

1 Mai C. Tran  
 2 Tax Counsel III  
 3 Board of Equalization, Appeals Division  
 4 450 N Street, MIC: 85  
 5 PO Box 942879  
 6 Sacramento, CA 95814  
 7 Tel: (916) 324-8244  
 8 Fax: (916) 324-2618

9 Attorney for the Appeals Division

10 **BOARD OF EQUALIZATION**  
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
 13 ) **PERSONAL INCOME TAX APPEAL**  
 14 **WILLIAM G. BEAN** ) Case No. 570401

Years	Amounts on Appeal
2003	\$ 1,670.70 <sup>1</sup>
2004	\$ 3,344.98 <sup>2</sup>
2006	\$ 2,879.05 <sup>3</sup>
2007	\$ 1,719.99 <sup>4</sup>

19  
 20 <sup>1</sup> According to the Notice of Action (NOA), the unpaid liability for 2003 is \$1,670.70, which includes: \$3,630.00 in tax, a  
 21 debit of \$1,352.00, credits of \$3,770.00, and interest to March 22, 2011, of \$458.70. Since that date, credits totaling  
 22 \$524.05 were credited to the 2003 tax year. Interest of \$548.36 accrued to the date of respondent's opening brief,  
 23 May 28, 2013. As of May 28, 2013, the unpaid liability for 2003 is \$1,236.31.

24 <sup>2</sup> For the 2004 tax year, the NOA reflects an unpaid liability of \$3,344.98, which includes tax of \$3,714.00, debits of  
 25 \$1,945.00, credits of \$3,296.00, and interest to March 22, 2011 of \$981.98. Since that date, interest of \$1,236.10 accrued to  
 26 the date of respondent's opening brief. As of May 28, 2013, the unpaid liability is \$3,599.10.

27 <sup>3</sup> Respondent granted partial innocent spouse relief for the 2006 tax year in accordance with the Internal Revenue Service  
 28 (IRS) determination granting partial ISR for the 2006 federal tax liability. Respondent denied relief from an unpaid liability  
 totaling \$2,879.05 that represented the tax liability attributed to appellant's income. This sum includes appellant's allocated  
 share of unpaid tax of \$1,958.45, debits of \$467.96, fees of \$94.02, credits of \$150.00, plus interest accrued to May 28,  
 2013, of \$694.41.

<sup>4</sup> Respondent initially granted partial ISR for the 2007 tax year. The IRS granted full ISR to appellant for the 2007 tax year.  
 Upon further review, respondent will grant full ISR for the 2007 tax year based on R&TC section 18533, subdivision (i).  
 Accordingly, it appears that the 2007 tax year is no longer at issue. (Resp. Op. Br., p. 2.)

1 Representing the Parties:

2 For Appellant: William G. Bean

3 For Franchise Tax Board: Marguerite Mosnier, Tax Counsel III

- 4
- 5 QUESTIONS: (1) Whether the Board has jurisdiction to consider this appeal;
- 6 (2) Whether appellant has shown that he is entitled to innocent spouse relief (ISR)
- 7 pursuant to Revenue and Taxation Code (R&TC) section 18533; and
- 8 (3) Whether appellant has shown that he is entitled to relief from joint liability
- 9 pursuant to R&TC section 19006.

10 HEARING SUMMARY

11 Background

12 2003 Tax Year

13 Appellant and his former spouse, Lisa Bean, filed a timely joint 2003 California tax

14 return. On the return, they reported federal adjusted gross income (AGI) of \$122,952,<sup>5</sup> California

15 adjustments (subtractions) of \$386, itemized deductions of \$45,480, taxable income of \$77,086, and tax

16 of \$3,353. They claimed exemption credits of \$935 and reported a total tax liability of \$2,418.

17 Appellant and his former spouse reported withholding credits of \$3,770 and claimed a refund of

18 \$1,352. Respondent accepted the return as filed, and transferred the overpayment, with interest, to

19 appellant's 2000 tax year account. (Resp. Op. Br., pp. 1-2, Exhs. A & B.)

20 The IRS subsequently audited the 2003 federal tax return and, among other things,

21 disallowed various Schedule A deductions totaling \$15,555.<sup>6</sup> These adjustments increased appellant

22 and Ms. Bean's federal taxable income to \$73,137. Accordingly, the IRS assessed additional tax of

23 \$2,276. (Resp. Op. Br., pp. 2-3, Exh. C & D.)

24 Appellant and Ms. Bean did not notify respondent of the federal adjustments. After the

25

26 <sup>5</sup> According to the 2003 Form W-2's, appellant earned wages of \$66,577 and Ms. Bean earned wages of \$51,326. (Resp.

27 Op. Br., Exh. A.)

28 <sup>6</sup> The federal adjustments included: \$1,889 of real estate taxes, \$1,632 in cash contributions, \$10,555 of employee business expenses, \$1,479 in state refunds, credits, or offsets. (Resp. Op. Br., Exh. C.)

1 IRS notified respondent of the adjustments, respondent made corresponding applicable adjustments to  
2 appellant and Ms. Bean's 2003 California tax return.<sup>7</sup> As a result, their California taxable income  
3 increased by \$13,176.00. Respondent issued a Notice of Proposed Assessment (NPA) on  
4 December 6, 2007, notifying appellant and Ms. Bean of the proposed adjustments and the  
5 corresponding proposed assessment of \$1,212.00 in additional tax, plus interest. Appellant and  
6 Ms. Bean did not protest the NPA, which became final after the protest period expired. Respondent  
7 later received payments and transfers from other years totaling \$524.05. (Resp. Op. Br., p. 3, Exhs.  
8 E & F.)

9 2004 Tax Year

10 Appellant and Ms. Bean filed a timely joint 2004 California tax return. On the return,  
11 they reported a federal AGI of \$117,845,<sup>8</sup> California adjustments of \$648, itemized deductions of  
12 \$57,303, taxable income of \$61,190, and tax of \$2,046. They claimed exemption credits totaling \$965,  
13 and reported a total tax liability of \$1,081. They reported withholding credits of \$3,026, and claimed a  
14 refund of \$1,945. Respondent accepted the return as filed, transferred \$1,853.54 on February 19, 2005,  
15 to the IRS due to an interagency intercept agreement, and issued a refund of \$91.46 to appellant and  
16 Ms. Bean on February 25, 2005. (Resp. Op. Br., p. 3, Exhs. H & I.)

17 The IRS subsequently audited appellant and Ms. Bean's 2004 federal tax return. The  
18 IRS disallowed various Schedule A deductions totaling \$ 37,349,<sup>9</sup> disallowed a Schedule D long-term  
19 capital loss of \$6,000, disallowed a child tax credit of \$150, and removed the alternative minimum tax  
20 of \$2,865. These adjustments increased their federal taxable income to \$73,587. As a result, the IRS  
21 assessed additional federal tax of \$3,565 for the 2004 tax year. (Resp. Op. Br., pp. 3-4, Exhs. J & K.)

22 Appellant and Ms. Bean did not notify respondent of the federal adjustments. After the  
23

24 \_\_\_\_\_  
25 <sup>7</sup> The NPA proposed the following adjustments to their California taxable income: disallowed deduction for contributions  
26 of \$1,632, disallowed employee business expenses of \$10,555, disallowed deduction for real estate taxes of \$1,889, and  
allowed deduction of home mortgage interest of \$900. For reasons that are not apparent in the record, respondent did not  
adjust appellant's income to reflect an additional \$900 Schedule A deduction. (Resp. Op. Br., Exh. E.)

27 <sup>8</sup> According to the 2004 Form W-2's, appellant earned wages of \$76,933 and Ms. Bean earned wages of \$44,471. (Resp.  
28 Op. Br., Exh. G.)

<sup>9</sup> These federal adjustments included: (1) \$4,353 of personal property taxes; (2) \$12,940 of medical and dental expenses;  
and (3) \$20,056 of unreimbursed employee expenses. (Resp. Op. Br., Exh. J.)

1 IRS notified respondent of the adjustments, respondent made corresponding applicable adjustments to  
2 their 2004 California tax return.<sup>10</sup> As a result, appellant and Ms. Bean's California taxable income  
3 increased by \$31,571. Respondent issued an NPA on August 14, 2008, notifying appellant and  
4 Ms. Bean of the proposed adjustments and the corresponding proposed assessment of \$2,633 in  
5 additional tax, plus interest. Appellant and Ms. Bean did not protest the NPA, which became final after  
6 the protest period expired. Respondent later received a payment of \$270. (Resp. Op. Br., p. 4,  
7 Exhs. L & F.)

#### 8 2006 Tax Year

9 Appellant and Ms. Bean filed a timely joint 2006 California tax return. On the return,  
10 they reported federal AGI of \$194,195,<sup>11</sup> California adjustments of \$857, itemized deductions of  
11 \$43,822, taxable income of \$149,516, and tax of \$9,648. They claimed exemption credits of \$752,  
12 reported a total tax liability of \$8,896, reported withholding credits of \$5,319, and reported an unpaid  
13 tax liability of \$3,577. Respondent accepted the return as filed. Since the tax liability was not paid by  
14 the original due date of the return, respondent imposed a late payment penalty of \$871.01, pursuant to  
15 R&TC section 19132. (Resp. Op. Br., p. 4, Exhs. M & N.)

#### 16 Collection Activity

17 Respondent subsequently began collection activity and received payments totaling  
18 \$150.<sup>12</sup> Respondent imposed a collection cost recovery fee of \$155 on October 2, 2007, and an  
19 installment agreement fee of \$20 on January 18, 2008. Respondent also initiated involuntary collection  
20 action by issuing an Earnings Withholding Order for Taxes. (Resp. Op. Br., p. 4, Exhs. N, O, & P.)

#### 21 Request for Innocent Spouse Relief

22 Appellant filed a request for ISR (Form 705) on or about July 23, 2009. Appellant also  
23

24  
25 <sup>10</sup> The NPA proposed the following adjustments to their California taxable income: disallowed Schedule D long term loss of  
26 \$3,000, disallowed Schedule A deduction for personal property taxes of \$4,353, disallowed Schedule A deduction for other  
unreimbursed employee business expenses of \$20,116, and disallowed Schedule A deduction for medical and dental  
expenses of \$4,102. (Resp. Op. Br., Exh. L.)

27 <sup>11</sup> According to the 2006 Form W-2's, appellant earned wages of \$103,842 and Ms. Bean earned wages of \$89,435.  
28 (Resp. Op. Br., Exh. M.)

<sup>12</sup> According to respondent's computer records, appellant made a payment of \$75 on November 15, 2007, and a payment of  
\$75 on February 19, 2008. (Resp. Op. Br., Exh. N.)

