

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
G. CALEGARI

) OTA Case No. 18011320
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OPINION

Representing the Parties:

For Appellant: G. Calegari

For Respondent: Brian Werking, Tax Counsel III

For Office of Tax Appeals: Andrea Long, Tax Counsel

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533, 19006, and 19045,¹ G. Calegari (appellant) appeals the action of the Franchise Tax Board (FTB) denying her innocent spouse relief for tax year 2009. A. Toups (Mr. Toups), the non-requesting spouse, was given the opportunity to join this appeal but waived his right by failing to file an opening brief.

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

ISSUES

1. Whether appellant has established that she is entitled to innocent spouse relief pursuant to R&TC section 18533(f).
2. Whether appellant has established that she is entitled to relief from joint liability pursuant to R&TC section 19006(c).

¹ R&TC sections 18533 and 19006 allow a taxpayer to dispute FTB’s actions on claims for innocent spouse relief under the statutory provisions applicable to protests and appeals, including R&TC section 19045.

FACTUAL FINDINGS

1. Appellant married Mr. Toups in September 2002, separated in March 2011, and divorced on December 6, 2012.
2. The IRS sent the couple a Form 4549 Income Tax Examination Changes (Form 4549) for the 2008 tax year, dated August 12, 2010. The IRS determined that the couple owed additional tax for the 2008 tax year.
3. Approximately two months later, on October 16, 2010, appellant and Mr. Toups (collectively referred to as “the couple”) filed a joint California Resident Return (Form 540) for tax year 2009. The couple reported a tax balance. They did not remit a payment with their return.
4. The couple reported wages earned by appellant during tax year 2009, as well as business income earned by Mr. Toups and reported on Schedule C.
5. FTB received appellant’s request for innocent spouse relief (FTB Form 705) for tax years 2008 and 2009 on June 18, 2015.² Appellant included a letter with her request, stating that Mr. Toups is “solely responsible” for the additional taxes for 2008 and 2009.
6. The marital settlement agreement executed by the couple is silent with respect to how tax debts should be divided.
7. FTB acknowledged receiving appellant’s request for innocent spouse relief and requested that appellant provide additional documentation.
8. In a Non-Requesting Taxpayer Notice, FTB informed Mr. Toups of appellant’s request for innocent spouse relief for 2008 and 2009 and requested relevant information and supporting documents.
9. In separate Notices of Action-Denial dated May 30, 2017, FTB informed appellant and Mr. Toups that it denied appellant’s request for innocent spouse relief under R&TC section 18533(f) for tax year 2009 and lists a 2009 balance due of \$7,293.04.³
10. The IRS granted appellant full relief of the 2008 federal tax liability under separation of liability pursuant to Internal Revenue Code (IRC) section 6015(c).

² Only the 2009 tax year is at issue in this appeal. The 2008 tax year is referenced as it pertains to relevant facts in this appeal.

³ Although appellant requested relief for tax years 2008 and 2009, the Notice of Action denied relief only for 2009. Appellant protested and appealed the denial for tax year 2009. The grant of relief for the 2008 tax year is not at issue in this appeal and we do not address 2008 relief herein.

11. The IRS denied appellant's request for innocent spouse relief for 2009 pursuant to IRC section 6015(f) because she had not established that it would be unfair to hold her jointly responsible for the debt. Specifically, the IRS noted that appellant did not have a reasonable expectation that the tax would or could be paid by Mr. Toups and she did not comply with all the income tax laws for the tax years after the year at issue in her claim.
12. This timely appeal followed FTB's issuance of the Notice of Action-Denial.

DISCUSSION

Issue 1: Whether appellant has established that she is entitled to innocent spouse relief pursuant to R&TC section 18533(f).

General Legal Background Regarding Innocent Spouse Relief under R&TC

Section 18533

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. (IRC, § 6013(d)(3); R&TC, § 19006(b).) However, a joint filer 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; subdivision (c) provides for relief by separation of liability; and, if a requesting spouse is not eligible for relief under 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 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 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 (*Tyler-Griffis*); R&TC, § 18533(g)(2).)

Although subdivisions (b), (c), and (f) of R&TC section 18533 provide three potential avenues for innocent spouse relief, neither subdivision (b) nor (c) is relevant to this appeal because these subdivisions require the existence of a deficiency due to an understatement of tax (rather than an underpayment of reported tax) and the tax year at issue in this appeal does not

involve a deficiency. In addition, R&TC section 18533(i), provides that an individual who has made a joint return and has been granted federal innocent spouse relief under IRC section 6015 may be eligible for relief if certain requirements are met. Subdivision (i) is not relevant to this appeal because the IRS denied federal innocent spouse relief for the tax year at issue. We will therefore limit our discussion of R&TC section 18533 to equitable relief under subdivision (f).

Standard of Review

The standard of review refers to the amount of deference an adjudicatory body gives to an agency or lower court when it reviews its decisions. (*Francel v. Commissioner*, T.C. Memo. 2019-35, at p. *28). The United States Tax Court (Tax Court) has defined a de novo review as one that “entails independent factfinding and legal analysis unmarked by deference to the administrative agency.” (*Wilson v. Commissioner*, T.C. Memo. 2010-134, at p. *4). In the past, the federal courts reviewed determinations under IRC section 6015(b) and (c) under a de novo standard of review and used an abuse of discretion standard of review⁴ for determinations under IRC section 6015(f). (See, e.g., *Cheshire v. Commissioner* (5th Cir. 2002) 282 F.3d 326, 338 [in which IRC section 6015(b), (c), and (f) relief were discussed].)

In the precedential *Tyler-Griffis* decision, Office of Tax Appeal’s (OTA) predecessor, the State Board of Equalization (BOE), followed the Tax Court and applied an abuse of discretion standard to review FTB’s determination under R&TC section 18533(f). Subsequently, in a case commonly referred to as *Porter II*, the Tax Court held that, in light of changes made to the relevant law in 2006, the correct standard of review for equitable relief determinations under IRC section 6015(f) is de novo. (*Porter v. Commissioner* (2009) 132 T.C. 203, 210.) Later, in *Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980 (*Wilson*), the Ninth Circuit Court of Appeals (the Ninth Circuit) agreed with this holding. The Tax Court cases relied upon by the BOE in *Tyler-Griffis* were essentially overruled and as a result, the BOE and the OTA have

⁴ Under an abuse of discretion standard of review, the court looks at the agency’s determination, which generally would stand unless the agency committed a clear error of judgment. (See *McCullough v. Johnson, Rodenburg & Lauinger, LLC* (9th Cir. 2011) 637 F.3d 939, 953).)

consistently extended the holding in *Wilson* to equitable innocent spouse relief cases under R&TC section 18533(f), applying a de novo standard of review.⁵

It is clear to us we must conduct our analysis of this matter using a de novo standard of review. Like the Tax Court, OTA “must be able to compile a de novo record if it is to consider ‘all the facts and circumstances’” when deciding whether a taxpayer is entitled to equitable relief from joint liability, “but it is pointless to do so” if it cannot utilize a de novo standard of review. (*Wilson, supra* at p. 993.) Some evidence may be newly presented and will be considered for the first time (a de novo scope of review), so it makes sense to review the case anew.⁶ There is no dispute that de novo is the correct standard of review for traditional and separation of liability relief determinations under R&TC sections 18533(b) and (c). Based on the same rationale, taxpayers seeking relief under R&TC section 18533(f) should receive similar treatment and thus the same standard of review.

To the extent that *Tyler-Griffis* is inconsistent with this Opinion with respect to the applicable standard of review, it is overturned. Formally removing *Tyler-Griffis*’ precedential status in regards to this issue provides clarity in the law. *Tyler-Griffis* should retain its precedential status in part for the purpose of making clear that federal authority is applied extensively to California innocent spouse cases, but it no longer provides current guidance on the appropriate standard of review.

For the reasons discussed above, we conclude that the de novo standard of review applies to requests made for equitable relief under R&TC section 18533(f). As a result, we conduct a

⁵ In several nonprecedential decisions, the BOE noted that *Wilson* was issued after the close of briefing, and as a result of *Wilson*, concluded that a de novo standard of review applies to all innocent spouse appeals under R&TC section 18533. (*Appeal of Beach* (June 11, 2013) 2013 WL 6831671; *Appeal of Barnett* (July 17, 2013) 2013 WL 7210665; *Appeal of Brown* (June 11, 2013) 2013 WL 6831672.) FTB also expressed its view that de novo standard of review should be applied due to the *Wilson* holding. (*Appeal of Beach, supra*. at p. *14, wherein footnote 7 states, “After the close of briefing, [FTB] informed our Appeals Division staff that it also believes that, as a result of *Wilson, supra*, a de novo standard of review applies. Therefore, there is no dispute on this issue.”)

⁶ The Ninth Circuit also explained that, because IRC section 6015(e) allows the Tax Court to hear a petition for innocent spouse relief without the matter having been decided by the IRS, and therefore “without any administrative record at all, logic dispels the notion that [IRC section] 6015(f) appeals to the Tax Court are reviewable only for an abuse of discretion.”⁶ (*Wilson, supra*, 705 F.3d at p. 993.) In other words, when some requests for innocent spouse relief go directly to the Tax Court, there is no IRS decision to review for an abuse of discretion. It only makes sense that the Tax Court decide that case de novo. Likewise, FTB is deemed to have denied a request for innocent spouse relief if it does not issue a notice of action granting or denying the request within six months after the request was made, and OTA has jurisdiction over that matter without there first being an FTB decision. It logically follows that the scope of review is de novo in these appeals. In the absence of an administrative record, there can be no abuse of discretion standard of review.

de novo review below to determine whether appellant is entitled to equitable innocent spouse review.

Equitable Relief under R&TC Section 18533(f)

R&TC section 18533(f) provides that FTB may relieve a taxpayer from a joint tax liability if: (1) under procedures prescribed by FTB, taking into account all the facts and circumstances, it is inequitable to hold the taxpayer liable for the unpaid tax or understatement; and (2) the taxpayer does not otherwise qualify for traditional or separate liability relief (under subdivisions (b) and (c), respectively). As discussed above, appellant does not qualify for relief under either subdivision (b) or (c).

IRS Guidance Regarding Claims for Equitable Relief

In considering whether, under all the facts and circumstances, it would be inequitable to hold appellant liable for the 2009 underpayment, we look to IRS Revenue Procedure 2013-34, which provides guidelines for the IRS to follow in deciding whether to grant equitable innocent spouse relief.⁷ As explained above, we are guided by the federal interpretation of the federal statute when it is substantially similar to the California statute. (*Douglas, supra*, 48 Cal.App.2d at p. 838). Revenue Procedure 2013-34 sets forth a three-step process for evaluating requests for equitable innocent spouse relief: (1) section⁸ 4.01 lists seven threshold conditions that must be met before the IRS will consider equitable relief; (2) section 4.02 specifies the situation in which IRS will make a streamlined relief determination; and (3) section 4.03 sets forth a list of nonexclusive factors that IRS will consider in determining whether relief should be granted should the requesting spouse not qualify for streamlined relief.

⁷ R&TC section 18533(g)(2) provides that it is the Legislature’s intent that, in construing R&TC section 18533, “any regulations that may be promulgated by the Secretary of the Treasury under [IRC] section 6015 . . . 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].” IRS regulations refer taxpayers to Revenue Procedure 2000-15 (which was a predecessor of Revenue Procedure 2013-34) or other guidance published by the IRS for guidance as to the application of equitable relief. (Treas. Reg. § 1.6015-4(c).) Revenue Procedure 2013-34 provides the current guidance of the IRS with respect to determining whether equitable relief is warranted.

⁸ Unless otherwise specific, “section” from here on refers to a section of Revenue Procedure 2013-34.

Threshold Conditions

There is no dispute that the first six threshold conditions set forth in section 4.01 have been satisfied.⁹ The seventh threshold condition is that 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. In regard to the seventh threshold requirement, FTB concedes that at least a portion of the unpaid liability was earned and attributable to Mr. Toups and, therefore, appellant satisfies each of the threshold conditions for the portion of the tax liability that is not attributable to her.¹⁰

Section 4.02

We next consider whether appellant is entitled to a streamlined determination of equitable innocent spouse relief. Section 4.02 of Revenue Procedure 2013-34 provides the following list of factors which, if met, permit a streamlined determination of equitable innocent spouse relief: (1) the requesting spouse establishes that s/he is no longer married to the non-requesting spouse; (2) the requesting spouse establishes that s/he would suffer economic hardship if relief were not granted; and (3) the requesting spouse establishes that s/he 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.

⁹ The threshold conditions are: (1) the requesting spouse filed a joint return for the taxable year for which s/he seeks relief; (2) relief is not available to him or her under traditional innocent spouse relief or separate allocation (separation of liability) innocent spouse relief; (3) the requesting spouse applies for relief within the applicable statute of limitations for requesting equitable relief; (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) unless an exception applies (e.g., attribution solely due to the operation of community property law, nominal ownership, misappropriation of funds, or abuse or fraud by the non-requesting spouse), the income tax liability from which the requesting spouse seeks relief is attributable to an item of the non-requesting spouse or an underpayment resulting from the non-requesting spouse's income. (Rev. Proc. 2013-34, § 4.01(1)-(7).)

