

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
G. GENTRY) OTA Case No. 22029732
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OPINION

Representing the Parties:

For Appellant: G. Gentry
For Respondent: Brad J. Coutinho, Attorney Supervisor

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 19045 and 18533, G. Gentry (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying her claim for innocent spouse relief (ISR) for the 2017 taxable year.

Appellant waived her right to an oral hearing; therefore, this matter is decided based on the written record.

ISSUE

Whether appellant has established that she qualified for ISR for the 2017 taxable year.

FACTUAL FINDINGS

1. Appellant and Mr. Gentry (collectively, the couple) filed their joint 2017 California tax return (Form 540) on April 15, 2020 (after they filed for divorce). On their return, they reported a balance due of \$15,470 but did not remit any payment. According to the couple’s federal tax return, most of the taxable income arose from the sale of real estate that Mr. Gentry had acquired before the couple married. FTB accepted their return and took collection action.
2. On November 12, 2020, FTB received appellant’s request for ISR. In the request, appellant stated that she was a housewife during the couple’s marriage, that the couple

- commenced divorce proceedings in July 2019, that she could not afford to pay the tax, and that Mr. Gentry passed away on October 11, 2020. FTB sent two requests for information from appellant, which appellant did not respond to.
3. On November 15, 2020, FTB collected \$1,911.25 from a bank account in appellant's name that only contained separate property funds.¹
 4. On July 7, 2021, the trustees of a family trust sold the home that appellant was living in.
 5. On December 15, 2021, FTB notified the executors of Mr. Gentry's Estate that appellant had requested ISR for the 2017 taxable year and provided an opportunity for the executors to object and provide information regarding whether appellant should receive ISR. The executors did not respond to this notice.
 6. On January 19, 2022, FTB denied appellant's request for ISR. FTB also notified the executors of the denial, and appellant appealed.
 7. On March 11, 2022, the executors remitted a payment of \$16,212.27 that satisfied the couple's tax balance for the 2017 taxable year.
 8. Since her request for ISR, appellant has filed at least two timely California tax returns. There is no indication that she has filed any untimely tax returns or has any other unpaid tax liabilities.
 9. After this appeal was filed, appellant was asked if she inherited, received a community property interest in, or otherwise received any assets or property from Mr. Gentry and/or his trust upon his death, and whether she applied for ISR from the IRS; appellant did not respond to this request.

DISCUSSION

When a joint return is filed by a married couple, each spouse is jointly and severally liable for the entire tax due on the aggregate income for that taxable year. (Internal Revenue Code (IRC), § 6013(d)(3); R&TC, § 19006(b).) 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 liabilities. (IRC, § 6015; R&TC, § 18533.) R&TC section 18533(b) provides for traditional ISR; R&TC section 18533(c) provides for separate allocation relief. If a requesting spouse is not eligible for ISR under either R&TC section 18533(b) or (c), a requesting spouse

¹ FTB agrees that appellant would be entitled to a refund of this separate payment of \$1,911.25 if it is established that she is entitled to ISR. Thus, it appears that the amount at issue is \$1,911.25.

may be eligible for equitable relief under R&TC section 18533(f). Traditional relief and separate allocation relief are only available for an understatement of tax, while equitable relief is available for both an underpayment and understatement of tax. (R&TC, § 18533(b)(1)(B), (c)(1) & (f).) Determinations under R&TC section 18533 are made without regard to community property laws. (R&TC, § 18533(a)(2).)

When a California statute is substantially identical to a federal statute (as is generally the case of the ISR statutes, IRC section 6015 and R&TC section 18533), federal law interpreting the federal statute may be considered highly persuasive with regard to the California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.) Thus, federal authority is applied extensively in California ISR cases. (*Appeal of Calegari*, 2021-OTA-337P.) Treasury Regulations are applied in California innocent spouse cases to the extent that such regulations do not conflict with R&TC section 18533. (R&TC, § 18533(g)(2).)

Generally, an individual claiming ISR has the burden of establishing each statutory requirement by a preponderance of the evidence. (*Stevens v. Commissioner* (11th Cir. 1989) 872 F.2d 1499, 1504.) Since the ISR provisions are remedial in nature, they are construed and applied liberally in favor of the individual claiming their benefits. (*Friedman v. Commissioner* (2d Cir. 1995) 53 F.3d 523, 528-529.) FTB's determinations are generally presumed to be correct, and unsupported assertions are not sufficient to satisfy an appellant's burden of proof. (*Appeals of F.A.R. Investments, Inc. and Arciero & Sons, Inc.*, 2022-OTA-395P.) Moreover, a payment made by a non-requesting spouse's estate cannot be refunded and/or credited to the requesting spouse. (*Kaufman v. Commissioner*, T.C. Memo. 2010-89 citing to *Ordlock v. Commissioner*, 126 T.C. 47 (2006), affd. (9th Cir.) 533 F.3d 1136 (2008).) Accordingly, FTB's position is that the amount at issue is \$1,911.25, which is the amount paid by appellant with her separate property funds.

Traditional and Separate Liability Allocation Relief

Both R&TC section 18533(b) and (c) provide that an individual may request ISR only if there is an understatement of tax. Because the 2017 tax was self-assessed and there is no understatement of tax on appellant's tax return, appellant is not entitled to traditional or separate liability allocation ISR.

Equitable Relief

R&TC section 18533(f) provides that FTB may relieve a taxpayer from a tax liability if, considering all the facts and circumstances, it is inequitable to hold the taxpayer liable for the unpaid tax or understatement, and the taxpayer does not otherwise qualify for ISR under R&TC section 18533(b) or (c). Determinations to deny equitable relief are reviewed de novo, and the requesting spouse bears the burden of showing that he or she is entitled to equitable relief. (*Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980, 982; *Appeal of Pifer*, 2021-OTA-338P.)

IRS Revenue Procedure 2013-34 provides guidance in determining whether to grant equitable relief. Section 4.01 of Revenue Procedure 2013-34 (section 4.01) sets out threshold conditions that a requesting spouse must meet to be eligible for equitable relief. If the requesting spouse meets all seven threshold conditions in section 4.01, the requesting spouse may be entitled to a streamlined determination of equitable ISR under section 4.02 of Revenue Procedure 2013-34 (section 4.02). If the requesting spouse meets the conditions of section 4.01, but does not qualify for relief under section 4.02, the requesting spouse may be eligible for relief after considering the factors set forth in section 4.03 of Revenue Procedure 2013-34.

Section 4.01

Section 4.01 lists the following threshold conditions for a taxpayer requesting equitable relief:

1. The taxpayer filed a joint return for the taxable year for which ISR is sought;
2. Relief is not available under traditional ISR or separate allocation ISR;
3. The requesting spouse applies for ISR within the applicable statute of limitations for requesting ISR;
4. No assets were transferred between spouses as part of a fraudulent scheme by the spouses;
5. The nonrequesting spouse did not transfer disqualified assets to the requesting spouse. Assets transferred from the nonrequesting spouse to the requesting spouse during the 12-month period before, or any time after, the mailing date of the first notice of proposed assessment (NPA) are presumed to be disqualified assets. (See IRC 6015(c)(4)(B)(ii)(I) and Treas. Reg. 1.6015-3(c)(3)(iii); R&TC, § 18533(c)(4)(B)(ii)(I).) The presumption does not apply if the requesting spouse establishes that the transfer was pursuant to a

divorce decree, separate maintenance agreement, or documents related to such a decree or agreement. (See IRC, § 6015(c)(4)(B)(ii)(II); R&TC, § 18533(c)(4)(B)(ii)(II).)

If the presumption of the transfer of a disqualified asset applies, the requesting spouse may rebut the presumption by establishing that the principal purpose of the transfer was not the avoidance of tax or payment of tax;

6. The requesting spouse did not file the return with a fraudulent intent; and
7. The income tax liability from which the requesting spouse seeks ISR is attributable, in full or in part, to an item of the individual with whom the requesting spouse filed the joint return, unless a specific exception applies.

There is no evidence or argument that the threshold conditions are not satisfied.

Regarding condition 5, the record contains no evidence of FTB issuing an NPA to appellant. As to condition 7, it appears most of the tax at issue arose from Mr. Gentry's sale of real estate he acquired prior to the couple's marriage. Based on the foregoing, appellant has established that she is eligible to be considered for equitable ISR.

Section 4.02

Next, whether appellant is entitled to a streamlined determination of equitable ISR needs to be considered. Section 4.02 of Revenue Procedure 2013-34 provides the following list of factors which, if met, permit a streamlined determination of equitable ISR:

1. The requesting spouse is no longer married to the non-requesting spouse as of the date FTB makes its determination;
2. The requesting spouse would suffer economic hardship if relief were not granted; and
3. The requesting spouse did not know or have reason to know that the nonrequesting spouse would not pay the tax liability shown on the return.

As Mr. Gentry passed away on October 11, 2020, the first factor would be satisfied but for the inheritance question. For purposes of this section, a requesting spouse will be treated as being no longer married to the nonrequesting spouse when the requesting spouse is a widow or widower and is not an heir to the nonrequesting spouse's estate that would have sufficient assets to pay the tax liability. (Rev. Proc. § 4.03(2)(a)(iii).) It appears that appellant did not inherit the home which tends to support appellant's contention that she did not inherit any assets. However, appellant did not respond to this Panel's inquiry as to whether she inherited, received a community property interest in, or otherwise received any other assets or property from

Mr. Gentry and/or his trust upon his death. Because appellant bears the burden of proof, this factor is not satisfied.

As for the second factor, economic hardship exists if the satisfaction of the tax liability in whole or in part will cause the requesting spouse to be unable to pay reasonable basic living expenses. (Rev. Proc. 2013-34, §§ 4.02(2) & 4.03(2)(b).) The taxing agency will compare the requesting spouse's income to the federal poverty guidelines for the requesting spouse's family size and will determine by how much, if at all, the requesting spouse's monthly income exceeds the spouse's reasonable basic monthly living expenses. (Rev. Proc. 2013-34, § 4.03(2)(b).) Generally, economic hardship will be established if the requesting spouse's income is below 250 percent of the federal poverty guidelines, or if the requesting spouse's monthly income exceeds his or her reasonable basic monthly living expenses by \$300 or less. (*Ibid.*) Treasury Regulation section 301.6343-1(b)(4) provides additional factors to consider in determining whether to release a tax levy.

Appellant asserts that she has no income besides allowances to buy food and household products and thus she cannot pay the taxes at issue. This is further supported by appellant filing two tax returns reporting no tax liability, which might be indicative of little income. However, appellant has not provided any documentation such as bank account statements, social security earning statements, paystubs, or tax returns that would demonstrate that she would suffer an economic hardship if relief is not granted. Therefore, this factor is not satisfied.

As to the third factor, whether appellant knew or had reason to know Mr. Gentry would not pay the tax liability shown on the return, appellant has not provided information regarding her knowledge of whether the unpaid tax would be unpaid by Mr. Gentry at the time the 2017 California tax return was filed or within a reasonable period after the filing. (See Rev. Proc. 2013-34, §§ 4.02(3)(a) & 4.03(2)(c)(i).) The knowledge requirement may be negated if the nonrequesting spouse abused the requesting spouse or maintained control of the household finances by restricting the requesting spouse's access to financial information such that the nonrequesting spouse's actions prevented the requesting spouse from questioning or challenging payment of the liability. (Rev. Proc. 2013-34, § 4.03(2)(c)(ii).) Claims of abuse require substantiation, or at minimum, specificity in allegations of abuse. (See *Nihiser v. Comm'r*, T.C. Memo. 2008-135, p. *9; *Thomassen v. Comm'r*, T.C. Memo. 2011-88.) "A generalized claim of abuse is insufficient." (*Contreras v. Comm'r*, T.C. Memo. 2019-12, p. 7, citations omitted.)

Appellant asserts that she was a housewife during the marriage and that Mr. Gentry managed all their financial affairs. In response to an information request from FTB, the executors alleged that appellant was provided with the 2017 California tax return and that she reviewed it prior to signing. In addition, the executors claimed that all of Mr. Gentry's financial affairs were kept in a room that appellant had access to. Appellant claimed that Mr. Gentry opened credit cards in her name, without her knowledge. However, appellant did not provide any documentation to support this claim, such as letters to and from credit card companies, a police report, etc. Appellant also failed to respond to multiple requests for information regarding what she knew at the time the return was filed and whether she had the opportunity to review the tax return.

The record indicates that appellant's knowledge of English is limited, and she contends she relied on her husband to handle their finances. Appellant's signature is reflected on the 2017 California return and she has not alleged the signature was forged. It is noted that appellant signed the return after she filed for divorce. There is no evidence that appellant made any inquiries to Mr. Gentry regarding whether or when the tax shown on the return would be paid. Based on the foregoing facts and circumstances, appellant has not shown that she did not know or have reason to know that the tax liability would not be paid. Thus, appellant has not established that she is entitled to a streamlined determination of equitable ISR under Rev. Proc. Section 4.02.

Section 4.03

If the threshold requirements are satisfied, and streamlined equitable ISR is unavailable, equitable relief may be available to a requesting spouse in an underpayment case based on the following nonexclusive factors pursuant to section 4.03 of Revenue Procedure 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. Whether the requesting spouse knew or had reason to know that the tax liability would not be paid;
4. Whether the non-requesting spouse had the sole legal obligation to pay the tax liability pursuant to a divorce decree or other legally binding agreement;
5. Whether the requesting spouse significantly benefited from the unpaid income tax liability (beyond normal support);

6. The requesting spouse's compliance with income tax laws in the following taxable years; and
7. The requesting spouse's mental and physical health at the time the requesting spouse signed the return.

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. (Rev. Proc. 2013-34, § 4.03(2).) While the guidelines provided by the Revenue Procedure are relevant to our inquiry, the Office of Tax Appeals is not bound by them as our analysis and determination ultimately turn on an evaluation of all the facts and circumstances. (See *Henson v. Commissioner*, T.C. Memo 2012-288; *Sriram v. Commissioner*, T.C. Memo 2012-91.) Equitable relief may be inappropriate even if a simple counting of factors would seem to favor relief. (Rev. Proc. 2013-34, §§ 3.05 & 4.03(2); *Henson v. Commissioner*, *supra*.)

Marital Status: Appellant's request was received on November 12, 2020. Mr. Gentry passed away on October 11, 2020. This factor favors relief.

Economic Hardship: As detailed in the discussion of section 4.02 above, while appellant claims that she has no income besides allowances to buy food and household products, she has not provided documentation to support that she would suffer an economic hardship if relief were not granted. Furthermore, the amount at issue has already been satisfied; appellant will not be required to pay additional amounts to satisfy this balance. Therefore, this factor is neutral.

Knowledge of the Underpayment: As discussed above, appellant has not established that she did not know or had no reason to know that the nonrequesting spouse would not pay the tax reported as due on the return. This factor weighs against relief.

Legal Obligation of Non-Requesting Spouse: There is no legally binding agreement assigning the legal obligation to pay the outstanding tax liability to either taxpayer. This factor is neutral.

Significant Benefit: There is no information in the record indicating that appellant received any benefit in excess of normal support from the underpayment. Due to the lack of such information, this factor is neutral.

Compliance with Income Tax Laws: According to FTB's records, appellant has filed two timely income tax returns since her claim for ISR. There is no indication of any untimely

income tax returns or other unpaid tax liabilities. Given appellant’s good faith effort to comply with the income tax laws following the 2017 taxable year, this factor weighs in favor of relief.

Mental or Physical Health: Appellant has not alleged that she was in poor physical or mental health when she signed the return for the taxable year at issue. Therefore, this factor is neutral.

In sum, two factors weigh in favor of relief, four factors are neutral, and one factor weighs against granting relief. Furthermore, as discussed above, appellant’s deceased husband’s estate sold the house she lived in, but she did not explain if she inherited or was transferred any other assets. After considering all the facts and evidence, this Panel finds that it would not be inequitable to hold appellant liable for the 2017 taxable year liability.

HOLDING

Appellant has not established that she qualified for ISR for the 2017 taxable year.

DISPOSITION

FTB’s action is sustained.

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Tommy Leung
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Tommy Leung
Administrative Law Judge

We concur:

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

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