1 submitted a copy of his 2006 and 2007 California returns, a copy of a State court Judgment of  
2 Dissolution, a copy of the 2004 NPA, and a copy of a letter dated June 23, 2009, from the IRS. In  
3 appellant's letter, he stated that Ms. Bean assumed sole responsibility for payment of all community  
4 debt to state tax authorities for tax years 2003 through 2007, beginning on April 1, 2009. The  
5 Judgment of Dissolution, which incorporated a Stipulated Judgment, contained the following  
6 information: appellant and Ms. Bean were married in 2003 and separated in 2006; appellant filed a  
7 petition for dissolution of the marriage on or about October 25, 2007; a judgment dissolving the  
8 marriage and incorporating the Stipulated Judgment settling rights, responsibilities, assets and liabilities  
9 of the parties was entered on March 17, 2009; according to paragraph 12 of the Stipulated Judgment,  
10 Ms. Bean assumed sole responsibility to pay all community tax debt to respondent for tax years 2003 to  
11 2007, was required to notify respondent of her obligation and to establish a payment arrangement with  
12 respondent, and agreed to hold appellant harmless from payment of the tax debt. (Resp. Op. Br., p. 5,  
13 Exh. Q.)

14 On or about September 9, 2009, respondent requested additional information from  
15 appellant, including a complete copy of his federal and state income tax returns for the 2003, 2004,  
16 2006, and 2007 tax years, a written statement explaining how appellant and his former spouse planned  
17 to pay the taxes due at the time he filed the returns, documentation supporting appellant's belief that the  
18 taxes were going to be paid when the tax returns were filed, a complete copy of the federal audit  
19 assessments of additional tax for the 2003 and 2004 tax year and any subsequent revisions, and, if  
20 appellant requested relief of liability, the letter of determination and related documents from the IRS.<sup>13</sup>  
21 (Resp. Op. Br., p. 5, Exh. R.)

22 Respondent also notified Ms. Bean that appellant requested ISR for the 2003, 2004,  
23 2006, and 2007 tax years by letter dated September 9, 2009. In the letter, respondent requested that  
24 Ms. Bean provide additional information to respondent. Specifically, respondent requested Ms. Bean  
25 explain whether appellant had knowledge of the audit assessment or knowledge of the nonpayment at  
26 the time the joint returns were filed. In addition, respondent asked Ms. Bean of the status of the federal  
27

28 <sup>13</sup> Staff notes that it is unclear whether appellant provided any response to respondent's request for information.

1 tax liability. Respondent also requested Ms. Bean to provide information on any assets transferred after  
2 the joint returns were filed. Respondent also asked Ms. Bean whether the liability is attributable to her,  
3 appellant, or to both of them. Respondent also requested Ms. Bean to discuss whether appellant  
4 benefited from the unpaid liability. Lastly, respondent asked Ms. Bean whether she believed that it  
5 would be fair or unfair to hold appellant liable for the unpaid tax liability. In response, Ms. Bean  
6 provided the following information: she and appellant were married during all the tax years at issue;  
7 they were jointly responsible for the debt; she was making arrangements for monthly installment  
8 payments with regard to the federal tax liability; there were no assets transferred; the unpaid tax  
9 liability was attributable to both appellant and herself; and appellant benefited from the unpaid liability  
10 and abandoned his financial responsibilities. (Resp. Op. Br., p. 5, Exh. U.)

11 Respondent also received information from the IRS indicating that appellant's request  
12 for federal ISR for the 2004 tax year was denied under IRC section 6105(b), (c), and (f), and his request  
13 for federal ISR for the 2006 tax year was partially granted under IRC section 6105(f). For the 2004 tax  
14 year, the IRS denied relief because appellant did not establish that he met the requirements for relief,  
15 relief is not allowed on tax appellant owed on his own income or deductions, appellant knew or had  
16 reason to know of the income and deductions that caused the additional tax, and appellant did not show  
17 that it would be unfair to hold him responsible. According to respondent, the IRS granted partial relief  
18 for the 2006 tax year for the additional tax attributable to Ms. Bean's income based on the IRS's work  
19 papers. (Resp. Op. Br., p. 5, Exh. W.)<sup>14</sup>

20 Respondent issued a Notice of Action (NOA) – Denial dated March 22, 2011, denying  
21 ISR to appellant for 2003 and 2004. Respondent also issued an NOA – Partial Approval dated  
22 March 22, 2011, granting partial ISR to appellant for the 2006 and 2007 tax years. Respondent also  
23 issued NOAs on March 22, 2011, to Ms. Bean informing her of respondent's determination on  
24 appellant's ISR request. Appellant then filed this appeal on April 29, 2011.<sup>15</sup> (Resp. Op. Br., p. 6;  
25

26  
27 <sup>14</sup> Respondent did not provide a copy of the IRS work papers with its briefing, but this assertion does not appear to be  
disputed. Respondent should provide this document prior to or at the hearing.

28 <sup>15</sup> Appellant's appeals from both NOAs are treated as an appeal pursuant to R&TC section 19045. (Rev. & Tax. Code, §18533, subd. (e)(1)(A); Rev. & Tax. Code, §19006, subd. (c)(4).)

1 Appeal Letter, Atths.)

2 During the appeal process, respondent received additional information that the IRS  
3 granted full ISR to appellant for the 2007 tax year. On January 10, 2013, respondent notified Ms. Bean  
4 as the nonrequesting spouse that respondent intended to grant partial ISR for the 2006 tax year and full  
5 ISR for the 2007 tax year to appellant in conformity with the federal determinations for those years.  
6 (Resp. Op. Br., p. 6, Exhs. X, Y, & Z; Appeal Letter, Atth.)

7 Contentions

8 Appellant

9 Jurisdiction

10 Appellant acknowledges that he did not appeal respondent's denials of ISR by the  
11 April 22, 2011 due date. Appellant contends that he was under a physician's care, he underwent  
12 surgery, and his recovery period prevented him from responding timely. In support, appellant provided  
13 a Work Status Report from Kaiser which indicates that appellant was placed off work from  
14 April 14, 2011, through April 22, 2011, and appellant was deemed to be able to return to work at full  
15 capacity on April 23, 2011. (Appeal Letter, Atths.)

16 Innocent Spouse Relief

17 Appellant contends that he is entitled to ISR for the tax years at issue. Appellant  
18 contends that he and Ms. Bean were divorced on March 17, 2009. Appellant states that during his  
19 marriage to Ms. Bean, they filed joint returns and accumulated an abundance of tax debt. Appellant  
20 contends that, as noted on their court-order divorce stipulated judgment, Ms. Bean is solely responsible  
21 for paying all community debt to any federal, state, and local taxing authorities for the tax years  
22 2003 through 2007, beginning on April 1, 2009. Appellant contends that Ms. Bean is responsible for  
23 notifying the tax agencies of her responsibility and arranging payments. Appellant states that he  
24 previously notified the FTB of Ms. Bean's responsibility. Appellant states that Ms. Bean's failure to  
25 own up and pay the taxes pursuant to the court order is unethical and unprofessional as she is a peace  
26 officer for the State of California. Appellant attached a copy of their Judgment of Dissolution

27 ///

28 ///

1 (Judgment) dated March 17, 2009,<sup>16</sup> which indicated that appellant and Ms. Bean were married on  
2 August 24, 2003, and separated on December 15, 2006. The Judgment further indicated that Ms. Bean  
3 is solely responsible for “paying all community debt, including all assessments, deficiencies, interest  
4 and penalties, to any federal, state, and local taxing authorities for tax years 2003 through 2007”  
5 beginning on April 1, 2009. The Judgment further reflected that Ms. Bean agrees to notify said taxing  
6 agencies of her responsibility of the taxes and establish payment arrangements of the taxes. The  
7 Judgment also indicated that if Ms. Bean fails to comply with these provisions, she shall indemnify  
8 appellant for, and hold appellant harmless from, any increased tax liability, late penalties, interest,  
9 attorney fees, accountant’s fees, and any other fees or costs incurred by or assessed against appellant as  
10 a result of Ms. Bean’s failure to comply. (Appeal Letter, Atths.)

11 In response to respondent’s contentions, appellant contends that he is not in agreement  
12 with the information showing that he is responsible to pay state taxes. (App. Reply Br., p. 1.)

13 Respondent

14 Jurisdiction

15 Respondent contends that the Board lacks jurisdiction to consider this appeal.  
16 Respondent contends that appellant did not file a timely appeal as required by California Code of  
17 Regulations, title 18, (Regulation) section 5412, subdivision (a). Respondent notes that it issued two  
18 NOAs for the tax years at issue. Respondent points out that the NOAs for the 2003 and 2004 tax years  
19 state that respondent denied ISR pursuant to R&TC section 18533, subdivisions (b), (c), and (f).  
20 Respondent further points out that the NOA for 2006 and 2007 states that respondent denied ISR  
21 pursuant to R&TC section 19006, subdivision (c). Respondent contends that its ISR and relief from  
22 joint liability determinations are final 30 days after the date the NOA is mailed to the requesting and  
23 nonrequesting spouse, unless the requesting or nonrequesting spouse appeals the determination to the  
24 Board within that 30-day period, citing R&TC section 18533, subdivision (e)(1) and R&TC  
25 section 19006, subdivision (c). Respondent further notes that Regulation 5422, subdivision (a)(1)  
26 requires that an appeal must be filed with the Board within the later of 30 days from the date  
27 respondent mailed the NOA or the deadline date set out in the NOA. Respondent contends that  
28 \_\_\_\_\_

<sup>16</sup> Appellant also resubmitted the Judgment of Dissolution and Stipulated Judgment on May 25, 2011.

1 appellant was informed of these requirements because the FTB included Form 1084, which discusses  
2 this requirement, with both NOAs. (Resp. Op. Br., pp. 6-7.)

3 Respondent contends that, according to the NOAs, the last day for appellant to file an  
4 appeal was April 22, 2011. Respondent notes that Regulation section 5422, subdivision(b)(1) extends  
5 the statutory period to timely file an appeal by five days if respondent's notice being appealed is sent to  
6 an address within California. As such, respondent contends that the last day on which appellant could  
7 appeal respondent's determination was April 27, 2011. Accordingly, respondent contends that  
8 appellant's appeal dated April 29, 2011, was made after respondent's determination became final.  
9 (Resp. Op. Br., p. 7.)

10 Respondent further contends that the Board does not have jurisdiction over respondent's  
11 actions that have become final, citing the *Appeal of Frank Joseph Rossiter*, 82-SBE-014, decided by the  
12 Board on January 5, 1982, and the *Appeal of Herman M. and Marie A. Karbacher*, 73-SBE-016,  
13 decided by the Board on March 27, 1973. Respondent contends that appellant's claimed health issue is  
14 insufficient to excuse appellant's untimely filing of the appeal. Respondent contends that no excuse  
15 allows an untimely appeal to be considered by the Board, citing the *Appeal of Ray Cavagnaro, Inc.*,  
16 78-SBE-055, decided by the Board on July 26, 1978. While respondent acknowledges that the *Appeal*  
17 *of Ray Cavagnaro, supra*, involved an untimely appeal from an NOA denying a claim for refund,  
18 respondent argues that the Board's rationale and conclusion regarding the Board's lack of jurisdiction  
19 over an action of respondent that has become final prior to the date that the appellant files his appeal  
20 applies equally to respondent's actions denying ISR and relief from joint liability that became final  
21 prior to the date appellant filed his appeal letter. (Resp. Op. Br., pp. 7-8.)

#### 22 Innocent Spouse Relief and Relief from Joint Liability

23 Respondent contends that appellant has not established that he is entitled to ISR for 2003  
24 or 2004 tax year pursuant to R&TC section 18533 (traditional, separate liability, and equitable) or  
25 R&TC section 19006 (court-ordered relief). Respondent further contends that appellant has not  
26 established that he is entitled to equitable ISR for the 2006 tax year beyond the relief already granted or  
27 that appellant is entitled to revision of the 2006 joint liability pursuant to R&TC section 19006  
28 (court-ordered relief and relief from self-assessed tax). (Resp. Op. Br., p. 8.)

1 With regard to traditional ISR (applicable for the 2003 and 2004 tax years), respondent  
2 contends that appellant has not met all the requirements. Respondent contends appellant has not shown  
3 that the understatement of tax on the return is due to the erroneous items of the other spouse.  
4 Respondent notes that the erroneous items for tax years 2003 and 2004 were erroneous deductions and  
5 contends that appellant has not provided any information or documentation to establish that these  
6 erroneous deductions are attributable to Ms. Bean and not to him. In addition, respondent contends that  
7 appellant has not shown that, when signing the 2003 and 2004 returns, he did not know or have reason  
8 to know of the understatement. Respondent notes that a requesting spouse has knowledge or reason to  
9 know of an understatement if the spouse actually knew of the understatement or if a reasonable person  
10 in similar circumstances, at the time he signed the return, could be expected to know that the return  
11 contained an understatement, citing Treasury Regulations section 1.6015-2(c). Respondent contends  
12 that appellant has not provided any evidence to establish that he did not know the 2003 and 2004 tax  
13 returns reflected erroneous deductions or that appellant had no duty to inquire about them. Respondent  
14 also contends that appellant has not provided sufficient evidence for respondent to determine whether it  
15 would be inequitable for appellant to be held responsible for the tax deficiency based on all the facts  
16 and circumstances. (Resp. Op. Br., pp. 8-10.)

17 With regard to separate allocation ISR (applicable for the 2003 and 2004 tax years),  
18 respondent contends that appellant has not met all the requirements. Respondent contends that  
19 appellant has not established his portion of the deficiency. In addition, respondent contends that it has  
20 insufficient information to determine whether appellant had actual knowledge of the erroneous  
21 deductions.<sup>17</sup> (Resp. Op. Br., pp. 10-11.)

22 ///

23 ///

24 \_\_\_\_\_  
25 <sup>17</sup> Respondent appears to argue that appellant has the burden of proof with regard to the actual knowledge exception to  
26 separate allocation ISR. Staff notes that R&TC section 18533, subdivision (c)(3)(C), specifically states that, if the FTB  
27 demonstrates that the taxpayer had actual knowledge, at the time the taxpayer signed the return, of any item giving rise to  
28 the deficiency (or portion thereof) that was not allocable to the taxpayer pursuant to the allocation method provided in  
R&TC section 18533, subdivision (d), then separate allocation does not apply to that item. Accordingly, if an individual  
claiming relief can show that the requirements of separate allocation ISR are otherwise met, respondent (not the claimant)  
has the burden of establishing that the claimant had actual knowledge making him ineligible for separate allocation relief.

1 With regard to equitable ISR (applicable for the 2003, 2004, and 2006 tax years),<sup>18</sup>  
2 respondent contends that appellant has not established that he meets the requirements of IRS  
3 Notice 2012-8.<sup>19</sup> With regard to the threshold conditions in section 4.01, respondent contends that  
4 appellant has not established that the tax liability as to which he seeks innocent spouse relief is due to  
5 income attributed to Ms. Bean. Respondent contends that appellant has not established that the  
6 disallowed deductions underlying the tax liabilities for 2003 and 2004 were attributable to Ms. Bean.  
7 Respondent notes that, for the 2006 tax year, respondent relieved appellant of tax attributable to  
8 Ms. Bean's wages and one-half of the interest income.<sup>20</sup> Respondent contends that appellant has not  
9 established that the remaining income is attributable to Ms. Bean. (Resp. Op. Br., pp. 11-13, Exhs. M  
10 & AA.)

11 Respondent contends that, even if appellant could establish that he meets the threshold  
12 requirements of section 4.01, he has not established that he meets the requirements for streamlined  
13 equitable ISR under section 4.02 or equitable ISR under section 4.03. (Resp. Op. Br., p. 13.)

14 With regards to streamlined equitable ISR, respondent contends that appellant has not  
15 shown that he would suffer economic hardship if relief is not granted. In addition, respondent contends  
16 that appellant has not alleged or shown, when signing the returns for the tax years at issue, he did not  
17 know or have reason to know of the understatement or that Ms. Bean would not or could not pay the  
18 tax shown on the joint return. Respondent notes that this factor was modified in the proposed revenue  
19 procedure.<sup>21</sup> Specifically, in understatement cases, if the nonrequesting spouse abused the requesting  
20

21 \_\_\_\_\_  
22 <sup>18</sup> It appears that appellant is not eligible for traditional or separate liability ISR for the 2006 tax year because those forms of  
23 ISR are limited to liability arising from a deficiency assessment. Respondent states that it followed the federal  
24 determination for the 2006 tax year that appellant was entitled to partial ISR attributable to Ms. Bean's income and granted  
25 partial equitable ISR for the 2006 tax year pursuant to R&TC section 18533, subdivision (i). (Resp. Op. Br., p. 11,  
26 Exh. AA.)

27 <sup>19</sup> Although respondent's brief discusses the requirements of equitable ISR pursuant to the proposed revised regulation in  
28 IRS Notice 2012-8, the current regulation applicable to this appeal is IRS Revenue Procedure 2013-34. The requirements in  
IRS Revenue Procedure 2013-34 are substantially similar to those in IRS Notice 2012-8.

<sup>20</sup> For the 2006 tax year, appellant and Ms. Bean reported federal AGI of \$194,195 (i.e., \$103,842 of wages earned by  
appellant + \$89,435 of wages earned by Ms. Bean + interest income of \$61 + a tax refund of \$857). Appellant and  
Ms. Bean reported a California adjustment (subtraction) of \$857 on their return. Accordingly, appellant and Ms. Bean's  
California AGI was \$193,338 (i.e., \$103,842 + \$89,435 + \$61).

<sup>21</sup> IRS Revenue Procedure 2013-34 section 4.02 (3) adopted this modification.

1 spouse or maintained control over finances by restricting the requesting spouse's access to financial  
2 information, and the requesting spouse was unable to challenge the treatment of any items on the joint  
3 return, this factor would be satisfied. In underpayment cases, if the requesting spouse could not  
4 question the payment of the tax liability reported on the return or challenge the nonrequesting spouse's  
5 assurance regarding payment of the tax liability due to fear of retaliation, this factor would be satisfied.  
6 Respondent contends that appellant has not alleged or established that he was abused by, or under the  
7 financial control of, Ms. Bean. (Resp. Op. Br., pp. 13-15.)

8           With regards to equitable ISR under 4.03, respondent contends that as it cannot evaluate  
9 all the facts and circumstances in this appeal due to a lack of information, appellant has not established  
10 that he is entitled to equitable ISR. Specifically, respondent contends that it does not have sufficient  
11 information to evaluate the following factors: whether appellant would suffer economic hardship if  
12 ISR is not granted; whether appellant did not know or have reason to know of the understated tax  
13 liabilities on the 2003 and 2004 tax returns and Ms. Bean would not or could not pay the 2006 tax  
14 liability at the time the 2006 tax return was filed; whether appellant received a significant benefit; and  
15 whether appellant was in poor physical or mental health at the time he signed the 2003, 2004 and 2006  
16 returns. Respondent acknowledges that the following factors weigh in favor of relief: appellant's  
17 marital status, Ms. Bean's legal obligation to pay the outstanding income tax liability pursuant to a  
18 divorce decree or other legally binding agreement;<sup>22</sup> and appellant's compliance with income tax laws  
19 in subsequent taxable years. (Resp. Op. Br., pp. 15-17.)

20           With regard to court-ordered relief under R&TC section 19006, subdivision (b),  
21 respondent contends that appellant has not established that he did not earn, manage or control the  
22 income on which the unpaid tax liabilities for all years at issue are based. Respondent contends that  
23 R&TC section 19006, subdivision (b), provides that a court may revise a joint tax liability in a divorce  
24 proceeding, but the court order revising the tax liability may not relieve a spouse of tax liability on the  
25

---

26 <sup>22</sup> According to respondent, Ms. Bean's legal obligation to pay the outstanding tax liabilities for the 2003 and 2004 tax  
27 years, and her legal obligation to pay the installment agreement fees owed for the 2006 tax year, has been discharged in  
28 bankruptcy. IRS Revenue Procedure 2013-34 section 4.03(2)(d) provides that respondent is required to disregard the fact  
that a nonrequesting spouse has been relieved of the tax liability due to discharge in bankruptcy when determining whether  
the requesting spouse has the sole legal obligation.

1 income earned by or subject to the exclusive management and control of the spouse. In addition to  
2 appellant not satisfying the substantive requirements for court-ordered relief, respondent contends that  
3 appellant's court order does not satisfy the statutory requirements of R&TC section 19006,  
4 subdivision (b)(2), because the court order does not separately state the tax liability for each year, the  
5 court order does not separately state the specific amount as to which a revision of liability is granted for  
6 each year, the court order lacks a tax revision clearance certificate issued for the 2006 tax year based on  
7 the amount of gross income for that year, and the court order has not been served on respondent.

8 (Resp. Op. Br., p. 17.)

9 With regard to relief from nonpayment under R&TC section 19006, subdivision (c),  
10 respondent contends that appellant has not shown that he did not know and did not have reason to know  
11 that Ms. Bean would not or could not pay the 2006 tax liability reported on the return at the time it was  
12 filed. Accordingly, respondent contends that appellant does not appear to qualify for ISR under R&TC  
13 section 19006, subdivision (c), which provides that respondent may revise a taxpayer's joint tax  
14 liability to the extent that the tax liability is unpaid, and is not a tax liability arising from income earned  
15 by or subject to the exclusive management and control of the spouse requesting relief. (Resp. Op. Br.,  
16 p. 18.)

### 17 Applicable Law

#### 18 Jurisdiction

19 Regulation section 5412, subdivision (a), provides that the Board has jurisdiction to hear  
20 and decide a timely filed appeal, including circumstances where respondent mails an NOA on a  
21 proposed deficiency assessment of additional tax or when respondent mails a notice that grants or  
22 denies, in whole or in part, ISR under R&TC section 18533, subdivisions (b) or (c), or R&TC section  
23 19006, subdivision (c). (Cal. Code Regs., tit. 18, §§ 5412, subd.(a)(1) and (9).)

