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STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

*No 66*

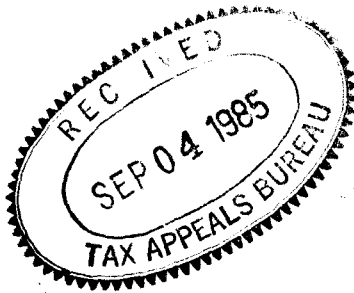
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Martin Masone

10 Norview Court

~~Hartford, CT 06111~~



**CERTIFIED**

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**MAIL**

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

August 21, 1985

Martin Masone  
10 Norview Court  
Huntington, NY 11743

Dear Mr. Masone:

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 & 722 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
PATRICIA MASONE  
for Redetermination of a Deficiency or for  
Refund of Personal Income and Unincorporated  
Business Taxes under Articles 22 and 23 of the  
Tax Law for the Years 1977, 1978 and 1979.

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DECISION

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In the Matter of the Petition  
of  
MARTIN MASONE  
for Redetermination of a Deficiency or for  
Refund of Personal Income and Unincorporated  
Business Taxes under Articles 22 and 23 of the  
Tax Law for the Years 1977, 1978 and 1979.

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Petitioners, Patricia Masone, 24 Maplewood Drive, Northport, New York 11768 and Martin Masone, 91 Hudson Avenue, Brentwood, New York 11717, filed a joint petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1977, 1978 and 1979 (File Nos. 34601 and 34602).

A consolidated small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 12, 1984 at 2:30 P.M. and continued to conclusion on December 5, 1984 at 12:25 P.M. for Patricia Masone and at 3:55 P.M. for Martin Masone. Petitioner Patricia Masone appeared by William Bernstein, Esq. Petitioner Martin Masone appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioners' New York State personal income tax liabilities should properly be computed based on the filing status "Married filing separately on one return" or "Married filing joint return", where for Federal purposes they filed joint returns for each of the years at issue.

FINDINGS OF FACT

1. Petitioners, Patricia Masone and Martin Masone, were married in 1967. In January, 1980, they were legally separated and subsequently, in August, 1983, they were divorced.

2. On December 10, 1980, the Audit Division issued a Statement of Personal Income Tax Audit Changes and a Statement of Unincorporated Business Tax Audit Changes to petitioners for the years 1976 through 1979, inclusive. Petitioners filed joint Federal returns for said years. However, since the Audit Division had no record of New York State returns having been filed by petitioners for said years, the tax liabilities computed on said statements were based on amounts reported by the individual petitioners as business net income on their separate Federal schedules C, plus amounts determined on audit to be "additional unreported income". Said liabilities, for both personal income tax and unincorporated business tax purposes, were computed on a joint basis. Accordingly, two (2) notices of deficiency were issued jointly against petitioners on March 11, 1981. One such notice asserted personal income tax of \$15,292.52, plus penalties and interest of \$8,538.23, for a total due of \$23,830.75. The other notice asserted unincorporated business tax of \$5,809.51, plus penalties and interest of \$3,304.54, for a total due of \$9,114.05. For personal income tax purposes, said penalties were asserted for

failure to file returns, failure to pay the taxes determined to be due, negligence and failure to file declarations of estimated tax, pursuant to sections 685(a)(1), 685(a)(2), 685(b) and 685(c) of the Tax Law, respectively. For unincorporated business tax purposes, the penalties were asserted for identical violations pursuant to said Tax Law sections, which are incorporated into Article 23 of the Tax Law by section 722(a).

3. Petitioners submitted books and records at a pre-hearing conference which, upon review, resulted in cancellation of the deficiencies asserted for 1976 and substantial reductions to the adjustments made for the remaining years at issue. The revised liabilities for 1977, 1978 and 1979 were recomputed based on a filing status of "married filing separately". The revised adjustments for "additional income per field audit" of \$7,803.00 (1977), \$2,881.00 (1978) and \$8,910.00 (1979) were attributable solely to Mr. Masone according to said recomputations. The revised separate tax deficiencies which resulted from the pre-hearing conference were as follows:

Patricia Masone

<u>Year</u>	<u>Unincorporated Business Tax</u>	<u>Personal Income Tax</u>
1977	\$ -0-	\$ 189.00
1978	98.75	314.50
1979	-0-	680.50
Total	<u>\$ 98.75</u>	<u>\$1,184.00</u>

Martin Masone

<u>Year</u>	<u>Unincorporated Business Tax</u>	<u>Personal Income Tax</u>
1977	\$ 886.00	\$1,277.00
1978	228.75	314.50
1979	790.00	680.50
Total	<u>\$1,904.75</u>	<u>\$2,272.00</u>

4. Neither petitioner contested the revised adjustments which were determined as the result of the pre-hearing conference. The only issue to be decided herein is whether petitioners' tax liabilities should be computed based on the filing status "Married filing joint. return" or the filing status "Married filing separately on one return".

5. During their respective continued hearings, petitioner Patricia Masone argued that the revised personal income tax liabilities should be computed separately, while petitioner Martin Masone argued that the revised personal income tax liabilities should be computed on a joint basis.

6. Petitioner Patricia Masone's desire for the personal income tax liabilities to be computed on a separate basis is understandable since this method would result in a lesser liability and she would not be held liable for any deficiency asserted against Martin Masone.

7. Petitioner Martin Masone's desire for the personal income tax liabilities to be computed on a joint basis appears to be solely the result of marital discord. He desires a joint filing even though his tax liability may be greater. He stated during the hearing that "I feel that the responsibility and liabilities should be borne equally between my ex-wife and myself, and I'm willing to go along with that, and even to the point that the State comes after myself for everything, because as I stated before to my wife -- my ex-wife's attorney, it's a moral issue with me, to myself, and have -- I'll pay all, but I'm not -- I won't give in just to the point -- I can't do it for me. And that's the only position I have."

8. The files contain copies of New York State personal income tax returns prepared for petitioners by Mr. Masone's business accountant for the years 1977, 1978 and 1979. The filing status claimed on each return was "Married

filing separately on one return". Said returns were never actually filed although one copy of the 1977 return was signed by both petitioners.

CONCLUSIONS OF LAW

A. That section 651(b)(2) of the Tax Law provides, in pertinent part, 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) and in subsection (e) of section six hundred eighty-five, or

(B) they may elect to file separate New York income tax returns on a single form..." (emphasis supplied).

B. That the exceptions provided in sections 651(b)(5) and 685(e) are not applicable in the instant case.

C. That pursuant to section 651, subsections (b)(2)(A) and (b)(2)(B) if, as in the instant case, petitioners do not concur in their election to file separate New York returns, their New York personal income tax liabilities must be computed based on the filing status "Married filing joint return."

D. That the revised separate unincorporated business tax liabilities, as scheduled in Finding of Fact "3", supra, are sustained since each petitioner was engaged in a separate unincorporated business. The provisions of section 651(b) are specifically inapplicable to unincorporated business tax by virtue of section 722(a) of Article 23 of the Tax Law.


E. That the joint petition of Patricia Masone and Martin Masone is granted to the extent provided in Conclusions of Law "C" and "D", supra, and except as so granted, said petition is, in all other respects, denied.


F. That the joint Notice of Deficiency issued March 11, 1981 with respect to personal income tax is to be modified so as to be consistent with the decision rendered herein. That the joint Notice of Deficiency issued March 11, 1981 with respect to unincorporated business is tax modified to the extent that the liability of each petitioner is to be computed separately, as scheduled in Finding of Fact "3", supra. Any assessment of unincorporated business tax made with respect thereto shall be separate rather than joint.

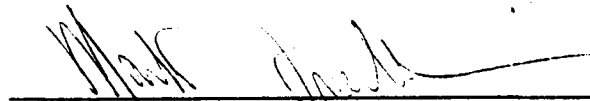
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER