STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **FRANK S. AND CHRISTINA YERRY** | : | DECISION<br>DTA NO. 827291 |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2009, 2010, 2011, 2012 and 2013. | : | |

Petitioners, Frank S. and Christina Yerry, filed an exception to the determination of the Administrative Law Judge issued on December 8, 2016. Petitioner Frank S. Yerry appeared pro se and on behalf of his spouse, petitioner Christina Yerry. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec and Ellen K. Roach, Esqs., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was heard on July 20, 2017 in Albany, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## *ISSUES*

I. Whether the Division of Taxation properly determined petitioners' tax liability for the years 2009, 2010, 2011, 2012 and 2013.

II. Whether petitioner Christina Yerry is subject to a penalty for fraud.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for finding of fact

15, which we have modified to more accurately reflect the record. As so modified, the Administrative Law Judge's findings of fact are set forth below.

1. On June 26, 2014, the Albany County District Attorney's Office (District Attorney's Office) sent a letter to the Division of Taxation (Division) requesting assistance with an investigation of petitioner Christina Yerry.[1] At the District Attorney's request, petitioners' tax returns as well as those of Carol LaBoissiere (the victim), a neighbor of petitioners, were reviewed by the Division's auditor. Following the Division's review, the Division referred the matter to the District Attorney's Office for an investigation of possible tax fraud.

2. The District Attorney's Office Assistant District Attorney (ADA) provided petitioners' bank statements[2] for the audit period as well as the victim's bank statements to the Division for audit and for analysis. The criteria for review by the Division's auditor was set forth by the ADA. The auditor was asked to review automatic teller machine withdrawals from the victim's bank accounts, transactions between the victim and petitioners, checks of the victim deposited directly into petitioners' accounts, and payments to SMART, LLC.[3]

3. Based upon the auditor's examination, the ADA identified $208,602.70 of monies stolen from the victim by petitioner during the years 2009 through 2013. In arriving at the amount of theft, cash deposited in the victim's bank accounts and checks from petitioner were netted against the transactions identified as theft by the ADA.

4. On August 1, 2014, an Albany County Grand Jury returned a six-count indictment

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[1] All references to petitioner are to petitioner Christina Yerry whereas all references to petitioners are to Frank S. and Christina Yerry unless otherwise noted.

[2] All of petitioners' accounts were jointly held by petitioners.

[3] The auditor identified SMART, LLC as a tuition payment service.

against petitioner Christina Yerry, to wit: (i) grand larceny in the second degree; (ii) identity theft in the first degree; and (iii) four counts of criminal possession of a forged instrument in the second degree.

5. On January 16, 2015, petitioner pled guilty before the Honorable Roger D. McDonough to one count of attempted grand larceny in the second degree.

6. Before Judge McDonough took the plea, he questioned petitioner regarding her age, her competency and general understanding of the charges. The judge specifically asked if she had received adequate time to speak with her lawyer and whether she was "highly satisfied with his representation." Petitioner responded in the affirmative to these questions. The judge, through a series of questions, asked petitioner if she was aware of her right to a trial, of the people's burden to prove her guilt beyond a reasonable doubt in the event of a trial, that it was not necessary for her to testify at a trial, and that she was entitled to question the witnesses against her and present her own witnesses. When asked if she understood that pursuant to her plea, she gave up all of these rights, petitioner again responded in the affirmative. Petitioner, by responding to the judge's questions, indicated that she was not threatened or forced in any way to plead guilty. The judge asked petitioner if she was pleading guilty because she was, in fact, guilty of the crime of attempted grand larceny in the second degree. Petitioner responded in the affirmative. The questioning then went as follows:

> "THE COURT: The indictment in this case, as amended for the purposes of the plea, charges as follows: That on or about and between February 25th, 2009 and January 1st, 2014, at various locations in the County of Albany, State of New York, you did steal property. . . valued in excess of $50,000, to wit:
>
> Between the aforesaid dates and at the aforesaid locations, you did attempt to steal in excess of $50,000 from Carol LaBoissiere – am I pronouncing that correctly?
>
> MS. BLAIN-LEWIS [the ADA]: Yes, your Honor.

THE COURT: In the form of United States currency by means of cashing checks belonging to Ms. LaBoissiere, cashing checks drawn on accounts of Ms. LaBoissiere, and withdrawing funds from accounts of Ms. LaBoissiere without permission or authority to do so; is that, in fact, the case, ma'am?

THE DEFENDANT: Yes, sir.

THE COURT: Tell me what happened.

THE DEFENDANT: We were actually very close friends, and I did a lot for the family, and that included banking and –

THE COURT: Did you have authority or permission to withdraw $208,602.70?

THE DEFENDANT: No sir.

THE COURT: Is that acceptable to the People?

MS. BLAIN-LEWIS: It is the People's position, your Honor, that many of the funds that were withdrawn were withdrawn with checks that were forged by the defendant.

THE COURT: All right. Ms. Yerry, did you attempt to access these funds without permission or authority by using checks in which you forged a signature?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that acceptable to the People?

MS. BLAIN-LEWIS: Yes, your Honor.

THE COURT: And again, Ms. Yerry, you understand that you did not have permission or authority to withdraw those funds or conduct those activities; is that correct?

THE DEFENDANT: Yes, sir."

7. Prior to petitioner taking the plea, the ADA indicated that in addition to petitioner's plea of guilty to the charge of attempted grand larceny in the second degree, restitution of $208,602.70 would be sought. The Judge questioned petitioner's lawyer as follows:

"THE COURT: Mr. Knox, is that your understanding of the plea offer in this case?

> MR. KNOX: That is, your Honor, except to just expand on the restitution, that that number is a cap, and the People are going to allow me to look at their figures to do my due diligence to make sure that I concur with their analysis.
>
> THE COURT: Well, let's assume a worst case scenario, that there's not concurrence.
>
> MR. KNOX: I've informed Ms. Yerry that, ultimately, she's liable under the terms of this plea up to that amount.
>
> THE COURT: All right. Is she waiving her right to a restitution hearing in that regard?
>
> MR. KNOX: Yes, judge."

8. On March 5, 2015, petitioner's defense counsel and the ADA met and came to an agreement on the amount of restitution to be paid by petitioner. Based upon the meeting, the amounts originally identified as theft by the ADA were adjusted to remove various checks signed by the victim's husband, checks signed by the victim, a hearing aid payment, and payments for Time Warner Cable, National Grid and the Department of Motor Vehicles. Added to the theft amount were bank fees incurred by the victim resulting in an agreed amount of $195,744.65 in restitution.

9. On March 13, 2015, a restitution order was signed by Judge McDonough, ordering petitioner to pay restitution in the amount of $145,744.65[4] to the victim plus surcharges and fees.

10. On April 3, 2015, the Division issued a notice of deficiency, notice number L-042669798-9, asserting tax due of $11,160.00 plus interest and penalty for the 2009 through 2013 tax years. No explanation was provided in the body of the notice for how the tax was determined.

11. On April 29, 2015, the auditor sent petitioner a letter explaining the basis of the notice

[4] The restitution order originally provided for restitution of $195,744.65, but was reduced to $145,744.65 to take into account $50,000.00 petitioner paid at sentencing.

of deficiency. Specifically, the Division assessed tax on the theft proceeds stolen by petitioner from the victim as determined by the restitution order and by petitioner's plea of guilty to attempted grand larceny in the second degree. The unreported income by year is as follows:

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|---|---|
| 2009 | $25,545.24 |
| 2010 | $53,953.05 |
| 2011 | $57,517.60 |
| 2012 | $34,805.76 |
| 2013 | $23,923.00 |
| **TOTAL** | **$195,744.65** |

The letter also explained that fraud penalty was also assessed.

12. The following table is a comparison of federal adjusted gross income (FAGI) as originally reported on petitioners' jointly filed New York State resident income tax returns during the years at issue and as adjusted by the auditor:

| Year | Reported FAGI | Adjusted FAGI |
|---|---|---|
| 2009 | $92,025.00 | $117,570.00 |
| 2010 | $64,351.00 | $118,304.00 |
| 2011 | $17,480.00 | $74,998.00 |
| 2012 | $11,351.00 | $46,157.00 |
| 2013 | ($3,072.00) | $20,851.00 |

13. By letter dated October 29, 2015 the Division adjusted the notice of deficiency to remove tax on $3,200.00 of bank fees incurred by the victim that were included in the restitution order. The adjustment resulted in a decrease of tax of $174.00 and corresponding penalties and interest.

14. In addition to the notice of deficiency at issue here, the Division issued a notice of

additional tax due to petitioners on April 8, 2015, which asserted a deficiency based upon a federal audit change that petitioners did not report to the Division. The federal audit change was the result of a distribution of $187,194.76 from a retirement account that was not reported on their personal income tax return in 2011. When questioned at the hearing in this matter, Mr. Yerry claimed his wife prepared the couple's tax returns and this was a mere oversight.

15. At the hearing in this matter, petitioners submitted various receipts and canceled checks purportedly indicating items and services paid for by petitioner but in the victim's name. Some of these receipts were for such things as airline flights, hotel lodging, limousine services, building materials and electronic items. Notations on some of these receipts allege that petitioner arranged for work done on the victim's house at the victim's request. Also included were checks made out to cash on one of petitioners' checking accounts that purportedly paid for a contractor's labor at the victim's house. According to notations accompanying the checks and the testimony of petitioner's daughter, Lauren Yerry, petitioner handled many of the financial dealings of the victim and arranged for many renovations at the victim's residence during the time encompassing the thefts. In addition, Lauren Yerry testified that she accompanied her mother around 70% of the time that ATM withdrawals were made by petitioner at the behest of the victim and such withdrawn funds were always given to the victim. Ms. Yerry confirmed that these receipts and canceled checks were provided to petitioner's defense attorney, but contended that the ADA was not cooperating with him in arriving at the restitution amount. When questioned about why her mother took the plea deal, she claimed that she did not live at home during this time period so she could not answer the question.

16. Introduced into the record was an unsworn memorandum prepared by petitioner and given to her defense attorney during her criminal prosecution. Mr. Yerry also read this letter into

the hearing record in this matter. The letter purportedly describes the relationship that petitioner had with the victim and also insinuates that the victim's daughter stole from the victim and that the victim's relationship with her family was "dysfunctional." Mr. Yerry attested to the truth of these statements and maintained that his wife was unjustly prosecuted and the subject of a witch hunt in their community. Mr. Yerry opined that the victim's daughter, and not his wife, is the guilty party.

17. Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services, a conciliation order sustaining the notice of deficiency was issued on October 2, 2015. Thereafter, petitioners timely filed a petition with the Division of Tax Appeals and this proceeding ensued. Prior to the hearing in this matter, the Division timely filed an answer to the petition on January 11, 2016, which generally denied the allegations contained in the petition, set forth the basis for the issuance of the notice of deficiency, and requested that, as an alternative to the fraud penalties asserted in the notice of deficiency, negligence penalties pursuant to Tax Law § 685 (b) should be imposed.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted that, pursuant to the Internal Revenue Code (IRC) and federal case law, income subject to tax includes money acquired by larceny. He also noted that the tax deficiency in this matter was premised on petitioner's guilty plea and the amount of restitution that petitioner was ordered to pay to her victim. The Administrative Law Judge found that the fact of the larceny and the amount thereof that are the basis of the deficiency were also essential issues in the criminal proceeding and that such issues were resolved by the guilty plea and the restitution order. He decided that petitioners' challenges to the asserted tax deficiency amounted to a challenge to the completed criminal proceeding. The Administrative Law Judge

determined that petitioner Christina Yerry had a full and fair opportunity to contest these issues in the criminal proceeding and concluded, therefore, that the doctrine of collateral estoppel prevented petitioners from contesting these issues. Accordingly, he sustained the asserted tax deficiency.

The Administrative Law Judge found that fraud penalty was properly imposed against petitioner Christina Yerry given her acts of theft over a five-year period; her failure to report those ill-gotten gains; and her failure to report the 2011 retirement distribution. The Administrative Law Judge found insufficient evidence for the imposition of fraud penalty against petitioner Frank Yerry, but did sustain negligence penalties asserted against that petitioner.

***ARGUMENTS ON EXCEPTION***

Petitioners contend that petitioner Christina Yerry was duped into accepting the plea agreement and that the restitution cap amount of $208,602.70 was not properly reduced in negotiations between petitioner's criminal defense attorney and the ADA. Petitioners argue that they should not be collaterally estopped from attacking the deficiency under such circumstances. Petitioners also contend that the evidence presented establishes that the amount of the restitution order erroneously includes many expenditures and ATM withdrawals that were made for the victim's benefit and, hence, not stolen and not properly considered income. According to petitioners, such claimed errors deprive the tax deficiency of a rational basis.

Petitioners assert that fraud penalty should be canceled because they did not act with intent to defraud. They contend that a proper analysis of the evidence presented demonstrates that the fraud allegation is unfounded. Petitioners do not contest the imposition of negligence penalties against petitioner Frank S. Yerry.

Petitioners also contend that the numerous mistakes made in the calculation of the

deficiency result in a denial of their rights to equal protection under the law.

The Division agrees with the Administrative Law Judge's conclusion that petitioners are collaterally estopped from further disputing the facts as determined in the criminal matter. The Division also agrees with the Administrative Law Judge's conclusion that petitioner's criminal conviction, her failure to report her larcenous income and her failure to report other income are facts sufficient to sustain a fraud penalty. The Division also supports the Administrative Law Judge's conclusion that petitioner Frank Yerry was subject to negligence penalties and contends that Mr. Yerry did not establish reasonable cause for the abatement of such penalties.

***OPINION***

Gross income is "income from whatever source derived" (IRC [26 USCA] § 61 [a]) and includes money received through unlawful means, such as larceny or embezzlement (***see Collins v Commr.***, 3 F3d 625, 630, 631 [2d Cir.] [1993]; ***Foster v Commr***., TC-Memo 1989-276 [1989]).[5]

The tax deficiency in the present matter is premised on petitioner Christina Yerry's guilty plea and the amount of the restitution order to which Ms. Yerry agreed as part of her plea bargain. The Division thus found that petitioner Christina Yerry stole $195,774.65 from her victim and had additional unreported income in that amount during the years at issue (less $3,200.00 in bank charges [***see*** finding of fact 13]). Contrary to petitioners' contention, given the rule that stolen money is income, the asserted deficiency is plainly rational (***see e.g. Matter of Mayo***, Tax Appeals Tribunal, March 9, 2017 [notice of deficiency requires a rational basis]).

As noted, the Administrative Law Judge concluded that petitioners were collaterally

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[5] We use the Internal Revenue Code's definition of gross income because New York adjusted gross income starts with federal adjusted gross income (***see*** Tax Law § 612 [a]).

estopped from contesting the amount of the tax deficiency. We agree.

The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (***Ryan v New York Tel. Co.***, 62 NY2d 494, 500 [1984] [citations omitted]).

> "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling (***see Gilberg v Barbieri***, 53 NY2d 285, 291 [1981])" (***Buechel v Bain***, 97 NY2d 295, 303, 304 [2001]).

"[A]n issue decided in a criminal proceeding may be given preclusive effect in a subsequent civil action (citations omitted)" ***(D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 664 [1990]). Collateral estoppel may apply where the prior criminal action has been resolved by a guilty plea and a restitution order (***see Kuriansky v Professional Care***, 158 AD2d 897 [1990]). The doctrine is applicable in administrative proceedings (***Bernstein v Birch Wathen School***, 51 NY2d 932 [1980]) and has been invoked by this Tribunal (***see Matter of Aqua-Mania, Inc.***, Tax Appeals Tribunal, March 6, 2008; ***Matter of DeFeo***, Tax Appeals Tribunal April 22, 1999).

Here, although petitioner pled guilty to a lesser charge of attempted grand larceny, the record is clear that the criminal case necessarily decided that petitioner actually stole $195,774.65 (less $3,200.00 in bank charges) from her victim. Petitioner's plea was in satisfaction of a charge of grand larceny and five other charges and, most significantly, petitioner agreed to restitution as part of her plea deal. "Restitution is the return of all the fruits of a crime" (***People v White***, 119 AD2d 708, 709 [1986]; ***see*** Penal Law § 60.27 [1]). The order of restitution thus necessarily

rests on a judicial finding that petitioner actually stole money from the victim. Petitioner could have gone to trial on the issue of larceny, but she chose to accept the plea bargain. Petitioner also could have challenged the People's claim regarding the dollar amount of the larceny by requesting a restitution hearing at which she could have submitted evidence to the court as to the amount she actually stole (***see*** Penal Law § 60.27 [2]; Criminal Procedure Law § 400.30). Petitioner, however, waived her right to such a hearing (***see*** finding of fact 7). Indeed, petitioner agreed to repay a maximum of $208,602.70 in restitution and further agreed to rely on an informal submission of proof to the ADA to reduce that cap to the amount set forth in the order (***see*** findings of fact 7 and 8). The same proof that was submitted to the ADA was submitted at the hearing in the present matter (***see*** finding of fact 15). Accordingly, petitioners' complaint that the ADA unreasonably rejected such proof rings hollow, for Christina Yerry agreed to the process by which the amount of the restitution order was determined. We see no unfairness in applying the principles of collateral estoppel to preclude a relitigation of the extent of petitioner's larceny under these circumstances (***see Gilberg v Barbieri***, 53 NY2d at 291 [collateral estoppel is based on "general notions of fairness"]).

We conclude, therefore, that the criminal matter conclusively established both the fact and the amount of petitioner Christina Yerry's larceny; that these facts are decisive of the instant matter; and that such petitioner had a full and fair opportunity to contest such facts in the criminal proceeding. Accordingly, we find that Ms. Yerry is collaterally estopped from contesting that she had $195,774.65 (less $3,200.00 in bank charges) in additional income during the years at issue as a consequence of her theft of money from her victim.

Although petitioner Frank S. Yerry was not a party to the criminal proceeding, he is also estopped from contesting the issues decided therein. He and petitioner Christina Yerry filed joint

returns during the years at issue and, accordingly, their tax liabilities are joint and several (***see*** Tax Law § 651 [b] [2]). As a result, the tax consequences that flow from the criminal matter to petitioner Christina Yerry also flow to petitioner Frank S. Yerry.

As we have precluded petitioners from contesting that they had additional income as asserted by the Division, we do not consider the evidence presented by them to show error in the amount of the restitution order.

Turning to the imposition of fraud penalty against petitioner Christina Yerry, we observe that such a penalty is authorized "[i]f any part of a deficiency is due to fraud" (Tax Law § 685 [e] [1]). The burden of proof of fraud rests with the Division (***Matter of Aqua-Mania, Inc.***). A finding of fraud requires the Division to show "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000). Fraud need not be established by direct evidence, but can be shown by surveying the taxpayer's entire course of conduct and drawing reasonable inferences therefrom (***see Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).

Here, petitioner's guilty plea to attempted grand larceny in full satisfaction of all charges against her and the restitution order requiring her to repay the victim the fruits of her crime establish fraudulent intention and action on her part throughout the period at issue and thereby justify the imposition of a fraud penalty.

Furthermore, the Administrative Law Judge's conclusion sustaining the imposition of negligence penalties against petitioner Frank S. Yerry is affirmed as petitioners did not contest this conclusion of the Administrative Law Judge.

Additionally, we find petitioners' equal protection argument to be without merit.

Finally, although not raised by either party, we acknowledge that the determination in this matter and this decision have not been issued in accordance with the time limits for an expedited hearing set forth in Tax Law § 2008 (2) (b).[6] As this delay was not caused by either party, the relief provided by Tax Law § 2008 (2) (b), that is, a default determination or decision, is inappropriate. The present matter notwithstanding, the Division of Tax Appeals and this Tribunal will continue to make every effort to comply with such time limits in the future.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frank S. and Christina Yerry is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Frank S. and Christina Yerry is granted to the extent indicated in conclusions of law F and G of the Administrative Law Judge's determination, but is in all other respects denied; and

4. The notice of deficiency, dated April 3, 2015, as modified pursuant to finding of fact 13 herein and pursuant to paragraph 3 above, is sustained.

[6] Both the determination and this decision have been issued within the standard (i.e., non-expedited) six-month period (see Tax Law §§ 2006 [7] and 2010 [3].

DATED: Albany, New York
August 10, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner