

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VISHNI SCHIRO WITHANACHCHI	:	DETERMINATION DTA NO. 825394
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2005 through 2009.	:	

Petitioner, Vishni Schiro Withanachchi, 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 2005 through 2009.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals in New York, New York, on February 26, 2014 at 10:30 A.M. All briefs were due by July 2, 2014, which date began the six-month period for the issuance of this determination. Petitioner appeared by Colligan Law, LLP (Frederick J. Gawronski, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUES

Whether petitioner is entitled to innocent spouse or other equitable relief with respect to personal income tax liabilities for the years 2005 through 2009.

FINDINGS OF FACT

1. Petitioner, Vishni Schiro Withanachchi, was a New York State resident who filed jointly with her spouse personal income tax returns for the years 2005, 2006, 2007, 2008 and 2009 (the years in issue).

2. Petitioner's spouse, Dominick Withanachchi, owned several restaurant franchises throughout New York City during the years in issue under the names Subway and Mr. Salad.

3. On December 22, 2010, Dominick Withanachchi pled guilty to two counts of offering a false instrument for filing in the second degree for violating Penal Law § 175.35, a class E felony. The pleas were related to his filing of a false New York State corporation franchise tax return for the year 2008 and a false New York City corporation franchise tax return for 2007 on behalf of Mr. Salad, Inc. These pleas were accepted in full satisfaction of the entire indictment, as well as a pending grand jury investigation into Mr. Withanachchi's theft of New York State and City sales tax collected from patrons of multiple food establishments for the period June 20, 2003 through June 20, 2010; evasion of New York State and New York City corporation taxes for the years 2005 through 2009, related to the food establishments other than Mr. Salad, Inc.; and evasion of New York State personal income tax for the years 2005 through 2009.

4. In his plea allocution, Mr. Withanachchi admitted willfully filing the false returns set forth above and also his deliberate failure to remit sales taxes collected at his Subway restaurants during the period June 20, 2003 through June 20, 2010 in the sum of approximately \$248,000.00, all the while filing quarterly sales and use tax returns with the Division that understated sales and the sales tax due.

5. The plea agreement entered into by Mr. Withanachchi specified, among its many provisions, that he would pay his outstanding New York State personal income tax of \$38,800.00 plus any additional interest and penalties, as determined by the New York State Department of Taxation and Finance.

6. In addition to the corporation franchise tax, sales and use tax and personal income tax he agreed to repay, Mr. Withanachchi was sentenced to 60 days in prison. A Judgment Order was entered against Mr. Withanachchi in New York Supreme Court, New York County, on December 22, 2010 in favor of the New York State Department of Taxation and Finance and the New York City Department of Finance in the sums of \$392,598.00 and \$106,925.00, respectively.

7. As a convicted felon, Mr. Withanachchi was prohibited from continuing to own Subway or Mr. Salad franchises, and was only able to find employment as a store clerk in a friend's Subway restaurant.

8. The Division of Taxation (Division) issued to petitioner and Dominick Withanachchi a Notice and Demand for Payment of Tax Due, dated May 26, 2011, which set forth additional personal income taxes due for the years 2005 through 2009 in the sum of \$38,800.00 plus penalty and interest. The explanation for the notice stated, "This Notice and Demand for Payment of Tax Due is issued based on the Plea Agreement, so ordered by Judge Richard Carruthers on December 22, 2010. This dollar amount reflects the tax agreed to by you, plus applicable penalty and interest."

9. On or about August 25, 2011, petitioner filed a Request for Innocent Spouse Relief, form IT-285, with the Division, requesting relief from liabilities that resulted from jointly filed

personal income tax returns for the years in issue. The returns had been filed jointly with her husband, Dominick Withanachchi, with whom she cohabited during the years in issue in the home they owned at 29-19 218th Street, Flushing (Bayside), New York. On the form IT-285, petitioner stated that she was not aware of additional tax owed to New York and did not know, or have reason to know, that the returns were incorrect or missing information. Petitioner also stated that, at no time was she involved in the operations of the business and was not aware of her spouse's criminal conduct.

10. In a letter to petitioner, dated January 4, 2012, the Division denied petitioner's request for relief citing the following reasons:

"Your marital status at the time of filing your request is not considered qualifying for the relief requested. You must have been divorced, widowed, or legally separated as of the date of the filing, or must have lived apart from your spouse (or former spouse) for 12 months preceding your request for relief.

