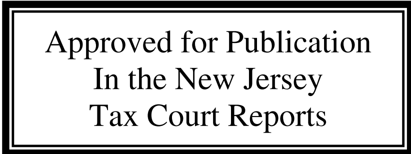
NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

ANITA K. LEATHER,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NO. 000852-2018
Plaintiff,	:	
	:	
v.	:	
	:	
DIRECTOR, DIVISION OF TAXATION,	:	
	:	
Defendant.	:	
	:	


Approved for Publication
In the New Jersey
Tax Court Reports

Decided: October 23, 2019

Anita Leather for plaintiff
(Self-Represented).

Miles Eckardt for defendant
(Gurbir S. Grewal, Attorney General of New Jersey, attorney).

SUNDAR, J.T.C.

This opinion denies defendant's summary judgment motion which seeks to dismiss the above-captioned complaint on grounds that it states a cause of action for which no relief is available. Specifically, defendant ("Director") argues that plaintiff is liable for New Jersey gross income tax ("GIT") on disability benefits fraudulently applied for and received by her (now) ex-spouse for tax years 2000-2009 from the Department of Veterans Affairs because she filed joint GIT returns for those tax years. Per the Director, it matters not that it was the ex-spouse who committed the fraud because (1) N.J.S.A. 54A:5-1(o) specifically defines gross income to include income, gain or profit from criminal offenses; and (2) N.J.S.A. 54A:8-3.1(c) specifically imposes joint and several liability when GIT returns are filed jointly. Plaintiff, who opposed the motion (but did not cross-move for summary judgment) maintains that the GIT assessment (plus interest and penalties) against her is unfair, unjust and unwarranted since she did not know of, and was not

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complicit in the ex-spouse's fraudulent activity, and as an "innocent spouse," she should not be liable.

For the reasons more fully stated below, the court finds that the ex-spouse's federal indictment for, and his guilty plea to, embezzling government monies, a non-tax criminal offense, is not a substitute for, nor dispels, the Director's burden to prove that plaintiff filed false or fraudulent returns for tax years 2000-2009 with an intent to evade the GIT. Such intent is a requirement of N.J.S.A. 54A:9-4(c)(1)(B), the statute under which the Director assessed the GIT beyond each year's statute of limitations. The Director's summary judgment motion provides nothing to show plaintiff had any such intent. Nonetheless, the court cannot reverse the final determination and grant relief to plaintiff without an opportunity for the Director to inquire into the relevant facts and meet his burden of proving intent. The matter will therefore be scheduled for a trial after the Director has completed discovery for purposes of N.J.S.A. 54A:9-4(c)(1)(B).

FACTS

The following undisputed facts are taken from the parties' respective pleadings, moving papers, certifications and documents in support of, and in opposition to, the summary judgment motion, including post-argument briefing.

Plaintiff was married to Paul Tillson ("Tillson") in August 1994. During their marriage, plaintiff believed Tillson to be disabled based on his representations to that effect; the fact that she took him to various doctors between her several jobs for treatment of his disability; and his receipt of disability benefit checks from the U.S. Department of Veterans Affairs ("VA").

In May 2010, Tillson left plaintiff, had LASIK surgery, got a driver's license and a car. In July 2010, he asked plaintiff for a quick divorce, as he was engaged to someone else.

In December 2011, plaintiff contacted an organization that investigates military fraud as to her suspicions about Tillson, who had photographs of himself on social media where he was in full military uniform with several medals, many of which plaintiff did not recognize or felt that he had not, or could not, have earned. It was only then that she discovered, through information provided by the investigating organization, that Tillson had been fraudulently receiving disability benefits from the VA.

Based on plaintiff's information and upon the third-party investigation, a federal grand jury indicted Tillson in 2014 for stealing from the VA because he falsely claimed to have suffered combat-related injuries when in fact he had not. Tillson had received $150,164 in VA disability benefits from November 2000 through July 2013. The indictment was under a federal criminal statute, 18 U.S.C. § 641, which punishes embezzlement and theft of public money with fine, jail time (up to 10 years) or both. On September 10, 2015, Tillson pleaded guilty to the embezzlement charge and admitted that he falsified information as to his alleged "combat stressors."[1]

During the years of her marriage, plaintiff filed federal income tax returns ("US-1040") and GIT returns ("NJ-1040") with Tillson under the status of married filing joint. Returns were prepared by a CPA. The court was provided a copy of the jointly filed US-1040 and NJ-1040 for tax year ("TY") 2004. Both reflected Tillson as being "retired/disabled," and "blind or disabled," reported plaintiff's wage income (as evidenced by Form W-2 issued to plaintiff, which also showed the amount of federal and state income tax withheld) and did not report the fraudulently received VA benefits anywhere. The US-1040 also reported the taxable amount of pensions and Social Security benefits (for the latter, based on Form SSA-1099 issued to Tillson by the Social Security

[1] During oral argument, plaintiff stated that Tillson was paying restitution to the VA. The Director did not contest this information.

Administration, which also showed no income tax was withheld). For TY 2000 income from "pension, annuities and IRA withdrawals" was reported. For TYs 2000-2009, the other items of income reported were plaintiff's wages, and in some TYs, income from interest, and/or dividends.

Due to her divorce from Tillson in 2010, plaintiff filed her income tax returns as single from TY 2010 onwards.

By letter dated December 11, 2015, the Division of Taxation ("Taxation"), the agency headed by the Director, issued a notice of deficiency to plaintiff and Tillson assessing them additional GIT for TYs 2000-2009. Taxation stated that Tillson's "guilty plea" for embezzlement of federal funds resulted in their receipt of "constructive income" under N.J.S.A. 54A:5-1(o), which includes income from criminal acts as a category of taxable New Jersey gross income. Per Taxation, this fraud also tolled any statute of limitations as to the audit under N.J.S.A. 54A:9-4(c)(1)(B), which provides that GIT can be "assessed at any time if a false or fraudulent return is filed with an intent to evade tax." The income added was $11,551 per TY ($150,164 benefits ÷ 13 years of the fraud). Taxation also imposed a civil fraud penalty under the State Uniform Tax Procedure Law ("SUTPL"), which states that "[i]f any part of an assessment is due to civil fraud, there shall be added to the tax an amount equal to 50% of the assessment." N.J.S.A. 54:49-9.1. The total (tax, interest, and civil fraud penalty) demanded was $6,714.[2]

By letter of March 7, 2016, plaintiff, through her representative, an entity which assists taxpayers, timely protested the assessed GIT, interest, and penalty. She asserted that "unbeknownst" to her Tillson committed the fraud, and that she had "absolutely no idea" of the fraud until after his arrest. Taxation duly scheduled a conference.

[2] The increase in gross income reduced the deduction for medical expenses (which are computed as amounts in excess of 2% of gross income).

By letter of November 15, 2017, Taxation issued a final determination affirming the additional GIT assessments as "correct" because plaintiff's filing of joint income tax returns with Tillson made her jointly liable for any GIT liability "associated with the 2000-2009 tax returns." The total amount demanded was $8,823.93 ($2,577.50 tax; $1,287 penalty; $4,959.43 interest as of 12/15/2017).[3] The penalty was imposed under N.J.S.A. 54A:9-6(e), which, like the SUTPL, states that "[i]f any part of a deficiency is due to fraud, there shall be added to the tax an amount equal to 50% of the deficiency." Plaintiff timely filed a complaint challenging the determination.

Plaintiff asserted (and Taxation did not deny) that the Internal Revenue Service ("IRS") never issued any notice of assessment or deficiency against her as a result of Tillson's fraud even though they had filed the U.S. 1040s as joint. This assertion is endorsed by the transcript of those returns for TYs 2000-2009. Thus, plaintiff did not need to (and did not in fact) file a petition before the IRS seeking relief from her joint federal income tax liability under the equitable doctrine of "innocent spouse" codified in the Internal Revenue Code ("Code" or "I.R.C.") at § 6015.

Plaintiff conceded that she was aware that Tillson was receiving disability benefit checks from the VA. She conceded that those amounts were treated and used as marital funds. She stated that she reported receipt of the VA disability checks to the CPA who prepared the GIT returns but did not know whether those checks were includible as income. She also conceded that filing a return as married filing joint imposes a joint and several liability for income earned by either individual.

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[3] A July 13, 2018 notice from Taxation addressed to plaintiff and Tillson claimed that the "taxable income on your 2000-2012" GIT returns was changed because of the non-reporting of the $150,164 "additional income in 2000-2012." During oral argument, Taxation stated that this letter applied to only to Tillson, and plaintiff's liability was for tax years 2000-2009 only.

ANALYSIS

Plaintiff argues that (1) she never knew until 2011 that Tillson was receiving checks from the VA under fraud; (2) if the disability benefits were taxable and unreported, she should not be penalized since she did not commit any fraud, did not know of Tillson's fraud, and it was only because of her actions that Tillson's fraud against the government was discovered; (3) she should be provided relief similar to the innocent spouse relief under I.R.C. § 6015; and (4) she cannot afford to pay the GIT assessments (plus interest and penalty), especially because Tillson owes her monies under the divorce decree.

Taxation argues that none of these equitable factors matter. The plain language of one GIT statute includes as gross income any receipts from criminal acts. N.J.S.A. 54A:5-1(o). The plain language of another GIT statute, N.J.S.A. 54A:8-3.1(c), ascribes joint and several liability to a couple filing joint returns, and since the couple are treated as one "economic unit," neither party's bad behavior matters to excuse either party's joint tax liability. To buttress this latter argument, Taxation points out that the two bills introduced in New Jersey which would have allowed innocent spouse relief under the GIT Act were never enacted.

A. Are VA Disability Benefits Taxable Income?

VA disability benefits are a form of compensation paid by the federal government for loss of wages. See 38 U.S.C. §§ 1110, 1114, and 1155 (the United States will pay "compensation" to any veteran disabled "in the line of duty" and honorably discharged, with the monthly compensation payments depending on the disability rating, such ratings to be "of reductions in earning capacity from" the injuries and to be "based, as far as practicable, upon the average impairments of earning capacity" due to the injuries). However, they are specifically exempt from tax. See 38 U.S.C. § 5301(a)(1) (benefits payable under "any law administered by" the VA "shall

be exempt from taxation"); Veterans Benefits Administration ("VA disability compensation (pay) offers a monthly tax-free payment to Veterans who got sick or injured while serving in the military") (https://www.va.gov/disability/ last visited October 22, 2019).

Thus, the IRS permits non-inclusion of military benefits for federal income tax purposes. See I.R.S. Pub. 907, Tax Highlights for Persons with Disabilities, 3 (Jan. 9, 2019) ("Do not include disability benefits you receive from the Department of Veterans Affairs (VA) in your gross income . . . [nor] any veterans' benefits paid under any law, regulation, or administrative practice administered by the VA . . . [including] . . . [d]isability compensation and pension payments for disabilities paid to veterans or their families"); I.R.S. Pub. 525, Taxable and Nontaxable Income, 16 (March 8, 2019) (same). See also Rev. Rul. 72-605, 1972-2 C.B. 35 ("payments of benefits under any law administered by the [VA] are excludable from the gross income of a recipient under" I.R.C. § 61) (citing 38 U.S.C. § 5301(a)(1)).

Taxation similarly exempts VA disability benefits from GIT. See Tax Topic Bulletin GIT-7, Military Personnel and Families, (rev'd March 2019) (VA "[d]isability [c]ompensation is . . . exempt from tax and should not be included as income"). The Director concedes this as evidenced by the Instructions to the GIT returns (for 2004). It thus logically follows that VA disability benefits need not be reported as income on GIT returns.

