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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 21057758
J. RINDLISBACHER[1]	

OPINION

Representing the Parties:

For Appellant: Anastasia Martyanova, Tax Appeals Assistance Program (TAAP)[2]

For Respondent: Joel Smith, Tax Counsel III

For Office of Tax Appeals: David Kowalczyk, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19045, J. Rindlisbacher (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying innocent spouse relief to appellant for the 2016 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Huy "Mike" Le, and Sara A. Hosey held an oral hearing for this matter in Sacramento, California, on October 18, 2022. At the conclusion of the hearing, the record was kept open to allow additional post-hearing briefing, and this matter was submitted for an opinion on March 24, 2023.

ISSUE

Whether appellant has established that he is entitled to innocent spouse relief pursuant to R&TC section 18533(b), (c), or (f).

[1] Appellant's former spouse did not participate in this appeal, but rather filed a separate request for innocent spouse relief with FTB, which is currently under review. The resolution of this appeal is not contingent on FTB's determination of the former spouse's request with FTB.

[2] Appellant filed his opening brief, and Susana Durgaryan of TAAP filed appellant's reply brief.

FACTUAL FINDINGS

1. For tax year 2016, appellant received wages of $80,000 from his employer reported on a Form W-2. The non-requesting spouse (appellant's former spouse) received wages of $97,574 reported on a Form W-2, and third-party sick pay of $1,606 from an insurance company reported on a Form W-2.[3]
2. On April 15, 2017, appellant and his former spouse (the couple) filed a joint California Resident Income Tax Return (Form 540) for tax year 2016. The return reported $179,180 of wages ($80,000 + $97,574 + $1,606) and subtracted wages of $97,574 on Schedule CA as a California adjustment, resulting in California Adjusted Gross Income (AGI) of $80,999.[4] The return reported total tax of $2,020, withholdings of $9,694, and requested a refund of $7,674.[5]
3. On June 2, 2018, the couple agreed on how to allocate their assets and property prior to the dissolution of their marriage in an Allocation of Assets and Property Agreement (Agreement). The Agreement states that "[a]ll individual debts, loans, and financial obligations entered into by each party shall remain the sole responsibility of that party." The Agreement states that "[a]ll current obligations in which both parties have entered into together will remain the responsibility of both parties equally." In addition, the Agreement states that "[t]he two parties shared joint bank accounts for common expenses" and that appellant's former spouse "has suspended any further contributions to these accounts…."
4. On January 11, 2019, the Solano Superior Court finalized the couple's divorce.
5. On May 15, 2020, FTB issued a Notice of Proposed Assessment (NPA) proposing to assess $8,444 of additional tax, plus applicable interest, based on its determination that the return erroneously subtracted wages of $97,574. The NPA stated that a protest must be received by July 14, 2020.

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[3] In general, third-party sick pay is excluded from gross income when the premiums are paid by an employee; however, third-party sick pay is includable in gross income to the extent the accident or health insurance premiums for personal injury or sickness are paid by an employer. (IRC, §§ 104(a)(3), 105(a); R&TC, § 17131.)

[4] This amount is equal to wages of $80,000 and $1,606 plus dividends of $43, less a retirement contribution deduction of $650. The dividend income and retirement contribution deduction are not at issue in this appeal.

[5] The filed return included copies of the Forms W-2.

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6. Correspondence from June 2020 indicates that appellant asked his former spouse the reason for the proposed assessment, and whether the former spouse knew if the proposed assessment was related to an error as to the former spouse's disability payments. No responses from the former spouse are shown in the record.
7. Correspondence between appellant and a tax preparer shows that appellant contacted the tax preparer for assistance prior to the NPA protest due date. The tax preparer stated they were going to attempt to contact the former spouse and that the tax preparer was "hoping he calls me back."
8. The couple did not timely protest the NPA and it became a final liability.
9. On July 17, 2020, in a response to a request by appellant, TurboTax explained in a letter that the return subtracted the former spouse's wages because the wages were marked as paid family leave, which is not taxable under California law.[6]
10. The couple filed an amended return on August 10, 2020, which included the previously excluded wages.
11. Appellant filed an innocent spouse relief request with FTB, explaining that his former spouse subtracted his wages from California taxable income on their return. Appellant explained that the former spouse did not initially cooperate with appellant to resolve their tax liability, but the couple filed an amended tax return through a tax preparer to include the former spouse's wages, though appellant did not speak with his former spouse.
12. FTB issued a State Income Tax Balance Due Notice to appellant for a total liability of $9,783.13, which is comprised of tax of $10,464.00 and interest of $1,339.13, less payments of $2,020.00.
13. Appellant's former spouse made a $4,894 payment towards the couple's tax liability.[7]
14. On April 13, 2021, FTB denied appellant's innocent spouse relief request.
15. Appellant timely filed this appeal.

[6] Paid family leave payments are treated as unemployment compensation paid pursuant to a governmental program and are excluded from gross income for California purposes, but not for federal purposes. (R&TC, § 17083.)

[7] FTB issued an Intent to Offset Federal Payments to appellant for the remaining $5,007.20. As of May 27, 2021, appellant and the former spouse's account balance was $5,044.79.

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16. On appeal, appellant provided the couple's joint bank account statements for the 2016 tax year from September 20, 2016, to December 31, 2016, which show deposits from the former spouse totaling $3,462.58, which is comprised of $1,000.00 on both September 22 and October 6; $317.78 on November 17; $1,000.00 on December 1; and $144.80 on December 15.[8]
17. Appellant provided a Notice of Deficiency and Audit Change dated October 18, 2018, showing the Utah State Tax Commission revised the couple's 2014 federal adjusted gross income to correct unreported income of $8,908.[9] In addition, the couple's 2014 federal account transcript shows the IRS assessed additional federal tax on May 15, 2017, and payment was made on June 5, 2017.
18. A letter dated July 6, 2021, from appellant to his former spouse, states that appellant was contacted by the Utah State Tax Commission as to the outstanding assessment, and that there is a tax lien filed. The letter states that appellant was unaware of the reasons for the federal and Utah deficiencies and asks his former spouse for an explanation. The letter states that appellant paid the federal deficiency and will pay the Utah deficiency if his former spouse immediately pays the other half.

DISCUSSION

General Legal Background Regarding Innocent Spouse Relief

When a joint return is filed, each spouse is jointly and severally liable for the tax on the aggregate income on the return. (R&TC, § 19006(b); Internal Revenue Code (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).) R&TC section 18533(b) provides for traditional innocent spouse relief; R&TC section 18533(c) provides for relief by separation of liability; 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).) Determinations under R&TC section 18533 are made without regard to community property laws. (R&TC,

[8] On the bank statements, the deposits are accompanied by a notation of the name of the former spouse's employer.

[9] The underreported amounts are shown to be related to amounts on Forms 1099-R, a Form-1099-MSA, a Form 1099-DIV, and a Schedule K-1.

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§ 18533(a)(2).) The Treasury Regulations shall be applied to the extent that they do not conflict with California's innocent spouse statute or regulations. (R&TC, § 18533(g)(2).)

Determinations denying innocent spouse relief are reviewed de novo. (*Appeal of Pifer*, 2021-OTA-338P.) Generally, an individual claiming innocent spouse relief has the burden of establishing each statutory requirement by a preponderance of the evidence. (*Ibid*.) A taxpayer must provide uncontradicted, credible, competent, and relevant evidence to establish each statutory requirement. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Traditional Innocent Spouse Relief – R&TC section 18533(b)

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. Relief under R&TC section 18533(b) may be allowed if the individual can show he or she satisfies all 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 of tax when he or she signed the joint return; (4) taking into account all 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 FTB has begun collection action with respect to the individual. A failure to meet any one of the requirements disqualifies an individual from relief. (*Appeal of Pifer*, *supra*.)

The issues in dispute are the third and fourth requirements: whether appellant did not know or have reason to know when signing the return of the understatement of tax, and whether it is inequitable to hold appellant liable.[10]

Appellant testified during the hearing that the return was simple, and when preparing the return, he entered his Form W-2 information himself, and his former spouse then entered the former spouse's information. Appellant stated that his former spouse changed the former spouse's wages to paid family leave after appellant entered his information. Appellant stated

[10] Appellant meets the first requirement because the couple filed a valid joint return for the 2016 tax year. Appellant meets the second requirement because the deficiency assessment is attributable to the former spouse's wages. (See Treas. Reg. § 1.6015–3(d)(2)(iii) ["Erroneous items of income are allocated to the spouse who was the source of the income"].) Appellant meets the fifth requirement because he timely filed his request for relief.

that, after they entered their information, he saw that the return showed approximately $8,000 owed to the IRS and an $8,000 refund due from FTB. Appellant stated that, during 2016, his former spouse suffered medical issues and was out of work for a number of months, and that the former spouse was receiving payments from multiple sources, including his employer, and disability insurance he may have had. Appellant stated that his former spouse was also receiving paid time off donated to him through coworkers.