You did not show in the statement and/or supporting documentation attached to your request for relief, that paying the liability in full would result in economic hardship. Examples of economic hardship include difficulty meeting household expenses, unanticipated medical expenses, child support arrears, or any similar financial distress.

You did not show in the statement and/or supporting documentation attached to your request for relief that you did not know, or have reason to know, at the time you signed the joint personal income tax return, of the item(s) giving rise to the deficiency or that the liability reported on the return would not be paid."

11. In reviewing the application for innocent spouse relief, the Division's Innocent Spouse Unit did not review the audit performed of Mr. Withanachchi's businesses nor did it determine how the amount of additional income tax asserted, \$38,800.00, was calculated or exactly where it originated. The supervisor of the Division's Innocent Spouse Unit speculated that she believed the personal income tax assessment against petitioner emanated from a sales tax audit, which

flowed through to the personal income tax of the corporate owner. However, she never saw the audit report prior to making her decision on petitioner's request for relief and produced no part of the audit file at hearing.

12. Petitioner and her spouse are citizens of the United States but were born in Sri Lanka. After marriage, Sri Lankan culture generally defined the male role as the businessman, while the female was charged with the duty to run the household and raise the children. To the extent that Mr. Withanachchi made his living owning and operating Subway and Mr. Salad restaurants during the audit years, he assumed the traditional male role. He also paid all household bills. Petitioner, on the other hand, while shouldering the traditional female duties of raising the couple's three young children and caring for the home, also assumed a more modern role.

13. Petitioner has a bachelor's degree in engineering and a master's degree in information systems. During the years in issue, she was an instructor at St. John's University and the City University of New York, teaching classes in, among other subjects, math and statistics.

14. Petitioner reported wage income from several sources for the years in issue:

YEAR	QUARTERS	EMPLOYER	WAGES
2005	1-4	St. John's Univ.	\$4,500
2005	1-4	Manhattan Sight	\$4,620
2005	1-4	Subway	\$5,100
2006	3-4	City University	\$3,100
2006	1-4	Subway	\$5,100
2006	1-4	Manhattan Sight	\$4,531
2006	1-4	St. John's Univ.	\$4,875
2007	1-4	City University	\$16,139
2007	1-4	Subway	\$5,200

2007	1	Manhattan Sight	\$710
2008	1-4	City University	\$24,054
2008	1-4	Subway	\$4,500
2009	1-4	City University	\$23,259
2009	3-4	Mr. Salad	\$2,550

15. Of petitioner's total wage income of \$108,238.00 for the years in issue, \$32,311.00, or about 30%, was derived from businesses controlled by Dominick Withanachchi and substantiated by wage reporting statements.

16. For the years in issue, petitioner and her spouse reported the following adjusted gross income on their New York personal income tax returns:

YEAR	ADJUSTED GROSS INCOME REPORTED
2005	\$162,688
2006	\$100,648
2007	\$104,827
2008	\$96,324
2009	\$82,520

17. Of note with respect to the adjusted gross income listed, Mr. Withanachchi received substantial income from his prior music businesses, Manhattan Sight and Sound, Manhattan Video and TV, Harmony CD and Video, West World Video, Dee & A Inc., for the years 2005, 2006 and 2007 (no forms W-2 were attached to the 2008 return in evidence), as he transitioned from the music business to the restaurant business. Thus, there was a diminishing income stream from the music entities during that period.

18. Petitioner and her spouse refinanced the mortgage on their principal residence, 29-19 218th Street, Flushing (Bayside), New York, twice during the audit years. First, in September

2005 with Citibank NA, creating an equity or credit line of \$150,000.00 and then in February 2007, with Washington Mutual Bank, creating an equity or credit line of \$250,000.00. The home, purchased in 2004, had an assessed value at that time of \$934,000.00.

19. For each of the years in issue, petitioner and her spouse reported and received refunds of New York State income tax: \$101.00 in 2005; \$6,882.00 in 2006; \$6,843.00 in 2007; \$5,101.00 in 2008; and \$2,670.00 in 2009. For the same period, petitioner and her husband claimed itemized deductions: \$71,856.00 in 2005; \$80,756.00 in 2006; \$77,108.00 in 2007; \$58,198.00 in 2008; and \$47,978.00 in 2009. Neither the itemized deductions nor the refund calculations were disputed.

20. The cultural boundaries that precluded petitioner's scrutiny of her husband's business affairs coupled with the demands on her time from child rearing, household chores and work outside the home during the years in issue, prevented her from taking an active and cogent part in the preparation of the couple's New York State personal income tax returns, which were prepared by an accountant. Further, she never reviewed, or asked to review, the returns that were prepared for the years 2005 through 2009. Their accountant prepared the returns and brought them to the couple's home for signature.

21. Although petitioner acknowledged preparing some employee "work schedules" on an Excel™ computer program for her husband's businesses, she denied that she ever "saw the wages" evidenced by the wage and tax statements issued to her, and was surprised to see her occupation listed on the returns for 2005, 2006 and 2007 as "store help" since she recalled visiting restaurant locations very infrequently and never worked in a restaurant.

22. During the audit years, petitioner paid for household expenses with a credit card, the

statement for which was paid by her husband. Petitioner did not know where he got the funds to pay bills, but admitted there was one joint checking account between them during the years in issue and that she never had an account in her name alone.

23. Petitioner and her husband jointly owned two vehicles during the years in issue: a 2002 BMW X5 sport utility vehicle and a 2003 Honda Pilot sport utility vehicle. Mr. Withanachchi also owned, in his own name, a 2003 Land Rover Range Rover HSE that was registered to him in 2006.

24. During all of the audit years in issue, petitioner and her husband owned several revenue-producing, rental properties in and outside of New York State: 5-28 115th Street, College Point, New York; 1006 Longfellow Avenue, Bronx, New York; and 3125 Cedar Drive, Long Pond, Pennsylvania. All of the properties were heavily mortgaged.

25. During the years in issue, petitioner's three children attended a Montessori school and a local parochial school. For each of the years in issue, petitioner and her husband filed a Claim for Child and Dependent Care Credit, form IT-216, which reported expenditures for child and dependent care in the following amounts:

YEAR	CHILD CARE EXPENSES
2005	\$13,200.00
2006	\$7,125.00
2007	\$10,000.00
2008	\$12,485.00
2009	\$5,720.00

26. The record contained no evidence of any illicit transfers of assets to petitioner during the audit years.

SUMMARY OF THE PARTIES' POSITIONS

27. Petitioner contends that she qualifies for innocent spouse relief under Tax Law § 654 for the chief reason that the understatement of tax on the returns filed for the years in issue was due to her husband's criminal conduct, of which she had no knowledge. She argues that her clerical support of her husband's business and the salary she received was de minimis and was not an indication of knowledge of the business operations. She noted that her Sri Lankan heritage dictated a separation of their familial duties leaving her little opportunity or discretion with regard to her husband's business and the payment of household expenses. She was absorbed in raising her three young children, working part-time and homemaking.

28. Petitioner further contends that neither her educational background nor her work experience made her any more likely to discover the understatement of taxes.

29. In the alternative, petitioner argues that, if she is not eligible for innocent spouse relief under Tax Law § 654, then she should be granted relief on the basis of equity. She argues that neither she nor her spouse transferred assets to one another as part of a fraudulent scheme or for the purpose of avoiding tax or the payment thereof; that she did not file a return with the intent of committing fraud; she did not pay the tax; and the circumstances surrounding the liability indicate that it would not be fair to hold her liable for the understatement or underpayment of the tax.

30. The Division argues that petitioner voluntarily signed and filed each of the personal income tax returns for the years in issue and was charged with the knowledge of the contents of those returns. Further, the Division notes that petitioner failed to review the returns prior to filing and is prohibited from now arguing that she had no knowledge of the understatement of

income and underpayment of tax.

31. The Division contends that petitioner knew or had reason to know of the understatement of tax and her reliance on her husband to handle the family's finances was nothing more than intentional ignorance. The Division believes petitioner's educational background and experience made her deliberate decision not to examine the returns she signed even more egregious. Further, the Division argues that the fact that petitioner received forms W-2 from some of her husband's business for her clerical assistance indicates that she had knowledge of the finances of the businesses and therefore knew or should have known of the understatement of business income that subsequently resulted in additional personal income tax.

CONCLUSIONS OF LAW

A. Generally, spouses who choose to file a joint return are subject to joint and several liability for tax deficiencies under the Internal Revenue Code (IRC) and the New York Tax Law. (IRC § 6013[d][3]; Tax Law § 651[b][2].) Since joint and several liability may prove to be unjust in certain circumstances, Congress and the New York State Legislature authorized relief from such liability under the innocent spouse provisions of IRC § 6015 and Tax Law § 654.

New York's innocent spouse rule is contained in Tax Law § 654(a) and expressly incorporates the federal provisions regarding innocent spouse status found in IRC § 6015. The latter section provides that a spouse may receive relief from joint and several liability if: (a) a joint return has been made for the tax year; (b) on the return there is an understatement of tax attributable to erroneous items of one of the individuals filing the joint return; (c) the innocent spouse establishes that in signing the return she did not know and had no reason to know that there was an understatement; (d) under all the facts and circumstances, it would be inequitable to

hold the innocent spouse liable for the deficiency in tax attributable to such understatement; and (e) the innocent spouse elects this relief within two years after any collection activity has begun against her (IRC § 6015 [b][1]).

B. In the instant matter, it is immediately evident that three of the five elements for innocent spouse relief set forth in IRC § 6015 have been met: a joint return was filed for the tax years in issue; on the return there was an understatement of tax attributable to erroneous items of one of the individuals filing the joint return, here, Dominick Withanachchi; and the innocent spouse elected to apply for innocent spouse relief within two years after any collection activity has begun.

As is often the case in these matters, it is petitioner's ability to establish the remaining two requirements that determine if innocent spouse relief should be granted. Petitioner needed to establish that, in signing the return, she did not know or have reason to know of the understatement of tax and that, under all the facts and circumstances, it would be inequitable to hold her liable for the deficiency in tax resulting from the understatement.

The courts have consistently held that in cases involving omitted income, the spouse's actual knowledge of the underlying transaction is sufficient to preclude innocent spouse relief. (*See Reser v Commr.*, 112 F3d 1258 [5th Cir 1997]; *Matter of Revere v Commr. of Taxation & Fin.*, 75 AD3d 860 [2010].) Under the knowledge-of-the-transaction test applied in omitted income cases, it is determined that petitioner has established entitlement to innocent spouse relief under IRC § 6015 (b)(1)(C) and Tax Law § 654(a).

C. The Division's regulation at 20 NYCRR 151.10(e)(1) mirrors IRC § 6015 (b)(1) in providing for innocent spouse relief where there was a joint return filed and said return contained

a substantial understatement of income tax attributable to the grossly erroneous items of one spouse. In such situations, the other spouse will be relieved of liability for tax attributable to such substantial understatement of income attributable to grossly erroneous items if (1) the other spouse establishes that she did not know or have reason to know that there was a substantial understatement of income, and (2) in taking into account all the facts and circumstances, including whether or not the other spouse benefitted directly or indirectly from the grossly erroneous items, it would be inequitable to hold her liable for the deficiency attributable to the substantial understatement. (20 NYCRR 151.10[e][1][i], [ii].) The term “grossly erroneous item” is defined in the regulations to mean any item of New York adjusted gross income which is omitted from same. (20 NYCRR 151.10[e][3][i].) The term “substantial understatement” is defined to mean the excess of the amount of tax required to be shown on the return over the amount of tax shown on the return (less any rebate provided for in Tax Law § 681[g]). (20 NYCRR 151.10[e][3][ii].)

D. The innocent spouse defense, raised to obtain relief from joint and several liability on a joint return, was designed to prevent the inequity of holding one spouse liable for the over-subtle financial machinations of the other. (*Friedman v Commr.*, 53 F3d 523, 529 [2nd Cir 1995].) The facts and circumstances in this case establish that such relief is warranted since the “financial machinations” of Dominick Withanachchi were so subtle that petitioner did not know or have reason to know of the understatement of tax resulting from her husband’s criminal acts.

In this matter, the grossly erroneous item omitted from income was additional income imputed from Dominick Withanachchi’s businesses, which profited from the failure to remit sales tax collected from customers. Dominick Withanachchi pled guilty to two counts of offering

a false instrument for filing with regard to the 2008 New York State corporation franchise tax return and the 2007 New York City corporation franchise tax return. In his plea allocution, he admitted to filing the false returns and also deliberately failing to remit sales taxes collected at his Subway restaurants for the period June 20, 2003 through June 20, 2010, while filing sales and use tax returns that understated sales.

Although there was no documentary evidence submitted by either party with regard to the audit performed, and the Division's witness conceded she did not know how the amount of additional income tax was determined, the court-approved plea agreement recited that Dominick Withanachchi agreed to pay his outstanding income tax for the years 2005 through 2009 in the sum of \$38,800.00, ostensibly flowing from his increased corporation franchise tax for the same years.

Until the authorities caught Mr. Withanachchi and brought him to justice, petitioner had no knowledge of his deceitful and fraudulent acts. And although she admitted that she relied on the honesty and professionalism of both her husband and their accountant, and never carefully reviewed the returns she freely signed for each of the years in issue, she would not have discovered the criminal acts and additional income attributed to her husband by the Division even if she had read every line of every page of the return at the time she signed them. Since innocence is determined from a taxpayer's state of mind at the time of signing the income tax return (*Friedman*), she was never in a position to discover the fraud that Dominick Withanachchi perpetrated on her and the State of New York. Therefore, in signing the return, she did not know or have reason to know of the understatement of tax. The knowledge-of-the-transaction test would be rendered meaningless if it intended that spouses who had been deceived and provided

no evidence of an understatement could be held liable. This circumstance in the instant action distinguishes it from the *Revere* case, which noted that innocent spouse relief was not designed to protect willful blindness or to encourage the deliberate cultivation of ignorance (citing *Friedman*).

Significant factors in determining whether a spouse had reason to know of a substantial understatement of tax include the innocent spouse's participation in the business affairs or bookkeeping; the culpable spouse's refusal to be forthright concerning the couple's income; and the presence of unusual or lavish expenditures. (*Sell v Commr.*, 64 TCM 304 [1992].)

Here, the evidence established that petitioner did not participate in the business affairs of the husband's businesses, except to prepare work schedules. She and Mr. Withanachchi credibly testified that she almost never entered a restaurant and performed no management, accounting or bookkeeping functions for the businesses. Dominick Withanachchi's criminal actions and the ensuing court proceedings and plea agreement make it clear that he was not forthright concerning the couple's income. Only he was privy to his criminal behavior and failure to hold in trust and pay over the sales taxes he collected from restaurant patrons.

Finally, the record reveals no unusual or lavish expenditures during the audit years. In fact, the Withanachchi's economic circumstances during the years in issue were not extraordinary or extravagant and did not raise the proverbial "red flags" that the Division suggests. The couple lived in the same house and drove the same older automobiles, with the exception of the used Range Rover Mr. Withanachchi purchased in 2006, which he owned and registered in his own name. They maintained one joint checking account and paid household expenses with a credit card. Although the children attended private schools in their neighborhood, for which tuition

was paid and a credit claimed on the returns filed, given the couple's income, the tuition expense was not unreasonable for three children in the New York metropolitan area. Further, in and of itself, the tuition expense does not constitute an unusual or lavish expense.

Their itemized deductions were relatively constant as were the refunds they received. Their adjusted gross income, although diminishing during the years in issue by \$80,000.00, was credibly explained by Dominick Withanachchi as due to his change in businesses, from management and ownership roles in music companies to his ownership and management of restaurants. In addition, the wage statements for 2005, 2006 and 2007 indicate the overlapping of the business operations and a greater income stream as a result.

For the years 2005, 2006 and 2007, both petitioner and her spouse received W-2s from several music companies, thus making it more difficult to discern any major fluctuation in income. Further, in September 2005 and February 2007, petitioner and her spouse refinanced their principal residence and created an equity or credit line of \$400,000.00. Hence, any shortfall in income that arose due to the change in Dominick Withanachchi's business was supplanted by the availability of income from the lines of credit, which kept the family income stable during a period of diminishing income and camouflaged any additional income that may have found its way to their bank account from the ill-gotten gains from Mr. Withanachchi's fraudulent business practices. However, the record did not reveal, and the Division did not question or pursue, what Mr. Withanachchi did with the sales tax he purloined.

The fact that petitioner and her husband owned three rental properties, which were documented on their tax returns for each of the years in issue, also does not indicate a lavish

lifestyle, since they were apparently purchased prior to the audit years in issue and were heavily mortgaged.

From the credible testimony of both petitioner and Dominick Withanachchi, their family life was stable and rather unremarkable for the years in issue. Their testimony was buttressed by the returns filed and the Division's Lexis-Nexus report on their real property holdings, automobile records, and documented loans. Nothing unusual was apparent from the returns filed or their lifestyle, lending more credence to petitioner's contention that she could not have known of the omitted income. From her perspective at the time the returns were filed, and that is the moment innocence is determined (*Friedman*), nothing about the family's economic circumstances during the years in issue would have indicated to a prudent observer that there was a substantial understatement of tax on the personal income tax returns filed.

Petitioner did not know or have reason to know that her husband was failing to remit sales tax collected and then omitting the income imputed to him, possibly as constructive dividends. During the years in issue, petitioner was primarily concerned with caring for the couple's three children and maintaining the home. She had very little to do with her husband's business and little control over the family finances. She credibly testified that she paid most household bills with a credit card, which in turn was paid for by her husband.

Petitioner has an engineering degree and a masters degree in information technology. During the years in issue, she taught college level mathematics courses, among others. However, nothing in her educational background or work experience could have prepared her, or given her the opportunity, to detect the deception and fraud perpetrated by her spouse in his business operations.

While it is true that petitioner performed basic clerical functions in connection with the work schedules of employees at the various Mr. Salad and Subway restaurants and received wages that were reported on W-2s, \$32,311.00 in five years, she credibly testified that she did not have any knowledge of the operation of the businesses, understood little about taxes and had no bookkeeping knowledge. (*Quinn v Commr.*, 62 TC 223 [1974] *affd* 524 F2d 617 [7th Cir 1975][where innocent spouse relief was denied due to the wife's intimate knowledge of a \$500,000.00 payment received for rent payment from husband's employer, including attendance at board meetings where payment was discussed].)

E. As outlined in the testimony of petitioner and Dominick Withanachchi, the family is now faced with severe economic hardship. Due to his status as a convicted felon, Mr. Withanachchi has been relegated to menial labor, the wages from which are garnished. The couple has not been able to pay its mortgages on their income-producing rental properties and stands to lose them in foreclosure. The family's chief income source is petitioner, who, with three children to feed, clothe and house, currently earns about \$60,000.00 as a college math instructor. Liability for the taxes in issue would create even more hardship for her going forward, since the garnishment of her wages, begun prior to this proceeding, would be reinstated.

The record shows no benefit to petitioner from the income imputed to her husband for his criminal actions and there was no evidence of any illicit transfers of assets to her during the audit years, outside of normal support, which, it is noted, has not been considered a significant benefit (*Estate of Krock*, 93 TC 672, 677 [1989] ; *Terzian v Commr*, 72 TC 1164, 1172 [1979]). In fact, normal support is determined by the circumstances of the parties. (*Sanders v US*, 509 F2d 162, 168 [5th Cir 1975] [where the court noted that one person's luxury can be another's

necessity, and the lavishness of an expense must be measured from each family's relative level of ordinary support].) As discussed above, petitioner's and Mr. Withanachchi's economic circumstances remained very constant during the years in issue and presented no evidence of lavish expenditures or spikes in income. What fluctuation in income did occur was logically explained by credible testimony.

Although petitioner and Mr. Withanachchi were never divorced and continue to cohabit, petitioner testified that the couple was considering separation due to Mr. Withanachchi's deceit. It is concluded herein that if she were forced to pay for her husband's criminal conduct and the unreported, imputed income therefrom, she would suffer a grave hardship. Since she did not receive any significant benefit from the additional income, it would be inequitable to hold her liable for Mr. Withanachchi's actions.

F. "The determination of the applicability of the innocent spouse provision can only be made through an examination of all of the facts and circumstances of the case, including an assessment of the credibility of the 'innocent spouse'" (*Sell*). Given the analysis above, it is concluded that the facts and circumstances and petitioner's credible testimony have satisfied the statutory requirements for innocent spouse relief, and petitioner is therefore relieved of liability for any additions to tax for the years in issue attributable to the substantial understatements attributable to Mr. Withanachchi's grossly erroneous items. (Tax Law § 654.)

G. It is noted that Congress, and derivatively New York, authorized three distinct types of relief for taxpayers who file joint returns. This case has been decided under the requirements of IRC § 6015(b). It was determined that petitioner did not qualify under IRC § 6015(c) since it only applies to taxpayers who are no longer married, are legally separated or do not reside

together. Finally, a taxpayer may seek equitable relief under IRC § 6015(f), which petitioner raised as an alternative basis for relief. Since equitable relief is only available when the relief under IRC § 6015(b) and (c) is not, it has been rendered moot in this matter.

H. The petition of Vishni Schiro Withanachchi is granted, and so much of the Division's Notice and Demand for Payment of Tax Due pertaining to her, dated May 26, 2011, is canceled, and the Division's denial of her request for innocent spouse relief is reversed.

Dated: Albany, New York
December 18, 2014

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE