CHAPTER 119. LIABILITIES AND ASSESSMENT—PROCEDURE AND ADMINISTRATION

Sec.

Cross References

This chapter cited in 61 Pa. Code § 113.9 (relating to use of prescribed forms).

§ 119.1. Payment on notice and demand.

Payment of tax due under this article shall be payable by taxpayer upon receipt of notice and demand from the Department.

§ 119.2. Assessment.

(a) *In general.* The Department is authorized and required to make inquiries necessary to the determination and assessment of taxes imposed by this article. The Department is further authorized and required to make the determinations

and assessments of the taxes. Certain inquiries and determinations may, by direction of the Department, be made by other officials. The term taxes includes interest, additional amounts, additions to the taxes and assessible penalties.

(b) *Failure to file return.* If a taxpayer fails or neglects to file a return as required by this article, the Department may make an estimated assessment of the proper amount of tax due and owing by the taxpayer. This estimated assessment may be based upon information available to the Department at the time of the estimated assessment. A notice of assessment of the estimated amount will be sent to the taxpayer at his last known address.

(c) *False or fraudulent returns.* If an examination of a return by the Department discloses that a taxpayer has filed a false or fraudulent return or that the tax disclosed by the return is less than the tax disclosed by the examination, the Department may issue a notice of assessment of additional tax due sent to the taxpayer's last known address. For purposes of this subsection, the term income as it relates to a trade or business, means the total of the amounts received or approved from the sale of goods or services, to the extent required to be shown on the return, without reduction for the cost of the sales or services. An item may not be considered as omitted from income if information, sufficient to apprise the Department of the nature and amount of the item, is disclosed in the return or in a schedule or statement attached thereto.

(d) *Clerical error or mistake.* If an examination of a return by the Department discloses that due to a clerical error or mistake in preparing the return or in computing the tax, the tax has been understated, the Department will immediately issue a notice to the taxpayer requesting him to pay the tax due together with interest, penalties or additions within 30 days of receipt of the notice by a taxpayer. The provisions of § 119.6 (Reserved) may not apply to notices issued under this subparagraph.

(e) *Payment.* Taxes assessed under subsections (b) or (c) shall be paid within 90 days of the date of the notice unless the taxpayer shall, within the period file a petition for reassessment in the manner prescribed in § 119.6.

§ 119.3. Bankruptcy or receivership.

(a) *Assessment.* Upon the adjudication of bankruptcy of a taxpayer in a bankruptcy proceeding or the appointment of a receiver for a taxpayer in receivership proceeding before court, the Department will immediately assess and proceed to collect tax due or estimated to be due together with interest, penalties and additions. The Department may determine the amount of the tax due by means of information available to it. The Department will cause an investigation to be made of the taxpayer's books and records to assist it in processing its claims.

(b) *Proof of claim.* Promptly after ascertaining the existence of a tax due or estimated to be due by a taxpayer in a proceeding under 11 U.S.C. §§ 101—151326, known as the Federal Bankruptcy Act or in a receivership proceeding, the Department will file proof of claim covering the tax in accordance with law

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in the court in which the proceeding is pending. At the same time the proof of claim is filed with the bankruptcy or receivership court, the Department will send notice and demand for payment to the taxpayer together with a copy of the proof of claim.

(c) *Preexisting appeals.* A petition for reassessment or an appeal therefrom which has not been adjudicated prior to the date of initiation of bankruptcy or receivership proceeding may in no way affect the rights of the Department to proceed under this section.

(d) *Application of funds.* Amounts received from the distribution of assets by the court shall be applied in extinguishment of the tax together with interest, penalties and additions due. The amounts first received shall be applied to the oldest amounts unpaid in chronological order.

§ 119.4. Fiduciaries.

This chapter applies to fiduciaries in the same manner as against a taxpayer except that an assessment, jeopardy assessment or claim will be asserted against the fiduciary acting in his representative capacity instead of against him personally. Satisfaction of an assessment, jeopardy assessment or claim will be limited to the property held by the fiduciary in his representative capacity unless he has committed some act which creates a personal liability.

§ 119.5. Jeopardy assessments.

(a) *Jeopardy assessments, filing and notice.* If the Department believes that the assessment or collection of a deficiency of a tax under this article will be jeopardized by delay, in whole or in part, it is required to assess the deficiency immediately, together with the interest, additional amounts and additions to the tax provided by law by mailing or issuing notice of its finding to the taxpayer, together with a demand for immediate payment of the deficiency declared to be in jeopardy.

(b) *Closing of taxable year.* If a taxpayer designs by immediate departure from this Commonwealth or otherwise, to avoid the payment of a tax imposed by this article for the preceding or current taxable year, the Department may, upon evidence satisfactory to it, declare the taxable period for the taxpayer immediately terminated and serve upon him notice and demand for immediate payment of the tax for the short taxable period resulting from the termination, and of a tax for the preceding taxable year, or so much of the tax as is unpaid. This tax shall be due and payable immediately, even though the time otherwise allowed by law for filing a return and paying the tax has not expired.

(c) *Payment and collection of jeopardy assessment.* After a jeopardy assessment has been made, the Department will be required to send notice and demand to the taxpayer for the amount of the jeopardy assessment. The amount of the jeopardy assessment shall be immediately due and payable and proceedings for collection may be commenced by the Department at once. Collection of the jeop-

ardy assessment may be stayed if the taxpayer, within 10 days after the date of the notice of the jeopardy assessment, files a petition for reassessment, accompanied by a bond or other security. The amount of the bond or security shall be the amount of the tax assessed, including interest, penalties and additions computed to the date of the notice plus 60 days together with an amount equaling 10% of the total figure. A bond given by a taxpayer under this subsection shall be executed by a surety company which is licensed with or under the supervision of the Insurance Commissioner of the Commonwealth. A security given by a taxpayer under this subsection may be any one of the following items or combination of items:

(1) The amount of the bond or security shall be in the amounts as the Department may deem necessary.

(2) A certified check on a State or national bank within the Commonwealth payable to the Department.

(3) Satisfactory municipal bonds negotiable by delivery, or obligations of the United States government negotiable by delivery.

(d) *Additional security.* The Department may require additional security whenever, in its opinion, the value of the security given is no longer sufficient to adequately secure the total amount of taxes and additions thereto.

(e) *Finality of jeopardy assessment.* A jeopardy assessment shall become final if a petition for reassessment, accompanied by bond or other security, is not filed within the 10 day period provided for in subsection (c).

(f) *Hearing and action on petition for reassessment.* The Department will grant a taxpayer or his authorized representative an oral hearing if the taxpayer so requests it in his petition for reassessment.

(g) *Decision.* The taxpayer will be notified by the Department of its decision after the oral hearing, if requested, and after considering the petition for reassessment. The decision of Department as to the validity of the jeopardy assessment will be final unless, within 90 days after notification of the Department's decision, the taxpayer files a petition for review by the Board of Finance and Revenue as provided under § 119.7 (relating to review by Board of Finance and Revenue).

(h) *Presumptive evidence of jeopardy.* In the event of a jeopardy assessment, the belief of the Department, whether made after notice to the taxpayer or not, will be, for purposes, presumptive evidence that the assessment or collection of the tax or the deficiency was in jeopardy. A certificate of the Department of the mailing or issuing of the notices specified in this section will be presumptive evidence that the notices were so mailed or issued.

Source

The provisions of this § 119.5 amended June 11, 1976, effective June 12, 1976, 6 Pa.B. 1331.

§ 119.6. [Reserved].

Source

The provisions of this § 119.6 amended January 9, 1987, effective January 10, 1987, 17 Pa.B. 186. Immediately preceding text appears at serial pages (36074) to (36075).

§ 119.7. Review by Board of Finance and Revenue.

(a) *Petition for review of reassessment.* The taxpayer has the right to file with the Board of Finance and Revenue a petition for review of a reassessment made by the Department within 90 days after the date of mailing the notice of the action taken upon a petition for reassessment. Failure of the Department to notify the petitioner of a decision within the 6-month period as provided for under § 119.6 (Reserved) shall act as a denial of the petition, and a petition for review may be filed with the Board of Finance and Revenue within 120 days after written notice is mailed to the petitioner that the Department has failed to dispose of his petition within the six-month period.

(b) *Information from the Department.* The Department may, if requested by the Board, furnish the Board with such information as it may have which may assist the Board in making a determination on the petition.

(c) *Action by the Board.* The Board of Finance and Revenue shall dispose of any petition within six months of its receipt thereof. Failure of the Board to dispose of any such petition within the 6-month period shall be deemed an affirmance of the action of the Department. The Board may sustain the action taken by the Department with respect to the petition for reassessment, or it may reassess the tax due upon such basis, as it shall deem, according to law.

(d) *Notice of action by Board.* The Board of Finance and Revenue shall give written notice by mail of any action taken by it to the Department and to the petitioner, his attorney, authorized agent or representative.

Cross References

This section cited in 61 Pa. Code § 119.5 (relating to jeopardy assessments).

§ 119.8. Appeal to a Commonwealth court.

From any decision or ruling made by the Board of Finance and Revenue, or upon the failure of the Board to act upon a petition for review, an aggrieved taxpayer shall have the right of an appeal to the Commonwealth Court. If the Commonwealth is aggrieved by a decision of the Board of Finance and Revenue, it also has the right of an appeal to the Commonwealth Court. Such appeals shall be filed within 30 days from the date of the mailing of the decision of the Board of Finance and Revenue or within 30 days from the end of the six-month period when the Board fails to act. From the action of the Commonwealth Court, further appeal to the Supreme Court of the Commonwealth may be had. For the rules and form of the petition to the Commonwealth Court, see the Commonwealth Court Procedural Rules.

Source

The provisions of this § 119.8 amended January 31, 1975, 5 Pa.B. 195.

§ 119.9. Collection of tax.

The Department will collect the taxes imposed by this article in the manner provided by law for the collection of taxes imposed by the laws of this Commonwealth.

§ 119.10. Time of collection of tax.

(a) *Collection.* The Department will proceed to collect any tax due including interest, penalties, and additions as follows:

(1) Immediately in all cases of bankruptcies, receiverships, assignments, judicial sales, and clerical errors or mistakes in preparing a return or in computing the tax.

(2) Immediately in all cases if a jeopardy assessment notice has been issued unless a taxpayer has filed a petition for reassessment and posted the required bond within ten days after mailing of the notice by the Department.

(3) After 90 days from the date of mailing of a notice of assessment, unless a taxpayer has filed a petition for reassessment within 90 days after mailing of the notice by the Department.

(4) After 90 days from the date of mailing of notice of a decision by the Department on a petition for reassessment unless a taxpayer has filed a petition for review with the Board of Finance and Revenue within 90 days after mailing of the notice by the Department.

(5) After 120 days from the date of mailing of notice by the Department that it failed to dispose of the petition for reassessment unless a taxpayer has filed a petition for review with the Board of Finance and Revenue within 120 days after mailing of the notice by the Department.

(6) After 30 days from the date of mailing of notice of a decision by the Board of Finance and Revenue on a petition for review unless a taxpayer shall have perfected an appeal to the Commonwealth Court within 30 days after mailing of notice by the Board, and shall have filed with the prothonotary of the Commonwealth Court appropriate security in the amount of 120% of the amount of taxes found due by the Board and remaining unpaid.

(7) After 30 days from the last day the Board of Finance and Revenue should have disposed of the petition for review if no decision was made unless a taxpayer shall have perfected an appeal to the Commonwealth Court within 30 days of the date the Board should have disposed of the petition, and shall have filed with the prothonotary of the Commonwealth Court appropriate security in the amount of 120% of the amount of taxes found due by the Board and remaining unpaid.

(8) Immediately upon a final order of the Commonwealth court or upon a final order of the Supreme Court of this Commonwealth if an appeal was taken to that court.

(b) *Defenses.* In any proceeding for the collection of tax due including interest, penalties, and additions, the taxpayer against whom an assessment was made shall not be permitted to set up any ground of defense that might have been presented to the Department, the Board of Finance and Revenue, or the Commonwealth court if he had properly pursued his administrative remedies under this article.

Source

The provisions of this § 119.10 amended September 17, 1976, 6 Pa.B. 2289.

§ 119.11. Liens for tax.

(a) If any person liable for any tax including interest, penalties, and addition neglects or for any reason refuses to pay the same on the date such becomes due, the amount of such tax, interest, penalties, and additions together with any other costs that accrue shall be a lien in favor of the Commonwealth against the real estate of such person. The following requirements shall apply:

(1) The Department may forward for filing a certified copy of such lien, interest, penalties, additions, and prothonotary's costs and fees and upon

(2) The lien will be considered perfected when filed and docketed by the prothonotary.

(3) The lien shall continue for five years from the date of docketing and may be revived and continued by the Department in the manner now or hereafter provided by law.

(4) The Department may seek a writ of *scire facias* in the Court of Common Pleas of the county where the real estate is situated and prosecute to judgment and execution in the manner now or hereafter provided by law in order to satisfy taxes including interest, penalties, and additions due and owing.

(b) Upon receipt from the Department of a certified copy of a lien the prothonotary shall forthwith enter and docket the lien which shall be indexed as judgments are now indexed. No prothonotary shall require the payment of any costs or fees as a condition precedent to the filing and docketing of any such liens. Any wilful failure of any prothonotary to carry out any duty imposed upon him by this section shall be a misdemeanor and, upon conviction thereof, he shall be sentenced to pay a fine not exceeding $1,000 and cost of prosecution, or to undergo imprisonment not exceeding one year, or both.

(c) The lien of the Department will have priority to and be fully paid before any other obligation, judgment, claim, lien, or estate with which the real estate may become charged with or liable for after the filing and docketing of the lien of the Department.

(d) The lien of the Department will be subordinate to the following:

(1) Mortgages against the real estate which have been duly recorded prior to the tax lien.

(2) Cost of the writ and the judicial sale.

(3) Real estate taxes imposed or assessed upon the real estate.

(e) Prior to execution and upon payment of all taxes due including interest, penalties, additions, and prothonotary's costs and fees and upon request of the taxpayer, the Department may release the property subject to the lien. A certificate by the Department to the effect that any property has been released from the lien shall be conclusive evidence that the property has been released.

§ 119.12. Refund or credit of overpayment.

(a) *General rule.* The Department, within the applicable period of limitations may credit any overpayment of tax, including interest thereon, against any outstanding liability for any tax, or for any interest, additional amount, addition to tax, or assessable penalty, owed by the person making the overpayment, and the balance, if any, will be refunded to such person by the Department.

(b) *Overpayment of installment of estimated tax.* If a taxpayer has paid an installment of estimated tax in excess of the correct amount of such installment, such overpayment will be credited against any unpaid installments. If the amount so paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, such overpayment will be credited or refunded as provided in subsection (a).

Cross References

This section cited in 61 Pa. Code § 119.13 (relating to restrictions on refunds).

§ 119.13. Restrictions on refunds.

(a) *General rule.* Except as provided in subsection (b), the Department will make a credit or refund under § 119.12 (relating to refund or credit of overpayment) only pursuant to a petition for refund. See Chapter 7 (relating to Board of Appeals).

(b) *Exceptions.* The Department will make a credit or refund if the credit or refund arises as a result of:

(1) The overpayment of an installment of estimated tax.

(2) The filing of a final return showing less tax due after the application of the allowable credits than the amount of tax withheld from the compensation of the taxpayer or the amount of tax paid by him as estimated tax under this article.

(3) The filing of an amended return showing an overpayment of tax.

(4) A petition for reassessment. The credit or refund will only be for amounts paid by reason of the assessment.

(5) A Departmental audit.

Authority

The provisions of this § 119.13 amended under section 354 of the Tax Reform Code of 1971 (72 P. S. § 7354).

Source

The provisions of this § 119.13 amended January 25, 2013, effective January 26, 2013, 43 Pa.B. 535. Immediately preceding text appears at serial pages (205414) to (205415).

§ 119.13a. Refund claim filed by a legal representative or other fiduciary.

If a return is filed by an individual and, after his death, a refund claim is filed by a legal representative, certified copies of the letters testamentary, letters of administration or other similar evidence shall be annexed to the claim to show the authority of the legal representative to file the claim. If an executor, administrator, guardian, trustee, receiver or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary does not need to accompany this claim if a statement is made in the claim showing that the return was filed by the fiduciary and that the latter is still acting. In these cases, if a refund is to be paid, letters testamentary, letters of administration or other evidence may be required but should be submitted only upon the receipt of a specific request therefor. If a claim is filed by a fiduciary other than the one by whom the return was filed, the necessary documentary evidence should accompany the claim. A claim may be executed by an agent of the person assessed, but in this case a power of attorney must accompany the claim.

Authority

The provisions of this § 119.13a issued under section 354 of the Tax Reform Code of 1971 (72 P. S. § 7354).

Source

The provisions of this § 119.13a adopted January 25, 2013, effective January 26, 2013, 43 Pa.B. 535.

§ 119.13b. Checks in payment of claims.

Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and may be sent directly to the claimant or to a person in care of an attorney or agent who has filed a power of attorney specifically authorizing him to receive checks.

Authority

The provisions of this § 119.13b issued under section 354 of the Tax Reform Code of 1971 (72 P. S. § 7354).

Source

The provisions of this § 119.13b adopted January 25, 2013, effective January 26, 2013, 43 Pa.B. 535.

§ 119.14. Limitations on assessment and collection.

(a) The amount of any tax imposed by this article will be assessed within three years after the return was filed.

(b) For purposes of §§ 119.15 and 119.16 (relating to omission from return; exceptions to general period of limitations on assessment and collection) any return filed before the last day prescribed by law or regulations for the filing thereof (determined without regard to any extension of time for filing) will be considered as having been filed on the last day.

§ 119.15. Omission from return.

If the taxpayer omits from the income stated in the return of a tax imposed by this article an amount properly includable therein which is in excess of 25% of the income so stated, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

Cross References

This section cited in 61 Pa. Code § 119.14 (relating to limitations on assessment and collection).

§ 119.16. Exceptions to general period of limitations on assessment and collection.

(a) *False return.* In the case of a false or fraudulent return with the intent to evade any tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time after such false or fraudulent return is filed.

(b) *Wilful attempt to evade tax.* In the case of a wilful attempt in any manner to defeat or evade any tax imposed by this article, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(c) *No return.* In the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time after the date prescribed for filing the return.

Cross References

This section cited in 61 Pa. Code § 119.14 (relating to limitations on assessment and collection).

§ 119.17. Extension of limitation.

The time prescribed by this chapter for the assessment of any tax may, prior to the expiration of such time, be extended for any period of time agreed upon in writing by the taxpayer and the Department. The extension shall become effec-

tive if the agreement has been executed by both parties. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

§ 119.18. Limitations on refund or credit.

Any petition for refund shall be filed in accordance with Chapter 7 (relating to Board of Appeals) and within applicable limitation periods.

Authority

The provisions of this § 119.18 amended under section 354 of the Tax Reform Code of 1971 (72 P. S. § 7354).

Source

The provisions of this § 119.18 amended January 25, 2013, effective January 26, 2013, 43 Pa.B. 535. Immediately preceding text appears at serial page (205416).

§ 119.19. Interest.

Interest at the rate of 0.75% per month, for each month or fraction thereof for which any amount of tax imposed by this article is not paid on or before the last day prescribed for payment, shall be imposed for the period from such last date to the date paid. The last date prescribed for payment shall be determined without regard to any extension of time for filing the return, however, this section shall not apply to any failure to pay estimated tax.

Source

The provisions of this § 119.19 amended December 29, 1978, 8, Pa.B. 3825. Immediately preceding text appears at serial page (36082).

§ 119.20. Additions.

(a) *Failure to file tax return.* In the event of failure to file any return required under § 117.1 (relating to general requirement of a return) on the date prescribed therefor (determined with regard to any extension of time for filing), there shall be added to the tax required to be shown on the return the amount specified in subsection (b) unless the failure to file the return within the prescribed time is shown to the satisfaction of the Department to be due to reasonable cause and not to wilful neglect. The amount to be added to the tax is 5% thereof, if the failure is for not more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, but which shall not exceed 25% in the aggregate.

(b) *Penalty imposed on net amount due.* The amount of tax required to be shown on the return for the purposes of this section shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return.

(c) *Month defined.* If the date prescribed for filing the return is the last day of a calendar month, each succeeding calendar month or fraction thereof during which the failure to file continues shall constitute a month for purposes of this chapter. If the date prescribed for filing the return is a date other than the last day of a calendar month, the period which terminates with the date numerically corresponding thereto in the succeeding calendar month and each such successive period shall constitute a month for purposes of this chapter. If a return is not timely filed, the fact that the date prescribed for filing the return or the corresponding date in any succeeding calendar month, falls on a Saturday, Sunday or a legal holiday shall be immaterial in determining the number of months for which the addition to the tax under this chapter applies.

§ 119.21. Failure to pay tax due to negligence or intentional disregard of rules and regulations.

If any part of any underpayment is due to negligence or intentional disregard to rules and regulations, but without intent to defraud, there will be added to the tax an amount equal to 5% of the underpayment.

Cross References

This section cited in 61 Pa. Code § 119.22 (relating to failure to pay due to fraud).

§ 119.22. Failure to pay due to fraud.

If any part of any underpayment of tax required to be shown on a return is due to fraud, there will be added to the tax an amount equal to 50% of the underpayment. If a 50% addition to the tax for fraud is assessed with respect to an underpayment then the addition as provided in § 119.21 (relating to failure to pay tax due to negligence or intentional disregard of rules and regulations) will not be assessed with respect to the same underpayment.

§ 119.23. Additions imposed for failure to file or to pay estimated tax.

(a) Except as provided in subsection (c), any individual who is required to file a declaration of estimated tax shall be deemed to have made an underpayment of estimated tax if he fails to pay all or any part of an installment when due. The amount of the underpayment shall be the excess of the amount of the installment which would be required to be paid if the estimated tax were equal to 80% of the tax (⅔ in the case of an individual) shown on the return for the taxable year (or if no return was filed of the tax for such year) over the amount, if any, of the installments paid on or before the last day prescribed for such payment.

(b) Any individual making an underpayment shall pay, in addition to the tax, an amount at the rate of 9% per annum of the underpayment for the period of the underpayment. The period of the underpayment shall begin on the day after such payment was due and continue until such tax is actually paid but not beyond the 15th day of the fourth month following the close of the taxable year of the individual.

(c) No additions to the tax will be imposed if such installment is paid on or before the last date prescribed for payment, and the amount of such payment is one of the following:

(1) At least 80% (66 ⅔% for an individual who expects to obtain at least ⅔ of his total estimated taxable income from farming for the year) of the amount due on the basis of the tax shown on the return for the taxable year.

(2) At least as much as would have been paid if based on the tax shown on the return of the prior year of the taxpayer.

(3) Based on a tax computed by using the income of the taxpayer for the prior year and the current tax rate.

(4) At least 90% of the tax due on the actual income earned in the months preceding the due date of the installment in question.

Source

The provisions of this § 19.23 amended December 29, 1978, 8 Pa.B. 3826. Immediately preceding text appears at serial page (36084).

§ 119.24. Failure to collect or truthfully account.

Any person required to collect, account for, and pay over any income tax who wilfully fails to collect, truthfully account for, and pay over such tax, or wilfully

attempts in any manner to evade or defeat any such tax or the payment thereof shall be liable to a penalty equal to the total amount of tax evaded or not collected or not accounted for and paid over.

§ 119.25. Failing to furnish or furnishing a false withholding statement.

Any employer required, under the provisions of § 113.4 (relating to time and place for filing reconciliation and withholding statements), to furnish a withholding statement to an employe who wilfully furnishes a false or fraudulent statement, or who wilfully fails to furnish a statement in the manner or at the time, or not showing the information required by § 113.4 shall for each such failure be liable to a penalty of $50 for each employe.

§ 119.26. Employer bad check.

Any employer who issues a check in payment of any tax which shall be returned to the Department as uncollectible, shall be charged a fee of 10% of the face amount of such check, but such fee shall not exceed $200 nor be less than $10, plus all protest fees, to cover the cost of collections.

§ 119.27. Fiduciary request.

To facilitate the settlement and distribution of a decedent's estate, the Department will, at the request of the fiduciary, executor, administrator, or other person who may have any liability for any income tax due from a decedent or his estate, determine the amount of income taxes due, if any, from the decedent or his estate and upon payment of the amount of tax plus appropriate penalty and interest so determined, the fiduciary or the person otherwise liable, shall be discharged from personal liability for any tax deficiency thereafter found to be due.

(1) After the filing of all returns due from the decedent and his estate, a request for such determination may be made, in duplicate, to the Department, on the form, ''Request for Final Determination of Personal Income Tax Liability.''

(2) The determination by the Department shall be final and conclusive, and if not appealed by the fiduciary and except upon proof of fraud, misrepresentation or nondisclosure of a material fact by the fiduciary:

(i) The determination shall not be reopened or modified by any officer, employe or agent of the Commonwealth.

(ii) In any suit, action or proceeding, such determination, or any collection, payment, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.

