

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19064861
) CDTFA Case IDs 091-041, 091-044, 091-040,
D. BALAZS) 091-042, 091-038, 091-043, 091-045
dba Gaspar Gloves)
)
)

OPINION

Representing the Parties:

For Appellant: D. Balazs
Robert Klein, C.P.A.

For Respondent: Jason Parker,
Chief of Headquarters Operations

For Office of Tax Appeals: Craig Okihara, Business Tax Specialist III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, D. Balazs, dba Gaspar Gloves (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)¹ denying, in part, appellant's petition for redetermination of a November 5, 2015 Notice of Determination (NOD).² The NOD is for tax of \$86,870, plus applicable interest, and failure-to-file penalties totaling \$8,687,³ for the period July 1, 2008, through June 30, 2015 (liability period).⁴

¹ Sales and use taxes (and other business taxes and fees) were formerly administered by the State Board of Equalization (board). In 2017, the California Legislature transferred most of the board's administrative (i.e., non-adjudicatory) functions to respondent effective July 1, 2017. (Gov. Code, § 15570.22.) When this Opinion refers to events that occurred before July 1, 2017, "respondent" refers to the board.

² As used here, the term "decision" refers to a July 27, 2017 Decision and Recommendation issued by respondent's Appeals Bureau, which included a denial of appellant's request for relief from penalties, and a subsequent August 9, 2021 letter from respondent's Petitions Section, which again denied appellant's request for relief from penalties and denied appellant's request for relief from interest.

³ Appellant failed to timely file sales and use tax returns (returns) for all reporting periods in the liability period.

⁴ The NOD was timely because appellant did not file returns for any of the fiscal year reporting periods at issue until after the NOD was issued, and respondent issued the NOD within eight years after the last day of the calendar month following the year for which respondent determined the liability. (R&TC, § 6487(b).)

Office of Tax Appeals (OTA) Administrative Law Judges Michael F. Geary, Keith T. Long, and Richard Tay held a virtual hearing for this matter on March 21, 2024. At the conclusion of the hearing, the parties submitted the matter, and OTA closed the record.

ISSUES⁵

1. Is appellant entitled to relief of the failure-to-file penalties?
2. Is appellant entitled to relief of interest?

FACTUAL FINDINGS

1. At all relevant times, appellant was a seller of specialty gloves. Although appellant was married during the liability period, her former spouse held no ownership interest in the business.⁶ Appellant was divorced from her former spouse after the liability period.
2. Appellant has held a seller's permit since 2005. For the period at issue, appellant was required to file sales and use tax returns (returns) on a fiscal year reporting basis. Appellant did not timely file returns for any of the years at issue.
3. Appellant's seller's permit was effective on June 1, 2005. Appellant filed returns on a fiscal year reporting basis (beginning July 1 and ending June 30 of the next year) through the fiscal year ending June 2008 (FYE08). After appellant failed to file returns for later years, respondent eventually calculated estimated taxable sales of \$946,694 for the liability period using information from Forms 1099-K.⁷
4. On November 5, 2015, respondent issued the NOD to appellant based on the above-described compliance assessment⁸ of \$86,870 in tax, applicable interest, and a failure-to-file penalty of \$8,687.

⁵ OTA previously identified innocent spouse relief as a separate issue. However, because appellant claims that she was an innocent spouse only in connection with the liability for penalties and interest, this Opinion incorporates the innocent spouse issue into the penalty relief and interest relief issues.

⁶ Appellant was a sole proprietor dba Gaspar Gloves until September 8, 2008, when appellant filed Limited Liability Company (LLC) Articles of Organization with the Secretary of State (SOS) identifying the new entity as Gaspar Gloves LLC. According to the records of the SOS, the status of Gaspar Gloves LLC is "FTB Suspended."

⁷ Form 1099-K is used to report payments made to a taxpayer by payment card (e.g., credit or debit cards) processing companies (e.g., Visa, MasterCard, or American Express) or third-party network (e.g., Venmo or PayPal). It is authorized by the Internal Revenue Service for tax administration purposes. (See 26 C.F.R. § 1.6050W-1 and Treas. Reg. § 1.6050W-1.)

⁸ A CDTFA compliance assessment is an assessment completed without the performance of an audit.

5. Appellant filed a timely petition for redetermination protesting the NOD in its entirety.
6. On May 31, 2017, the parties participated in an appeals conference as part of respondent's internal appeals process.
7. Appellant filed a Request for Relief from Penalty, Collection Cost Recovery Fee, and Interest (Request for Relief) dated June 19, 2017. The Request for Relief asserts that appellant did not file timely returns for the years in question because her son became gravely ill during 2008, which was a drain on her time and energy and burdened her family with significant medical bills, and that her former husband lost his business in 2009, which exacerbated the family's hardship. Appellant specifically alleges that due to these events, she was unable to pay for an accountant or bookkeeper to take care of the business and handle sales and use tax compliance. The Request for Relief does not indicate that appellant relied on her former husband to handle sales and use tax compliance.
8. On July 27, 2017, respondent issued its Decision and Recommendation (D&R), which recommended a reaudit and denied penalty relief.⁹
9. Respondent performed a reaudit, which resulted in an increase of the liability.
10. This timely appeal followed.
11. Respondent later agreed to a reduction of the liability.
12. By letter dated June 16, 2021, appellant asked respondent to waive the penalties and interest because appellant is unable to afford this additional liability and because she is "an Innocent Spouse."¹⁰
13. By letter dated August 9, 2021, respondent denied appellant's Request for Relief, specifically stating that as a sole proprietor, appellant did not appear to qualify for innocent spouse relief.
14. The parties agree that appellant's tax liability is \$27,695. Only appellant's requests for penalty and interest relief remain at issue.

⁹ The D&R does not address interest relief. There is no collection cost recovery fee at issue.

¹⁰ The request was signed by appellant's representative, not by appellant.

DISCUSSION

Issue 1: Is appellant entitled to relief of the failure-to-file penalties?

Returns are due by the end of the month following the taxpayer's designated reporting period. (R&TC, §§ 6451, 6455.) It is undisputed that all the returns filed by appellant for the reporting periods at issue were filed late. As a result, respondent added a 10 percent failure-to-file penalty for each of the seven annual reporting periods at issue. (R&TC, § 6591.)

Appellant argues that she is entitled to relief of the failure-to-file penalties on two bases. This Opinion will discuss each below.

Relief under R&TC section 6592 – reasonable cause

R&TC section 6592(a)(1) provides that such penalties may be relieved if the failure to timely file a return or pay taxes was due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect. A person seeking relief of a penalty under R&TC section 6592 must submit a Request for Relief, signed under penalty of perjury, setting forth the facts upon which the person bases the claim for relief. (R&TC, § 6592(b).)

In support of the first basis, appellant offers her statement under penalty of perjury, which indicates that she then believed (on June 14, 2017) that her failure to timely file the returns was due to the financial and emotional trauma to her and her family that resulted from her minor son's illness (beginning in the middle of 2008) and her then husband's loss of his business (in 2009).¹¹ This is the only evidence in OTA's hearing record relevant to this issue. Appellant's statement appears to be intended to show that she could not afford to pay the taxes due. The penalties at issue are for failing to file timely returns, not for failing to pay the taxes due. (See R&TC, § 6591(a); cf. R&TC, § 6591(b).) The evidence does not establish reasonable cause for

¹¹ There is no mention in the statement of appellant's reliance on her former husband to handle the business's sales and use tax compliance.

appellant's failure to file timely returns.¹² Thus, OTA finds that the evidence does not show that appellant is entitled to relief of the failure-to-file penalties pursuant to R&TC section 6592.

Relief under R&TC section 6456 – innocent spouse

Appellant also argues that she should be relieved of the failure-to-file penalties because she relied on her former spouse to properly handle the business's sales and use tax compliance and was not aware until after July 31, 2015, the due date for the final return at issue here, that he had not done so.

R&TC section 6456 provides that, if a sales or use tax liability (including a nonpayment or underpayment of tax, interest, penalties, and other amounts) is attributable to one spouse (the non-requesting spouse), and the other spouse (the requesting spouse) establishes that they did not know of, and had no reason to know of that liability, and, taking into account whether or not the requesting spouse significantly benefited directly or indirectly from the understatement or nonpayment, and taking into account all other facts and circumstances, it is inequitable to hold the requesting spouse liable for the deficiency in tax attributable to that understatement or nonpayment, the requesting spouse shall be relieved of the liability. California Code of Regulations, title 18, (Regulation) section 1705.1 states that a spouse shall be relieved of liability for sales and use tax, interest, penalties, and other amounts where all the requirements set forth in Regulation section 35055 are met.¹³ A divorced or separated spouse (or registered domestic partner)¹⁴ who seeks to request innocent spouse relief must file a written request for innocent spouse relief that is signed and dated by the spouse seeking relief and specifically requests innocent spouse relief. (Cal. Code Regs., tit. 18, § 35055(b), (c).) The request must identify the liability and account and state the specific grounds for the request. (*Ibid.*)

¹² OTA recognizes that the law also required appellant to pay the taxes due with the returns and that, had she failed to do so, respondent would probably have imposed a 10 percent failure-to-pay penalty, thus leaving appellant in the same position. However, OTA can only address the issues presented. In any event, appellant's statement does not establish financial inability to pay taxes. The factual assertions contained in the statement are unsupported by other evidence and do not prove that appellant was prevented by outside forces, beyond her control, from making the tax payments before the delinquency dates. (See *Appeal of Eichler*, 2022-OTA-029P, citing *Ashlan Park Center LLC v. Crow* (2015) 233 Cal.App.4th 1274, 1283, which analyzes and interprets language identical to that contained in R&TC section 6592(a)(1).)

¹³ This analysis does not address all issues that may arise in connection with a request for innocent spouse relief. Rather, it is tailored to the facts of this appeal.

¹⁴ All subsequent references to "spouse" should be read to include "or registered domestic partner."

To be eligible for innocent spouse relief, the request must be timely filed. (Cal. Code Regs., tit. 18, § 35055(f).) A request filed within one year after respondent's first contact with the requesting taxpayer is timely as to all liabilities (Cal. Code Regs., tit. 18, § 35055(f)(1)); but a request filed more than one year after such contact is timely only as to liabilities that were reported on a return due no more than five years before the filing of the request *and* assessed by an NOD or similar billing document for collection of a tax which became final no more than five years before the filing of the request (Cal. Code Regs., tit. 18, § 35055(f)(2)(A), (B)).

Generally, an innocent spouse will be relieved of a liability under the Sales and Use Tax Law, such as the one at issue here, if: (1) the liability is attributable to the non-requesting spouse; (2) the requesting spouse establishes that they did not know of the liability, and that a reasonably prudent person in the requesting spouse's circumstances would not have had reason to know of the liability; *and* (3) it would be inequitable to hold the requesting spouse responsible for the liability, taking into account all facts and circumstances, including whether they significantly benefited directly or indirectly from the liability. (Cal. Code Regs., tit. 18, § 35055(i).) The requesting spouse has the burden of proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(a), (b).)

As relevant to this appeal, attribution of a liability resulting from a failure to file a return or the omission of an item from a return to a spouse may be determined by whether they rendered substantial services as a taxpayer engaged in an activity or transaction that is both subject to the Sales and Use Tax Law and related to the liability. (Cal. Code Regs., tit. 18, § 35055(j)(2).) If neither spouse rendered substantial services as a taxpayer, the attribution of the liability shall be treated as community property. (*Ibid.*) Otherwise, the determination of the spouse to whom the liability is attributed is made without regard to community property laws. (Cal. Code Regs., tit. 18, § 35055(j)(1).)

As an alternative to the relief discussed above, innocent spouse relief may also be available if it would be inequitable to hold the requesting spouse liable. (Cal. Code Regs., tit. 18, § 35055(l).) Factors that may be considered include whether:

- the requesting spouse is separated (whether legally or not) or divorced from the non-requesting spouse (Cal. Code Regs., tit. 18, § 35055(l)(1)(A));
- the requesting spouse would suffer economic hardship if relief were not granted (Cal. Code Regs., tit. 18, § 35055(l)(1)(B));

- duress from the non-requesting spouse caused the requesting spouse to not file returns or pay the liability (Cal. Code Regs., tit. 18, § 35055(l)(1)(C));
- the requesting spouse did not know and had no reason to know about the failure to file, the items causing the understatement, or that the tax would not be paid (Cal. Code Regs., tit. 18, § 35055(l)(1)(D));
- either spouse has a legal obligation under a divorce decree or agreement to pay the tax, and if the non-requesting spouse has such obligation, whether the requesting spouse knew or had reason to know, at the time the divorce decree or agreement was entered into, that the non-requesting spouse would not pay the tax (Cal. Code Regs., tit. 18, § 35055(l)(1)(E) & (2)(E));
- the tax from which the spouse is requesting relief is attributable to the requesting spouse, the non-requesting spouse, or both (Cal. Code Regs., tit. 18, § 35055(l)(1)(F) & (2)(F));
- the requesting spouse received a significant benefit from the unpaid tax or items causing the understatement (Cal. Code Regs., tit. 18, § 35055(l)(2)(C)); and
- the requesting individual has made a good faith effort to comply with the Sales and Use Tax Law for the periods for which the spouse is requesting relief or for subsequent periods of liability (Cal. Code Regs., tit. 18, § 35055(l)(2)(D)).

Regulation section 35055 sets forth a procedure for making a request for innocent spouse relief and to ensure that the non-requesting spouse receives due process, including adequate notice of and an opportunity to be heard regarding the request for relief. (Cal. Code Regs., tit. 18, § 35055(g).) The regulation also states that the requesting spouse may submit their written request or completed form by one of the following methods: (1) by hand delivery to the Offers in Compromise Section; (2) by mail to the Offers in Compromise Section; (3) by facsimile to the Officers in Compromise Section ; or (4) as otherwise expressly provided on respondent's website. (Cal. Code Regs., tit. 18, § 35055(d)(2).) There are also provisions that establish procedures for respondent's review of the request (Cal. Code Regs., tit. 18, § 35055(h)), written findings following such review (Cal. Code Regs., tit. 18, § 35055(m)), appeals conferences (Cal. Code Regs., tit. 18, § 35055(n), (o)(1)), and decisions (Cal. Code Regs., tit. 18, § 35055(o)(2), (3)).

Regulation section 35055 does not address OTA's authority to review denials of innocent spouse relief. However, Regulation section 30103(b) states that the jurisdictional document required to appeal respondent's actions to OTA is an adverse Appeals Bureau decision. While there is an adverse Appeals Bureau decision here, it does not address innocent spouse relief because appellant did not raise that argument until June 16, 2021, almost four years after the D&R that denied appellant's request for relief of penalties. When a request for innocent spouse relief is submitted to respondent while an appeal is pending and before OTA issues an opinion, respondent is required to confirm that it has provided, or has made reasonable efforts to provide, notice to the non-requesting spouse of the requesting spouse's request for such relief. (Cal. Code Regs., tit. 18, § 30312(i)(1).) However, Regulation section 30312(e) provides that when innocent spouse relief is raised as an affirmative defense, as appellant has here, OTA retains jurisdiction, but defers proceedings pending respondent's determination of the claim to innocent spouse relief.

Appellant did not send the innocent spouse relief request to the Offers in Compromise Section, and respondent did not process appellant's request for innocent spouse relief as directed by Regulation section 35055. It did not provide notice to the non-requesting spouse or refer the request to its Offer in Compromise Section, which is designated to handle such requests. (Cal. Code Regs., tit. 18, § 35055(d), (g), (m)-(o).) However, respondent's August 9, 2021 letter denied the request stating, "as a sole proprietor, your client does not appear to qualify for innocent spouse relief."¹⁵ At hearing, respondent essentially argued that, as a matter of law, the evidence establishes that appellant was not an innocent spouse, apparently tendering that as an explanation for its failure to process appellant's request according to Regulation section 35055. Appellant's approach to the issue was to accept respondent's conclusion as expressed in the August 9, 2021 letter as a determination subject to appeal. Appellant then proceeded to make the argument at the hearing and willingly submit the issue to OTA.

These are unusual circumstances. Appellant does not seek innocent spouse relief in the usual sense. Appellant raised the issue solely as a ground for relief from penalties and interest. While respondent's D&R did not address the question whether appellant was an innocent spouse, it also did not address appellant's request for interest relief. OTA is satisfied that the D&R, as supplemented by the August 9, 2021 letter, confers on OTA the jurisdiction to consider this

¹⁵ Respondent also gave appellant a copy of respondent's Publication 57, *Innocent Spouse Relief*.

appeal and that jurisdiction encompasses changes to the arguments and even the inclusion of the interest relief issue omitted from the D&R. The parties were fully aware of the issues well before the hearing where both argued in support of their respective positions regarding whether appellant was an innocent spouse. If OTA finds that appellant may meet the requirements for innocent spouse relief, OTA will defer further action on the request for innocent spouse relief pursuant to Regulation section 30312(e). Appellant's request will be returned to respondent for processing, which would include notifying the non-requesting spouse of the request and permitting the non-requesting spouse to submit information to support or counter the request pursuant to Regulation section 35055(g). OTA will therefore proceed to consider this narrow issue.

The first question is whether the liability is attributable to the non-requesting spouse. There is nothing in OTA's hearing record to establish grounds for such attribution. Appellant agrees that the non-requesting spouse did not own the business. Appellant owned it. The sole factual basis for appellant's claim is the assertion, unsupported by any evidence, that appellant relied on the non-requesting spouse to handle sales and use tax compliance for the business. Even if there was proof that the non-requesting spouse undertook those responsibilities, it would not have been grounds for attribution as a matter of law because such undertaking would not have been a substantial service as a taxpayer engaged in an activity or transaction that is both subject to the Sales and Use Tax Law and related to the liability. (Cal. Code Regs., tit. 18, § 35055(j)(2).) Because appellant failed to satisfy one of the requirements under Regulation section 35055(i), OTA finds that appellant does not qualify as an innocent spouse under that provision. OTA will nevertheless briefly analyze the other requirements of that provision for which evidence is lacking.

Regulation section 35055(i)(3) requires that the requesting spouse show that they did not know of the liability, and a reasonably prudent person in the requesting spouse's circumstances would not have had reason to know of the liability. Again, appellant offered no evidence to establish this requirement, and the evidence and concessions in the record show that appellant, the person who owned and operated the business, certainly would have known of the liability.

Regulation section 35055(i)(4) requires that OTA find that it would be inequitable to hold the requesting spouse responsible for the liability. There is nothing in the hearing record that

would support such a finding. The evidence shows that appellant owned and operated the business. OTA infers from that evidence that appellant received the benefits of such ownership.

Because of the foregoing, OTA finds that appellant does not qualify as an innocent spouse under Regulation section 35055(i). OTA will now consider whether appellant qualifies on equitable grounds under Regulation section 35055(l).

The evidence shows that appellant is divorced from the non-requesting spouse. That is the only factor shown by the evidence. There is no evidence that appellant will suffer economic hardship if relief is not granted, no evidence that appellant has made a good faith effort to comply with the Sales and Use Tax Law, no evidence to support attribution of the liability to the non-requesting spouse, no evidence that appellant failed to timely file returns due to duress from her former spouse, and no evidence that the divorce decree assigned the liability to the non-requesting spouse.¹⁶ On the other hand, the evidence shows that appellant would have been aware of the unpaid liability and financially benefited from her failure to file returns and pay the taxes due.¹⁷ OTA finds that appellant has not established facts that would warrant finding, on equitable grounds, that she was an innocent spouse. Consequently, OTA finds that appellant does not qualify as an innocent spouse. Therefore, appellant is not entitled to relief of the failure-to file penalties on the grounds that she is an innocent spouse.

Issue 2: Is appellant entitled to relief of interest?

The imposition of interest is mandatory. (R&TC, § 6482.) There is no statutory right to interest relief. (R&TC, § 6593.5.) The law allows respondent, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by respondent's employee(s) acting in their official capacity. (R&TC, § 6593.5(a)(1).) Such a delay could be, for example, due to an unreasonable failure to work on an appeal. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) The burden of proving unreasonable error or delay rests

¹⁶ It seems likely that the former spouses included provisions for satisfaction of the tax liability in their divorce settlement, and the copy of the decree refers to an attached settlement agreement, but appellant did not provide that information to OTA.

¹⁷ Although not necessary to support OTA's findings, OTA notes that appellant's failure to offer any evidence to explain why she filed no returns for years – statements made by appellant's representative during argument are not evidence – would permit an inference of the willful neglect of appellant's sales tax obligations as the sole owner of the business.

with the taxpayer. (Cal. Code Regs., tit. 18, § 30219(a), (b).) Because OTA has already found, above, that appellant is not an innocent spouse, the only question remaining is whether appellant is entitled to interest relief under R&TC § 6593.5(a)(1). OTA will find that an unreasonable error or delay has occurred only if no significant aspect of the error or delay is attributable to an act or failure by the taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c).)


Appellant does not allege or prove an unreasonable error or delay by respondent’s employee(s) acting in their official capacity. Consequently, she is not entitled to relief of interest.

HOLDINGS

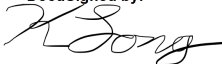
1. Appellant is not entitled to relief of the failure-to-file penalties.
2. Appellant is not entitled to relief of interest.

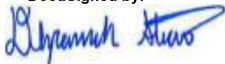
DISPOSITION

Respondent’s action denying appellant’s request for relief of the failure-to-file penalties and interest is sustained.

DocuSigned by:

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 Michael F. Geary
 Administrative Law Judge

We concur:

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 Keith T. Long
 Administrative Law Judge

DocuSigned by:

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 Richard Tay
 Administrative Law Judge

For

Date Issued: 6/27/2024