B. Are Fraudulently Obtained VA Benefits Taxable?

The next question is whether the tax-exempt nature of the VA disability benefits render them immune or excepted from N.J.S.A. 54A:5-1(o). This statute specifically includes as a category of New Jersey gross income any "[i]ncome, gain or profit derived from acts or omissions defined as crimes or offenses under the laws of this State or any other jurisdiction." Enacted in 1987 (L. 1987, c. 76, §56), pursuant to the June 11, 1987 Senate committee amendments, it was

intended to capture "any illegal income." See Assembly Approp. Comm. Statement to Assembly Comm. Substitute for A. 823 (June 12, 1986); Senate Revenue Fin. and Approp. Comm. Statement to A. Comm. Substitute for A. 823 (Feb. 23, 1987).

N.J.S.A. 54A:5-1(o) does not define the terms "income, gain or profit." The definition of "gross income" in N.J.S.A. 54A:1-2 is simply that it "shall include that set forth in" N.J.S.A. 54A:5-1. N.J.S.A. 54A:5-1 lists specific types of receipts, and thus does not assist the court in interpreting N.J.S.A. 54A:5-1(o). There is no guidance from Taxation since it never promulgated any regulations interpreting the meaning or scope of this statute.

The meaning of "income" and "gain" in the context of taxing illegal income for federal income tax purposes, however, provides ample guidance. Like the GIT law, and for purposes of imposing income tax, the Code defines the phrase "gross income." Whereas the GIT law specifies certain categories as being encompassed within the phrase "gross income," see N.J.S.A. 54A:5-1, the Code broadly defines the phrase to mean "all income from whatever source derived." See I.R.C. § 61(a). The term "income," in turn, means "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). 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." Rutkin v. United States, 343 U.S. 130, 137 (1952). Such control "occurs when cash . . . is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though it may have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it." Ibid. (deeming as income, monies received from extortion).

Thus, and although the Code does not have a specific category of "illegal income" like N.J.S.A. 54A:5-1(o), the above two "broad principles" and congressional intent to "tax income

derived from both legal and illegal sources, to remove the incongruity of having the gains of the honest laborer taxed and the gains of the dishonest immune," render stolen monies income to the embezzler. James v. United States, 366 U.S. 213, 218-19 (1961) (citations omitted).[4] There, the Court ruled:

> 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 . . . . This standard brings wrongful appropriations within the broad sweep of 'gross income'; it excludes loans. When a law-abiding taxpayer mistakenly receives income in one year, which receipt is assailed and found to be invalid in a subsequent year, the taxpayer must nonetheless report the amount as 'gross income' in the year received. We do not believe that Congress intended to treat a law-breaking taxpayer differently . . . .
>
> [Id. at 219-220 (citations omitted)].

Applying the above federal income tax precedents, the VA disability benefits fraudulently obtained by Tillson undoubtedly resulted in accretion to his cash flow (thus, wealth) and provided an economic/monetary benefit to Tillson and plaintiff. Due to fraud, monies paid by the VA lose

[4] The petitioner had been convicted "for willfully attempting to evade the federal income tax" under I.R.C. §§ 145(b) and 7201 for failing to report over $738,000 of money he stole from his employer and employer's client, and was sentenced to prison. James, 366 U.S. at 214-215. The Court noted examples of illegal income as "gains from illicit liquor . . . protection payments made to racketeers, ransom payments paid to kidnappers, bribes, money derived from the sale of unlawful insurance policies, graft, black market gains, funds obtained from the operation of lotteries, income from race track bookmaking and illegal prize fight pictures." Id. at 218-19 (citation omitted).

