

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Louise Kaplan :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1978 & 1979. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Louise Kaplan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louise Kaplan
30 Vassar St.
Staten Island, NY 10314

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
7th day of November, 1985.

David Parchuck

Commie R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Louise Kaplan :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1978 & 1979. :
:

AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Scott J. Milchman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Scott J. Milchman
299 Broadway, Suite 1420
New York, NY 10007

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
7th day of November, 1985.

David Parchuck

Annex A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Louise Kaplan
30 Vassar St.
Staten Island, NY 10314

Dear Mrs. Kaplan:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Scott J. Milchman
299 Broadway, Suite 1420
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LOUISE KAPLAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1978 and 1979.	:	

Petitioner, Louise Kaplan, 30 Vassar Street, Staten Island, New York 10314, 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 1978 and 1979 (File No. 36194).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 12, 1984 at 1:15 P.M. and was continued to conclusion before the same Hearing Officer at the same location on April 2, 1985 at 9:15 A.M., with all briefs to be submitted by August 2, 1985. Petitioner appeared by Scott J. Milchman, Esq. The Audit Division appeared on July 12, 1984 by John P. Dugan, Esq. (Irving Atkins, Esq., of counsel), and on April 2, 1985 by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner signed and filed joint New York State income tax resident returns with her husband for the years 1978 and 1979.

II. Whether, if petitioner signed and filed joint returns as described, she is liable for additional personal income tax plus penalty and interest for such years, or rather qualifies for relief therefrom as an "innocent spouse".

FINDINGS OF FACT

1. For each of the years 1978 and 1979, New York State income tax resident returns were timely received by the Audit Division in the names of Gary L. Kaplan and petitioner, Louise Kaplan, husband and wife. These returns were filed under filing status "3" (i.e. "married filing joint return"), reflected all income as having been earned by Gary L. Kaplan, indicated petitioner's occupation as "housewife" and reflected signatures of Gary L. Kaplan and petitioner, Louise Kaplan.

2. In or about 1981, Gary L. Kaplan was convicted of embezzling from his employer the sums of \$5,108.82 in 1978 and \$174,557.46 in 1979.

3. On September 10, 1981, following an audit by its Special Investigations Bureau, the Audit Division issued to petitioner and to Gary L. Kaplan a single Notice of Deficiency asserting additional personal income tax due for the years 1978 and 1979 in the aggregate amount of \$32,063.21, plus a fraud penalty pursuant to Tax Law section 685(e) equal to fifty percent of the asserted deficiency, plus interest. The asserted deficiency was premised upon inclusion of the funds embezzled by Gary L. Kaplan as additional income subject to tax, with petitioner's liability based upon the filing of a joint return for each of the years in question.¹

4. Petitioner was not employed during the years in question and spent her time in the care and upbringing of her two minor children. Petitioner was not in any manner involved in or party to the embezzlement perpetrated by Gary L.

1 Petitioner timely filed a petition protesting the Notice of Deficiency. There is no evidence in the record to indicate that Gary L. Kaplan timely protested the Notice of Deficiency.

Kaplan, nor did she know of the embezzlement until Mr. Kaplan was indicted for this crime.

5. During the years in question, Gary L. Kaplan alone handled all of the family's finances, including grocery shopping and paying all bills, and petitioner was not allowed to open any mail nor was she given (or given access to) any funds. A portion of the embezzled funds were allegedly used by Gary L. Kaplan to purchase a Chevrolet Corvette automobile and a large boat. Petitioner was not allowed access to these items nor did she ever use them.

6. Petitioner testified that she did not prepare, sign or file any tax returns for 1978 or 1979, and did not believe she was required to file any returns. She did see Gary L. Kaplan working on tax returns at various times, but she never asked questions or became involved with him in this work.

7. Petitioner's signature, as appearing on the two tax returns in question, is distinctly different from her signature as appearing on other documents introduced in evidence, including a notarized power of attorney and her petition. Furthermore, handwriting expert Felix Klein testified that, in his opinion, the two returns in question had not been signed by the petitioner but rather were clearly forgeries.

8. At the commencement of the hearing on April 2, 1985, the Audit Division withdrew its assertion of the fraud penalty [Tax Law section 685(e)], and asserted in its place the (lesser) negligence penalty provided for by Tax Law section 685(b).

CONCLUSIONS OF LAW

A. That the burden of proof in any hearing under Article 22 of the Tax Law is governed by section 689(e) of the Tax Law, which in pertinent part provides:

"(e) Burden of proof. - In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

(1) whether the petitioner has been guilty of fraud with intent to evade tax;..."

B. That petitioner was not employed nor did she otherwise have any income (or items of tax preference) subject to tax during either 1978 or 1979. Accordingly, petitioner was not required to file federal income tax returns for such years (see I.R.C. §6011, 6012).

However, notwithstanding that petitioner had no income and was not required to file returns, she could have chosen to file tax returns for either or both years, including joint returns with her husband, Gary L. Kaplan (I.R.C. §6013).

C. That Tax Law section 611(b) provides, in relevant part, as follows:

"Husband and wife.

(1) If the Federal taxable income of husband or wife is determined on a separate Federal return, their New York taxable incomes shall be separately determined.

(2) If the Federal taxable income of husband and wife is determined on a joint Federal return, or if neither files a Federal return:

(A) their tax shall be determined on their joint New York taxable income, or

(B) separate taxes may be determined on their separate New York taxable incomes if they so elect and if they comply with the requirements of the tax commission in setting forth information on a single form."

D. That Tax Law section 651(a) provides, in pertinent part, as follows:

"General. On or before the fifteenth day of the fourth month following the close of a taxable year, an income tax return under this article shall be made and filed by or for:

(1)(A) every resident individual required to file a Federal income tax return for the taxable year, or (B) having New York adjusted gross income for the taxable year, determined under section six hundred twelve, in excess of the sum of his New York personal exemptions, provided his New York adjusted gross income for the taxable year is more than two thousand five hundred dollars or in the case of any husband and wife whose New York adjusted gross income for the taxable year determined jointly, is more than five thousand dollars, or the aggregate of whose New York adjusted gross income for the taxable year, determined separately, is more than five thousand dollars, or (C) having any items of tax preference in excess of the specific deduction provided in subsection (c) of section six hundred twenty-two;"

E. That if a (New York) resident husband and wife file a joint Federal return:

"(1) They are required to file a joint New York income tax return and their liabilities are joint and several, except as provided in section 651(b)(5) of the Tax Law (the New York 'Innocent Spouse' provision) or section 685(e) (fraud penalty); or

(2) They may elect to file separate returns on the combined form, in which event their tax liabilities are to be separate, except as provided in section 651(b)(4) (regarding withheld taxes and estimated payments)." [Tax Law §651(b)(2)].

F. That based upon the foregoing, had petitioner in fact filed joint Federal returns with Gary L. Kaplan (even though not required to file any returns) and failed to elect with Mr. Kaplan to file separate New York State returns, liability for tax on the additional income at issue would be a joint and several liability, including petitioner. However, based upon the documentary evidence submitted, and giving weight also to petitioner's credible testimony, it is clear that petitioner did not file a joint Federal return with her husband, Gary L. Kaplan, for either of the years at issue. The signature on the Federal returns submitted in evidence is patently different from petitioner's signature on several other documents, and was adjudged a forgery of petitioner's signature by a handwriting expert. Accordingly, since petitioner did not join in the filing of joint Federal returns for 1978 or 1979 and was not otherwise

required to file Federal or New York State tax returns for such years, she is not liable for the deficiency issued based on additional unreported income of Mr. Kaplan

G. That Issue "II" is rendered moot.

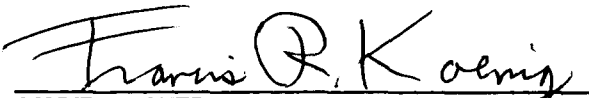
H. That the petition of Louise Kaplan is hereby granted and the Notice of Deficiency dated September 10, 1981 cancelled insofar as it applies to Louise Kaplan.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER