

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

JOSEPH V. RALLO AND ELAINE R. ROSA
F/K/A ELAINE R. RALLO

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1971 and 1972.

Petitioners, Joseph V. Rallo, address unknown, and Elaine R. Rosa, f/k/a Elaine R. Rallo, 89 Ridgeway Estates, Rochester, New York 14626, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971 and 1972 (File No. 13361).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September 18, 1986 at 9:15 A.M., with all briefs to be submitted by May 6, 1987. Petitioner Elaine R. Rosa appeared by James D. Doyle, Esq. Petitioner Joseph V. Rallo did not appear. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner Elaine R. Rosa, f/k/a Elaine R. Rallo, **was an "innocent spouse"** pursuant to Tax Law § 651(b)(5)(i) during the years at issue and thus not liable for the deficiency asserted herein.

FINDINGS OF FACT

1. On January 27, 1975, following an audit, the Audit Division issued a

Notice of Deficiency to Joseph V. Rallo and Elaine R. Rosa, dated January 27, 1975.

personal income tax for the years 1971 and 1972 in the respective amounts of \$1,094.88 and \$1,394.86 plus interest and fraud penalty.

2. Joseph V. and Elaine R. Rallo timely filed a petition with respect to the aforementioned deficiencies, but their failure to appear at a scheduled hearing in the matter resulted in the issuance of a default order by this Commission. At the request of petitioner Elaine R. Rallo, the default order previously issued by this Commission was vacated to allow her to protest said deficiencies at hearing. Accordingly, all references to petitioner herein, unless otherwise stated, refer to Elaine R. Rallo, now known as Elaine R. Rosa.

3. Joseph V. and Elaine R. Rallo filed joint Federal and State income tax returns during the years at issue. With respect to 1971, they reported \$5,200.00 in income. On audit, the Audit Division found \$17,578.08 in additional, unreported income for that year. With respect to 1972, Mr. and Mrs. Rallo reported no income on their return. On audit, the Audit Division found \$22,973.70 in additional, unreported income for that year.

4. At hearing, the Audit Division withdrew its assertion of fraud against petitioner herein.

5. Petitioner presented no evidence to refute the amounts of additional income found on audit.

6. All of the additional income found on audit was earned by Joseph V. Rallo. Petitioner earned no income during the years at issue.

7. Petitioner married Joseph V. Rallo in 1964 when she was 20 years of age. At that time, she had a high school diploma and two years of training at a business secretarial school. She received no further formal education subsequent to her marriage.

8. From the time she was married in 1964 through the years at issue, petitioner worked as a housewife and mother and did not work outside the home. Mr. Rallo owned and operated an insurance agency during that period.

9. Mr. and Mrs. Rallo had four children, two **of** whom were born prior to the period at issue and were between the ages of 4 and 6 years during this time. Additionally, one child was born to the Rallos in 1972.

10. The Rallo family resided at two locations during the years at issue. From approximately 1967 through the early part of 1971, they lived at 95 Laurelton Road in Rochester. They were forced to leave this residence in 1971 because of imminent foreclosure proceedings. They subsequently moved to a home on Culver Parkway in Rochester. This house was in a poorer condition than their Laurelton Road residence.

11. Mr. Rallo had complete control over the family finances during the marriage. He was in charge of paying all bills and taxes. From time to time, Mr. Rallo failed to pay the family's utility bills, and petitioner received telephone calls demanding payment **or** threatening action unless such bills were paid. Mr. Rallo refused **to** divulge any information with respect to such matters even when questioned by petitioner, saying only that he would "take care of things".

12. From time to time during the years at issue petitioner needed money to purchase groceries and, on such occasions, she had to ask Mr. Rallo for cash. He generally would then provide her with some cash, \$25.00 for example, with which she could buy groceries for the family. On occasion, Mr. Rallo refused to give his wife any grocery money, and she was then forced to turn to her mother for grocery money.

13. Mr. **Rallo** did not keep large amounts of cash at home or on his person. Petitioner did not know how much money Mr. Rallo earned.

14. Petitioner did not buy nor was she given any jewelry or furs during the period at issue. The Rallos took only one vacation, in 1965, during their marriage.

15. Mr. Rallo prepared the income tax returns for the years at issue. Petitioner signed those returns prior to Mr. Rallo's preparation thereof. At no time did Mr. Rallo allow petitioner to review the completed returns.

16. Petitioner's father-in-law was indicted **on** Federal income tax evasion charges not long before the commencement of the audit herein. Petitioner was aware of this indictment.