REQUEST FOR FINAL DETERMINATION OF PERSONAL INCOME TAX LIABILITY

*ESTATE OF*_____ *EIN*_____

Date of Death_____
Will Book No. or Administration
No.
_____

Decedent's Social Security No._____

(note to drafter—use identifying information similar to that on the Inheritance Tax Waiver forms)

Decedent's Final Return was filed
by the Fiduciary on_____
Estate Final Return was filed_____

(1) Was the decedent at any time subsequent to June 1, 1971, an ''employer'' within the meaning of the Tax Reform Code of 1971?
Yes_____ No_____

(2) Are there any outstanding assessments against decedent or the estate for Personal Income Tax liability?
Yes_____ No_____

(administrator, executor,
guardian trustee) of the estate of_____
hereby requests that the Department of Revenue, Personal Income Tax Bureau, make a final determination of the Personal Income Tax liability of the subject individual and of his estate in accordance with the provisions of Section 338 of the Tax Reform Code of 1971 and the regulations thereunder. Said_____ (fiduciary)does hereby represent that all returns due under the Tax Reform Code of 1971 have been duly filed and paid and there are no outstanding assessment against the decedent or his estate. The fiduciary further agrees to immediately notify the Department of Revenue, Personal Income Tax Bureau, in the event knowledge of income over and above that which has been reported comes to his attention in the future.

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I hereby certify under the penalties of perjury that the statements contained herein are true and correct to the best of my knowledge, information and belief.

_____

(administrator, executor, et cetera)

Source

The provisions § 119.27 adopted December 12, 1975, 5 Pa.B. 3199, amended December 19, 1975, 5 Pa.B. 3278.

§ 119.28. Timely mailing treated as timely filing and payment.

Whenever payment of all or any portion of the tax imposed by this article is required to be received by the Department on or before a certain date, the taxpayer shall be deemed to have complied with this article if the letter transmitting payment of such tax is received by the Department and is postmarked by the United States Postal Service on or prior to the final day on which the payment is required to be received. Any private postage meter or similar device imprinting a postmark or date shall not be controlling upon the Department.

Source

The provisions of this § 119.28 adopted June 12, 1975, 5 Pa.B. 1561.

§ 119.29. Procedure for claiming special tax provisions.

The following procedures shall be employed for claiming the special tax provisions:

(1) The claimant may claim the special tax provisions upon the expiration of his taxable year by completing a Special Tax Provisions Schedule (Schedule SP) and filing it in conjunction with the annual return required under the provisions of this article.

(2) If the claimant is required to file an estimated tax return under the provisions of this article, he may utilize the special tax provisions in computing the tax due with such returns.

Source

The provisions of this § 119.29 adopted June 12, 1975, effective 5 Pa.B. 1561.

§ 119.30. Innocent spouse relief.

(a) *Definitions*.

The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Collection activity—The application of any overpayment to the liability provided for under section 346 of the TRC (72 P. S. § 7346), the mailing of a notice that the Department plans to intercept taxpayer's Federal Income Tax

under section 6402 of the IRC (26 U.S.C.A. § 6402) or the issuance of a writ of execution, whichever first occurs.

Disqualified asset—Any property or right to property that was transferred from the nonelecting spouse to the electing spouse if the principal purpose of the transfer was the avoidance of tax or payment of tax, including additions to tax, penalties and interest.

Electing spouse—A taxpayer who follows the procedure described in subsection (f).

Nonelecting spouse—An electing taxpayer's spouse in the tax year for which the electing taxpayer is seeking tax relief under this section.

Rebate—The amount refunded or credited to a taxpayer because the Department determined that the Pennsylvania tax liability reported on the Personal Income Tax return exceeds the Pennsylvania tax liability due or any other amount refunded or credited to taxpayer that reduces the Pennsylvania tax liability reported on the return.

Taxpayers' Rights Advocate—As defined in section 207 of the Taxpayers' Bill of Rights (72 P. S. § 3310-207).

Understatement—The excess of the tax required to be shown on the Personal Income Tax return for the taxable year, less the tax shown on the Personal Income Tax return reduced by any rebate.

(b) *In general.*

(1) *Relief from joint and several liability for understated tax*. A spouse who filed a joint Pennsylvania Personal Income Tax return with a spouse may elect relief from joint and several liability for Pennsylvania Personal Income Tax which was understated on the joint return, provided the following conditions are met:

(i) The understatement of tax is attributable to erroneous items of the spouse.

(ii) The eligible spouse did not know or have reason to know of the understatement.

(2) *Relief from joint and several liability for unpaid tax*. The Taxpayers' Rights Advocate may grant relief for a tax liability due to the underpayment of tax as reported on the taxpayers' joint return. The relief granted must be a separate liability of the taxpayer's spouse, and the Taxpayers' Rights Advocate must find that it is inequitable to hold the taxpayer liable for the separate liability of the taxpayer's spouse.

(c) *Joint liability relief for an understatement of tax available to all joint filers*.

(1) *In general*. A joint filer shall be relieved of liability for tax (including interest, penalties and other charges) for a taxable year to the extent the liability is an understatement attributable to the other joint filer if the following conditions are met:

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(i) A joint return has been made for a taxable year.

(ii) There is an understatement of tax on the return attributable to erroneous items of the other individual filing the joint return.

(iii) The individual establishes that in signing the return the individual did not know and had no reason to know of the understatement made on the return.

(iv) Taking into account all the facts and circumstances, it is inequitable to hold the individual liable for the tax deficiency attributable to the understatement.

(v) The individual elects the benefits of this subsection no later than 2 years from the date of the first collection activity for the understatement.

(2) *Knowledge or reason to know*. A spouse has knowledge or reason to know of an understatement if the spouse actually knew of the understatement or if a reasonable person in similar circumstances would have known of the understatement. All facts and circumstances are considered in determining whether an electing spouse had reason to know of an understatement. Some of the facts and circumstances considered include the following:

(i) The nature of the erroneous item and the amount of the erroneous item relative to other items.

(ii) The couple's financial situation.

(iii) The electing spouse's educational background and business experience.

(iv) The extent of the electing spouse's participation in the activity that resulted in the erroneous item.

(v) Whether the electing spouse failed to inquire, at or before the time the return was signed, about items on the return or omitted items from the return that a reasonable person would question.

(vi) Whether the erroneous item represented a departure from a recurring pattern reflected in prior years' returns; such as, omitted income from an investment regularly reported on prior years' returns.

(3) *Apportionment of relief*. Relief shall be apportioned when a spouse establishes that in signing the return the spouse did not know, and had no reason to know, the extent of the understatement; and but for spouse's knowledge of the understatement, the spouse would have been relieved of liability under paragraph (1). The spouse shall be relieved of liability for tax (including interest, penalties and other charges) for the taxable year to the extent that the liability is attributable to the portion of the understatement of which the spouse did not know and had no reason to know.

Example: H and W are married and file their 2005 joint Pennsylvania Personal Income Tax return on March 1, 2006. In 2005, casinos report income of $300,000 to H, and H and W do not include this income on their return. H kept his gambling income in an individual bank account; and each month, H transferred a sum of at least $6,000 into H and W's joint bank account. The total deposits from H's

separate account to the joint account for the 2005 tax year totaled $90,000. All of H and W's reported income was deposited into this joint account.

W paid the household expenses using the joint account and regularly received the bank statements for it. W did have knowledge and reason to know of at least $90,000 of the $300,000 income reported by the casinos. W may not be relieved of the liability for the tax deficiency arising from $90,000 of the unreported gambling income of which she knew. W may be relieved of the deficiency arising from the additional $210,000 of gambling income reported by the casinos if given the facts and circumstances of H and W's activities, income, and the like, W had no reason to know of the additional $210,000 of income.

(d) *Joint liability relief by separation of liability available to taxpayers no longer married or taxpayers legally separated or not living together.*

(1) *In general.* Except as provided in this subsection, if an individual who has made a joint return for any taxable year elects the relief available in this subsection, the individual's liability for tax which is assessed due to an understatement of tax on the return may not exceed the portion of the deficiency allocable to the individual as provided in paragraph (3).

(2) *Election.*

(i) *Individuals eligible to make election.*

(A) *In general.* An individual shall only be eligible to elect the application of this subsection if one of the following conditions is met:

(I) At the time the election is filed, the individual is no longer married to, or is legally separated from the individual with whom the individual filed the joint return to which the election relates.

(II) The electing individual was not a member of the same household as the individual with whom the joint return was filed at any time during the 12-month period ending on the date the election is filed.