The Court stated that it had previously "wrongly decided" in Comm'r v. Wilcox, 327 U.S. 404 (1946) that "embezzled money does not constitute taxable income to the embezzler in the year of the embezzlement" since the embezzler never had legal or equitable title or right to such monies. James, 366 U.S. at 215, 221. Due to this "gloss placed upon" I.R.C. §61(a) "by Wilcox" for the TYs involved in James, "the element of willfulness could not be proven in a criminal prosecution" for embezzlement. Id. at 221-22. Therefore, it reversed the taxpayer's indictment. Id. at 222.

their identity as disability benefits and become monies stolen by, and thus illegal income to, Tillson. As such, then, the basis for their exclusion from income does not arise, which therefore means that they are includible in gross income. In other words, simply because VA disability benefits are tax-exempt does not mean they are excluded from N.J.S.A. 54A:5-1(o). This is because when such benefits are fraudulently obtained, the fraudulent act converts the otherwise excludible income into includible income. See, e.g., Frempong-Atuahene v. Comm'r, T.C. Memo. 1989-67 (U.S. Tax Ct. 1989) (tax-exempt welfare benefits are includible in gross income when obtained by false representations to the County Welfare Board as taxpayers had "gain[ed] benefits they were not entitled . . . [thus] their receipt of the welfare benefits is analogous to embezzlement income" deemed taxable under the ruling in James).

C. Imposing GIT Beyond the Statute of Limitations Solely Due to Joint Filing Status

That our Legislature included illegal income as gross income does not require an automatic conclusion that such income is taxable regardless of the statute of limitations for Taxation to impose additional assessments.

N.J.S.A. 54A:9-4(a) provides a three-year statute of limitation for auditing GIT returns. Thus, assuming that the statutory exceptions to the three-year rule do not apply, the time period to audit and impose additional GIT for TYs 2000-2009 had expired when Taxation issued its December 2015 notice of deficiency.[5]

One of the statutory exceptions to the three-year limitations period is where "[a] false or fraudulent return is filed with an intent to evade tax." N.J.S.A. 54A:9-4(c)(1)(B). If so, GIT "may

[5] Taxation can audit a GIT return within three years after it is filed. N.J.S.A. 54A:9-4(a). The filing deadline is April 15 of the year following the TY, unless extended. N.J.S.A. 54A:8-1(a). Taxation's worksheets accompanying its notice of deficiency do not show the filing dates of the NJ-1040 for TYs 2000-2009. The IRS transcript shows the US-1040s for these TYs were filed in 2001 through 2010. The court presumes that the filing dates for the NJ 1040s were the same.

be assessed at any time." Ibid. See also N.J.A.C. 18:2-2.6(c)(1) ("Additional gross income tax may be assessed at any time if . . . a false or fraudulent return is filed with intent to evade tax"). Taxation relied upon this fraud exception statute to assess plaintiff beyond the three-year period, but based solely on grounds that she filed joint GIT returns with Tillson. See N.J.S.A. 54A:8-3.1 (c) (married couple must file "a joint return" for GIT "purposes" if they file as such federally, "and their [GIT] . . . liabilities . . . shall be joint and several").

However, the fact that plaintiff filed a joint return does not eviscerate the requirements of N.J.S.A. 54A:9-4(c)(1)(B). For the statute to apply, either a false return with an "intent" to evade the GIT, or a fraudulent return with an "intent" to evade the GIT must have been filed. Intent, being subjective in nature, cannot be established merely by the filing of joint returns. The joint return filing requirement has no requirement of intent, and only establishes that the GIT liability is assigned to both spouses. Therefore, Taxation must independently show that N.J.S.A. 54A:9-4(c)(1)(B) applies to plaintiff under this statute's language and requirements.

