STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2012-05

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF REVENUE
DIVISION OF TAXATION
ONE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

IN THE MATTER OF:	
Taxpayer.	**Case No.: 11-T-0009** **Personal Income Tax**

DECISION

I. INTRODUCTION

The above-entitled matter came before the undersigned as the result of a Notice of Hearing and Appointment of Hearing Officer dated February 22, 2011 and issued to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division") in response to a request for hearing. A hearing was held on November 28, 2011. At hearing, both parties were represented by counsel and rested on the record.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-30-1 *et seq.*, the Division's *Administrative Hearing Procedures, Regulation AHP 97-01*, and the Department of Administration's *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings.*

III. ISSUE

Whether the Taxpayer owes the Division's assessment for personal income tax that was assessed on a certain bank account set forth in Division's Exhibit Ten (10).

IV. MATERIAL FACTS AND TESTIMONY

("Auditor"), Principal Revenue Agent, testified on the Division's behalf. She testified that she conducted a personal income tax audit for 2005 through 2008 on the Taxpayer because of ("Company One") outstanding withholding tax and the Taxpayer was listed as a responsible officer of said company. She testified that at the time of the audit, the Taxpayer had not filed State or Federal tax returns. She testified that for 2005, Company One had filed a W-2 for the Taxpayer and had filed wage reports for the Taxpayer with the Department of Labor and Training ("DLT") for 2006, 2007, and 2008. She testified that the Taxpayer provided various check stubs to the Division that showed weekly checks for made out to her by Company One. See Division's Exhibit Eight (8). She testified that the Taxpayer also provided weekly checks made out by Company One for her husband ("Husband") of because of a levy for bankruptcy imposed on his wages. See Exhibit Seven (7).[1]

The Auditor testified that in addition to the weekly checks to Taxpayer from Company One, there were another set of checks made out by Company One in various amounts to Taxpayer for an account in her name at ("Bank Account"). See Division's Exhibits Nine (9) (check stubs), Ten (10) (bank statements), and 11 (checks written on said account). She testified that the Taxpayer told her (Auditor) that she (Taxpayer) was not aware of that Bank Account, had no access to the account, and was not aware of money going into that account. She testified that the address used for the Bank Account was ("Address"). She testified that the

[1] A review of the Husband's check stubs shows that the checks from July 28, 2005 through July 13, 2006 were for more than since no levy is indicated on them but a levy is indicated on the checks from August 10, 2006 through March 21, 2008. The March 28, 2008 check still indicates a levy but no deduction for the levy.

Taxpayer was associated with the Address since the Taxpayer took out a large loan with Bank using the Address. See Division's Exhibit 16 (loan documents). The Auditor testified that there was a Porsche registered in the Taxpayer's name for one (1) week using the Address before said car was transferred to a realty company for which the Taxpayer was the registered agent. See Division's Exhibit 17. She testified that the Taxpayer has since filed Federal income tax returns for 2005 through 2008 but she (Auditor) was told by the IRS that the IRS has not audited those returns. See Division's Exhibit 20 (IRS letter stating have not audited Taxpayer's returns). See also Taxpayer's Exhibit Five (5) (Taxpayer's IRS filings). She testified that Notices of Deficiency were issued to the Taxpayer for the years 2005 through 2008.[2] See Division's Exhibit 15.

On cross-examination, the Auditor testified that she never spoke to anyone that worked at Company One and did not know what was located at the Address. She testified that she agreed that the Taxpayer's signatures on the realty company's Secretary of State's filings (Divison's Exhibit 19) were from a signature stamp. She also testified that both sets of checks made out to the Taxpayer by Company One tied in to Company One's W-2 and DLT wage reports.

("Witness") testified on behalf of the Taxpayer. She testified that she is 28, currently in college, and has known the Husband since she was six (6) months old. She testified that she is familiar with many of the Husband's various companies but when she started working for him in December, 2007 it was for Company One which turned into ("Company Two") but she did not know why it changed names. She testified that the Husband has always been in construction and that

[2] Division's Exhibit 14 were tax returns for the Taxpayer prepared by the Division on the basis of both sets of checks contained in Division's Exhibits Eight (8) and Nine (9).

