

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**A. MAJORS**<sup>1</sup>

) OTA Case No. 18011321  
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**OPINION**

Representing the Parties:

For Appellant: Tax Appeals Assistance Program (TAAP)<sup>2</sup>

For Respondent: Meghan McEvelly, Tax Counsel III

For Office of Tax Appeals: Matthew D. Miller, Tax Counsel III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19045, A. Majors (appellant) appeals an action by respondent Franchise Tax Board (FTB) in denying innocent spouse relief for the 2000 tax year.

Appellant waived his right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUE**

Whether appellant has established that he is entitled to innocent spouse relief for the 2000 tax year.

**FACTUAL FINDINGS**

1. Appellant and his former spouse, Ms. Rose, (collectively, the couple) timely filed a joint 2000 California Resident Income Tax Return (Form 540), reporting tax due. The couple did not remit payment with the return. FTB processed the return, and imposed a late

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<sup>1</sup> J. Rose, the nonappealing spouse in this matter, is deceased. Her estate did not file an opening brief and is deemed not to have joined the appeal.

<sup>2</sup> Appellant filed his opening brief, and Victoria Majors, as appellant’s representative, filed supplemental information to appellant’s opening brief. Subsequent representation was provided by TAAP.

- payment penalty, a collection cost recovery fee, and a county lien fee, plus applicable interest. FTB commenced involuntary collection activities individually against appellant and his former spouse.
2. The Internal Revenue Service (IRS) provided information to FTB indicating that the IRS increased the couple's 2000 federal income by \$12,617, to account for an unreported pension/annuity distribution from Fidelity Investments.
  3. To the extent applicable under California law, FTB made adjustments to the couple's 2000 California tax return following the federal changes. On June 3, 2003, FTB issued the couple a Notice of Proposed Assessment (NPA) for the 2000 tax year. As applicable to this appeal, the NPA increased the couple's taxable income by \$12,617, and proposed additional tax of \$1,373.60, plus interest. As no timely protest was filed, the NPA became final and nonappealable.
  4. Subsequently, FTB imposed an amnesty penalty on November 21, 2006.<sup>3</sup> Between 2007 and 2013, FTB received a total of \$352.98 in payments made toward the couple's 2000 account.
  5. On May 23, 2016, appellant submitted to the IRS an Identify Theft Affidavit, regarding the 2000 tax year. In response, the IRS informed appellant of its determination that, with regard to the filed joint 2000 federal tax return, appellant was not a victim of identity theft.
  6. On January 17, 2017, appellant filed a Request for Innocent Spouse Joint Filer Relief (FTB Form 705) contending that Ms. Rose prepared and filed the couple's 2000 return while appellant was incarcerated. Appellant attached a copy of a San Mateo County Sheriff's Office Inmate History printout indicating that appellant was booked on March 7, 2001, and served a multi-year sentence. Appellant contended that he never reviewed or signed the return and that Ms. Rose signed both signatures on the return. Appellant also contended that he was not aware of any 2000 tax liability until March 2013, when he received a letter from the IRS requesting payment.

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<sup>3</sup> R&TC section 19777.5 imposes an amnesty penalty for unpaid amounts due on March 31, 2005 for tax years which are eligible for amnesty, but for which amnesty was not requested.

7. In response, FTB sent appellant a Request for Information acknowledging receipt of his request for innocent spouse relief, and requesting appellant provide FTB certain documentation, including documentation establishing the recipient of the unreported pension/annuity distribution. Appellant has not provided information regarding the recipient.
8. After reviewing the information appellant provided, FTB issued appellant a Notice of Action – Denial on June 28, 2017, notifying him that his request for innocent spouse relief was denied. This timely appeal followed.
9. Appellant did not file a separate return for the 2000 tax year.

### DISCUSSION

#### General Legal Background Regarding Innocent Spouse Relief

When a joint return is filed by a married couple, each spouse is jointly and severally liable for the entire tax due for that tax year. (Internal Revenue Code (IRC), § 6013(d)(3); R&TC, § 19006(b).) However, federal and California law provide that an individual who files a joint return may be relieved of all or a portion of such joint and several liabilities. (IRC, § 6015; R&TC, § 18533.) R&TC section 18533(b) provides for traditional innocent spouse relief; subdivision (c) provides for separate allocation relief; and, if a requesting spouse is not eligible for relief under either subdivision (b) or (c), a requesting spouse may be eligible for equitable relief under subdivision (f). (Cf. IRC, § 6015(b), (c), & (f).) Determinations under R&TC section 18533 are made without regard to community property laws. (R&TC, § 18533(a)(2).)

When a California statute is substantially identical to a federal statute (as is generally the case of the innocent spouse statutes, IRC section 6015 and R&TC section 18533), federal law interpreting the federal statute may be considered highly persuasive with regard to the California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.) Thus, federal authority is applied extensively in California innocent spouse cases. (See *Appeal of Tyler-Griffis* (2006-SBE-004) 2006 WL 3768792; see also R&TC, § 18533(g)(2).) Treasury Regulations are applied in California innocent spouse cases to the extent that such regulations do not conflict with R&TC section 18533 or FTB's regulations. (R&TC, § 18533(g)(2).)

Generally, an individual claiming relief has the burden of establishing each statutory requirement by a preponderance of the evidence. (*Stevens v. Commissioner* (11th Cir. 1989) 872 F.2d 1499, 1504.) Since the innocent spouse provisions are remedial in nature, they are construed and applied liberally in favor of the individual claiming their benefits. (*Friedman v. Commissioner* (2d Cir. 1995) 53 F.3d 523, 528-529.) FTB's determinations are generally presumed to be correct, and unsupported assertions are not sufficient to satisfy an appellant's burden of proof. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Traditional relief and separate allocation relief are only available for an understatement of tax, while equitable relief is available for both an underpayment or understatement of tax. (R&TC, § 18533(b)(1)(B), (c)(1) and (f).) Here, both an underpayment (unpaid self-assessed tax) and an understatement (deficiency) of tax exist for the 2000 tax year. The self-assessed tax liability reported on the couple's return represents the underpayment portion of the 2000 tax liability at issue in this appeal, and the June 3, 2003 NPA's tax assessment represents the understatement portion of the underlying liability at issue in this appeal.

#### Filing a Joint Return

R&TC section 18521 provides that, except as otherwise provided, an individual shall use the same filing status on his or her California return that he or she used on his or her federal return for the same tax year. IRC section 6013(a) provides that married taxpayers may elect to file a joint income tax return. Generally, a joint return must be signed by both spouses. (Treas. Reg. § 1.6013-1(a)(2).)

There is an exception to the general rule that, to constitute a valid joint return, both taxpayers must sign the return. This exception provides that, if both spouses intend to file a joint return, the failure of one spouse to sign the return will not preclude its treatment as a joint return. (*Estate of Campbell v. Commissioner* (1971) 56 T.C. 1, 12; see also *Harrington v. Commissioner* (2012) T.C. Memo. 2012-285.) The exception is generally applied when one spouse signed a joint return for both spouses and the nonsigning spouse tacitly consented to the joint return filing. (*Alioto v. Commissioner* (1994) T.C. Memo. 1994-51.) This exception is commonly referred to as the tacit consent rule. (See, e.g., *Hennen v. Commissioner* (1961) 35 T.C. 747, 748; *Reifler v. Commissioner* (2013) T.C. Memo. 2013-258; *Harris v. Commissioner* (1961) T.C. Memo. 1961-324.) The tacit consent rule has been described by the tax court as a presumption of correctness

attaching to the tax agency's determination that a joint return was in fact intended. (*Hennen v. Commissioner, supra.*) If the presumption is not rebutted, then FTB's determination is to be sustained, "whether called a presumption of tacit consent or the regular presumption of correctness." (*Id.* at p. 749.)

The spouses' intent regarding a joint return is a question of fact. (*Heim v. Commissioner* (8th Cir. 1958) 251 F.2d 44, 46.) In evaluating intent, the tax court has considered the following factors: 1) whether the nonsigning spouse filed a separate return; 2) whether the nonsigning spouse objected to the joint filing; and 3) whether prior filing history indicates an intent to file jointly. (*Estate of Campbell v. Commissioner, supra*, 56 T.C. at p. 12; see also *Harrington v. Commissioner, supra.*) A nonsigning spouse's objection to a joint return because the return lacks his or her signature does not make the joint return invalid. (*Parker v. Commissioner* (1978) T.C. Memo. 1978-23.) The nonsigning spouse's intent to file jointly may be inferred from his or her acquiescence, even if his or her purported signature is signed by another. (*Heim v. Commissioner* (1956) 27 T.C. 270, 273-274 *affd.*, 251 F.2d 44 (8th Cir. 1958); *Magee v. Commissioner* (2005) T.C. Memo. 2005-263; *Crew v. Commissioner* (1982) T.C. Memo. 1982-535.) A spouse's failure to file a separate return is considered an indication that the spouse tacitly consented to the filing of a joint return. (*Walker v. Commissioner* (1995) T.C. Memo. 1995-529.)

Appellant received sufficient income during the 2000 tax year to prompt a return-filing requirement.<sup>4</sup> Appellant states that before his incarceration he worked for Stanford University and a corporation, and concedes that both he and Ms. Rose "had good jobs and enough money to pay the tax." FTB's income summary records for appellant indicate that he received the following during the 2000 tax year: 1) wage income of \$35,793 from Stanford University Employee Trust for Post-Retirement and Post-Employ; 2) pension/annuity distribution of \$12,617 from Fidelity Investments; and 3) wage income of \$11,476 from Storagenetworks Connections, LLC.<sup>5</sup> Despite having a return-filing requirement, appellant did not file a separate return for the 2000 tax year, and appellant has not presented any evidence to indicate that he

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<sup>4</sup> For the 2000 tax year, an individual filing married filing separately (with both spouses under age 65) with no dependents realizing California gross income of \$22,605 or more, or California adjusted gross income of \$18,084 or more, was required to file a California income tax return.

<sup>5</sup> FTB's income summary records indicate the same income reported to Ms. Rose, with the addition of wage income of \$41,386 from the City of Palo Alto Utilities.

objected to the filing of the joint 2000 return. Additionally, according to the couple's filing history, appellant and Ms. Rose filed joint returns for the 1997, 1998, and 1999 tax years, which indicates a history of filing joint returns. Furthermore, appellant indicated that Ms. Rose handled the family finances and prepared the tax returns every year. Accordingly, we conclude that the couple's 2000 joint return is a valid return under the tacit consent rule.<sup>6</sup>

### Traditional Relief

R&TC section 18533(b) provides that an individual may, with certain qualifications, elect to claim traditional innocent spouse relief with respect to an understatement of tax. Such relief may be allowed if the requesting spouse can show he or she satisfies all of the following five requirements: (1) a joint return has been filed; (2) there is an understatement of tax on the joint return attributable to erroneous items of one individual filing the joint return (the nonrequesting spouse); (3) the other individual filing the joint return (the requesting spouse) establishes that he or she did not know of, and had no reason to know of, the understatement of tax when he or she signed the joint return; (4) taking into account all facts and circumstances, it is inequitable to hold the requesting spouse liable for the deficiency in tax attributable to that understatement; and (5) the requesting spouse files a timely request for relief no later than two years after the date FTB has begun collection action with respect to the requesting spouse. (R&TC, § 18533(b)(1)(A)-(E).) The requirements of R&TC section 18533(b) are stated in the conjunctive; a failure to meet any one of them disqualifies an individual from relief. (*Tompkins v. Commissioner* (2013) T.C. Memo. 2013-24; *Alt v. Commissioner* (2002) 119 T.C. 306, 313, affd. (6th Cir. 2004) 101 Fed.Appx. 34, cert. denied (2004) 543 U.S. 1000.)

