



Representing a Party With Tax Issues

By Maria Gonzalez, Esquire, North Miami Beach

We all recognize that in any divorce proceeding there are always tax aspects and consequences to consider. In those instances, where the family breadwinner has elected not to file federal income tax returns during the marriage or has filed the returns, but failed to pay the taxes and associated penalties and interest due to the IRS, some of the most severe tax implications may result. At times, the penalties and interest imposed by the IRS will far exceed the principal income tax due. More and more often, involving a tax attorney in these complex cases becomes a necessity to fully protect your client.

What should you consider doing if you receive mandatory disclosure from a professional self-employed spouse and his or her response to your request for production of three years of income tax returns is "none"; or a party files a financial affidavit disclosing hundreds of thousands of dollars as a contingent liability to the IRS for unpaid income taxes, related penalties and interest? Instead of working towards resolution of equitable distribution of the marital estate, you are faced with immediately addressing matters such as minimizing the income taxes, penalties and interest involved, protecting your client from any future liability flowing from any late tax filings; getting the non-compliant spouse current with the IRS; determining how the ultimate tax liability should be shared between the parties and whether an unequal distribution is justified; and whether your client should join in a joint tax return filing.

There are instances where a court may assess more of the tax liability to the non-filing or non-compliant spouse where that spouse was either responsible for not filing the return, he primarily benefited from the income generated during the tax year in question or he has the superior ability.¹ There may be instances where equity dictates that the base tax liability be shared equally by the parties, but the non-compliant spouse

be assessed all resulting penalties and interest. However, in *Pierre-Louis v. Pierre-Louis*, 715 So.2d 1073 (Fla. 3d DCA 1998), the District Court of Appeal held exactly the opposite. It ruled that the non-compliant spouse should be solely responsible for the entire tax liability including the penalties and interest. The Court reasoned that there existed justification for an unequal distribution of the marital tax debt under §61.075(1)(b), Fla. Stat.² Interestingly, in *Ruiz v. Ruiz*, 821 So.2d 1112 (Fla. 3d DCA 2002), the Third District Court of Appeal determined that a husband's withdrawal of IRA monies (which were only partially used to cover marital debts) would not subject the husband to sole responsibility for the resulting income tax liability created by the withdrawals. The court reasoned that there was no justification for an unequal distribution of the tax liability.

Likewise, a \$90,000 tax debt was deemed marital and the District Court of Appeal found no basis for unequal distribution of that debt in *Branch v. Branch*, 775 So.2d 406 (Fla. 1st DCA 2000). In *Branch*, the husband solely managed the couple's finances and his failure to pay the tax lien resulted in doubling the penalties and interest due. However, absent evidence that the husband diverted funds otherwise available to pay the tax lien (and thereby engaged in 'marital waste'), the tax lien was to be shared equally by the parties. Equal division of un-

paid income taxes may also result despite the fact that the parties filed separate income tax returns for the subject years. In *Barner v. Barner*, 716 So.2d 795 (Fla. 4th DCA 1998), the husband's earnings were used to support the family during the three year period in question and the income taxes due were primarily associated with his earnings. Accordingly, the court reasoned that the husband should "not be punished because he is the only one who generates income." *Id.* 798. Based on the foregoing cases, it is unclear exactly which factors will weigh more in support of an unequal distribution of the marital tax liability upon the non-compliant spouse. Therefore, it is up to you to argue the specific facts of your case.

If the non-compliant spouse decides to file late filings, should the dependent spouse agree to sign any joint income tax returns? Consider whether signing a joint return will destroy the other spouse's possible innocent spouse status and expose him or her to the income taxes due. Consider propounding supplemental discovery requests to determine whether the IRS has assessed unpaid taxes or commenced collection activity. Remember that some procedures available to a spouse to limit his or her tax liability are time sensitive to actual commencement of collection activities. Determine whether a deficiency notice has been issued, or tax liens placed on the parties' real property.

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To advance your claim for an unequal distribution of the income tax liability, conduct discovery aimed at establishing the following: how the tax debt came about, who made the decision not to file or pay income taxes during the subject years, who primarily benefited from the income generated during the time in question, who controlled the parties' finances and how earnings or other available income were utilized in lieu of payment of taxes and why, and who had knowl-

edge of non-payment of the taxes.³

Conclusion

When you are faced with complex tax issues in a dissolution of marriage action, tailor your discovery to determine everything you need to know to best tackle the problem, determine whether an unequal distribution of the tax debt is appropriate and consider retaining a tax attorney to assist in resolving your more complex tax issues.

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Endnotes:

1 *Hair v. Hair*, 402 So.2d 1201 (Fla. 5th DCA 1981) (income tax liability was \$250,000 at time of dissolution of marriage. Trial court assessed first \$150,000 to the non-compliant husband)

2 See also, *Stewart v. Stewart* (696 So.2d 1237, 1240 (5th DCA 1997) (Sharp, W., dissenting) (husband was non-compliant taxpayer and was held solely responsible for entire tax debt where wife had no knowledge of nonpayment and was not involved in his business) .

3 *Lorman v. Lorman*, 633 So.2d 106 (Fla. 2d DCA 1994) ; *Nicewonder v. Nicewonder*, 602 So.2d 1354 (Fla. 1st DCA 1992)