

JOSEPH R. & VIVIAN E. HOWE
3011 CHARMINGDALE DRIVE W.
MOBILE, AL 36618,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers,

§

DOCKET NO. INC. 07-936

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER

The Revenue Department assessed Joseph R. and Vivian E. Howe (together “Taxpayers”) for 1996 through 2001 income tax.¹ The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on March 18, 2008. The Taxpayers attended the hearing. Assistant Counsel Duncan Crow represented the Department.

Russell Howe worked in the maintenance department of the Mobile Housing Board during the years in issue. Vivian Howe worked as an insurance clerk at Radney Funeral Home in Mobile.

Vivian Howe pled guilty in 2002 to embezzling almost \$1 million from her employer from 1996 through 2001. She stole the money by issuing fraudulent refund checks, forging the names of the payees, and then depositing the checks into a bank account she had opened for that purpose. She was convicted and incarcerated in State prison. Before going to prison, and also while in prison, she was diagnosed as having a compulsive-obsessive disorder and acute alcoholism. After being released from prison, she filed for

¹ The Department assessed Vivian Howe individually for 1998 because it did not have a joint return on file for the Taxpayers, and, as explained below, the final assessments are based solely on income received by Mrs. Howe. It assessed the Taxpayers jointly for the remaining years because they filed joint returns in those years.

Chapter 7 bankruptcy in 2005. She is now working at a business owned by a relative.

Russell Howe testified at the March 18 hearing that his wife became withdrawn and began drinking heavily in the mid-1990's, which strained their marriage. He testified that he did not know that his wife had been embezzling money until 2002, when she confessed to him after her scheme was discovered by her employer. He explained that he and his wife have always lived from paycheck to paycheck, and that they struggled during the subject years to support their family, which included their children and a parent and sibling that lived with them.

Vivian Howe stated in her appeal letter that she was an "out of control sick human being" during the years that she stole the money from her employer. She claims that she never willfully attempted to evade tax because she never associated her actions with any resulting tax consequences. "If I was truly the 'intelligent, scheming' individual as portrayed by the State and court system, you would think I surely would have tried to hide the money." See, October 20, 2007 letter from Vivian Howe at 2.

The Taxpayers concede that some tax is due on the embezzled income. They claim, however, that the fraud penalty should not apply because Mrs. Howe did not knowingly and willfully attempt to evade tax on the embezzled income due to her impaired condition.

I sympathize with the Taxpayers and commend them for trying to get their life back together after Mrs. Howe's release from prison. I also appreciate their honest and forthright testimony at the March 18 hearing. My duty, however, is to objectively determine if the fraud penalty applies under the facts of this case.

Mrs. Howe handled the couple's finances and also filled out their State and federal tax returns. She knew that she had received the embezzled income during the years in issue, yet she failed to report the income on their returns. It is understandable why she did so because if she had reported the income she would have been admitting to the theft. But she nonetheless willfully and knowingly failed to report the income on the returns. The fraud penalty thus applies.

The Department assessed the Taxpayers jointly on the embezzled income because the Taxpayers filed joint returns for the subject years, except concerning 1998, see n. 1, *supra*. The evidence indicates, however, that Russell Howe was not aware of the income until 2002, after the years in issue. There is also no evidence that he benefited from the income because he and his wife did not live extravagantly or purchase any luxury items during the subject years.

Because Russell Howe was unaware of and did not benefit from the ill-gotten income, it would be unjust to require him to pay tax on the income. Consequently, he is relieved of liability as an innocent spouse. See, Code of Ala. 1975, §40-18-27(e); *Humber v. State of Alabama*, Inc. 03-230 (Admin. Law Div. 1/24/2007).

The final assessments are affirmed against Vivian Howe, individually. Judgment is entered for 1996 tax, penalty, and interest of \$10,090.31; 1997 tax, penalty, and interest of \$18,509.14; 1998 tax, penalty, and interest of \$17,110.19; 1999 tax, penalty, and interest of \$16,451.58; 2000 tax, penalty, and interest of \$11,807.17; and 2001 tax, penalty, and interest of \$16,838.52. Additional interest is also due from the date the final assessments were entered, October 1, 2007.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered April 21, 2008.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.
Joseph R. Howe
Tony Griggs