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2021 – OTA – 166
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18093813
B. QUEZADA[1]	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: B. Quezada

For Respondent: Mira Patel, Tax Counsel

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

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533, 19006, and 19045, B. Quezada (appellant) appeals an action by the Franchise Tax Board (FTB) denying her innocent spouse relief for 2008.

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

ISSUES

1. Whether appellant demonstrated error in respondent's determination to deny her request for innocent spouse relief.
2. Whether appellant demonstrated error in respondent's determination that she is not entitled to court-ordered relief.

FACTUAL FINDINGS

1. On their 2008 California Resident return (Form 540), appellant and Mr. Salazar (collectively, "the couple") reported California adjustments (subtractions) of $23,698 consisting of wages of $22,877 and taxable refunds, credits, and offsets of state and local

[1] The Office of Tax Appeals notified appellant's former spouse, Mr. Salazar, of his right to join this appeal by filing an opening brief on or before January 25, 2019, but he did not do so.

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income taxes of $821. On Schedule CA (540) of their 2008 return, the couple reported total wage income of $98,749 and then subtracted wages of $22,877. On Schedule W-2 CG of their 2008 return, the couple listed total state wages of $98,749 from three Forms W-2 consisting of wages of $81,143 for "taxpayer" and wages of $17,606 for "spouse/RDP." Attached to the 2008 return is a copy of a Form W-2 that was issued to Mr. Salazar for wages of $75,872.49.[2]

2. FTB processed the 2008 return.
3. Based on an Internal Revenue Service (IRS) audit (which determined that the couple did not report on their 2008 return a taxable distribution of $7,472 from a qualified retirement account (hereinafter referred to as an early retirement distribution) and interest income of $37), FTB issued the couple a Notice of Proposed Assessment (NPA). The NPA increased the couple's reported taxable income by $7,509 and proposed additional tax of $591, including a qualified retirement premature distribution tax of $186, plus interest. When the couple failed to protest the NPA, it became final. This deficiency hereinafter will be referred to as the "first deficiency."
4. FTB issued to the couple a second NPA which disallowed their California adjustment (subtraction) of wages of $22,877. The second NPA increased the couple's revised taxable income by $22,877 and proposed additional tax of $1,521, plus interest. The second NPA stated that, as California residents, all of the couple's wages, even wages earned outside of California, are taxable. The second NPA instructed the couple to contact FTB if they were not California residents for all of 2008 and, alternatively, if they qualified for a tax credit for taxes paid to another state on these wages, they should provide the FTB with a completed Schedule S, a copy of the return that they filed with the other state, and proof that taxes were paid. When the couple failed to protest the second NPA, the proposed assessment became final. This deficiency hereinafter will be referred to as the "second deficiency."
5. FTB commenced collection action with respect to both deficiencies and imposed a collection cost recovery fee of $159 and a county lien fee of $36. FTB asserts in its brief that it has not collected any payments on either deficiency.

[2] We note that the couple's 2008 return was prepared by "The Tax Doctor" at "2530 S 6th Ave." No city or state is provided.

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6. In 2017, appellant filed an Innocent Joint Filer Relief Request (FTB Form 705) for the 2008 tax year, which states that the couple divorced on March 29, 2010. Attached to the FTB Form 705 are copies of the couple's 2006, 2007, and 2008 federal account transcripts and the couple's notarized divorce consent decree, which was signed by the spouses and filed with the Arizona court on March 29, 2010.
7. FTB acknowledged receiving the request for relief of liability and requested that appellant provide additional information.
8. FTB sent Mr. Salazar a Non-Requesting Taxpayer Notice informing him that appellant requested innocent spouse relief and requesting that he provide additional information.
9. Appellant sent FTB a letter in support of her request for innocent spouse relief for 2008. She asserted that she only worked in Arizona and the income earned in California belonged to Mr. Salazar, who was employed in Riverside, California. She also asserted that she lived in Arizona when he was working and living in California. She further asserted that she and Mr. Salazar are now divorced, and they filed joint returns in Arizona.
10. FTB asserts that it made unsuccessful "multiple attempts to contact appellant for more information" concerning her request for relief. In separate Notices of Action dated August 16, 2018, FTB informed appellant and Mr. Salazar that it denied appellant's request for relief of liability pursuant to R&TC section 18533(b), (c), and (f), and that the couple's 2008 account had a balance due of $3,122.22.
11. Appellant filed this timely appeal on September 18, 2018. On appeal, appellant states that she "was not personally aware of the omitted income that was attributable to" income that Mr. Salazar earned from a job in California. According to appellant, her portion of the couple's 2008 income is $17,605.81, as reflected on the Form W-2 issued to her by Roosevelt Elementary School District. Appellant also states that the omitted income may be due to "an early pension withdrawal for wages earned [by Mr. Salazar] in California, but there is no means for me to prove this because we got divorced in 2010, and I no longer have rights to obtain his financial records." Appellant asserts that she is providing a copy of the couple's 2008 federal account transcript, which she obtained from the IRS, because she does not have a copy of the couple's 2008 federal return. She further states that when she signed the 2008 joint return, "the information was accurate to my

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understanding and due to no fault of my own, the omitted additional income was not made aware to me."

12. The couple's 2008 federal wage and income transcript shows that Roosevelt Elementary School District in Phoenix, Arizona, issued appellant a Form W-2 for wages of $17,605 and Quebecor in New Haven, Connecticut, and the City of Phoenix issued Mr. Salazar Forms W-2 for wages of $75,872 and $5,271, respectively. The wages that the couple subtracted from their taxable income on their 2008 return ($22,877) equals the sum of appellant's wages of $17,605 from Roosevelt Elementary School District and Mr. Salazar's wages of $5,271 from the City of Phoenix. The federal transcript also shows that Bank of America issued Mr. Salazar a Form 1099-INT for interest of $37 and Mercer Trust Company issued Mr. Salazar a Form 1099-R for an early retirement distribution of $7,472. Lastly, the federal transcript shows that Flagstar Bank FSB of Troy, Michigan, issued the couple a Form 1098 for mortgage interest received of $20,545, Maricopa County Community Colleges issued Mr. Salazar a Form 1098-T for tuition and expenses of $3,311, and FTB and the Arizona Department of Revenue issued the couple Forms 1099-G for prior year tax refunds of $1,355 and $821, respectively.

DISCUSSION

Issue 1: Whether appellant demonstrated error in respondent's determination to deny her request for innocent spouse relief.

When a joint return is filed, each spouse is jointly and severally liable for the entire tax due for that tax year. (Int.Rev. Code (IRC), § 6013(d)(3); R&TC, § 19006(b).) However, a requesting spouse may seek relief from joint and several liability under innocent spouse relief statutes. (IRC, § 6015; R&TC, § 18533.) R&TC section 18533(b) provides for traditional innocent spouse relief; (c) provides for separate allocation relief; and, if a requesting spouse is not eligible for relief under (b) or (c), a requesting spouse may be eligible for equitable relief under (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 in 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

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statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838.) Thus, federal authority is applied extensively in California innocent spouse cases. (See *Appeal of Tyler-Griffis* (2006-SBE-004*)* 2006 WL 3768792; 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 respondent's regulations. (R&TC, § 18533(g)(2).)

R&TC section 18533(b), (c), and (f) are relevant to the tax year at issue. R&TC section 18533(b) and (c) apply because they require the existence of a tax deficiency (rather than an underpayment of reported tax) and the tax year at issue in this appeal involves two tax deficiencies. R&TC section 18533(f) applies because it is available for both a tax deficiency and an underpayment of reported tax.

R&TC section 18533(b) – Traditional Innocent Spouse 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 individual 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 the non-electing spouse filing the joint return; (3) the individual 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 individual liable for the deficiency in tax attributable to that understatement; and (5) the individual files a timely request for relief no later than two years after the date that the FTB has begun collection action with respect to the requesting spouse.[3] (R&TC, § 18533(b)(1)(A-E).) The requirements of R&TC section 18533(b), like the requirements of Internal Revenue Code section 6015(b) upon which they are based, are stated in the conjunctive; a failure to meet any one of them disqualifies an individual from relief. (*Tompkins v. Commissioner*, T.C. Memo. 2013-24; *Alt v. Commissioner, supra*, 119 T.C. at p. 313.)

A requesting spouse knows or has reason to know of an understatement if, at the time he or she signed the joint return, he or she had actual knowledge of the understatement, or if a

[3] Essentially, the same language appears in the equities test of R&TC section 18533(b)(1)(D), and R&TC section 18533(f), and the equitable factors considered are the same. Thus, the same conclusion as to whether it is inequitable to hold an individual claiming relief liable would conceivably flow from either provision. (See, e.g., *Alt v. Commissioner* (2002) 119 T.C. 306, 316; *Butler v. Commissioner* (2000) 114 T.C. 276, 291.)

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reasonable person in similar circumstances could be expected to know that the joint return contained an understatement. (Treas. Reg. § 1.6015-2(c).) For purposes of R&TC section 18533(b), actual knowledge of omitted income includes knowledge of the receipt of the income. (Treas. Reg. §§ 1.6015-2(c), 1.6015-3(c)(2)(ii)(A).) A requesting spouse does not meet his or her burden of proof under R&TC section 18533(b) if, at the time he or she signed the joint return, he or she had a duty to inquire or investigate further. (*Tompkins v. Commissioner*, T.C. Memo. 2013-24 (citing *Stevens v. Commissioner* (11th Cir. 1989) 872 F.2d 1499, 1505, affg. T.C. Memo. 1988-63).) A requesting spouse has a duty to inquire when he or she knows sufficient facts to put him or her on notice that an understatement exists. (*Tompkins v. Commissioner, supra.*) In determining whether a requesting spouse knew or had reason to know of an understatement, all of the facts and circumstances are considered, including, but not limited to, the nature of the erroneous item, the amount of the erroneous item relative to other items, the couple's financial situation, the requesting spouse's educational background and business experience, the extent of the requesting spouse's participation in the activity that resulted in the erroneous item, whether the requesting spouse failed to inquire, at or before the time the joint return was signed, about items on the joint return or omitted from the joint return that a reasonable person would question, and whether the erroneous item represented a departure from a recurring pattern reflected in prior years' joint returns. (Treas. Reg. § 1.6015-2(c); see also *Tompkins v. Commissioner, supra*.) Under the relevant Treasury Regulations, a requesting spouse will be treated as having knowledge of an erroneous item of unreported or misreported income if that spouse had knowledge of the unreported or misreported income, even though the spouse was unaware of the proper tax treatment for that item. (Treas. Reg. § 1.6015-3(c)(2)(ii) ["A requesting spouse's actual knowledge of the proper tax treatment of an item is not relevant for purposes of demonstrating that the requesting spouse had actual knowledge of an erroneous item"]; see also Treas. Reg. § 1.6015-3(c)(4), Example 1.)

For purposes of R&TC section 18533(b), we will discuss the two deficiencies separately. The first deficiency was based on an early retirement distribution of $7,472 and interest income of $37. Neither of these items was reported on the couple's 2008 return. Appellant argues on appeal that she did not know of these omitted income items and they were attributable to Mr. Salazar. She asserts that Mr. Salazar earned income from his job in California and she lived in Phoenix, Arizona, while he worked in California. There is no dispute that during 2008, appellant

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worked in Arizona and that, at least part of the year, Mr. Salazar worked in California. The copy of the Form W-2 issued to appellant from her Arizona employer lists her address in Arizona. The copy of the Form W-2 issued to Mr. Salazar from Quebecor indicates that he was employed in California. Furthermore, the only income included in the couple's California adjusted gross income (AGI) on their 2008 California return is $75,872, which is the amount of wages paid to Mr. Salazar from Quebecor. Both items that comprise the first deficiency are attributable to Mr. Salazar, because the couple's 2008 federal wage and income transcript shows that the Form 1099-R for the early retirement distribution of $7,472 and the Form 1099-INT for the interest income of $37 were issued only to Mr. Salazar.

The evidence establishes that the early retirement distribution of $7,472 and the interest income of $37 were reported as taxable income on the couple's 2008 federal return but omitted from the couple's 2008 California return. The copy of the couple's 2008 federal account transcript, which is attached to the appeal letter, shows that a federal AGI of $107,079 was reported on the couple's 2008 federal return, whereas line 13 of the couple's 2008 California return shows that a federal AGI of $99,570 was reported on the couple's 2008 federal return. The discrepancy between these two federal AGI amounts is $7,509 ($107,079 - $99,570), which is the sum of the omitted early retirement distribution of $7,472 and the omitted interest income of $37. Appellant therefore had actual knowledge that when she signed the couple's 2008 California return the early retirement distribution and the interest income were omitted from the couple's 2008 California return. Based on this evidence, we find that appellant does not satisfy the third requirement (lack of knowledge) of R&TC section 18533(b) with respect to the first deficiency. We therefore need not discuss the remaining requirements for traditional relief under R&TC section 18533(b). We conclude that appellant is not entitled to innocent spouse relief under R&TC section 18533(b) for the first deficiency.

Next, we will discuss whether appellant is entitled to relief under R&TC section 18533(b) for the second deficiency, which was based on the couple having subtracted $22,877 of income from their California AGI on their 2008 return. That amount is comprised of appellant's wages of $17,605.81, as reflected on the Form W-2 issued to her from her Arizona employer, and Mr. Salazar's wages of $5,271, as reflected on the Form W-2 issued to him from his Arizona employer. The omitted wages are thus attributable partly to appellant and partly to Mr. Salazar.

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We find that appellant had actual knowledge at the time she signed the 2008 return that the wages she and Mr. Salazar earned in Arizona were subtracted from their California AGI. The couple's California AGI of $75,872, as reported on line 17 of their 2008 return, consists solely of the wages of $75,872 that Mr. Salazar earned from Quebecor, as reflected on the Form W-2 issued by Quebecor, whereas the couple's total wages from their Forms W-2 of $98,749 is reported on line 12 of their 2008 return. The 2008 Schedule CA lists total wages of $98,749 and subtracts wages of $22,877, resulting in a California AGI of $75,872, as reported on line 17 of the couple's 2008 return. In addition, the 2008 Schedule W-2 CG lists the wages that both appellant and Mr. Salazar earned from each of their employers, including the omitted wages, as reflected on the three Forms W-2 issued to appellant and Mr. Salazar.

Under these facts and circumstances, appellant does not satisfy the knowledge requirement of R&TC section 18533(b) with respect to the second deficiency. We therefore need not discuss the remaining requirements for traditional relief under R&TC section 18533(b). We conclude that appellant is not entitled to innocent spouse relief under R&TC section 18533(b) for the second deficiency.

R&TC section 18533(c) – 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 electing individual had separate returns been filed. 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).) Second, the individual requesting relief must file a timely request for relief no later than two years after the date that the FTB has begun collection action with respect to the requesting individual. (R&TC, § 18533(c)(3)(B).)

Lastly, if respondent 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 also not allowable to the extent that an item that gave rise to the deficiency provided the electing individual a tax benefit. (R&TC, § 18533(d)(3)(B).)

To deny separate liability allocation relief, the burden is on respondent to prove the requisite actual knowledge by a preponderance of evidence. (R&TC, § 18533(c)(3)(C); *Culver v. Commissioner* (2001) 116 T.C. 189, 196.) In the context of deficiencies based on either omitted income or disallowed deductions, actual knowledge of the electing individual as to the tax law or legal consequences of the operative facts is not a prerequisite for denial of separate allocation relief. (Treas. Reg. §§ 1.6015-3(c)(2)(ii), 1.6015-3(c)(4), Example 1; see also *Cheshire v. Commissioner* (2000) 115 T.C. 183, 194-195, affd. 282 F.3d 326 (5th Cir. 2002); *King v. Commissioner* (2001) 116 T.C. 198, 203.)

In the case of omitted income, as in this appeal, knowledge of the item includes knowledge of the receipt of the income. (Treas. Reg. § 1.6015-3(c)(2)(i)(A).) Respondent must show that the electing individual had an actual and clear awareness of the existence of the item that gave rise to the deficiency; separate allocation relief is not available where the electing individual had actual knowledge of an income source and amount, even though he or she has no actual knowledge that the omitted income (or any portion thereof) is incorrectly reported on the return. (*Cheshire v. Commissioner, supra*, 115 T.C. at p. 195.)

