

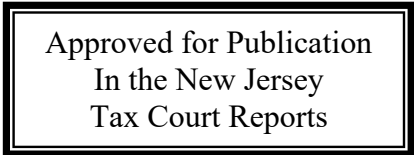
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THE TAX COURT COMMITTEE ON OPINIONS

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NICHOLAS L. GENTILE, JR. and :  
DOREEN A. GENTILE, :  
 :  
Plaintiffs, :  
 :  
v. :  
 :  
DIRECTOR, DIVISION OF TAXATION, :  
 :  
Defendant. :  
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TAX COURT OF NEW JERSEY  
DOCKET NO. 013601-2017



Decided: March 26, 2021

Nicholas L. Gentile, Jr. and Doreen A. Gentile, for plaintiffs (Self-Represented).

Jamie M. Zug, Deputy Attorney General, for defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

BEDRIN MURRAY, J.T.C.

I. Introduction

Before the court is defendant’s motion for summary judgment seeking to dismiss plaintiffs’ complaint for failure to state a claim cognizable under the laws of the State of New Jersey governing the taxation of gross income. In short, plaintiffs Nicholas L. Gentile, Jr. (“Nicholas”) and Doreen A. Gentile (“Doreen”)<sup>1</sup>, a married couple filing joint income tax returns, seek to relieve Nicholas of the joint and several liability visited upon him by Doreen’s failure to report income derived from criminal activity over the course of several years, purportedly unknown to him. In so doing, plaintiffs rely on the “innocent spouse” relief provided by the federal government and

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<sup>1</sup> Plaintiffs are referred to by their first names merely for ease of reading, given their shared surname. No disrespect is intended.

codified in 26 U.S.C. § 6015, whereby an unknowing spouse may apply for relief from liability for a tax deficiency, including interest and penalties, attributable to an understatement of the spouse filing the return.<sup>2</sup> Defendant, Director, Division of Taxation (“Director”) counters such equitable relief is not afforded under the New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1 to 12-6 (“NJ GIT Act”), thereby obviating any inquiry as to a spouse’s lack of culpability or knowledge. Instead, the Director relies on N.J.S.A. 54A:8-3.1(c), imposing joint and several liability when gross income tax returns are jointly filed. In addition, N.J.S.A. 54A:5-1(o) defines gross income as including income, gain or profit from criminal activities. As such, the Director contends there are no material facts in dispute, and summary judgment dismissing the complaint is warranted. The court disagrees.

As more fully set forth below, the absence of an equitable spousal relief law does not free defendant from the limitations imposed on the assessment of tax within three years after a return is filed. N.J.S.A. 54A:9-4(a). In order for an assessment of gross income tax to be made more than three years from the date of filing, as is the case in each of the tax years here, there must be a showing that “[a] false or fraudulent return [was] filed with intent to evade tax.” N.J.S.A. 54A:9-4(c)(1)(B).

At this point, the record is devoid of proof of such intent, or of evidence refuting Nicholas’s claim he knew nothing of his wife’s criminal activity or her filing of false and fraudulent returns. Therefore, summary judgment dismissing plaintiffs’ complaint is not warranted. Discovery will proceed as to the issue of intent, after which the matter will be scheduled for trial.

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<sup>2</sup> In this regard, plaintiffs offer that after filing their protest, they were invited by defendant to submit any information regarding federal innocent spouse relief as it pertained to Nicholas, and that such documents would be considered. Given the outcome of defendant’s motion, it is unnecessary to address this issue at this juncture in the litigation.

## II. Findings of Fact and Procedural Posture

Plaintiffs have been married for approximately forty years. Nicholas was a middle school language arts and history teacher until his retirement in 2011, while Doreen was the owner of an accounting firm. According to Nicholas, Doreen handled all of the couple's financial affairs, including the preparation and filing of joint federal and state income tax returns. She routinely handed him various tax documents to sign and he obliged. On or about September 2015, Doreen pled guilty to federal mail fraud charges and to filing false federal income tax returns. In brief, Doreen concocted a scheme in which she prepared two sets of income tax returns for each of her affected clients. One set, prepared for the client, contained a nominal or no refund. The other return, which Doreen filed with the appropriate taxing authority, resulted in a significant refund that was remitted directly to her accounting firm at a designated post office box. All told, Doreen's ill-gotten gains amounted to \$905,004, none of which she reported on plaintiffs' joint federal and state income tax returns for tax years 2006 through 2010. Nicholas, for his part, applied for innocent spouse relief as provided by 26 U.S.C. § 6015. The record does not indicate if such application was granted. Regardless, Nicholas was not charged with any criminal conduct in the federal matter, nor does the Director allege he was culpable in or aware of Doreen's wrongdoing.

When the New Jersey Division of Taxation became aware of Doreen's federal criminal case, it conducted an audit of plaintiffs' gross income tax ("GIT") returns for tax years 2006 through 2010. By letter dated February 29, 2016, a Notice of Deficiency issued to plaintiffs informing them of an outstanding tax liability in the total amount of \$114,720, including interest and civil fraud penalties, for all such years as a result of the unreported income totaling \$905,004. In the Explanation of Adjustments page under "Audit of Prior Years," the Notice of Deficiency states that N.J.S.A. 54A:9-4(c)(1)(B) permits a tax assessment to be imposed at any time in cases

where “[a] false or fraudulent return is filed with intent to evade tax.” Ibid. Likewise, the Notice sets forth that a civil fraud penalty equal to fifty percent of the assessment is imposed, under N.J.S.A. 54:49-9.1, in cases where the “assessment is due to civil fraud.” Ibid.

In this matter, unreported income from Doreen’s criminal activity was divided between the fifty-one months at issue, and determined to be \$212,940 for tax years 2006, 2007, 2008, and 2009, and \$53,235 for tax year 2010. The net tax due for years 2006 through 2009 varies between approximately \$12,000 and \$13,000 plus interest, and a civil fraud penalty equal to half the net tax due. For tax year 2010, the net tax due was assessed at \$2,930 plus interest in the amount of \$1,021, and a civil fraud penalty in the amount of \$1,465, one-half the net tax.

On May 25, 2016, plaintiffs filed a protest challenging the Notice of Deficiency asserting, among other things, that Nicholas timely reported his income during the subject period, and that he should be entitled to innocent spouse relief as he had no knowledge of Doreen’s criminal undertaking. On July 14, 2016, New Jersey GIT Auditor Nicole Haggart responded to the protest, asking plaintiffs to submit contradictory proofs of the amount due along with any information related to the innocent spouse considerations in the federal case.

By letter dated August 24, 2017, the Director issued a final determination upholding the February 29, 2016 Notice of Deficiency. Accrued interest increased the total deficiency to \$135,667. The notice included an explanation that the civil penalty imposed was due to fraud pursuant to N.J.S.A. 54A:9-6(e). On November 20, 2017, plaintiffs filed a complaint with the Tax Court of New Jersey challenging the final determination.

### III. Conclusions of Law

Applications for summary judgment are governed by R. 4:46-2, which provides in pertinent part that:

The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

[R. 4:46-2.]

In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the Court amended the standard for summary review by holding that:

[T]he determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[Id. at 523.]

In the matter at bar, the parties' arguments swirl around Nicholas's purported entitlement to "innocent spouse" relief akin to that provided in 26 U.S.C. § 6015. The argument is misplaced on both sides, as no such relief is found in the NJ GIT Act, rendering it an academic debate. The issue, instead, is whether defendant can skirt the three-year statute of limitations period for auditing gross income tax returns as set forth in N.J.S.A. 54A:9-4(a). In the absence of statutory exception, which opens wide the assessment period, the time for auditing each tax year in question had long expired when the Notice of Deficiency issued. Defendant, however, relies on N.J.S.A. 54A:9-4(c)(1)(B) to provide an exception to the limitation period where "[a] false or fraudulent return is filed with intent to evade tax." Ibid. Clearly, the record is not settled in this regard.

The court is guided by a recent Tax Court decision on point with the instant matter, Anita K. Leather v. Dir., Div. of Taxation, 31 N.J. Tax 285 (Tax 2019). There, Judge Sundar concluded the filing of a joint return "does not eviscerate the requirements of N.J.S.A. 54A:9-4(c)(1)(B). For

the statute to apply [to the non-wrongdoing spouse], either a false return with an ‘intent’ to evade the GIT, or a fraudulent return with an ‘intent’ to evade the GIT must have been filed.” Id. at 296. In sum, the court held that the burden fell on the Division of Taxation to show that the exempting statute applies to the plaintiff. As in the Leather case, the record before the court reveals no claims by the Director of false or fraudulent actions on the part of Nicholas or any evidence in that regard.

Based on the foregoing, the court concludes the Director’s motion for summary judgment is not ripe for determination and must be denied. Defendant will be given an opportunity to proceed with discovery in accordance with this decision.