Company One was a steel commercial construction company. She testified that she was in charge of processing the purchasing for the field staff. She testified that knew the Taxpayer was on the payroll but she did not know about the two (2) sets of checks. She testified that there was a problem with the payroll at the end of her employment so that the Husband signed checks for workers using a different bank account than previously used but she did not know why. She testified that the Husband asked her to put her name on a checking account with him so she could take care of his and the Taxpayer's personal bills so the Husband did that but then she never saw a checkbook and stopped working there so she got her name off the account since she decided it was not a good idea to have her name on a bank account where she did not see the checks.

On cross-examination, the Witness testified that the Husband had a daughter by her (Witness) mother so she has a half-sister whose father is the Husband so he has been a family friend for years. She testified that she worked for the Husband from December, 2007 to June, 2009. She testified that toward the end of her employment, she started looking at payroll checks because the Husband said he was being investigated because a prior bookkeeper had not paid taxes and she saw the Taxpayer's name on payroll checks. She testified that her account with the Husband was not necessarily what made her concerned over the work situation but rather the investigation was not of the previous bookkeeper blamed by the Husband and also her family warned her about getting involved with the Husband.

The Taxpayer testified on her behalf. She testified that she attended the University of Massachusetts from 1984 to 1992 starting full-time but turning part-time since she became a full-time employee at an insurance company and received tuition

reimbursement. She testified that she married her first husband in October, 1994 and four (4) months later, he died in a car accident. She testified that she stopped working in 1996 when she was pregnant and was sick all the time and had many illnesses which she thought would end when her first daughter was born in April 1997 but did not. She testified that in 1997, because of her medical problems, she obtained Social Security disability. She testified that she did not marry her oldest daughter's father.

The Taxpayer testified she met her Husband in August 1998 while she was on disability. She testified that they moved in together a year later and were married in 2002 and she did not work during this time as her sickness had taken over her life. She testified that she had a daughter with her Husband in 2004 and the daughter has a rare genetic disorder, is severely disabled, cannot speak, and only walked at age four (4). She testified that caring for her youngest daughter is a full time job.

The Taxpayer testified that along with her children, she also was at home with her Husband's daughter, who was age 11 when she (Taxpayer) moved in with the Husband and is the half-sister of the Witness. She testified that she had no other income except from her Husband, her disability, and child support for her oldest daughter. She testified that between 2005 and 2008, they lived at ("Home Address") but it has been foreclosed on since her Husband did not make the payments.

The Taxpayer testified that she never bought a car while with her Husband but he bought many cars including the Porsche (Division's Exhibit 18). She testified that he could have borrowed her driver's license and registered a car in her name. She testified that they had fights because of his car purchases and because she was home alone with

the kids a lot since he was never home and later she discovered that he cheated on her throughout the marriage.

The Taxpayer testified that her Husband formed many different business entities in his name and that she was dumb and trusted him. She testified that she would sign something when asked because she did not think he would ruin her life or that he was sleeping with other women. She testified that he never told her he was bankrupt or going to jail. The Taxpayer testified that her Husband suggested she get off disability and be put on Company One's payroll and be eligible for medical coverage but she never worked for Company One and that was her biggest mistake because that was when the Husband started to abuse her identity. She testified that because of her attorney she was able to obtain some of Company One's records from one of the receivership attorneys.

The Taxpayer testified that her Husband gave her the weekly checks but she never saw a check stub. She testified that the checks were signed with her signature stamp which is how she found out her name was on the business but she did not make the stamp. She testified that a couple of years later she argued with her Husband about the stamp and told him she did not want her name on the stamp but he claimed there were too many checks for him to sign. She testified that later when the Husband was in jail, she found the signature stamp in the barn as well as her bank check stubs and her Husband's check stubs in the receivership boxes.

In June, 2010, the Taxpayer testified that she went to Bank and discovered the Bank Account. She testified that all the checks that were written on that account use her signature stamp. See Division's Exhibit 11. In reviewing the various exhibits, the Taxpayer testified that it was her signature on the commercial loan but it was

not her signature for the signature card or tax identification number. For Division's Exhibit 23, she testified that one of the signatures for a consulting company's filings is her's but not the four (4) other signatures. The Taxpayer testified that her power of attorney (Division's Exhibit Six (6)) was her signature but not for Company One's Articles of Incorporation, the 2006 and 2007 annual reports, or 2007 change in registered agent form. See Division's Exhibits Three (3), Four (4), and Five (5). She testified that during her marriage, she had her own bank account at Bank Five. See Taxpayer's Exhibits One (1) through Four (4).

The Taxpayer testified that she never hired or fired any employees, bought or sold any supplies or assets, bid on jobs, or provided any services to Company One. She testified that her Husband was the principal at Company One. She testified that she only found out when her Husband was in jail that Company One's payroll taxes had not been paid. She testified that she keeps finding out that her name has been put on other companies and property when she goes through the boxes as well as finding out that her Husband was buying a house and cars for his mistresses. She testified that some of the documents that she found with her name on them have forged signatures. The Taxpayer testified that the Address on the Bank Account was her Husband's accountant's address and that she never used that address. She testified that she never received the money from the various checks in the Bank Account.

On cross-examination, the Taxpayer testified that she received her B.S. in business from the University of Massachusetts. She testified that there is one (1) check from the Bank Account that has her signature which was when the account was closed out. She testified that her Husband took her to the bank and she signed the check and the

bank teller asked if it was for house but she said it was going to her Husband. Tr 80.[3] She testified that the commercial loan used the Address and not the Home Address and that her Husband told her to sign it with her name as president and she was nervous about that. She testified that the bank loan signature card had a fake signature and she assumed that her Husband had people do that and notarize it. She testified that with her first husband her name had not been on the house so after he died four (4) months into the marriage her mother-in-law tried to get the house so she thinks that her Husband played on that fear and she thought he was protecting her so she did not think about why he needed her to sign documents. The Taxpayer testified that for Division's Exhibit Three (3), she thinks her Husband signed her name as it has certain letter the way he made them and not the way she did.

On re-direct examination, the Taxpayer testified that she is in divorce proceedings with her Husband and he has a history of using people that love and trust him.

("Brother") testified on behalf of the Taxpayer. He testified that he is the Husband's younger brother and that he worked at various times for his brother from 1993 to 1999 and then 2007 to 2008. He testified that the first time he worked for his brother, it was for six (6) different companies (including Company Two). He testified in the beginning, a new company would replace an old company but then the companies and paychecks started overlapping. He testified that he did not work for his brother during 2005 and 2006. He testified that his brother was always evasive about business. The Brother testified during the second period working for his brother, Company One was being phased out and there were other companies from which he received paychecks. He

[3] Reference is to page number of the transcript of the hearing.

testified that he registered cars for the Husband. He also testified that he saw one of the Husband's attorneys notarize documents without witnessing the signing.

The Brother testified that in 1999, the Husband approached him to do stuff for a consulting company and mentioned getting him a signature stamp. He testified that he thought it had not gone any further than a conversation but he found out later that his name was put on this company and a signature stamp made for him. He testified that he never authorized or participated in making the stamp but it was made of his signature. He testified that prior to meeting the Taxpayer, the Husband had been in prison for violating the Davis-Bacon Act since the Husband's workers had to kickback part of their wages to the company. His testimony confirmed the Taxpayer's testimony about her disabled daughter. He testified that the Taxpayer was a stay-at-home mom.

On cross-examination, the Brother testified that the Husband told him that for the proposed consulting company he wanted to compartmentalize things and that he could create a signature stamp and not bother him with it but that he (Brother) never agreed because he knew the Husband had already gone to jail.

The parties agreed that the Husband is currently in prison and pled guilty in Rhode Island Federal District Court to lying to a bankruptcy judge and tax evasion by not remitting payroll tax.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). See *Parkway*

Towers Associates v. Godfrey, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (citations omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Arguments

In closing, the Division argued that the Taxpayer was educated and admitted signing some of Company One's forms and receiving a weekly check of from Company One. The Division argued that while the Husband may be dishonest and a bad husband, the income is attributable to the Taxpayer.

