OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18011278
HARRY TAUB	Date Issued: February 7, 2019

OPINION

Representing the Parties:

For Appellant: Harry Taub

For Respondent: Bradley Coutinho, Tax Counsel
Marguerite Mosnier, Tax Counsel IV[1]

For Office of Tax Appeals: Linda Frenklak, Tax Counsel IV

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code sections 18533 and 19045,[2] Harry Taub (appellant) appeals from the action of the Franchise Tax Board (FTB or respondent) denying him innocent spouse relief for the 1992 and 1993 tax years.

Office of Tax Appeals Administrative Law Judges Jeffrey G. Angeja, Michael F. Geary, and Linda C. Cheng held an oral hearing in this matter in Sacramento, California, on November 27, 2018. When the hearing concluded, OTA closed the record and took the matter under submission.

ISSUES

1. Whether appellant has established that he is entitled to innocent spouse relief pursuant to section 18533(f) for the 1992 or 1993 tax liability.

[1] Respondent's opening brief was filed by Amanda F. Vassigh, Tax Counsel III, its additional brief was filed by Marguerite Mosnier, Tax Counsel IV, and its supplemental brief was filed by Bradley Coutinho, Tax Counsel. Although Ms. Vassigh is currently one of the administrative law judges for the Office of Tax Appeals (OTA), she did not participate in the deliberation of this case with any of the panel judges.

[2] Unless otherwise indicated, all "section" or "§" references are to sections of the California Revenue and Taxation Code.

2. Whether appellant has established that he is entitled to court-ordered relief pursuant to section 19006(b), for the 1992 or 1993 tax liability.

3. Whether appellant has established that he is entitled to relief pursuant to section 19006(c), for the 1992 or 1993 tax liability.

4. Whether the Office of Tax Appeals (OTA) has jurisdiction to address the statute of limitations for collection (§ 19255), and if so, whether the statute for collection regarding the 1992 tax year has expired.[3]

FACTUAL FINDINGS

1. Appellant was an attorney licensed to practice law in California during 1992 and 1993. His California law license was suspended in August 1994. Appellant admits that he earned income in 1992 and 1993, and used it to pay his living expenses and attorneys' fees, among other expenses.

2. Appellant was first married to Ms. Hilarie Taub (Hilarie) in 1975, and that marriage was dissolved in 1988. Appellant then remarried, in 1989, to Ms. Kerry Taub (hereafter Ms. Taub), and that marriage was dissolved in 1999.

3. Ms. Taub operated a corporate business, "Baby Thoughts." The ownership of Baby Thoughts is not clear, and is a disputed issue in this appeal.

4. Appellant and Ms. Taub (collectively referred to as "the couple") filed a 1992 joint California return on December 13, 1993. On their 1992 return, the couple reported California adjusted gross income (AGI) of $277,562, total deductions of $4,686, total exemption credits of $310, taxable income of $272,876, and a tax liability of $22,910.[4] The couple reported estimated tax payments of $37,987, resulting in a refund claim of $15,077. Respondent accepted the couple's 1992 return as filed, except that it disallowed the reported estimated tax payments because its records showed that the couple made no estimated tax payments for 1992. Respondent thus calculated a 1992 balance due of $22,910, which was posted to their 1992 account on November 21, 1994. Because the

[3] Respondent concedes that the statute of limitations for collection has expired with respect to the 1993 tax year.

[4] Respondent no longer has a copy of the 1992 joint return. In accordance with section 19530 and its document retention policy, the couple's 1992 joint tax return was destroyed. Respondent obtained information regarding the 1992 account from its electronically stored data.

couple filed their 1992 return after the filing deadline of April 15, 1993, respondent imposed a late-filing penalty of $5,727.50, which was posted to their 1992 account on November 21, 1994. Respondent sent the couple a Statement of Tax Due and imposed a collection fee of $13, which was posted to their 1992 account on September 24, 1999. On November 21, 2006, respondent imposed an amnesty penalty of $20,721.80 pursuant to section 19777.5, because the couple had an outstanding balance due for the 1992 tax year as of March 31, 2005.

5. The couple filed a 1993 joint California return on August 18, 1995. On their 1993 return, the couple reported California AGI of $176,101, total deductions of $4,804, total exemption credits of $320, taxable income of $171,297, and a total tax liability of $12,612.[5] The couple did not remit any payment when they filed their 1993 return. Respondent accepted the couple's 1993 self-assessed tax liability of $12,612, which was posted to their 1992 account on September 22, 1995. Because the couple failed to pay their tax liability by the filing deadline of April 15, 1994, respondent imposed an estimated tax penalty of $476 and a late payment penalty of $3,153. Respondent sent the couple a Statement of Tax Due and imposed collection fees of $11, $11, and $13 on September 12, 1997, October 19, 2000, and October 8, 2009, respectively. On November 18, 2006, respondent imposed an amnesty penalty of $10,343.51 pursuant to section 19777.5, because the couple had an outstanding balance due for the 1993 tax year as of March 31, 2005.

6. Respondent pursued involuntary collection actions to collect the tax liabilities for the 1992 and 1993 tax years by issuing billing notices, tax lien notices, and orders to withhold taxes to financial institutions and employers, and recording tax liens. In addition, respondent applied credits to the 1992 balance due from the 2002, 2007, 2008, and 2015 tax years on February 22, 2003, December 2, 2008, November 17, 2009, and March 24, 2016, in the amounts of $4.18, $140.91, $124.63, and $5.00, respectively.

7. On or about October 21, 2014, appellant filed a request for innocent spouse relief (FTB Form 705) for 1992 and 1993, on which he indicated that he and Ms. Taub divorced in 1999. Attached to the FTB Form 705 was a letter dated September 30, 2014, from

[5] Respondent no longer has a copy of the 1993 joint return. In accordance with section 19530 and its document retention policy, the couple's 1993 joint tax return was destroyed. Respondent obtained information regarding the 1993 account from its electronically-stored data.

appellant concerning his request for relief and copies of correspondence from respondent, summarizing his 1992 and 1993 tax accounts.

8. Respondent acknowledged receiving appellant's request for relief of liability in a letter dated October 21, 2014. In a Non-Requesting Taxpayer Notice dated August 28, 2015, respondent informed Ms. Taub of appellant's request for innocent spouse relief for 1992 and 1993 and requested relevant information and supporting documents. Ms. Taub did not respond to this notice.

9. In separate Notices of Action-Denial dated November 6, 2015, respondent informed appellant and Ms. Taub that it denied appellant's request for innocent spouse relief under section 18533, subdivision (f). This timely appeal followed.

10. Appellant was incarcerated from approximately 1999 through 2002, based on his conviction of two counts of grand theft of funds from his clients.

11. A March 8, 1995 order issued by the Los Angeles County Superior Court in an action to dissolve appellant's first marriage expressly enjoined appellant (a party to the proceeding), and both Ms. Taub and Baby Thoughts (nonparties to the proceeding), from disposing of any funds held by Baby Thoughts, except to the extent that the order authorized Ms. Taub and Baby Thoughts to pay various expenses specified in the order.

12. A "Register of Actions" from appellant's first divorce proceedings lists the names and dates of voluminous records and pleadings filed in connection with his first divorce and a "Register of Actions" from his second divorce proceedings lists court appearances and hearing dates in the second divorce proceedings.

DISCUSSION

Issue 1: Whether appellant has established that he is entitled to innocent spouse relief pursuant to section 18533(f) for the 1992 or 1993 tax liability.

General Legal Background Regarding Innocent Spouse Relief

When a joint return is filed by a husband and wife, each spouse is jointly and severally liable for the entire tax due for that tax year. (§ 19006(b); Int.Rev. Code, § 6013(d)(3).) However, a requesting spouse may seek relief from joint and several liability under innocent spouse relief statutes. (§ 18533; Int.Rev. Code, § 6015.) Here, the parties have agreed that the applicable authority is section 18533(f), which provides for equitable relief. (*Cf.* Int.Rev. Code,

§ 6015(f).) Determinations under section 18533 are made without regard to community property laws. (§ 18533(a)(2).)

Section 18533(f), gives respondent the discretion to provide equitable innocent spouse relief from any unpaid tax or any deficiency when a taxpayer does not qualify for innocent spouse relief under either subdivisions (b) or (c) of section 18533. The OTA has the jurisdiction to review respondent's denial of an individual's request for equitable relief under section 18533(f). (§ 18533(e)(1)(A)(ii-iii).) Determinations to deny equitable relief are reviewed *de novo*. (See *Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980, 995, affg. T.C. Memo. 2010-134.) The requesting spouse bears the burden of proof. (*Porter v. Commissioner* (2009) 132 T.C. 203, 210.)

IRS Guidance Regarding Claims for Equitable Relief

Section 18533(g)(2), provides that it is the Legislature's intent that, in construing section 18533, "any regulations that may be promulgated by the Secretary of the Treasury under [IRC] section 6015 . . . shall apply to the extent that those regulations do not conflict with this section or with any regulations that may be promulgated by the [FTB]." Internal Revenue Service (IRS) regulations reference Revenue Procedure 2000-15 (which was a predecessor of Revenue Procedure 2013-34) or "other guidance" published by the Treasury and the IRS in determining eligibility for equitable relief. (Treas. Reg. § 1.6015-4.) Revenue Procedure 2013-34 provides the current guidance of the IRS with respect to determining whether equitable relief is warranted.

Threshold Conditions

Section 4.01 of Revenue Procedure 2013-34 (hereinafter referred to as section 4.01) provides that a requesting spouse must satisfy *all* of the following threshold conditions to be eligible to submit a request for equitable relief:

- the requesting spouse filed a joint return for the tax year for which relief isrequested;
- traditional innocent spouse relief or separate liability allocation relief is not availableto the requesting spouse;

- the request for relief is timely filed;[6]
- no assets were transferred between the spouses as part of a fraudulent scheme by the spouses;
- no disqualified assets were transferred to the requesting spouse by the nonrequesting spouse;
- the requesting spouse did not knowingly participate in the filing of a fraudulent joint return; and
- the income tax liability is attributable (either in full or in part) to an item of the nonrequesting spouse or an underpayment resulting from the nonrequesting spouse's income unless specific exceptions apply.[7] If the liability is partially attributable to the requesting spouse, then relief is considered only for the portion of the liability attributable to the nonrequesting spouse.

Generally, the taxpayer seeking innocent spouse relief has the burden of proving each requirement for relief, and the failure to satisfy any one of the requirements precludes relief. (*Stevens v. Commissioner* (11th Cir. 1989) 872 F.2d 1499, 1504.) If a requesting spouse does not satisfy the threshold conditions, then equitable relief is not warranted. If a requesting spouse satisfies the threshold conditions, sections 4.02 and 4.03 of Revenue Procedure 2013-34 apply additional criteria by which to ascertain whether relief is warranted.

On appeal, appellant explains that from approximately 1989 through 1999, appellant was married to Ms. Taub. Appellant states that Ms. Taub owned and controlled Baby Thoughts, and that the business was Ms. Taub's separate property pursuant to a prenuptial agreement between appellant and Ms. Taub. (Appellant has not provided the alleged prenuptial agreement.) Appellant further explains that his divorce from his first wife was particularly acrimonious, and that his first wife sought to join Ms. Taub as well as Baby Thoughts into the divorce proceeding.

[6] Revenue Procedure Section 4.01(3)(a) provides that, if a requesting spouse is applying for relief from a liability or a portion of a liability that remains unpaid, the request for relief must be made on or before the Collection Statute Expiration Date (CSED). The CSED is the date the period of limitation on collection of the income tax liability expires, as provided in Internal Revenue Code (IRC), section 6502. This period generally expires 10 years after the assessment of tax, but it may be extended by other provisions of the IRC. Under Revenue and Taxation Code, section 19255, the FTB has a 20-year collection statute of limitations.