Lastly, an election for separate liability allocation relief shall be invalid if respondent demonstrates that assets were transferred between the requesting and nonrequesting spouses as part of a fraudulent scheme. (R&TC, § 18533(c)(3)(A)(ii).) There is no allegation of any such transfers here.

For purposes of separate allocation relief under R&TC section 18533(c), appellant would only be entitled to relief for the portion of the tax liabilities for 2008 that were not attributable to her. Such relief would be available for the portions of the couple's 2008 tax liabilities that arose from the early retirement distribution, the interest income, and Mr. Salazar's Arizona wages, but not the portion of the tax liability that arose from appellant's wages. With respect to the knowledge requirement, for the same reasons discussed in connection with R&TC section 18533(b), appellant had actual knowledge at the time she signed the 2008 return that the early retirement distribution and the interest income were omitted from the 2008 return, and that the wages Mr. Salazar earned in Arizona, which were not allocable to her, were subtracted from

their California AGI on the 2008 return. Thus, appellant does not satisfy the knowledge requirement of R&TC section 18533(c).[4] She is thus not entitled to separate allocation relief for the first or the second deficiency and we need not discuss the remaining requirements for separate allocation relief under R&TC section 18533(c).

R&TC section 18533(f) – Equitable Innocent Spouse Relief

R&TC section 18533(f) provides that FTB may relieve an individual from a tax liability arising from a joint return filing if, considering all the facts and circumstances, it is inequitable to hold the individual liable for the unpaid tax or understatement, and the individual does not otherwise qualify for relief under R&TC section 18533(b) or (c). A tax agency's decision to deny equitable relief is reviewed de novo, and the requesting spouse bears the burden of proving that he or she is entitled to equitable relief. (*Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980; *Pullins v. Commissioner* (2011) 136 T.C. 432.)

Treasury Regulation section 1.6015-4(c) provides that the criteria set forth in IRS Revenue Procedure (Revenue Procedure) 2013-34 shall be used in determining whether to grant equitable relief.[5] Section 4.01 of Revenue Procedure 2013-34 (hereinafter referred to as 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 in section 4.01,[6] the FTB then considers the factors in section 4.02 of Revenue Procedure 2013-34 (hereinafter referred to as section 4.02) to determine if the requesting spouse is entitled to a "streamlined determination" of equitable relief. If the requesting spouse meets the requirements of section 4.01 but does not qualify for relief under section 4.02, the FTB then considers the nonexclusive factors set forth in section 4.03 of Revenue Procedure 2013-34 (hereinafter referred to as section 4.03).

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[4] Appellant does not contend and the evidence does not show that she signed the 2008 return under duress.

[5] The applicable Treasury regulation refers to Revenue Procedure 2000-15 (which was a predecessor to Revenue Procedure 2013-34) "or other guidance published by the Treasury or IRS" for guidance as to the application of equitable innocent spouse relief provision. (Treas. Reg. § 1.6015-4(c).)

[6] 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., *Reilly-Casey v. Commissioner*, T.C. Memo. 2013-292; *Stanwyck v. Commissioner*, T.C. Memo. 2012-180; *Franc v. Commissioner*, T.C. Memo. 2010-79; *O'Meara v Commissioner*, T.C. Memo. 2009-71.)

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Section 4.01

Section 4.01 identifies the following threshold requirements for a taxpayer requesting equitable relief:

1. The requesting spouse filed a joint return for the tax year for which relief is sought;
2. Relief is not available to the requesting spouse under R&TC section 18533(b) or (c).
3. The requesting spouse applies for relief within the applicable statute of limitations for requesting relief;[7]
4. No assets were transferred between spouses as part of a fraudulent scheme by the spouses;
5. The non-requesting 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 whole or in part) to an item of the individual with whom the requesting spouse filed the joint return, unless a specific exception applies.[8] If the liability is attributable in part to the requesting spouse, then relief can only be considered for the portion of the liability that is attributable to the nonrequesting spouse.

