

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-A-94 (12) I
Income Tax
August 16, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE
ADVISORY OPINION PETITION NO. I940517B

On May 17, 1994, a Petition for Advisory Opinion was received from Phyllis Spielman, 69 Willets Road, Old Westbury, New York 11568.

The issue raised by Petitioner, Phyllis Spielman, is whether New York State can withhold the refund due and owing to Petitioner for calendar year 1992 when Petitioner filed a joint personal income tax return.

Petitioner filed a joint New York State personal income tax return with her husband, Stanley Spielman, for calendar year 1992, in which they were entitled to a refund by reason of an estimated tax payment made during the calendar year. The refund due and owing was withheld by New York State and applied towards a personal assessment of Stanley Spielman individually, arising out of his interest in the XII Arches Restaurant Corp. New York State assessed Stanley Spielman, personally, in the sum of \$56,757.89, by reason of the claim of non-payment of sales taxes. XII Arches Restaurant Corp.'s obligation for said sales taxes were assumed by another corporation, with the knowledge and consent of the State Tax Commission. Said sums were paid by the G.M. Triple S.Corp., through the United States Bankruptcy Court as administrative expenses.

Section 686(a) of the Tax Law provides that the Commissioner of Taxation and Finance, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by the Tax Law on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of the Tax Law or any other law on such person if such tax is administered by the Commissioner of Taxation and Finance and, as provided in sections 171-c, 171-d, 171-e and 171-f of the Tax Law, against past-due support, a past-due legally enforceable debt, and against the amount of a default in repayment of a guaranteed student, state university or city university loan. The balance shall be refunded by the Comptroller.

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, they shall file a joint New York income tax return, and their tax liabilities shall be joint and several except as provided in section 651(b)(5) and (6) of the Tax Law and section 685(e) of the Tax Law.

Section 607(a) of the Tax Law provides that any term used in Article 22 of the Tax Law shall have the same meaning as when used in a comparable context in the laws of the United States relating to Federal income taxes, unless a different meaning is clearly required.

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Section 6402(a) of the Internal Revenue Code ("IRC") gives the Secretary or his delegate authority to credit the amount of any overpayment including any interest allowed thereon, against the liability in respect of an Internal Revenue Tax on the part of the person who made the overpayment, and requires a refund of the balance "to such person". Section 6013 of the IRC provides for the filing of a joint return by a husband and wife and imposes joint and several liability upon them for the tax computed on their aggregate income. In Rev Rul 74-611, 1974-2 CB 399, the Internal Revenue Service ruled that when a husband and wife file a joint return each spouse has a separate interest in the jointly reported income and a separate interest in any overpayment. Court decisions have consistently held that a husband and wife who file a joint return do not have a joint interest in an overpayment; each has a separate interest. See Maragon v United States, 153 F Supp 365 (Ct. Cl. 1957).

Sections 6402(a) and 6013 of the IRC are similar to sections 686 and 651(b)(2) of the Tax Law. Pursuant to section 607 of the Tax Law, the phrase in section 686 of the Tax Law "credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by the Tax Law on the person who made the overpayment" and the phrase in section 651(b)(2) of the Tax Law "their tax liabilities shall be joint and several" should be interpreted the same as under the IRC. Therefore, conclusions reached in Rev Rul 74-611, supra, should also apply to Article 22 of the Tax Law when a husband and wife file a joint New York State personal income tax return.

Accordingly, under section 686 of the Tax Law, when a husband and wife file a joint New York State personal income tax return, the Commissioner of Taxation and Finance may not credit an overpayment of income tax and interest on such overpayment of one spouse against any liability in respect of any tax imposed by the Tax Law owed by the other spouse.

Section 651(b)(6) of the Tax Law and section 151.10(f) of the Personal Income Tax Regulations ("Regulations"), promulgated thereunder, provide that if a husband and wife file a joint New York State personal income tax return, any excess payment and interest thereon by either spouse may be applied against any past-due support, or a past-due legally enforceable debt, or against any amount of a default in repayment of a guaranteed student, state university or city university loan attributable to the other spouse, of which the Department of Taxation and Finance has been notified pursuant to the provisions of sections 171-c, 171-d, 171-e, or 171-f of the Tax Law. However, the spouse not liable for such past-due support, or a past-due legally enforceable debt, or any amount of a default in repayment of a guaranteed student, state university or city university loan may demand, on a declaration made in accordance with regulations or instructions prescribed by the Commissioner of Taxation and Finance, that the portion of the overpayment and interest attributable to such spouse not be credited against such amount owed by the other spouse.

Section 151.10(f) of the Regulations provides the method for determining the portion of the overpayment and interest attributable to each spouse for determining the amount of excess payment and interest thereon which may be applied against past-due support or against a default in repayment of a guaranteed student, State University or city university loan of a spouse as follows:

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[i]f a spouse makes a demand that any overpayment made by him or her be applied only on account of his or her separate liability, then:

(1) amounts attributable to withholding from wages of such spouse will be applied only against the separate liability of such spouse;

(2) amounts attributable to separate payments of estimated income tax by such spouse will be applied only against the separate New York State personal income tax liability of such spouse; and

(3) amounts attributable to joint payments of estimated income tax and amounts attributable to any other payment will be applied against the separate New York State personal income tax liability of each spouse in such proportion as is agreed upon by both spouses; provided, however, that in the absence of any such agreement, such amounts will be applied against the separate New York State personal income tax liability of each spouse in the same proportion which the separate New York State personal income tax liability of each spouse bears to the total New York State personal income tax liability of both spouses. In the absence of an agreement between spouses, the amounts of joint estimated income tax payments and other payments will be apportioned based upon the following formula:

separate New York State personal income <u>tax liability of spouse</u>	amount of estimated income tax payments
total New York State personal income tax X liability of both spouses	

For purposes of this subdivision, the separate New York State personal income tax liability of each spouse will be determined by the following formula:

New York adjusted gross income of each <u>spouse</u>	total New York State personal income tax liability of both spouses
combined New York adjusted gross income X of both spouses	

The method of determining the amount of joint estimated income tax payments attributable to each spouse and the separate New York State personal income tax liability of each spouse under section 151.10(f) of the Regulations should also apply for purposes of determining the amount of overpayment and the interest on such overpayment attributable to each spouse under section 686 of the Tax Law.

Herein, Petitioner filed a joint New York State personal income tax return with her husband for taxable year 1992. Pursuant to section 686 of the Tax Law, the portion of any overpayment of income tax and the interest on such overpayment

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attributable to Petitioner, as determined pursuant to section 151.10(f) of the Regulations, may not be credited against any liability in respect of any tax imposed by the Tax Law on her husband.

DATED: August 16, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.