

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ESTATE OF ANDREA DUNHAM BURT :
 : DETERMINATION
 : DTA NO. 818708
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
and the Administrative Code of the City of New York :
for the Years 1977, 1978, 1979 and 1980. :

Petitioner,¹ Estate of Andrea Dunham Burt, c/o Barry Marcus, Executor of Estate of Andrea Dunham Burt, 575 Madison Avenue (1006), New York, New York 10022, filed a petition² for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1977, 1978, 1979 and 1980.

The Division of Taxation (“Division”), by its representative, Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel), filed a motion dated December 5, 2002 for an order granting summary determination and denying the petition. Petitioner did not file any timely³

¹ The petition in this matter was filed by Andrea Dunham Burt and her then husband, Michael Burt, who are both now deceased. Consequently, for purposes of this determination, the term “petitioner” refers to the estate of Andrea Dunham Burt.

² The undated petition was received on July 21, 1983 by the Tax Appeals Bureau, the predecessor to the Division of Tax Appeals.

³ The Division served a copy of its motion on Barry Marcus as executor of petitioner’s estate by a transmittal letter dated January 22, 2003 with a copy to attorney, Patricia Canzoneri, Esq. An affidavit dated March 17, 2003 of Barry Marcus in opposition to the Division’s motion was transmitted by a letter of attorney Canzoneri dated April 4, 2003. By a letter dated April 7, 2003, Assistant Chief Administrative Law Judge, Daniel J. Ranalli, advised Mr. Marcus that his papers “cannot be considered” since they were submitted over a month late. Attorney Canzoneri, by a letter dated April 8, 2003, filed with the Division of Tax Appeals a power of attorney executed by

reply papers which were due by February 21, 2003, and such date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affirmation and documents filed therewith, and the pleadings in this matter, Frank W. Barrie, Administrative Law Judge, renders the following order.

ISSUE

Whether additional taxes asserted due by the Division as the result of the disallowance of certain losses, generated by investment tax shelters under investigation by the Internal Revenue Service, should be abated on the basis of innocent spouse relief granted by the IRS.

FINDINGS OF FACT

1. Approximately 20 years ago, on April 8, 1983, the Division issued a Notice of Deficiency asserting additional New York State and City income tax due in the amount of \$48,282.00⁴ plus interest against Andrea Dunham Burt (“Dunham Burt”) and her husband, Michael Burt, for the years 1979 and 1980. Just over a month later, on May 25, 1983, the Division issued two additional notices of deficiency against Dunham Burt and her husband. One asserted additional New York State and City income tax due in the amount of \$3,601.00 plus interest for the year 1977, and the other asserted additional New York State and City income tax due in the amount of \$11,530.00 plus interest for the year 1978. Penalties were not asserted due for any of the years at issue.

2. Dunham Burt and her husband late filed their 1977 and 1978 New York State and City personal income tax returns on October 8, 1980. On their 1977 return, filed under the status

Barry Marcus, as executor of petitioner’s estate, authorizing her to represent petitioner in this matter.

⁴ The copies of the notices of deficiency in the record are extremely light and the amounts (especially cents) noted therein are not easily deciphered. However, in her affirmation dated November 29, 2002, attorney Neri set forth the dollar amounts of the deficiencies, and since they have not been challenged by the timely filing of opposing papers, they have been accepted.

“married filing joint return,” they reported New York taxable income of “none” and claimed a refund in the amount of \$11,755.73 representing the total amount of State and City taxes withheld and estimated taxes paid as follows:

Prepayments	Amount
State tax withheld	\$ 2,790.00
State estimated tax paid	7,005.73
City tax withheld	1,260.00
City estimated tax paid	700.00
Total	\$11,755.73

On their 1978 return, filed under the status “married filing separately on one return,” they reported New York taxable income for Mr. Burt of \$6,016.00 and for Dunham Burt of \$33,068.00 and calculated State and City income taxes for 1978 of \$4,646.24 consisting of \$304.12 on Mr. Burt’s taxable income and of \$4,342.12 on Dunham Burt’s taxable income. They claimed a refund in the amount of \$9,909.49 after subtracting their calculation of tax due for 1978 of \$4,646.24 from \$14,555.73, which represented the total amount of State and City taxes withheld and estimated tax paid as follows:

Prepayments	Amount
State tax withheld	\$ 2,080.00
State estimated tax paid	11,755.73
City tax withheld	720.00
Total	\$14,555.73

Dunham Burt and her husband timely filed their 1979 and 1980 New York State and City personal income tax returns pursuant to extensions to file (until 10/15/80 for the 1979 return and

until 10/15/81 for the 1980 return) duly obtained by the taxpayers. On their 1979 return, filed under the status “married filing joint return,” they reported New York taxable income of \$3,402.00 and calculated State and City income taxes for 1979 of \$105.10. They claimed a refund in the amount of \$10,209.88 after subtracting their calculation of tax due for 1979 of \$105.31 from \$10,315.19, which represented the total amount of State and City taxes withheld and estimated tax paid as follows:

Prepayments	Amount
State tax withheld	\$ 405.50
State estimated tax paid	9,909.49
City tax withheld	.20
Total	\$10,315.19

On their 1980 return, filed under the status “married filing joint return,” they reported New York taxable income of “none” and claimed a refund in the amount of \$10,809.88 representing the total amount of State tax withheld and estimated tax paid as follows:

Prepayments	Amount
State tax withheld	600.00
State estimated tax paid	10,209.88
Total	\$10,809.88

3. Most of the income reported on the tax returns for the years at issue was Dunham Burt’s income and not her husband’s. She had the following wages, reported on W-2 forms for

each of the years at issue, from D & M Research Corp., located at W 61 Glen Ave., Paramus, New Jersey⁵:

Year	Dunham Burt's wages from D & M Research Corp.
1977	\$62,000.00
1978	42,000.00
1979	51,750.00
1980	55,000.00

4. The tax returns include only two W-2 forms for Mr. Burt as follows:

Year	Employer	Amount
1979	Saint Luke's Lutheran Church	\$ 20.00
1980	City Center of Music & Drama, Inc.	\$1,753.28

The 1978 tax return also details what Mr. Burt categorized as his "business income" from the following "fees"⁶ he received:

Source of Income	Amount
Dunham & Marcus ⁷	\$10,135.00
Eastern Opera	1,305.00
Brockton Symphony	200.00
Handel & Hayden Society, Boston	500.00
Lake George Opera Festival	850.00

⁵ This Paramus, New Jersey address for petitioner's employer corresponds to the "home address" used by Dunham Burt and her husband on their State and City income tax returns at issue. In fact, Dunham Burt's home address during the period at issue was 530 Park Avenue, New York, New York.

⁶ It appears that Mr. Burt received income as a musician.

⁷ This item of income seems unrelated to Mr. Burt's musical performances.

Long Island Concert Society	250.00
Goldovsky Opera Theater	1,000.00
Trinity Church Manhattan	120.00
Seton Hall University, New Jersey	100.00
New York Grand Opera	200.00
New Mexico Symphony	500.00

5. For each of the years at issue, Dunham Burt included on her tax returns substantial investment losses. All of these losses were generated through brokerage or trading accounts which she owned and maintained although Mr. Burt might have directed or effectuated the actual transactions. In correspondence from Vincent Tese, a New York attorney, to Samuel Bloom⁸ at the Paramus, New Jersey address noted in Finding of Fact “3”, the following investment losses⁹ in Dunham Burt’s name are detailed:

Type of loss	Brokerage or trading firm ¹⁰	Amount of loss
1977		
Ordinary loss	Pershing	(\$105,470.00)
Short term capital loss	Competex	(99,180.00)
Short term capital loss	Competex	(3,116.00)
1978		
Ordinary loss	Pershing	(117,862.00)
1979		
Ordinary loss	Arbitrage Management	(138,164.00)

⁸ Mr. Bloom was petitioner’s former accountant.

⁹ Gains included in this correspondence have not been noted in the chart below.

¹⁰ These firms appear to trade in silver futures and Treasury Bill futures.

Short term loss	Competex S.A.	(255,874.73)
1980		
Long term capital loss	Competex S.A.	(143,430.64)
Ordinary loss	Arbitrage Management	(342,925.00)
Short term capital loss	Competex S.A.	(724,956.48)

6. As noted in Finding of Fact “1”, the notices of deficiency were issued approximately 20 years ago, and as noted in Footnote “2”, an undated petition challenging the notices was duly filed. Soon thereafter, on February 17, 1984, a conference in the former Tax Appeals Bureau was held in this matter. The conferee placed the matter in a suspended file to await the final determination from the Internal Revenue Service (“IRS”) with respect to the verification and explanation of the losses which generated the deficiencies at issue. In turn, the IRS issued a deficiency notice dated February 10, 1986 against Dunham Burt and her husband for the years at issue. By a petition dated May 7, 1986¹¹ filed with the United States Tax Court, Dunham Burt sought to challenge the Federal notice which had also disallowed the investment losses detailed above in Finding of Fact “5”. Approximately four years later on September 17, 1990, a conference was scheduled by the Bureau of Conciliation and Mediation Services (“BCMS”), but Dunham Burt failed to appear and a default order was issued. At her request, the default order was vacated but she failed to appear at the next scheduled conference. Further, during the period from 1994 through 2000, this matter was held in abeyance at Dunham Burt’s request. Yet, the Division monitored the delay by requesting frequent updates from Dunham Burt concerning the status of the Federal litigation.

¹¹ Eight years later in 1994, petitioner amended her petition in the United States Tax Court by adding a claim for innocent spouse relief.

7. In January of 2000, Dunham Burt entered into a Stipulation of Settled Issues with the IRS whereby it was agreed that under the innocent spouse provisions of IRC § 6015, she was not liable for the deficiencies in income tax for the years 1977 through 1981.¹² Subsequent to the settlement of her Federal tax case, the Division scheduled a BCMS conference on October 24, 2000, and by a conciliation order dated June 8, 2001, the notices of deficiency were sustained. By a petition dated August 27, 2001, Dunham Burt contended that the Division is barred from enforcing the notices at issue based on the innocent spouse relief granted by the IRS and that the Division's delay in assessing and collecting the taxes due constituted laches and a violation of the Statute of Limitations.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Here, petitioner did not timely respond to the Division's motion, and is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942).

B. As noted in Finding of Fact "7", the IRS agreed to provide Dunham Burt with innocent spouse protection with regard to the investment losses at issue. However, although this Federal determination may have some persuasive value, the State, as a separate sovereign, is not bound by this agreement on the part of the IRS (*cf., Ross-Viking Merchandise Corp. v. Tax*

¹² The year 1981 is not at issue herein although it was a year at issue in the Federal proceeding.

Appeals Tribunal, 188 AD2d 698, 590 NYS2d 576). Moreover, the innocent spouse provisions in the Internal Revenue Code at IRC § 6015 vary from the statutory provisions applicable to petitioner for the years at issue. It was not until the Laws of 1999 (ch 407), that New York adopted IRC § 6015 for tax years “beginning on or after January 1, 1999” (*see*, Tax Law § 654). Consequently the relevant analysis whether the deficiencies at issue may be abated based on Dunham Burt’s status as an innocent spouse varies from any analysis applied by the IRS in reaching its agreement to apply innocent spouse protection (*cf.*, *Codata Corp. v. Commissioner*, 163 AD2d 755, 558 NYS2d 723, 724 [wherein the court noted that “where the State tax laws specifically and expressly diverge from the Federal tax laws, there is no requirement that the court strain to read them as identical”]).

C. Prior to 1999, the innocent spouse provision in the Tax Law was more restrictive than the Federal standard (*see*, Tax Law former § 651[b][5]). For the years at issue, Tax Law former § 651(b)(5)(i) provided that:

Under regulations prescribed by the tax commission, if

(A) a joint return has been made . . . for a taxable year and on such return there was omitted from New York adjusted gross income an amount properly included therein which is attributable to one spouse and which is in excess of twenty-five percent of the amount of New York adjusted gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of such omission and

(C) taking in account whether or not the other spouse significantly benefitted directly or indirectly from the items omitted from New York adjusted gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission, 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 omission from New York adjusted gross income.

D. Chapter 65 of the Laws of 1985, effective April 17, 1985, eliminated the requirement that, in order to qualify for innocent spouse treatment, there had to be an omission from New York adjusted gross income in an amount which was in excess of 25 percent of the amount of New York adjusted gross income stated in the return. In addition chapter 65 of the Laws of 1985 also did away with the prior statutory mandate of “taking into account whether or not the other spouse significantly benefitted directly or indirectly from the items omitted from New York adjusted gross income.” However, for the years at issue, 1977 through 1980, the most restrictive version of the innocent spouse law, cited in Conclusion of Law “C”, applies to petitioner.

E. Initially, it is concluded that for the year 1978, since Dunham Burt filed separately on one return, as noted in Finding of Fact “2”, innocent spouse protection, which requires that “a joint return has been made,” is not applicable.

F. Further, in light of the fact that the disallowed tax shelter investments were *owned* by Dunham Burt, it is a veritable impossibility to confer innocent spouse status under the applicable New York law on her for the remaining years at issue. It simply cannot be concluded that she did not benefit directly or indirectly from the investment losses when she owned such investments. Furthermore, as noted in Finding of Fact “3”, Dunham Burt reported substantial wage income from employment with an entity named D & M Research Corp., which shared the same Paramus, New Jersey address as her accountant. Such fact raises a host of problems for petitioner to ever establish Dunham Burt’s *lack of knowledge* concerning the tax deficiencies relating to the investment losses at issue since notice and information concerning such losses were sent, as noted in Finding of Fact “5”, to Samuel Bloom at this very same Paramus, New Jersey location (*see, Macaluso v. Dept. of Tax. & Finance*, 259 AD2d 795, 686 NYS2d 193). Once again, given her ownership of the investments, it would be impossible for Dunham Burt to

establish that she neither *knew nor should have known* of the understatement of income (*cf.*, *Matter of Miller*, Tax Appeals Tribunal, February 22, 1991). Consequently, the Division is correct that it was not bound by the granting of innocent spouse protection to Dunham Burt by the IRS since under New York law, Dunham Burt was not entitled to such protection for the years at issue.

G. Petitioner's position that the Division is barred by laches from continuing to assert any liability against her based upon the three notices of deficiency at issue is also rejected. As detailed in Finding of Fact "6", any delay in resolving the petition at hand was caused primarily by Dunham Burt's request to await resolution of the related Federal matter. Moreover, even in the face of inaction by the Division, laches or estoppel may not be applied to bar the State from seeking to collect tax due and owing (*cf.*, *G.H. Walker & Co. v. State Tax Commission*, 62 AD2d 77, 403 NYS2d 811). Nor does it provide any basis to abate interest (*see*, *Matter of Toothaker*, Tax Appeals Tribunal, September 9, 1993).

H. Finally, the contention in the petition that the statute of limitations bars the assessments at issue is without merit. As noted in Finding of Fact "1", the notices of deficiency were issued in the spring of 1983, within the period of limitations based upon the filing dates of the tax returns at issue (*cf.*, *Matter of Pittman*, Tax Appeals Tribunal, February 20, 1992).

I. The petition of the Estate of Andrea Dunham Burt is denied, and the Notice of Deficiency dated April 8, 1983 and the two notices of deficiency dated May 25, 1983 are sustained.

DATED: Troy, New York
May 8, 2003

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE