

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18093813
B. QUEZADA)
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OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: B. Quezada

For Respondent: Mira V. Coutinho, Tax Counsel

T. LEUNG, Administrative Law Judge: On May 7, 2020, the Office of Tax Appeals (OTA) issued an Opinion, based on the written record, in which it found that:

1. Appellant is entitled to innocent spouse relief pursuant to Revenue and Taxation Code (R&TC) section 18533(f) for the first deficiency and the portion of the second deficiency that is attributable to Mr. Salazar’s wages (\$5,271) that were subtracted from the couple’s California adjusted gross income (AGI) on their 2008 return. Appellant is still liable for the portion of the second deficiency that is attributable to her Arizona wages (\$17,605) that were subtracted from the couple’s California AGI on their 2008 return.
2. Appellant is not entitled to court-ordered relief pursuant to R&TC section 19006(b).

Respondent Franchise Tax Board (FTB) filed a petition for rehearing (PFR) under R&TC section 19048. Upon consideration of FTB’s PFR, we conclude the grounds set forth therein do not meet the requirements for a rehearing under California Code of Regulations, title 18, (Regulation) section 30604.

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party (here, FTB) are materially affected: (a) an irregularity in the appeal proceedings which occurred prior to the issuance of the written Opinion and prevented fair consideration of the appeal; (b) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could

not have prevented; (c) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Cal. Code Regs., tit. 18, § 30604(a)-(e); *Appeal of Do*, 2018-OTA-002P.)

In its PFR, FTB claims that there was insufficient evidence to justify the Opinion, and that the Opinion was contrary to law.¹

FTB's first assertion is that OTA lacked jurisdiction to determine the validity of the underlying assessment. The Opinion did not disturb the underlying assessment. Nevertheless, FTB is under the mistaken impression that OTA determined that appellant was an Arizona resident and not a California resident. We made no such finding and, moreover, the Opinion's first finding of fact concluded that appellant filed a 2008 California Form 540—a *resident* return—not a nonresident return. In any event, whatever mistake FTB perceives was made in this regard, it is immaterial to OTA's holding that appellant was entitled to partial innocent spouse relief and, hence, not proper grounds for a PFR. In this regard, we note that the Opinion granted appellant innocent spouse relief solely for the tax due on the \$5,271 of income attributed to Mr. Salazar, but not for the Arizona income attributable to her, thereby continuing to hold her liable for the tax on such income (which is consistent with the filing of a California resident income tax return). Furthermore, as a matter of law, an individual can have more than one state of residence. (See *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 284, citing *Texas v. Florida* (1939) 306 U.S. 398.) Thus, even if OTA did conclude that appellant was an Arizona resident, it does not preclude appellant from also being a California resident for the same taxable year.

FTB's second assertion is that OTA erred by finding the R&TC section 18533(f) balancing factor of knowledge in favor of appellant. However, the Opinion found that two of the balancing factors weighed in favor of relief, the marital status and compliance factors. The Opinion explicitly found that the knowledge factor was not favorable, and that according to the IRS Revenue Procedure (Rev. Proc. 2013-34) explaining these factors, the knowledge factor was

¹ FTB's PFR asserts that, under the fifth ground, our Opinion "is based on an error in law." However, consistent with California Code of Civil Procedure section 657, we interpret the fifth ground to refer to an error in law occurring during the appeal proceedings, as opposed to a legal error in the Opinion. (*Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) FTB does not argue that there was an error in law during the proceedings. Thus, we interpret FTB's "error in law" contention to be based solely on the last clause of the fourth ground; namely, that our Opinion is contrary to law.

not to be given any greater weight than any of the other factors. In addition, FTB argues that the compliance factor should be neutral, even though it admits that appellant had no filing requirement after 2008. Even if we agreed with this argument,² as stated in the Opinion, section 3.05 of Rev. Proc. 2013-34 provides that “relief still may be appropriate if the number of factors weighing against relief exceeds the number of factors weighing in favor of relief” With the compliance factor neutralized, there would be just as many balancing factors in favor of relief as there are against relief, and, as explained in the Opinion, a determination to grant relief is not based solely on a simple counting of the balancing factors. Although FTB believes a “tie” when considering the balancing factors is equivalent to denying innocent spouse relief, it is within OTA’s discretion to reach the opposite conclusion as OTA reviews innocent spouse claims using a de novo standard. (*See Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980; *accord*, Cal. Code Regs., tit. 18, § 30214; *contra*, *Appeal of Tyler-Griffis* (2006-SBE-004) 2006 WL 3768792.) Furthermore, because the innocent spouse provisions are remedial in nature, such statutes 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.) Thus, we find no reason to grant the PFR based on this argument.

Finally, FTB asserts OTA lacks jurisdiction to determine whether appellant was entitled to court-ordered relief under R&TC section 19006(b) due to a lack of statutory authority over such claims. R&TC section 19006(c)(4) provides as follows: “Any action taken under this section shall be treated as though it were action on a protest taken under Section 19044 and shall become final upon the expiration of 30 days from the date that notice of the action is mailed to both spouses, unless, within that 30-day period, one or both spouses appeal the determination to the board as provided in Section 19045.”³ (Emphasis added.)

Clearly, R&TC section 19006(c)(4) does not limit OTA’s jurisdiction solely to matters arising under subdivision (c) of R&TC section 19006, as it provides appeal rights for “any action taken under this section.” The reference to “this section” refers to the entirety of R&TC section 19006; it is not limited to any particular subdivision thereof. “When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest.

² Although we see some merit in FTB’s position, the law on this point is not clear, and we decline FTB’s invitation to reconsider our conclusion in the context of this PFR.

³ With respect to an appeal, “board” means OTA. (R&TC, § 20(b).)

Only the written word is the law, and all persons are entitled to its benefit.” (*Bostock v. Clayton County, Georgia* (2020)___U.S., 140 S.Ct. 1731, 1737.) Here, there is “no contest”: appeals from FTB’s actions under any subdivision of R&TC section 19006 are to OTA as prescribed under R&TC section 19006(c). Because appellant appealed FTB’s denial of innocent spouse relief under R&TC section 19006(b) and Regulation section 30103(a)(8) gives OTA jurisdiction to hear and decide appeals where FTB mails any notice denying innocent spouse relief under R&TC section 19006(c), it cannot be said that OTA “incorrectly [added] a second issue to the appeal” since R&TC section 19006(c) specifically granted OTA jurisdiction to hear and decide the appeal.

Based on the foregoing, FTB’s PFR is denied.

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

We concur:

DocuSigned by:
Jeffrey I. Margolis
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Jeffrey I. Margolis
Administrative Law Judge

DocuSigned by:
Nguyen Dang
77AFD3EA552843B...
Nguyen Dang
Administrative Law Judge

Date Issued: 4/8/2021