

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

P. SIMON) OTA Case No. 21057815
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)
)**OPINION**

Representing the Parties:

For Appellant:

P. Simon

For Respondent:

Bradley J. Coutinho, Attorney

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19045, P. Simon (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying innocent spouse relief for the 2015 and 2016 tax years.

Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUE

Whether appellant has established she is entitled to equitable innocent spouse relief for tax years 2015 and 2016.¹

FACTUAL FINDINGS

1. On November 10, 2017, appellant and the non-requesting spouse (the couple) filed a joint 2015 California tax return. The only income reported on the return was from the non-requesting spouse's Schedule C businesses. The couple reported zero total tax.

¹ Appellant attempted to file an appeal for tax years 2014, 2015, and 2016, but she provided the Notice of Action for tax years 2015 and 2016 only. OTA will not decide whether appellant has established that she is entitled to equitable innocent spouse relief for tax year 2014 because appellant did not provide the applicable FTB notice that allows OTA to hear appellant's appeal for tax year 2014, and FTB stated that it did not receive a "Notice of Action of Claim for Refund" or claim for refund for that year. (Cal. Code. Regs., tit. 18, §30103(a).)

2. On the same day, the couple filed a joint 2016 California tax return. The only income reported on the return was from the non-requesting spouse's Schedule C business. The couple reported zero total tax.²
3. In August 2019, the couple filed an amended joint 2015 California tax return, which includes appellant's and the non-requesting spouse's signatures in the spaces provided. The couple reported total tax and an amount due of \$8,033 because of a \$144,248 increase to their taxable income. The couple reported net income of \$96,987 from the non-requesting spouse's Schedule C construction business, net income of \$87,637 from the non-requesting spouse's other Schedule C construction business, and a net loss of \$20,375 from the non-requesting spouse's Schedule C restaurant business. The couple did not remit a tax payment with their amended tax return.³
4. In August 2019, the couple filed a joint amended 2016 tax return, which includes appellant's and the non-requesting spouse's signatures in the spaces provided. The couple reported total tax and an amount due of \$1,544 because of a \$73,418 increase to their taxable income. The couple reported net income of \$84,764 from the non-requesting spouse's Schedule C construction business. The couple did not remit a tax payment with their amended tax return.
5. On February 18, 2020, FTB issued a Final Notice Before Levy and Lien to appellant for the amount of unpaid tax and interest for tax years 2015 and 2016.
6. On March 4, 2020, appellant filed a request for innocent spouse relief for tax years 2015 and 2016. Appellant explained that the couple was married on March 1, 2001; separated on July 14, 2014; and divorced on June 7, 2019. Appellant claimed that she had no knowledge of the couple's income or debts. Appellant provided the decree of divorce showing that appellant was divorced on June 7, 2019.
7. On December 2, 2020, FTB requested more information regarding appellant's innocent spouse relief request, including how the couple planned to pay the taxes due at the time they filed their return.

² The parties did not provide the couple's 2015 or 2016 original federal income tax returns. However, it appears the couple reported income from the non-requesting spouse's Schedule C business(es) only based on the couple's amended 2015 and 2016 federal tax returns.

³ FTB applied the couple's overpayments from tax years 2019 to 2020 to partially pay for the couple's tax liability for tax year 2015.

8. In response, appellant explained that the non-requesting spouse filed the couple's tax returns without her knowledge and she did not sign the couple's 2015 and 2016 tax returns. Appellant explained that she believed that the tax preparer would not file joint tax returns because the couple was separated, even though the couple continued to live together. Appellant provided a letter dated September 9, 2020, that she mailed to the couple's tax preparer explaining that she had no knowledge that the tax preparer filed joint tax returns for tax year 2015 and 2016.
9. On March 9, 2021, FTB requested information from the non-requesting spouse regarding how the couple planned to pay the taxes due when they filed the joint returns, to whom the tax liability is attributable, and whether it would be inequitable to hold the requesting spouse liable for the balance due. The non-requesting spouse did not respond.
10. On April 12, 2021, FTB issued a Notice of Action – Denial to the couple. FTB explained that it denied equitable relief to appellant because appellant did not establish that it would be inequitable to hold her liable for the tax liabilities, she had no knowledge or reason to know of the underpayments, and she had a reasonable belief that the tax liabilities would be paid in full.⁴
11. Thereafter, appellant filed this timely appeal.
12. While on appeal with OTA, appellant provided the IRS's decision denying appellant's innocent spouse relief requests for tax years 2014 and 2015. The IRS explained that it determined that appellant did not have a reasonable expectation that the tax would or could be paid by the non-requesting spouse. The IRS also explained that it determined that appellant filed valid, joint tax returns for tax years 2014 and 2015.
13. FTB also requested on appeal that appellant provide more information regarding appellant's involvement in the non-requesting spouse's Schedule C businesses, the circumstances surrounding the preparation and filing of the 2015 and 2016 tax returns, appellant's income for tax years 2015 and 2016, whether appellant was involved in preparing the couple's tax returns, and whether appellant requested that she review the tax returns. Appellant did not respond to FTB's request for information.

⁴ FTB may revise a tax liability, including penalties and interest, to one spouse if the spouse whose liability is to be revised establishes that he or she did not know of, and had no reason to know of, the nonpayment at the time the return was filed. (R&TC, § 19006(c)(2).) "Reason to know" means whether or not a reasonably prudent person would have had reason to know of the nonpayment. (R&TC, § 19006(c)(2).) Appellant did not provide information to FTB regarding her knowledge of whether the couple's tax liability would be paid.

DISCUSSION

General Legal Background to Innocent Spouse Relief

Each spouse is jointly and severally liable for the tax on the aggregate income on the return when a joint return is filed. (R&TC, § 19006(b); Internal Revenue Code (IRC), § 6013(d)(3).)⁵ However, an individual who files a joint return may be relieved of all or a portion of the joint and several liability if the individual qualifies for innocent spouse relief. (R&TC, § 18533(a); IRC, § 6015(a).) The three types of innocent spouse relief are traditional innocent spouse relief, separate liability relief, and equitable relief. (R&TC, § 18553(b), (c), (f).) Traditional and separate allocation relief are available with respect to tax liabilities based on additional tax imposed or assessed by FTB only. (R&TC, § 18533(b), (c); IRC, § 6015(b), (c).) This Opinion will not discuss whether appellant has established that she qualifies for traditional or separate allocation relief because the tax was self-reported by the couple and FTB did not impose or assess additional tax.

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.*) A taxpayer's failure to produce evidence that is within his or her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer's case. (*Appeals of Kwon, et al.*, 2021-OTA-269P.)

Filing a Joint Tax Return for Tax Years 2015 and 2016

Taxpayers shall use the same filing status on their California tax return that they used on their federal tax return for the same tax year. (R&TC, § 18521(a)(1).) Married taxpayers may elect to file a joint tax return and both spouses must generally sign the tax return. (IRC, § 6013(a); Treas. Reg. § 1.6013-1(a)(2).) An individual who is legally separated from a spouse

⁵ 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).) Federal law interpreting a federal statute may be considered highly persuasive when interpreting a California statute that is substantially similar to a federal statute. (*Appeal of Pifer*, 2021-OTA-338P.)

under a decree of divorce or of separate maintenance by the close of the taxable year shall not be considered as married. (R&TC, § 18532(b); IRC, § 6013(d)(2).)

Appellant asserts that she did not file valid, joint tax returns for tax years 2015 and 2016 because she did not sign or approve of the tax returns, but that her signature was forged. Appellant provides a letter dated September 9, 2020, that she mailed to the couple's tax preparer stating that she was not aware that the tax preparer filed joint tax returns for tax years 2015 and 2016.

If one spouse did not sign a tax return, then the determination of whether the tax return was jointly filed depends on whether the non-signing spouse intended to file a joint tax return based on all the facts and circumstances. (*Ashworth v. Commissioner*, T.C. Memo. 1990-423; *Estate of Campbell v. Commissioner* (1971) 56 T.C. 1, 12.) This rule is commonly referred to as the tacit consent rule. (*Howell v. Commissioner* (1948) 10 T.C. 859, 866.) The intent to file jointly may be inferred from the acquiescence of the non-signing spouse. (*Walker v. Commissioner*, T.C. Memo. 1995-529.) To determine whether the non-signing spouse intended to file a joint tax return, courts consider whether the non-signing spouse filed a separate tax return, whether the non-signing spouse objected to filing a joint tax return, whether the spouses had a history of filing joint tax returns, whether the other spouse received any of the benefits of the joint return, and whether the other spouse's income and expenses were reported on the joint return. (*Ibid.*) Courts have described the tacit consent rule as a presumption of correctness attaching to the tax agency's determination that a joint return was in fact intended. (*Hennan v. Commissioner* (1961) 35 T.C. 747, 749.) If the presumption is not rebutted, then the tax agency's determination is to be sustained. (*Ibid.*)

The amended returns include signatures in the spaces provided for the couple. Therefore, the record indicates that appellant signed the returns. Appellant does not provide evidence establishing that she did not sign the returns or that the signatures were forged. Nevertheless, even if her signatures were missing or forged, appellant has the burden to rebut the presumption that she filed joint tax returns for tax years 2015 and 2016 because FTB determined that appellant filed valid, joint tax returns. Appellant explained that she believed that the tax preparer would not file joint tax returns because she was separated from the non-requesting spouse on July 14, 2014. However, the determination of whether the tax return was jointly filed depends on whether appellant intended to file a joint tax return and the intent to file jointly may be

inferred from appellant's acquiescence. Appellant was considered married for tax years 2015 and 2016 because appellant was married on March 1, 2001, and the decree of divorce was not issued until June 7, 2019.⁶ The record does not show that appellant told the non-requesting spouse that she did not want to file joint tax returns for tax years 2015 and 2016, objected to the filing of the joint tax returns, or filed separate tax returns. Appellant first objected to the filing of joint returns for tax years 2015 and 2016 approximately three years after they were filed and after FTB began collection action, even though the couple lived together after the July 14, 2014 separation.

The IRS also determined that the couple filed valid, joint federal tax returns for tax years 2014 and 2015, and appellant does not dispute that the couple had a history of filing joint tax returns before tax year 2014. FTB requested that appellant provide more information regarding the circumstances surrounding the preparation and filing of the 2015 and 2016 tax returns and provide proof of her income, but appellant did not respond to FTB's request. Without any additional evidence, appellant has not rebutted the presumption of correctness. Therefore, appellant filed valid, joint tax returns for tax years 2015 and 2016.

Equitable Relief

FTB may relieve a taxpayer from a tax liability if the requesting spouse does not otherwise qualify for traditional innocent spouse or separate liability relief and it is inequitable to hold the requesting spouse liable for the unpaid tax or understatement after considering all the facts and circumstances. (R&TC, § 18533(f); IRC, § 6015(f).) A requesting spouse must establish all of the following threshold conditions to be eligible for equitable relief:

- (1) The requesting spouse filed a joint return for the taxable year for which he or she seeks relief;
- (2) Relief is not available to the requesting spouse under traditional innocent spouse relief or separate liability relief;
- (3) The claim for relief is timely filed;
- (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 knowingly participate in the filing of a fraudulent return; and

⁶ The record does not include any evidence of whether a decree of separate maintenance was previously issued.

- (7) The income tax liability from which the requesting spouse seeks relief is attributable (in full or in part) to an item of the non-requesting spouse. If the liability is partially attributable to the requesting spouse, then relief can be considered only for the portion of the liability attributable to the non-requesting spouse, unless an exception applies.⁷

(Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.01; IRC, § 6015(f)(1); Treas. Reg. § 1.6015-4(c); *Reilly-Casey v. Commissioner*, T.C. Memo. 2013-292.) If the requesting spouse satisfies the threshold requirements, then the requesting spouse must establish that he or she qualifies for equitable relief under the streamlined determination under Revenue Procedure 2013-34 section 4.02 or the nonexclusive factors under Revenue Procedure 2013-34, section 4.03. (Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.02.)

When determining whether the income is attributable to a non-requesting spouse, courts look not only to how ownership is nominally held between the spouses but also to each spouse's level of participation in the activity which gave rise to the erroneous item. (*Juell v. Commissioner*, T.C. Memo. 2007-219.) Generally, a requesting spouse who voluntarily agrees to enter into an investment and who actively participates in it is precluded from attributing the entire investment to the non-requesting spouse. (*Caphart v. Commissioner*, T.C. Memo. 2004-268; *Bartak v. Commissioner*, T.C. Memo. 2004-83.) However, if the requesting spouse is a business partner in name only and not an active participant, then the requesting spouse may qualify for relief. (*Juell v. Commissioner, supra.*)

Here, the parties do not dispute that appellant satisfies the first six threshold requirements. However, as to the seventh threshold requirement, appellant has not provided any evidence establishing what portion of the liability is attributable to the non-requesting spouse. The non-requesting spouse is listed as the sole proprietor of the Schedule C businesses on the couple's 2015 and 2016 tax returns, but the tax returns alone do not establish whether appellant actively participated in the Schedule C businesses. In *Drayer v. Commissioner*, T.C. Memo.

⁷ There may be relief regardless of whether the understatement, deficiency, or underpayment is attributable (in full or in part) to the requesting spouse, if any of the following exceptions applies: (1) if an item is attributable or partially attributable to the requesting spouse solely due to the operation of community property law; (2) if the item is titled in the name of the requesting spouse, the requesting spouse establishes that the item is only nominally owned by him or her; (3) if the requesting spouse did not know, and had no reason to know, that funds intended for the payment of tax were misappropriated by the non-requesting spouse; (4) if the requesting spouse establishes that he or she was the victim of abuse prior to the time the return was filed; (5) or if the requesting spouse establishes that the non-requesting spouse's fraud was the reason for the erroneous item. Appellant does not provide argument or evidence to establish an exception applies. (Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 4.01.)

2010-257, with regard to whether the liability was attributable to the ex-husband under IRC section 6015(f), the court stated that “Mr. Drayer started his business... as a sole proprietorship before he met petitioner. He still owned and operated this business as a sole proprietorship long after their divorce. These facts, although not dispositive, are important.” Therefore, the fact that the income was reported on the Schedule C as part of a sole proprietorship is not dispositive.

In *Drayer v. Commissioner, supra*, the court concluded that the “petitioner met her burden of proving that the income for all the years at issue is attributable to Mr. Drayer and his sole proprietorship.” However, the court’s conclusion was based on additional evidence, including testimony of the petitioner, establishing her minimal involvement in the business, and that “her primary focus was to raise her children and care for the Drayers’ household.” (*Ibid.*) In this case, FTB requested on appeal that appellant provide more information on whether she was actively engaged in the non-requesting spouse’s Schedule C businesses, but appellant has not provided this information. Without this information, it cannot be determined if appellant actively participated in the Schedule C businesses. Therefore, appellant has not established that the threshold conditions are met under Revenue Procedure 2013-34, section 4.01, or that she is entitled to equitable innocent spouse relief for tax years 2015 and 2016.

HOLDING

Appellant has not established that she is entitled to equitable innocent spouse relief for tax years 2015 and 2016.

DISPOSITION

FTB's action is sustained in full.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Ovsep Akopchikyan
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Ovsep Akopchikyan
Administrative Law Judge

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...

Tommy Leung
Administrative Law Judge

Date Issued: 9/25/2023