adjusted gross income of the couple was \$65,320.00 which consisted of business income in the amount of \$17,730.00 from a graphic consulting service of Peter Donahue as well as wages earned in the amount of \$47,974.00. According to the various wage and tax statements attached to the return, petitioner earned \$4,991.25 from LeMarc's Fifth Avenue Cards, Inc. and \$2,632.00 from Neuchatel Chocolate, Inc. The balance of the wage income was earned by Peter Donahue from a number of different employers.

4. On or about June 22, 2000, petitioner filed a Request for Innocent Spouse Relief (form IT-285) with the Division. By letter dated August 7, 2000, the Division, citing Tax Law § 651(b)(former[5]), denied innocent spouse relief to petitioner stating, in part, that a review of the file revealed that petitioner signed a joint return with a knowledge of the unpaid balance shown to be due and that "[w]hen a joint return is filed, each spouse is jointly and separately liable for the entire balance due, even if one spouse had no income. This responsibility applies even if a divorce decree or any other agreement states differently."

5. Petitioner submitted, along with her petition, an affidavit of her former husband, Peter L. Donahue, dated May 11, 1998, which stated, in pertinent part, as follows:

During the years 1993 and 1994 Kerry and I filed our taxes together as married filing joint return. However, the taxes incurred during those years are my responsibility. If you analyze the joint return for 1993 and 1994, you will see that I made the major portion of the income.

I want to absolve Kerry Hong of any responsibility for these back taxes. I will take full responsibility for this bill.

6. Petitioner also submitted, as an attachment to her petition, a letter from the Internal Revenue Service ("IRS") dated May 8, 2000 which pertained to the tax years 1993 and 1994. This letter states, in part, that petitioner had been relieved of the remaining liability for the tax

years 1993 and 1994, but that her payments on these accounts could not be refunded.

Accordingly, the IRS partially disallowed the claim under Internal Revenue Code § 6015(f).

SUMMARY OF PETITIONER'S POSITION

7. Petitioner alleges:

- a. Her former husband controlled the finances and made much more money than she did. What little income she made was subject to withholding;
- b. Her former husband agreed to pay the outstanding tax balance;
- c. She was forced to sign the return by her former husband;
- d. The IRS has relieved her from the responsibility for unpaid taxes for 1993.

CONCLUSIONS OF LAW

A. For the tax year 1993, Tax Law § 651(b)(former[5]) provided as follows:

(A) 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.

(B) For purposes of this paragraph, (i) the term 'grossly erroneous items' means, with respect to any spouse, any item of adjusted gross income attributable to such spouse which is omitted from New York adjusted gross income and any claim of a New York deduction, exemption, credit or basis by such spouse in an amount for which there is no basis in fact or law,

(ii) the term 'substantial understatement' means any understatement (as defined in subsection (p) of section six hundred eighty-five) which exceeds one hundred dollars.

B. In the present matter, petitioner and her former husband, Peter L. Donahue, filed a joint tax return for the 1993 tax year. However, except for a payment of \$1,000.00, the balance of tax shown to be due on the return (\$3,324.00 - \$1,000.00, or \$2,324.00) was not paid when the return was filed. Tax Law § 651(b)(former[2]), in effect for the year at issue, provided that when a joint return is filed, a husband and wife are jointly and severally liable for payment of the tax due. Here, petitioner signed the tax return with the knowledge that there remained a balance due and owing. Despite her assertion that she was forced to sign the return (there is no evidence in the record that petitioner was coerced to sign the return) and that her former husband agreed to pay the outstanding balance, the statute imposes joint and several liability which cannot now be disclaimed.

The “innocent spouse” provision of Tax Law § 651(b)(former[5]) is inapplicable in this matter because the statute applied only to situations where there was a substantial understatement of tax attributable to grossly erroneous items of one spouse, with no knowledge on the part of the other spouse that the tax was understated. This is clearly not the situation here. The tax due which is at issue in this matter was not the result of an understatement of income or the illegal claiming of a deduction, exemption or credit by petitioner’s former husband, but rather was shown as due and owing on the return filed and was, therefore, self assessed. Petitioner cannot reasonably claim that she had no knowledge that the tax was due given that the liability therefor was clearly disclosed on the return which she signed.

C. As to petitioner’s assertion that she should be entitled to innocent spouse relief because the IRS granted such relief to her, such assertion is rejected. The IRS letter of May 8, 2000 does not fully disclose the exact relief granted and the reasons therefor. However, in any case, 20 NYCRR 159.4 provides that the Division is not required to accept as correct, any change in a

taxpayer's Federal taxable income but, instead, may conduct an independent audit or investigation.

It should be pointed out that because petitioner's former husband, Peter L. Donahue, has, per his affidavit of May 11, 1998, accepted full responsibility for the taxes due for the year at issue (*see*, Finding of Fact "5"), it may be possible for petitioner to pursue legal action against Mr. Donahue for indemnification for any payments of tax, penalties or interest which she is required to make pursuant to this determination.

D. The petition of Kerry Hong is denied and the Notice and Demand for Payment of Tax Due issued August 1, 1994, as modified by payments made subsequent to its issuance (*see*, Finding of Fact "2"), is hereby sustained.

DATED: Troy, New York
July 3, 2002

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE