

FACTUAL FINDINGS

1. Appellant and her then husband R. Moseley (R. Moseley), filed a joint 2015 California tax return (Form 540) on October 15, 2016. On the return, they reported a total tax of \$12,640, and a refund of \$3,757.
2. FTB processed the return, accepted it as filed, and applied the refund to a balance due on appellant's and R. Moseley's 2014 tax year account, which was applied to R. Moseley's separate 2014 liability. On October 26, 2016, FTB issued a Notice of Tax Return Change to explain that the 2015 reported overpayment, plus applicable interest, was applied to a balance due on the 2014 tax year account and resulted in a zero balance for the 2015 tax year, and therefore no refund would be issued.
3. Subsequently, FTB received information from the IRS indicating that the IRS had subsequently increased appellant's taxable wages due to unreported W-2 income in the amount of \$55,848. Based on this information, FTB issued a Notice of Proposed Assessment (NPA) on July 10, 2019, proposing to increase appellant's and R. Moseley's taxable income by \$55,848 and assess additional tax of \$3,298.65. There is no record that either appellant or R. Moseley responded to the NPA by the protest deadline of September 9, 2019.
4. FTB issued a State Income Tax Balance Due Notice to appellant on October 7, 2019. Appellant replied October 15, 2019, stating that the notice was inapplicable to her because it applied to R. Moseley's income. Appellant also requested that her name be removed from the account as she was divorced from R. Moseley, and they do not speak to each other.
5. On November 12, 2019, FTB received appellant's Innocent Joint Filer Relief Request (FTB Form 705) for the 2015 tax year. In the request for innocent spouse relief, appellant provided the following information: (1) Appellant and R. Moseley divorced on January 2, 2017; (2) 2015 was the only tax year that they filed a joint return; (3) per the marital settlement agreement, appellant contends that R. Moseley is responsible for paying all tax assessments, liabilities, deficiencies, penalty, interest, and expenses; (4) appellant attached a copy of her 2015 federal and state tax returns and a copy of the marital settlement agreement.

6. On November 26, 2019, FTB issued an Income Tax Due Notice to appellant. On December 17, 2019, FTB sent appellant an acknowledgement of her FTB Form 705. On March 4, 2020, FTB informed appellant that because of the outstanding balance for the 2015 tax year, it intended to offset that balance by federal payments and that it would submit the debt to the U.S. Treasury Offset Program unless the balance was paid within 60 days of the date of the notice.
7. On April 27, 2020, FTB sent appellant a Request for Information requesting documentation relating to her request for innocent spouse relief for the 2015 tax year. FTB also stated that appellant cannot be relieved of tax based on her own income and that because the marital settlement agreement did not conform to state law or FTB's specifications, it could not be honored. Appellant was also notified that her request for innocent spouse relief was to be reviewed under R&TC sections 18533 and 19006.
8. On May 4, 2020, FTB received appellant's response stating that appellant was confused by the statement that she did not report her wage income of \$55,848 on the joint 2015 tax return. Appellant claimed that she gave her W-2 to R. Moseley and trusted that he and his accountant took care of things properly. Appellant asked if she could file a 2015 tax return separately and whether it was too late to file for a past year.
9. On July 22, 2020, FTB issued appellant a Notice of Action - Denial, denying innocent spouse relief pursuant to section 18533, subdivisions (b), (c), and (f) for the 2015 tax year.
10. Appellant then filed this timely appeal.
11. During this appeal, overpayments (refunds) from the amended tax returns appellant filed for the 2016, 2017, 2018, and 2019 tax years were applied to the balance due on the account for the 2015 tax year. A payment of \$699.67 was applied to the 2015 tax year account as an Electronic Order to Withhold Personal Income Tax issued to R. Moseley's bank. Two Treasury Offset Payments were also applied to her 2015 tax year balance, the first on December 2, 2020, for \$149.26, and the second on December 4, 2020, for \$2,155.09. As a result, there is no longer an outstanding balance for the 2015 tax year.

DISCUSSION

When a joint return is filed, each spouse is jointly and severally liable for the entire tax due for that tax year. (IRC, § 6013(d)(3); R&TC, § 19006(b).) In addition to joint and several

tax liability, R&TC section 19006(b) states that a joint refund may be used for a spouse's separate liability, including a spouse's debts incurred before marriage unless there is a notarized prenuptial agreement where each spouse's separate property is identified and defined. When appellant signed the joint 2015 California tax return, she was jointly and severally liable for the entire tax liability for that tax year unless she is able to successfully prove that she is entitled to innocent spouse relief.

Federal and California law provide 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.) R&TC section 18533, subdivision (b), provides for traditional innocent spouse relief; subdivision (c) provides for separate allocation relief; and, if a requesting spouse is not eligible for relief under subdivision (b) or (c), a requesting spouse may be eligible for equitable relief under subdivision (f). (Cf. IRC, § 6015(b), (c), & (f).) Determinations under R&TC section 18533 are made without regard to community property laws. (R&TC, § 18533(a)(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 credible, competent, and relevant evidence to establish each statutory requirement. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not enough to satisfy a taxpayer's burden of proof. (*Ibid.*)

Traditional relief and separate allocation relief are only available for an understatement of tax, while equitable relief is available for both an underpayment or understatement of tax. (R&TC, § 18533(b)(1)(B), (c)(1) and (f).) In this case, all of the proposed liability for the 2015 tax year is based on a deficiency tax assessment and not on an underpayment of self-assessed tax. Accordingly, appellant could be considered for relief under R&TC section 18533(b), (c), and (f).

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 requesting spouse 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 one individual filing the joint return (the nonrequesting spouse); (3) the other individual filing the joint return (the requesting spouse) 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 requesting spouse liable for the deficiency in tax attributable to that understatement; and (5) the requesting spouse files a timely request for innocent spouse relief no later than two years after the date FTB has begun collection action with respect to the requesting spouse. (R&TC, § 18533(b)(1)(A)-(E).) 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. (*Appeal of Pifer, supra.*)

With regard to the second requirement, the erroneous item must be solely attributable to the nonrequesting spouse. (Treas. Reg. § 1.6015-2(a)(2); *Appeal of Pifer, supra.*) Records reflect that it is appellant's omitted wage income of \$55,848 that resulted in the deficiency assessment. Therefore, the understatement is attributable to appellant's erroneous item and not to R. Moseley. As such, appellant is not entitled to traditional innocent spouse relief because she fails to satisfy each of the requirements of R&TC section 18533(b).

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 requesting 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 nonrequesting spouse or, alternatively, that individual must not be a member of the same household as the nonrequesting 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)(I)-(II).) Second, the individual requesting 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).)

Third, 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).) Separate liability allocation relief is not allowable to the extent that an item that gave rise to the deficiency provided the requesting individual a tax benefit. (R&TC, § 18533(d)(3)(B).)

An individual who requests separate liability allocation relief has the burden to establish the portion of any deficiency allocable to that individual. (R&TC, § 18533(c)(2).) Any item giving rise to a deficiency on a joint return shall be allocated to individuals filing the return in the same manner as it would have been allocated if the individuals had filed separate returns for the taxable year. (R&TC, § 18533(d)(3)(A).) Here, appellant meets the first two requirements because she and R. Moseley divorced in January 2017, and she filed her request for innocent spouse relief in November 2019. Appellant may not have had actual knowledge of the understatement of her income when she signed the 2015 joint tax return, but since the deficiency is solely attributable to her income, she does not meet the third requirement and does not satisfy all of the criteria for separate allocation relief. Therefore, appellant is not entitled to separate liability allocation relief.

Equitable Relief

R&TC section 18533(f) provides that FTB may grant equitable innocent spouse relief to an individual “if taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either),” and the individual does not qualify for innocent spouse relief under R&TC section 18533(b) and (c).

IRS Guidance Regarding Claims for Equitable Relief

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).)

IRS regulations reference Revenue Procedure 2000-15 (which was a predecessor of Revenue Procedure 2013-34) or "other guidance" published by the IRS in determining eligibility for equitable relief. (Treas. Reg. § 1.6015-4(c).) Revenue Procedure 2013-34 provides the current guidance of the IRS with respect to determining whether equitable relief is warranted. (*Appeal of Calegari*, *supra*.)

Threshold Conditions

Section 4.01 of Revenue Procedure 2013-34 (section 4.01) provides that a requesting spouse must satisfy all 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 relief is requested;
2. Traditional innocent spouse relief or separate liability allocation relief is not available to the requesting spouse;
3. The request for relief is timely filed;
4. No assets were transferred between the spouses as part of a fraudulent scheme by the spouses;
5. The nonrequesting spouse did not transfer disqualified assets to the requesting spouse;
6. The requesting spouse did not knowingly participate in the filing of a fraudulent joint return; and

7. The income tax liability is attributable (either in full or in part) to an item of the nonrequesting spouse or an underpayment resulting from the nonrequesting spouse's income unless a specific exception applies.

Appellant satisfies the first six threshold conditions set forth in section 4.01. However, appellant has conceded and the record clearly establishes that the liability at issue is fully attributable to appellant and the income she earned during the 2015 tax year. Therefore, appellant does not satisfy all seven of the threshold conditions and is not eligible for equitable relief.

However, there may be relief regardless of whether the understatement, deficiency, or underpayment is attributable (in full or in part) to the requesting spouse if the requesting spouse establishes that the non-requesting spouse's fraud was the reason for the erroneous item. (Rev. Proc. 2013-34 § 4.01(7)(e).)

Appellant argues that R. Moseley gave reasonable assurances that he would complete tasks to assist in the preparation of their joint 2015 tax returns, but he failed to complete these tasks and provided no information to appellant. Appellant argues these misrepresentations by R. Moseley are tantamount to fraud on appellant, and she should be granted relief.

OTA finds that appellant's arguments concerning "fraud" are not sufficient to establish her burden of proving R. Moseley committed fraud so that she is entitled to equitable relief, and she does not argue that she qualifies for any of the other exceptions to the non-requesting spouse attribution condition. By her own words, appellant gave R. Moseley her wage and filing information with "ample time to for his accountant to prepare their return" and trusted him to file correctly. Furthermore, appellant has a non-delegable duty to review the returns for accuracy and has an individual responsibility to ensure that all of the information being reported is accurate and correct. A review of the federal and state returns show that only R. Moseley's wage income was reported, and only his W-2 was attached to the returns. Appellant has not offered any evidence or documentation that she involuntarily signed the return, that she was not allowed to see the return, or that R. Moseley's representation about the return amounted to fraud or that he did not provide her W-2 to his accountant.

Accordingly, because appellant has not met all seven threshold conditions, she may not be considered for relief under this section and the streamlined determination under section 4.02 or the section 4.03 balancing factors will not be discussed.

On appeal, appellant argues that FTB erroneously and improperly applied the refund reported on the joint 2015 tax return to her R. Moseley's separate liability. R&TC section 19006 states that a joint refund can be applied to a spouse's separate liability unless there is a notarized prenuptial agreement where each spouse's separate property is identified and defined. Appellant argues that the marital settlement agreement she entered into with R. Moseley "counts as a prior agreement because the tax reassessment occurred after recording the marriage settlement agreement." However, a marital settlement agreement entered into at the time a marriage is ending cannot be considered a prenuptial agreement. Furthermore, appellant's and R. Moseley's marital settlement agreement does not bind FTB to collect joint and several liability from only one spouse. R&TC section 19006 states that certain procedural requirements must be met before FTB can grant relief and appellant has not established that any of the requirements have been met. Furthermore, relief cannot be granted under R&TC section 19006(b) or (c) for a liability arising from income earned by the requesting spouse or for a liability that has been paid, both of which are present in this appeal.

Appellant also argues that relief is allowed under the three forms of traditional innocent spouse relief because the understatement is "attributable" to the error of R. Moseley. However, "attributable" in traditional innocent spouse relief is referring to which spouse the income underlying the deficiency is attributable. In this case, the deficiency was based on income solely attributable to appellant. Therefore, appellant is ineligible for innocent spouse relief under all forms of traditional innocent spouse relief.

HOLDING

Appellant is not entitled to innocent spouse relief for the 2015 tax year.

DISPOSITION

FTB’s action is sustained.

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Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

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Huy "Mike" Le
Administrative Law Judge

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

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