Although N.J.S.A. 54A:9-4(c)(1)(B) and the implementing regulations are silent in this regard, the intent to evade GIT must be proven by Taxation. It is Taxation which is alleging that the GIT returns were filed with an intent to evade taxes, therefore, it must prove the same. This same burden of proof is attendant upon Taxation when it seeks to impose a civil fraud assessment or penalty under the SUTPL. It should be no different when it seeks to assess taxes based on an assertion that the GIT returns were filed falsely or fraudulently with an intent to evade taxes. This is because the SUTPL provisions and the GIT provisions in both situations are almost identical in language and intent requiring, (1) false or fraudulent return filing, either filing being with an intent to evade taxes, and (2) the 50% additional assessment be imposed due to fraud. Cf. N.J.S.A. 54:49-6(b) (SUTPL) ("in the case of a false or fraudulent return with intent to evade tax . . . the tax may

be assessed at any time") with N.J.S.A. 54A:9-4(c)(1)(B) (GIT law) ("tax may be assessed at any time if [a] false or fraudulent return is filed with intent to evade tax"), and N.J.S.A. 54:49-9.1 ("[i]f any part of an assessment is due to civil fraud, there shall be added to the tax an amount equal to 50% of the assessment") with N.J.S.A. 54A:9-6(e) ("[i]f any part of a deficiency is due to fraud, there shall be added to the tax an amount equal to 50% of the deficiency"). Cf. also Neely v. Comm'r, 116 T.C. 79, 85 (U.S. Tax Ct. 2001) ("the determination of fraud for purposes of the period of limitations on assessment under" I.R.C. § 6501(c)(1) "is the same as the determination of fraud for purposes of the penalty under" I.R.C. §6663)).[6]

Thus, Taxation's regulations interpreting fraud and intent under the SUTPL apply equally to N.J.S.A. 54A:9-4(c)(1)(B). Under N.J.A.C. 18:2-2.9(a), Taxation must "determine[] that any part of an assessment is due to civil fraud," and if so, impose the additional 50% penalty. Further, "[i]f a taxpayer files a false or fraudulent tax return with the intent to evade tax or fails to file a tax return," then Taxation "may make an assessment of tax at any time." N.J.A.C. 18:2-2.9(c). Fraud is the "intent to evade or avoid the payment of taxes known to be due to the State." N.J.A.C. 18:2-2.9(b). Consequently, here, Taxation must prove that the GIT returns for TYs 2000-2009 were false or fraudulent and were filed with the intent to evade GIT which plaintiff "knew" were owed to Taxation, so that the unlimited assessment period applies.

[6] I.R.C. § 6501(c)(1), like the SUTPL and GIT law, allows an assessment to be made at any time "[i]n the case of a false or fraudulent return with the intent to evade tax." I.R.C. § 6663, like the SUTPL and GIT law, imposes a penalty if any underpayment of tax on a return is "due to fraud." Note that Taxation's regulations were patterned after the Code as to standard of proof, burden of proof upon the government, and the non-exclusive list of fraud indicators. See 46 N.J.R. 595(a) (April 7, 2014) ("[t]he indicia of fraud listed in the proposed rule are consistent with Federal case law and the Internal Service Manual on civil fraud."); 46 N.J.R. 1974(c) (Sep. 15, 2014) (fraud "indicia are consistent with applicable multistate and Third Circuit caselaw [and IRS] "guidance").

The burden that a GIT return was falsely or fraudulently filed with an intent to evade tax must be met by clear and convincing evidence, such intent being evidenced by "conduct intended to conceal, mislead, or otherwise prevent the administration and collection of the taxes imposed by the laws of this State." See N.J.A.C. 18:2-2.9(b); 2.9(d). Intent is not "inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness." N.J.A.C. 18:2-2.9(d).[7]

Plaintiff's responses to interrogatories (under penalties of perjury), which Taxation relied upon in support of its summary judgment motion, tend to deflect any actual or imputed intent on her part to evade the GIT for any tax year at issue here (or indeed, even to commit fraud on the VA). She re-asserted those responses during oral argument, including that she knew of the receipt of the VA disability benefits and had informed the CPA of the same for purposes of preparing the GIT returns each year, but did not know whether VA benefits are tax-exempt. Thus, if taxable, she stated, she presumed they must have been reported. Indeed, there is no evidence of even the IRS notifying plaintiff that she filed federal income tax returns intending to falsely or fraudulently evade tax.