24 Regulation section 5422, subdivision (a), provides that, for appeals of unpaid  
25 assessments, an appeal is timely if it is mailed to or received by the Board's Board Proceedings  
26 Division no later than the later of (A) 30 days from the date the FTB mails an NOA upon the protest of  
27 the unpaid assessment, or (B) the date indicated on the notice as the deadline for filing an appeal. (Cal.  
28 Code Regs., tit. 18, § 5422, subd. (a)(1).)

1 For ISR appeals pursuant to R&TC section 18533 and appeals pursuant to R&TC  
2 section 19006, subdivision (c), an appellant may appeal the determination of the FTB to the Board  
3 within 30 days from the date that the FTB mails the NOA to both individuals filing the joint return.  
4 (Rev. & Tax. Code, §18533, subd. (e)(1)(A)(iii); Rev. & Tax. Code, §19006, subd. (c)(4); Cal. Code  
5 Regs., tit. 18, § 5422, subd. (a)(9).)<sup>23</sup> If an appellant does not appeal the determination within this  
6 prescribed period, the FTB's determination shall be final. (Rev. & Tax. Code, §18533,  
7 subd. (e)(1)(A)(ii); Rev. & Tax. Code, §19006, subd. (c)(4).)

8 The statutory 30-day period for filing an appeal is extended for five additional days if  
9 the FTB's notice being appealed was mailed to an address within California. (Cal. Code Regs., tit. 18,  
10 § 5422, subd. (b).) The date of mailing is the date of receipt if the document is filed by facsimile or  
11 other electronic means. (Cal. Code Regs., tit. 18, §§ 5422, subd. (c) and 5421, subd. (a).)

12 Where respondent's determination is final, the Board has consistently held that it does  
13 not have jurisdiction to consider an appeal of that determination. In the *Appeal of*  
14 *Frank Joseph Rossiter, supra*, the Board determined that it lacked jurisdiction to consider an untimely  
15 appeal from respondent's determination on a claim for refund where the taxpayer did not file his appeal  
16 until after respondent's determination became final. Similarly, in the *Appeal of Ray Cavagnaro Inc.,*  
17 *supra*, the Board determined that as the taxpayer filed an untimely appeal from an NOA denying a  
18 claim for refund, the FTB's denial of the claim for refund became final and the Board did not have  
19 jurisdiction to consider a final determination. In the *Appeal of Herman M. and Marie A. Karbacher,*  
20 *supra*, the Board determined that it lacked jurisdiction to consider an appeal from respondent's  
21 determination on a proposed assessment where the taxpayers failed to file their appeal within the  
22 30 day time limit and the instructions for filing a timely appeal were clearly stated in the NOA.

23 In the *Appeal of Chris A. Heuldon and Florence K. Sutter, 82-SBE-242*, decided by the  
24 Board on October 14, 1982, the Board held that it had no jurisdiction to consider a final jeopardy  
25 assessment where the taxpayer failed to appeal the assessment within the statutory period. The  
26

27  
28 <sup>23</sup> It does not appear that the Board has jurisdiction to consider respondent's denial of relief pursuant to R&TC section 19006, subdivision (b). In contrast to relief from nonpayment of tax liability reported on a joint return pursuant to R&TC section 19006, subdivision (c), there is no express statutory provision within R&TC section 19006, subdivision (b) that permits a taxpayer to appeal to the Board.

1 taxpayer claimed that their failure to timely appeal was due to reasonable cause. (*Id.*) The Board  
2 determined that as there is no provision in the applicable statute to waive the statutory period for  
3 reasonable cause, the assessment became final. (*Id.*)

4           In *Healy v. Comm'r*, (9th Cir. 1965) 351 F.2d 602, the Ninth Circuit Court of Appeals  
5 held that it did not have jurisdiction to consider a petition for reviewing an alleged deficiency when the  
6 notice of deficiency was sent to petitioner's correct address and the petitioner failed to file his petition  
7 to contest the notice of deficiency within the statutory period. The Ninth Circuit Court of Appeals  
8 reasoned that the requirement to meet the statutory deadline for filing a petition is a jurisdictional issue  
9 and, no matter how allegedly inequitable the situation, there is no authority to relieve the taxpayer from  
10 the clear jurisdictional requirements of the law. (*Healy v. Comm'r, supra* at 603.)

11           In *Gormeley v. Comm'r*, T.C. Memo 2009-252, the taxpayer filed a petition outside the  
12 statutory period for appealing a federal denial of ISR. The taxpayer argued that the statutory period is  
13 not a jurisdictional issue, but a statute of limitations subject to tolling. (*Id.*) The taxpayer further  
14 argued that equitable tolling applied due to her belated receipt of the notice of determination and that  
15 the statutory period should not begin to run before the date of the taxpayer's receipt of the notice. (*Id.*)  
16 Tax Court held that it did not have jurisdiction to hear the petition due to its untimeliness. (*Id.*) The  
17 Tax Court further reasoned that the taxpayer's generalized reliance on equity and policy considerations  
18 cannot overcome a jurisdictional defect. (*Id.*)

#### 19           Innocent Spouse Relief

20           R&TC section 19006, subdivision (b), provides that when a joint return is filed, the  
21 liability for the tax on the aggregate income is joint and several. When a couple files a joint return,  
22 each person is treated as consenting, whether or not the person realizes it, to joint and several liability.  
23 (Int.Rev. Code, § 6013(d); Rev. & Tax. Code, § 19006.) The taxpayer who controls the disposition of,  
24 or receives, or spends, community income, as well as the taxpayer who is taxable on the income, is  
25 liable for the tax on that income. (Rev. & Tax. Code, § 19006, subd. (a).) The entire amount of tax due  
26 may be collected from either person or may be collected from both persons signing the return.  
27 (Rev. & Tax. Code, § 19006.)

28           However, federal and California law provide that an individual who files a joint return

1 may be relieved of all or a portion of such joint and several liability if the individual qualifies as an  
2 innocent spouse. (Int.Rev. Code, § 6015; Rev. & Tax. Code, §§ 18533 and 19006.) When a California  
3 statute is substantially identical to a federal statute (as in the case of the innocent spouse statutes)  
4 federal law interpreting a federal statute may be considered highly persuasive with regard to the  
5 California statute. (*Douglas v. State of California*, (1942) 48 Cal.App.2d 835, 838.) Thus, federal  
6 authority is applied extensively in California innocent spouse cases. (Rev. & Tax. Code, § 18533,  
7 subd. (g).)

8           Except as otherwise provided, an individual claiming ISR has the burden of establishing  
9 each statutory requirement by a preponderance of the evidence. (*Stevens v. Comm'r*, T.C. Memo  
10 1988-63; *Appeal of Frederick and Charlotte Dillett*, 85-SBE-012, Feb. 5, 1985.) Since the innocent  
11 spouse provisions are remedial in nature, they are construed and applied liberally in favor of the  
12 individual claiming their benefits. (*Friedman v. Comm'r*, (2d Cir. 1995) 53 F.3d 523, 528-529.)  
13 However, respondent's determinations are generally presumed to be correct, and an appellant generally  
14 bears the burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109,  
15 June 18, 1986; *Todd v. McColgan*, (1949) 89 Cal.App.2d 509, 514.) Unsupported assertions are not  
16 sufficient to satisfy an appellant's burden of proof. (*Appeal of Aaron and Eloise Magidow*,  
17 82-SBE-274, Nov. 17, 1982.)

18           There are three types of ISR under R&TC section 18533: traditional relief under  
19 subdivision (b), separate allocation election under subdivision (c), and equitable relief under  
20 subdivision (f).

#### 21           Traditional Innocent Spouse Relief

22           R&TC section 18533, subdivision (b), allows relief with respect to an understatement of  
23 tax attributable to the erroneous items of the other individual filing the joint return when the requesting  
24 spouse meets the following requirements:

- 25           1. A joint return was filed for the tax year in question;
- 26           2. There is an understatement of tax on the return due to erroneous items of the other spouse;
- 27           3. The requesting spouse establishes that in signing the return, he or she did not know of, and had  
28           no reason to know of, the understatement;

1 4. Taking into account all facts and circumstances, it would be inequitable to hold the requesting  
2 spouse liable for the deficiency attributable to the understatement;<sup>24</sup> and

3 5. The requesting spouse elects the benefits of this subdivision within the applicable statute of  
4 limitations for requesting relief.

5 (Rev. & Tax. Code, § 18533, subd. (b)(1).)

6 A taxpayer has reason to know of an understatement if a reasonably prudent taxpayer in  
7 his or her position at the time he or she signed the return could be expected to know that the return  
8 contained an understatement. (*Wiener v. Comm'r*, T.C. Memo 2008-230.) Key factors include his or  
9 her education level and involvement in the family's business and financial affairs, the presence of  
10 lavish or unusual expenditures as compared to the family's past income levels, income standards, and  
11 spending patterns; and the culpable spouse's evasiveness and deceit concerning the couple's finances.  
12 (*Butler v. Comm'r*, (2000) 114 T.C. 276, 284.) A requesting spouse has a duty of inquiry. (*Mora v.*  
13 *Comm'r*, (2001) 117 T.C. 279, 289.) Tax returns setting forth dramatic deductions will generally put a  
14 reasonable taxpayer on notice that further investigation is warranted. (*Id.*) A spouse who has a duty to  
15 inquire but fails to do so may be charged with constructive knowledge of the substantial understatement  
16 and thus precluded from obtaining innocent spouse relief. (*Id.*; *Wiener v. Comm'r*, T.C. Memo  
17 2008-230.)

#### 18 Separate Allocation Innocent Spouse Relief

19 R&TC section 18533, subdivision (c), provides that a requesting spouse may limit his or  
20 her liability for a deficiency with respect to a joint return to the amount which would have been  
21 allocable to the requesting spouse had separate returns been filed, if the requesting spouse meets the  
22 following requirements:

- 23 1. At the time of the election for ISR is filed, the individual is no longer married to, is legally  
24 separated from, or for at least 12 months, has been living apart from, the person with whom the  
25

---

26 <sup>24</sup> It appears that the language in the equities test of R&TC section 18533, subdivision (b)(1)(D) is the same as the language  
27 in R&TC section 18533, subdivision (f), and the equitable factors considered under both provisions are the same.  
28 Accordingly, the determination as to whether it is equitable to hold a party claiming relief liable would be the same from  
either provision. (*Alt v. Commissioner*, (2002) 119 T.C. 303, 316; *Butler v. Commissioner*, (2000) 114 T.C. 276, 291;  
*Barranco v. Commissioner*, T.C. Memo. 2003-18.)

1 joint return was filed;

2 2. The election must be made within the applicable statute of limitations for making the request for  
3 relief; and

4 3. The requesting spouse has the burden of proof of establishing his or her portion of the  
5 deficiency. Under the methodology provided in R&TC section 18533, subdivision (d), for  
6 allocation of income, any item giving rise to a deficiency generally must be allocated in the  
7 manner it would have been allocated if the taxpayers had filed separate returns.