In closing, the Taxpayer argued that while the weekly might not be income since the she provided no services to Company One, she did receive those weekly checks. However, the Taxpayer argued that it is unconscionable to tax her on money she did not know about and never received. The Taxpayer argued that the Bank Account was obviously a scheme by the convicted felon Husband to obtain money that was not subject to a lien and that money was under his control.

C. Agreements

The parties agreed that the Taxpayer would owe tax on her weekly checks from Company One. There was withholding taken from those checks which the Taxpayer contends was more than enough to cover the tax liability. However, the withholding was not remitted to the State. The consequence of the weekly checks and withholding is not a part of this matter. Tr 34. The parties agreed that the Taxpayer filed Rhode Island returns on September 15, 2010 for 2005 through 2008 based on the weekly checks and later filed amended returns but the Division did not process those returns. Tr 39. See Taxpayer's Exhibit Six (6) (amended State returns).

D. Whether the Taxpayer Owes the Assessed Tax

R.I. Gen. Laws § 44-30-12 defines the Rhode Island income of a resident individual to mean "his or her adjusted gross income for federal income tax purposes, with the modifications specified in this section." Federal law, 26 USC § 61, defines income as follows:

> § 61. Gross income defined
> (a) General definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Alimony and separate maintenance payments;
> (9) Annuities;
> (10) Income from life insurance and endowment contracts;
> (11) Pensions;
> (12) Income from discharge of indebtedness;
> (13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

Thus, the issue is what is Federal gross income as defined in 26 USC § 61. If the Bank Account falls under that Federal definition of income, then it is considered income under State law and is taxable by the State.

Over time, the issue of what is considered Federal income has been addressed by the US Supreme Court and Federal Courts. In *Commissioner of Internal Revenue v. Wilcox*, 327 US 404 (1939), the Court found that embezzled money was not income. *James v. United States*, 366 US 213 (1961) specifically overturned *Wilcox* and found instead that embezzled funds are included in the gross income of an embezzler and are taxable in the year in which they were misappropriated. *James* reviewed *Rutkin v. United States*, 343 US 952 (1952) and found it vitiated *Wilcox's* holding.

James found that it was established prior to *Wilcox* and *Rutkin* that Congress meant to tax illegally acquired income when Congress amended the 1913 Income Tax Act in 1916 to omit the term "lawful" in defining income. The Court further found that the question of taxability cannot turn on "attenuated subtleties" such as title or voidable title to the money. *James*, at 216 (internal citation omitted). Thus, the Court found in determining what is income, one must begin with the basic premise that Congress was "'to use the full measure of its taxing power'" *Id.*, at 218 (citation omitted). And the Court found it has liberally construed "gross income" in recognition of Congress' intent to tax all gains except those specifically exempted. *Id.*, at 219.

James found that the 1939 and 1954 Federal Income Tax Code has been "held to encompass all 'accessions to wealth, clearly realized, and over which the taxpayers have

complete dominion.'" *Id.* citing to *Commissioner of Internal Revenue v. Glenshaw Glass Co.*, 348 US 426, 431 (1955). *James* found that a "gain 'constitutes taxable income when its recipient has such control over it that, as a practical matter he derives readily realizable economic value from it.'" *Id.* citing to *Rutkin*, at 137. *James* further found as follows:

> When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.' (citation omitted). In such case, the taxpayer has 'actual command over the property taxed-the actual benefit for which the tax is paid,' (citation omitted). This standard brings wrongful appropriations within the broad sweep of 'gross income.' *Id.*, at 219.

The US Supreme Court revisited the issue of what is income in *Commissioner of Internal Revenue v. First Sec. Bank of Utah, N. A.*, 405 U.S. 394 (1972) finding as follows:

> We know of no decision of this Court wherein a person has been found to have taxable income that he did not receive and that he was prohibited from receiving. In cases dealing with the concept of income, it has been assumed that the person to whom the income was attributed could have received it. The underlying assumption always has been that in order to be taxed for income, a taxpayer must have complete dominion over it. 'The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.' Corliss v. Bowers, 281 U.S. 376, 378 . . . (1930).
>
> It is, of course, well established that income assigned before it is received is nonetheless taxable to the assignor. But the assignment-of-income doctrine assumes that the income would have been received by the taxpayer had he not arranged for it to be paid to another. *Id.*, at 403-404.

In 1990, the US Supreme Court again addressed income in the context of advance payments to a utility company in *Commissioner of Internal Revenue v. Indianapolis Power & Light*, 493 U.S. 203 (1990) and looked to *James* and *Glenshaw* in discussing the

taxpayer's economic benefits and/or complete dominion and/or accession to wealth in determining whether payments were income.

Subsequent to *James*, *First Bank of Utah*, and *Indianapolis Power*, the Federal Courts of Appeal have addressed the issue of what is income. *United States v. Mueller*, 74 F.3rd 1152 (11th Cir. 1996) relied on *Rutkin* (*supra*, at 137) and also cited to *United States v. Schmidt*, 935 F .2nd 1440 (4th Cir. 1991) for the finding that dominion and control of property makes it taxable. And *Mueller* cited to *In Re Bentley*, 916 F. 2nd 431 (8th Cir. 1990) for the finding that an increase in wealth over which the taxpayer has dominion is taxable. In *United States v. Toushin*, 899 F.2nd 617 (7th Cir. 1990), the Court citing to *Rutkin* found that income is taxable when the holder has such control over it that he has "'freedom to dispose of it at will.'" *Id.*, at 622. Relying on *Bank of Utah* and *Glenshaw Glass*, *Toushin* found that the taxpayer must have complete dominion over money for it to be taxable and a taxpayer exercises ownership over the money when he has the power to dispose of it. *Toushin*, at 622-23.

Additionally, in *Haverly v. United States*, 513 F.2d 224 (7th Cir. 1975) *cert. denied* 423 US 912 (1975), the taxpayer received free sample textbooks which he then donated to the library and took a $400 tax deduction. The Court found the receipt of textbooks is unquestionably an "accession to wealth" and the receipt and possession of books indicate the income was "clearly realized" and the taxpayer manifested an intent to accept the property or exercise "complete dominion" over it by taking a charitable deduction for the donation of the property. The Court did not reach the issue receiving free samples without taking a deduction but found that since the taxpayer had taken a

deduction for the free sample there was clearly an accession to wealth with complete dominion over the property.

Thus, in reviewing the above cases, in order for property to be considered Federal income and taxable a taxpayer must have an increase or accession to wealth, have complete dominion or control of the property, must be able to dispose of the property, and must have readily realized an economic value from it.

The Taxpayer argues that she never knew about the Bank Account but the Division argues that she should have known about it based on her background and position. Obviously, the Division is concerned with any conspiracy or arrangement that a taxpayer may enter into in order to receive income "off-the-books." Indeed, the Division rightfully wants to avoid a matter where a party partakes in the scheme but after-the-fact claims to know nothing when in fact he or she partook in the scheme to illegally obtain income. Nonetheless, the Courts do not want to tax property from which a taxpayer has not received any economic benefit and over which he or she had no control.

In the cases that often come before the courts, the taxpayer who received the ill-gotten gains had knowledge of his or her own embezzlement or theft or was in receipt of the funds from a co-conspirator involving an illegal scheme. However, the Court has apparently not taxed property that a taxpayer should have known about but did not know about. Instead, the Court has reviewed certain touchstones to determine whether the property is taxable income in order to ensure that the taxpayer had control of property and an economic benefit and increase to wealth. Thus, even if a taxpayer should have known about certain income that was in his or her name, it does not follow that the taxpayer has gained wealth and had complete dominion over the property.

In this matter, there is no embezzlement or theft by the Taxpayer. Instead, the Taxpayer denies knowledge of the Bank Account and its funds deposited in her name.

The Taxpayer was not the only witness to testify about the Husband's business dealings. The Husband's girlfriend's daughter testified that he opened a bank account in his and her name but she never saw the checkbook and got her name off the account and her family warned her about being involved with the Husband. Like the Taxpayer, the Brother testified that the Husband made a signature stamp of the Brother's name without the Brother's knowledge or permission and without the Brother's authorization put the Brother's name on one of the Husband's many companies.

The Husband did not testify at hearing. Instead, he was in jail for income tax evasion and lying to a bankruptcy judge. The hearing was replete with testimony about companies that the Husband started and closed down over the years for known and unknown reasons. There was also testimony about the Husband's payroll problems and different payroll accounts. Based on those actions alone, it would not be surprising if part of the Husband's income tax evasion scheme (whether convicted of it or not) would have included diverting money to himself from his businesses using his wife's name.

Based on the Taxpayer's testimony as supported by the Witness' and Brother's testimony, it is credible that she did not know about the Bank Account. Indeed, the Taxpayer admitted she received weekly from Company One despite providing no services to Company One. The Bank Account statements were forwarded to the Husband's accountant's address. The checks written on said account apparently used a signature stamp. See Division's Exhibit 11. In addition, the Husband was subject to a levy on his income during part of the years in question so it is believable that he wanted

access to money without it being levied as well. The Husband was also (apparently) carrying on affairs and buying many cars so it is also believable that he would want access to money without his wife's knowledge. The checks written on the Bank Account include the Husband's accountant, another bank, a town, and an individual.

If the Taxpayer did not know about the Bank Account then she had no accession to wealth, no complete dominion and/or control of the money, could not dispose of it, and realized no economic value from it.[4] However, there is one check that she admitted she wrote and that was the check she testified closed out the account in the amount of ("Check").[5] The Check was made out to cash. The Taxpayer's testimony was that she gave the Check (money) to her Husband. Before she gave the Check to the Husband, did the Taxpayer have complete dominion and control of the money, did she dispose of it, and did she realize an economic value from it?

Suppose instead of giving the Check to her Husband, the Taxpayer bought a car that day with it? In that situation, there would be no doubt that the Taxpayer gained wealth, controlled it, and disposed of it. Even if the control of the Check was fleeting, the money was still disposed of by the Taxpayer. While it is unfortunate for the Taxpayer that her Husband had not further drained the account prior to her acceding to wealth by making out the Check and controlling it and disposing of it by giving it to her

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[4] While the Taxpayer has already admitted tax liability on the weekly , it is clear that those weekly checks would be considered Taxpayer's income pursuant to the cases cited above despite the fact that the Taxpayer provided no services to Company One.

[5] A review of the Bank Account's record indicate that after the Taxpayer wrote the Check, there still was in the account that was withdrawn four (4) days later with the notation "levy withdrawal RI Levy" on the bank statement. Nine (9) days after the Check was made out, was deposited and withdrawn the same day leaving the Bank Account at a zero balance. There was no testimony regarding the "levy" so one can only infer that is why the Husband had his wife withdraw such a large amount when he did. The Check was made out in 2008 but the Taxpayer testified that she did not realize about the Bank Account until 2010 when she went to said bank. Presumably, the Taxpayer did not realize how the account came about in 2008 when she signed the Check and only realized its secret nature later.

Husband, the Check under Federal case law represents Federal income and thus State taxable income for the Taxpayer. See R.I. Gen. Laws § 44-30-12.

E. Interest and Penalties

Pursuant to R.I. Gen. Laws § 44-30-85,[6] the Division assessed late payment interest, a late filing penalty, and a late payment penalty.