With regard to the second requirement, the erroneous item must be *solely* attributable to the nonrequesting spouse. (Treas. Reg. § 1-6015-2(a)(2); *Work v. Commissioner*, T.C. Memo. 2014-190 [for purposes of traditional innocent spouse relief, the attribution requirement was met for certain items that were "solely attributable" to the nonrequesting spouse; for other items that were not "solely attributable" to nonrequesting spouse, the attribution requirement was not met]; see also *Deihl v. Commissioner*, T.C. Memo. 2012-176.) As discussed above, the erroneous item at issue is an unreported pension/annuity distribution of \$12,617 from Fidelity Investments.

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<sup>6</sup> We note that to qualify for innocent spouse relief under R&TC section 18533, the requesting spouse must have filed a joint return. Therefore, appellant's contention that the jointly filed 2000 return is not valid does not support his request for innocent spouse relief.

According to evidence in the appeal record, Fidelity Investments reported on Form 1099R (pension and profit sharing) both appellant and Ms. Rose as recipients of the pension/annuity distribution. Appellant has not presented any evidence to establish that the unreported pension/annuity distribution from Fidelity Investments is solely attributable to Ms. Rose. As appellant failed to establish that the understatement at issue is solely attributable to Ms. Rose, appellant does not satisfy the second requirement necessary for traditional relief. As such, appellant is not entitled to traditional innocent spouse relief because he fails to satisfy each of the requirements of R&TC section 18533(b).

#### Separate Liability Allocation Relief

R&TC section 18533(c) provides that an individual may, with certain qualifications, elect to limit his or her liability for a deficiency with respect to a joint return to the amount that would have been allocable to the requesting individual had the spouses filed separate returns. To qualify for separate liability allocation relief, however, the requesting spouse must satisfy the following qualifications. First, at the time the request is filed, the individual requesting relief must no longer be married to, or must be legally separated from, the nonrequesting spouse or, alternatively, that individual must not be a member of the same household as the nonrequesting spouse at any time during the 12-month period ending on the date he or she files the request for separate allocation relief. (R&TC, § 18533(c)(3)(A)(i)(I)-(II).) Second, the individual requesting relief must file a timely request for relief no later than two years after the date FTB has begun collection action with respect to the requesting individual. (R&TC, § 18533(c)(3)(B).)

Lastly, if FTB demonstrates that an individual requesting separate liability allocation relief had actual knowledge, when that individual signed the return, of any item giving rise to the deficiency (or portion thereof) that is not allocable to that individual, then separate liability allocation relief will not apply to such deficiency (or portion thereof), unless that individual establishes that he or she signed the return under duress. (R&TC, § 18533(c)(3)(C).) Separate liability allocation relief is not allowable to the extent that an item that gave rise to the deficiency provided the requesting individual a tax benefit. (R&TC, § 18533(d)(3)(B).)

An individual who requests separate liability allocation relief has the burden to establish the portion of any deficiency allocable to that individual. (R&TC, § 18533(c)(2).) Any item giving rise to a deficiency on a joint return shall be allocated to individuals filing the return in the same manner as it would have been allocated if the individuals had filed separate returns for the

taxable year. (R&TC, § 18533(d)(3)(A).) Here, appellant has not established the allocation of the liability between himself and Ms. Rose, as if they filed separate 2000 returns. As appellant has not met his burden of establishing proper allocation, appellant does not satisfy all of the criteria for separate allocation relief. Therefore, appellant is not entitled to traditional innocent spouse relief.

### Equitable Relief

R&TC section 18533(f) provides that FTB may relieve a taxpayer from a tax liability if, taking into account all the facts and circumstances, it is inequitable to hold the taxpayer liable for the unpaid tax or understatement, and the taxpayer does not otherwise qualify for relief under subdivisions (b) or (c). Determinations to deny equitable relief are reviewed de novo, and the requesting spouse bears the burden of showing that he or she is entitled to equitable relief. (*Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980, 982; *Porter v. Commissioner* (2009) 132 T.C. 203, 210.)

Revenue Procedure 2013-34 provides guidance in determining whether to grant equitable relief.<sup>7</sup> Section 4.01 of Revenue Procedure 2013-34 (section 4.01) sets out threshold conditions that a requesting spouse must meet to be eligible for equitable relief. If the requesting spouse establishes that he or she meets all seven threshold conditions<sup>8</sup> in section 4.01, FTB then considers whether the requesting spouse is entitled to a streamlined determination of equitable innocent spouse relief under section 4.02 of Revenue Procedure 2013-34 (section 4.02). If the requesting spouse meets the conditions of section 4.01, but does not qualify for relief under section 4.02, FTB then considers the section 4.03 factors of Revenue Procedure 2013-34 (section 4.03).

Section 4.01 of Revenue Procedure 2013-34 lists the following threshold conditions for a taxpayer requesting equitable relief.

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<sup>7</sup> R&TC section 18533(g)(2) provides that “[i]t is the intent of the Legislature that, in construing this section . . . , any regulations that may be promulgated by the Secretary . . . 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].” The applicable Treasury regulations refer taxpayers to Revenue Procedure 2000-15 (which was a predecessor of Revenue Procedure 2013-34) or other guidance published by the Treasury or IRS for guidance as to the application of equitable relief. (Treas. Reg. § 1.6015-4(c).)

<sup>8</sup> The Revenue Procedure and federal court cases indicate that, if the requesting spouse cannot satisfy all the threshold conditions, then the claim for equitable relief must be denied. (See, e.g., *Stanwyck v. Commissioner*. (2012) T.C. Memo. 2012-180; *Franc v. Commissioner* (2010) T.C. Memo. 2010-79.)



1. The taxpayer filed a joint return for the taxable year for which he or she seeks relief;
2. Relief is not available to him or her under traditional innocent spouse relief or separate allocation innocent spouse relief;
3. The requesting spouse applies for relief within the applicable statute of limitations for requesting relief;
4. No assets were transferred between spouses as part of a fraudulent scheme by the spouses;
5. The nonrequesting spouse did not transfer disqualified assets to the requesting spouse;
6. The requesting spouse did not file the return with a fraudulent intent; and
7. The income tax liability from which the requesting spouse seeks relief is attributable, in full or in part, to an item of the individual with whom the requesting spouse filed the joint return, unless a specific exception applies.

Appellant meets the first three conditions. With respect to conditions 4, 5, and 6, there is no evidence to suggest that any assets were transferred or that fraud was involved. With respect to condition 7, appellant has not presented any evidence to establish that either the deficiency assessment or any portion of the self-assessed liability is attributable to Ms. Rose. Therefore, appellant has not met the seventh threshold condition required for full or partial equitable relief. However, Revenue Procedure 2013-34 provides five exceptions to the seventh condition; if appellant meets any of these exceptions, FTB may nevertheless consider granting relief. The available exceptions are:

1. If an item is attributable or partially attributable to the requesting spouse solely due to the operation of community property law, then the item will be considered attributable to the nonrequesting spouse;
2. The requesting spouse's ownership of the item of income giving rise to the tax is "nominal";
3. The requesting spouse did not know, and had no reason to know, that funds intended for the payment of tax were misappropriated by the nonrequesting spouse for the nonrequesting spouse's benefit;
4. The requesting spouse was the victim of abuse prior to the filing of the return;
5. The nonrequesting spouse's fraud is the reason for the erroneous item.

Appellant has not demonstrated that any of the exceptions to the seventh threshold condition apply; therefore, he has not met any of the exceptions to the seventh threshold condition. Since appellant does not meet all of the threshold conditions for equitable relief, we need not consider the factors pursuant to sections 4.02 or 4.03. As appellant fails to satisfy the threshold conditions under section 4.01, he is not entitled to equitable relief.

HOLDING

Appellant has failed to establish that he is entitled to innocent spouse relief for the 2000 tax year.

DISPOSITION

FTB’s action denying innocent spouse relief to appellant for the 2000 tax year is sustained.

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Sheriene Anne Ridenour  
Administrative Law Judge

We concur:

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Teresa A. Stanley  
Administrative Law Judge

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Sara A. Hosey  
Administrative Law Judge

Date Issued: 3/6/2020