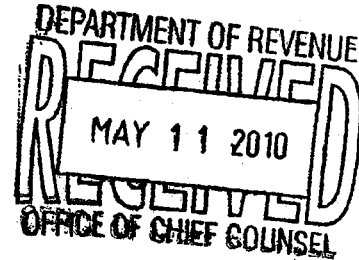
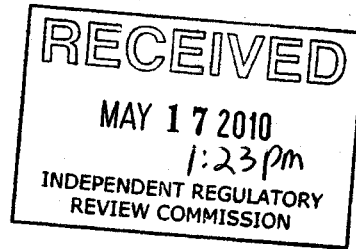


# Pennsylvania Coalition Against Domestic Violence

The Nation's First State Domestic Violence Coalition • Founded 1976

2829

Mary R. Sprunk  
Office of Chief Counsel  
Department of Revenue  
P.O. Box 281061  
Harrisburg, PA 17128-1061



Re: Regulation ID #15-448 (#2829)

Dear Ms. Sprunk:

Please accept the Coalition's comments to the proposed rulemaking under 61 PA. Code Ch. 119 "Personal Income Tax - Innocent Spouse Relief." We appreciate and thank you for the opportunity to comment on the currently proposed changes.

The Pennsylvania Coalition Against Domestic Violence ("PCADV") is a private non-profit organization that provides services and advocacy on behalf of victims of domestic violence and their minor children. PCADV and its members have been involved in the legislative and judicial development of Pennsylvania's Protection from Abuse Act from its inception. Further, we have assisted in the development of other state and federal laws that provide rights to victims of intimate partner violence. PCADV served on the national policy advisory board on children living in the context of domestic violence, which was convened by the National Council of Juvenile and Family Court Judges. PCADV currently administers the Civil Legal Representation (CLR) Project. The CLR Project supports and trains attorneys placed in local domestic violence programs to provide survivors of domestic violence with effective, competent civil legal representation including representation in custody litigation. PCADV provides technical assistance to the CLR Project Staff as well as to other attorneys who represent survivors of domestic violence in custody and other civil cases across Pennsylvania.

The proposed rulemaking under 61 PA. Code Ch. 119 regarding the innocent spouse defense under the personal income tax regulations is an important part of the relief for victims of domestic violence. Many batterers use economic coercion and abuse to control their victims, and the availability of innocent spouse relief may assist the victim in regaining financial independence from the abuser. Please accept our comments on the proposed rulemaking.

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

**PCADV recommends the addition of specific language indicating possible considerations, including abuse, and a notation that the list of considerations under subsection (c) is not intended to be exclusive.**

Under this section, the electing and non-electing spouse may still be married to each other. Five requirements must be satisfied. The spouses must file a joint return; the return contained an understatement due to erroneous items attributable to the non-electing spouse; the electing spouse had no knowledge or reason to know of the errors; all facts and circumstances make it inequitable to hold the electing spouse liable; and the electing spouse must make the election within a specific time frame.

Although the specific language of the regulation indicates that the fact-finder should consider all the facts and circumstances in the individual case, no specific considerations are listed. In many cases, abuse victims are coerced into signing tax returns and other documents as part of the pattern of coercive control. The “all facts and circumstances” language appears to cover a consideration of abuse, but “abuse” as such does not appear in this section as a consideration. Because abuse is a listed consideration for relief under subsection (e), the fact that it is not listed in subsection (c) might suggest that domestic abuse is not a consideration here. We would suggest that specific language indicating possible considerations, including abuse, might be added, and a notation that the list is not intended to be exclusive.

**PCADV recommends adding abuse as a “fact or circumstance” for the Taxpayers’ Rights Advocate (TRA) to consider and the inclusion of a statement that the list of facts and circumstances is not intended to be exclusive.**

Subsection (c)(2) describes “Knowledge or reason to know,” listing six facts and circumstances for consideration in determining whether the electing spouse knew or had reason to know about the understatement of tax. The language indicates these are “some” of the factors to consider, which would suggest that the list is not exclusive. However, we suggest adding abuse as a “fact or circumstance” for the Taxpayers’ Rights Advocate (TRA) to consider and the inclusion of a statement that the list is not intended to be exclusive.

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

**PCADV recommends clarification in this section regarding the evidentiary standard for a determination of a fraudulent scheme.**

Relief under this section applies to an individual who filed a joint return and is now divorced from, legally separated from, or resides in a different household than, the person with whom the individual filed the joint return. To qualify as residing in a different household, the person must reside in a separate household for twelve months prior to filing the election for tax relief. A subsequent section of the regulation describes in detail what separate household means (see

Subsection (d)(2)(i)(C)). If assets have been transferred between the individuals as part of a fraudulent scheme for the purpose of defrauding the Department of Revenue, an ex-spouse, creditor or business partner, neither individual is eligible for relief. The Department makes the determination as to what constitutes a fraudulent scheme. It is unclear from the text as to how this determination will be made, and what evidentiary standards will be used. If such information is provided in the statute or other regulations, we suggest a referral be included to that section of the law or the specific regulation. If neither law nor regulations clarify how fraud is determined, evidentiary standards and other information used to determine fraud should be included.

It appears that actual knowledge of omitted income or actual knowledge of a wrongful deduction or credit by the electing spouse will make that electing spouse ineligible for relief under this section. If a deduction or credit was erroneous, the Department must establish that the electing spouse actually knew about the deduction or credit. There is no information regarding whether or not the Department must establish actual knowledge of the electing spouse if income was omitted. Such an indication would be helpful. If the electing spouse had partial knowledge, the election only applies to that part of the wrongful portion that the electing spouse knew about.

This subsection also contains a list of factors the TRA may rely on to determine actual knowledge of an erroneous item on a tax return. The language also indicates the TRA may rely on all the facts and circumstances. Abuse is not included in the list of specific factors to be considered. Arguably, the language of the regulation is broad enough to encompass abuse. However, we suggest adding abuse as a “fact or circumstance” to be considered and a statement that the list is not intended to be exclusive for the facts and circumstances the TRA should consider.

The regulation includes a rebuttable presumption that property transferred to the electing spouse during a specific time frame is presumed a disqualified asset for which relief will not be available. This presumption does not apply if the transfer was part of a divorce settlement agreement or court order, and is rebuttable in any case.

As stated above, abusers use various means to control their victims, including economic measures. An abuser might transfer assets to the victim spouse with the intention that the tax consequences might fall on the victim spouse. Such a tax liability on a victim spouse might create an insurmountable burden on the victim spouse. We suggest adding abuse as a consideration in rebutting the presumption, and other considerations relevant to such a rebuttal might also be considered. Alternatively, language suggesting the TRA could consider all facts and circumstances to rebut the presumption, including but not limited to abuse of the electing spouse and other relevant considerations.

Allocation of erroneous items is handled by assigning them to the spouses as though the spouses had filed separate returns. If the electing spouse received a benefit from the allocation or if fraud occurred, the erroneous item can be allocated to the electing spouse. Erroneous items of income and erroneous deductions are allocated to the spouse who was the source or in proportion to the individual ownership by the spouses. If the ownership interest is not specified, it will be

allocated equally between the spouses unless clear and convincing evidence supports a different allocation.

The electing spouse bears the burden of proving all the qualifications in the section and to establish the proper allocation of erroneous items. The text does not indicate what evidentiary standard applies to this burden. If the burden is specified elsewhere by statute or regulation, it should be referenced, and if not, specify whether the burden is met by preponderance of the evidence, or clear and convincing evidence. Elsewhere in this regulation, clear and convincing evidence is cited as the standard. If the regulation intends that to be the standard, it should so state. Failing to do so may lead to a heavier burden to the electing spouse than was intended.

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

**PCADV recommends the addition of language that clarifies the burden of proof for the electing spouse to meet for relief, whether that standard is preponderance of the evidence, clear and convincing or another standard.**

This subsection serves as a catchall provision that can offer relief if the individual does not qualify under either of the other sections. It is based on concepts of fairness or equity. The text states that when the factors favoring relief outweigh those that militate against relief, the TRA may grant relief. Spouses who are divorced, widowed or legally separated are eligible for relief under this subsection, as are spouses who have not resided together for twelve months ending on the date the election is filed. The tax liability from which the electing spouse seeks relief must be attributable to the other spouse unless the electing spouse meets one of three criteria. 1) The electing spouse has only a nominal interest in the item; if the item is titled in the name of the electing spouse it is presumptively attributed to that electing spouse. The presumption is rebuttable. 2) The electing spouse did not know and had no reason to know that funds to pay the tax were misappropriated by the other spouse. 3) The electing spouse was a victim of abuse prior to the time she signed the tax return, and did not challenge the items on the return due to fear of the other spouse's retaliation. Relief under this section is not available if the tax is for a tax year more than twelve months prior to legal separation or divorce or the spouses ceased residing together. Additionally, if the electing spouse has taxable income and has not filed tax returns or has an outstanding tax liability, relief will not be available.

The TRA may grant relief after considering several factors, taking into account all the facts and circumstances, and finding it is inequitable to hold the electing spouse liable for a deficiency or unpaid tax. These factors include knowledge or reason to know, abuse, non-electing spouse's legal obligation, significant benefits, compliance with tax laws, economic hardship and mental or physical health. The standards for knowledge or reason to know vary, depending on whether it is a case of unpaid tax or deficiency cases.

Abuse is a consideration in Subsection (e), and provides that a history of abuse by the non-electing spouse may mitigate knowledge or reason to know. Presence of abuse is a factor weighing in favor of relief.

The burden of proof on all elements is borne by the electing spouse, but again, there is no indication whether the standard is preponderance of the evidence, clear and convincing evidence or some other standard.

*Subsection (f): Procedure for requesting relief.*

**PCADV recommends the addition of language that will clarify what process and procedure is appropriate to elect relief under subsection (e).**

This section of the regulation describes the process and procedure for electing relief under subsections (c) and (d), but makes no mention of how to elect under subsection (e). PCADV recommends adding clarification, either in this section or in subsection (e), regarding the process and procedure to elect relief under subsection (e).

*Subsection (g)(5): Appeal rights.*

**PCADV recommends providing appellate review for denials of taxpayers who seek relief under subsection (e).**

Appellate rights under this regulation are limited. Under subsections (c) and (d) the electing taxpayer may appeal the denial of the election or the failure to notify the electing taxpayer of the decision by the TRA within six months of the valid election.

PCADV recommends that a taxpayer who seeks relief under subsection (e) should have a similar right of appellate process if the TRA denies relief under this subsection.

We appreciate the Department of Revenue's consideration of PCADV's recommendations and thank you for the opportunity to provide them. Please feel free to contact me if you have any questions or need clarification.

Very truly yours,



Peg J. Dierkers  
Executive Director  
Pennsylvania Coalition Against Domestic Violence