Taxation, on the other hand, the party with the burden of proof, did not adduce any evidence of intent. Its statement of materially undisputed facts assigns no mal-intent to plaintiff. Rather, it simply relied on plaintiff's joint return filing status as justification for its assessments. This position is incorrect for the reasons stated above.

Further, Tillson's guilty plea in a non-income tax criminal prosecution is not tantamount to "clear and convincing evidence" of plaintiff's "intent to evade tax" due to a joint filing of the GIT returns. See, e.g., McGowan v. Comm'r, 187 F. App'x 915, 917-18 (11th Cir. 2006) (collateral

[7] The regulations provide a non-exhaustive list of fraud indicia. See N.J.A.C. 18:2-2.9(e).

estoppel does not apply as there is no "identity of issues between the criminal case" for willfully filing a false return, "and the tax case regarding intention to evade tax," thus, while "criminal convictions under" the Code "are badges of fraud, they are not alone conclusive proof" of the intent to evade tax, especially where such intent was "not litigated in" the criminal case prosecution. Rather, "[i]n the tax case, the Commissioner had the burden of establishing through clear and convincing proof," the intent to evade tax). See also Patel v. Comm'r, T.C. memo 2008-223 (U.S. Tax Ct. 2008) (husband's "guilty plea" under I.R.C. § 7206 "for intentionally filing a false return does not in itself prove that" I.R.C. § 6501(c)(1) "applies," thus, the IRS "must show that" the taxpayers "intended to evade tax for each of the years at issue") (citations omitted); Toussaint v. Comm'r, 743 F.2d 309, 312 (5th Cir. 1984) (fraud can never be "imputed or presumed and the court should not sustain findings of fraud upon [sic] circumstances which create at most only suspicion") (citations and internal quotation marks omitted).

Here, Tillson was indicted under 18 U.S.C. § 641, a non-tax criminal statute. It penalizes stealing money from the government, not tax fraud. There is no evidence that the IRS or Taxation prosecuted and convicted Tillson of filing false returns with an intent to evade taxes, or filing fraudulent returns with such intent. Given that VA disability benefits are tax-exempt by law, their exclusion from gross income for GIT purposes would have been legally proper when the returns were filed; therefore, Taxation must show that there was an intent to evade GIT when the returns for TYs 2000-2009 were filed. Thus, attempting to impute to plaintiff an intent to evade GIT "known to be due," based purely on Tillson's guilty plea of stealing VA disability benefits in a

non-tax criminal prosecution, does not satisfy Taxation's burden of proving intent under N.J.S.A. 54A:9-4(c)(1)(B), and cannot be sustained on grounds plaintiff filed joint returns with Tillson.[8]

However, determining that there existed an intent to evade GIT requires supporting facts to be established. Thus, summary judgment is inappropriate to dispose of the matter at this stage.

(D) Civil Fraud Penalty

As noted above, Taxation imposed a 50% civil fraud penalty upon plaintiff as part of its assessment for each TY 2000-2009 totaling $1,287 (50% of the GIT imposed of $2,557.50, rounded) under the SUTPL and the GIT law, both imposing the same amount of penalty for the same act of fraud. See also N.J.A.C. 18:35-9.1(b) ("[i]f a deficiency is assessed against a taxpayer and it is determined that any part of such assessment is due to civil fraud, there shall be added to the tax an amount equal to 50 percent of the assessment"). Taxation used both these statutes as justification for imposition of the civil fraud penalty upon plaintiff (in its 2015 audit letter and in its 2017 final determination).

Although the GIT regulation on civil fraud penalty is not as detailed and descriptive as the SUTPL regulation, N.J.A.C. 18:2-2.9, imposing such penalty, the latter's standards and examples apply equally in the GIT context since both laws impose the identical 50% penalty for the identical reason, i.e., for fraud. Thus, as explained above, Taxation must prove that there was an intent to commit the fraud, i.e., an intent to act or do something so that taxes known to be due are evaded.