[7] For example, the misappropriation of funds exception provides that equitable relief may be granted, even though the underpayment may be attributable in part or in full to an item of the requesting spouse, if he or she did not know, and had no reason to know, that the nonrequesting spouse misappropriated funds intended for the payment of tax for the nonrequesting spouse's benefit. (Rev. Proc. 2013-34, § 4.01(7)(c).)

Appellant argues that during the divorce proceedings, the court determined that Baby Thoughts was the exclusive, separate property of Ms. Taub. Appellant then asserts that the liability for the 1992 and 1993 tax years is attributable to the income earned by Baby Thoughts, over which appellant had no management, control, or authority. Appellant argues that as a result, the liabilities at issue are exclusively attributable to Ms. Taub.

In support of his assertion, appellant provided an ex-parte order dated March 8, 1995, from the Los Angeles County Superior Court, authorizing Ms. Taub to pay various expenses from Baby Thoughts' funds. Appellant asserts that the ex-parte order establishes that Baby Thoughts was the separate property of Ms. Taub. In addition, appellant submitted a "Register of Actions" that lists the names and dates of voluminous records and pleadings filed in connection with appellant's divorce from his first wife.[8] Appellant asserts that the Register also proves that Baby Thoughts was the separate property of Ms. Taub. Finally, appellant asserts that Ms. Taub had the opportunity to join this appeal as a non-appealing spouse, and that it was in her interest to do so if she wished to reduce her responsibility for the liabilities at issue, yet she elected not to do so. According to appellant, Ms. Taub's failure to join this appeal constitutes her adoptive admission of the truth of appellant's assertions that Ms. Taub is exclusively responsible for the liabilities at issue herein.

Our review of the evidence does not support appellant's contentions. Specifically, the ex-parte order does not address whether Baby Thoughts was the separate property of Ms. Taub, and in any event that order was not a final order. Moreover, while the order prevented Ms. Taub from spending funds held by Baby Thoughts, it also enjoined *appellant* from doing so. In other words, the order suggests the possibility that appellant had some degree of ownership or control over Baby Thoughts, and certainly does not establish that Ms. Taub had exclusive ownership and control over it. Also, neither "Register of Actions" establishes that Baby Thoughts was the separate property of Ms. Taub, and appellant has provided no judgment, prenuptial agreement, or other documentation establishing that Baby Thoughts was the separate property of Ms. Taub.

Next, we reject appellant's assertion that Ms. Taub's failure to join this appeal qualifies as her adoptive admission of appellant's contention that he is an innocent spouse. The adoptive admission exception to the hearsay rule is codified in Evidence Code section 1221, which states,

[8] At the hearing in this appeal, appellant asserted that the court had destroyed these decades-old records, but appellant's initial brief in this matter indicates that all of the pleadings from that divorce proceeding are available on microfiche at the Archives Division of the Los Angeles County Superior Court.

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." The exception is often used in criminal cases when there is evidence sufficient to sustain a finding that: (1) the defendant heard and understood the statement under circumstances that normally would call for a response, and (2) by words or conduct, the defendant adopted the statement as true. (*People v. Sample* (2011) 200 Cal.App.4th 1253.) While it can also apply in other proceedings, it is not applicable here. Appellant does not make the argument to persuade us to admit hearsay evidence. He makes it to persuade us that we should assume Ms. Taub agrees with the factual underpinnings of appellant's position that he is entitled to innocent spouse relief. We are not certain that Ms. Taub received the notice, and even if she did receive it, the circumstances do not warrant the conclusion that she agrees, in whole or in part, with the factual underpinnings of appellant's claim for innocent spouse relief.

In sum, appellant has provided no persuasive evidence to establish that the liability at issue is attributable exclusively to Ms. Taub.[9] There is insufficient evidence to establish that Baby Thoughts was Ms. Taub's separate property, and even if there was, appellant admits that he earned income in 1992 and 1993. Appellant has not identified the amount of income he earned during that time, and has made no attempt to allocate the tax liability between the various sources of income. As a result, appellant fails to satisfy the threshold condition of section 4.01 that the income tax liabilities for the 1992 and 1993 tax years are attributable, either in full or in part, to Ms. Taub.

Because appellant does not satisfy the income attribution threshold factor for equitable relief, there is no need to discuss the remaining threshold factors set forth in section 4.01. Also, there is no need to discuss whether appellant is entitled to equitable relief under sections 4.02 or section 4.03 of Revenue Procedure 2013-34, because those provisions are only relevant if each of the threshold conditions are satisfied. Appellant is not entitled to equitable innocent spouse relief under section 18533(f) for the 1992 or 1993 tax years.

[9] Appellant's unsupported assertions are not persuasive, particularly in light of his past felony convictions for stealing from his clients. (Evid. Code, § 788).

Issue 2: Whether appellant has shown that he is entitled to court-ordered relief pursuant to section 19006(b) for the 1992 or 1993 tax liability.

Section 19006 provides an independent exception to the general rule that spouses are jointly and severally liable for tax on the aggregate income stated on a joint return. Section 19006 (b) provides that a joint and several liability may be revised by court order in a marriage dissolution proceeding; however, that section also provides that the following conditions must be met:

- The court order may not relieve a spouse of a tax liability on income earned by or subject to the exclusive management and control of that spouse;
- The court order must separately state the income tax liability for each tax year for which the revision of a tax liability is granted;
- The court order shall not revise a tax liability that has been fully paid prior to the effective date of the order;
- The court order shall not be effective unless the FTB is served with or acknowledges the receipt of the order; and
- Where the gross income reportable on the return is greater than $150,000 or the amount of the tax liability the spouse is relieved of exceeds $7,500, a court-ordered revision is effective only if the parties obtain a Tax Revision Clearance Certificate (TRCC) from the FTB and file it with the court.

First, it is not clear that we have jurisdiction to review any denial of relief under section 19006(b), because that subdivision contains no express appeal mechanism. (*Cf.* § 19006(c)(4).) Second, even if we had such jurisdiction, appellant is not entitled to court-ordered relief pursuant to section 19006(b) for the 1992 or 1993 tax liability, because he has not complied with the statutory requirements. He has not shown that a court that had jurisdiction over the couple's divorce proceeding ordered a revision of the 1992 or 1993 tax liability on income that was not earned by or subject to appellant's exclusive management and control. Appellant has not produced a court order from the couple's divorce proceeding that specifically states the income tax liability for each tax year for which a revision of liability was granted. He has not proven that the FTB was served with or acknowledged receipt of such a court order. Appellant has not substantiated that he obtained a TRCC from the FTB that was filed with the court, which is required because the amounts of the 1992 and 1993 tax liabilities were more than $7,500.

Issue 3: Whether appellant has shown that he is entitled to relief from nonpayment of a joint tax liability pursuant to section 19006(c) for the 1992 or 1993 tax liability.

Section 19006(c) provides that the FTB may revise an unpaid tax liability as to one spouse for the payment of taxes that were reported due on a joint tax return. However, the liability shall not be revised to relieve a spouse of the tax liability on income earned by or subject to the exclusive management and control of that spouse. (§ 19006(c)(1)(A).) In addition, the liability shall not be revised to relieve a spouse of the liability below the amount actually paid on the liability prior to granting relief. (§ 19006(c)(1)(B).) The liability may be revised only if the spouse whose liability is to be revised establishes that he or she did not know, and had no reason to know, of the nonpayment at the time the return was filed. (§ 19006(c)(2).) "Reason to know" means whether or not a reasonably prudent person would have reason to know of the nonpayment. (*Id*.)

Appellant is not entitled to relief pursuant to section 19006(c) for the 1992 or 1993 tax liability, because he has not complied with the statutory requirements. As discussed above, appellant has not proven that the 1992 or 1993 tax liability was not earned by him or subject to his exclusive management and control. In addition, appellant has not established that he did not know and that he had no reason to know that Ms. Taub would not or could not pay the 1992 or 1993 tax liability when the returns were filed.

Issue 4: Whether the OTA has jurisdiction to determine whether the collection statute of limitations remains open for the 1992 tax liability pursuant to section 19255.

The OTA's jurisdiction to hear appeals arising from the actions of respondent in administering the Personal Income Tax Law is created solely by the Personal Income Tax Law. (*Appeal of Sam I. and Marjorie H. Lewis*, 85-SBE-151, Dec. 3, 1985. See also *Appeal of Nicholas Schillace*, 95-SBE-005, Aug. 2, 1995.) [10] The OTA does not have the jurisdiction to address procedural issues, such as the propriety of respondent's collection actions. (See *Appeals of Robert E. Wesley, et. al.*, 2005-SBE-002, Nov. 15, 2005.)

The plain language of section 18533(e) limits our jurisdiction to review the FTB's denial of the specific relief contemplated under section 18533, subdivision (b), (c), or (f). In an appeal

[10] Board of Equalization (BOE) opinions are generally available for viewing on the BOE's website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

arising from the IRS's denial of a taxpayer's request for innocent spouse relief under IRC section 6015, the Tax Court held that it lacked jurisdiction over the issue of whether the underlying assessment was barred by the statute of limitations. In *Block v. Commissioner* (2003) 120 T.C. 62, the taxpayer appealed from the IRS's denial of her request for innocent spouse relief under IRC section 6015(b) and 6015(f) regarding taxes previously assessed for tax years 1983 and 1984. The taxpayer filed a motion for leave to amend her petition to claim that the statute of limitations barred the assessment of the underlying income tax liabilities. The Tax Court denied the taxpayer's motion to amend her petition because it lacked jurisdiction to determine the issue of whether the IRS was barred from assessing the underlying taxes due to the expiration of the statute of limitation. The Tax Court stated, "[t]he plain language of [IRC] section 6015(e)(1) limits our jurisdiction to review the Commissioner's denial of the specific relief contemplated under section 6015." (*Id*. at p. 65.) The Tax Court held that IRC section 6015 assumes that the requesting individual "is to be relieved from an existing joint tax liability, not whether the underlying joint tax liability exists." (*Id*. at p. 68.) With respect to a request for equitable relief, the Tax Court stated:

> Thus, [IRC] section 6015(f) does not provide a platform upon which a taxpayer can prevail by merely using the strictly legal argument that the assessment of the underlying liability is barred. When a taxpayer disputes the Commissioner's determination regarding relief sought pursuant to [IRC] section 6015(f), the issue we have jurisdiction to address in a "stand alone" petition under [IRC] 6015(e) is whether the Commissioner erroneously denied equitable relief from an existing joint and several tax liability. (*Id*. at pp. 66-67.)

Similarly, we lack jurisdiction in this appeal to determine whether respondent is barred from collecting the 1992 tax liability due to the expiration of the collection statute of limitations. This appeal arose from respondent's denial of appellant's request for relief from the couple's 1992 joint self-assessed tax lability pursuant to section 18533(f). Our only power "is to determine the correct amount of an appellant's California personal income tax liability for the appeal years." (*Appeals of Fred R. Dauberger, et al*., 82-SBE-082, Mar. 31, 1982.) Accordingly, we need not address appellant's arguments as to whether respondent properly determined that the 20-year collection statute of limitations has expired.

HOLDINGS

1. Appellant has not established that he is entitled to innocent spouse relief pursuant to section 18533(f) for the 1992 or 1993 tax liability.
2. Appellant has not established that he is entitled to court-ordered relief pursuant to section 19006(b) for the 1992 or 1993 tax liability.
3. Appellant has not established that he is entitled to relief pursuant to section 19006(c) for the 1992 or 1993 tax liability.
4. The OTA lacks jurisdiction to determine whether the collection statute of limitations (section 19255) remains open for the 1992 tax liability.

DISPOSITION

Respondent's action is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

DocuSigned by:
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Linda C. Cheng
Administrative Law Judge