Appellant testified that he is from Utah and not familiar with the California tax code, especially disability and insurance payments. Appellant stated that his former spouse told him that he had been discussing with his employer's human resources department about what information to include on his return. Appellant stated that his former spouse's pay varied because he was an hourly employee. Appellant stated that they had a joint bank account where they both deposited $2,000 per month to cover mutual expenses, but there were times his former spouse deposited less because his income fluctuated. Appellant stated that he had no access or means to verify his former spouse's tax documentation, such as the Form W-2. Appellant stated that he could have had access if he had asked his former spouse, but did not need to because he trusted his former spouse. Appellant stated that, for the 2014 tax year, his former spouse previously received distributions from his 401k and did not report the income. Appellant testified that he paid the amount owed to the IRS for that year.

Knowledge or Reason to Know

A requesting spouse has knowledge or reason to know of an understatement if he or she actually knew of the understatement or if a reasonable person in similar circumstances, at the time he or she signed the return, could be expected to know that the return contained an understatement. (Treas. Reg. § 1.6015-2(c).) In determining whether a requesting spouse knew or had reason to know of an understatement, all of the facts and circumstances are considered, including, but not limited to: (1) the nature of the erroneous item and the amount of the erroneous item relative to other items; (2) the couple's financial situation; (3) the requesting spouse's educational background and business experience; (4) the extent of the requesting spouse's participation in the activity that resulted in the erroneous item; (5) whether the requesting spouse failed to inquire, at or before the time the joint return was signed, about items on the joint return or omitted from the joint return that a reasonable person would question; and

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(6) whether the erroneous item represented a departure from a recurring pattern reflected in prior years' joint returns. (*Ibid.*)

A spouse has reason to know if a reasonably prudent taxpayer could have been expected to know that the return contained an understatement. (*Busch v. Commissioner*, T.C. Memo. 2017-169.) A requesting spouse does not meet his or her burden of proof under R&TC section 18533(b) if at the time he or she signed the joint return, he or she had a duty to inquire or investigate further. (*Tompkins v. Commissioner*, T.C. Memo. 2013-24.) A requesting spouse has a duty to inquire when he or she knows enough facts to put him or her on notice that an understatement exists. (*Ibid.*) A taxpayer who signs a return without reading it is charged with constructive knowledge of its contents. (*Hayman v. Commissioner* (1993) 992 F.2d 1256, 1262.) In *Muhn v. Commissioner*, T.C. Memo. 1997-534, the court stated that, although the petitioner might not have been aware of the amount of compensation received by her husband from his employer or where those amounts were going, she certainly was aware that he was employed and earned income, and even a cursory examination of the tax return would have alerted the petitioner that her husband's compensation was not reported.

Appellant asserts that, after the return was prepared, he did not question his former spouse as to the accuracy of the return. Appellant contends that, even if he suspected there was an error and confronted his former spouse, there is no reason to believe he would have doubted his former spouse's responses, or that his former spouse would provide honest responses given the history of financial deceit.

Appellant had sufficient knowledge of the facts underlying the wages that a reasonably prudent taxpayer in his position would question the legitimacy of the exclusion. (See *Price v. Commissioner* (9th Cir. 1989) 887 F.2d 959, 965.) As stated by appellant, the information on the return was simple; there were only three amounts entered as income, two were wages, and the third was third-party sick pay. A cursory glance at the first page of the California return would have shown that all of the former spouse's wages, a significant amount totaling more than $97,000, were excluded from California AGI. Appellant was aware that his former spouse earned wages and joint bank account statements show deposits from his former spouse's employer. While appellant asserts that he is not knowledgeable in tax, it does not take a tax expert to know that wages are generally taxable, as appellant earned wages himself, and a

reasonable person in this situation would have questioned why all of his former spouse's wages were removed.

Appellant asserts that he believed his former spouse was receiving payments related to disability or paid family leave. However, appellant's duty to inquire is not relieved by the possibility of paid family leave or disability payments, as these sources do not sufficiently explain why an exclusion of 100 percent of his former spouse's wages was appropriate. The size of the exclusion, together with appellant's knowledge that his former spouse earned wages during the 2016 tax year, was enough to put him on notice. (See *Price v. Commissioner*, *supra*, 887 F.2d at p. 966.) Therefore, appellant has not established that he did not know of and had no reason to know of the understatement of tax when he signed the joint return. Appellant has not established that he meets the third requirement of knowledge; therefore, FTB's denial of R&TC section 18533(b) relief was proper.

Separate Liability Allocation Relief – R&TC section 18533(c)

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 the following qualifications. First, 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. (R&TC, § 18533(c)(3)(A)(i).) Second, 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. (R&TC, § 18533(c)(3)(A)(ii).) Third, 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. (R&TC, § 18533(c)(3)(B).)

Lastly, 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)(C).) In determining whether an individual is entitled to separate liability allocation relief under R&TC section 18533(c), the proper standard and scope of review is de novo. (See *Appeal of Calegari*, 2021-OTA-337P.) Except with regard to whether appellant had knowledge of the erroneous item that gave rise to the assessment at issue, appellant has the burden of proof. (Treas. Reg. § 1.6015-3(c)(2)(i).) FTB must establish by a preponderance of the evidence that appellant had actual knowledge of the erroneous item. (*Ibid.*)

All of the income that gave rise to the deficiency would have been appellant's former spouse's income had the couple filed separate returns. In addition, appellant meets the first requirement because he requested innocent spouse relief on August 13, 2020, more than 12 months after the couple's marriage ended. Appellant meets the second requirement because assets were not transferred as part of a fraudulent scheme. Appellant meets the third requirement because he timely filed his request. As a result, the only remaining issue is whether FTB has established that appellant had actual knowledge of the erroneous item that gave rise to the assessment at issue.

Actual Knowledge

Actual knowledge of omitted income means knowledge that the amount of income was received. (Treas. Reg. § 1.6015-3(c)(2)(i)(A), (c)(2)(ii), (c)(4).) The knowledge standard in an omitted income case is "actual and clear awareness" of an item of income. (*Cheshire v. Commissioner* (2002) 282 F.3d 326, 337 (*Cheshir*e).) Actual knowledge of erroneous deductions or credits generally means knowledge of the facts that made the item not allowable. (Treas. Reg. § 1.6015-3(c)(2)(i)(B)(1).) If the deduction was fictitious or inflated, actual knowledge means knowledge that the expenditure was not incurred, or not incurred to the extent reported. (Treas. Reg. § 1.6015-3(c)(2)(i)(B)(2).) Knowledge of an erroneous item's source alone is insufficient. (Treas. Reg. § 1.6015-3(c)(2)(iii).)[11]

FTB points to Treasury Regulation section 1.6015-3(c)(4), Example 3, which addresses the signing of a blank return with knowledge of the income at issue shows actual knowledge.

[11] A requesting spouse's actual subjective knowledge may be established by circumstantial evidence in an appropriate case. (*Smaaland v. Commissioner*, T.C. Memo. 2017-31.)

FTB asserts that appellant knew his former spouse worked and earned wages during the 2016 tax year, received mail from the California Employment Development Department, and admitted he could have accessed his former spouse's IRS Form W-2 and pay stubs but chose not to because he trusted his former spouse.

Appellant argues that Treasury Regulation section 1.6015-3(c)(2) distinguishes between omitted income and erroneous deductions, but that neither applies to the facts of this case. Appellant asserts that his former spouse mischaracterized an item attributable to his income on the 2016 tax return by subtracting it from federal AGI, a situation not described or shown in the examples in Treasury Regulation section 1.6015-3. Appellant argues that there is the factual possibility that his former spouse received nontaxable paid family leave or disability benefits, but appellant is unable to prove it due to his former spouse's refusal to cooperate. Appellant states that he did not know the extent and the exact sources of income received by his former spouse. Appellant asserts that he did not have access to his former spouse's finances or personal bank account, and that they utilized a joint account solely for joint expenditures. Appellant contends that, if the Treasury Regulations are applied, his circumstances are similar to Treasury Regulation section 1.6015-3(c)(4), Example 2, where knowledge of a spouse's gambling habits without knowledge of whether he had winnings where the spouse had a separate bank account, demonstrates there was no actual knowledge.

In this case, the wages were reported on the return and then mischaracterized as paid family leave, resulting in their exclusion from gross income, pursuant to R&TC section 17083. R&TC section 17083 is in Part 10, Chapter 3, Article 2, "Items Specifically Included in Gross Income," as opposed to Part 10, Chapter 3, Article 6, "Deductions." Therefore, the erroneous item is not a deduction, but relates to what is included in income. In addition, Treasury Regulation 1.6015-1(h)(4) states: "An erroneous item is any item resulting in an understatement or deficiency in tax to the extent that such item is omitted from, or improperly reported (including improperly characterized) on an individual income tax return… ordinary income that is improperly reported as capital gain resulting in an understatement or deficiency in tax is also an erroneous item." Therefore, the wages, which were mischaracterized as paid family leave, are the erroneous item. As a result, FTB must establish that appellant had actual knowledge of the omitted income for separate liability allocation relief to be inapplicable to appellant.

It appears that appellant would be aware that his former spouse made more income than what was deposited into the account. However, the standard under R&TC section 18533(c) is not that of a hypothetical, reasonable person, but only that of actual subjective knowledge. (*Culver v. Commissioner* (2001) 116 T.C. 189, 197.) Here, appellant had actual and clear awareness of income that was deposited in the joint bank account, regardless of whether he believed it was nontaxable paid family leave. (See *Cheshire*, *supra*, 282 F.3d 326, 337.) As stated in Treasury Regulation section 1.6015-3(c)(4), Example 1(ii): "H's election to allocate the deficiency to W is invalid because, at the time H signed the joint return, H had actual knowledge of W's self-employment income. The fact that H was unaware of the tax consequences of that income (i.e., that an individual is required to pay self-employment tax on that income) is not relevant." And as explained in Treasury Regulation section 1.6015-3(c)(4), Example 4(ii) & (iii), knowledge of a partial amount of income precludes separate allocation of that amount.

Appellant states that his spouse would deposit up to $2,000 per month, though the deposit amounts would vary. According to the Agreement, "The two parties shared joint bank accounts for common expenses" and that, because the couple were divorcing, appellant's former spouse "has suspended any further contributions to these accounts…." Appellant also stated that his former spouse was "off work for a number of months and I didn't have access to his personal finances, I just knew that…for a period there he was not depositing the full $2,000 amount per month into our joint account..." As a result, the evidence does not show that appellant was aware of the actual total amount of income received by his former spouse. However, appellant had actual knowledge of amounts deposited in the joint bank account by his former spouse. Therefore, appellant is only entitled to separate liability allocation relief of the amounts other than those deposited in the joint bank account by his former spouse.

In this case, the joint bank account statements show deposits of $3,462.58 by his former spouse during 2016 from September 20, 2016, to December 31, 2016. Appellant stated that, other than for a "few months," his former spouse deposited $2,000.00 a month. The period of September 20, 2016, to December 31, 2016, does not show deposits of $2,000.00 a month, and OTA uses that period as the "few months" when the former spouse did not deposit $2,000.00 a month. Therefore, OTA determines that the portion of the year not shown by the provided bank account statements represents when the former spouse deposited $2,000.00 a month (i.e., January 1, 2016, to September 19, 2016, equals 263 days). This equates to deposits totaling

$17,245.90 for the period of January 1, 2016, to September 19, 2016 ([$24,000.00 per year ÷ 366 days][12] * 263 days). Therefore, the evidence shows that appellant had actual knowledge of $20,708.48 for the entire year ($17,245.90 + $3,462.58). As a result, based on the testimony and facts of this case, appellant does not qualify for relief for the deficiency related to this amount. However, the deficiency related to the remaining wages of the former spouse of $76,865.52 ($97,574.00 - $20,708.48) are allocable to the former spouse.

Equitable Innocent Spouse Relief – R&TC section 18533(f)

FTB may relieve a taxpayer from a tax liability if the requesting spouse does not otherwise qualify for traditional innocent spouse or separation of liability relief and it is inequitable to hold the requesting spouse liable for the understatement after considering all the facts and circumstances. (R&TC, § 18533(f); IRC, § 6015(f).) Because appellant has not been relieved of all the liabilities, OTA considers whether appellant is entitled to additional relief under R&TC section 18533(f). (See *Phemister v. Commissioner*, T.C. Memo. 2009-201.) In determining whether appellant is entitled to equitable relief, OTA looks to IRS Revenue Procedure 2013-34 for guidance. (*Appeal of Calegari*, *supra*.)

A requesting spouse must establish all of the threshold conditions under section 4.01 of Rev. Proc. 2013-34 to be eligible for equitable relief. (26 CFR 601.105, § 4.01(1)-(7).) 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 list of nonexclusive factors under section 4.03 of Rev. Proc. 2013-34. (26 CFR 601.105, §§ 4.02, 4.03.)

FTB stated that it agreed that appellant meets the threshold conditions under Revenue Procedure 2013-34, section 4.01. Appellant stated that he is seeking to qualify for relief under the factors provided by Rev. Proc. 2013-34, section 4.03, and not section 4.02. Therefore, OTA considers whether appellant is entitled to equitable relief based on the following nonexclusive factors pursuant to section 4.03 of Rev. Proc. 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

[12] 2016 was a leap year, so there were 366 days in that year.

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 he or 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. (26 CFR 601.105, § 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. (26 CFR 601.105, §§ 3.05 & 4.03(2); *Appeal of Calegari*, *supra*.)

Marital Status

This factor will weigh in favor of relief if the requesting spouse is no longer married to the non-requesting spouse as of the date of the determination. (26 CFR 601.105, § 4.03(2)(a).) Here, appellant was not married to his former spouse as of January 11, 2019, and FTB denied appellant's innocent spouse relief request on April 13, 2021. Therefore, this factor weighs in favor of relief.

Economic hardship

This factor will be neutral if denying relief from the joint and several liability will not cause the requesting spouse to suffer economic hardship. (26 CFR 601.105, § 4.03(2)(b).) Here, the parties agree that appellant would not suffer an economic hardship if relief were not granted. Therefore, this factor is neutral.

Knowledge or Reason to Know

This factor will weigh against relief if the requesting spouse knew or had reason to know of the item giving rise to the understatement as of the date the joint return was filed. (26 CFR 601.105, § 4.03(2)(c)(i).) Depending on the facts and circumstances, if non-requesting spouse maintained control of the household finances by restricting the requesting spouse's access to

financial information and because of the financial control, the requesting spouse was not able to challenge the treatment of any items on the joint return for fear of the non-requesting spouse's retaliation, then this factor will weigh in favor of relief, even if the requesting spouse knew or had reason to know of the items giving rise to the understatement or deficiency. (*Ibid*.)

As discussed above, appellant had constructive knowledge of the return and did not fulfill his duty of inquiry, and had actual knowledge of the income deposited into appellant and his former's spouse's joint account. Therefore, this factor weighs against relief.

Legal Obligation

This factor will be neutral if both spouses have a legal obligation to pay the outstanding income tax liability based on a divorce decree or other legally binding agreement or the divorce decree or agreement is silent as to any obligation to pay the outstanding income tax liability. (26 CFR 601.105, § 4.03(2)(d).)

Appellant argues that he is responsible for only the tax on his income because the Agreement states that individual financial obligations remain the sole responsibility of that party. Appellant points to the Agreement where it states: "All individual debts, loans, and financial obligations entered into by each party shall remain the sole responsibility of that party." However, the Agreement also states that "all current obligation which both parties have entered into together will remain the responsibility of both parties equally." Both spouses have a legal obligation to pay the outstanding income tax liability because they are joint and severally liable for the amount of tax due when they filed a joint 2016 tax return. (R&TC, § 19006(b).) Therefore, this factor is neutral.

Significant Benefit

This factor is neutral if the understatement was small such that neither spouse received a "significant benefit." (26 CFR 601.105, §4.03(2)(e).) A "significant benefit" is any benefit in excess of normal support, such as enjoying the benefits of a lavish lifestyle. (Treas. Reg. § 1.6015-2(d); 26 CFR 601.105, §4.03(2)(e).) This factor will weigh in favor of relief if only the non-requesting spouse significantly benefits from the understatement and the requesting spouse had little or no benefit, or the non-requesting spouse enjoyed the benefit to the requesting spouse's detriment. (26 CFR 601.105, §4.03(2)(e).)

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Appellant argues that his former spouse significantly benefitted from the understatement because the former spouse paid less than half of the couple's joint state tax liability and the couple paid their federal tax liability using their state tax refund. A significant benefit is defined as any benefit in excess of normal support and appellant explained that the couple used their state tax refund to pay their federal tax liability, which is not a benefit in excess of normal support. Here, the tax liability is small enough such that appellant nor his former spouse significantly benefited from the unpaid tax. Therefore, this factor is neutral.

Compliance With Income Tax Laws

This factor will weigh in favor of relief if the requesting spouse is compliant for the taxable years after being divorced from the non-requesting spouse. (26 CFR 601.105, § 4.03(2)(f).) Here, appellant made a good faith effort to comply with the income tax laws for tax years 2017, 2018, and 2019. Therefore, this factor weighs in favor of relief.

Mental Or Physical Health

This factor is neutral if the requesting spouse was in neither poor physical nor mental health when the tax return was filed. (26 CFR 601.105, §4.03(2)(g).) Here, appellant was not in poor physical or mental health when the couple filed their 2016 tax return. Therefore, this factor is neutral.

Conclusion

After evaluating the factors, OTA finds that two factors weigh in favor of relief, one factor weighs against relief, and four factors are neutral. In *Appeal of Calegari*, *supra*, great weight was given to the fact that the appellant knew or should have known that based on the couple's financial difficulties the non-requesting spouse could not or would not pay the tax liability.[13] In this case, those issues weighing against relief are not present. While appellant did not undertake a full review of the return or inquire as to the return, the evidence shows that the former spouse filed the return and removed the wages from the return, and that this was not the

[13] Additionally, in *Sleeth v. Commissioner*, T.C. Memo. 2019-138, the court found that the scales were tipped in favor of denying equitable relief due to the taxpayer's unwillingness to confront the financial problems she and her spouse faced, and the court stated that she cooperated in the three-year practice of not paying tax.

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first time the former spouse had failed to properly report income, such as with past federal and Utah tax returns.

In addition, the evidence shows that the former spouse's circumstances were such that appellant could reasonably believe the former spouse received paid family leave or disability. As previously noted, appellant stated that, during 2016, his former spouse suffered serious medical issues and was out of work for a number of months and was receiving paid time off donated to him from coworkers.[14] Appellant also stated that his former spouse told him that he was discussing with his employer's human resources department how to properly complete the return to account for these circumstances. Therefore, the evidence shows that appellant had no reason to doubt his former spouse at the time his return was filed. In addition, appellant and his former spouse had separate bank accounts, so appellant was unaware of the extent of actual wages, as compared to his former spouse's receipt of paid family leave or disability.

As stated by the court in *Wiener v. Commissioner*, T.C. Memo. 2008-230, which granted equitable relief even though the petitioner had constructive knowledge, "[w]e recognize that petitioner did not review her tax returns, but her failure was consistent with her apparently well-established but unwise reliance on her husband to manage their financial and tax affairs." And "[e]ven if petitioner had reviewed the tax returns and inquired…we believe that it is unlikely petitioner would have received the information necessary to evaluate whether to file the returns as prepared." (*Ibid*.) The court also stated that the petitioner's spouse "consistently misled petitioner…representing to petitioner years later that any tax issues with the IRS related to his business and would be resolved."

Similarly, the evidence shows that appellant's former spouse misled appellant as to the receipt of disability or paid family leave, and it is unlikely that, if appellant inquired as to the return, the former spouse would have provided the information necessary for appellant to evaluate whether the returns were properly prepared. (See *Wiener v. Commissioner*, *supra*.) The evidence also shows that appellant sought to remedy the situation, such as communicating with TurboTax and a tax preparer, and contacting his former spouse for information and assistance, but that no response was received. In addition, similar to *Wiener v. Commissioner*, *supra*, the deficiency in this case is not a significant amount and did not create a significant benefit for

[14] Appellant's former spouse received some third-party sick pay. Appellant also stated that he believed his former spouse was receiving payments related to disability or paid family leave, so such payments could not be taxable in California.

appellant. After considering all the facts and circumstances, OTA finds that it would be inequitable to deny innocent spouse relief for the remaining deficiency.

HOLDING

Appellant is entitled to relief under R&TC section 18533(c) with respect to the deficiency related to all but $20,708.48 of his former spouse's wages. In addition, appellant is entitled to equitable relief under R&TC section 18533(f) with respect to the remaining deficiency related to his former spouse's wages.

DISPOSITION

FTB's action is reversed.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

DocuSigned by:
Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

Date Issued: 7/3/2023