(B) *Certain taxpayers ineligible to elect.* If the Department determines that assets were transferred between individuals filing a joint return or by individuals filing a joint return as part of a fraudulent scheme by the individuals, an election under this subsection by either individual shall be invalid and the liability with respect to the tax shall be joint and several. Transfers made as part of a fraudulent scheme include transfers made to frustrate the collection of tax. For purposes of this subsection, a fraudulent scheme includes a scheme to defraud the Department or another third party, including, but not limited to, creditors, ex-spouses and business partners.

(C) *Member of the same household.*

(I) *Separate dwellings.* A husband and wife who reside in the same dwelling are considered members of the same household. In addition, a husband and wife who reside in two separate dwellings are considered members of the same household if the spouses are not estranged

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or one spouse is temporarily absent from the other's household within the meaning of subclause (II).

(II) *Temporary absences*. An electing spouse and a nonelecting spouse are considered members of the same household during either spouse's temporary absences from the household if it is reasonable to assume that the absent spouse will return to the household; and the household or a substantially equivalent household is maintained in anticipation of the return. Examples of temporary absences may include absence due to incarceration, illness, business, vacation, military service or education.

(ii) *Election not valid with respect to certain deficiencies*. If the individual making an election under this subsection had actual knowledge, at the time the individual signed the return, of any item giving rise to a deficiency (or portion thereof) which is not allocable to the individual under paragraph (3), an election does not apply to the deficiency or any portion.

(A) *Actual knowledge—omitted income*. In the case of omitted income, knowledge of the item includes knowledge of the receipt of the income. This rule applies equally in situations where the other spouse has unreported income although the spouse does not have an actual receipt of cash (such as, dividend reinvestment or a distributive share from a flow-through entity).

Example. W received $5,000 of dividend income from her investment in X Company but did not report it on the joint return. H knew that W received $5,000 of dividend income from X Company that year. H had actual knowledge of the erroneous item (that is, $5,000 of unreported dividend income from X Company); and no relief is available under this section for the deficiency attributable to the dividend income from X Company.

(B) *Actual knowledge—deduction or credit*. In the case of an erroneous deduction or credit, knowledge of the item means knowledge of the facts that made the item not allowable as a deduction or credit. If a deduction is fictitious or inflated, the Department must establish that the electing spouse actually knew that the expenditure was not incurred or not incurred to that extent.

(C) *Partial knowledge*. If an electing spouse had actual knowledge of only a portion of an erroneous item, then relief is not available for that portion of the erroneous item. An electing spouse's actual knowledge of the proper tax treatment of an item is not relevant for purposes of demonstrating that the electing spouse had actual knowledge of an erroneous item. In addition, an electing spouse's knowledge of how an erroneous item was treated on the tax return is not relevant to a determination of whether the electing spouse had actual knowledge of the item.

Example 1. If H knew that W received $5,000 of gambling winnings but did not know that W's actual winnings were $25,000, relief would not be available for the portion of the deficiency attributable to the $5,000 of income of which H had actual knowledge.

Example 2. Relief is not available under this subsection when H knew that W received winnings of $5,000 but did not know they were taxable.

Example 3. H knew of W's winnings, but H failed to review the completed return and did not know that W omitted the income from the return. Relief is not available under this subsection.

(D) *Knowledge of the source not sufficient*. Knowledge of the source of an erroneous item is not sufficient to establish actual knowledge. In addition, an electing spouse's actual knowledge may not be inferred when the electing spouse merely had reason to know of the erroneous item. Similarly, the Department need not establish that an electing spouse knew the source of an erroneous item to establish that the electing spouse had actual knowledge of the item itself.

Example 1. H knew that W owned X Company stock, but H did not know that X Company paid dividends that year. H's knowledge of W's ownership in X Company is not sufficient to establish that H had actual knowledge of the dividend income from X Company. Even if H's knowledge of W's ownership interest in X Company indicates a reason to know of the dividend income, actual knowledge of the dividend income cannot be inferred from H's reason to know.

Example 2. H knew that W received $5,000, but he did not know the source of the $5,000. W and H omit the $5,000 from their joint return. H had actual knowledge of the erroneous item (that is, the omitted $5,000). No relief is available under this subsection.

(E) *Factors supporting actual knowledge*. To demonstrate that an electing spouse had actual knowledge of an erroneous item at the time the return was signed, the Taxpayers' Rights Advocate may rely upon all the facts and circumstances. One factor that may be relied upon in demonstrating that an electing spouse had actual knowledge of an erroneous item is whether the electing spouse made a deliberate effort to avoid learning about the item to be shielded from liability. This factor, together with all other facts and circumstances, may demonstrate that the electing spouse had actual knowledge of the item, and the electing spouse's election would be invalid with respect to that entire item. Another factor that may be relied upon in demonstrating that an electing spouse had actual knowledge of an erroneous item is whether the electing spouse and the nonelecting spouse jointly owned the property that resulted in the erroneous item. Joint ownership is a factor supporting a finding that the electing spouse had actual knowledge of an erroneous item.

(iii) *Disqualified asset transfers*.

(A) *In general*. The portion of the deficiency for which an electing spouse is liable is increased (up to the entire amount of the deficiency) by the value of any disqualified asset that was transferred to the electing spouse. For purposes of this subparagraph, the value of a disqualified asset is the fair market value of the asset on the date of the transfer.

(B) *Presumption*. Any asset transferred from the nonelecting spouse to the electing spouse during the 12-month period before the mailing date of the Department's first billing notice of the tax liability for which innocent spouse relief is requested is presumed to be a disqualified asset. The presumption also applies to any asset that is transferred from the nonelecting spouse to the electing spouse after the mailing date of the first billing notice. The presumption does not apply, however, if the electing spouse establishes that the asset was transferred pursuant to a divorce decree or a separate maintenance order or a written instrument incident to the decree or court order. If the presumption does not apply, but the Department can establish that the purpose of the transfer was the avoidance of tax or payment of tax, the asset will be disqualified, and its value (up to the entire amount of the deficiency) will be added to the amount of the deficiency for which the electing spouse remains liable. If the presumption applies, an electing spouse may still rebut the presumption by establishing that the principal purpose of the transfer was not the avoidance of tax or payment of tax.

Example 1. Disqualified asset presumption. H and W are divorced. In May 2005, W transfers $20,000 to H, and in April 2006, H and W receive a billing notice proposing a $40,000 deficiency on their 2004 joint Pennsylvania Personal Income Tax return. The liability remains unpaid, and in October 2006, H elects to allocate the deficiency under this section. Seventy-five percent of the net amount of erroneous items is allocable to W, and 25% of the net amount of erroneous items is allocable to H.

In accordance with the proportionate allocation method (see paragraph (3)), H proposes that $30,000 of the deficiency be allocated to W and $10,000 be allocated to himself. H submits a signed statement providing that the principal purpose of the $20,000 transfer was not the avoidance of tax or payment of tax, but he does not submit any documentation indicating the reason for the transfer. H has not overcome the presumption that the $20,000 was a disqualified asset. Therefore, the portion of the deficiency for which H is liable ($10,000) is increased by the value of the disqualified asset ($20,000). H is relieved of liability for $10,000 of the $30,000 deficiency allocated to W, and remains jointly and severally liable for the remaining $30,000 of the deficiency (assuming that H does not qualify for relief under any other provision).

Example 2. Disqualified asset presumption inapplicable. On May 1, 2001, H and W receive a billing notice regarding a proposed deficiency on their 1999 joint Pennsylvania Personal Income Tax return relating to an unreported capital gain

from H's sale of his investment in Z stock. W had no actual knowledge of the stock sale. The deficiency is assessed in November 2001, and in December 2001, H and W divorce. According to a decree of divorce, H must transfer 1/2 of his interest in mutual fund A to W. The transfer takes place in February 2002. In August 2002, W elects to allocate the deficiency to H. Although the transfer of 1/2 of H's interest in mutual fund A took place after the billing notice was mailed, the mutual fund interest is not presumed to be a disqualified asset because the transfer of H's interest in the fund was made pursuant to a decree of divorce.

Example 3. Overcoming the disqualified asset presumption. H and W are married for 25 years. Every September, on W's birthday, H gives W a gift of $500. On February 28, 2007, H and W received a billing notice from the Department relating to their 2003 joint Pennsylvania Personal Income Tax return. The deficiency relates to H's business, and W had no knowledge of the items giving rise to the deficiency. H and W are legally separated in June 2004, and, despite the separation, H continues to give W $500 each year for her birthday. H is not required to give the amounts pursuant to a decree of divorce or separate maintenance. On January 27, 2009, W files an election to allocate the deficiency to H. The $1,500 transferred from H to W from February 28, 2006, (a year before the billing notice was mailed) to the present is presumed disqualified. However, W may overcome the presumption that the amounts were disqualified by establishing that the amounts were birthday gifts from H and that she has received the gifts during their entire marriage. Those facts would show that the amounts were not transferred for the purpose of avoidance of tax or payment of tax.

(3) *Allocation of relief.*

(i) *Allocation of erroneous items*. For purposes of allocating a deficiency under this section, erroneous items are generally allocated to the spouses as if separate returns were filed, subject to the following exceptions:

(A) *Benefit on the return*. An erroneous item that would otherwise be allocated to the nonelecting spouse is allocated to the electing spouse to the extent that the electing spouse received a tax benefit on the joint return.

(B) *Fraud*. The Taxpayers' Rights Advocate may allocate any item between the spouses if the Department establishes that the allocation is appropriate due to fraud by one or both spouses.

(C) *Erroneous items of income*. Erroneous items of income are allocated to the spouse who was the source of the income. Compensation is allocated to the spouse who performed the services producing the compensation. Items of business or investment income are allocated to the spouse who owned the business or investment. If both spouses owned an interest in the business or investment, the erroneous item of income is generally allocated between the spouses in proportion to each spouse's ownership interest in the business or investment, subject to the limitations of this paragraph. In the absence of clear and convincing evidence supporting a different allocation, an erroneous income item relating to an asset that the

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spouses owned jointly is generally allocated 50% to each spouse, subject to the limitations in this paragraph and the exceptions in this subparagraph.

(D) *Erroneous deduction items*. Erroneous deductions related to a business or investment are allocated to the spouse who owned the business or investment. If both spouses owned an interest in the business or investment, an erroneous deduction item is generally allocated between the spouses in proportion to each spouse's ownership interest in the business or investment. In the absence of clear and convincing evidence supporting a different allocation, an erroneous deduction item relating to an asset that the spouses owned jointly is generally allocated 50% to each spouse, subject to the limitations in this paragraph and the exceptions in this subparagraph. Deduction items unrelated to a business or investment are also allocated 50% to each spouse, unless the evidence shows that a different allocation is appropriate.

(ii) *Allocation method.*

(A) *Proportionate allocation*. The portion of a deficiency allocable to the electing spouse is the amount that bears the same ratio to the deficiency as the net amount of erroneous items allocable to the electing spouse bears to the net amount of all erroneous items. This calculation may be expressed as follows:

$$X = (\text{deficiency}) * \left(\frac{\text{net amount of erroneous items allocable to the electing spouse}}{\text{net amounts of all erroneous items}} \right)$$

X = Electing spouse's share of deficiency

(B) *Items proportionately allocated*. The proportionate allocation in clause (A) applies to any portion of the deficiency, except for the following:

(I) Any portion of the deficiency attributable to erroneous items allocable to the nonelecting spouse of which the electing spouse had actual knowledge.

(II) Any portion of the deficiency attributable to penalties.

(C) *Penalties*. Any additions, penalties and fees under section 352 of the TRC of 1971 (72 P. S. § 7352) are allocated to the spouse whose item generated the cost.

(D) *Examples*. In each example, the electing spouse or spouses qualify to elect to allocate the deficiency, that any election is timely made, and that the deficiency remains unpaid. In addition, unless otherwise stated, assume that neither spouse has actual knowledge of the erroneous items allocable to the other spouse.

Example 1. Allocation of erroneous items. W and H timely file their 2005 joint Pennsylvania Personal Income Tax return on April 15, 2006. On October 17, 2006, the Department issued an assessment with respect to their 2005 joint return. The following erroneous items give rise to the deficiency:

A disallowed business expense for H's business.

A disallowed deduction for educational expenses reported by W.

Unreported interest income from a joint account. H and W divorce on January 4, 2007, and W timely elects to allocate the deficiency. The erroneous items are allocated as follows:

The disallowed business expense is allocable to H.

The disallowed educational expense is allocable to W.

The unreported interest income from the joint account normally would be allocated 1/2 to H and 1/2 to W, but because both H and W had knowledge of the income, an election to allocate this portion of the deficiency is invalid.

Example 2. Proportionate allocation. W and H timely file their 2005 joint Pennsylvania Personal Income Tax return on April 15, 2006. On October 17, 2006, the Department issued an assessment for $12,280 with respect to their 2005 joint return. H and W divorce on December 4, 2006, and W timely elects to allocate the deficiency. The following erroneous items give rise to the deficiency:

$300,000 business loss allocable to H.

Deduction under section 179 of the IRC (26 U.S.C.A. § 179) of $60,000 allocable to H.

$15,000 deduction for unreimbursed employee business expenses allocable to W.

$25,000 of unreported interest allocable to W.

H's items:	*W's items:*
$300,000 Business loss	$25,000 Interest
$60,000 Section 179	$15,000 Unreimbursed employee business expenses

In total, there are $400,000 of erroneous items, of which $40,000 is attributable to W and $360,000 is attributable to H. The ratio of erroneous items allocable to W to the total erroneous items is 1/10 ($40,000/$400,000).

$$\$1,228 = (\$12,280) * \frac{\$40,000}{\$400,000}$$

W's liability is limited to $1,228 of the deficiency (1/10 of $12,280). The Department may collect up to $1,228 from W and up to $12,280 from H. The total amount collected, however, may not exceed $12,280. If H also made an election, there would be no remaining joint and several liability, and the Department would be permitted to collect $1,228 from W and $11,052 from H.

Example 3. Proportionate allocation with joint erroneous item. On September 4, 2006, W elects to allocate to H a $921 deficiency for the 2005 tax year. The following erroneous items give rise to the deficiency:

Unreported interest in the amount of $20,000 from a joint bank account.

Disallowed unreimbursed employee business expenses of $2,000 attributable to W.

Disallowed business expenses in the amount of $8,000 attributable to H's business.

The erroneous items total $30,000. Generally, income, deductions, or credits from jointly held property that are erroneous items are allocable 50% to each spouse. However, in this case, both spouses had actual knowledge of the unreported interest income. Therefore, W's election to allocate the deficiency attributable to the interest is invalid. W and H remain jointly and severally liable for the tax due on the interest. The tax due on the interest is $614. W may allocate the remaining $10,000. The tax due on the amount to be allocated is $307.

H's items:	*W's items:*
$8,000 Business expenses	$2,000 Unreimbursed employee business expenses

Total allocable items: $10,000

$$\$61.40 = (\$307) * \frac{\$2,000}{\$10,000}$$

W's remaining tax liability = $724; [$61 (Allocable to W) + $614 (Nonallocable portion of deficiency)]

H's liability = $921. The Department would be permitted to collect $724 from W and $921 from H. The total amount collected, however, may not exceed $921.

If H were also to make an election, the Department would be permitted to collect $860 from H. [(.8) ($307) = $246 Portion allocable to H]; [$860 = $246 + 614 (Nonallocable portion of deficiency)]

(4) *Burden of proof*. Except for establishing actual knowledge under paragraph (2)(ii), the electing spouse must prove that all of the qualifications for making an election under this section are satisfied and that none of the limitations (including the limitation relating to transfers of disqualified assets) apply. The electing spouse must also establish the proper allocation of the erroneous items.

(5) *Limitations*. The relief available under this subsection is limited to relief for understated tax. Refunds are not authorized under this subsection.

(e) *Relief by income allocation for unpaid tax or an understatement of tax if relief was unavailable under subsections (c) and (d).*

(1) *In general*. Using the factors provided in paragraph (3), if the electing spouse is divorced, widowed, or legally separated and the factors favoring relief outweigh the factors weighing against relief and none of the limitations in paragraph (2) apply, the Taxpayers' Rights Advocate may allocate the electing spouse's tax liability as provided in paragraph (3).

(2) *Relief limitations*.

(i) The income tax liability which the electing spouse seeks relief must be attributable to an item of the other spouse (or former spouse) with whom the electing spouse filed the joint return, unless one of the following exceptions applies:

(A) An electing spouse has only nominal ownership of an item. If an item is titled in the name of the electing spouse, the item is presumptively attributable to the electing spouse. This presumption is rebuttable.

Example: H opens an individual retirement account (IRA) in W's name and forges W's signature on the IRA in 1980. Thereafter, H makes contributions to the IRA. In 2007, when H is age 50, H takes a distribution from the IRA. H and W file a joint return for the 2007 taxable year but do not report the taxable portion of the distribution on their joint return. The Department issues an assessment relating to the IRA distribution and assesses the deficiency against H and W. W requests relief from joint and several liability under this section. W establishes that W had no knowledge of the IRA account, did not contribute to the IRA, sign paperwork relating to the IRA, or otherwise act as if she were the owner of the IRA. W thereby rebutted the presumption the IRA is attributable to W.

(B) If the electing spouse did not know and had no reason to know that funds intended for the payment of tax were misappropriated by the nonelecting spouse for the nonelecting spouse's benefit, the Taxpayers' Rights Advocate will consider granting equitable relief in this case only to the extent that the funds intended for the payment of tax were taken by the nonelecting spouse.

(C) If the electing spouse establishes he was the victim of abuse prior to the time the return was signed, and that, as a result of the prior abuse, the electing spouse did not challenge the treatment of any items on the return for fear of the nonelecting spouse's retaliation, the Taxpayers' Rights Advocate will consider granting equitable relief although the understatement may be attributable in part or in full to an item of the electing spouse.

(ii) Refunds are not available under this subsection. Relief is limited to reducing or eliminating an electing spouse's tax deficiency.

(iii) Relief is not available for unpaid tax that is a separate liability of the taxpayer's spouse and is for a tax year more than 12 months prior to the legal separation or divorce of the taxpayer from the spouse or for a tax year

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more than 12 months prior to the date the taxpayer and the spouse were no longer members of the same household as described in subsection (d)(2)(i)(C).

(iv) Relief is not available if an electing spouse has taxable income and has not filed the return required by section 330 of the TRC (72 P. S. § 7331) or if an electing spouse has an outstanding personal income tax liability for a tax year or tax years other than the year or years for which the electing spouse is seeking relief under this section.

(v) Relief is not available for an electing spouse unless one of the following conditions is met:

(A) At the time the election is filed, the individual is no longer married to, or is legally separated from, the individual with whom the individual filed the joint return to which the election relates.

(B) The electing individual was not a member of the same household as the individual with whom the joint return was filed at any time during the 12-month period ending on the date the election is filed.

(3) Factors for determining whether to grant relief as described in this subsection. The Taxpayers' Rights Advocate will consider the following factors in determining whether, taking into account all the facts and circumstances, it is inequitable to hold the electing spouse liable for all or part of the tax deficiency or unpaid tax:

(i) *Knowledge or reason to know*. The electing spouse's knowledge or reason to know of a deficiency or the failure to pay the reported tax liability is a factor weighing against relief. The lack of the knowledge, however, is not a factor weighing in favor of granting relief.

(A) *Unpaid tax*. In the case of an income tax liability that was properly reported but not paid, the electing spouse's actual knowledge or reason to know that the nonelecting spouse would not pay the income tax liability is a factor weighing against relief.

(B) *Deficiency cases*. Actual knowledge of the item giving rise to the deficiency is a strong factor weighing against relief. This strong factor only may be overcome if the factors in favor of relief are compelling. Reason to know of the item giving rise to the deficiency rather than actual knowledge will not be weighed more heavily than other factors.

(C) *Reason to know*. For purposes of clauses (A) and (B), in determining whether the electing spouse had reason to know, the Taxpayers' Rights Advocate will consider the electing spouse's level of education, any deceit or evasiveness of the nonelecting spouse, the electing spouse's degree of involvement in the activity generating the income tax liability, the electing spouse's involvement in business and household financial matters, the electing spouse's business or financial expertise, and any lavish or unusual expenditures compared with past spending levels.

(ii) *Abuse*. The presence of abuse by the nonelecting spouse is a factor favoring relief. The lack of abuse by the nonelecting spouse will not be weighed against relief. A history of abuse by the nonelecting spouse may mitigate an electing spouse's knowledge or reason to know.

(iii) *Nonelecting spouse's legal obligation*. The nonelecting spouse's legal obligation to pay the outstanding income tax liability pursuant to a divorce decree or agreement will not weigh in favor of relief if the electing spouse knew or had reason to know, when entering into the divorce decree or agreement, that the nonelecting spouse would not pay the income tax liability.

(iv) *Significant benefit*. The electing spouse has significantly benefited beyond normal support from the unpaid liability. Evidence of direct or indirect benefit may consist of transfers of property or rights to property, including transfers that may be received several years after the year of the understatement. The receipt of a significant benefit is a strong factor weighing against relief. The failure of the electing spouse to receive a significant benefit will not weigh in favor of relief.

Example. If an electing spouse receives property (including life insurance proceeds) from the nonelecting spouse that is beyond normal support and traceable to items omitted from gross income that are attributable to the nonelecting spouse, the electing spouse will be considered to have received significant benefit from those items.

(v) *Compliance with income tax laws*. The failure of an electing spouse to comply with Article III of the TRC (72 P. S. §§ 7301—7361) in the taxable years following the taxable year or years to which the request for relief relates is a strong factor weighing against relief without clear evidence that the electing spouse made a good faith effort to comply.

(vi) *Economic hardship*. Whether the electing spouse would suffer economic hardship if the Taxpayers' Rights Advocate does not grant relief from the income tax liability. Economic hardship is present when the electing spouse is unable to pay reasonable basic living expenses. The determination of a reasonable amount of basic living expenses will vary according to the circumstances of the individual taxpayer. These circumstances, however, do not include the maintenance of an affluent or luxurious standard of living. In determining a reasonable amount for basic living expenses, the Taxpayers' Rights Advocate will consider information provided by the taxpayer including the following:

(A) The taxpayer's age, employment status and history, ability to work, number of dependents, and status as a dependent of someone else.

(B) The amount reasonably necessary for food, clothing, housing (including utilities, homeowner insurance, homeowner dues, and the like), medical expenses (including health insurance), transportation, current tax payments (including Federal, State and local), alimony, child support, or

other court-ordered payments, and expenses necessary to the taxpayer's production of income (such as dues for a trade union or professional organization, or child care payments which allow the taxpayer to be gainfully employed).

(C) The cost of living in the geographic area in which the taxpayer resides.

(D) The amount of property exempt from levy which is available to pay the taxpayer's expenses.

(E) Extraordinary circumstances such as special education expenses, a medical catastrophe or natural disaster.

(F) Eligibility for tax forgiveness in current and tax years subsequent to the tax year for which relief is requested.

(vii) *Mental or physical health*. In determining whether the electing spouse was in poor mental or physical health on the date the electing spouse signed the return or at the time the electing spouse requested relief, the Taxpayers' Rights Advocate will consider the nature, extent, and duration of illness when weighing this factor, but the lack of evidence of poor mental or physical health of an electing spouse will not weigh against relief.

(4) *Allocation method for unpaid tax*. The electing spouse's liability for unpaid tax (including interest, penalties and other charges) is determined using the items reported on the joint return and calculating the separate return amount due from the electing spouse in accordance with the following:

(i) Income, deductions and credits earned by, paid to, paid by, or attributable to solely one spouse will be assigned to that spouse.

(ii) Except for estimated tax payments made jointly and a payment made with the joint return from joint funds of both spouses, income, deductions and credits earned by, paid to, paid by, or attributable to both spouses jointly, or paid from joint funds of both spouses will be divided equally between the spouses.

(iii) The portion of the estimated tax payments made jointly and the payment made with the joint return that is from joint funds of the spouses that is allocable to each spouse is the amount that bears the same ratio to the sum of the spouse's joint estimated payments and joint payment with the return as the separate return amount of each spouse's total income less compensation bears to the total income less compensation reported on the joint return.

Example 1: H and W filed a joint 2006 Pennsylvania Personal Income Tax return on February 1, 2007, and reported a tax due amount of $307. H and W did not include any payment with the return. H and W had separate checking accounts. W did not participate in H's business. The Department issued an assessment for the $307 on October 1, 2007. H and W did not file a petition for reassessment. On November 1, 2008, H and W's divorce was finalized. On July 15, 2009, W filed the forms required to request innocent spouse relief for the tax

assessment issued on October 1, 2007. W timely filed her 2007 and 2008 Pennsylvania Personal Income Tax returns and paid the tax due with the return. W states that she assumed H wrote a check for the 2006 tax due and enclosed the check with the return because in previous years he paid the tax due with the return because her earnings were subject to withholding tax and H had no withholding tax. In addition, the interest they earned each year generally was less than the unreimbursed business expenses W incurred.

