

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: |) | OTA Case No. 220710947 |
| L. BOAVENTURA-DELANOE¹ |) | |
| (REQUESTING SPOUSE) AND |) | |
| P. BOAVENTURA-DELANOE² (NON- |) | |
| REQUESTING SPOUSE) |) | |

OPINION

Representing the Parties:

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|----------------------------|---------------------------|
| For Requesting Spouse: | L. Boaventura-Delanoe |
| For Non-Requesting Spouse: | P. Boaventura-Delanoe |
| For Respondent: | Brian Werking, Attorney |
| For Office of Tax Appeals: | Andrew Jacobson, Attorney |

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 18533 and 19006, L. Boaventura-Delanoe, the requesting spouse (LBD), appeals an action by respondent Franchise Tax Board (FTB) denying her request for innocent spouse relief for tax years 2007 and 2008. P. Boaventura-Delanoe, the non-requesting spouse (PBD), joins the appeal in opposition to FTB’s determination to deny innocent spouse relief to LBD for tax years 2007 and 2008.

LBD has waived the right to an oral hearing, and PBD did not request an oral hearing. Therefore, the matter is being decided based on the written record.

¹ The requesting spouse listed a different name on the couple’s 2007 and 2008 California returns. In this appeal, the term LBD encompasses all current and prior names used by the requesting spouse.

² The non-requesting spouse used a different name on the couple’s 2007 and 2008 California returns. In this appeal, the term PBD encompasses all current and prior names used by the non-requesting spouse.

ISSUES

1. Whether LBD is entitled to innocent spouse relief for tax years 2007 and 2008.
2. Whether LBD has established entitlement to relief from nonpayment of the 2007 and 2008 tax liabilities under R&TC section 19006(c).

FACTUAL FINDINGS

Tax Year 2007

1. On April 15, 2009, LBD and PBD (together, “the couple”) filed a 2007 California Resident Income Tax Return (Form 540) on which they elected the filing status of married/RDP (registered domestic partner) filing jointly and reported California taxable income of \$0.
2. FTB processed the couple’s 2007 California return as filed. Subsequently, the IRS audited and made adjustments to the couple’s 2007 federal taxable income that totaled \$925,596.
3. According to a Confidential License and Certificate of Marriage (Marriage Certificate) issued by the Registrar-Recorder/County Clerk of the County of Los Angeles, LBD and PBD married on October 31, 2012. They were not married during the tax years in question.
4. On October 29, 2013, FTB received information from the IRS regarding its adjustments to the couple’s 2007 federal return.
5. On October 7, 2015, FTB issued a Notice of Proposed Assessment (NPA) to the couple for tax year 2007 that proposed to increase the couple’s taxable income from -\$352,371 to \$564,157, an increase of \$916,528. The NPA proposed an additional tax of \$48,077 and a late-filing penalty of \$12,019.25, plus applicable interest. The NPA stated that FTB followed adjustments to the couple’s 2007 federal return made by the IRS.
6. The couple did not protest the 2007 NPA, and the proposed assessment became a final tax liability.

Tax Year 2008

7. On June 3, 2010, the couple filed a 2008 California Resident Income Tax Return (Form 540) on which they elected the filing status of married/RDP filing jointly³ and reported taxable income of \$0.
8. FTB accepted the couple's 2008 California return as filed. Subsequently, the IRS audited and made total adjustments of \$1,285,068 to the taxable income listed on the couple's 2008 federal return (Form 1040). On October 29, 2013, FTB received information from the IRS regarding the IRS's adjustments to the couple's 2008 federal return.
9. On October 7, 2015, FTB issued an NPA to the couple for tax year 2008. The 2008 NPA proposed to increase the couple's California taxable income from -\$598,326 to \$336,831, an increase of \$935,157. The NPA proposed an additional tax due of \$26,093 and a late-filing penalty of \$4,651.25, plus applicable interest. The NPA stated that FTB followed adjustments to the couple's 2008 federal return made by the IRS.
10. The couple did not protest the 2008 NPA, and the proposed assessment became a final tax liability.

Innocent Spouse Request

11. On April 24, 2020, LBD filed an FTB Form 705, *Request for Innocent Joint Filer Relief* (Request) for tax years 2007 and 2008. LBD stated that she and PBD had a married/RDP

³ Prior to the June 3, 2010 filing of the couple's 2008 California return, FTB had issued to LBD a Request for Tax Return dated March 10, 2010. FTB states that LBD did not timely respond to the Request for Tax Return. On May 17, 2010, FTB issued to LBD an NPA for tax year 2008, which estimated that LBD had taxable income of \$134,195 based on income of \$94,358 from LEP Inc. and income of \$39,837 received from Aviva Life & Annuity Co. The NPA proposed a tax of \$9,733.00 and a late-filing penalty of \$2,433.25, plus interest. On a completed Quick Resolution Worksheet signed by LBD and PBD on May 25, 2010, the couple protested the NPA and asserted that they had already filed a 2008 California return.

status as of November 19, 2012, and that this was their current filing status. LBD filed another Request on October 24, 2021.⁴

12. On July 19, 2022, FTB issued a Notice of Action-Denial to LBD that denied LBD's request for innocent spouse relief for tax years 2007 and 2008. FTB also issued a Notice of Action-Denial to PBD dated the same day.
13. LBD filed this timely appeal.
14. PBD subsequently joined the appeal, opposing FTB's denial of innocent spouse relief to LBD for tax years 2007 and 2008.

DISCUSSION

Issue 1: Whether LBD is entitled to innocent spouse relief for tax year 2007 and 2008.

When a joint return is filed by a married couple or RDP, each spouse is jointly and severally liable for the entire tax due for that tax year. (R&TC, § 19006(b); Internal Revenue Code (IRC), § 6013(d)(3).) However, 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. (R&TC, § 18533(a); IRC, § 6015.) R&TC section 18533(a)(1) specifically states, "Notwithstanding subdivision (a) and the first sentence of subdivision (b) of Section 19006[,] [a]n individual who has made a joint return may elect to seek relief under the procedures prescribed under subdivision (b), and [subdivision (c)]." R&TC section 18533(b) provides for traditional innocent spouse relief; R&TC section 18533(c) provides for separate allocation relief; and, if a requesting spouse is ineligible for relief under subdivisions (b) or (c), a requesting spouse may still qualify for equitable relief under R&TC section 18533(f). (See also IRC, § 6015(b), (c), & (f).)

Determinations denying innocent spouse relief are reviewed de novo. (*Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980, 992; *Appeal of Calegari*, 2021-OTA-337P.)

⁴ In a letter to LBD dated March 1, 2021, FTB stated that because it received an offer in compromise application on June 29, 2020, and taxpayers cannot apply for two different programs at the same time, it had withdrawn her Request. In a fax to FTB dated May 20, 2021, LBD asked that her Request be reinstated following the rejection of the proposed offer in compromise. In her fax, LBD stated, "I have attached my Marriage Certificate where I got married to [PBD] on 10-31-2012. Since we were not married in 2007 and 2008, I believe I qualify for relief as an Innocent Spouse." LBD attached a copy of the couple's Marriage Certificate, which showed that LBD and PBD were married on October 31, 2012.

On or about October 25, 2021, LBD filed a second Request that provided incomplete information. In a fax cover sheet dated January 20, 2022, that LBD sent to FTB, LBD states, "I am not technically an 'innocent spouse' when the debt was incurred because I was not a spouse in 2007 and 2008"

Generally, an individual claiming innocent spouse relief has the burden of establishing each statutory requirement by a preponderance of the evidence. (*Stevens v. Commissioner*, T.C. Memo. 1988-63; *Appeal of Pifer*, 2021-OTA-338P.)

On appeal, FTB argues that LBD is not entitled to innocent spouse relief under R&TC section 18533(b), (c), or (f), while LBD and PBD both argue that LBD should be granted innocent spouse relief.

Federal law interpreting a federal statute may be considered highly persuasive when interpreting a California statute that is substantially similar to that federal statute. (*Appeal of Pifer*, *supra*, citing *Douglas v. State of Cal.* (1942) 48 Cal.App.2d 835, 838.) California and federal law provide that marital status is generally determined as of the close of the tax year. (R&TC, § 18532(a)(1); IRC, § 6013(d)(1)(A).) The determination of whether a taxpayer is a “spouse” entitled to innocent spouse relief is governed by the laws of the state of the marital domicile of the parties. (*Freck v. I.R.S.* (3d Cir. 1994) 37 F.3d 986 (*Freck*), 995.) For instance, in *Freck*, the Third Circuit Court of Appeals held that a taxpayer who incorrectly believed that her common law marriage was recognized in her home state was not the “spouse” of the boyfriend with whom she filed a joint income tax return, and therefore she was not entitled to federal innocent spouse relief under IRC section 6013. (*Ibid.*)

Here, FTB asserts for purposes of R&TC section 18533 that the couple filed valid joint 2007 and 2008 California returns. FTB explains that it followed federal determinations for both tax years and that FTB did not determine that the married filing joint filing status used by the couple on their 2007 and 2008 federal returns was incorrect. However, LBD and PBD now concede that they were not married to one another during the 2007 and 2008 and that they did not marry until October 31, 2012. In a fax cover sheet dated January 20, 2022, that LBD sent to FTB, LBD states, “I am not technically an ‘innocent spouse’ when the debt was incurred because I was not a spouse in 2007 and 2008” The parties do not contend, and the evidence does not show, that LBD and PBD were ever RDPs, which means that they do not qualify for the one exception that allows non-married couples to file joint California returns. (R&TC, § 18521(d).) Based on appellants’ admissions, OTA finds that appellants were not spouses at the close of tax

year 2007 on December 31, 2007, and at the close of tax year 2008 on December 31, 2008. (R&TC, § 18532(a)(1).)

OTA exercises jurisdiction over innocent spouse appeals that is independent of whether an NPA has become a final determination. (Cal. Code Regs., tit. 18, § 30103(a)(8).) As previously stated, OTA carries out a de novo review of FTB's action relating to an innocent spouse, which is independent of FTB's issuance of its 2007 and 2008 NPAs, which are now final determinations. (*Wilson v. Commissioner, supra*; *Appeal of Calegari, supra*.) Consistent with *Freck*, LBD filed a joint return that she was not permitted to file under California law because she was neither married nor an RDP under California law yet claims innocent spouse protection. (*Freck*, 37 F.3d at p. 995.) Even when the taxpayer in *Freck* attempted unsuccessfully to amend her returns after the fact, the trial court found, and the Third Circuit affirmed, that Freck could not qualify for federal innocent spouse protection even though her joint return was still valid. (*Freck*, 37 F.3d at pp. 992 and 995.) In this case, the language of R&TC section 18533(b)(1)(A) and IRC section 6015(b)(1)(A) is virtually identical, which means that Freck's interpretation of the federal innocent spouse statute is highly persuasive. (*Appeal of Pifer, supra*.) Therefore, OTA finds the *Freck* analysis to be applicable to LBD, because she continues to have a joint return, but still does not qualify as a spouse or RDP under California law.

Therefore, based on appellants' own admissions, OTA finds that, *for the purposes of innocent spouse relief*, appellants did not properly file 2007 and 2008 joint California returns, and there is no joint and several liability upon which relief can be considered. Therefore, LBD does not satisfy the requirements of R&TC sections 18533(b)(1)(A), 18533(c), nor 18533(f). Because under each of these sections, there must be a joint and several liability from which a requesting spouse seeks relief, and the requesting spouse must satisfy the requirement of having a properly filed joint return for the year(s) for which relief is requested, it is not necessary to examine factors for relief under R&TC sections 18533(c) or (f). LBD does not meet the requirement for traditional innocent spouse relief, for separate allocation relief, nor for equitable relief.

Issue 2: Whether LBD has established entitlement to relief from nonpayment of the 2007 and 2008 tax liabilities under R&TC section 19006(c).

R&TC section 19006(c) provides that FTB may revise an unpaid tax liability as to one spouse for the payment of taxes that were reported due on a joint tax return, i.e., a self-assessed

tax liability. As reflected on the Notices of Action-Denial for tax years 2007 and 2008, FTB made no determination as to whether the couple's 2007 or 2008 tax liability may be revised pursuant to R&TC section 19006(c).

By its own terms, R&TC section 19006(c) only applies to spouses. As discussed above, it is undisputed that LBD and PBD were not spouses on December 31, 2007, or on December 31, 2008, the dates on which a determination is made on whether taxpayers are spouses for 2007 and 2008, respectively. (R&TC, § 18532(a)(1).) Therefore, LBD does not qualify for relief from the unpaid tax liability for tax year 2007 or 2008 pursuant to R&TC section 19006(c).


In his concurrence, our colleague states that he disagrees with the majority's methodology in reaching the conclusion that LBD does not qualify for innocent spouse relief, and that OTA lacks the jurisdiction to alter appellants' filing status. However, the majority does not seek to alter the filing status of appellants' 2007 and 2008 California tax returns. The decision of this Opinion is relevant to the question of innocent spouse relief only, and the majority holds, as explained above, that OTA has jurisdiction to determine whether LBD is eligible for relief as an innocent spouse though she was not married to PBD during the tax years in question.

HOLDINGS


1. LBD is not entitled to innocent spouse relief for tax years 2007 and 2008.
2. LBD has not established entitlement to relief from nonpayment of the 2007 and 2008 tax liabilities under R&TC section 19006(c).

DISPOSITION

FTB's action is sustained.

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Amanda Vassigh
Administrative Law Judge

I concur:

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Teresa A. Stanley
Administrative Law Judge

T. LEUNG, concurring.


I concur with the disposition of this appeal. However, I disagree with the methodology used by the majority to reach that outcome.

Under California law, taxpayers must use the same filing status as used on their federal income tax return. (Revenue and Taxation Code (R&TC), § 18521(a).) Under federal law, with exceptions that are not relevant here, taxpayers cannot change their election to file a joint return after the due date of that return. (See Treas. Reg. § 1.6013-1(a).) Respondent Franchise Tax Board (FTB) may change the taxpayers' filing status, but only if it issues a timely notice of such change. (See R&TC, §§ 18521, 19033.)

In this appeal, L. Boaventura-Delanoe (LBD) and P. Boaventura-Delanoe (collectively, appellants) filed a joint federal income tax return (Form 1040) for 2007 and 2008; appellants also filed joint 2007 and 2008 California personal income tax returns (Forms 540). The record is devoid of any evidence that appellants changed their joint filing status on their 2007 and 2008 Forms 1040 before the due date of those returns, not even when the IRS examined appellants' 2007 and 2008 Forms 1040. Thus, by law, appellants cannot change their joint filing status on their 2007 and 2008 Forms 540. Moreover, because FTB did not issue any notice that it was changing appellants' 2007 and 2008 filing status, the Office of Tax Appeals (OTA) has no jurisdiction over this issue. Hence, the innocent spouse relief (ISR) analysis cannot be based on whether appellants made a valid election to file a joint return because the expiration of the statute of limitations has foreclosed any discussion of that issue. Simply put, at this late juncture OTA lacks the authority to redetermine any item from LBD's 2007 and 2008 Forms 540, including her election to file a joint return.

Furthermore, the facts in this appeal show that LBD does not qualify for traditional ISR (R&TC section 18533(b)) and equitable ISR (R&TC section 18533(f)) because at least part of the understatement of tax is attributable to her, and the extent to which the remaining understatement is attributable solely to her spouse is unproven. The IRS audit resulted in adjustments to LBD's business for 2007 and 2008, including under-reporting of over \$100,000 in gross receipts and disallowance of thousands of dollars of deductions for each taxable year. LBD does not qualify for separate allocation ISR (R&TC section 18533(c)) because she was

married to her spouse at the time her ISR application was filed with respondent. Thus, regardless of whether there was a valid election to file a joint return, LBD is not entitled to ISR.

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Tommy Leung
Administrative Law Judge

Date Issued: 12/18/2024