

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MAYA ILYAICH</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 820875
for Redetermination of Deficiencies or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and New York City Personal Income Tax	:	
pursuant to the Administrative Code of the City of New	:	
York for the Years 2002 and 2003.	:	

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Petitioner, Maya Ilyaich, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the years 2002 and 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York, on July 24, 2007 at 3:00 P.M. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Allan Edmond).

Since neither party reserved time to file a post-hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether petitioner, a married individual, has established that she met the conditions set forth in Internal Revenue Code § 7703(b) to be considered unmarried and is thus entitled to claim head of household filing status for the two years at issue in this proceeding.

***FINDINGS OF FACT***

1. Petitioner, Maya Ilyaich, was born on May 1, 1974, and on September 9, 1992 she married Zakhar Ilyaich. In 1993 petitioner gave birth to a daughter, Mazol Ilyaich. A second daughter, Rachel Ilyaich, was born in 1999. Almost from the outset of her marriage, petitioner's relationship with her husband was strained, and they have experienced several separations and reconciliations.

2. For the 2002 and 2003 tax years, petitioner filed her New York State and City personal income tax returns claiming head of household filing status and two dependent exemptions, one for each of her daughters. The address shown on petitioner's 2002 tax return was "62-61 99<sup>th</sup> Street, 2FL, Rego Park, New York." Petitioner's 2003 tax return listed the same address, except it did not indicate "2FL" in the box for apartment number.

3. Petitioner's spouse also filed New York State and City personal income tax returns for 2002 and 2003 claiming head of household filing status and one dependent exemption. The address listed by Zakhar Ilyaich on his 2002 and 2003 tax returns was the same 62-61 99<sup>th</sup> Street, Rego Park, New York, address that was shown on petitioner's tax returns.

4. Based solely on a review of the addresses reported by petitioner and her husband on their respective separate New York personal income tax returns for the 2002 and 2003 tax years, the Division of Taxation ("Division"), on November 15, 2004, issued separate statements of proposed audit changes to petitioner asserting that additional New York State and City income tax was due for 2002 and 2003. Each Statement of Proposed Audit Changes contained the following explanation:

A recomputation of your return results in a balance due.

Our recomputation corrects the refund previously issued.

Based on available information, we have changed your filing status.

Married taxpayers living at the same address, who elect to file separate returns, must each claim the filing status "Married Filing Separate Return" on their New York returns.

Since your filing status is married filing separate returns, and your combined adjusted gross income (federal) is over \$32,000, you are not allowed the household credit.

Married persons filing separate returns generally cannot claim child and dependent care credit. Therefore, your child and dependent care credit has been disallowed.

If you are legally separated or lived apart from your spouse the last six months of the year, you may be able to file a separate return and still claim the credit.

Your earned income credit has been disallowed. You cannot claim the Earned Income Credit if your filing status was "married filing separately" UNLESS you filed jointly on your federal return and you were required to file separately because one spouse is a full year resident and the other is a nonresident or part year resident.

5. Based on the statements of proposed audit changes, the Division, on January 10, 2005, issued two notices of deficiency to petitioner asserting that she owed additional New York State and New York City personal income taxes of \$1,527.00 for 2002 and \$2,481.50 for 2003. Each Notice of Deficiency also asserted that interest was due.

6. During the years 2002 and 2003, petitioner and her husband were experiencing marital problems; however, they were not legally separated under a decree of divorce or of separate maintenance during these two years.

7. The residence located at 62-61 99<sup>th</sup> Street, Rego Park, New York, is a two-family house owned by petitioner's mother-in-law. For both years in dispute, petitioner and her two children resided in the upstairs apartment, while her estranged husband resided in the first floor apartment with his mother. Petitioner, a certified nurse's aide who earned approximately \$30,000.00 a year in wages, paid \$600.00 a month rent to her mother-in-law for all of 2002 and 2003 for the use of the second floor apartment. After the years in question, petitioner initiated divorce proceedings and moved out of the 62-61 99<sup>th</sup> Street, Rego Park, New York, second floor apartment.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 607, entitled "Meaning of terms," provides that the terms used in Article 22 of the Tax Law will have the same meaning as when used in a comparable context in the provisions of the Internal Revenue Code ("IRC") unless a different meaning is clearly required. Subsection (b) of Tax Law § 607 further provides that "an individual's marital or other status . . . shall be the same as his marital or other status for purposes of establishing the applicable federal income tax rates." Accordingly, it is appropriate to review the applicable provisions of the IRC, regulations and case law to determine if petitioner is entitled to claim head of household filing status under the facts presented in this case.

B. As relevant to this controversy, petitioner, in order to be eligible to claim head of household filing status, must be unmarried (IRC § 2[b][1]) or considered unmarried (IRC § 7703[b]) on the last day of each tax year in dispute. To be unmarried, a taxpayer must be legally separated from his or her spouse pursuant to a decree of divorce or of separate maintenance (IRC § 2[b][2][B]; 7703[a][2]). Certain married individuals can be considered unmarried if they meet the conditions set forth in IRC § 7703(b).

C. In the instant matter, it is undisputed that for the two years in question petitioner was not legally separated from her husband pursuant to a decree of divorce or of separate maintenance. Accordingly, resolution of the controversy at issue herein turns on whether petitioner has demonstrated that she is properly considered unmarried pursuant to IRC § 7703(b) for the tax years in question. After carefully reviewing all the evidence, I conclude that petitioner has sustained her burden of proof to show that she is, for the years at issue, entitled to claim head of household filing status. This conclusion is reached based on the determination that there is sufficient evidence to prove that: (i) petitioner and her husband did not occupy the same residence during the years at issue; (ii) petitioner solely and individually maintained the 62-61 99<sup>th</sup> Street, Rego Park, New York, second floor apartment for both years in dispute; (iii) the 62-61 99<sup>th</sup> Street, Rego Park, New York, second floor apartment was the principal place of abode of petitioner's two minor children; and (iv) petitioner was entitled to claim a deduction for a personal exemption for her minor children. Thus, even though petitioner was legally married during the years in question, she is nonetheless entitled to claim head of household filing status pursuant to IRC § 7703(b), which section applies to certain married individuals living apart.

D. While I am aware that petitioner's living arrangement for 2002 and 2003 was unusual and could not be considered traditional, it is noted that the Division's audit in this matter consisted solely of a review of the respective addresses reported on the personal income tax returns of both petitioner and her estranged husband. Accordingly, the Division has no evidence to prove, or even suggest, that the testimony of both petitioner and her estranged husband to the effect they were separated and living apart for 2002 and 2003 was not truthful or accurate. There is simply nothing in the record to discredit the testimony or documentary evidence adduced by petitioner.

E. Since the adjustments proposed by the Division for the 2002 and 2003 tax years are based solely on the change of petitioner's filing status from head of household to married filing separate and as this determination allows petitioner head of household status, there are no additional New York State and City personal income taxes due from petitioner for said years.

F. The petition of Maya Ilyaich is granted, and the two notices of deficiency dated January 10, 2005 are hereby canceled.

DATED: Troy, New York  
October 18, 2007

/s/ James Hoefer  
PRESIDING OFFICER