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Noelle Geiger / Photo: Bob Giglione

**Financial Infidelity**

By: Kristen D'Andrea April 1, 2015 0

April 15 is just around the corner but, before married couples dot the I's and cross the T's on their joint tax return, they might want to take a step back.

Couples having marital problems should consider filing separately even if they may have to forfeit certain benefits and tax breaks, according to industry experts.

In the event of a divorce, if a joint return was filed, both spouses can be liable for unpaid taxes, according to Steven Eisman, an executive partner at Lake Success-based law firm Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf and president of the Nassau County Bar Association. In that situation, the Internal Revenue Service would not distinguish between a wage earner and a non-monied spouse.

"Just because one of the spouses accumulated all of the debt doesn't mean the other spouse is not accountable," said Mark Ackerman, a partner at Mayer CPAs in Woodbury.

If a couple suspects a divorce may be in their future, they should consider choosing the married-filing-separately status, which offers financial protection, said David Shuster, director of tax controversy at Grassi & Co. in Jericho.

Even if a troubled couple has the foresight to file separately this year, if an older return that was filed jointly is audited, each spouse will still be held liable, Shuster said. The IRS' innocent-spouse relief clause recognizes several exceptions, however.

If tax is understated due to omission of income (which generally occurs when a spouse owns his or her own business) or overstated deductions, a spouse can claim he or she had no knowledge or reason to know there was an understatement of tax, Shuster said. Whether or not the IRS will grant the relief depends on several factors including how involved the spouse may have been in the business, as well as educational background.

"You can't just say, 'I shouldn't be liable; I'm innocent.'" Shuster said. "The government is not going to give up so easily."

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A second set of circumstances involves separation of liability relief, available to spouses who have divorced, separated or have been living apart for the last 12 months. In this situation, a spouse claiming innocence would still have to prove he or she had no actual knowledge of the understatement of tax.

It is easier to prove someone did not have actual knowledge than proving that person did not have a reason to know there was an understatement of tax, according to Noelle Geiger, Grassi & Co.'s tax controversy principal. If granted relief, the couple's prior joint-tax-return filing would be recomputed as if each were filed separately, with each spouse responsible for paying taxes only on their allocable share of income, she said.

"The IRS won't let you separate liability if they prove you knew about the understatement of tax," she said, adding a spouse who enjoyed a lavish lifestyle made possible by an understatement of taxes would have a hard time getting granted this type of relief.

"You have to have no idea what's going on," Eisman agreed. "You can't live in a million-dollar house and vacation three or four times a year and file a joint return claiming \$50,000 in income and then say, 'I had no idea.'"

When a spouse files for relief, the other spouse receives notification from the IRS and has the opportunity to intervene, Geiger said. Even if a couple is in the middle of a messy divorce, often one spouse will come forward in support of the innocent spouse, taking full responsibility for the understatement of taxes, she said.

But when there's a "War of the Roses" matrimonial situation, the non-requesting spouse might intervene with a vengeance by asserting that his or her former spouse had knowledge and does not deserve

relief.

"Then you have to prove who knew what," Geiger said. Many factors come into play, including the educational background and financial sophistication of both spouses, whether they signed powers of attorney if the liabilities were examined by the IRS, and whether one party was abused or on certain medications and might not have the capacity to meet the requisite knowledge standard.

Over the years, Geiger has been involved in many innocent-spouse relief cases that have gone to tax court. In one case, a wife filed for relief after her ex-husband underreported taxes. The wife was granted innocent-spouse relief after Geiger proved she had no knowledge of what her husband had done.

"It was not easy to prove," she said, noting she had to bring in medical records to show the woman had had an ectopic pregnancy and adopted a child with special needs during the timeframe in which the transaction giving rise to the underpayment was executed and the joint tax return would have been reviewed and signed.

Those not eligible for the innocent-spouse relief or relief by separation of liability because the tax was underpaid may qualify for equitable relief.

"It's the saddest prong [of the various types of relief available]," Geiger said, noting in this situation, a spouse may need to prove there was duress or abuse.

In many situations, matrimonial attorneys and accountants will work together on cases involving innocent-spouse relief.

"Every time a matrimonial attorney gets a new client, one of those parties, either the husband or wife, needs a new accountant, immediately," Geiger said, noting accountants are not bound by attorney/client privilege.

"If you are having marital problems, the smartest thing you can do is to work with your accountant and your attorney to figure out your past and current tax situation and do some divorce tax planning," Geiger said.

And, even in the strongest marriages, both individuals should understand their financial position, Eisman said.

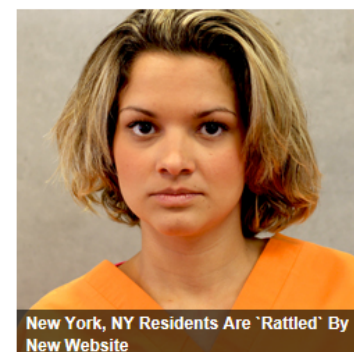
"Even if one party is tasked with paying the bills," he said, "both should plan their financial future together."



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