

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
P. PIFER

) OTA Case No. 20096748
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OPINION

Representing the Parties:

For Appellant: P. Pifer

For Respondent: Noel Garcia, Tax Counsel

For Office of Tax Appeals: David Kowalczyk, Tax Counsel

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19045, P. Pifer (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying innocent spouse relief to appellant for the 2013 taxable year.

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

ISSUE

Whether appellant has established that she is entitled to innocent spouse relief.

FACTUAL FINDINGS

1. Appellant and J. Pifer (the couple) were married during 2013 and filed joint 2013 federal (Form 1040) and California (Form 540) personal income tax returns. The couple legally separated and began the divorce process after 2013.
2. During 2013, the couple operated a vocational school, which was formed as a corporation. According to information filed with the California Secretary of State, appellant served as the business’s vice president, CEO, CFO, secretary, and the only director.

3. The sole source of wages for the couple was the vocational school; J. Pifer's occupation was manager, and appellant's occupation was vice president.
4. The IRS examined the couple's 2013 Form 1040, which resulted in an adjustment for additional income of \$112,459 in constructive dividends¹ due to the payment of the couple's personal expenses by the vocational school. Consequently, FTB issued a Notice of Proposed Assessment (NPA), making comparable adjustments to the couple's 2013 Form 540. FTB proposed to assess \$9,792 of additional tax, plus a late filing penalty, and an accuracy related penalty.
5. The NPA went final and FTB commenced collection activity.
6. On July 15, 2019, appellant requested innocent spouse relief for taxable year 2013.
7. FTB then requested appellant to provide a copy of the IRS determination letter and the IRS audit assessment for taxable year 2013. FTB also requested appellant to explain why the couple listed appellant's occupation as vice president on their 2013 federal tax return. FTB did not receive a response from appellant.
8. FTB issued a Notice of Action (NOA) denying appellant's request for traditional innocent spouse relief, separate liability relief, and equitable relief.²

DISCUSSION

Each spouse is jointly and severally liable for the tax on the aggregate income on the return when a joint return is filed. (R&TC, § 19006(b); IRC, § 6013(d).) However, an individual who files a joint return may be relieved of all or a portion of the joint and several liability if the individual qualifies for innocent spouse relief. (R&TC, § 18533(a); IRC, § 6015(a).) The three types of innocent spouse relief that might be applicable in this appeal are traditional innocent spouse relief, separate liability relief, and equitable relief. (R&TC, § 18533(b), (c), (f).)³

¹ It appears that J. Pifer claimed that the IRS determined that appellant received constructive dividends from the vocational school because the IRS disallowed the vocational school's deduction for appellant's personal expenses, the expenditures created an economic benefit for appellant, and appellant was a shareholder of the vocational school. (See *Merifan Woods Products Company v. United States* (9th Cir. 1984) 725 F.2d 1183, 1191.)

² FTB also issued a NOA – Non-Requesting Taxpayer – Denial to J. Pifer.

³ This opinion will not discuss whether appellant has established that she is entitled to conforming relief under R&TC section 18533(i) because the record does not contain evidence establishing that the IRS granted innocent spouse relief.

Treasury Regulations relating to innocent spouse relief shall be applied to the extent that they do not conflict with California's innocent spouse statute or regulations. (R&TC, § 18533(g)(2).) Federal law interpreting a federal statute may be considered highly persuasive when interpreting a California statute that is substantially similar to a federal statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838.)

Determinations denying innocent spouse relief are reviewed *de novo*. (*Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980; *Porter v. Commissioner* (2009) 132 T.C. 203; contra, *Appeal of Tyler-Griffis* (2006-SBE-004) 2006 WL 3768792, which we specifically overrule herein with respect to the issue of *de novo* review.) Generally, an individual claiming innocent spouse relief has the burden of establishing each statutory requirement by a preponderance of the evidence. (*Appeal of Dillett* (85-SBE-012) 1985 WL 15791; *Stevens v. Commissioner*, T.C. Memo. 1988-63.) A taxpayer must provide credible, competent, and relevant evidence to establish each statutory requirement. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not enough to satisfy a taxpayer's burden of proof. (*Ibid.*)

I. Traditional Innocent Spouse Relief

The requesting spouse must satisfy all five requirements of R&TC section 18533(b)(1) to be entitled to relief with respect to an understatement of tax. (R&TC, § 18533(b)(1)(A)-(E); IRC, § 6015(b); Treas. Reg. § 1.6015-2(a).) Here, appellant has failed to satisfy at least one of these requirements – whether the understatement is attributable solely to the non-requesting spouse.

An erroneous item is attributable to the individual whose activities gave rise to such item. (Treas. Reg. § 1.6015-1(f)(1).) The erroneous item must be solely attributable to the non-requesting spouse. (*Work v. Commissioner*, T.C. Memo. 2014-190.) Joint ownership alone does not dictate whether an erroneous item is allocated to both spouses. (*Juell v. Commissioner*, T.C. Memo. 2007-219.) Even where a requesting spouse is listed as a corporate director, relief may be available where the requesting spouse did not actually participate in the business activity. (*Varela v. Commissioner*, T.C. Memo. 2014-222.)

Appellant stated that she was not aware of the couple's tax liability because she did not have access to their financial records, bank accounts, or tax returns. Appellant asserted that she

was a stay-at-home mom, was not involved in the business, did not earn any income, and trusted J. Pifer with their financial obligations.

