

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

**J.L. SILVA (REQUESTING SPOUSE) AND
J.A. SILVA (NON-REQUESTING SPOUSE)**) OTA Case No. 19064936
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)**OPINION**

Representing the Parties:

For Requesting Spouse: J.L. Silva

For Non-Requesting Spouse: J.A. Silva

For Respondent: David Muradyan, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19045, J.L. Silva (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying innocent spouse relief to appellant for the 2009 tax year. On appeal, FTB now concludes that appellant is entitled to innocent spouse relief for the 2009 tax year. J.A. Silva (Ms. Silva) joins the appeal in opposition to FTB's grant of innocent spouse relief to appellant for the 2009 tax year.

Appellant waived the right to an oral hearing and Ms. Silva did not request an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant is entitled to innocent spouse relief for the 2009 tax year.

FACTUAL FINDINGS

1. As part of its Non-Filer Compliance Program, FTB received information that appellant's spouse, Ms. Silva, had sufficient income for the 2009 tax year such that she had a filing requirement. As such, on January 11, 2011, FTB issued a Demand for Tax Return, requesting that Ms. Silva submit a 2009 California personal income tax return, or explain why she was not required to do so, by February 16, 2011.

2. Having received no response, FTB issued a Notice of Proposed Assessment (NPA) dated March 14, 2011, proposing a tax liability of \$3,038, a late-filing penalty of \$759.50, a demand penalty of \$759.50, a filing enforcement fee of \$1,000.00, and interest of \$141.14.
3. On April 15, 2011, appellant and Ms. Silva (collectively, the couple) filed a joint 2009 California income tax return, reporting a California adjusted gross income (AGI) of \$27,985 and claiming a standard deduction of \$7,274, resulting in a taxable income of \$20,711 and a tax of \$308. The couple also applied exemption credits of \$294, which resulted in a tax liability of \$14.
4. FTB corrected a computational error but otherwise accepted the return as filed, with a total tax due of \$31.
5. The IRS subsequently audited the couple's joint 2009 federal tax return and made adjustments, of which neither appellant nor Ms. Silva informed FTB.
6. On June 9, 2014, the IRS notified FTB of the adjustments made to the couple's 2009 federal income tax return: disallowing Schedule C1 – Other Expenses of \$198,464 claimed by Ms. Silva's real estate business, CA Freedom Realty, and adding a \$7,280 self-employment AGI adjustment, which resulted in a total adjustment of \$191,184.
7. On January 22, 2015, based on the federal information received, FTB issued a second NPA for the 2009 tax year, increasing the couple's taxable income by \$191,184 and proposing an assessment of tax in the amount of \$15,371, a late-filing penalty of \$3,820, plus applicable interest. The couple failed to timely protest, and the NPA went final.
8. FTB initiated collection activities against appellant by issuing a Final Notice before Levy and Lien on July 10, 2015,¹ and to date, received payments totaling \$7,640.02.
9. On June 19, 2018, appellant filed an FTB Form 705, Innocent Joint Filer Relief Request (Request), for the 2009 tax year. According to appellant, he was receiving medical care for his mental health issues in 2009 and Ms. Silva was handling the daily operations of appellant's auto shop business, C&R Auto Electric, and kept appellant away from making

¹ FTB asserts that collection activity began on June 3, 2015. However, the notice issued by FTB on June 3, 2015, was an Income Tax Due Notice (FTB Form 4963), which is a billing notice and does not constitute collection activity.

- important financial decisions.² Appellant also claimed that Ms. Silva falsified his signature on the 2009 joint tax return such that he should be granted equitable relief.
10. FTB issued a “Non-Requesting Taxpayer Notice” to Ms. Silva informing her of appellant’s Request and providing her with an opportunity to respond. Ms. Silva did not provide a response.
 11. On May 17, 2019, FTB issued a Notice of Action (NOA) to appellant, denying his Request. On the same date, FTB issued a separate NOA to Ms. Silva, informing her of the same.
 12. Appellant filed this timely appeal, contending that he was not mentally well to run his business in 2009 and was thus not aware of the tax deficiency. He claims that Ms. Silva handled all the business and financial matters.
 13. On appeal, FTB reversed its position and determined that appellant is entitled to innocent spouse relief under R&TC sections 18533(b), (c), and (f) for the 2009 tax year.
 14. The couple divorced in 2020. The couple has not been living together since 2014. An affidavit signed by appellant’s and Ms. Silva’s adult child states that the child lived with both parents until they separated in 2014.
 15. Ms. Silva subsequently joined the appeal, opposing FTB’s grant of relief to appellant. Ms. Silva contends that appellant was very much involved in the day-to-day dealings of his auto shop business by taking care of his customers, directing his mechanics on the work, ordering parts, and test driving vehicles. Ms. Silva disputes appellant’s claim that she forged his signature on the couple’s 2009 joint tax return. Ms. Silva submitted declarations from her sisters, supporting her contention that appellant had actively participated in running his auto shop business in 2009 and lied about Ms. Silva forging his signature on the joint tax return. The declarations also state that during this period, appellant was mentally unwell and at times did not physically go to work.

DISCUSSION

When a joint return is filed by a husband and wife, each spouse is jointly and severally liable for the entire tax due. (Internal Revenue Code (IRC), § 6013(d)(3); R&TC, § 19006(b).) Federal and California law provides, however, that an individual who files a joint return may be

² Despite appellant’s claim that Ms. Silva was exclusively controlling the finances during the period at issue, he has not furnished any evidence supporting this claim.

relieved of all or a portion of such joint and several liability. (IRC, § 6015; R&TC, § 18533.) For deficiency cases, R&TC section 18533(b) provides for traditional innocent spouse relief; R&TC section 18533(c) provides for separate allocation relief; and, if a requesting spouse is not eligible for relief under R&TC section 18533(b) or (c), a requesting spouse may be eligible for equitable relief under R&TC section 18533(f). (Cf. IRC, § 6015(b), (c), & (f).) The Office of Tax Appeals (OTA) has jurisdiction to review FTB's grant or denial of an individual's request for relief under R&TC section 18533(b), (c), and (f). (See R&TC, § 18533(e).) Determinations are made under R&TC section 18533 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), federal law interpreting the federal statute may be considered highly persuasive with regard to the California statute. (*Appeal of Pifer*, 2021-OTA-338P.) Thus, federal authority is applied extensively in California innocent spouse cases. (See *Appeal of Calegari*, 2021-OTA-337P.) Treasury Regulations are applied in California innocent spouse matters to the extent that such regulations do not conflict with R&TC section 18533 or FTB's regulations. (R&TC, § 18533(g)(2).)

Generally, an individual claiming innocent spouse relief has the burden of establishing each statutory requirement. (*Appeal of Pifer, supra.*) Because the innocent spouse provisions are remedial in nature, they are construed and applied liberally in favor of the individual claiming their benefits. (*Friedman v. Commissioner* (2d Cir. 1995) 53 F.3d 523, 528-529.) Unsupported assertions are not sufficient to satisfy an appellant's burden of proof. (*Appeal of Pifer, supra.*)

Traditional Relief

R&TC section 18533(b) allows relief with respect to an understatement of tax attributable to the erroneous items of the other individual filing the joint return when the requesting spouse meets each of the following requirements:

1. A joint return was filed for the tax year at issue;
2. The return contains an understatement attributable to an erroneous item of the non-requesting spouse;
3. The requesting spouse established that in signing the return, he or she did not know of, and had no reason to know of, the understatement;

4. Taking into account all facts and circumstances, it would be inequitable to hold the requesting spouse liable for the deficiency attributable to the understatement;³ and
5. The requesting spouse files a timely request for relief no later than two years after the date that FTB has begun collection action with respect to the requesting spouse.

(R&TC, § 18533(b)(1).)

The requirements of R&TC section 18533(b) are stated in the conjunctive; a failure to meet any one of them disqualifies an individual from relief. (See *Alt v. Commissioner* (2003) 119 T.C. 306, 313, affd. (6th Cir. 2004) 101 Fed. Appx. 34, cert. denied. (2004) 543 U.S. 1000; *Rogers v. Commissioner*, T.C. Memo. 2021-20.)