¹⁰ Revenue Procedure 2013-34 states, "If the requesting spouse establishes that he or she was the victim of abuse prior to the time the return was filed, and that, as a result of the prior abuse, the requesting spouse was not able to . . . question the payment of any balance due reported on the return, for fear of the non-requesting spouse's retaliation, the Service will consider granting equitable relief even though the deficiency or underpayment may be attributable in part or in full to an item of the requesting spouse." (Rev. Proc. 2013-34, § 4.01(7)(d).) Though, as discussed below, appellant alluded to financial control and raised alcohol abuse in her federal request for relief, she has not produced evidence to show that any such abuse existed prior to the time the return was filed or that she was prevented from questioning Mr. Toups's assurances of payment of the balance due reported on the return. As such, we will only be discussing whether relief can be granted on the portion of the liability attributable to Mr. Toups.

The first factor is satisfied as the couple divorced as of December 6, 2012. As for the second factor, economic hardship exists if the satisfaction of the tax liability in whole or in part will cause the requesting spouse to be unable to pay reasonable basic living expenses. (Rev. Proc. 2013-34, §§ 4.02(2) and 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 will 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 current 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.*) Further, the taxing agency is directed by the Revenue Procedure to seek additional guidance in Treasury Regulation section 301.6343-1(b)(4), which generally provides circumstances to consider in determining whether to release a tax levy.

Here, the evidence in the record supports a finding that appellant would not suffer an economic hardship if relief is not granted. The information available to us pertains to appellant's 2017 income, and shows that based on appellant's 2017 income, it would not be an economic hardship to hold appellant liable for the tax liability.¹¹ Appellant states that she lives with her minor child. According to the federal poverty guidelines for 2017, the poverty guideline for a household of two is \$16,240 per year. According to Form 8857, Request for Innocent Spouse Relief filed with the IRS, appellant's income far exceeds 250 percent of the federal poverty guidelines.¹² Thus, appellant has not shown that it would be an economic hardship to hold her liable for the tax liability.

The third factor to consider in determining whether streamlined relief is available is whether, when the requesting spouse signed the joint return, s/he had no knowledge or reason to know that the non-requesting spouse would not or could not pay the tax liability at that time or within a reasonable period of time after the filing of the return. If the non-requesting spouse abused (abuse includes physical, psychological, sexual, or emotional abuse) the requesting spouse or maintained control over finances by restricting the requesting spouse's access to

¹¹ The income and expense information for 2017 is the most current information in the record.

¹² Appellant has not substantiated that her monthly income exceeds her monthly expenses by \$300 or less. As such, we do not consider whether appellant's expenses fall within the parameters of what constitutes "reasonable basic monthly living expenses." (Rev. Proc. 2013-34, § 4.03(2)(b).)

financial information, and that because of the abuse or financial control the requesting spouse was not able to challenge the treatment of any item on the return, then the abuse or financial control will result in this factor being satisfied even if the requesting spouse knew or should have known that the requesting spouse would not pay the tax liability when the return was filed.¹³

Appellant contends that Mr. Toups assured her that the taxes would be paid when his pending commission checks cleared the bank. Appellant states that she was unaware that Mr. Toups was paying bills sporadically. Appellant contends that she primarily paid household bills using her own income and thus it was not apparent that Mr. Toups had financial issues. However, appellant has not offered any evidence or supporting documentation to support these contentions. Moreover, appellant has not explained how the health of Mr. Toups's business affects the ability of the couple to pay their joint liabilities, as opposed to business debts, nor why she paid all the household bills, but not taxes. To the contrary, appellant admits that the couple waited until October 2010 to file their 2009 return because they were waiting for commission check(s), yet no payment was remitted with the 2009 return.

The evidence shows that appellant was aware that the couple was having financial difficulties and should have known that taxes were not being paid. On or about August 12, 2010, the couple received federal Form 4549 with a balance due of \$9,424 for the 2008 tax year. The Form 4549 was notice to appellant that the couple had an outstanding federal tax liability. The couple then filed their 2009 California and federal returns approximately two months later. Appellant stated that when the couple filed their 2009 California and federal returns, they were experiencing financial difficulties. On her federal request for relief, appellant indicated that at the time of filing, the household income had been significantly reduced and expenses had increased due to the birth and care for appellant and Mr. Toups's child. At the time of filing the 2009 return, appellant states that Mr. Toups advised her that he would pay the tax when commission checks came in. She was aware that he was not paying the tax liability at the time of

