

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
T. DICKEY¹

) OTA Case No. 18010709
)
)
)
)
)

OPINION

Representing the Parties:

For Appellant: T. Dickey

For Respondent: Megan McEvelly, Tax Counsel III

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19045, T. Dickey (appellant) appeals the action of Franchise Tax Board (FTB) granting partial innocent spouse relief to appellant’s former spouse (the non-appealing spouse) for the 2010 tax year.²

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

ISSUE

Whether appellant has shown that FTB erred in granting conforming innocent spouse relief to the non-appealing spouse, pursuant to R&TC section 18533(i).

FACTUAL FINDINGS

1. Appellant and her spouse at the time, the non-appealing spouse, filed a timely joint California income tax return (Form 540) for the 2010 tax year, reporting tax of \$1,176,

¹ The non-appealing spouse did not file an appeal letter and is not a party to this appeal.

² In its Notice of Action (NOA), FTB granted partial innocent spouse relief to the non-appealing spouse in the amount of \$817.20 out of a joint liability of \$1,241.12.

- withholdings of \$1,777, and an overpayment of \$601, which was transferred to the 2009 tax year.
2. FTB received information from the Internal Revenue Service (IRS) indicating that it audited the couple's federal tax return for 2010 and disallowed various itemized deductions and applied the federal standard deduction. Neither appellant nor the non-appealing spouse notified FTB of the federal determination, which was reported by the IRS to FTB. FTB issued a Notice of Proposed Assessment (NPA) on May 27, 2015. The NPA disallowed the itemized deductions that were disallowed by the IRS, applied the California standard deduction, and calculated a revised total tax of \$2,930, resulting in a proposed additional tax assessment of \$1,754, plus interest.
 3. Neither appellant nor the non-appealing spouse timely protested the NPA, which became final.
 4. A collection cost recovery fee of \$226 was subsequently imposed for nonpayment of the liability.
 5. Subsequent payments were made on the liability totaling \$1,028.87, which include payments of \$700 and \$328.87 on March 28, 2016. This resulted in total payments at this point of \$2,204.87 (\$1,028.87 + \$1,176).
 6. The non-appealing spouse requested and was granted partial federal innocent spouse relief, pursuant to Internal Revenue Code (IRC) section 6015(b). Specifically, the non-appealing spouse was granted relief of \$1,348 and denied relief of \$2,320. The amount in which the non-appealing spouse was granted relief was 36.75 percent of the federal tax liability. He then requested innocent spouse relief from FTB for his California liability, and provided a copy of the divorce decree and a Final Appeals Determination letter from the IRS indicating that it granted him partial innocent spouse relief.
 7. FTB sent appellant a notice explaining that the non-appealing spouse requested conforming innocent spouse relief. The notice provided appellant with an opportunity to provide information demonstrating why the non-appealing spouse should not receive conforming innocent spouse relief. Appellant did not respond.
 8. On March 27, 2017, FTB issued a Notice of Action (NOA) to the non-appealing spouse stating that it was conforming to the IRS determination to grant him partial relief of the liability. Specifically, the NOA stated that relief is granted in the amount of \$817.20 out

of the joint liability of \$1,241.12. The NOA states that he is liable for a balance of \$423.92.³

9. On March 27, 2017, a separate NOA was issued to appellant notifying her that innocent spouse relief was granted to the non-appealing spouse and stating that she did not provide evidence to show that FTB should not conform to the IRS grant of relief. The NOA stated that appellant remained liable for the balance due of \$1,241.12. The liability of \$1,241.12 includes tax of \$2,930, a collection cost recovery fee of \$226, and interest of \$289.99, less payments totaling \$2,204.87.⁴
10. On May 23, 2017, a payment of \$423.92 was made on the liability. This resulted in total payments at this point of \$2,628.79 (\$1,452.79 + \$1,176).
11. This timely appeal followed.
12. On appeal, FTB agrees to reduce the joint additional tax liability to \$562 based on information provided by the IRS. FTB states that the non-appealing spouse previously made payments on the joint liability, such that the remaining balance encompasses only the portion of the liability for which the non-appealing spouse was granted partial innocent spouse relief. FTB states that the portion which the non-appealing spouse is granted relief is 36.75 percent of the joint liability, which is tax of \$206.54 (36.75 percent of \$562) and the collection cost recovery fee of \$83.05 (36.75 percent of \$226), plus interest.

³ The NOA grants the non-appealing spouse relief of 65.84 percent of the liability of \$1,241.12 (i.e., \$817.20 [relief granted] ÷ \$1,241.12 [total liability] = 65.84 percent), while remaining liable for 34.16 percent (i.e., \$423.92 [balance due] ÷ \$1,241.12 [total liability] = 34.16 percent). However, the non-appealing spouse was granted federal relief of 36.75 percent, and he remained liable for 63.25 percent. On appeal, FTB now states that the non-appealing spouse is granted relief for 36.75 percent of the joint liability. Therefore, any errors on the NOA have been corrected by FTB on appeal.

⁴ The NOA calculation includes \$827 labeled as “debits,” which is the total of the collection cost recovery fee of \$226 and the overpayment of \$601 that was transferred to 2009. These amounts are offset by total payments of \$2,805.87 labeled as “credits,” which includes withholdings of \$1,777 and payments made at this point totaling \$1,028.87. The NOA indicates that the net of the “debits” and “credits,” tax of \$2,930, and interest of \$289.99, totals \$1,241.12, which is the balance due.

DISCUSSION

FTB's determination is presumed correct and the taxpayer has the burden of proving error. (*Appeal of Davis*, 2020-OTA-182P.) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, FTB's determination must be upheld. (*Ibid.*)

Federal and California law provide that when a joint return is filed by a married couple, each spouse is jointly and severally liable for the entire tax due. (IRC, § 6013(d)(3); R&TC, § 19006(b).) However, an individual who files a joint return may be relieved of all or a portion of such liability if the individual qualifies as an innocent spouse. (IRC, § 6015; R&TC, §§ 18533, 19006.) There are several types of innocent spouse relief, but the relief that is relevant to this appeal is found in R&TC section 18533(i)(1), which provides that an individual who files a joint return and is granted innocent spouse relief under IRC section 6015 shall be eligible for relief if three conditions are satisfied:

1. The individual requests relief under R&TC section 18533;
2. The facts and circumstances that apply to the understatement and liabilities for which the relief was requested are the same facts and circumstances that applied to the understatement and liabilities for which that individual was granted relief under IRC section 6015; and
3. The individual requesting relief under R&TC section 18533(i) furnishes FTB with a copy of the federal determination granting that individual relief under IRC section 6015.

However, R&TC section 18533(i)(2) provides that the relief provided under R&TC section 18533(i)(1) does not apply when the non-requesting spouse has provided information to FTB demonstrating any of the following:

1. Information that indicates that the facts and circumstances that apply to the understatement and liabilities for which relief is requested are not the same facts and circumstances that applied to the understatement and liabilities for which the requesting spouse was granted federal relief under IRC section 6015;
2. Information that indicates that there has not been a federal determination granting relief under IRC section 6015, or that the federal determination granting relief has been modified, altered, withdrawn, canceled, or rescinded;
or

3. Information indicating that the other individual did not have an opportunity to participate, within the meaning of IRC section 6015 and the regulations thereunder, in the federal administrative or judicial proceeding that resulted in relief under IRC section 6015.

In the instant case, the federal and California liabilities both result from the same adjustments to disallow itemized deductions on the federal and California tax returns, respectively. Therefore, the facts and circumstances that apply to the understatement and liabilities for which partial relief was granted by FTB are the same facts and circumstances that applied to the understatement and liabilities for which partial relief was granted by the IRS, pursuant to IRC section 6015. The non-appealing spouse requested relief under R&TC section 18533 and provided FTB with a copy of the final federal determination granting partial innocent spouse relief. Therefore, the conditions under R&TC section 18533(i)(1) which must be met for the non-appealing spouse to be eligible for conforming innocent spouse relief are satisfied. On the other hand, appellant provides no information to establish that relief should not be granted to the non-appealing spouse, pursuant to R&TC section 18533(i)(2).⁵

Instead, appellant argues that FTB's calculation of her liability is incorrect. On appeal, FTB states that the joint liability is revised to include tax of \$562, the collection cost recovery fee of \$226, and interest. FTB states that the non-appealing spouse is granted partial relief for 36.75 percent of the liability, which conforms to the federal grant of partial relief.⁶ FTB asserts that, because the non-appealing spouse made payments satisfying 63.25 percent of the joint liability, appellant is liable for the portion in which the non-appealing spouse was granted relief, which is 36.75 percent of the remaining California liability. Accordingly, FTB calculated that the balance for which appellant remains liable is tax of \$206.54 (36.75 percent of \$562) and the collection cost recovery fee of \$83.05 (36.75 percent of \$226), plus interest. We find no error in FTB's calculation of appellant's liability on appeal.

⁵ Appellant contends that she did not receive proper notice regarding the taxes owed to FTB until October 2015. However, it is well established that notices sent by FTB to a taxpayer's last-known address are sufficient. (R&TC, § 18416.) In this case, the NPA dated May 27, 2015, was sent to appellant's last-known address, which is the same address as indicated on the 2010 tax return and as used in appellant's appeal letter. FTB's records do not indicate that any mail was returned as undeliverable. Therefore, appellant received sufficient notice of the tax because the NPA was mailed to her last-known address, pursuant to R&TC section 18416.

⁶ The collection cost recovery fee is included in the granting of relief, as it is a liability attributable to the understatement. (See R&TC, §§ 18533(2)(b)(1)(E), 19254(a).)

Appellant also argues for audit reconsideration and for a reduction of the tax. However, neither appellant nor the non-appealing spouse protested the NPA and, as a result, the tax is a final liability. We only have authority in this appeal to determine whether FTB erred in granting conforming innocent spouse relief to the non-appealing spouse, pursuant to R&TC section 18533(i). Accordingly, we have no authority to address whether any adjustments should be made to the underlying tax liability.⁷

HOLDING

Appellant has not shown that FTB erred in granting conforming innocent spouse relief to the non-appealing spouse, pursuant to R&TC section 18533(i).

DISPOSITION

FTB’s action is modified as conceded on appeal to grant conforming innocent spouse relief to the non-appealing spouse for 36.75 percent of the revised joint liability, which includes tax of \$562, the collection cost recovery fee of \$226, and interest.

DocuSigned by:
Josh Lambert
CB1F7DA37831416...
Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
873D9797B9E64E1...
John O. Johnson
Administrative Law Judge

DocuSigned by:
Andrew J. Kwee
715CE19AD48041B...
Andrew J. Kwee
Administrative Law Judge

Date Issued: 3/17/2021

⁷ As noted by FTB, if appellant believes that FTB erroneously disallowed deductions, her recourse is to pay the liability in full and file a claim for refund.