Here, OTA finds that appellant failed to satisfy the requirement to file his request for innocent spouse relief within two years after FTB started collection activity with respect to him. Specifically, FTB issued a Final Notice before Levy and Lien on July 10, 2015. To satisfy the timeliness requirement of R&TC section 18533(b), appellant should have filed his request for innocent spouse relief by no later than July 10, 2017. Appellant filed his request for relief on June 19, 2018, more than two years after FTB began its collection activity on appellant's 2009 liability. Because appellant failed to satisfy the timeliness requirement of section 18533(b), the remaining requirements will not be discussed. Appellant is not entitled to traditional relief.

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 the spouses filed separate returns. To qualify for separate liability allocation relief, however, the requesting spouse must satisfy each of the following qualifications:

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, 313, affd. (6th Cir. 2004) 101 Fed.Appx. 34.)

1. At the time the request is filed, the individual requesting relief must no longer be married to, or must be legally separated from, the non-requesting spouse or, alternatively, that individual must not be a member of the same household as the non-requesting spouse at any time during the 12-month period ending on the date he or she files the request for separate allocation relief;
2. Separate allocation relief is not allowable if assets were transferred between individuals filing a joint return as part of a fraudulent scheme by those individuals;
3. The individual requesting separate allocation relief must file a timely request for relief no later than two years after the date FTB has begun collection action with respect to the requesting individual; and
4. If FTB 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).)

Appellant fails to qualify for relief under separate allocation for the same reason he fails to qualify for traditional relief, i.e., he did not file his request for innocent spouse relief with FTB within two years from the date FTB began collection activity with respect to him. That is, instead of filing his request for innocent spouse relief by July 10, 2017, appellant filed his request on June 19, 2018, which is beyond the statutorily allotted time. Because appellant does not satisfy the timeliness requirement, the remaining requirements will not be discussed. Appellant is not entitled to relief under separate allocation.

Equitable relief

R&TC section 18533(f) gives FTB the discretion to provide equitable innocent spouse relief from any unpaid tax or any deficiency when a taxpayer does not qualify for innocent spouse relief under either subdivision (b) or (c). 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 [FTB].” IRS regulations reference Revenue Procedure (Rev. Proc.) 2000-15

(which was a predecessor of Revenue Procedure 2013-34) or “other guidance” published by the Treasury and the IRS in determining eligibility for equitable relief. (Treas. Reg. § 1.6015-4.) Revenue Procedure 2013-34 provides the current guidance of the IRS with respect to determining whether equitable relief is warranted.

Threshold Conditions

Section 4.01 of Revenue Procedure Code 2013-34 provides that a requesting spouse must satisfy each of the following threshold conditions to be eligible to submit a request for equitable relief:

1. The requesting spouse filed a joint return for the tax year for which he seeks relief;
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;
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 non-requesting spouse’s income, unless a specific exception applies.

If the spouse requesting innocent spouse relief cannot satisfy all seven threshold conditions, equitable relief is not available. (*Appeal of Pifer, supra.*)

Here, the couple filed a joint 2009 California income tax return on April 16, 2011, thereby satisfying the first threshold condition.⁴ As discussed above, appellant is not entitled to relief under R&TC section 18533(b) or (c) because he failed to satisfy the statute of limitations requirement, thereby satisfying the second threshold condition. With regard to the third threshold condition, Revenue Procedure 2013-34 provides that the applicable statute of limitations is the collection statute of limitations. California’s collection statute of limitations is 20 years, and appellant timely filed his request for relief with FTB within three years of the commencement of collection activity, i.e., well within the applicable statute of limitations. There is no claim nor dispute as to the fourth, fifth, or sixth threshold condition (i.e., fraudulent transfers of assets, transfers of disqualified assets, and filing the return with fraudulent intent, respectively). As for the seventh threshold condition, according to IRS information, the disallowed claimed expenses giving rise to the tax deficiency here stem from Ms. Silva’s real estate business, CA Freedom Realty, not from appellant’s auto shop business. That is, the income attribution is established based on the federal account transcript finding that the deficiency is wholly attributable to Ms. Silva’s claimed business expenses, thereby satisfying the seventh condition.

Accordingly, there is no dispute that appellant meets each of the threshold requirements, and therefore satisfies section 4.01. If the requesting spouse satisfies the threshold requirements of section 4.01, then the requesting spouse must establish that he or she qualifies for equitable relief under the streamlined determination in section 4.02 of Rev. Proc. 2013-34 or the equitable factors in section 4.03 of Rev. Proc. 2013-34. (Rev. Proc. 2013-34, *supra*.)

Section 4.02

Next, whether appellant is entitled to a streamlined determination of equitable innocent spouse relief needs to be considered. Section 4.02 of Revenue Procedure 2013-34 provides the

⁴ Appellant claims that Ms. Silva forged his signature on the joint return but has not submitted any evidence to support his claim. OTA cannot accept appellant’s unsubstantiated statement that his signature on the 2009 is not genuine. Furthermore, the “tacit consent” rule (see, e.g., *Hennen v. Commissioner* (1961) 35 T.C. 747, 748; *Reifler v. Commissioner* (2013) T.C. Memo. 2013-258; *Harris v. Commissioner* (1961) T.C. Memo. 1961-324) supports the finding that the couple’s 2009 joint return is valid, as the couple has historically filed joint returns, the 2009 joint return contained appellant’s business income from his auto shop, and appellant did not file a separate return. (See *Estate of Campbell v. Commissioner* (1971) 56 T.C. 1, 12; see also *Harrington v. Commissioner* (1994) T.C. Memo. 2012-285.)

following list of factors which, if met, permit a streamlined determination of equitable innocent spouse relief:

1. The requesting spouse is no longer married to the non-requesting spouse as of the date FTB makes its determination⁵;
2. The requesting spouse would suffer economic hardship if relief were not granted; and
3. The requesting spouse did not know or have reason to know that there was an understatement on the return.

An affidavit signed by appellant's and Ms. Silva's adult child states that the child lived with both parents until they "separated in 2014," long before FTB made its determination. An affidavit signed by Ms. Silva's sister states that she lived with appellant and Ms. Silva until "early 2014." Therefore, appellant satisfies the marital status element.

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) & 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 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. (*Ibid.*)

Here, there is no evidence indicating that it would be an economic hardship to hold appellant liable for the 2009 tax liability. Specifically, appellant contends that his "current financial situation and [his] ability to pay the tax liability is limited." However, appellant has not

⁵ Rev. Proc. 2013-34, section 4.02(1) provides the following element: the requesting spouse is no longer married to the non-requesting spouse as set forth in section 4.03(2)(a), which states, the requesting spouse is treated as being no longer married to the non-requesting spouse if they are divorced, legally separated, the requesting spouse is a widow/widower, or the requesting spouse has not lived with the non-requesting spouse for at least 12 months prior to the tax agency's determination.

provided any documentation to substantiate his claim of economic hardship. Therefore, this factor is not satisfied.

As for the third factor, OTA finds that appellant established that he lacked knowledge about the understatement or deficiency on the couple's 2009 joint return. (Rev. Proc. 2013-34, §§ 4.02(3)(a) & 4.03(2)(c)(i).) As discussed above, the item giving rise to the deficiency at issue was the disallowance of the expenses claimed by Ms. Silva's real estate business, in which appellant had no involvement in 2009. Indeed, the affidavit signed by appellant's and Ms. Silva's adult child states that Ms. Silva was working "as a realtor," not appellant. There is no evidence in the record before us that appellant spent any time assisting Ms. Silva in her real estate business, or otherwise had reason to know of the validity of Ms. Silva's business-related expenses. Thus, OTA finds appellant did not have reason to know about the deficiency on the couple's 2009 return.

Given that at least one factor (i.e., the second) has not been established, appellant is not entitled to a streamlined determination of equitable innocent spouse relief under section 4.02.

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;⁶
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 of the date of the joint return was filed;
4. Whether the non-requesting spouse had the sole legal obligation to pay the tax liability pursuant to a divorce decree or other legally binding agreement;
5. Whether the requesting spouse significantly benefited from the understatement or deficiency (beyond normal support);

⁶ See Rev. Proc. 2013-34, § 4.03(2)(a).

6. The requesting spouse's compliance with income tax laws in the following tax years;⁷
7. The requesting spouse's mental and physical health at the time he signed the return.

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).) While the guidelines provided by the Revenue Procedure are relevant to our inquiry, OTA is 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. (Rev. Proc. 2013-34, §§ 3.05 & 4.03(2); *Henson v. Commissioner*, *supra*; *Hudgins v. Commissioner*, T.C. Memo 2012-260.)

Marital Status: The couple has not been living together since 2014. This factor favors relief.

Economic Hardship: As discussed in section 4.02 above, the record does not show that appellant would suffer an economic hardship if relief were not granted. This factor is neutral.

Knowledge of the Understatement: As discussed above, appellant had no reason to know that there was an understatement reported on the return as of the date the return was filed. This factor weighs in favor of relief.

Legal Obligation of Non-Requesting Spouse: There is no legally binding agreement assigning the legal obligation to pay the outstanding tax liability to Ms. Silva. This factor is neutral.

Significant Benefit: The amount of the understatement at issue is \$18,159.45, plus applicable interest. However, the record contains no information indicating that appellant received any benefit in excess of normal support from this understatement. Due to the lack of such information, this factor is neutral.

⁷ Revenue Procedure 2013-34 states: "If the requesting spouse is compliant for tax years after being divorced from the non-requesting spouse, then this factor will weigh in favor of relief. If the requesting spouse is not compliant, then this factor will weigh against relief. If the requesting spouse made a good faith effort to comply with the tax laws but was unable to fully comply, then this factor will be neutral."

Compliance with Income Tax Laws: According to FTB’s records, appellant has filed income tax returns for the 2010, 2011, 2013, 2014, 2015, and 2016 tax years without owing any balance for those years. Given appellant’s good faith effort to comply with the income tax laws following the 2009 tax year, this factor weighs in favor of relief.

Mental or Physical Health: Appellant claims to have suffered from mental health issues in the 2009 tax year such that he was not able to operate his business and submitted a psychiatrist’s letter in support of his claim. However, the psychiatrist’s letter indicates that appellant was under her care from August 2011 onward and was not able to work until July 2014; it does not specifically address appellant’s mental condition in 2009. Absent evidence in the record regarding appellant’s mental or physical health in 2009, this factor is neutral.

In sum, three factors weigh in favor of relief, four factors are neutral, and no factor weighs against granting relief. After considering all the facts and evidence, OTA finds that it would be inequitable to require appellant to be jointly liable for the assessed tax. OTA finds particularly persuasive the fact that the deficiency at issue is entirely attributable to Ms. Silva’s business, and to hold appellant equally liable would be unjust. Therefore, OTA finds that appellant is entitled to equitable relief for the tax liability at issue.

Ms. Silva, in objecting to appellant’s request for innocent spouse relief, contends on appeal that appellant was actively operating his auto shop business during the 2009 tax year and that she did not forge appellant’s signature on the couple’s 2009 joint tax return. Ms. Silva further alleges that appellant “assisted [her] in doing other duties such as lock outs, clean outs, and other tasks required of an REO Agent” but that appellant “did not have good business acumen and on most occasions, due to this and his need to be ‘liked’, he would undercharge customers.” The declarations submitted in support of Ms. Silva’s position similarly state that appellant was able to, and did, actively participate in operating his auto shop business in 2009; these declarations also state that appellant seemed to suffer from mental health and anger issues.

OTA finds Ms. Silva’s arguments unpersuasive, as none of them rebuts the factors for granting equitable relief. Specifically, as discussed above, the item giving rise to the deficiency at issue relates to the disallowance of expenses claimed by Ms. Silva’s real estate business, not appellant’s auto shop business. While Ms. Silva claims that appellant was able to, and did, participate in operating his auto shop business and assisted in some of the business tasks associated with her real estate business, she does not allege nor establish that appellant knew or

had reason to know that the couple’s 2009 joint return erroneously claimed expenses for Ms. Silva’s real estate business. While Ms. Silva states that appellant “continued to benefit from the dual income,” she does not contend, and there is no evidence that shows, that appellant benefited from the understatement of \$18,159.45 in excess of normal support. While she aptly points out that the psychiatrist’s letter fails to describe appellant’s mental condition during 2009, this merely reflects OTA’s finding above that this factor is neutral.

Accordingly, Ms. Silva’s argument that appellant is not entitled to equitable relief is meritless.

HOLDING

Appellant is entitled to innocent spouse relief under R&TC section 18533(f).

DISPOSITION

As conceded by FTB on appeal, its denial of appellant’s request for innocent spouse relief is reversed. Appellant is entitled to innocent spouse relief under R&TC section 18533(f).

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Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

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Ovsep Akopchikyan
Administrative Law Judge

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Huy "Mike" Le
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Administrative Law Judge

Date Issued: 12/22/2022