¹³ Appellant's letter to the IRS alludes to financial deceit on the part of the non-requesting spouse, but appellant has not provided us with any information, other than her own unsupported claim, that she was misled about the couple's finances. Appellant's letter to the IRS also claims that Mr. Toups abused alcohol, and provides emails from a therapist the couple saw, which confirm appellant was concerned about Mr. Toups's drinking in 2011. However, this evidence does *not* show that when the 2009 tax return was filed, there existed in the relationship abuse that would have resulted in the knowledge factor being satisfied even if appellant knew or had reason to know Mr. Toups would not pay the tax liability. Appellant has not claimed or shown that Mr. Toups maintained control of the finances by restricting appellant's access to financial information, and that because of such abuse or control, appellant was unable to challenge Mr. Toups's assurances regarding payment of the taxes, for fear of his retaliation. (Rev. Proc. 2013-34, § 4.03(2)(c)(ii).)

filing the return. Appellant also indicated in her appeal letter that Mr. Toups had a history of writing checks with insufficient funds. Because appellant was aware of the weakened financial situation of the household, and because she was aware of Mr. Toups's history of writing checks with insufficient funds, appellant knew or should have known that Mr. Toups would not or could not pay the tax liability at the time of filing the 2009 return or within a reasonable period of time thereafter.

In sum, appellant was aware that the couple owed the IRS payment for the prior tax year, that there was an amount due on the 2009 California return, that no payment was made when the 2009 California return was filed, and that Mr. Toups was writing checks with insufficient funds. Thus, appellant had reason to know that Mr. Toups would not or could not pay the reported 2009 liability at the time of filing the 2009 return or within a reasonable time thereafter.

Accordingly, appellant is not entitled to a streamlined determination of equitable innocent spouse relief.

Section 4.03

If the threshold requirements are satisfied, and streamlined equitable innocent spouse relief is unavailable, equitable relief may be available to a requesting spouse based on the following nonexclusive factors pursuant to 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) the requesting spouse's knowledge or reason to know whether the non-requesting spouse would or could pay the tax liability shown on the return; (4) the non-requesting spouse's legal obligation to pay the tax liability; (5) whether the requesting spouse significantly benefited from the unpaid tax liability; (6) the requesting spouse's compliance with income tax laws in the following tax years; and (7) the requesting spouse's mental and physical health at the time she signed the returns.

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 may still 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. Equitable relief may be

inappropriate even if a simple counting of factors would seem to favor relief. (Rev. Proc. 2013-34, §§ 3.05 & 4.03(2); *Henson v. Commissioner*, T.C. Memo. 2012-288; *Hudgins v. Commissioner*, T.C. Memo. 2012-260.)

(1) Marital status

This factor will weigh in favor of relief if the requesting spouse is no longer married to the non-requesting spouse. (Rev. Proc. 2013-34, §4.03(2)(a).) The couple divorced as of December 6, 2012. This factor favors relief.

(2) Economic hardship

If denying relief from joint and several liability will cause the requesting spouse to suffer economic hardship, this factor will weigh in favor of relief. (Rev. Proc. 2013-34, § 4.04(2)(b).) If a denial of relief will not cause the requesting spouse to suffer economic hardship, this factor will be neutral. (*Ibid.*) As discussed above, the record shows that appellant would not suffer an economic hardship if relief is not granted.¹⁴ This factor is neutral.

(3) Knowledge of the underpayment

In regard to the knowledge factor, when an income tax liability was properly reported but not paid, the question is whether, as of the date the return was filed (or the date the requesting spouse reasonably believed the return was filed), the requesting spouse knew or had reason to know that the non-requesting spouse would not or could not pay the tax liability at the time or within a reasonable period of time after the filing of the return. (Rev. Proc. 2013-34, § 4.03(2)(c)(ii).) It is not reasonable for the requesting spouse to believe that the non-requesting spouse would or could pay the tax liability shown on the return if, for example, appellant knew of her spouse's prior bankruptcies, financial difficulties, or other issues with the IRS or other creditors, or was otherwise aware of difficulties in timely paying bills. (*Ibid.*)

As discussed above in section 4.02, appellant had reason to know that Mr. Toups would not or could not pay the reported 2009 liability at the time of filing the 2009 return or within a reasonable time thereafter. This factor weighs against relief.

¹⁴ The Panel considers the possibility that appellant's financial situation may have changed since she applied for innocent spouse relief. However, if we were to find this factor in favor of appellant, our conclusion, based on the entirety of the facts and circumstances of this appeal, would not have changed. As a result, we are disinclined to burden appellant with a detailed request for updated financial information.