FTB issued a Non-Requesting Spouse Taxpayer Notice to J. Pifer requesting that he provide more information about the couple's tax liability for taxable year 2013. In response, J. Pifer explained that:

- he and appellant were co-owners of a bartending and casino training business (i.e., the vocational school);
- appellant had knowledge of the business's finances because she was the business's main account holder;
- the couple's federal tax liability was a result of an IRS audit of their business; and
- the IRS disallowed the business's deductions because appellant and J. Pifer used the business's credit cards for personal expenses.⁴

In this appeal, the erroneous items at issue are the constructive dividends. Appellant has not provided an IRS determination letter or any other evidence establishing the circumstances surrounding the federal adjustments. Appellant also has not rebutted J. Pifer's claim that a portion of the federal adjustments resulted from appellant's use of the vocational school's credit cards for her personal expenses. Appellant argues that the understatement is attributable to J. Pifer because she did not earn any income and trusted J. Pifer to make all of their financial decisions. However, the couple reported that appellant earned wages from the business. In addition, appellant was the business's CEO, CFO, vice president, secretary, and director. As such, the evidence suggests that appellant actively participated in running the vocational school.

Therefore, appellant has not shown that the understatement was solely attributable to J. Pifer, and we need not address any of the other four requirements. Thus, appellant has not established that she is entitled to traditional innocent spouse relief.

II. Separate Liability Relief

If an individual who has made a joint return for any taxable year elects separate liability relief, then the individual's liability for any deficiency that is assessed with respect to the return may not exceed the portion of the deficiency that is properly allocable to the individual. (R&TC,

⁴ It appears that J. Pifer claimed that the IRS determined that appellant received constructive dividends from the vocational school because the IRS disallowed the company's deduction for appellant's personal expenses, the expenditures created an economic benefit for appellant, and appellant was a shareholder of the company.

§ 18533(c)(1).) To qualify for separate liability relief, a requesting spouse must establish (in relevant part): (1) that he or she is no longer married to or is legally separated from the joint filer at the time the election is filed, (2) that he or she made an election for separate liability relief no later than two years after the date on which FTB has begun collection activities with respect to the individual making the election, and (3) the portion of any deficiency to allocate to the requesting spouse. (R&TC, § 18533(c)(2), (3)(A)(i)(I), and (3)(B).) Any item giving rise to a deficiency on a joint return shall be allocated to individuals filing the return in the same manner as it would have been allocated if the individuals had filed separate returns for the taxable year. (R&TC, § 18553(d)(3)(A).)

Here, the parties do not dispute that the couple was legally separated at the time appellant timely filed her innocent spouse relief request. However, appellant has not provided evidence showing what portion of the federal adjustments are attributable to her or J. Pifer.

Therefore, appellant has not established that she is entitled to separate liability relief.

III. Equitable Relief

FTB may relieve the requesting spouse from joint and several liability if the requesting spouse does not otherwise qualify for traditional innocent spouse or separate liability relief and it is inequitable to hold the requesting spouse liable for the unpaid tax or understatement after considering all the facts and circumstances. (R&TC, § 18533(f); IRC, § 6015(f).) A requesting spouse must satisfy seven threshold conditions to be eligible for equitable relief. One of those conditions is to show that the income tax liability from which the requesting spouse seeks relief is attributable (in full or in part) to an item of the non-requesting spouse. If the liability is partially attributable to the requesting spouse, then relief can be considered only for the portion of the liability attributable to the non-requesting spouse. However, there may be relief regardless of whether the understatement, deficiency, or underpayment is attributable (in full or in part) to the requesting spouse if any of the following exceptions applies:

- (a) If an item is attributable or partially attributable to the requesting spouse solely due to the operation of community property law.
- (b) If the item is titled in the name of the requesting spouse, the item is presumptively attributable to the requesting spouse; this presumption is rebuttable.

- (c) If the requesting spouse did not know, and had no reason to know, that funds intended for the payment of tax were misappropriated by the non-requesting spouse.
- (d) If the requesting spouse establishes that he or she was the victim of abuse prior to the time the return was filed.
- (e) If the requesting spouse establishes that the non-requesting spouse's fraud was the reason for the erroneous item.

(Rev. Proc. 2013-34, 2013-43 I.R.B. 397, 399; see also IRC, § 6015(f)(1); Treas. Reg. § 1.6015-4(c); *Reilly-Casey v. Commissioner*, T.C. Memo. 2013-292.) If the requesting spouse satisfies the threshold requirements, then the requesting spouse must establish that he or she qualifies for equitable relief under the streamlined determination under section 4.02 of Rev. Proc. 2013-34 or the nonexclusive factors under section 4.03 of Rev. Proc. 2013-34. (Rev. Proc. 2013-34, 2013-43 I.R.B. 397.)

Here, appellant has not established that she is entitled to traditional innocent spouse or separate liability relief, and the parties do not dispute that appellant satisfies the first six threshold conditions. However, appellant has not provided persuasive evidence establishing what portion of the liability is attributable to J. Pifer. Appellant also does not argue that she qualifies for any of the exceptions to the non-requesting spouse attribution condition.

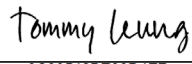
Therefore, appellant has not established that she is entitled to equitable relief.

HOLDING


Appellant has not established that she is entitled to innocent spouse relief.

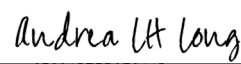
DISPOSITION

FTB’s action is sustained in full.

DocuSigned by:

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Tommy Leung
Administrative Law Judge

We concur:

DocuSigned by:

7B17E958B7C14AC...
Amanda Vassigh
Administrative Law Judge

DocuSigned by:

272945E7B372445...
Andrea L.H. Long
Administrative Law Judge

Date Issued: 10/19/2021