

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19115466  
)  
**M. THOMAS (REQUESTING SPOUSE) AND** )  
**K. THOMAS (NON-REQUESTING SPOUSE)** )  
)  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For M. Thomas: Keri Firth, Attorney  
For K. Thomas K. Thomas  
For Respondent: Joel M. Smith, Tax Counsel III  
For Office of Tax Appeals: Linda Frenklak, Tax Counsel V

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19045, M. Thomas (MT)<sup>1</sup> appeals an action by respondent Franchise Tax Board (FTB) denying her innocent spouse relief for the 2010 tax year. On appeal, FTB now concludes that MT is entitled to innocent spouse relief for the 2010 tax year. K. Thomas (KT) joins the appeal in opposition to FTB’s grant of innocent spouse relief to MT for the 2010 tax year.

MT waived the right to an oral hearing; therefore, the matter is being decided based on the written record.<sup>2</sup>

**ISSUE**

Whether MT is entitled to innocent spouse relief.

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<sup>1</sup> MT is also known as and sometimes referred to by the Franchise Tax Board (FTB) as M. Martinez. For consistency purposes, the Office of Tax Appeals (OTA) will only refer to her as MT.

<sup>2</sup> KT also did not request an oral hearing.

## FACTUAL FINDINGS

### Tax Return

1. On or about December 2, 2011, MT and KT (collectively, the couple) untimely filed a joint 2010 California Non-Resident or Part-Year Resident Income Tax Return (Form 540NR). The couple reported a total tax of \$338,742. After applying California income tax withholdings of \$771,412, the couple claimed an overpayment of \$432,670. The couple's address on the return is the address of their tax preparer in Pennsylvania. Attached to the return are copies of the 2010 Form W-2 issued by Sacramento Kings LP to KT, KT's Texas driver's license, the Sacramento Kings 2009-2010 game schedule with handwritten notations, a Wikipedia printout about KT's career as a basketball player, a letter to FTB dated November 9, 2011, from a senior tax accountant at the couple's tax preparer's office in Pennsylvania, and a schedule that lists a total of 43 duty days KT performed in 2010, consisting of 22 duty days performed outside of California and 21 duty days performed in California.
2. FTB accepted the couple's 2010 return as filed and remitted a refund of \$432,670 to the couple.

### Audit and Proposed Assessment

3. FTB audited the couple's 2010 return and issued the couple a Notice of Proposed Assessment (NPA) dated January 30, 2015. The NPA is addressed to the couple's tax preparer in Pennsylvania. The NPA proposed additional tax of \$49,820 and a late-filing penalty of \$135, plus interest. The NPA stated that the proposed assessment is due to FTB's determination that KT spent 24 duty days performing services in California as a professional basketball player for the Sacramento Kings out of a total of 43 duty days performed in the 2010 basketball year. FTB determined that the couple underreported their California tax by omitting three duty days KT performed in California.
4. The couple did not protest the NPA, and the NPA became final.

Collection Action

5. FTB sent notices to the couple at their tax preparer's address concerning the 2010 balance due.
6. FTB issued to Wells Fargo Bank in Phoenix, Arizona, an Order to Withhold Personal Income Tax dated April 3, 2019, to withhold funds from MT's account with respect to an amount due for the 2010, 2014, and 2015 tax years. The order lists MT's address as the couple's tax preparer in Pennsylvania.
7. On May 19, 2016, the couple's tax preparer and KT spoke with FTB concerning the NPA. On September 28, 2016, the couple's tax preparer spoke again with FTB concerning the NPA and some submitted documents.