(4) Legal obligation

This factor will weigh in favor of relief if the non-requesting spouse has the sole legal obligation to pay the outstanding tax liability under a divorce decree or a separate agreement. (Rev. Proc. 2013-34, §4.03(2)(d).) This factor will be neutral if the divorce decree or separation agreement is silent as to any obligation to pay the outstanding income tax liability. (*Ibid.*) There is no legally binding agreement assigning the legal obligation to pay the outstanding tax liability to Mr. Toups or appellant. The couple's settlement agreement does not address which party is responsible for the tax liabilities.¹⁵ This factor is neutral.

(5) Significant benefit

FTB concedes that the amount of the 2009 tax liability is small enough (\$5,974) such that neither appellant nor Mr. Toups derived a significant benefit from the unpaid tax. (See Rev. Proc. 2013-34, § 4.03(2)(e).) This factor is neutral.

(6) Compliance with income tax laws

If the requesting spouse is compliant for the taxable years after being divorced from the non-requesting spouse, then this factor will weigh in favor of relief, and if not, then this factor will weigh against relief. (Rev. Proc. 2013-34, § 403(2)(f)(i).) According to FTB's records, appellant timely filed and paid all liabilities for the 2010 through 2017 tax years. This factor weighs in favor of relief.

(7) Mental or physical health

This factor will weigh in favor of relief if the requesting spouse was in poor physical or mental health at the time the return was filed. (Rev. Proc. 2013-34, § 4.03.) The mental or physical health factor is neutral in this case because appellant does not contend, and the evidence does not show, that she suffered from any mental or physical health problem at the time the couple's 2009 return was filed or when she made her request for relief. (Rev. Proc. 2013-34, § 4.03(2)(g).)

¹⁵ The couple's settlement agreement provides that, with respect to the foreclosure sale on the residence, each spouse will be responsible for his or her share of any tax liability incurred. That provision is not relevant to the outstanding tax liability at issue here.

While some factors favor relief and some are neutral, we give great weight to the fact that appellant knew or had reason to know that Mr. Toups would not or could not pay the tax liability reported on the 2009 return. Appellant admits that the couple did not timely file their 2009 return because Mr. Toups was waiting on commission checks to clear the bank. Appellant knew or should have known that based on their financial difficulties Mr. Toups could not or would not pay the tax liability on the 2009 return. Appellant provides no evidence of steps she took to ascertain if and when payments were actually made, and no evidence that she was precluded from doing so. Therefore, we find that appellant is not entitled to equitable relief for any portion of the 2009 tax liability.

Issue 2: Whether appellant has established that she is entitled to relief from joint liability pursuant to R&TC section 19006(c).

An exception to the joint and several liability of joint filers is provided in R&TC section 19006(c). That provision provides that FTB may provide limited equitable relief by revising an unpaid tax liability as to one spouse for the payment of taxes that were reported due on a joint tax return.¹⁶ The liability may be revised only if the spouse whose liability is to be revised establishes that he or she did not know, and had no reason to know, of the nonpayment at the time the return was filed. (R&TC, § 19006(c)(2).) “Reason to know” means whether or not a reasonably prudent person would have reason to know of the nonpayment. (*Ibid.*)

Appellant is not entitled to relief for the 2009 tax liability pursuant to R&TC section 19006(c), because she does not satisfy the statutory requirements. As discussed above, appellant has not established that she did not know, and that she had no reason to know, that Mr. Toups would not or could not pay the tax liability when they filed the 2009 return.


¹⁶ The liability shall not be revised to relieve a spouse of the tax liability on income earned by or subject to the exclusive management and control of that spouse. (R&TC, § 19006(c)(1)(A).) In addition, the liability shall not be revised to relieve a spouse of the liability below the amount actually paid on the liability prior to granting relief. (R&TC, § 19006(c)(1)(B).)

HOLDINGS


1. Appellant has not established that she is entitled to innocent spouse relief pursuant to R&TC section 18533(f).
2. Appellant has not established that she is entitled to relief from joint liability pursuant to R&TC section 19006(c).

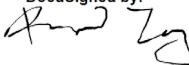
DISPOSITION

FTB’s action denying innocent spouse relief to appellant is sustained.

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 Amanda Vassigh
 Administrative Law Judge

We concur:

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 Teresa A. Stanley
 Administrative Law Judge

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 Richard Tay
 Administrative Law Judge

Date Issued: 10/15/2021