Here, Taxation's statement of materially undisputed facts assigns no false or fraudulent actions to plaintiff. Again, its assessment was based purely on the fact that plaintiff filed joint

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[8] For this same reason, Taxation's final determination is not entitled to presumption of correctness which plaintiff has the burden to overcome. As noted above, the intent evade the GIT, or to file false or fraudulent returns with an intent to evade GIT known to be due, cannot be presumed, assumed, or implied. Therefore, the burden is first upon Taxation to prove intent, a requisite of N.J.S.A. 54A:9-4(c)(1)(B).

returns with Tillson. For the same reasons stated above, Taxation's reasoning is incorrect, and not based on the statute and its own regulations. See, e.g. 46 N.J.R. at 1975 (responding that Taxation "has established heightened internal review procedures for civil fraud assessments, including the appointment of specially trained advisors to review and approve civil fraud assessments"). Thus, for the same reasons stated above, summary judgment is inappropriate to decide this issue.

(E) Innocent Spouse Relief

Under I.R.C. § 6015, an innocent spouse is relieved of her or his liability for income tax when tax fraud was committed by the other spouse. It is available if the IRS determines that "taking into account all the facts and circumstances, it is inequitable to hold" the spouse liable. I.R.C. §§ 6015(e); (f). There is no such statutory relief under the GIT law. New Jersey has proposed but never enacted such a law. See S. 2787 (2013); S. 953 (2014).

Taxation points out that this lack of statutory relief is yet another example of how the GIT law was "designed to avoid loopholes possible" federally. This is incorrect. The Code's innocent spouse provision is not a tax avoidance loophole but is an equitable measure enacted precisely to alleviate the harshness caused under the Code's joint and several liability imposition after precedents had declared embezzlement proceeds to be gross income. See Comm'r v. Neal, 557 F.3d 1262, 1264-65 (11th Cir. 2009) ("fairness" of joint and several liability for personal income tax was "rarely questioned," however, after James, 366 U.S. 213, "the IRS began assessing underpayment of taxes to the joint filers of embezzlers" since the "embezzlers were insolvent," regardless of the fact that the spouses were ignorant of the scheme and did not receive any "of the embezzled funds." This prompted "Congress [to] respond[]" by providing equitable relief to an innocent joint filer).

Here, plaintiff stated during oral argument that she never had to apply for innocent spouse relief with the IRS. Rather, she stated, when she called the IRS to confirm that she did not have to pay any taxes, the IRS assured her that she was not deemed liable for Tillson's fraud. The IRS transcript regarding her returns also evidences no imposition of federal income tax in connection with Tillson's guilty plea.

In any event, here, the court is denying summary judgment because Taxation has not proven intent to evade GIT independent of Tillson's non-tax fraud indictment. Therefore, it does not decide plaintiff's argument that she must be provided equitable relief by virtue of being an innocent spouse. Taxation must be provided an opportunity to establish all facts before such a decision can be made.

CONCLUSION

VA disability benefits are tax-exempt, but their receipt by fraud renders them includible in gross income. That fraudulently obtained VA benefits are taxable does not, per se, mean that the three-year statute of limitations for imposing an assessment is suspended, or that plaintiff is subject to a civil fraud penalty, solely because plaintiff filed joint returns with Tillson. Rather, Taxation must first prove that plaintiff filed the GIT returns falsely or fraudulently with the "intent to evade" GIT "known to be" payable to Taxation. Taxation's materially undisputed facts in support of its summary judgment motion attribute no fraud or mal-intent to plaintiff. Nonetheless, the court cannot grant a judgment in favor of plaintiff or to the Director until Taxation has the opportunity to prove intent. Therefore, the Director's summary judgment motion is denied.