With respect to the first and the second deficiencies, there is no dispute that the first six conditions have been satisfied. The couple filed a joint return. Traditional relief and separate allocation relief are not available to appellant under R&TC section 18533(b) and (c). There is no dispute that appellant timely filed her request for relief. There is no evidence that disqualified assets were transferred, that the couple engaged in a fraudulent scheme, or that appellant filed the 2008 return with a fraudulent intent.

[7] A request for equitable relief must be made on or before the Collection Statute Expiration Date (CSED), which is the date the period of limitation on collection of the income tax liability expires. (Rev. Proc. 2013-34, § 4.01(3)(a).) Generally, for federal purposes, the CSED is the date that is 10 years after the assessment of the tax. (IRC, § 6502 (a).) However, in California, the FTB generally has 20 years to collect an outstanding tax liability from the date when it becomes due and payable. (See R&TC, § 19255.)

[8] Revenue Procedure 2013-34 provides the following exceptions to the seventh requirement of section 4.01: (1) the liability is attributed to the requesting spouse solely due to community property laws; (2) the requesting spouse's ownership of items giving rise to the liability is nominal; (3) funds intended for payment of the tax were misappropriated by the nonrequesting spouse; (4) abuse; or (5) fraud committed by the nonrequesting spouse. (Rev. Proc. 2013-34, § 4.01(7).)

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As for the seventh condition, the tax liability for the first deficiency is attributable entirely to Mr. Salazar, because the Form 1099-R for the early retirement distribution and the Form 1099-INT for the interest income were both issued solely to Mr. Salazar, whereas the tax liability for the second deficiency is attributable partly to appellant and partly to Mr. Salazar, because both of their Arizona wages were subtracted from the couple's California AGI on their 2008 return. Appellant does not contend and the evidence does not show that any of the exceptions to the seventh requirement of section 4.01 applies with respect to her Arizona wages.

With respect to the first deficiency, appellant satisfies each of the seven threshold conditions of section 4.01. With respect to the portion of the second deficiency that is attributable to the wages that Mr. Salazar earned in Arizona during 2008, appellant satisfies each of the seven threshold conditions of section 4.01. With respect to the portion of the second deficiency that is attributable to the wages that she earned in Arizona during 2008, appellant does not satisfy section 4.01. She is thus not entitled to equitable relief under R&TC section 18533(f) as to this portion of the second deficiency.

Section 4.02

We next consider whether appellant is entitled to a "streamlined determination" of equitable innocent spouse relief pursuant to Section 4.02 of Revenue Procedure 2013-34 with respect to the first deficiency and the portion of the second deficiency that is attributable to the wages that Mr. Salazar earned in Arizona during 2008. A streamlined determination of equitable innocent spouse relief is permitted when the requesting spouse establishes that he or she satisfies the following three criteria: (1) he or she is no longer married to the nonrequesting spouse; (2) he or she would suffer economic hardship if relief were not granted; and (3) he or she did not know or have reason to know that the non-requesting spouse would not or could not pay the underpayment of tax reported on the joint income tax return.

The first factor is satisfied because appellant and Mr. Salazar were divorced on March 29, 2010. As for the second factor, economic hardship exists if satisfaction of the tax liability in whole or in part would cause the requesting spouse to be unable to pay reasonable basic living expenses. (Rev. Proc. 2013-34, §§ 4.02(2) & 4.03(2)(b).) The taxing agency will compare the requesting spouse's income to the federal poverty guidelines for the requesting spouse's family size and determine by how much, if at all, the requesting spouse's monthly income exceeds the spouse's reasonable basic monthly living expenses. (Rev. Proc. 2013-34,

§ 4.03(2)(b).) Generally, economic hardship will be established if the requesting spouse's income is below 250 percent of the federal poverty guidelines, or if the requesting spouse's monthly income exceeds his or her reasonable basic monthly living expenses by $300 or less. (*Ibid*.) In determining whether the requesting spouse would suffer economic hardship if relief were not granted, the taxing agency applies rules similar to those developed in Treasury Regulation section 301.6343-1(b)(4), regarding when economic hardship exists for purposes of determining whether to release a tax levy. (Rev. Proc. 2013-34, § 4.03(2)(b).)

Here, appellant failed to establish that she would suffer an economic hardship if relief was not granted. In its Request for Information, the FTB did not ask appellant to provide information showing that she would suffer an economic hardship if she was not granted innocent spouse relief. Nevertheless, FTB states in its brief that appellant may contact FTB if she believes that she meets this requirement and it will provide her with "appropriate paperwork that appellant may complete and submit to respondent." There is no indication in the appeal record that appellant contacted FTB to obtain the appropriate paperwork to establish that she meets this requirement. Furthermore, we provided appellant an opportunity to file a reply brief but she did not do so. We therefore conclude that appellant does not satisfy the economic hardship requirement of section 4.02. She is thus not entitled to a streamlined determination of equitable innocent spouse relief pursuant to section 4.02. We need not discuss the remaining requirements for a streamlined determination of equitable innocent spouse relief under section 4.02.

Section 4.03

If the threshold requirements of section 4.01 are satisfied, but streamlined equitable innocent spouse relief is unavailable under section 4.02, equitable relief from a deficiency may still be available to a requesting spouse based on the following nonexclusive factors set forth in section 4.03 of Revenue Procedure 2013-34: (1) the requesting spouse's marital status; (2) whether the requesting spouse would suffer an economic hardship if relief is not granted; (3) whether the requesting spouse knew or had reason to know of the item giving rise to the understatement or deficiency as of the date the joint return was filed, or the date the requesting spouse reasonably believed the joint return was filed; (4) whether the nonrequesting spouse had a legal obligation to pay the tax liability; (5) whether the requesting spouse significantly benefited from the understatement; (6) whether the requesting spouse has made a good faith effort to comply with the income tax laws in the tax years following the tax year at issue; and (7) whether

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the requesting spouse was in poor mental and physical health at the time the return was filed.

No single factor is determinative, the list of factors is not exhaustive, and the degree of importance of each factor varies depending on the requesting spouse's facts and circumstances. (Rev. Proc. 2013-34, § 4.03(2).) Section 3.05 of Revenue Procedure 2013-34 states that, depending on the facts and circumstances of the case, relief still may be appropriate if the number of factors weighing against relief exceeds the number of factors weighing in favor of relief, or a denial of relief may still be appropriate if the number of factors weighing in favor of relief exceeds the number of factors weighing against relief. (Rev. Proc. 2013-34, § 3.05.) While the guidelines provided by Revenue Procedure 2013-34 are relevant to our inquiry and we consider them below, we are not bound by them as our analysis and determination ultimately turn on an evaluation of all the facts and circumstances. (See *Henson v. Commissioner*, T.C. Memo. 2012-288; *Sriram v. Commissioner*, T.C. Memo. 2012-91.) Equitable relief may be inappropriate even if a simple counting of factors would seem to favor relief, and vice versa. (Rev. Proc. 2013- 34, §§ 3.05 & 4.03(2); *Henson v. Commissioner*, *supra*; *Hudgins v. Commissioner*, T.C. Memo. 2012-260.)

1. Marital status. Appellant and Mr. Salazar were divorced on March 29, 2010. This factor favors relief. (Rev. Proc. 2013-34, § 4.03(2)(a).)
2. Economic hardship. As discussed above, appellant did not establish that she would suffer an economic hardship if relief is not granted. This factor is neutral. (Rev. Proc. 2013-34, § 4.03(2)(b).)
3. Knowledge of the understatement. As discussed above, appellant knew that the early retirement distribution and interest income were omitted from the couple's 2008 return and the wages that Mr. Salazar earned in Arizona during 2008 were subtracted from the couple's California AGI on their 2008 return. This factor weighs against relief. (Rev. Proc. 2013-34, § 4.03(2)(c)(i)(B).)
4. Legal obligation. For purposes of this factor, a legal obligation is an obligation arising from a divorce decree or other legally binding agreement. (Rev. Proc. 2013-34, § 4.03(2)(d).) The couple's March 29, 2010 notarized divorce decree, which was filed with the Arizona court before the 2008 NPAs were issued, is silent as to any obligation to pay the 2008 tax liabilities. There is no other evidence indicating that either spouse had a legal obligation to pay the 2008 tax liabilities pursuant to a legally binding agreement.

This factor is neutral. (Rev. Proc. 2013-34, § 4.03(2)(d).)

5. Significant benefit. The FTB acknowledges—and we agree—that the amount of the tax liabilities for the two deficiencies are small enough such that appellant did not derive a significant benefit from the unpaid taxes. This factor is neutral. (Rev. Proc. 2013-34, § 4.03(2)(e).)
6. Compliance with income tax laws. According to the FTB's records, appellant has not filed any California returns and has no outstanding balances for any tax year following 2008. As discussed above, the evidence indicates that appellant resided and worked in Arizona. The FTB does not contend that appellant had a California filing obligation for any tax year after 2008. It appears that the only reason appellant had a California filing obligation in 2008 was due to Mr. Salazar having been employed by Quebecor in California during 2008. Although the FTB contends that this factor is neutral, we find that this factor weighs in favor of relief. (Rev. Proc. 2013-34, § 4.03(2)(f).)
7. Mental and physical health. Appellant has not alleged that she was in poor mental or physical health at the time she signed the 2008 return or when she requested relief. This factor is neutral. (Rev. Proc. 2013- 34, § 4.03(2)(g).)

In sum, two factors weigh in favor of relief, four are neutral, and one weighs against relief. In our evaluation of the facts and circumstances of this case, we are mindful that Revenue Procedure 2013-34 states: "Actual knowledge of the item giving rise to the understatement or deficiency will not be weighed more heavily than any other factor." (Rev. Proc. 2013- 34, § 4.03(2)(c)(1)(A).) Although we find that appellant had actual knowledge of the items that comprise the two deficiencies, it appears that the couple filed their 2008 return under the belief that it was proper to file a California resident return and include in their California taxable income only the wages that Mr. Salazar earned in California to the exclusion of these other items. Unfortunately, the couple did not contact the FTB after the two NPAs were issued to resolve this matter. Instead, the proposed assessments became final and appellant, who is apparently a resident of Arizona, is requesting innocent spouse relief from two California deficiencies from 2008. If appellant's former spouse had not worked in California during 2008, it appears that appellant would not be liable for California taxes for 2008. Based on the foregoing, we conclude that appellant is entitled to innocent spouse relief for the first deficiency and the portion of the second deficiency that is attributable to Mr. Salazar's wages that were

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subtracted from the couple's California AGI on their 2008 return. Appellant is still liable for the portion of the second deficiency that is attributable to her Arizona wages that was subtracted from the couple's California AGI on their 2008 return, as this amount was attributable to her.

Issue 2: Whether appellant is entitled to court-ordered relief pursuant to R&TC section 19006(b).

Although we grant appellant most of the relief she seeks under the equitable innocent spouse relief provisions of R&TC section 18533(f), we also examine whether she is entitled to greater relief under R&TC section 19006. That section 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. R&TC section 19006(b) provides that joint and several liability may be revised by court order in a marriage dissolution proceeding. R&TC section 19006(b) 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.

Appellant is not entitled to court-ordered relief pursuant to R&TC section 19006(b) because she did not satisfy the statutory requirements: (1) she failed to show that the court with jurisdiction over the couple's divorce proceeding ordered a revision of the 2008 tax liability on income that was not earned by or subject to appellant's exclusive management and control; (2) she did not produce a court order from the couple's divorce proceeding that specifically states

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the income tax liability for each tax year for which a revision of liability was granted; and (3) she did not prove that the FTB was served with or acknowledged receipt of such a court order.

HOLDINGS

1. Appellant is entitled to innocent spouse relief pursuant to R&TC section 18533(f) for the first deficiency and the portion of the second deficiency that is attributable to Mr. Salazar's wages that were subtracted from the couple's California AGI on their 2008 return. Appellant is still liable for the portion of the second deficiency that is attributable to her Arizona wages 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).

DISPOSITION

Appellant is entitled to innocent spouse relief for the first deficiency and the portion of the second deficiency that is attributable to Mr. Salazar's wages that were subtracted from the couple's California AGI on their 2008 return. Appellant is still liable for the portion of the second deficiency that is attributable to her Arizona wages that were subtracted from the couple's California AGI on their 2008 return.

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge

We concur:

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

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Nguyen Dang
4D465973EB44469...
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