17. Petitioner had no knowledge **of** the Audit Division's audit of her and her husband's income tax returns until 1981.

18. Mr. Rallo purchased a Chris Craft cabin cruiser in 1971. Mr. Rallo did not discuss the purchase of the boat with his wife prior to taking delivery thereof. Petitioner had no knowledge of the cost of the boat or how Mr. Rallo paid for it.

19. Mr. Rallo used the boat frequently and often took the children boating. Petitioner used the boat very infrequently.

20. On March 28, 1981, Mr. Rallo formally entered the Federal Witness Relocation Program (FWRP) as a federally protected witness relative to his cooperation with the investigation and prosecution of organized crime.

21. Mr. Rallo's current whereabouts and identity are unknown to and unobtainable by petitioner as he was a recipient of an entirely new and secret identity as a relocated federally protected witness.

22. At the time immediately prior to Mr. Rallo's entering the FWRP, based upon statements then made to petitioner by agents of the FWRP, petitioner understood that any tax problems Mr. Rallo may then have had would be resolved upon his entry into the FWRP and that such relief would extend as well to petitioner, since Mr. and Mrs. Rallo filed their returns jointly.

23. Petitioner and her four children were invited to join the Federal Witness Protection Program as participants eligible for new identities and relocation but petitioner declined on behalf of herself and her children.

24. Petitioner was divorced from Mr. Rallo on February 8, 1983. She subsequently remarried and, as stated previously, is now known as Elaine R. Rosa.

CONCLUSIONS OF LAW

A. That during the years in issue Tax Law § 651(b)(5)(i) provided as follows:

"(5)(i) Under regulations prescribed by the tax commission, if

(A) a joint return has been made pursuant to paragraph (2)(A) or paragraph (3) of this subsection 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 per cent 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 into account whether or not the other spouse significantly benefited 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."

B. That Tax Law § 651(b)(5)(i) was enacted by Laws of 1972 (ch. 209). Section 4 of Chapter 209 provided that this section "shall take effect immediately and shall apply to all taxable years and periods to which article twenty-two of the tax law applies". Accordingly, § 651(b)(5)(i) *is* applicable to both of the years at issue herein.

C. That petitioner is entitled to the benefit of Tax Law § 651(b)(5)(i). Finding of Fact "3" establishes that the Audit Division's asserted deficiency of personal income tax was at least twenty-five percent of New **York** adjusted gross income. This deficiency *is* hereby sustained and thus the first requirement of Tax Law § 651(b)(5)(i) is satisfied.

D. That the remaining requirements of Tax Law § 651(b)(5)(i) have also been satisfied. There were insufficient facts available to petitioner to provide her with a reason to know **of** the omitted income and overwhelming facts to establish that petitioner did not know and reasonably could not have known of the omitted income. Petitioner was not permitted to participate in her family's financial affairs; she did not even see completed income tax returns; she had no say in determining which of her family's debts would be paid and which would not; she had no knowledge of her husband's income; her family was forced to move during the audit period because of financial difficulties; in view of Finding of Fact "10" petitioner's standard of living obviously did not suddenly rise during the audit period, but may have fallen. As to Mr. Rallo's purchase of a boat during this period, given his failure to pay certain other of his bills (Finding of Fact "11"), petitioner's failure to attribute this purchase to unreported income can hardly be said to be unreasonable. In light of the foregoing it would be inequitable to hold petitioner liable for the

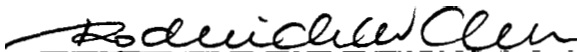
deficiency asserted herein. Accordingly, petitioner is entitled to the benefit that **is** provided for an innocent spouse by Tax Law § 651(b)(5)(i) (see Matter of Richard Cocilova and Joan Cocilova, State Tax Commission, February 24, 1987).

E. That the petition of Joseph V. Rallo and Elaine R. Rosa, f/k/a Elaine R. **Rallo** is granted with respect to petitioner Elaine R. Rosa; that the Notice of Deficiency, dated January 27, 1975, **is** cancelled insofar as it extends to petitioner Elaine R. Rosa; and that said Notice of Deficiency is sustained insofar as it extends to petitioner Joseph V. Rallo.

DATED: Albany, New York

STATE TAX COMMISSION

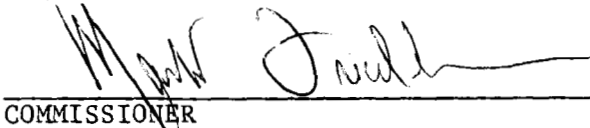
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PRESIDENT



COMMISSIONER



COMMISSIONER