8 (Rev. & Tax. Code, §18533, subd. (c).)<sup>25</sup>

9 The requesting spouse has the burden of proving which items would not have been  
10 allocated to him if the spouses had filed separate returns. (*Mora v. Comm'r, supra* at 290.)

11 R&TC section 18533 provides three exceptions under which items initially attributed to  
12 the nonrequesting spouse must also be attributed to the requesting spouse. R&TC section  
13 18533(c)(3)(C) provides an exception to separate allocation when the requesting spouse has actual  
14 knowledge of the items giving rise to the deficiency at the time the requesting spouse signed the return.  
15 If respondent demonstrates that the requesting spouse electing separate liability relief had actual  
16 knowledge, at the time the requesting spouse signed the return, of any item giving rise to a deficiency  
17 (or portion thereof) which is not allocable to the electing individual, then the separate liability election  
18 will not apply to such deficiency (or portion).<sup>26</sup> (Rev. & Tax. Code, § 18533, subd. (c)(3)(C).)

19 To deny separate allocation on the basis of actual knowledge, respondent must establish  
20 that appellant had actual knowledge of any item giving rise to the deficiency by a preponderance of the  
21 evidence. (*Culver v. Comm'r, (2001) 116 T.C. 189.*) In the case of omitted income, actual knowledge

22 ///

23 \_\_\_\_\_  
24 <sup>25</sup> In addition, R&TC section 18533, subdivision (c)(3)(A)(ii), provides that, if the FTB establishes that assets were  
25 transferred between the spouses as part of a fraudulent scheme by those spouses, then an election for separate allocation is  
26 invalid. Staff notes that respondent has not alleged, and the record does not support, that appellant and Ms. Bean transferred  
assets in this manner.

27 <sup>26</sup> An electing individual with actual knowledge of the understatement not allocable to him or her is still able to elect  
28 allocation under subdivision (c), if that individual establishes that he or she signed the return under duress. (Rev. & Tax.  
Code, § 18533, subd. (c)(3)(C).) Staff notes that appellant has not alleged, and the current record does not support, that  
appellant meets this exception.

1 of the item includes knowledge of the receipt of the item. (Treas. Reg. section 1.6015-3(c)(2)(i)(A).)<sup>27</sup>  
2 In the case of erroneous deductions, respondent must establish that the requesting spouse had actual  
3 knowledge of the factual circumstances which made the item unallowable as a deduction. (Treas. Reg.  
4 section 1.6015-3(c)(2)(i)(B)(1); *Hopkins v. Comm'r*, (2003) 121 T.C. 73, 86 (T.C. 2003), citing  
5 *Culver v. Comm'r*, *supra*.) In the case of a fictitious or inflated deduction, respondent must establish  
6 that the requesting spouse actually knew that the expenditure was not incurred, or not incurred to that  
7 extent. (Treas. Reg. section 1.6015-3(c)(2)(i)(B)(2).) Actual knowledge of the tax laws or legal  
8 consequences of the operative facts are not required. (*Hopkins v. Comm'r*, *supra*, citing *Culver v.*  
9 *Comm'r*, *supra*.)

10 R&TC section 18533, subdivision (d)(3)(B), provides an exception to separate allocation  
11 where the items giving rise to the deficiency that are attributable to the nonrequesting spouse are also  
12 attributed to the requesting spouse if the requesting spouse received a tax benefit from the items on the  
13 joint return.

14 R&TC section 18533, subdivision (d)(3)(C) provides an exception to separate allocation  
15 where the FTB establishes fraud by one or both of the spouses. In such a case of fraud, the FTB may  
16 allocate any item in a manner that is appropriate due to the fraud. (Rev. & Tax. Code, § 18533,  
17 subd. (d)(3)(C).)

#### 18 Equitable Innocent Spouse Relief

19 R&TC section 18533, subdivision (f), provides that respondent may relieve a taxpayer  
20 from a tax liability if, taking into account all the facts and circumstances, it is inequitable to hold the  
21 taxpayer liable for the unpaid tax or understatement, and the taxpayer does not otherwise qualify for  
22 relief under subdivisions (b) and (c). Determinations to deny equitable relief were previously reviewed  
23 under an abuse of discretion standard of review, but are now reviewed de novo. (See *Wilson v.*  
24 *Comm'r*, (9th Cir. 2013) 705 F.3d 980, *aff'g* T.C. Memo 2010-134; *Porter v. Comm'r*, (2009)  
25 132 T.C. 203.)

26 Revenue Procedure 2013-34 provides guidance in determining whether to grant  
27

28 <sup>27</sup> R&TC section 18533, subdivision (g)(2), provides that IRS regulations promulgated under IRC section 6015 shall apply to the extent that those regulations do not conflict with R&TC section 18533 and its regulations.

1 equitable relief. Section 4.01 of IRS Revenue Procedure 2013-34 explains the following threshold  
2 requirements for a taxpayer requesting equitable relief:

- 3 1. The taxpayer filed a joint return for the taxable year for which he or she seeks relief;
- 4 2. Relief is not available to him or her under traditional ISR or separate allocation ISR;<sup>28</sup>
- 5 3. The requesting spouse applies for relief within the applicable statute of limitations for  
6 requesting relief;
- 7 4. No assets were transferred between spouses as part of a fraudulent scheme by the spouses;
- 8 5. The nonrequesting spouse did not transfer disqualified assets to the requesting spouse;
- 9 6. The requesting spouse did not file the return with a fraudulent intent; and
- 10 7. The income tax liability from which the requesting spouse seeks relief is attributable, in full or  
11 in part, to an item of the individual with whom the requesting spouse filed the joint return,  
12 unless a specific exception applies.<sup>29</sup>

13 Section 4.02 of Revenue Procedure 2013-34 applies to requests for ISR in cases where  
14 the tax liability resulted from a deficiency assessment or underpayment, and provides the following list  
15 of factors which, if met, permit a streamlined determination of ISR:

- 16 (1) the requesting spouse establishes he or she is no longer married to the nonrequesting spouse;
- 17 (2) the requesting spouse establishes he or she would suffer economic hardship if relief were not  
18 granted;<sup>30</sup> and
- 19 (3) the requesting spouse establishes he or she did not know or have reason to know that there was  
20 an understatement or deficiency on the joint return or did not know or have reason to know that  
21 the nonrequesting spouse would not or could not pay the underpayment of tax reported on the

22 ///

23 ///

---

24  
25 <sup>28</sup> The California equivalent to IRC sections 6015(b) and (c) are R&TC section 18533, subdivisions (b) and (c).

26 <sup>29</sup> These exceptions include: attribution solely due to the operation of community property law, nominal ownership,  
27 misappropriation of funds, abuse and fraud committed by the nonrequesting spouse. Staff notes that appellant has not  
28 alleged or provided evidence to support the application of these exceptions.

<sup>30</sup> Revenue Procedure 2013-34 section 4.02(2) provides that the economic hardship requirement for streamlined equitable  
ISR is analyzed pursuant to Revenue Procedure 2013-34 section 4.03(2)(b).

1 joint income tax return.<sup>31</sup>

2 When streamlined equitable relief is unavailable, equitable relief may be available to a  
3 requesting spouse based on the following nonexclusive factors pursuant to section 4.03 of Revenue  
4 Procedure 2013-34:

5 (1) Marital status: Whether the requesting spouse is no longer married to the nonrequesting spouse  
6 as of the date the Service makes its determination. (Rev. Proc. 2013-34, §4.03(2)(a).) If the  
7 requesting spouse is still married to the nonrequesting spouse, this factor is neutral. (*Id.*) If the  
8 requesting spouse is no longer married to the nonrequesting spouse, this factor will weigh in favor  
9 of relief. (*Id.*)

10 (2) Economic hardship: Whether the requesting spouse would suffer economic hardship if relief  
11 is not granted. (Rev. Proc. 2013-34, § 4.03(2)(b).) The taxing agency will compare the  
12 requesting spouse's income to the federal poverty guidelines for the requesting spouse's family  
13 size and will determine by how much, if at all, the requesting spouse's monthly income exceeds  
14 the spouse's reasonable basic monthly living expenses. (*Id.*) If the requesting spouse's income  
15 is below 250 percent of the federal poverty guidelines, or if the requesting spouse's monthly  
16 income exceeds the requesting spouse's reasonable basic monthly living expenses by \$300 or  
17 less, then this factor will weigh in favor of relief unless the requesting spouse has assets out of  
18 which the requesting spouse can make payments towards the tax liability and still adequately  
19 meet the requesting spouse's reasonable basic living expenses. (*Id.*) If the requesting spouse's  
20 income exceeds these standards, the taxing agency will consider all facts and circumstances in  
21 determining whether the requesting spouse would suffer economic hardship if relief is not  
22 granted. (*Id.*) The lack of a finding of economic hardship does not weigh against relief, and is a  
23 neutral factor. (*Id.*)

---

24  
25  
26 <sup>31</sup> Revenue Procedure 2013-34 section 4.02(3)(a) provides that, if the nonrequesting spouse maintained control over the  
27 household finances by restricting the requesting spouse's access to financial information, and therefore, because of the  
28 financial control the requesting spouse was not able to challenge the treatment of any items on the joint return, or to question  
the payment of the taxes reported as due on the joint return or challenge the nonrequesting spouse's assurance regarding  
payment of the taxes, for fear of the nonrequesting spouse's retaliation, then the financial control will result in this factor  
being satisfied even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement  
or deficiency.

1 (3) Knowledge or reason to know: In understatement cases, if the requesting spouse did not  
2 know or have reason to know of the item giving rise to the understatement, this factor will  
3 weigh in favor of relief.<sup>32</sup> (Rev. Proc. 2013-34, §4.03(2)(c)(i)(A).) If the requesting spouse  
4 knew or had reason to know of the item giving rise to the understatement, this factor will weigh  
5 against relief. (*Id.*) Actual knowledge of the item will not be weighed more heavily than other  
6 factors in understatement cases. (*Id.*) In underpayment cases, if the requesting spouse  
7 reasonably expected the nonrequesting spouse to pay the tax liability reported on the return, this  
8 factor will weigh in favor of relief. (Rev. Proc. 2013-34, §4.03(2)(c)(ii).) This factor will weigh  
9 against relief if, based on the facts and circumstances of the case, it was not reasonable for the  
10 requesting spouse to believe that the nonrequesting spouse would or could pay the tax liability  
11 shown on the return. (*Id.*) The facts and circumstances that are considered in determining whether  
12 the requesting spouse had reason to know of an understatement, or reason to know whether the  
13 nonrequesting spouse could or would pay the reported tax liability, include, but are not limited to,  
14 the requesting spouse's level of education, any deceit or evasiveness of the nonrequesting spouse,  
15 the requesting spouse's degree of involvement in the activity generating the income tax liability, the  
16 requesting spouse's involvement in business or household financial matters, the requesting spouse's  
17 business or financial expertise, and any lavish or unusual expenditures compared with past spending  
18 levels. (Rev. Proc. 2013-34, §4.013(2)(c)(iii).) In addition, if the requesting spouse establishes  
19 that he or she was the victim of abuse, then depending on the facts and circumstances of the  
20 requesting spouse's situation, the abuse may result in certain factors weighing in favor of relief  
21 when otherwise the factor may have weighed against relief. (Rev. Proc. 2013-34, §4.03(c)(iv).)

22 (4) The nonrequesting spouse's legal obligation: This factor will weigh in relief if the  
23 nonrequesting spouse has the sole legal obligation to pay the outstanding tax liability pursuant  
24 to a divorce decree or agreement. (Rev. Proc. 2013-34, §4.03(d).) This factor, however, will be  
25

---

26 <sup>32</sup> Depending on the facts and circumstances, if the requesting spouse was abused by the nonrequesting spouse (as described  
27 in section 4.03(2)(c)(iv)), or the nonrequesting spouse maintained control of the household finances by restricting the  
28 requesting spouse's access to financial information, and because of the abuse or financial control, the requesting spouse was  
not able to challenge the treatment of any items on the joint return for fear of the nonrequesting spouse's retaliation, this  
factor will weigh in favor of relief even if the requesting spouse knew or had reason to know of the items giving rise to the  
understatement or deficiency. (Rev. Proc. 2013-34, §4.03(2)(c)(i)(A).)

1 neutral if the requesting spouse knew or had reason to know, when entering into the divorce  
2 decree or agreement, that the nonrequesting spouse would not pay the income tax liability. (*Id.*)  
3 This factor will weigh against relief if the requesting spouse has the sole legal obligation. (*Id.*)  
4 The fact that the nonrequesting spouse has been relieved of liability for the taxes at issue as a  
5 result of a discharge in bankruptcy is disregarded in determining whether the requesting spouse  
6 has the sole legal obligation. (*Id.*)

7 (5) Significant benefit to the electing spouse: If the requesting spouse significantly benefited<sup>33</sup>  
8 from the unpaid income tax liability or understatement, this factor will weigh against relief.  
9 (Rev. Proc. 2013-34, §4.03(e).) If only the nonrequesting spouse significantly benefitted from  
10 an item giving rise to an understatement or deficiency, and the requesting spouse had little or no  
11 benefit, or the nonrequesting spouse enjoyed the benefit to the requesting spouse's detriment,  
12 this factor will weigh in favor of relief. (*Id.*) If the amount of unpaid tax or understatement was  
13 small such that neither spouse received a significant benefit, then this factor is neutral. (*Id.*)

14 (6) The electing spouse's compliance with income tax laws: Whether the requesting spouse has  
15 made a good faith effort to comply with the income tax laws in the taxable years following the  
16 taxable year or years to which the request for relief relates. (Rev. Proc. 2013-34, §4.03(f).) If the  
17 requesting spouse is compliant for taxable years after being divorced from the nonrequesting  
18 spouse, then this factor will weigh in favor of relief. If the requesting spouse is not compliant, then  
19 this factor will weigh against relief. (Rev. Proc. 2013-34, §4.03(f)(i).) If the requesting spouse  
20 made a good faith effort to comply with the tax laws but was unable to fully comply, then this factor  
21 will be neutral. (*Id.*)

22 The additional following factor weighs in favor of equitable relief if present, but does  
23 not weigh against relief if not present:

24 (7) Mental or physical health of the electing spouse: If the requesting spouse was in poor  
25 mental or physical health at the time the return or returns for which the request relates were filed  
26 (or at the time the requesting spouse reasonably believed the return or returns were filed), or at  
27

28 <sup>33</sup> A significant benefit is any benefit in excess of normal support. (Rev. Proc. 2013-34, §4.03(e); Treas. Reg. § 1-6015-2(d).)

1 the time the requesting spouse requested relief, this factor will weigh in favor or relief.  
2 (Rev. Proc. 2013-34, §4.03(g).)

3 No single factor is determinative, the list of factors is not exhaustive, and the degree of  
4 importance of each factor varies depending on the requesting spouse's facts and circumstances.  
5 (Rev. Proc. 2013-34, §4.03(2).) Section 3.05 of Revenue Procedure 2013-34 states that, depending on  
6 the facts and circumstances of the case, relief may still be appropriate if the number of factors weighing  
7 against relief exceeds the number of factors weighing in favor of relief, or a denial of relief may still be  
8 appropriate if the number of factors weighing in favor of relief exceeds the number of factors weighing  
9 against relief. (Rev. Proc. 2013-34, §3.05.) While the guidelines provided by the Revenue Procedure  
10 are relevant to the Board's inquiry, the Board is not bound by them as the Board's analysis and  
11 determination ultimately turn on an evaluation of all the facts and circumstances. (See *Henson v.*  
12 *Comm'r*, T.C. Memo 2012-288; *Sriram v. Comm'r*, T.C. Memo 2012-91.) Equitable relief may be  
13 inappropriate even if a simple counting of factors would seem to favor relief. (Rev. Proc. 2013-34,  
14 §3.05 & §4.03(2); *Henson v. Comm'r, supra*; *Hudgins v. Comm'r*, T.C. Memo 2012-260.)

#### 15 Court-Ordered Relief

16 R&TC section 19006, subdivision (b), also provides relief from joint and several  
17 liability based on court order in a proceeding for dissolution of marriage. The liability may be revised  
18 by a court in a proceeding for dissolution of the marriage of the husband and wife, provided that the  
19 order revising tax liability may not relieve a spouse of tax liability on income earned by or subject to  
20 the exclusive management and control of the spouse. (Rev. Tax. Code, § 19006, subd.(b)(1).) The  
21 liability of the spouse for the tax, penalties, and interest due for the taxable year shall be in the same  
22 ratio to total tax, penalties, and interest due for the taxable year as the income earned by or subject to  
23 the management and control of the spouse is to total gross income reportable on the return. (*Id.*)

24 In addition, the order revising tax liability: (1) must separately state the income tax  
25 liabilities for the taxable years for which revision of tax liability is granted; (2) shall not revise a tax  
26 liability that has been fully paid prior to the effective date of the order (however, any unpaid amount  
27 may be revised); (3) shall become effective when the FTB is served with or acknowledges receipt of the  
28 order; and (4) shall not be effective if the gross income reportable on the return exceeds one hundred

1 fifty thousand dollars (\$150,000) or the amount of tax liability the spouse is relieved of exceeds  
2 seven thousand five hundred dollars (\$7,500), unless a tax revision clearance certificate is obtained  
3 from the FTB and filed with the court. (Rev. & Tax. Code, § 19006, subd. (b)(2).)

#### 4 Relief from Nonpayment of Joint Tax Liability

5 R&TC section 19006, subdivision (c), provides that the FTB may revise an unpaid tax  
6 liability as to one spouse for payment of taxes that were reported due on a joint tax return. However,  
7 the liability shall not be revised to relieve a spouse of tax liability on income earned by or subject to  
8 exclusive management and control of that spouse. (Rev. & Tax. Code, § 19006, subd.(c)(1)(A).) In  
9 addition, the liability shall not be revised to relieve a spouse of liability below the amount actually paid  
10 on the liability prior to granting of relief. (Rev. & Tax. Code, § 19006, subd.(c)(1)(B).) The liability  
11 may be revised only if the spouse whose liability is to be revised establishes that he or she did not  
12 know, and had no reason to know of, the nonpayment at the time the return was filed. (Rev. & Tax.  
13 Code, § 19006, subd.(c)(2).) “Reason to know” means whether or not a reasonably prudent person  
14 would have reason to know of the nonpayment. (*Id.*)

#### 15 STAFF COMMENTS

##### 16 Jurisdiction

17 The March 22, 2011 NOAs informed appellant that his appeal from the FTB’s  
18 determination must be filed by April 22, 2011. Respondent also included a Form 1084 with the NOAs  
19 to further inform appellant of the process of appealing respondent’s determination. R&TC section  
20 18533, subdivision (e)(1)(A)(ii), requires appellant to file his appeal of respondent’s ISR determination  
21 within 30 days of the NOAs. It appears to staff that appellant was required to file his appeal for the tax  
22 years at issue by April 27, 2011, pursuant to Regulation section 5422, subdivisions (a)(1) and (b)(1).  
23 Appellant filed his appeal by facsimile on April 29, 2011. It appears to staff that appellant’s appeal is  
24 untimely. Accordingly, it appears that respondent’s determination is final. Staff notes that the Board  
25 has held that it does not have jurisdiction to consider an appeal where the FTB’s determination is final.  
26 (*Appeal of Frank Joseph Rossiter, supra; Appeal of Ray Cavagnaro, Inc., supra; Appeal of Herman M.*  
27 *and Marie A. Karbacher, supra.*)

28 With regard to appellant’s contentions regarding his health issue preventing him from

1 filing a timely appeal, staff is sympathetic to the circumstances, but there is no statutory or regulatory  
2 provision that permits waiving or tolling a deadline for filing an appeal with the Board for reasonable  
3 cause. In addition, staff is not aware of any case law that would allow reasonable cause to waive or toll  
4 the statutory deadline for filing an appeal and available authorities indicate that the statutory deadline  
5 cannot be waived for reasonable cause. (See, e.g., *Appeal of Chris A. Heuldon and Florence K. Sutter*,  
6 *supra*; *Healy v. Comm'r, supra* at 603; *Gormeley v. Comm'r, supra*.)

7 In the event the Board determines that it has jurisdiction to consider appellant's appeal  
8 for the 2003, 2004 and 2006 tax years, then the Board must consider whether appellant has shown that  
9 he is entitled to ISR pursuant to R&TC section 18533 or relief from joint liability pursuant to R&TC  
10 section 19006.

#### 11 Traditional Innocent Spouse Relief

12 R&TC section 18533, subdivision (b), applies only to appeals based on deficiency  
13 assessments. Appellant's appeal for the 2003 and 2004 tax years are based on deficiency assessments  
14 resulting from disallowed erroneous deductions. Accordingly, appellant may seek traditional ISR for  
15 2003 and 2004. Appellant's appeal for the 2006 tax year is based on appellant and Ms. Bean's  
16 nonpayment of tax reported on their 2006 tax return. Accordingly, it appears that appellant is  
17 precluded from seeking traditional ISR for the 2006 tax year (but may seek equitable relief).

18 To qualify for traditional ISR, appellant must show that he (1) filed a joint tax return for  
19 the year at issue; (2) the understatement of tax on the return is due to the erroneous items of the other  
20 spouse; (3) appellant did not know of, and had no reason to know of, the understatement when he  
21 signed the return; (4) based on all the facts and circumstances it would be inequitable to hold appellant  
22 liable for the deficiency; and (5) appellant timely elected ISR. The parties agree that the first and fifth  
23 requirements have been satisfied. It appears that the second, third, and fourth requirements are at issue  
24 and appellant should be prepared to address these requirements. Staff notes that appellant has not  
25 asserted that he meets these requirements. Instead, it appears that appellant's position through the  
26 appeals process thus far is that he should be granted ISR based on the divorce settlement which  
27 provides that his former spouse is responsible for any tax liability arising from the years at issue.

28 With regard to the second requirement, it appears to staff that appellant has not asserted

1 or provided evidence demonstrating that the understatement of tax on the return was due to the  
2 erroneous items of the other spouse. For 2003, these erroneous items included: disallowed deduction  
3 for contributions of \$1,632, disallowed employee business expenses of \$10,555, and disallowed  
4 deduction for real estate taxes of \$1,889. For 2004, these erroneous items included: a disallowed  
5 Schedule D long term loss of \$3,000, disallowed deduction for personal property taxes of \$4,353,  
6 disallowed deduction for other unreimbursed employee business expenses of \$20,116, and disallowed  
7 deduction for medical and dental expenses of \$4,102. Staff notes that appellant has yet to provide any  
8 documentation to establish that the erroneous items for 2003 and 2004 are attributable to Ms. Bean and  
9 not to him. Staff further notes that the IRS determined that the 2004 federal tax liability arose from  
10 items of his own income or deductions. (Resp. Op. Br., Exh. W.)

11 With regard to the third requirement, it appears to staff that appellant has not asserted or  
12 demonstrated that, when signing the 2003 and 2004 returns, he did not know or have reason to know  
13 that the 2003 and 2004 tax returns reflected erroneous deductions. In addition, the parties should be  
14 prepared to discuss whether he had a duty to inquire of the erroneous deductions. Staff notes that the  
15 IRS determined that appellant knew or had reason to know of the income or deductions that caused the  
16 additional tax for the 2004 tax year. (Resp. Op. Br., Exh. W.)

17 With regard to the fourth requirement, it appears that appellant has not asserted that it  
18 would be inequitable to hold him liable for the tax deficiency. Appellant should be prepared to discuss,  
19 and provide evidence of, whether it would be inequitable to hold him responsible for the tax deficiency  
20 based on all the facts and circumstances. Relevant facts and factors regarding this issue are set forth  
21 below in the discussion regarding equitable relief. As discussed below, appellant will want to provide  
22 more evidence to show that it would be inequitable to hold him responsible for the liability, such as  
23 evidence with respect to whether the items were attributable to him, his knowledge of the erroneous  
24 items and whether he would suffer an economic hardship if relief was not granted. Staff notes that the  
25 IRS determined that it would not be inequitable to hold appellant liable for the tax liability for the 2004  
26 tax year. (Resp. Op. Br., Exh. W.)

27 Separate Allocation Innocent Spouse Relief

28 R&TC section 18533, subdivision (c), applies only to appeals based on deficiency

1 assessments. Appellant's appeal for the 2003 and 2004 tax years is based on deficiency assessments.  
2 Accordingly, appellant may seek separate liability ISR for 2003 and 2004. Appellant's appeal for the  
3 2006 tax year is based on appellant and Ms. Bean's nonpayment of tax reported on their 2006 tax  
4 return. Accordingly, it appears that appellant is precluded from seeking separate liability ISR for the  
5 2006 tax year.

6 With regard to the 2003 and 2004 tax years, respondent acknowledges that appellant is  
7 no longer married at the time of the ISR election and appellant's election for ISR was timely.

8 Appellant has the burden of proof in establishing which items would not have been  
9 allocated to him if the spouses had filed separate returns. (*Mora v. Comm'r, supra* at 290.) For 2003,  
10 these erroneous items included: disallowed deduction for contributions of \$1,632, disallowed employee  
11 business expenses of \$10,555, and disallowed deduction for real estate taxes of \$1,889. For 2004, these  
12 erroneous items included: a disallowed Schedule D long term loss of \$3,000, disallowed deduction for  
13 personal property taxes of \$4,353, disallowed deduction for other unreimbursed employee business  
14 expenses of \$20,116, and disallowed deduction for medical and dental expenses of \$4,102. Appellant  
15 will want to discuss and show how the erroneous deductions and disallowed loss should be allocated  
16 between appellant and Ms. Bean.

17 With regard to the actual knowledge exception to separate allocation, in the event  
18 appellant can establish what portion (if any) of the erroneous items were not attributable to him, the  
19 parties should be prepared to discuss whether appellant had actual knowledge of the factual  
20 circumstances which made the reported deductions erroneous. Respondent has the burden to show  
21 appellant had actual knowledge of the item giving rise to the deficiency by a preponderance of the  
22 evidence. (Rev. & Tax. Code, § 18533, subd. (c)(3)(C); Treas. Reg, § 1.6015-3(c)(2)(i)(B)(1); *Culver*  
23 *v. Comm'r, supra*.)

#### 24 Equitable Innocent Spouse Relief

25 Appellant may seek equitable ISR for all tax years at issue (i.e., 2003, 2004, and the  
26 remaining portion of the tax liability for 2006). However, in order to obtain equitable relief, appellant  
27 will want to demonstrate that, at a minimum, he meets all of the threshold conditions in section 4.01 of  
28 Revenue Procedure 2013-34. If appellant satisfies these threshold conditions, then appellant should

1 discuss whether he meets the requirements for streamlined equitable ISR in section 4.02 of Revenue  
2 Procedure 2013-34 or the factors for general equitable ISR in section 4.03 of Revenue Procedure  
3 2013-34.

4 With regard to the threshold conditions in Revenue Procedure 2013-34 section 4.01,  
5 appellant must establish: (1) that he filed a joint tax return for the tax years he seeks relief; (2) that  
6 relief is not available under traditional or separate allocation ISR; (3) that he filed for relief within the  
7 applicable statute of limitations; (4) that no assets were transferred between spouses as part of a  
8 fraudulent spouse; (5) that the nonrequesting spouse did not transfer disqualified assets to appellant;  
9 (6) that appellant did not file the return with a fraudulent intent; and (7) that the income tax liability  
10 from which appellant seeks relief is attributable, in full or in part, to an item of his former spouse  
11 (unless a specific exception applies).

12 The Revenue Procedure and federal court cases indicate that, if appellant cannot satisfy  
13 all of the threshold conditions, his claim for equitable relief should be denied. (See, e.g., *Reilly-Casey*  
14 *v. Comm'r*, T.C. Memo 2013-292; *Stanwyck v. Comm'r*, T.C. Memo 2012-180; *Franc v. Comm'r*, T.C.  
15 Memo 2010-79; *O'Meara v Comm'r*, T.C. Memo 2009-71.)

16 Respondent acknowledged that appellant has satisfied the first, second, and third  
17 conditions (he filed a joint tax return; relief is not available under traditional or separate allocation ISR,  
18 and appellant filed his request for ISR within the applicable statute of limitations). Respondent further  
19 acknowledges that there is nothing in the record to suggest that any assets were transferred or that fraud  
20 was involved. Therefore, it appears that the only condition at issue is the seventh condition regarding  
21 whether the income tax liability from which appellant seeks relief is attributable, in full or in part, to an  
22 item of his former spouse. As a result, appellant will want to provide evidence demonstrating that he  
23 has satisfied this condition.<sup>34</sup>

---

24  
25  
26 <sup>34</sup> Staff notes that there is an exception to this seventh threshold condition for instances where (1) the attribution of the item  
27 to the requesting spouse is due solely to the operation of community property law, (2) the requesting spouse merely has  
28 nominal ownership of item from which the tax liability arose, (3) the requesting spouse did not know of the nonrequesting  
spouse's misappropriation of funds (4) due to abuse prior to signing the return, the requesting spouse was not able to  
challenge the treatment of any items on the return for fear of retaliation from the nonrequesting spouse; or (5) fraud  
committed by the nonrequesting spouse caused the erroneous item. (Rev. Proc. 2013-34, § 4.01(7).) Staff notes that  
appellant has not alleged and the current record does not support the application of these exceptions.

1 Appellant should be prepared to discuss, and provide evidence of, whether the tax  
2 liability is attributable, in whole or part, to the nonrequesting spouse. For 2003, the tax liability arose  
3 from the following erroneous items: disallowed deduction for contributions of \$1,632, disallowed  
4 employee business expenses of \$10,555, and disallowed deduction for real estate taxes of \$1,889. For  
5 2004, the tax liability arose from the following erroneous items: a disallowed Schedule D long term  
6 loss of \$3,000, disallowed deduction for personal property taxes of \$4,353, disallowed deduction for  
7 unreimbursed employee business expenses of \$20,116, and disallowed deduction for medical and  
8 dental expenses of \$4,102.

9 Staff notes that, according to information reported on the 2003 and 2004 federal tax  
10 returns, both appellant and Ms. Bean are employed as correctional employees. (Resp. Op. Br., Exh.  
11 A & G.) Staff notes that appellant will need to clarify whether the disallowed deductions for  
12 unreimbursed employee business expenses are attributable to appellant or Ms. Bean or to both of them.  
13 Staff notes that the 2004 federal tax return also reports that the unreimbursed employee business  
14 expenses include \$8,623 for vehicle expenses related to their occupation and the remaining amounts are  
15 related to union dues, uniforms, safety equipment, communication services, weapons training and  
16 maintenance, and personal care and grooming. (Resp. Op. Br., Exh. G.) In order to satisfy the  
17 threshold conditions, appellant will want to demonstrate that all, or some portion of, these erroneous  
18 deductions are attributable to Ms. Bean.

19 Staff notes that Ms. Bean alleges that the tax liability is attributed to both her and  
20 appellant. (Resp. Op. Br., Exh. V.) Staff further notes that the IRS determined that federal ISR for the  
21 2004 tax year was unavailable for appellant, in part, because relief was not allowed on tax appellant  
22 owes on his own income or deductions. (Resp. Op. Br., Exh. W.)

23 For 2006, respondent contends that it reduced appellant's tax liability in accordance with  
24 the federal determination on the 2006 federal tax liability. Respondent contends that the federal  
25 determination on the 2006 tax year relieved appellant of responsibility for tax attributable to  
26 Ms. Bean's income. Staff notes that respondent submitted a copy of the IRS determination regarding  
27 appellant's request for federal ISR for the 2004 and 2006 tax years, in which the IRS denied ISR for  
28 2004 and granted partial equitable ISR for 2006. (Resp. Op. Br., Exh. W.) Respondent indicated that

1 the IRS granted federal ISR for the 2006 tax year from tax liability attributed to Ms. Bean's income  
2 based on IRS workpapers. Staff requests that, at least 14 days prior to the hearing, respondent provide  
3 as an additional exhibit the IRS workpapers and any other federal documentation on which respondent  
4 based its determination for 2006 (as well as any federal documentation it has, if any, for the other  
5 years). Appellant should be prepared to discuss and provide evidence of whether the remaining 2006  
6 state tax liability is attributable to Ms. Bean. If respondent's contention is correct (i.e., that none of the  
7 remaining liability is attributable to Ms. Bean), appellant would not satisfy this threshold condition for  
8 2006.

9           If appellant can establish that he meets the threshold conditions, he should be prepared  
10 to discuss whether he qualifies for streamlined equitable ISR. Under Revenue Procedure 2013-34  
11 section 4.02, appellant must show the following requirements are met: (1) appellant is no longer  
12 married to the nonrequesting spouse; (2) appellant would suffer economic hardship if relief were not  
13 granted; and (3) appellant did not know or have reason to know that there was an understatement or  
14 deficiency on the return or that the nonrequesting spouse would not or could not pay the underpayment  
15 of tax reported on the return. It appears to staff that the second and third requirements are at issue.  
16 Staff notes that appellant meets the first requirement as he was divorced from Ms. Bean as of  
17 March 17, 2009.

18           With regard to the economic hardship requirement, appellant has the burden to establish  
19 that he would be unable to pay reasonable basic living expenses if he was responsible for partially or  
20 wholly satisfying the tax liabilities. (*Henson v. Comm'r, supra.*) Appellant will need to provide  
21 evidence of his current income, assets, expenses, and discuss whether he shares expenses with anyone  
22 else. Appellant will also need to discuss whether his monthly income is relative to 250 percent of the  
23 federal poverty guidelines for his family size.

24           With regard to the knowledge requirement, appellant has the burden to establish that he  
25 did not know or have reason to know that the 2003 and 2004 tax returns reflected erroneous deductions  
26 when he signed the returns. Staff notes that the IRS determination indicated that appellant knew or had  
27 reason to know of the income or deductions that caused the additional tax for the 2004 tax year. (Resp.  
28 Op. Br., Exh. W.) In addition, appellant has the burden to establish that he did not know or have reason

1 to know that Ms. Bean would not or could not pay the tax reported on the joint return for the 2006 tax  
2 year. Appellant will want discuss and provide evidence to show that he has satisfied this requirement.

3 If the Board finds that appellant has satisfied the threshold conditions in section 4.01,  
4 but appellant does not satisfy the requirements in section 4.02 for streamlined equitable ISR, the Board  
5 must determine whether appellant qualifies for equitable ISR under the factors listed in section 4.03.  
6 Both parties should be prepared to discuss the factors below and any other facts and circumstances that  
7 are relevant to this determination. The factors include the following:

- 8 1. Marital Status: Appellant and Ms. Bean are divorced effective March 17, 2009. As  
9 respondent acknowledges, this factor favors relief.
- 10 2. Economic Hardship: It appears to staff that appellant has not provided any evidence to  
11 evaluate this factor, despite respondent's request for such evidence. As noted above,  
12 appellant should be prepared to provide evidence showing that he would be unable to  
13 pay reasonable basic living expenses if he was responsible for partially or wholly  
14 satisfying the tax liabilities. As there is currently no evidence to support the finding that  
15 there is economic hardship, it appears that this factor is neutral.
- 16 3. Knowledge: As noted above, appellant should be prepared to discuss and provide  
17 evidence of, whether appellant did not know or have reason to know that the 2003 and  
18 2004 tax returns reflected erroneous deductions when he signed the 2003 and 2004  
19 returns. In addition, appellant should be prepared to discuss, and provide evidence of,  
20 whether he did not know or have reason to know that Ms. Bean would not or could not  
21 pay the tax reported on the joint return for the 2006 tax year. Staff notes that appellant  
22 has not asserted or provided evidence showing that he was abused by his former spouse  
23 or that his former spouse had financial control. Staff further notes that the IRS denied  
24 federal ISR for the 2004 tax year based in part on its determination that appellant knew  
25 or had reason to know of the income or deductions that caused the additional tax. The  
26 IRS also allowed partial federal equitable ISR for 2006 for reasons that are not specified  
27 in the determination letter. Accordingly, it appears that based on the current record, for  
28 the 2004 tax year, it appears that this factor weighs against relief. As for the 2003 and

1 2006 tax years, appellant has the burden of proof to establish that this factor favors relief  
2 and appellant will need to provide evidence to support his appeal. Otherwise, it appears  
3 that this factor is neutral.

- 4 4. Nonrequesting spouse's legal obligation: According to the stipulated judgment  
5 approved by the Court in the Judgment of Dissolution, Ms. Bean has the legal obligation  
6 to pay the outstanding tax liabilities for the years at issue. As respondent acknowledges,  
7 this factor favors relief.
- 8 5. Significant benefit: It appears to staff that appellant has not provided any evidence to  
9 evaluate whether he received a significant benefit beyond normal support from the  
10 erroneous deductions that gave rise to the tax liability. Appellant has not shown that he  
11 did not significantly benefit from the unpaid tax liability. Staff notes that Ms. Bean  
12 alleges that appellant significantly benefited from the unpaid tax liability. However,  
13 there is nothing in the record to suggest that appellant and Ms. Bean led anything but a  
14 normal lifestyle. Staff notes that according to the stipulated judgment approved by the  
15 Court in the Judgment of Dissolution, appellant and Ms. Bean owned a house, two cars,  
16 a boat and other personal property. Staff notes that appellant received the house, a car,  
17 and various personal property and appellant received the boat, a car and various personal  
18 property. Staff notes that it is not clear when appellant and Ms. Bean acquired these  
19 assets. Appellant should be prepared to discuss and provide evidence of his and  
20 Ms. Bean's lifestyle during 2003, 2004, and 2006. Staff further notes that the total  
21 amount of the unpaid tax liability for all three tax years as of May 28, 2013 was  
22 \$7,714.46.<sup>35</sup> If the amount of unpaid tax or understatement was small such that neither  
23 spouse received a significant benefit, then this factor is neutral. (Rev. Proc. 2013-34,  
24 §4.03(5).) Accordingly, it appears to staff that the current record supports finding this  
25 factor neutral.

- 26 6. Compliance with income tax laws: Respondent's records reflect that appellant filed  
27

28 <sup>35</sup> This amount is calculated as: \$1,236.31 (2003 tax year) + \$3,599.10 (2004 tax year) + \$2,879.05 (2006 tax year).

1           timely California returns for the 2005, and 2008 through 2012 tax years. Respondent's  
2 records further reflect that appellant timely paid tax liabilities for these tax years. As  
3 respondent acknowledges, this factor favors relief.

- 4           7. Mental or physical health: Appellant has not alleged that he was in poor mental or  
5 physical health when he signed the returns or when he requested ISR. If appellant does  
6 allege these circumstances, appellant should be prepared to discuss the circumstances  
7 and provide evidence in support of his contentions.

8           In weighing the factors, no single factor is determinative, the list of factors is not  
9 exhaustive, and the degree of importance of each factor varies depending on the requesting spouse's  
10 facts and circumstances. (Rev. Proc. 2013-34, §4.03(2).) Depending on the facts and circumstances of  
11 the case, a denial of relief may be appropriate even if the number of factors weighing in favor of relief  
12 exceeds the number of factors weighing against relief, and, conversely, relief may be granted even if  
13 the negative factors outnumber the positive factors. (Rev. Proc. 2013-34, §3.05; *Henson v. Comm'r*,  
14 *supra*; *Hudgins v. Comm'r, supra*.) Staff notes that, for all the tax years at issue, based on the evidence  
15 in the record to-date, three factors appear to favor relief: marital status, legal obligation of the  
16 nonrequesting spouse, and appellant's compliance with tax laws. It appears the mental and physical  
17 health factor is not relevant for any of the tax years. With regard to the knowledge factor, it appears  
18 that this factor weighs against relief for the 2004 tax year and appears that this factor is neutral for 2003  
19 and 2006. It appears that the remaining factors are neutral. If appellant can establish that he satisfies  
20 the threshold conditions for relief (and specifically that the items are not attributable to him), the parties  
21 will want to discuss whether, considering the above factors, and any other relevant facts and  
22 circumstances, it would be inequitable to hold appellant responsible for the tax liability.

#### 23           Court-Ordered Relief

24           R&TC section 19006, subdivision (b), provides that respondent may adjust a taxpayer's  
25 joint tax liability based on a court order. It is staff's opinion that the Board does not have jurisdiction  
26 to review respondent's determination of whether this provision is applicable.

27           The Board's jurisdiction in this appeal is provided by R&TC section 18533, which does  
28 not provide jurisdiction for the Board to review determinations under R&TC section 19006,

1 subdivision (b). Notably, while subdivision (c) of R&TC section 19006 (which addresses revision of  
2 the taxpayer's liability by the FTB) provides the Board with authority to review determinations under  
3 that provision, subdivision (b) (regarding court orders) does not provide the Board with jurisdiction to  
4 review determinations made under subdivision (b). It therefore appears to staff that the Board does not  
5 have authority to review respondent's determination that relief is not available under R&TC section  
6 19006, subdivision (b).

7 In the event that the Board determines that it does have jurisdiction to consider an appeal  
8 based on R&TC section 19006, subdivision (b), appellant would need to demonstrate that he did not  
9 earn, manage, or control the income on which the unpaid tax liabilities for 2003 and 2004, and the  
10 remaining unpaid tax liability for 2006 are based. In addition, even if appellant could show that he did  
11 not earn, manage or control the income at issue, it appears to staff that the court order revising the tax  
12 liability does not satisfy the requirements of R&TC section 19006, subdivision (b)(2). Specifically, the  
13 court order here does not separately state the income tax liabilities or the amount of the revisions  
14 granted for each year. In addition, appellant has not demonstrated that respondent was served with or,  
15 acknowledged receipt of, the order. Furthermore, appellant has not demonstrated that he obtained a tax  
16 revision clearance certificate from respondent for the 2006 tax year as the gross income reportable on  
17 the 2006 return exceeded \$150,000.

#### 18 Relief from Nonpayment of Joint Tax Liability

19 Pursuant to R&TC section 19006, subdivision (c), respondent may revise a taxpayer's  
20 unpaid joint tax liability reported due on a tax return to the extent that it is not a tax liability arising  
21 from income earned by or subject to the exclusive management and control of the spouse requesting  
22 relief. Accordingly, appellant may seek relief under this provision for the 2006 tax year. However, it  
23 appears that the 2003 and 2004 tax years are precluded from relief under this provision because the  
24 unpaid tax liability in those years are due to deficiency assessments and were not the result of unpaid  
25 tax reported due on the returns. Staff notes that respondent already granted partial relief to appellant  
26 for the 2006 tax liability arising from income attributable to Ms. Bean. With regard to the remaining  
27 tax liability for the 2006 tax year, appellant should be prepared to demonstrate that the income at issue  
28 is not attributable to him. In addition, appellant should be prepared to discuss whether he did not know

1 and did not have reason to know that Ms. Bean would not or could not pay the 2006 tax liability  
2 reported on the return at the time it was filed.

3 Additional Evidence

4 If either party has any additional evidence to present, they should provide their evidence  
5 to the Board Proceedings Division at least 14 days prior to the oral hearing pursuant to California Code  
6 of Regulations, title 18, section 5523.6.<sup>36</sup>

7 ///

8 ///

9 ///

10 Bean\_mt

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

---

<sup>36</sup> Evidence exhibits should be sent to: Khaaliq Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.