F. Conclusion

The Taxpayer does not owe the assessments issued by the Division for the years 2005 through 2008 and entered as Division's Exhibit 15 (Notices of Deficiency). However, as set forth above, the Check represents taxable income for the Taxpayer. Thus, she owes tax and any applicable penalties on that amount.[7]

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[6] R.I. Gen. Laws § 44-30-85 provides in part:

> Additions to tax and civil penalties. – *(a) Failure to file tax returns or to pay tax.* In the case of failure:
>
> (1) To file the Rhode Island personal income tax return or the employer's withheld tax return on or before the prescribed date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect, an addition to tax shall be made equal to five percent (5%) of the tax required to be reported if the failure is for not more than one month, with an additional five percent (5%) for each additional month or fraction thereof during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate. For this purpose, the amount of tax required to be reported shall be reduced by an amount of the tax paid on or before the date prescribed for payment and by the amount of any credit against the tax which may properly be claimed upon the return;
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> (2) To pay the amount shown as tax on the personal income tax return or the employer's withheld tax return on or before the prescribed date for payment of the tax (determined with regard to any extension of time for payment) unless it is shown that the failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on the return five-tenths percent (0.5%) of the amount of the tax if the failure is for not more than one month, with an additional five-tenths percent (0.5%) for each additional month or fraction thereof during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate; or
>
> ***
>
> *(b) Negligence.* If any part of a deficiency is due to negligence or intentional disregard of the Rhode Island personal income tax law or rules or regulations under this section (but without intent to defraud), five percent (5%) of that part of the deficiency shall be added to the tax.
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> ***

[7] R.I. Gen. Laws § 44-30-85(a)(1) and (2) provides that if it is found there was a reasonable cause for the failure to file and/or failure to pay, the penalty(ies) may be waived. The Division will need to review those provisions upon its issuance of a new deficiency for the Taxpayer based on this decision.

VI. FINDINGS OF FACT

1. On or about February 22, 2011, the Division issued a Notice of Hearing and Appointment of Hearing Officer.

2. A hearing in this matter was held on November 28, 2011 with the parties resting on the record.

3. The facts contained in Sections IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.* and R.I. Gen. Laws § 44-30-1 *et seq.*

2. Pursuant to R.I. Gen. Laws § 44-30-1 *et seq.* and Federal case law, the Check represents the Taxpayer's State taxable income in this matter.[8]

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends as follows:

Pursuant to R.I. Gen. Laws § 44-30-1 *et seq.* and Federal case law, the Taxpayer does not owe the assessments issued by the Division for the years 2005 through 2008 and entered as Division's Exhibit 15. However, as set forth above, the Check represents State taxable income for the Taxpayer. Thus, she owes tax and any applicable penalties on that amount.

Date: January 27, 2012

Catherine R. Warren
Hearing Officer

[8] It has already been agreed that the weekly checks are taxable income.

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

_____ ADOPT
_____ REJECT
_____ MODIFY

Date: Feb 15, 2012

David Sullivan
Tax Administrator

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DIVISION. THIS ORDER MAY BE APPEALED TO THE SIXTH DIVISION DISTRICT COURT PURSUANT TO THE FOLLOWING WHICH STATES AS FOLLOWS:

§ 44-30-90 Review of tax administrator's decision. – *(a) General.* Any taxpayer aggrieved by the decision of the tax administrator or his or her designated hearing officer as to his or her Rhode Island personal income tax may within thirty (30) days after notice of the decision is sent to the taxpayer by certified or registered mail, directed to his or her last known address, petition the sixth division of the district court pursuant to chapter 8 of title 8 setting forth the reasons why the decision is alleged to be erroneous and praying relief therefrom. Upon the filing of any complaint, the clerk of the court shall issue a citation, substantially in the form provided in § 44-5-26 to summon the tax administrator to answer the complaint, and the court shall proceed to hear the complaint and to determine the correct amount of the liability as in any other action for money, but the burden of proof shall be as specified in § 8-8-28.

(b) Judicial review sole remedy of taxpayer. The review of a decision of the tax administrator provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for Rhode Island personal income tax.

(c) Date of finality of tax administrator's decision. A decision of the tax administrator shall become final upon the expiration of the time allowed for petitioning the district court if no timely petition is filed, or upon the final expiration of the time for further judicial review of the case.

CERTIFICATION

I hereby certify that on the 15th day of February, 2012 a copy of the above Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to the Taxpayer's attorney's address on file with the Division of Taxation and by hand-delivery to Linda Riordan, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.

Gail Belasco