Innocent Spouse Relief Request

8. On April 16, 2019, FTB received MT's completed and signed FTB Form 705 (Request for Innocent Joint Filer Relief). MT requested innocent spouse relief for the 2010 tax year and indicated that the couple divorced in February 2018.<sup>3</sup> Attached to FTB Form 705 is a letter from MT.
9. In letters to MT dated April 23, 2019, and August 21, 2019, FTB acknowledged receipt of MT's request for innocent spouse relief for 2010 and requested a complete copy of MT's divorce court order and the dates of the couple's marriage and separation.
10. In a Non-Requesting Taxpayer Notice dated August 21, 2019, FTB informed KT of MT's request for innocent spouse relief for 2010 and requested relevant information and supporting documents.
11. On September 5, 2019, FTB received KT's written responses to the Non-Requesting Taxpayer Notice. KT indicated that MT received 50 percent of all assets and neither one of them benefited from the unpaid tax liability. KT stated, "It would be fair to hold her liable because she benefited from all money and assets so she should be responsible for the taxes."

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<sup>3</sup> According to a copy of the divorce judgment KT later provided FTB, the marriage terminated on February 12, 2018.

12. In separate Notices of Action – Denial dated October 8, 2019, FTB informed MT<sup>4</sup> and KT that it denied MT’s request for innocent spouse relief under R&TC section 18533(b), (c), and (f), and indicated that there was a 2010 balance due of \$65,995.16.

### Appeal

13. MT filed this timely appeal.<sup>5</sup> MT contends that during the couple’s marriage, “[KT] received all incomes into a private account and held all assets in his sole name,” which “was a form of spousal financial abuse that was devastating,” because she “only learned of the monies’ lost after the divorce disclosures were provided.” MT asserts that during the divorce proceeding, no debt for 2010 was disclosed in the disclosures or the judgment, and she never received a copy of the couple’s 2010 return. MT produced a copy of the household budget sheet from October 1, 2009, to April 11, 2010, which shows that the household spent \$107,489 each month. She asserts that KT and his designated money managers controlled the household budget. MT states that the only funds she knew about were the funds reflected on the household budget sheet, because she “had no access or authorization to access other bank accounts held by [KT].” She states that she obtained a copy of federal income tax records that reflect taxable income far more than the amount of funds presented in the household budget sheet for 2010. MT states that she “received no benefit of these additional funds as they were deemed lost in [KT’s] various business investments,” and she “had no access to these funds and any assets acquired with these funds in 2010 were also not disclosed in his Divorce Declaration of Disclosures.” MT indicates that she first became aware of the 2010 tax liability on April 16, 2019, when she received notice that FTB issued an Order to Withhold Personal Income Tax from her bank account. Lastly, MT states that she is unable to pay the 2010 tax liability due to her current financial circumstances. She asserts that she is unemployed and seeking a job while being the sole provider and caregiver of the couple’s minor child living at home. She indicates that the couple’s older son is in college, and she pays for all his expenses that are not covered by his college account.

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<sup>4</sup> FTB mailed the Notice of Action – Denial to MT at an address in Sacramento, California.

<sup>5</sup> MT appealed by letter dated November 7, 2019, which OTA received on November 12, 2019.

14. On March 1, 2020, MT remitted a payment of \$20,000 to FTB that was applied to the couple's 2010 account balance due.
15. In a letter dated August 17, 2020, FTB requested additional information from MT concerning her request for innocent spouse relief.
16. On September 18, 2020, FTB received MT's written statements in support of her position that she is entitled to innocent spouse relief. MT asserted that during 2010, she was a homemaker with only a high school diploma, she did not earn any income, and she raised the couple's two sons. MT stated that throughout the couple's marriage, she "had NO say in the financial dealings" and in 2010, KT solely handled the financial affairs, they had separate bank accounts and never held a joint account, MT had no authorization of any accounts other than her own account, KT had full control of every account, and KT was the only person who could authorize transfers or withdrawals. (All caps in original.) MT asserted that she did not participate in any financial meetings. With respect to the 2010 joint return, MT stated that she was not involved in the preparation of any return, she never had any conversations with KT about any joint return, she had no income to report, she was not involved in the hiring of the tax preparer and had no conversations with him, and she only reviewed the spelling of her first and last name on the 2010 joint return. MT contended that the 2010 tax liability was never brought to her attention during the couple's divorce proceedings. MT submitted a copy of her 2010 federal wage and income transcript, which only shows interest income of \$11, and a letter from Bank of America dated January 10, 2020, which indicates that the bank no longer has statement records for the checking account that MT held in 2010.
17. FTB sent separate letters to MT and KT dated January 21, 2021, informing each of them that, based on the information MT provided on appeal, FTB was revising its position and granting MT innocent spouse relief under R&TC section 18533(b). In addition, FTB stated that if the Office of Tax Appeals (OTA) sustains its revised position, MT will be entitled to a refund and/or credit of her payment of \$20,000.
18. KT subsequently joined the appeal by opposing FTB's grant of relief to MT. KT asserts that no documents were attached to FTB's January 21, 2021 letter, FTB's original position should be considered final and not subject to reconsideration pursuant to R&TC

section 18533(e)(3)(B), and MT's appeal is untimely under R&TC section 18533(e)(1)(A)(ii).

19. During the appeal, KT was provided copies of MT's appeal letter and FTB's brief, including the information and documents that MT submitted to FTB on appeal that caused FTB to revise its position and grant MT innocent spouse relief. In addition, OTA requested additional briefing from KT and FTB. KT was requested to provide relevant information and documents that support his position on appeal. FTB was requested to identify the factors that support its determination on appeal that MT satisfies the inequities requirement under R&TC section 18533(b). KT did not submit an additional brief. In a memorandum dated March 14, 2022, FTB provided the requested information to OTA. Subsequently, MT and KT were provided an opportunity to submit responsive briefs but neither one elected to do so.

## DISCUSSION

### General Legal Background Regarding Innocent Spouse Relief

When a joint return is filed by spouses, 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 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).) 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. (*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 Calegari*, 2021-OTA-337P.) The 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).) Moreover, in determining whether an individual is entitled to relief under R&TC section 18533(b), (c), or (f), the proper standard and scope of review is *de novo*.<sup>6</sup> (*Appeal of Calegari, supra; Porter v. Commissioner* (2009) 132 T.C. 203, 210; *Thomassen v. Commissioner*, T.C. Memo. 2011-88.)

Generally, an individual claiming innocent spouse relief has the burden of establishing each statutory requirement. (*Appeal of Pifer*, 2021-OTA-33P.) 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.) FTB's determinations are presumed to be correct, a taxpayer generally bears the burden of proving error in FTB's determinations, and unsupported assertions are not sufficient to satisfy the burden of proof. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Davis and Hunter-Davis*, 2020-OTA-182P.)

#### Traditional 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 that he or she satisfies each 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-requesting 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 when he or she signed the joint return; (4) taking into account all of the 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 FTB has begun collection action with respect to the individual. The requirements of R&TC section 18533(b) are stated in the conjunctive; a failure to meet any one

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<sup>6</sup> The Taxpayer First Act (Act), Pub. L. 116-25, section 1203, 133 Stat. 985, 988 (2019), added IRC section 6015(e)(7) and (f)(2). IRC section 6015(e)(7) provides that the United States Tax Court's review of the IRS's determination of a request for relief under IRC section 6015(b), (c), or (f) shall be made *de novo* and shall be based on "(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence." Congress specified that the amendments effected by section 1203(b) of the Act "shall apply to petitions or requests filed or pending on or after the date of the enactment of this Act," which was July 1, 2019. IRC section 6015(e)(7) does not apply to OTA's review of FTB's determinations of requests for relief under R&TC section 18533(b), (c), or (f).

of them disqualifies an individual from relief. (*Alt v. Commissioner* (2003) 119 T.C. 306, 313, affd. (6th Cir. 2004) 101 Fed.Appx. 34, cert. den. (2004) 543 U.S. 1000; *Rogers v. Commissioner*, T.C. Memo. 2021-20.)

Here, MT satisfies the joint return and the timely election requirements. The couple filed a joint 2010 return. MT filed her FTB Form 705 on April 16, 2019, within two weeks after FTB began collection action with respect to MT by issuing the April 3, 2019 Order to Withhold Personal Income Tax from MT's bank account to satisfy the couple's 2010 tax liability.

MT satisfies the income attribution requirement. Generally, an erroneous item is attributed to the individual whose activities gave rise to the item. (Treas. Reg. § 1.6015-1(f)(1).) The NPA explained that the understatement of tax is based on FTB's determination that KT spent 24 duty days performing services for the Sacramento Kings in California out of 43 total duty days in the 2010 basketball year.

As for the knowledge requirement, a requesting spouse knows or has reason to know of an understatement of tax if, at the time he or she signed the joint return, he or she had actual knowledge of the understatement, or if a reasonable person in similar circumstances would have known of the understatement of tax. (Treas. Reg. § 1.6015-2(c); see also *Hopkins v. Commissioner* (2003) 121 T.C. 73, 77; *Busch v. Commissioner*, T.C. Memo. 2017-169.) 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 reported 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*, T.C. Memo. 2013-24.)

As reflected on the duty days schedule attached to the return, the 2010 joint return reported California tax based on KT having spent 21 duty days performing as a basketball player in California out of a total of 43 duty days performing in the 2010 basketball year; whereas, FTB determined, as reflected on the NPA, that KT spent 24 duty days performing as a basketball player in California out of a total of 43 duty days in the 2010 basketball year. Clearly, MT did



not participate in KT's basketball playing activities that resulted in the erroneous reporting of the number of his duty days in California during 2010. The number of underreported duty days (3) is small relative to the total number of duty days at issue (43). KT does not contend that MT knew or should have known that the number of his duty days performing as a basketball player in California in 2010 reported on the 2010 joint return was underreported by three duty days. Nor does KT dispute MT's assertions that she was not involved in the hiring of the tax preparer who prepared and filed the 2010 joint return without her review and approval, she did not have any conversations with KT concerning the 2010 joint return, and she only reviewed the spelling of her name on the 2010 joint return. Furthermore, KT does not dispute that MT has no higher education than a high school diploma and she lacked any relevant business experience. At the time she signed the 2010 joint return, MT did not know or have reason to know that the return underreported three duty days that KT worked as a professional basketball player in California during 2010. MT thus satisfies the knowledge requirement.

As for the equity requirement, all of the facts and circumstances are considered in determining whether it would be inequitable to hold a requesting spouse jointly and severally liable for an understatement of tax. (Treas. Reg. § 1.6015-2(d).) The Treasury Regulations under IRC section 6015(b) identify the relevant factors as whether: (1) the requesting spouse significantly benefited, directly or indirectly, from the understatement;<sup>7</sup> (2) the non-requesting spouse has deserted the requesting spouse; (3) the spouses are divorced or separated; and (4) the requesting spouse received a benefit on the return from the understatement. (Treas. Reg. § 1.6015-2(d).) Guidance concerning the criteria to be used in determining whether the requesting spouse satisfies the inequity requirement under R&TC section 18533(b) may also be found in Revenue Procedure 2013-34.<sup>8</sup> (*Ibid.*) As relevant to this appeal, Revenue Procedure 2013-34 provides that if the non-requesting spouse maintained financial control over the household finances by restricting the requesting spouse's access to financial information, this is a

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<sup>7</sup> A significant benefit is any benefit in excess of normal support. (Treas. Reg. § 1.6015-2(d).)

<sup>8</sup> Essentially, the same language appears in the equities test of R&TC section 18533(b)(1)(D) and (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*, *supra*, (2002) 119 T.C. 306, 316, *affd.* (6th Cir. 2004) 101 Fed.Appx. 34, cert. den. (2004) 543 U.S. 1000; *Butler v. Commissioner* (2000) 114 T.C. 276, 291.)

factor that may impact the other factors in favor of granting the requesting spouse innocent spouse relief. (Rev. Proc. 2013-34, § 4.03(2), 2013-43 I.R.B. 397.)

MT satisfies the inequity requirement. Considering the facts and circumstances presented on appeal, it would be inequitable to hold MT liable for the deficiency in tax attributable to the underreporting of KT's duty days performing in California as a basketball player. The erroneous item is attributable to KT, and MT had no actual or constructive knowledge of this erroneous item when she signed the couple's 2010 return. There is no evidence indicating that MT significantly benefitted from the understatement of tax of \$49,820, especially if she only had access to the money KT deposited into a checking account to pay for household expenses. KT stated in his responses to the Non-Requesting Taxpayer Notice that neither he nor MT benefitted from the tax liability. Furthermore, MT indicates that KT failed to disclose the 2010 tax liability during the couple's divorce proceedings, and she was not aware of it until April 2019, when FTB commenced collection action against her. The couple's February 12, 2018 divorce judgment supports MT's statement, as it is silent with respect to the 2010 tax liability. It thus appears that KT concealed the couple's 2010 tax liability, which prevented the divorce court from considering whether KT should be assigned the sole legal obligation to pay this marital debt. The couple is now divorced, and MT contends that she is unable to pay the couple's 2010 tax liability due to her current financial circumstances.

Next, OTA addresses KT's argument that MT's appeal is untimely because it was not submitted to OTA within the time set forth in R&TC section 18533(e)(1)(A)(ii). On October 8, 2019, FTB mailed to MT and KT separate Notices of Action – Denial, stating that it denied MT's request for innocent spouse relief. FTB mailed the Notice of Action – Denial to MT at an address in Sacramento, California. MT was required to submit an appeal with OTA within 30 days from October 8, 2019, the date that FTB mailed her the Notice of Action – Denial. (R&TC, § 18533(e)(1)(A)(iii).) When the notice being appealed was mailed to an address within California the deadline for submitting an appeal via mail is extended by five days pursuant to Code of Civil Procedure section 1013(a). (Cal. Code Regs., tit. 18, § 30204(a).) OTA accepted MT's letter dated November 7, 2019, which OTA received on November 12, 2019, as an appeal based on FTB's Notice of Action – Denial dated October 8, 2019. Therefore, MT submitted a timely appeal with OTA.

Citing R&TC section 18533(e), KT also argues that FTB’s original determination to deny MT innocent spouse relief “should be considered final and should not be subject to reconsideration.” KT may be relying on R&TC section 18533(e)(3)(B), which provides that “if a decision of the board in any prior proceeding for the same taxable year” concerning a request for innocent spouse relief under R&TC section 18533(b), (c), or (f) “has become final, that decision shall be conclusive . . . .” KT may be incorrectly assuming that this statutory provision is referring to FTB as “the board.” For purposes of R&TC section 18533, R&TC section 17003 defines “Board” as the Board of Equalization. Currently, “Board,” as defined in R&TC section 17003, refers to OTA.<sup>9</sup> After FTB separately notified MT and KT that it changed its position on appeal and provided KT 30 days to file an appeal with OTA, KT filed a brief with OTA and thereby joined this appeal. There is no merit to KT’s argument.

OTA concludes that MT is entitled to innocent spouse relief under R&TC section 18533(b). Accordingly, OTA need not address whether she is also entitled to relief under R&TC section 18533(c) or (f).

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<sup>9</sup> As of July 1, 2017, most of the duties performed by the Board of Equalization were transferred to the newly created California Department of Tax and Fee Administration and OTA pursuant to Assembly Bill 102, The Taxpayer Transparency and Fairness Act of 2017, and as amended by Assembly Bill 131 (2017-18 Reg. Sess.). (See also R&TC, § 20(b).)

HOLDING

MT is entitled to innocent spouse relief pursuant to R&TC section 18533(b).

DISPOSITION

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

DocuSigned by:

*Sheriene Anne Ridenour*

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Sheriene Anne Ridenour  
Administrative Law Judge

We concur:

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*Andrea L.H. Long*

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Andrea L.H. Long  
Administrative Law Judge

DocuSigned by:

*Ovsep Akopchikyan*

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Ovsep Akopchikyan  
Administrative Law Judge

Date Issued: 1/5/2023