H and W's joint return reported the following:

Gross Compensation	$40,000		
(Unreimbursed Business Expense)	($10,000)		
Net Compensation		$30,000	
Net Profits		$40,000	
Interest		$10,000	
Total PA Taxable Income			$80,000
(Other Deductions)		($10,000)	
Adjusted PA Taxable Income			$70,000
PA Tax Liability			$2,149
Total PA Tax Withheld		$1,228	
Resident Credit		$614	
Tax Due			$307

If H and W were to have filed separate returns, the returns would appear as follows:

H's Separate Return:

Gross Compensation	—		
(Unreimbursed Business Expense)	—		
Net Compensation		—	
Net Profits		$40,000	
Interest		$5,000	
Total PA Taxable Income			$45,000
(Other Deductions)		($5,000)	

Adjusted PA Taxable Income			$40,000
PA Tax Liability			$1,228
Resident Credit		$614	
Tax Due			$614

W's Separate Return:

Gross Compensation	$40,000		
(Unreimbursed Business Expense)	($10,000)		
Net Compensation		$30,000	
Net Profits		—	
Interest		$5,000	
Total PA Taxable Income			$35,000
(Other Deductions)		($5,000)	
Adjusted PA Taxable Income			$30,000
PA Tax Liability			$921
Total PA Tax Withheld		$1,228	
Overpayment			$307

Factors weighing in favor of granting W relief are W's divorce from H within the year following the tax year for which she is seeking tax relief. H and W did not have a joint checking account, and in past years, H paid the tax due with each return with a check from his account. W's withholding exceeded the tax liability attributable to the income allocable to her. W has no outstanding tax liabilities, and she properly filed her 2007 and 2008 Pennsylvania Personal Income Tax returns. Both years her withholding tax exceeded the tax due with the return. No evidence exists for factors weighing against granting relief from the tax liability attributable to H's income.

The Taxpayers' Rights Advocate may grant W relief on the assessment because the factors weighing in favor of granting relief exceed the factors weighing against granting relief. W does not receive a refund. H is liable for the $307 tax due with H and W's 2007 joint return.

Example 2: H and W have lived apart since December 2008. H and W filed a joint income tax return for tax year 2006. The return included the following:

Compensation (H-$40,000; W-$40,000)	$80,000	
Interest	$8,000	
Rent	$12,000	
Total PA Taxable Income	$100,000	
PA Tax Liability		$3,070
Total PA Tax Withheld		$2,456
Tax Due		$614

H and W did not pay the tax due. H and W only had a joint checking account, and the interest they received related to jointly held investment. The rental property was owned by H and W. W regularly picked up and opened the household mail.

W received a notice that her Federal income tax refund would be intercepted to pay the 2006 Pennsylvania Personal Income Tax liability. W filed an election to obtain innocent spouse relief. W did not present any evidence that she would suffer economic hardship if relief was not granted. W's tax returns for subsequent tax years were filed and any tax due was paid.

Since H and W's employers withheld the applicable income tax on the compensation they earned, the unpaid tax due related to the interest and rental income. Since this income is attributable to jointly held property, if H and W had filed separate returns, they each would have reported half of the interest income and rental income. Accordingly, if the Taxpayers' Rights Advocate grants W any relief, the relief which may be granted is limited to 50% of the outstanding liability.

The factors weighing against granting even 50% relief outweigh the factors favoring relief because no factor weighs in favor of relief. W had reason to know that the tax due was not paid with the return and is outstanding. The income on which the tax was not paid was attributable to jointly held property. The Taxpayers' Rights Advocate should not grant W relief.

Example 3: H and W divorced in November 2008. H and W filed a joint income tax return for tax year 2003. The return included the following:

Compensation (H-$40,000; W-$40,000)	$80,000	
Interest	$8,000	
Rent	$12,000	
Total PA Taxable Income	$100,000	
PA Tax Liability		$3,070
Total PA Tax Withheld		$2,456
Tax Due		$614

H and W did not pay the tax due. H and W only had a joint checking account, and the interest they received related to jointly held investment. The rental property was owned by H and W. W regularly picked up and opened the household mail.

W received a notice that her Federal income tax refund would be intercepted to pay the 2003 Pennsylvania Personal Income Tax liability. W filed an election to obtain innocent spouse relief. W did not present any evidence that she would suffer economic hardship if relief was not granted. W's tax returns for subsequent tax years were filed and any tax due was paid.

The unpaid tax due is attributable to income obtained from jointly held property. If H and W had filed separate returns, they each would have reported half of the interest income and rental income.

No relief may be granted because W is seeking relief for a tax year more than 12 months before she was divorced or maintained a separate household from her spouse.

(5) *Burden of proof.* The electing spouse must prove that the allocation of the income, deductions, credits, and other items from the joint return to separate returns is correct.

(f) *Procedure for requesting relief.*

(1) *Election.*

(i) To make an election for the relief available in subsections (c) and (d), an electing spouse shall complete and file with the Taxpayers' Rights Advocate the forms and documentation prescribed by the Department.

(ii) A valid election under this section is the first timely claim for relief from joint and several liability for the tax year for which relief is sought. A valid election also includes an electing spouse's second election to seek relief from joint and several liability for the same tax year under subsection (d) when the following apply:

(A) The electing spouse did not qualify for relief under subsection (d) when the Taxpayers' Rights Advocate considered the first election solely because the qualifications of subsection (d)(2)(i)(A) were not satisfied.

(B) At the time of the second election, the qualifications for relief under subsection (d) are satisfied.

(iii) An electing spouse is entitled to only one final administrative determination of relief under this section for a given liability, unless the electing spouse properly submits a second request for relief as described in subparagraph (ii). A taxpayer's failure to make a valid election as provided in subsection (g)(1) is not an election for relief, and the Taxpayers' Rights Advocate notice to the Taxpayer of the invalid election is not an administrative determination of relief.

(2) *Timing of election.*

(i) The forms prescribed by the Department shall be filed no later than 2 years from the date of the first collection activity against the electing spouse with respect to the joint tax liability.

(ii) The Taxpayers' Rights Advocate may not consider a claim for innocent spouse relief that is filed for a tax year prior to the date the tax becomes collectible by the Department.

(g) *Taxpayers' Rights Advocate's procedure*.

(1) *Invalid election*. If the taxpayer fails to complete and provide the prescribed forms and documentation required for a valid election, the taxpayer will be notified that the forms as submitted do not qualify as an election and will advise the electing spouse what information or documentation must be provided to make the election. If the taxpayer fails to cure the inadequacy of the election, the Taxpayers' Rights Advocate will notify the electing spouse that a decision cannot be rendered.

(2) *Spousal notification*. The Taxpayers' Rights Advocate will notify the nonelecting spouse of the valid election filed by the spouse for relief under this section and give the nonelecting spouse the opportunity to become a party to any proceeding or object to the Taxpayers' Rights Advocate's proposed allocation.

(3) *Relief determination*. The Taxpayers' Rights Advocate will determine the portion of the tax that will be apportioned or allocated solely to the nonelecting spouse as permitted under subsections (c), (d) and (e) and grant the electing spouse relief from joint and several liability for the amounts.

(4) *Notification of relief*. Within 6 months of the Taxpayers' Rights Advocate's notice of its receipt of a valid election, the Taxpayers' Rights Advocate will notify the electing spouse of the relief granted.

(5) *Appeal rights*.

(i) The electing spouse may appeal any of the following actions by filing a petition as prescribed in section 2704 of the TRC of 1971 (72 P. S. § 9704):

(A) A denial of the election for relief available in subsections (c) and (d).

(B) The Taxpayers' Rights Advocate's failure to notify the electing spouse of a decision within 6 months of the date of the electing spouse's valid election.

(ii) Since a taxpayer elects the relief available under subsections (c) and (d) and the right of appeal is limited to a denial of the taxpayer's election or the failure to notify the taxpayer of a decision within 6 months of the valid election, the Taxpayers' Rights Advocate's decision to deny relief described in subsection (e) is not subject to review.

(h) *Relief for penalties, interest and other charges*. Relief for penalties, interest and other charges follows relief granted on the underlying tax. Thus, if an electing spouse is eligible for relief from tax, the electing spouse is also eligible

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for relief from the corresponding penalties, interest and other charges. Relief is not available under this section if there was no underpayment of tax on the tax return or the tax reported as due with the return was paid with the return.

Example: Taxpayers filed a joint return late, paid the tax but still owed penalties and interest for filing late. Relief is not available under this section.

Authority

The provisions of this § 119.30 issued under section 212 of the Taxpayers Bill of Rights (72 P. S. § 3310-212).

Source

The provisions of this § 119.30 adopted December 10, 2010, effective December 11, 2010, 40 Pa.B. 7093.

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