

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011101
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D. O'REAR AND)
J. O'REAR)
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OPINION

Representing the Parties:

For Appellant-Husband	D. O'Rear
For Appellant-Wife:	Lane J. Lopez, Attorney
For Respondent:	Brandon Knoll, Tax Counsel III ¹ Bradley Coutinho, Tax Counsel
For the Office of Tax Appeals:	Andrew Jacobson, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, D. O'Rear (D. O'Rear) and J. O'Rear (J. Ford) appeal an action by Franchise Tax Board (FTB) proposing additional tax of \$68,117, plus applicable interest, for 2007 and additional tax of \$185,066, plus applicable interest for 2008. Pursuant to R&TC section 18533, J. Ford also appeals an action by FTB denying her innocent spouse relief for the full amounts of the 2007 and 2008 proposed assessments.²

Office of Tax Appeals Administrative Law Judges: Teresa A. Stanley, Richard I. Tay, and Elliott Scott Ewing, held an oral hearing for this matter in Cerritos, California, on

¹ Amanda Vassigh, one of the administrative law judges for the Office of Tax Appeals (OTA), previously represented FTB in this case while she was employed with that agency. Ms. Vassigh has been excluded from having any involvement in any aspect of OTA's consideration of this matter.

² During this appeal, J. Ford (formerly O'Rear) requested innocent spouse relief for the couple's 2007 and 2008 proposed assessments. FTB determined that J. Ford was entitled to partial innocent spouse relief for both tax years pursuant to R&TC section 18533(f). J. Ford appeals FTB's determination that she is not entitled to relief in full for both tax years.

January 22, 2020. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Have appellants shown that FTB's proposed assessments for the 2007 and the 2008 taxable years are erroneous?
2. Is J. Ford entitled to innocent spouse relief for the full amounts of the 2007 and the 2008 proposed assessments?

FACTUAL FINDINGS

2007 and 2008 Proposed Assessments

1. For the 2007 taxable year, appellants filed a joint California Resident Income Tax Return (Form 540). As relevant to this appeal, appellants reported, on a federal Schedule D, a sales price of long-term capital gains of \$10,973,734 and net long-term capital gain of \$2,828,661. Appellants' Schedule D did not include the details of the sales transactions and only reported "LTCGL" on a single line.
2. For the 2008 taxable year, appellants also filed a joint return. As relevant to this appeal, appellants reported, on a federal Schedule D, a net long-term capital gain of \$311,879 and a net short-term capital loss of \$29,300 for a total net capital gain of \$282,579.
3. FTB audited appellants' 2007 and 2008 returns and sent appellants letters dated August 20, 2010, and April 7, 2011, requesting: (1) a schedule of all 2007 long-term capital gains transactions that included descriptions, the dates the assets were acquired, the dates the assets were sold, the sales prices, the cost bases, and the gains or losses; (2) documentation related to the sales price and cost basis of the following capital assets sold in 2008: CA ST, Biosolar, Cereplast, and Cereplast Inc.,³ and (3) documentation supporting the claim for a charitable deduction claimed in 2008.

³ For 2008, FTB's letter requested documentation supporting the sales price and cost basis of long-term capital dispositions. However, assets listed in FTB's letter included CA ST, which was a short-term capital disposition.

4. Based on information provided by D. O'Rear, FTB issued a Notice of Proposed Assessment (NPA) for taxable year 2007, proposing to increase appellants' long-term capital gains by \$661,330.⁴
5. FTB issued an NPA for 2008, which proposed to increase appellants' reported California taxable income by \$4,971,492, consisting of unreported capital gains of \$4,798,820 and disallowed itemized deductions of \$172,672.⁵
6. D. O'Rear protested the 2007 and 2008 NPAs and provided documentation supporting a cost basis of \$3,031,508 for the short-term capital asset, CA ST, for the 2008 taxable year. As a result, FTB allowed appellants a short-term capital loss of \$101,893 on their sale of CA ST.
7. On February 3, 2015, FTB issued a Notice of Action (NOA) affirming the 2007 NPA. The instant appeal for 2007 followed.
8. On February 3, 2015, FTB also issued an NOA for 2008, which revised the 2008 NPA. The 2008 NOA increased income by \$1,873,350, consisting of revised capital gains of \$1,767,312 and revised disallowed itemized deductions of \$106,038.⁶ The instant appeal for 2008 followed.

Innocent Spouse Relief Request

9. After this appeal was filed, J. Ford requested innocent spouse relief for 2007 and 2008 in a letter dated July 14, 2015, which she subsequently supplemented in a signed Form 705 and the Innocent Spouse Questionnaire.

⁴ Appellants reported \$10,973,734 of long-term capital asset sales. Appellants submitted documentation from Wells Fargo Bank reporting a sales price for various long-term securities of \$7,501,895 with an associated basis of \$7,483,543, resulting in net capital gain of \$18,352. Because the documentation did not support the basis of the remaining \$661,330 reported on appellants' 2007 return, FTB disallowed the claimed basis and proposed to increase appellants' 2007 income by that amount.

⁵ Appellants provided documentation at protest concerning claimed charitable contributions that formed a portion of these disallowed itemized deductions. FTB ultimately allowed all the claimed charitable contributions and they are not at issue in this appeal.

⁶ The remaining itemized deductions denied by the NOA appear to be due to the limitation on itemized deductions for high-income taxpayers. For California taxpayers filing jointly whose federal adjusted gross income (AGI) exceeds \$200,000, miscellaneous itemized deductions must be reduced by the lesser of: (1) 6 percent of the excess of AGI over the applicable amount (for married couples filing jointly, \$200,000); or (2) 80 percent of the amount of the itemized deductions otherwise allowable for such tax year. (See R&TC, § 17077(a); Int.Rev. Code, § 68(a).)

10. FTB notified D. O'Rear and J. Ford that it had determined that J. Ford is not entitled to innocent spouse relief pursuant to R&TC section 18533(b) or (c), but is entitled to partial equitable innocent spouse relief from 50 percent of the 2007 and 2008 proposed assessments, which FTB attributed to D. O'Rear pursuant to R&TC section 18533(f).
11. J. Ford appealed, arguing that FTB erroneously denied her innocent spouse relief from the entire amounts of the 2007 and 2008 proposed assessments pursuant to R&TC section 18533(b) or, alternatively, section 18533(f). D. O'Rear did not respond to J. Ford's appeal related to the claimed innocent spouse relief.
12. Based on J. Ford's credible testimony at the oral hearing, FTB conceded that she is entitled to equitable innocent spouse relief for the entire tax owed for 2007 and 2008.

DISCUSSION

Issue 1: Have appellants shown that FTB's proposed assessments for the 2007 and the 2008 taxable years are erroneous?

Internal Revenue Code (IRC) section 61(a)(3) defines gross income to include income from gains derived from dealings in property.⁷ IRC section 1001 provides that the gain on the sale of property shall be the excess of the amount realized over the adjusted basis of the property.⁸ IRC section 1011 provides that the adjusted basis for determining the gain from the sale of property shall be the property's initial basis (determined under IRC section 1012 or other applicable statutes in that subchapter) adjusted as provided for in IRC section 1016. IRC section 1012 provides that the basis of property generally shall be the cost of such property.

The question of a taxpayer's basis is an issue of fact. (*Vaira v. Comm'r* (3d Cir. 1971) 444 F.2d 770, 774; *Appeal of Giese* (86-SBE-016) 1986 WL 22687.) "It is well established that a presumption of correctness attends [FTB's] determinations as to issues of fact and that appellant has the burden of proving such determinations erroneous." (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.) This is a rebuttable presumption that may only be overcome by sufficient evidence proving the contrary. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in FTB's determinations, they must be upheld. (*Ibid.*) Unsupported assertions are not sufficient to satisfy the taxpayer's burden of proof. (*Appeal of*

⁷ California conforms to IRC section 61 at R&TC section 17071.

⁸ California conforms to IRC sections 1001 and 1011-1016 at

Magidow (82-SBE-274) 1982 WL 11930.) A taxpayer's failure to introduce evidence that is within his or her control gives rise to the presumption that the evidence, if provided, would be unfavorable to his or her position. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.) “The fact that basis may be difficult to establish does not relieve a taxpayer from his [or her] burden.” (*Coloman v. Comm’r* (9th Cir. 1976) 540 F.2d 427, 430, citing *O’Neill v. Comm’r* (9th Cir. 1959) 271 F.2d 44, 50; *Appeal of Giese*, *supra*.)

Here, appellants have failed to meet their burden of proving that FTB erroneously adjusted the reported capital gains that give rise to the 2007 and 2008 proposed assessments. After FTB’s initial request for substantiation of 2007 and 2008 capital gains dispositions, appellants provided documentation for 2007 showing cost basis and sales prices for some, but not all, of the transactions. Appellants provided no support for the cost basis claimed with respect to any of the 2008 dispositions. FTB informed appellants that it accepted the information provided, but that for 2007, there was still no evidence supporting a cost basis for the remaining \$3,471,839 in gross receipts reported on appellants’ return. FTB requested that appellants provide “copies of canceled checks, bank statements, wire transfers, brokerage statements, and/or alternative source documentation” in order to prove their cost basis in the remaining assets sold in 2007, and for all 2008 dispositions. On appeal appellants produced several credit advice confirmations spanning from 2006 through 2010. The confirmations, all from an entity identified as Westpac, listed amounts of money received by Westpac from various accounts in appellants’ names. While the amounts shown on the credit advice confirmations appear to represent deposits into a brokerage account that could have been used to purchase stock or other capital assets, the deposits do not establish that appellants actually received capital assets in exchange for the amounts deposited. The appeal record does not provide documentation that would allow us to match a particular deposit to a particular capital asset purchase and sale. The beneficiaries shown on the credit advice confirmations do not match the names of the assets sold and listed on appellants’ returns. Moreover, several credit advice confirmations contain handwritten notations, stating that they were used for capital contributions or loans or consulting fees, but they do not clarify whether these deposited amounts resulted in the issuance of the shares or other capital assets that appellants sold during 2007 and 2008.

Despite having had ample opportunity to do so, appellants have failed to provide any additional evidence substantiating the remainder (after FTB’s adjustments) of reported capital

gains bases in 2007 and 2008. D. O'Rear indicated that he would travel to Australia to obtain further documentation; however, except for the credit advice confirmations, no other documents were submitted to FTB, with this appeal, or at the oral hearing.

Appellants have the burden of showing that FTB's 2007 and 2008 proposed assessments are in error. (*Appeal Seltzer, supra.*) We conclude that appellants have failed to meet their burden of proving that the 2007 and 2008 proposed assessments are erroneous.

Issue 2: Is J. Ford entitled to innocent spouse relief for the full amounts of the 2007 and 2008 proposed assessments?


Based on the credible testimony of J. Ford at the oral hearing, FTB conceded that she is entitled to full relief of assessed taxes for 2007 and for 2008.

HOLDINGS

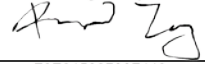
1. Appellants failed to demonstrate error in FTB's proposed assessments for the 2007 and 2008 taxable years.
2. J. Ford is entitled to full equitable innocent spouse relief from the couple's 2007 and 2008 proposed assessments, as conceded by FTB.

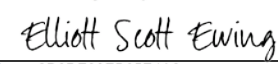
DISPOSITION

FTB's proposed assessments for 2007 and 2008 are sustained. FTB's partial grant of innocent spouse relief is modified to grant full relief to J. Ford for 2007 and 2008.

DocuSigned by:

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Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:

F8E81582726E448
Richard I. Tay
Administrative Law Judge

DocuSigned by:

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Elliott Scott Ewing
Administrative Law Judge

Date Issued: 4/15/2020