

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18124092  
L. LI )  
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**OPINION**

Representing the Parties:

For Appellant: L. Li

For Respondent: Eric R. Brown, Tax Counsel III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, L. Li (appellant) appeals an action by Franchise Tax Board (respondent) denying appellant’s claim for refund for the 2016 tax year.

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

**ISSUES**

1. Whether appellant is entitled to change his filing status from married filing jointly to married filing separately.
2. Whether appellant has demonstrated that an overpayment exists on his 2016 California tax year account.

**FACTUAL FINDINGS**

1. Appellant and his spouse (the couple) timely filed a joint 2016 California return (Form 540), reporting California state wages of \$116,185, California taxable income of \$102,427, tax of \$7,717, total income tax of \$5,679, total payments of \$5,018, use tax of \$5,679, and a use tax balance due of \$657, which was remitted with the return. The couple attached a copy of a 2016 W-2 issued to appellant reporting wages, tips, other compensation of \$116,185.30, and state income tax withholdings of \$5,018.33.

2. In processing the return, respondent noted computational errors with the return and issued the couple a Notice of Tax Return Change – Revised Balance. The notice indicated a corrected total income tax liability of \$2,811, a use tax of \$5,675,<sup>1</sup> and payments totaling \$5,675 (i.e., \$5,018 + \$657).
3. Subsequently, the couple filed a second joint 2016 Form 540 (first amended return), reporting California taxable income of \$101,527, total income tax of \$5,177, total payments of \$6,029, use tax of \$5,679, and an overpayment of \$852.
4. Respondent commenced collection activity based on the originally filed return, pending the processing of the first amended return.
5. In processing the first amended return, respondent noted computational errors with the return and issued the couple a second Notice of Tax Return Change – Revised Balance. Specifically, respondent noted that its records indicated a withholding credit of \$5,018, as opposed to the \$6,029 reported on the first amended return. The notice indicated a corrected total income tax liability of \$2,649, a use tax of \$5,675, and payments totaling \$5,675.
6. The 2016 outstanding liability was paid in full, with a credit balance of \$156.96, which respondent refunded.
7. Thereafter, appellant filed an amended 2016 California return (Form 540X) (second amended return), this time claiming the married filing separately filing status. Appellant reported California taxable income of \$111,156, tax of \$7,350, total tax of \$6,506, total payments of \$13,531 (which includes a reported withholding credit of \$10,371), and an overpayment of \$7,025.
8. In response, respondent sent appellant a letter notifying him that it processed his Form 540X, using the married filing jointly filing status. The letter further notified appellant that respondent denied his claim for refund. Thereafter, appellant filed this timely appeal.

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<sup>1</sup> We note that while the couple reported use tax of \$5,679, as opposed to \$5,675, the \$4 difference on the notice is in appellant's favor.

## DISCUSSION

### Issue 1. Whether appellant is entitled to change his filing status from married filing jointly to married filing separately.

Generally, spouses may not change their filing status from joint to separate after the return filing period has expired. (R&TC, § 18521(e).) For the 2016 tax year, the regular return filing period expired on April 15, 2017. (R&TC, § 18566.) In order to change his filing status, appellant had to amend the joint return prior to April 15, 2017, claiming married filing separately. As appellant did not do so, appellant's filing status for the 2016 tax year may not be changed.

R&TC section 18521 provides that married taxpayers who filed a joint return may elect to file separate returns, after the due date for filing the tax return has passed, if either spouse was a nonresident for the entire taxable year who had no income from a California source. (R&TC, § 18521(c)(2).) The applicability of this exception is limited by California community property laws because an individual's marital property interest in personal property is determined by the laws of the acquiring spouse's domicile. (*Schechter v. Superior Court* (1957) 49 Cal.2d 3, 10; *Rozan v. Rozan* (1957) 49 Cal.2d 322, 326.) Consequently, under California's community property laws, one-half of the resident spouse's salary and income is generally considered to be California source income of the nonresident spouse. (*United States v. Malcolm* (1931) 282 U.S. 792; *United States v. Mitchell* (1971) 403 U.S. 190; *Appeal of Idella I. Browne* (75-SBE-019) 1975 WL 3280.)

Here, the wage income earned by appellant in California is California source income. According to the original and amended tax returns appellant filed for 2016, appellant was domiciled in California during 2016. Appellant states that his spouse was domiciled in Texas during 2016. Appellant's spouse's marital property interest in appellant's wage income is determined by appellant's domicile, California. (*Schechter v. Superior Ct., supra*; *Rozan v. Rozan, supra*.) Thus, pursuant to California's community property laws, one-half of appellant's wage income is considered California source income of appellant's spouse. Accordingly, R&TC section 18521(c)(2) does not apply here because the nonresident spouse had California source income attributed to her during the year.

For the reasons explained above, we find appellant is not entitled to change his 2016 filing status, and that respondent was correct to process the filed returns using the married filing jointly status.

Issue 2. Whether appellant has demonstrated that an overpayment exists on his 2016 California tax year account.

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal.App.4th 1, 22; *Appeal of Estate of Gillespie*, 2018-OTA-052P.) The taxpayer must prove not only that respondent's determination of his tax liability is incorrect but also the correct amount of tax that he owes. (*Appeal of Durley* (82-SBE-154) 1982 WL 11831.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Appellant reported on his second amended return a withholding credit of \$10,371, and total payments of \$13,531. Appellant originally reported on his return a withholding credit of \$5,018, which is consistent with the amount reflected on the 2016 W-2 issued to appellant. While appellant subsequently reported a withholding credit of \$6,029 and \$10,371 on his first and second amended return, respectively, appellant has provided no documentation substantiating either amount. With regard to total payments made, the record reflects appellant remitted payments totaling \$3,847.99,<sup>2</sup> for total payments of \$8,865.99 (i.e., \$5,018.00 + \$3,847.99) for the 2016 tax year. Respondent applied the \$8,865.99 in payments to the couple's 2016 tax account liability of \$8,709.03,<sup>3</sup> and refunded the credit balance of \$156.96. While appellant reported total payments of \$13,531 on the second amended return, appellant has not substantiated this amount.

For the reasons explained above, we find appellant has failed to demonstrate that an overpayment exists.

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<sup>2</sup> This amount consists of: (1) \$657.00 remitted with the original return; (2) \$1,927.59 paid in March 2018; (3) \$156.96 paid in April 2018; and (4) \$1,106.44 paid in April 2018.

<sup>3</sup> This amount consists of: (1) self-reported use tax of \$5,675; (2) income tax liability of \$2,649 (as reflected on the second notice); (3) collection cost recovery fee of \$287; and (4) interest of \$98.03.

HOLDINGS

1. Appellant is not entitled to change his filing status from married filing jointly to married filing separately.
2. Appellant has not demonstrated that an overpayment exists on his 2016 California tax year account.

DISPOSITION

Respondent’s action in denying the claim for refund is sustained.

DocuSigned by:  
*Sheriene Anne Ridenour*  
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 Sheriene Anne Ridenour  
 Administrative Law Judge

We concur:

DocuSigned by:  
*Michael Geary*  
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 Michael Geary  
 Administrative Law Judge

DocuSigned by:  
*Elliott Scott Ewing*  
 2D0DE92EB66E4A6...  
 Elliott Scott Ewing  
 Administrative Law Judge

Date Issued: 2/20/2020