

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Florence Schwartz

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Year :  
1967. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Florence Schwartz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Florence Schwartz  
1259 Curtis Place  
Baldwin, NY 11510

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of October, 1982.

*Carrie C. [Signature]*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 171

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

October 6, 1982

Florence Schwartz  
1259 Curtis Place  
Baldwin, NY 11510

Dear Mrs. Schwartz:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FLORENCE SCHWARTZ	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1967.	:	

Petitioner, Florence Schwartz, 1259 Curtis Place, Baldwin, New York 11510, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1967 (File No. 25918).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 10, 1981 at 9:00 A.M. Petitioner, Florence Schwartz, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

#### ISSUES

I. Whether petitioner, Florence Schwartz, is jointly and severally liable for the payment of personal income tax and interest due which was assessed against her and her now deceased husband.

II. Whether petitioner, if determined liable for the abovementioned taxes and interest, can be relieved of said liability under the "innocent spouse" provisions of section 651(b)(5) of the Tax Law.

#### FINDINGS OF FACT

1. Petitioner, Florence Schwartz, and her husband, Carl W. Schwartz, timely filed a U.S. Individual Income Tax Return for the year 1967 wherein their filing status was indicated as "Married filing joint return". Total

income of \$20,493.63 was reported on said return. Petitioner and her husband did not file a New York State income tax return for 1967.

2. On June 15, 1970, the Audit Division issued a Notice of Deficiency to Carl W. and Florence Schwartz for the year 1967 asserting that personal income tax of \$984.36 was due, together with penalty [Tax Law section 685(a)] and interest. The Notice of Deficiency was based on a Statement of Audit Changes, originally dated December 10, 1969, wherein the assessment was explained in the following statement:

Since you failed to reply to our letters of April 22, 1969 and September 19, 1969, we have computed your 1967 New York State income tax liability on the basis of information available in this office. Penalty is imposed pursuant to Section 685(a) of the New York State Income Tax Law for failure to file a 1967 New York State income tax return.

The additional tax due of \$984.36 was computed using a total New York income figure of \$20,493.63, while the maximum \$1,000.00 standard deduction and five personal exemptions totaling \$3,000.00 were allowed as deductions in arriving at taxable income. Neither petitioner, Florence Schwartz, or her husband filed a petition for redetermination of the deficiency dated June 15, 1970.

3. On November 29, 1971 the Audit Division issued a Notice of Additional Tax Due to Carl W. Schwartz and Florence Schwartz, his wife, for the year 1967, assessing additional personal income tax due of \$433.30, plus penalty [Tax Law section 685(a)] and interest. The notice dated November 29, 1971 was "...based on unreported Federal audit changes".

4. Subsequent to the notice dated November 29, 1971, the Audit Division recomputed Mr. and Mrs. Schwartz's 1967 New York State personal income tax liability by allowing itemized deductions of \$4,571.60 and cancelling the late filing penalty asserted pursuant to section 685(a) of the Tax Law. Said

recomputation, which took into consideration the unreported Federal audit changes referred to in Finding of Fact "3", supra, resulted in a total tax due of \$1,140.59. The revised tax due of \$1,140.59, plus interest of \$718.20, was paid by petitioner Florence Schwartz on November 28, 1978.

5. On January 12, 1979 Florence Schwartz filed a claim for refund requesting that the \$1,858.79 paid on November 28, 1978 be returned since she was an "innocent spouse". The Audit Division denied her claim in full via a Notice of Disallowance dated March 26, 1979. Florence Schwartz timely filed a petition for refund, said petition being dated May 13, 1979.

6. During the year 1967 petitioner was not employed nor did she earn any income from other sources. Total income reported on the 1967 joint Federal income tax return of petitioner and her husband represented wages earned solely by Carl W. Schwartz. Petitioner had no knowledge of her husband's business affairs and met her expenses through a weekly allowance given her by Mr. Schwartz. Petitioner and her husband did not have joint checking or savings accounts.

7. Although experiencing martial discord, petitioner and her spouse nevertheless occupied the same residence during the year 1967 and lived together as husband and wife. Petitioner and her husband were first legally separated in 1972. Carl W. Schwartz died in May, 1974, leaving no assets.

#### CONCLUSIONS OF LAW

A. That section 651(b)(2) of the Tax Law provides that:

If the federal income tax liabilities of husband and wife... are determined on a joint federal return, or if neither files a federal return:

(A) they shall file a joint New York income tax return, and their tax liabilities shall be joint and several except as provided in paragraph (5) of this subsection (b)...or

(B) they may elect to file separate New York income tax returns on a single form if they comply with the requirements of the tax commission in setting forth information, in which event their tax liabilities shall be separate...

B. That since petitioner and her husband did not elect to file separate New York income tax returns on a single form, the Audit Division has properly computed their 1967 personal income tax liability on the basis of a joint return, thereby causing petitioner, Florence Schwartz, to be jointly and severally liable for any tax, penalty or interest due within the meaning and intent of section 651(b)(2)(A) of the Tax Law.

C. That the "innocent spouse" provisions of section 651(b)(5) of the Tax Law contain three qualifying conditions, the first of which is that:

(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.

D. That the "innocent spouse" provisions of section 651(b)(5) of the Tax Law are in all material respects identical to the "innocent spouse" provisions contained in section 6013(e) of the Internal Revenue Code. The U.S. District Court in U.S. v. Bingham, 78-1, USTC §§9368 opinioned that "The innocent spouse statute is plainly inapplicable, since this litigation does not involve tax liability stemming from understated income on the returns, but instead simply nonpayment". That petitioner is not entitled to relief under the "innocent spouse" provisions of section 651(b)(5) of the Tax Law since the tax obligation in question did not arise from understated income on the return and also due to the fact that a joint New York income tax return was not filed.

E. That the petition for refund of Florence Schwartz is denied and the Notice of Disallowance dated March 26, 1979 is hereby sustained.

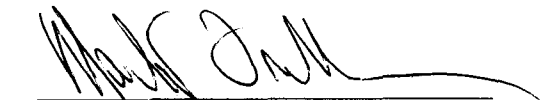
DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER