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7 **BOARD OF EQUALIZATION**  
 8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
 11 ) **PERSONAL INCOME TAX APPEAL**  
 12 **TONJA M. JARRELL**<sup>1</sup> ) Case No. 571357  
 13 **SPOUSE REQUESTING RELIEF** )

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	<u>Years</u> <sup>2</sup>	<u>Amounts of Relief Requested</u> <sup>3</sup>
	2005	\$682.16
	2006	\$5,486.73

18 Representing the Parties:  
 19 For Appellant: Sonia Zaheer, Tax Appeals Assistance Program (TAAP)<sup>4</sup>  
 20 For Franchise Tax Board: Kathleen B. Cooke, Tax Counsel III

22 <sup>1</sup> Appellant resides in Sacramento, California. The nonrequesting spouse, Jason Kimbrough, did not participate in  
 23 respondent's consideration of appellant's request for relief from liability and he did not respond to the Board's letter dated  
 24 May 19, 2011, advising him of his right to join this appeal.

25 <sup>2</sup> The tax years at issue are more than five years from when the appeal was filed because the self-assessed joint liabilities for  
 26 the tax years at issue were never paid and appellant filed a request for innocent spouse relief on October 18, 2010, which  
 27 respondent denied.

28 <sup>3</sup> These amounts, which consist of tax, penalties/costs, interest, and credits, are shown on the Notice of Action-Denial dated  
 April 7, 2011, which is attached to appellant's appeal letter; the appeal letter reflects the same amounts.

<sup>4</sup> Appellant filed the appeal letter, Poonam Dayalji of TAAP filed appellant's reply brief, Cassandra Banks of TAAP filed  
 appellant's supplemental brief, and Jaimi Nakata of TAAP filed appellant's additional brief. Board records indicate that  
 Sonia Zaheer of TAAP is currently representing appellant.

1 QUESTION: Whether appellant has demonstrated error in respondent's determination to deny her  
2 innocent spouse relief.

3 HEARING SUMMARY

4 Introduction

5 As set forth in more detail below, appellant requested innocent spouse relief from the  
6 self-assessed unpaid tax liabilities reported on the 2005 and 2006 California returns appellant and her  
7 former spouse, Jason Kimbrough, jointly filed on April 15, 2007. The couple divorced in 2009.  
8 Appellant requested relief from the couple's 2005 and 2006 balance due on the grounds that their  
9 marital settlement agreement, which is attached to the couple's divorce decree, provides that the  
10 couple's California tax debt is assigned to appellant's former spouse's separate debt. Contrary to  
11 respondent's recommendation, appellant chose not to request a court order revising her tax liability to  
12 obtain relief from the portion of the tax liability that is not attributable to her income pursuant to  
13 Revenue & Taxation Code (R&TC) section 19006, subdivision (b). Appellant appeals from  
14 respondent's determination that she is not entitled to equitable innocent spouse relief under R&TC  
15 section 18533, subdivision (f).

16 Background

17 2005 and 2006 Tax Returns

18 The couple failed to file a timely 2005 California return. Respondent received  
19 information indicating that appellant earned sufficient income during 2005 to require the filing of a  
20 return. Respondent issued appellant a Demand for Tax Return (demand letter) dated January 16, 2007.  
21 After appellant did not respond to the demand letter, respondent issued her a Notice of Proposed  
22 Assessment (NPA) dated March 19, 2007, which estimates appellant's income, proposes a tax due, and  
23 imposes a late filing penalty, a failure to file upon demand penalty, and a filing enforcement fee plus  
24 interest. On April 15, 2007, the couple filed a 2005 joint California return on which they reported  
25 California adjusted gross income (AGI) of \$184,441 and, after applying itemized deductions of  
26 \$45,490, they reported taxable income of \$138,951. After applying an exemption credit of \$174, the  
27 couple self-assessed a tax liability of \$8,686. The couple did not remit any payment at the time they  
28 filed the 2005 return. Respondent accepted this return and withdrew the 2005 NPA. The NPA's

1 demand penalty of \$1,579.25 and filing enforcement fee of \$125.00 remained outstanding, but  
2 respondent reduced the NPA's late filing penalty to \$100.00 and assessed interest of \$529.59.  
3 (Resp. Opening Br., pp. 1-2, exhibits A-E.)

4 On April 15, 2007, the couple filed a timely 2006 joint California tax return. On the  
5 2006 return, the couple reported California AGI of \$207,949 and, after applying itemized deductions of  
6 \$41,427, they reported taxable income of \$166,522 and a tax of \$11,229. After applying an exemption  
7 credit of \$182 and including an additional tax on early distribution from a qualified retirement plan of  
8 \$530, the couple self-assessed a total tax liability of \$11,577. The couple did not remit any payment at  
9 the time they filed the 2006 return. Respondent accepted this return, imposed an estimated tax penalty  
10 of \$68.42 and an underpayment of tax penalty of \$856.75, and assessed interest of \$1,016.18.  
11 (Resp. Opening Br., pp. 2-3, exhibit H; Appeal Letter, attachment.)

#### 12 Collection Activities

13 Respondent commenced involuntary collection action after the couple did not respond to  
14 routine billing notices for the tax years at issue, as well as tax years 2003 and 2004. On January 24,  
15 2007, respondent issued an Earnings Withholding Order for Taxes (EWOT) to appellant's employer,  
16 Action Learning Systems, Inc., for the couple's unpaid tax liability of \$3,147.75 for tax year 2004. On  
17 June 25, 2007, respondent issued an EWOT to Action Learning Systems, Inc. for the couple's total  
18 unpaid tax liabilities of \$14,001.75 for tax years 2003, 2004, 2005, and 2006. On April 30, 2008,  
19 respondent issued an EWOT to Action Learning Systems, Inc. for the couple's unpaid 2004, 2005, and  
20 2006 tax liabilities. Pursuant to an installment payment agreement, appellant's former spouse remitted a  
21 total of \$1,685 of payments to respondent between January 5, 2010 and November 1, 2010, which  
22 respondent applied to the couple's 2005 account. On April 29, 2010, respondent applied a 2009  
23 overpayment of \$11.02 to the couple's 2005 account. On February 26, 2011, it applied a 2010  
24 overpayment of \$305, to the couple's 2005 account. Respondent imposed a collection cost fee of \$155  
25 on the couple's 2006 account. Respondent issued an EWOT dated September 29, 2010, to appellant's  
26 employer, the University of California, for tax years 2005 and 2006. Respondent did not collect any  
27 payments from having issued the September 29, 2010 EWOT. (Resp. Opening Br., pp. 2-3, exhibits F,  
28 H; Resp. Reply Br., p. 5, exhibits W, Y; Appeal Letter, attachment.)

1                   Request for Innocent Spouse Relief

2                   On October 18, 2010, appellant filed a request for innocent spouse relief (FTB Form  
3 705) for 2005 and 2006. On the Form 705, appellant indicated that she and her former spouse divorced  
4 on November 24, 2009. Attached to the Form 705 is a letter from appellant concerning her request for  
5 relief and copies of the September 29, 2010 EWOT, a one-page excerpt from the couple's marital  
6 settlement agreement entitled Exhibit "C" Community Debt Agreed To Become Separate Debt (Exhibit  
7 "C"), and a one-page income and expense declaration. (Resp. Opening Br., p. 3, exhibit I.)

8                   According to its records, respondent called appellant on October 28, 2010, and informed  
9 appellant that the submitted Exhibit C was insufficient for establishing her entitlement to relief, and her  
10 recourse was to request the divorce court to enforce the marital settlement agreement with respect to  
11 her former spouse's obligation to pay the couple's California tax liabilities. Respondent also informed  
12 appellant that, pursuant to R&TC section 19006, subdivision (b), she could obtain a Tax Revision  
13 Clearance Certificate (TRCC) from respondent to petition the divorce court for an order revising the  
14 2005 and 2006 tax liabilities to her former spouse, but she could not be relieved of any taxes that arose  
15 from income attributable to her. In a letter to respondent dated November 5, 2010, appellant requested  
16 a TRCC for 2006 California taxes and 2006 household income in excess of \$150,000. She stated in the  
17 letter that she understands that she will obtain relief from only a portion of the amount requested,  
18 "despite the fact that the divorce order indicates Jason A. Kimbrough is responsible for the debt based  
19 on agreements we reached in the divorce proceedings." Respondent subsequently issued appellant a  
20 TRCC dated November 19, 2010, for 2006. The TRCC provides that the total balance due for 2006 is  
21 \$5,416.79 and it will accept an order from the Sacramento County Superior Court revising appellant's  
22 tax liability to an amount not less than \$3,185.93. It also provides that the TRCC must be filed with the  
23 court within 90 days of the date of the TRCC. In a letter to respondent dated February 11, 2011,  
24 appellant stated that after consulting with legal counsel, she concluded that there is no reason to seek a  
25 revised order from the court because the marital settlement agreement, which was filed with the court  
26 as an attachment to the couple's divorce decree, already assigns the couple's California tax debt to her  
27 former spouse's separate debt. Attached to appellant's November 19, 2010 letter, is a copy of Exhibit  
28 "C." (Resp. Opening Br., pp. 3-4, exhibits J-L.)

1 In a Non-Requesting Taxpayer Notice dated February 14, 2011, respondent informed  
2 appellant's former spouse of appellant's request for innocent spouse relief and requested relevant  
3 information and supporting documents. He did not respond to respondent's notice. Respondent sent  
4 appellant a Request for Information dated March 18, 2011, which acknowledges appellant's February  
5 11, 2011 letter and states that appellant would not be granted relief without a TRCC. (Resp. Opening  
6 Br., p. 4, exhibits M-N.)

7 In a Notice of Action dated April 7, 2011, respondent informed appellant that it denied  
8 her request for innocent spouse relief for the following reasons: 1) she failed to establish that she had  
9 reason to believe the 2005 and 2006 tax liabilities would be paid when the returns were filed; 2) she did  
10 not provide documentation showing she had no knowledge of the 2005 and 2006 tax liabilities; and  
11 3) there are no provisions in the R&TC that "allow relief on income earned by the requesting  
12 individual." Respondent also sent a Notice of Action-Denial Non-Requesting Taxpayer dated April 7,  
13 2011, to appellant's former spouse, which informed him of its determination. (Resp. Opening Br., p. 4,  
14 exhibits O-P.)

15 This timely appeal followed.

16 Request for Additional Briefing

17 To further develop the issues, the Appeals Division requested additional briefing from  
18 the parties by letter dated August 17, 2012. Respondent was requested to discuss the applicability of  
19 the proposed revenue procedure set forth in Internal Revenue Service (IRS) Notice 2012-8,<sup>5</sup> and  
20 appellant's contentions that her former spouse maintained control over the household finances, he was  
21 legally obligated to pay the couple's 2005 and 2006 tax liabilities, and he misappropriated funds  
22 intended for the payment of the couple's 2005 and 2006 tax liabilities. Appellant was requested to  
23 address respondent's additional brief and to explain why she did not want to obtain a revised court  
24 order in accordance with R&TC section 19006, subdivision (b). She was requested to provide a  
25 complete copy of the divorce decree and the marital settlement agreement. With respect to the issue of  
26 economic hardship if relief is not granted, appellant was requested to provide information about her  
27

28 <sup>5</sup> Notice 2012-8 can be accessed at the IRS's website ([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html)).

1 education and current or prior occupations, and any evidence of her current financial condition and  
2 employment status, including, but not limited to, bank statements, bills and pay stubs for both her and  
3 her current spouse.

4 The parties submitted responsive additional briefs, which are incorporated below.

5 Contentions

6 Appellant's Contentions

7 R&TC section 19006, subdivision (b)

8 In her appeal letter, appellant contends that the legal representative who handled the  
9 couple's divorce advised her not to request a revised court order, as recommended by respondent,  
10 because her former spouse agreed to assume responsibility for the tax liabilities at issue pursuant to the  
11 marital settlement agreement, which allowed him to keep the couple's residence and vehicle. Appellant  
12 asserts that legal counsel drafted the marital settlement agreement and the court approved it. She states,  
13 "The logic of this arrangement was guided by the fact that I am pursuing a doctoral degree full time at  
14 UC Berkeley and do not currently have an income nor will I again have an income until 2015."  
15 Appellant asserts that she therefore does not concede any amount at issue. (Appeal Letter, p. 1.)

16 In her additional brief, appellant states:

17 Mr. Kimbrough has been assigned the entire outstanding liability by the Superior Court  
18 of California. It would be inequitable to require appellant to file a TRCC which assigns  
19 her liability that has already been assigned to another. It is especially inequitable when  
20 the other person received benefits from the assignment of that liability, such as an  
increase in the community estate, and appellant has nothing to compensate her for the  
additional liability.

21 Attached to appellant's additional brief are copies of her divorce decree and marital settlement  
22 agreement, as requested in the Appeals Division's August 17, 2012 letter. The divorce decree provides  
23 that the property division is ordered as set forth in the marital settlement agreement. (App. Add.  
24 Br., p. 7, attachment.)

25 R&TC Section 18533, Subdivision (f)

26 Threshold Requirements

27 Appellant contends that she meets the threshold requirements set forth in section 4.01 of  
28 Revenue Procedure 2003-61 (hereinafter referred to as section 4.01). Appellant asserts that respondent

1 does not dispute that she meets the threshold requirements of section 4.01 except for the income  
2 attribution threshold requirement. Appellant contends that the misappropriation of funds exception to  
3 the income attribution threshold requirement applies to this appeal.<sup>6</sup> She asserts that she did not know  
4 and she had no reason to know that her former spouse misappropriated for his benefit the funds that  
5 were intended to be used to pay the couple's 2005 and 2006 tax liabilities. According to appellant, her  
6 former spouse had complete control of the couple's finances and she believed that he "was making the  
7 payments on the tax liability because he listed it as an expense in their Marital Settlement Agreement."  
8 Appellant asserts that her former spouse would not have agreed to assume responsibility for the  
9 payment of the tax liabilities at issue in the couple's marital settlement agreement if he expected her to  
10 be responsible for the payment of them. Appellant also asserts that the fact that her former spouse did  
11 assume this tax liability during the couple's divorce proceeding "strengthens the position that Appellant  
12 had no knowledge or reason to know that the funds were being misappropriated." Attached to  
13 appellant's reply brief is a declaration she signed under penalty of perjury setting forth the above  
14 contentions. (App. Reply Br., p. 4, attachment.)

15 In her supplemental brief, appellant states that her former spouse filed the couple's 2005  
16 and 2006 returns in April 2007, "however, funds were not set aside to pay the tax liabilities until  
17 November 2009 when the trial court assigned exclusively to Mr. Kimbrough the 2005 and 2006 tax  
18 liabilities and simultaneously granted him sole ownership of the marital home and car." She argues  
19 that she satisfies the misappropriation of funds exception of section 4.01 because her former spouse  
20 "wrongly took for his own benefit the assets that were supposed to be used to pay the 2005 and 2006  
21 taxes because he accepted the family home and car as his separate assets but did nothing to pay off the  
22 tax liabilities also given to him as his sole property." (App. Suppl. Br., pp. 3-4.)

23 In her additional brief, appellant states:

24 The misappropriation exception does not contain language that requires the funds  
25 intended for the payment of tax to have also been intended for use on the date the tax  
26 returns were filed. There is nothing that limits when the funds can be set aside, and

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27 <sup>6</sup> As discussed below in Applicable Law, section 4.01 sets forth threshold conditions that must be satisfied, including an  
28 income attribution threshold requirement. Section 4.01 provides, however, that the income attribution threshold requirement  
need not be satisfied if one of the specified exceptions applies, such as the misappropriation of funds exception.

1 therefore nothing that disallows the funds to be set aside in a property settlement  
2 agreement during divorce proceedings.

3 App. Add. Br., p. 5.)

4 Section 4.02

5 In her reply brief, appellant argues that she meets the requirements set forth in section  
6 4.02 of Revenue Procedure 2003-61 (hereinafter referred to as section 4.02). She asserts that  
7 respondent only contends that she does not satisfy the second and third factors of section 4.02.

8 Knowledge Factor

9 With respect to the second factor of section 4.02, appellant argues that she did not know  
10 or have reason to know that her former spouse would not pay the taxes when the returns were filed.  
11 She contends that 1) her former spouse was in charge of the family taxes; 2) he assumed control of the  
12 family expenses and he was in charge of ensuring the taxes would be paid; 3) he intercepted all of the  
13 mail before appellant had an opportunity to see any of respondent's demand notices; and 4) he made  
14 payments totaling \$1,685 pursuant to an installment payment agreement he made with respondent. She  
15 asserts that her former spouse would not have entered into an installment payment agreement or made  
16 installment payments if he intended not to pay the taxes. Appellant states, "Based on this behavior, it  
17 was reasonable for Appellant to believe that Mr. Kimbrough would pay the tax liability" and therefore  
18 she "had no knowledge or reason to know that the tax liability would not have been paid when they  
19 filed." In her additional brief, appellant argues that the fact that she knew her former spouse entered  
20 into an installment payment plan for unpaid taxes for prior tax years should not be weighed against  
21 relief because it "has the potential to discourage individuals from requesting to enter an installment  
22 agreement to pay outstanding tax liabilities." (App. Reply Br., pp. 4-5; App. Add. Br., pp. 3-4.)

23 In her supplemental brief, appellant contends that her former spouse maintained control  
24 over the household finances. She asserts that since 2002, she was employed in a job with Action  
25 Learning Systems and this job "kept her away from home 10-12 nights per month, which enabled  
26 Mr. Kimbrough to assume complete control of the finances." She also asserts that Action Learning  
27 Systems withheld state income taxes from her pay during 2005 and 2006. Appellant further asserts that  
28 her former spouse collected and took charge of the utility bills, credit card bills, bank statements, and

1 all other financial statements, and, even when she was not traveling, he maintained exclusive control  
2 over the mail, the finances, and the financial statements. Moreover, she states that there was no course  
3 of conduct by her former spouse that put her on notice that he did not timely file the couple's returns as  
4 he claimed "because he lied and hid all evidence of such actions from her." She contends that her  
5 former spouse hired a certified public accountant (CPA) in Modesto, which is 80 miles from the  
6 couple's home, to prepare the couple's returns, he did not tell her when he was going to meet the CPA,  
7 he did not invite her to join him at his meetings with the CPA, and he did not share with her any  
8 information about what he discussed with the CPA. Appellant states that "the only conduct that  
9 Mr. Kimbrough allowed Ms. Jarrell to see was the façade of an authoritative and dutiful husband who  
10 told her he was diligently maintaining their finances and from all appearances was doing so." (App.  
11 Supp. Br., p. 6.)

12 Appellant asserts that in 2007, the personnel director at Action Learning Systems  
13 informed her that respondent sent a notice of garnishment of appellant's wages for unpaid taxes.  
14 Appellant states that she confronted her former spouse about the pending garnishment and "he told her  
15 that respondent had made a mistake, some confusion had taken place, and he would take care of the  
16 problem." She indicated that he electronically filed the couple's 2005 and 2006 returns on April 15,  
17 2007. Appellant contends that in January 2008, she first discovered that the couple had an outstanding  
18 tax deficiency when her former spouse indicated to her "that he had settled with respondent and had set  
19 up a payment plan" because "they still owed some money for unpaid taxes from the prior year."  
20 Appellant asserts that in January 2009, she separated from her former spouse. She indicates that in  
21 June 2009, she quit her job to begin an education policy and organization doctoral program and her  
22 only source of income was unemployment benefits and a graduate fellowship. She further asserts that  
23 at an unspecified date, the couple began maintaining separate bank accounts and she filed for divorce.  
24 Appellant contends that, as part of the couple's divorce settlement, the divorce court allowed her former  
25 spouse to retain as his separate property his retirement benefits, his social security benefits, all banking  
26 and investment accounts in his name, all personal property in his possession, the couple's residence,  
27 and their only vehicle, a 1999 Porsche Boxter, and the divorce court ordered that the couple's  
28 outstanding California tax liabilities were her former spouse's separate debt. Appellant also contends

1 that the divorce court allowed her to retain as her separate property her social security benefits, all  
2 banking and investment accounts in her name, and the personal property in her possession. She states  
3 that “it was not ordered that any of the California taxes were her debt.” (App. Reply Br., p. 5; App.  
4 Supp. Br., pp. 1-2.)

5 In her additional brief, appellant argues that the fact pattern in *Torrise v. Commissioner*,  
6 T.C. Memo 2011-235 (*Torrise*) is similar to the fact pattern in the present appeal. Appellant asserts that  
7 in *Torrise*, which involved a request for equitable relief for unpaid taxes for tax years 1997 through  
8 2000, the Tax Court concluded that the requesting spouse had a reasonable belief that her spouse would  
9 pay the delinquent taxes for 1997 and 1998. Appellant asserts that in *Torrise*, the requesting spouse  
10 claimed that when she signed the joint return for 1998, she did not know that there was an outstanding  
11 balance of tax due for 1997, even though, at the nonrequesting spouse’s request, she wrote a check  
12 payable to the IRS for \$2,000 for the 1997 taxes when she knew that the couple’s 1997 return reported  
13 a tax due of \$45,762. According to appellant, the Tax Court granted the requesting spouse equitable  
14 relief for 1997 and 1998 based on the requesting spouse’s credible testimony that she did not assist her  
15 spouse in paying all of the bills and her spouse’s business was generating substantial income.  
16 Appellant also asserts that in *Torrise*, the Tax Court concluded that at the time the requesting spouse  
17 signed the 1999 joint return on August 19, 2000, she had no reason to know that her spouse would not  
18 pay the 1999 tax liability. According to appellant, the Tax Court granted equitable relief for 1999  
19 based on a finding that the requesting spouse first discovered that the joint 1997 and 1998 tax liabilities  
20 were unpaid at the end of 2000 when her spouse requested that she sign a home equity loan. With  
21 respect to both *Torrise* and the present appeal, appellant contends that “the requesting spouses made  
22 requests for consecutive years after finding out about the remaining liability through the disclosure of  
23 the nonrequesting spouse by means of a document unrelated to the return itself.” Appellant asserts that  
24 she has submitted a statement she signed under penalty of perjury that indicates that her former spouse  
25 “actively intercepted appellant’s access to financial information, was dishonest about their finances and  
26 treated her in a demeaning, embarrassing, and disheartening way.” She argues that she had a more  
27 reasonable belief that her former spouse would pay the tax liabilities at issue than the requesting spouse  
28 in *Torrise* “who wrote a check for an amount less than 5% of the tax due one year and merely did not

1 know there was a liability from that year upon filing the return for the subsequent year.” (App. Add.  
2 Br., p. 4-5.)

### 3 Economic Hardship Factor

4 With respect to the third factor in section 4.02, appellant contends that she will suffer  
5 economic hardship if relief is not granted. In her reply brief, appellant asserts that currently she has “no  
6 source of income” because she “is a full-time student pursuing her doctorate degree at U.C. Berkeley”  
7 and she “is responsible for all expenses attributable to her [newborn] child.” In her supplemental brief,  
8 appellant asserts that she is remarried, she is unemployed, she is a full-time student raising an infant  
9 daughter, and she expects to complete her doctorate in 2015. Appellant states that “[s]he and her  
10 daughter are supported by her student loans and fellowships, and by her husband.” (App. Reply Br.,  
11 p. 5; App. Supp. Br., pp. 1-2, 6.)

### 12 Section 4.03

13 In her reply brief, appellant argues that six of the eight factors set forth in section 4.03 of  
14 Revenue Procedure 2003-61 (hereinafter referred to as section 4.03) weigh in favor of granting her  
15 equitable relief. She contends that there is no dispute that she and her former spouse are divorced, and  
16 respondent concedes that her former spouse has the legal obligation to pay the taxes at issue based on  
17 the marital settlement agreement and its records show that she has filed California returns for each year  
18 since the tax years at issue. Appellant contends that she received no significant benefit from the unpaid  
19 tax liabilities and she actually “gave up her interests in many of the marital assets during her divorce.”  
20 She also contends that, as she previously discussed, she had no knowledge or reason to know that her  
21 former spouse would not pay the tax liabilities. Lastly, she contends that, as she previously discussed,  
22 she will suffer economic hardship if relief is not granted because she “is a full-time doctorate student  
23 and a new mother.” (App. Reply Br., pp. 5-6.)

### 24 Proposed Revenue Procedure

25 Appellant argues that under the proposed revenue procedure, a requesting individual “is  
26 in a stronger position” than under Revenue Procedure 2003-61 for obtaining equitable relief because  
27 the proposed revenue procedure adds an additional exception to the seventh threshold condition, and it  
28 “lowers the economic hardship standard as well as disallows the factor to weigh against the requesting

1 spouse under section 4.03(2)(b)[.]” Appellant contends that the misappropriation of funds exception of  
2 section 4.01 of the proposed revenue procedure “does not limit when the funds can be set aside, and  
3 therefore [there is] nothing that disallows the funds to be set aside in a property settlement agreement  
4 during divorce proceedings.” Appellant contends that under section 4.03(2)(c)(ii) of the proposed  
5 revenue procedure, the “knowledge or reason to know” factor weighs in favor of granting equitable  
6 relief “[i]f the requesting spouse reasonably expected the nonrequesting spouse to pay the tax liability  
7 reported on the return[.]” According to appellant, this factor weighs against granting the requesting  
8 spouse equitable relief only “if it was not reasonable for the requesting spouse to believe the  
9 nonrequesting spouse would not or could not pay the liability within a reasonably prompt time after  
10 filing the return.” She states that “[t]here is nothing in Notice 2012-8 to suggest that the spouse  
11 requesting equitable relief has a burden to prove that there were funds available to pay a tax liability at  
12 the time the return is filed.” Appellant also states that under the legal obligation factor set forth in  
13 section 4.03(2)(d) of the proposed revenue procedure, “[c]onsiderable weight should be given to the  
14 fact that the outstanding joint tax liability has been assigned to Mr. Kimbrough by the Superior Court of  
15 California. (App. Add. Br., pp. 3-7.)

#### 16 Respondent’s Contentions

##### 17 R&TC section 19006, subdivision (b)

18 Respondent contends that there is no statute that requires it to abide by the terms of  
19 “agreements that the parties to a divorce may enter into regarding the payments of California tax  
20 liabilities when respondent is not a party to the court proceeding.” Citing *Stevens v. Commissioner*  
21 (11th Cir. 1989) 872 F.2d 1499; *Bokum v. Commissioner* (1990) 94 T.C. 126, affd. (11th Cir. 1993) 992  
22 F.2d 1132; *Murphy v. Commissioner* (1994) 103 T.C. 111; *Pesch v. Commissioner* (1982) 78 T.C. 100,  
23 respondent argues that appellant cannot avoid a tax liability pursuant to a marital settlement agreement  
24 that does not include respondent as a party.

25 Respondent contends that the tax liabilities at issue may be revised by an order of the  
26 divorce court but such an order may not relieve appellant from a tax liability that arose from income  
27 that she earned or controlled. Because the couple reported gross income in excess of \$150,000 and  
28 self-assessed tax liabilities in excess of \$7,500 on their 2005 and 2006 joint returns, respondent asserts

1 that appellant is required to obtain a TRCC from respondent and provide it to the divorce court.  
2 Respondent also asserts that the court order revising the tax liability is not effective until it is filed with  
3 respondent. According to respondent, appellant is responsible for the portion of the couple's 2006 tax  
4 liability that arose from her reported wages, one-half of interest income, and her pension distribution.  
5 Respondent thus determined that, after applying withholdings, appellant is responsible for \$3,185.93 of  
6 tax, penalties, and interest for tax year 2006. Respondent asserts that at appellant's request, it issued a  
7 TRCC for her to submit to the divorce court for an order revising the remaining portion of the couple's  
8 2006 tax liability to her former spouse, but appellant chose not to submit it to the divorce court  
9 "because the relief afforded her by the statute did not grant her the entire relief for the payment of the  
10 tax liabilities that the parties agreed to in their marital property agreement." Accordingly, respondent  
11 contends that appellant does not qualify for relief under R&TC section 19006, subdivision (b), and she  
12 and her former spouse are jointly and severally liable for the 2005 and 2006 tax liabilities at issue.  
13 (Resp. Opening Br., pp. 5-7.)

#### 14 Innocent Spouse Relief

##### 15 R&TC section 18533, Subdivisions (b) and (c)

16 Respondent contends that under R&TC section 18533, subdivisions (b) and (c), relief is  
17 only available from a proposed or assessed deficiency. Respondent therefore contends that appellant is  
18 not entitled to relief for the self-assessed unpaid tax liabilities for 2005 and 2006 pursuant to R&TC  
19 section 18533, subdivision (b) or (c), because it accepted the 2005 and 2006 joint tax returns as filed  
20 and did not assess any additional taxes. (Resp. Opening Br., p. 7.)

##### 21 R&TC Section 18533, Subdivision (f)

#### 22 Threshold Requirements

23 With respect to the threshold requirements of section 4.01, respondent contends in its  
24 opening brief that appellant does not meet the income attribution threshold requirement for tax year  
25 2005 or 2006 because she has not established that the income reported on the couple's 2005 and 2006  
26 returns was attributable solely to her former spouse, and not also attributable to her or to income  
27 attributable to both of them. Respondent asserts that appellant has failed to provide any evidence  
28 establishing that the misappropriation of funds exception of the income attribution threshold

1 requirement applies to this appeal. Respondent asserts that the only supporting documentation  
2 appellant provided was her own declaration. Citing *Mora v. Commissioner* (2001) 117 T.C. 279 and  
3 *Price v. Commissioner* (9th Cir. 1989) 887 F.2d 959, respondent argues that it is insufficient for  
4 appellant to claim that the misappropriation of funds exception applies “because she had relied on  
5 Mr. Kimbrough to pay their 2005 and 2006 tax liabilities and that he failed to do so.” Respondent  
6 asserts that appellant has not established that she and her former spouse had any discussions or  
7 agreements concerning how they planned on paying their self-assessed tax liabilities at the time they  
8 filed their 2005 or 2006 returns. Respondent also asserts that appellant has failed to provide evidence,  
9 such as bank documents from 2007, showing that she and her former spouse had sufficient funds  
10 available to pay the 2005 or 2006 tax liabilities on April 15, 2007, when they filed their 2005 and 2006  
11 returns. Respondent states that on April 15, 2007, appellant and her former spouse were still married  
12 and living together and they held joint bank accounts. Respondent contends that appellant had access  
13 to the couple’s bank records and she would therefore have known if the couple had sufficient funds to  
14 pay their 2005 and 2006 tax liabilities when they filed their 2005 and 2006 returns on April 15, 2007,  
15 or if her former spouse misappropriated the intended funds for his own benefit. In addition, respondent  
16 argues that if appellant knew that her former spouse requested an installment agreement to pay the  
17 couple’s tax liabilities for prior tax years, she needs to explain how the couple had funds available to  
18 pay their 2005 and 2006 tax liabilities on April 15, 2007. (Resp. Opening Br., pp. 8-9; Resp. Reply Br.,  
19 pp. 2-4; Add. Br., p. 5.)

20 Respondent contends that there is no merit to appellant’s contention that she first  
21 discovered that her former spouse did not pay the couple’s 2005 and 2006 tax liabilities during the  
22 couple’s divorce proceeding in 2009. According to respondent’s records, the couple filed their joint  
23 returns for tax years 2002, 2003, and 2004 prior to filing their 2005 and 2006 returns, and respondent  
24 issued an EWOT to appellant’s employer, Action Learning Systems, Inc., on January 24, 2007, which  
25 indicated that the couple’s 2004 account had a tax balance due of \$3,147.75. Respondent states that its  
26 records also reflect that on February 5, 2007, appellant’s former spouse called respondent to discuss the  
27 EWOT. Respondent asserts that it subsequently released the EWOT because appellant’s former spouse  
28 indicated that his tax preparer would be filing the couple’s 2005 and 2006 returns within 30 days and he

1 agreed to contact respondent “during the week of March 5, 2007, to discuss an installment payment  
2 arrangement to pay the couple’s delinquent taxes.” Respondent argues that based on these facts,  
3 appellant knew or should have known that the 2005 and 2006 tax liabilities would not be paid when the  
4 2005 and 2006 returns were filed on April 15, 2007. Attached to respondent’s reply brief are copies of  
5 the January 24, 2007 EWOT that was issued to appellant’s employer, the January 24, 2007 EWOT that  
6 appellant’s employer was to provide appellant, respondent’s electronic notation of the February 5, 2007  
7 telephone conversation, and the Withdrawal of Order to Withhold Tax dated February 5, 2007. (Resp.  
8 Reply Br., pp. 4-5, exhibits U-W.)

9           Respondent contends that appellant’s former spouse failed to contact it during the week  
10 of March 5, 2007, to discuss an installment payment agreement, and on June 25, 2007, it issued a  
11 second EWOT to appellant’s employer for the couple’s total unpaid tax liabilities of \$14,001.75 for tax  
12 years 2003, 2004, 2005, and 2006. Respondent states that its records reflect that on July 16, 2007,  
13 appellant’s former spouse called respondent to discuss the June 25, 2007 EWOT and he indicated that  
14 he intended to enter into an installment payment agreement. Respondent asserts that on April 30, 2008,  
15 it issued a third EWOT to appellant’s employer for the couple’s unpaid 2004, 2005, and 2006 tax  
16 liabilities. Respondent argues that appellant’s employer would have provided her with copies of the  
17 EWOTs and she would therefore have known that the 2005 and 2006 tax liabilities were not paid prior  
18 to her divorce proceeding in 2009. In its reply brief, “[r]espondent invites appellant to provide credible  
19 documentary evidence, such as copies of bank records, police reports, notarized statements signed  
20 under penalty of perjury by persons with personal knowledge of the facts pertaining to the claimed  
21 misappropriation of funds by Mr. Kimbrough.” In the absence of additional documentation, respondent  
22 argues that appellant has not established that the misappropriation of funds exception to the income  
23 attribution threshold condition applies to the present appeal and she therefore has failed to show that  
24 she meets all of the threshold factors set forth in section 4.01. Attached to respondent’s reply brief are  
25 copies of the June 25, 2007 and April 30, 2008 EWOTs and respondent’s electronic notation of the July  
26 16, 2007 telephone conversation with appellant’s former spouse. (Resp. Reply Br., pp. 4-6, exhibits W-  
27 Y.)

28           Respondent further argues that appellant’s former spouse’s subsequent failure to pay the

1 liability as required by the marital property agreement does not establish that he misappropriated the  
2 funds for purposes of the misappropriation exception to the income attribution threshold condition.  
3 Respondent contends that the misappropriation exception addresses a misappropriation of funds at the  
4 time the tax returns are filed rather than to a subsequent failure by a spouse to comply with agreements  
5 that the taxpayers may enter into later. (Resp. Add. Br., p. 6.)

6 Section 4.02

7 With respect to the requirements of section 4.02, respondent contends that appellant has  
8 not met her burden of showing she meets the second and third requirements of section 4.02. According  
9 to respondent, appellant has only made assertions, which are not supported by uncontradicted, credible,  
10 competent, and relevant evidence, to show that on the dates when she filed the returns for the tax years  
11 at issue she had no knowledge or reason to know that her former spouse would not pay the income tax  
12 liabilities for the tax years at issue. Respondent states:

13 Because both the taxpayers had established a course of conduct of not paying their taxes  
14 when they filed their tax returns for the 2002, 2003, and 2004 tax years, respondent  
15 issued a number of tax notices to appellant and her spouse at their home address of  
16 records in the years prior to the taxpayers filing their 2005 and 2006 tax [returns] and an  
17 EWOT was mailed to appellant's employer, appellant has not established a lack of  
18 knowledge of the failure to pay the tax.

19 Also, respondent contends that appellant has not submitted any documentation proving she would  
20 suffer economic hardship if relief were not granted. Respondent states that its records show that  
21 appellant and her current spouse reported \$147,233 of adjusted gross income on their 2010 joint return,  
22 and the Income and Expense Declaration that appellant filed with the divorce court on November 3,  
23 2009, indicates that she earned \$8,000 each month and she has a Bachelor's degree and a Master's  
24 degree, and she holds professional credentials in teaching and administration. (Resp. Opening Br.,  
25 pp. 9-10, exhibit S; Resp. Reply Br., pp. 7-8)

26 Section 4.03

27 Respondent argues that appellant fails to establish that she is entitled to equitable relief  
28 when all the additional factors set forth in section 4.03 are considered. Respondent acknowledges that  
29 appellant's former spouse has a legal obligation to pay the couple's 2005 and 2006 tax liabilities based  
30 on their marital settlement agreement, and appellant complied with income tax laws by filing California

1 returns for each tax year since 2005 and 2006. However, respondent contends that appellant is not  
2 entitled to relief when the remaining factors are considered. In this regard, respondent contends that  
3 appellant does not claim that she was the subject of spousal abuse and she does not assert or provide  
4 any evidence indicating that she was in poor mental or physical health when she signed the return for  
5 2005 or 2006. Respondent further contends that appellant has not shown that she did not receive a  
6 significant benefit from the 2005 and 2006 unpaid tax liabilities because she has not provided any  
7 information or evidence indicating how the couple spent the money that was not used to pay the unpaid  
8 taxes at issue. Respondent states in its reply brief, “The mere assertion that appellant did not receive a  
9 significant benefit from the unpaid taxes, without appellant providing any supporting evidence, is not  
10 sufficient for appellant to meet her burden of proof that she meets this factor.” (Resp. Opening Br.,  
11 pp. 10-11, Resp. Reply Br., p. 8.)

#### 12 Proposed Revenue Procedure

13 In its additional brief, respondent asserts that its position concerning appellant not  
14 being entitled to equitable relief is the same under Revenue Procedure 2003-61 and the proposed  
15 revenue procedure. With respect to the financial control factor set forth in sections 4.02(3) and  
16 4.03(2)(c)(ii) of the proposed revenue procedure, respondent contends that “appellant has not provided  
17 any credible, independent documentary evidence to show that Mr. Kimbrough controlled their family’s  
18 finances or restricted her access to financial documents against her will prior to the filing of their joint  
19 2005 and 2006 tax returns on April 15, 2007.” Respondent asserts that appellant has not established the  
20 following: 1) her former spouse “took charge of handling their financial or tax matters against her will,  
21 or without her consent or approval;” 2) he “restricted her access to information regarding their finances  
22 prior to the filing of 2005 and 2006 tax returns on April 15, 2007;” or 3) she did not have access to the  
23 couple’s joint bank account information. Respondent contends that “as a highly educated professional  
24 woman, who has not alleged that she experienced any abusive or threatening treatment from  
25 Mr. Kimbrough, appellant has not explained why she did not make any independent inquiries regarding  
26 their financial or tax matters.” In addition, respondent argues that if appellant’s former spouse  
27 maintained control over the household finances and restricted her access to financial information, then  
28 appellant should explain how she could have known that the couple had funds available to pay the 2005

1 and 2006 tax liabilities when they filed their 2005 and 2006 returns on April 15, 2007. (Resp. Add. Br.,  
2 pp. 3-5.)

3 With respect to section 4.03(2)(d) of the proposed revenue procedure, respondent states  
4 that it has not been able to determine whether the divorce court “incorporated the taxpayers’ marital  
5 settlement agreement into its divorce order.” Respondent states that if the divorce decree ordered the  
6 couple to abide by the terms of the marital settlement agreement, “respondent would find that  
7 Mr. Kimbrough’s obligation to pay the 2005 and 2006 tax liabilities at issue in this appeal is a strong  
8 factor in favor of granting appellant relief in this appeal,” but it “is not, by itself, determinative of  
9 whether appellant is entitled to equitable relief.” (Resp. Add. Br., p. 9.)

#### 10 Applicable Law

##### 11 General Legal Background Regarding Innocent Spouse Relief

12 When a joint return is filed by a husband and wife, each spouse is jointly and severally  
13 liable for the entire tax due for that tax year. (Int.Rev. Code, § 6013(d)(3); Rev. & Tax. Code, § 19006,  
14 subd. (b).) However, a requesting spouse may seek relief from joint and several liability under  
15 innocent spouse relief statutes. (Int.Rev. Code, § 6015; Rev. & Tax. Code, § 18533.) R&TC section  
16 18533, subdivision (b), provides for traditional innocent spouse relief; subdivision (c) provides for  
17 separate allocation relief; and, if a requesting spouse is not eligible for relief under subdivision (b) or  
18 (c), a requesting spouse may be eligible for equitable relief under subdivision (f). (Cf. Int.Rev. Code,  
19 § 6015(b), (c), & (f).) Determinations under R&TC section 18533 are made without regard to  
20 community property laws. (Rev. & Tax. Code, § 18533, subd. (a)(2).)

21 When a California statute is substantially identical to a federal statute (as in the case of  
22 the innocent spouse statutes, Internal Revenue Code (IRC) section 6015 and R&TC section 18533),  
23 federal law interpreting the federal statute may be considered highly persuasive with regard to the  
24 California statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838.) Thus, federal  
25 authority is applied extensively in California innocent spouse cases. (See *Appeal of Patricia Tyler-*  
26 *Griffis*, 2006-SBE-004, Dec. 12, 2006; Rev. & Tax. Code, § 18533, subd. (g)(2).)<sup>7</sup>

27 \_\_\_\_\_  
28 <sup>7</sup> State Board of Equalization cases (designated “SBE”) can be viewed on the Board’s website (www.boe.ca.gov).

1 Respondent’s determinations are generally presumed to be correct, and an appellant  
2 generally bears the burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109,  
3 June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) Unsupported assertions are not  
4 sufficient to satisfy an appellant’s burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-  
5 274, Nov. 17, 1982.)

6 Although subdivisions (b), (c), and (f) of R&TC section 18533 provide three potential  
7 avenues for innocent spouse relief, neither subdivision (b) nor (c) is relevant to the tax years at issue in  
8 this appeal because these subdivisions require the existence of a deficiency (rather than an  
9 underpayment of reported tax) and the tax years at issue in this appeal do not involve deficiencies.

#### 10 R&TC Section 18533, subdivision (f)

11 R&TC section 18533, subdivision (f), gives respondent the discretion to provide  
12 equitable innocent spouse relief from any unpaid tax or any deficiency when a taxpayer does not  
13 qualify for innocent spouse relief under subdivisions (b) and (c). In recent years, the law regarding  
14 equitable innocent spouse relief has evolved. Recent changes in this area are discussed below.

#### 15 Jurisdiction for Claims for Equitable Relief

16 Prior to the 2010 amendments to R&TC section 18533,<sup>8</sup> R&TC section 18533,  
17 subdivision (e), only provided appeal rights for individuals who requested relief under subdivision (b)  
18 or (c). In this respect, California law was similar to the equivalent federal provision in IRC section  
19 6015(e) for petitions to the Tax Court. Because there was no express statutory appeal right for a  
20 “stand-alone” claim for equitable relief, the Board held that it only had jurisdiction to review requests  
21 for equitable relief that were coupled with requests for traditional or separate allocation relief under  
22 subdivisions (b) or (c). (*Appeal of Patricia Tyler-Griffis, supra.*)

23 In addition, the Board applied an abuse of discretion standard of review when reviewing  
24 requests for equitable relief because federal courts “found abuse of discretion to be the proper standard  
25 of review for a denial of equitable relief.” (Citing *Appeal of Jonson v. Commissioner* (2002) 118 T.C.  
26 106; *Butler v. Commissioner* (2000) 114 T.C. 276.) Applying this standard of review, the Board  
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28 <sup>8</sup> Stats 2010 ch. 318, § 1 (SB 1065), effective January 1, 2011.

1 sustained the FTB’s denial of equitable relief unless it was arbitrary, capricious, or without sound basis  
2 in fact. (*Jonson v. Commissioner, supra*, 118 T.C. 106.) For the reasons discussed below, this “abuse  
3 of discretion” standard of review no longer applies.

4 In 2006, IRC section 6015(e)(1) was amended to provide that, in addition to having the  
5 authority to determine relief under subsections (b) and (c), the Tax Court also has jurisdiction to  
6 determine the appropriate relief available to an individual requesting equitable relief under subsection  
7 (f).<sup>9</sup> The current version of IRC section 6015(e)(1) thus gives the Tax Court explicit “stand-alone”  
8 equitable relief jurisdiction, and California conforms to this federal provision for requests for equitable  
9 relief under R&TC section 18533, subdivision (f), that are filed with the FTB on or after January 1,  
10 2011. As amended, R&TC section 18533, subdivision (e)(1), thus grants the Board jurisdiction to  
11 review “stand-alone” requests for equitable relief under subdivision (f) of R&TC section 18533 that are  
12 filed on or after January 1, 2011, because it provides those requests with the same appeal procedures as  
13 are applicable to requests for relief under subdivisions (b) or (c) of R&TC section 18533.

14 In contrast, for requests for equitable relief filed prior to January 1, 2011, such as the  
15 request for relief in this appeal, the Board only has jurisdiction to determine the appropriate relief when  
16 such requests are coupled with requests for traditional and/or separate allocation relief under R&TC  
17 section 18533, subdivisions (b) and/or (c). (*Appeal of Patricia Tyler-Griffis, supra*.) The  
18 administrative appeal language set forth in R&TC section 18533, subdivision (e)(1), as applicable for  
19 requests for relief filed prior to January 1, 2011, only requires that the individual “making the election  
20 under (b) or (c)” may appeal the determination of the FTB of the appropriate relief available to the  
21 individual under section 18533; that subdivision does not require that the individual actually be entitled  
22 to relief under subdivision (b) or (c) to appeal to the Board. Appellant did not limit her request to any  
23 specific subdivision of section 18533. Furthermore, she filed a copy of FTB Form 705, Request for  
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25 \_\_\_\_\_  
26 <sup>9</sup> Prior to the 2006 amendment, IRC section 6015(e)(1) allowed an individual who was denied relief by the IRS under IRC  
27 section 6015(b) or (c) to petition the Tax Court for relief. In *Ewing v. Commissioner* (2002) 118 T.C. 494, the Tax Court  
28 held that it had jurisdiction under IRC section 6015(e)(1) to review non-deficiency cases brought under IRC 6015(f). In  
*Ewing v. Commissioner* (9th Cir. 2006) 439 F.3d 1009, the Ninth Circuit Court of Appeal reversed the Tax Court on the  
ground that the Tax Court’s interpretation was precluded by the plain language of IRC section 6015(e)(1). Subsequently,  
Congress amended IRC section 6015(e) to grant the Tax Court jurisdiction to review equitable relief petitions under IRC  
section 6015(f) that the IRS had denied. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. C, § 408, 120  
Stat. 2920, 3061-62. (See *Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980, 984 (*Wilson*).)

1 Innocent Joint Filer Relief, which expressly provides in Part III that respondent will review the request  
2 under R&TC section 18533, subdivisions (b), (c), and (f), as well as R&TC section 19006, subdivision  
3 (b) and (c). Accordingly, appellant requested relief under subdivisions (b) and (c), and the Board has  
4 jurisdiction to review respondent's denial of appellant's request for relief under subdivision (f) for the  
5 tax years at issue.

6 Standard of Review for Claims for Equitable Relief

7 Following the amendment to IRC section 6015(e), and beginning with *Porter v.*  
8 *Commissioner* (2009) 132 T.C. 203, the Tax Court abandoned its use of an abuse of discretion standard  
9 of review and held that, pursuant to the current version of IRC section 6015(e)(1), it now applies a de  
10 novo standard of review in determining whether a taxpayer is entitled to equitable relief under IRC  
11 section 6015(f).<sup>10</sup> (*Id.* at p. 210. See also *Hudgins v. Commissioner*, T.C. Memo 2012-260; *Henson v.*  
12 *Commissioner*, T.C. Memo 2012-288; *Wilson v. Commissioner*, T.C. Memo 2010-134.) Subsequently,  
13 on January 15, 2013, the Ninth Circuit Court of Appeals endorsed a de novo standard of review in a  
14 sweeping opinion. (*Wilson, supra*, 705 F.3d at pp. 992-993.) In its opinion, the Ninth Circuit Court of  
15 Appeals held that a de novo standard of review is consistent with the plain language used in the statute,  
16 the structure of the statute, the history of de novo review, and the nature of equitable relief. (*Ibid.*) For  
17 purposes of California law, it is noteworthy that the Ninth Circuit Court of Appeals did not limit its  
18 analysis to the specific language set forth in the current version of IRC section 6015, which California  
19 law applies to requests for equitable relief filed with the FTB on or after January 1, 2011. In a recent  
20 Action on Decision, the IRS formally acquiesced in *Wilson, supra*, 705 F.3d 980 and will no longer  
21 argue in innocent spouse equitable relief cases that the Tax Court is required to apply an abuse of  
22 discretion standard and an abuse of discretion scope of review. (AOD 2012-007, 2013 TNT 108-22.)  
23 As a result of *Wilson, supra*, 705 F.3d 980, it appears that a de novo standard of review applies to  
24 requests for equitable relief under R&TC section 18533, subdivision (f), even if such requests precede  
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27  
28 <sup>10</sup> The Tax Court in *Porter v. Commissioner, supra*, 132 T.C. 203, also applied a de novo scope of review. In this context,  
scope of review refers to whether the court limits its consideration of evidence to evidence in the administrative record that  
was available to the IRS prior to its determination. Generally, to consider fully issues and achieve a just and fair result, the  
Board has considered all available evidence, including evidence that was not considered previously by the FTB. The recent  
court decision in *Wilson, supra*, 705 F.3d 980, like the decision in *Porter v. Commissioner, supra*, 132 T.C. 203, endorses  
such a de novo scope of review.

1 January 1, 2011.<sup>11</sup>

2 IRS Guidance Regarding Claims for Equitable Relief

3 In Revenue Procedure 2003-61, the IRS set forth guidelines it used to determine whether  
4 it would be inequitable to hold an individual jointly liable for a tax debt. Revenue Procedure 2003-61  
5 is effective for requests for relief filed on or after November 1, 2003.<sup>12</sup> Last year, the IRS published  
6 Notice 2012-8 announcing that it was proposing a new revenue procedure that would revise and  
7 supersede Revenue Procedure 2003-61 with regard to claims for equitable innocent spouse relief, and  
8 until the proposed revenue procedure is finalized it would apply the provisions of the proposed revenue  
9 procedure instead of Revenue Procedure 2003-61. (See also IRS Chief Counsel Notice CC-2012-  
10 004.)<sup>13</sup> Section 4.01 of Revenue Procedure 2003-61 and section 4.01 of the proposed revenue  
11 procedure both provide that a requesting spouse must satisfy all of the threshold conditions set forth in  
12 section 4.01 to be eligible for equitable relief. In *Sriram v. Commissioner*, T.C. Memo 2012-91, the  
13 Tax Court stated that it would continue to apply the factors set forth in Revenue Procedure 2003-61,  
14 because the proposed revenue procedure is not final and the comment period only closed recently. (See  
15 also *O'Neil v. Commissioner*, T.C. Memo 2012-339; *Henson v. Commissioner*, *supra*, T.C. Memo  
16 2012-288; *Hudgins v. Commissioner*, *supra*, T.C. Memo 2012-260; *Yosinski v. Commissioner*, T.C.  
17 Memo 2012-195; *Deihl v. Commissioner*, T.C. Memo 2012-176.) While the Tax Court has continued  
18 to apply Revenue Procedure 2003-61, it has also considered relevant areas where the proposed revenue  
19 procedure differs from the existing revenue procedure. (See, e.g., *Henson v. Commissioner*, *supra*,  
20 T.C. Memo 2012-288 at p. 30; *Sriram v. Commissioner*, *supra*, T.C. Memo 2012-91, fn. 7.) While the  
21 factors considered by the IRS in evaluating claims for equitable relief are helpful, they are not binding  
22

23  
24 <sup>11</sup> Respondent's briefing previously argued that an abuse of discretion standard of review applied, which was consistent with  
25 prior precedent. (Resp. Opening Br., pp. 11-12.) However, *Wilson*, *supra*, 705 F.3d 980, was issued after respondent filed  
its additional brief, and respondent subsequently informed the Appeals Division that it agrees that, in light of *Wilson*, *supra*,  
705 F.3d 980, a de novo standard of review now applies to all innocent spouse appeals.

26 <sup>12</sup>Revenue Procedure 2003-61 supersedes Revenue Procedure 2000-15, and is effective for equitable relief requests filed on  
27 or after November 1, 2003. It applies to the present appeal because appellant filed her innocent spouse request on October  
18, 2010. (Resp. Opening Br., p. 3, exhibit I.)

28 <sup>13</sup> Notice 2012-8 can be accessed at the IRS's website ([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html)). Chief Counsel  
Notice CC-2012-004 can also be accessed at the IRS's website (<http://www.irs.gov/pub/irs-ccdm/cc-2012-004.pdf>).

1 on the Tax Court or on the Board. (See, e.g., *Henson v. Commissioner, supra*, T.C. Memo 2012-288;  
2 *Sriram v. Commissioner, supra*, T.C. Memo 2012-91.)

3 Threshold Conditions

4 Section 4.01 provides that a requesting spouse must satisfy all of the following threshold  
5 conditions to be eligible to submit a request for equitable relief:<sup>14</sup>

- 6 • the requesting spouse must have filed a joint return for the taxable year in which relief is  
7 sought;
- 8 • relief is not available by traditional innocent spouse relief or by separate liability  
9 allocation;
- 10 • no assets were transferred between the spouses as part of a fraudulent scheme;
- 11 • no “disqualified assets” (as defined to include assets transferred for tax avoidance  
12 purposes) were transferred to the requesting spouse by the nonrequesting spouse;
- 13 • the requesting spouse did not file the return with fraudulent intent; and
- 14 • the income tax liability is attributable to an item of the nonrequesting spouse (unless,  
15 e.g., funds intended for payment of the tax liability were misappropriated by the  
16 nonrequesting spouse; or where the requesting spouse establishes that he or she was the  
17 victim of abuse prior to the time the return was signed.)<sup>15</sup>

18 Section 4.02

19 If the threshold conditions for equitable relief are met, section 4.02 provides that  
20 equitable relief will ordinarily be granted where liability reported on a joint return is unpaid, if certain

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25 <sup>14</sup> Section 4.01 also lists a seventh threshold condition concerning the statute of limitations for electing relief, which is not  
26 relevant here.

27 <sup>15</sup> Section 4.01(7)(e) of the proposed revenue procedure provides the following additional exception to the threshold  
28 condition in section 4.01(7): the IRS will consider a request for equitable relief even though the item giving rise to the  
understatement or deficiency is attributable to the requesting spouse if it is shown that the nonrequesting spouse’s fraud is  
the reason for the erroneous item. ([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html).)

1 requirements are satisfied.<sup>16</sup> Under section 4.02, *all* of the following requirements must be satisfied:

- 2 • The requesting spouse is divorced, legally separated, or has lived apart from his or her
- 3 spouse for 12 months prior to requesting relief.
- 4 • The requesting spouse shows that when he or she signed the return he or she had no
- 5 knowledge or reason to know that the tax would not be paid.
- 6 • The requesting spouse will suffer economic hardship if relief is not granted.

7 Section 4.03

8 If the threshold conditions for equitable relief are met, but the individual requesting  
9 relief does not meet the requirements under section 4.02, then relief may still be granted under section  
10 4.03. Section 4.03 provides a list of factors that are relevant to whether equitable relief should be  
11 granted. Under this section, no single factor is determinative in any particular case; all factors are to be  
12 considered and weighed appropriately; and the list of factors is not intended to be exclusive. (See Rev.  
13 Proc. 2003-61, § 4.03(2).)<sup>17</sup> Section 4.03 sets forth the following additional conditions to the grant of  
14 equitable relief:

- 15 • marital status – whether the spouse requesting relief is separated (whether legally
- 16 separated or living apart) or divorced from the nonrequesting spouse;

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22 <sup>16</sup> Section 4.02 of the proposed revenue procedure has been revised to apply a streamlined determination of equitable relief  
23 in cases of understatements of income tax, as well as underpayments. Section 4.02 has also been revised to provide that if  
24 the nonrequesting spouse abused the requesting spouse or maintained control over the household finances by restricting the  
25 requesting spouse's access to financial information, and, therefore, because of the abuse or financial control the requesting  
26 spouse was unable to challenge the treatment of any items on the joint return, to question the payment of the taxes reported  
27 as due on the joint return, or to challenge the nonrequesting spouse's assurance regarding payment of the taxes, for fear of  
28 the nonrequesting spouse's retaliation, then that abuse or financial control will result in the knowledge factor being satisfied,  
even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement or deficiency  
or had knowledge or reason to know that the nonrequesting spouse would not pay the tax liability.  
([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html).)

<sup>17</sup> Section 4.03 of the proposed revenue procedure has been revised to clarify that no one factor or a majority of factors  
necessarily controls the determination of whether equitable relief will be granted.  
([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html).)

- 1 • economic hardship – whether the requesting spouse would suffer economic hardship if  
2 relief is not granted;<sup>18</sup>
- 3 • knowledge or reason to know –with respect to an underpayment (as here), whether the  
4 requesting spouse did not know and had no reason to know that the nonrequesting  
5 spouse would not pay the tax liability;<sup>19</sup>
- 6 • nonrequesting spouse’s legal obligation – whether the nonrequesting spouse has a legal  
7 obligation to pay the outstanding tax liability pursuant to a divorce decree or  
8 settlement;<sup>20</sup>
- 9 • significant benefit – with respect to an underpayment (as here), whether the requesting  
10 spouse received a significant benefit (beyond normal support) from the unpaid tax  
11 liability;
- 12 • compliance with income tax laws – whether the requesting spouse has made a good faith  
13 effort to comply with income tax laws in years following the years to which the request  
14 for relief relates;
- 15 • abuse – whether the requesting spouse was the subject of abuse (but the absence of this  
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17 <sup>18</sup> Economic hardship would exist if satisfaction of the tax liability in whole or in part will cause the requesting spouse to be  
18 unable to pay his or her reasonable basic living expenses. The determination of a reasonable amount for basic living  
19 expenses will vary according to the unique circumstances of the individual taxpayer. Unique circumstances, however, do  
20 not include the maintenance of an affluent or luxurious standard of living. (See Rev. Proc. 2003-61, §§ 4.03(2)(ii),  
21 4.02(1)(c); Treas. Reg. § 301.6343-1(b)(4).) Section 4.03(2)(b) of the proposed revenue procedure has been revised to  
22 provide minimum standards based on income, expenses, and assets for purposes of determining whether the requesting  
23 spouse would suffer economic hardship if relief is not granted, and it is also revised to provide that a lack of a finding of  
24 economic hardship does not weigh against relief. ([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html).)

25 <sup>19</sup> Section 4.03(2)(c)(i) of the proposed revenue procedure has been revised to provide that actual knowledge of the item  
26 giving rise to an understatement or deficiency will no longer be weighed more heavily than other factors. Section  
27 4.03(2)(c)(ii) has been revised to clarify that if the nonrequesting spouse abused the requesting spouse or maintained control  
28 over the household finances by restricting the requesting spouse’s access to financial information, and, therefore, because of  
the abuse or financial control the requesting spouse was unable to question the payment of the taxes reported as due on the  
joint return, challenge the nonrequesting spouse’s assurance regarding payment of the taxes, or challenge the treatment of any  
items on the joint return for fear of the nonrequesting spouse’s retaliation, then that abuse or financial control will result in  
this factor weighing in favor of relief, even if the requesting spouse had knowledge or reason to know that the nonrequesting  
spouse would not pay the tax liability. ([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html).)

<sup>20</sup> Section 4.03(2)(d) of the proposed revenue procedure has been revised to clarify that a requesting spouse’s legal obligation  
to pay outstanding tax liabilities is a factor to consider in determining whether equitable relief should be granted, as well as  
whether the nonrequesting spouse has a legal obligation to pay the tax liabilities. ([http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html).)

1 factor will not weigh against a grant of relief); and

- 2 • mental or physical health – whether the requesting spouse was in poor mental or  
3 physical health when he or she signed the return or when he or she requested relief (but  
4 the absence of this factor will not weigh against a grant of relief).

5 (Rev. Proc. 2003-61, § 4.03.)

6 Court-Ordered Relief

7 R&TC section 19006 provides an independent exception to the general rule that spouses  
8 are jointly and severally liable for tax on the aggregate income stated on a joint return. R&TC section  
9 19006, subdivision (b), provides that joint and several liability may be revised by court order in a  
10 marriage dissolution proceeding. However, R&TC section 19006, subdivision (b), provides that the  
11 following conditions must be met:

- 12 • The court order may not relieve a spouse of tax liability on income earned by or subject  
13 to the exclusive management and control of the spouse;
- 14 • The court order must separately state the income tax liability for each tax year for which  
15 revision of tax liability is granted.
- 16 • The court order shall not revise a tax liability that has been fully paid prior to the  
17 effective date of the order;
- 18 • The court order shall not be effective unless the FTB is served with or acknowledges  
19 receipt of the order; and
- 20 • Where the gross income reportable on the return is greater than \$150,000 or the amount  
21 of tax liability the spouse is relieved of exceeds \$7,500, a court-ordered revision is  
22 effective only if the parties obtain a TRCC from the FTB and files it with the court.)

23 STAFF COMMENTS

24 Threshold Conditions

25 The parties should be prepared to address whether all the threshold conditions to relief  
26 set forth in Section 4.01 are met. It appears that the only threshold condition that is at issue is the  
27 income attribution condition.

28 It further appears to the Appeals Division that appellant may satisfy the income

1 attribution threshold condition with respect to the portion of the liability arising from appellant's former  
2 spouse's wage income.<sup>21</sup> At the hearing, respondent should be prepared to state whether it disagrees.  
3 However, it appears that appellant cannot satisfy the threshold condition with respect to the remaining  
4 liability (i.e., the portion of the liability attributable to her own income), unless she can demonstrate  
5 that her former husband misappropriated funds that were intended to pay the tax liabilities shown on  
6 the tax returns (i.e., the misappropriation exception).

7           With regard to the misappropriation exception to the income attribution threshold  
8 condition, the parties dispute whether appellant's former spouse's purported misappropriation of funds  
9 intended for the payment of the tax liabilities must occur contemporaneous to the filing of the 2005 and  
10 2006 returns on April 15, 2007, or whether the misappropriation may occur at a subsequent time, such  
11 as the period following the couple's divorce in November 2009. IRC section 6151 and R&TC section  
12 19001 both require taxpayers to pay the tax due at the time they file their returns. Here, the couple was  
13 thus legally required to have funds intended for the payment of their 2005 and 2006 tax liabilities  
14 available for remittance to respondent as of April 15, 2007. Moreover, the knowledge requirement of  
15 sections 4.02 and 4.03 of Revenue Procedure 2003-61 and the proposed revenue procedure addresses  
16 the issue of whether the requesting spouse knew or should have known that the tax liability would not  
17 be paid *at the time the return is filed*. Accordingly, the Appeals Division's opinion is that the  
18 misappropriation of funds exception must apply to the period contemporaneous to the time when the  
19 couple filed their 2005 and 2006 returns, rather than the period after they entered into their marital  
20 settlement agreement in 2009. Further, the funds misappropriated must have been intended for the  
21 payment of the tax shown on the return. As of the writing of this hearing summary, there is no  
22 evidence that on or about April 15, 2007, appellant's former spouse misappropriated funds intended for  
23 the payment of the couple's self-assessed tax liabilities for 2005 and 2006. It appears to the Appeals  
24 Division that, unless appellant provides further evidence on this issue, the misappropriation of funds  
25 exception is not satisfied as to the portion of the liability that is not attributable to appellant's former  
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27  
28 <sup>21</sup> The proposed revenue procedure, at section 4.01(7), explains that this threshold condition refers to an item that is  
"attributable (either in full or in part) to an item of the nonrequesting spouse or an underpayment resulting from the  
nonrequesting spouse's income[.]" and provides that relief can only be considered for the portion of the liability attributable  
to the nonrequesting spouse.

1 spouse's wage income. Therefore, unless appellant provides additional evidence on this issue, it  
2 appears she cannot obtain relief with respect to this portion of the liability. However, with respect to  
3 the portion of the liability that is attributable to an item of appellant's former spouse, the parties will  
4 want to address section 4.02 and 4.03, which are discussed below.

5 Section 4.02

6 Assuming the Board determines that appellant satisfies all of the threshold conditions for  
7 equitable relief with respect to some portion of the liability, the parties should be prepared to discuss  
8 whether appellant satisfies all of the factors set forth in section 4.02 of Revenue Procedure 2003-61 and  
9 the proposed revenue procedure. As to whether appellant would suffer economic hardship if relief  
10 were not granted, the Appeals Division requested in its August 17, 2012 letter that appellant provide  
11 evidence and information about her education and current or prior occupations and evidence of her  
12 current financial condition and employment status, including, but not limited to, bank statements, bills,  
13 and pay stubs for both her and her current spouse. Although she filed an additional brief in response to  
14 the Appeals Division's August 17, 2012 letter, appellant did not provide the requested evidence  
15 concerning economic hardship. According to respondent's records, appellant and her current spouse  
16 reported adjusted gross income of \$147,233 on their joint 2010 return. (Resp. Opening Br., p. 10,  
17 exhibit S.) If appellant still contends that she would suffer economic hardship if relief were not  
18 granted, she should provide supporting information and documents other than her submitted  
19 declaration.

20 Although appellant contends that she did not know or have reason to know that the  
21 couple's 2005 and 2006 tax liabilities would not be paid by April 15, 2007, when the couple filed their  
22 2005 and 2006 returns, she does not appear to dispute that she knew of the prior EWOTs issued to her  
23 employer and the installment agreement discussions between her former spouse and respondent.  
24 Appellant relies on *Torrisi, supra*, T.C. Memo 2011-235, as support for her contention that she satisfies  
25 the knowledge requirement of section 4.02. However, the Tax Court in *Torrisi, supra*, denied the  
26 requesting spouse equitable relief for 2000 due in part to a determination that the requesting spouse did  
27 not satisfy the knowledge requirement of sections 4.02 and 4.03 of Revenue Procedure 2003-61. The  
28 Tax Court found that, although she previously relied on her spouse's assurances that he would pay the

1 tax liabilities, the requesting party had reason to know when she signed the 2000 return that her spouse  
2 would not pay the tax liability for 2000 for the following reasons: 1) as of September 2000 her spouse  
3 retired and he no longer had a steady income; and 2) when the couple applied for a home equity loan in  
4 the end of 2000, the requesting spouse discovered that the 1997-1999 tax liabilities were unpaid.

5 The parties should be prepared to discuss the financial control exception to the  
6 knowledge requirement set forth in section 4.02(3) (and section 4.03(2)(c)(ii)) of the proposed revenue  
7 procedure). Appellant may wish to provide additional evidence to support her assertions that her  
8 former spouse maintained control of the household finances.

#### 9 Section 4.03

10 Assuming that the Board determines that appellant satisfies all of the threshold  
11 conditions for equitable relief but she does not satisfy all of the conditions set forth in section 4.02, the  
12 parties should be prepared to discuss whether appellant is entitled to equitable relief based on the  
13 nonexclusive factors set forth in section 4.03 of the Revenue Procedure 2003-61 and the proposed  
14 revenue procedure. If appellant does not satisfy the economic hardship requirement and/or the  
15 knowledge requirement of section 4.02, then she presumably would not satisfy one or both of these  
16 factors for purposes of section 4.03. Appellant does not contend that she was the subject of abuse or  
17 that she was in poor mental or physical health when she signed the 2005 and 2006 returns.  
18 Nevertheless appellant satisfies the marital status factor and it appears that she also satisfies the legal  
19 obligation factor of section 4.03. The significant benefit factor thus appears to be the remaining  
20 additional factor of section 4.03 in dispute should the Board make a determination that appellant is not  
21 entitled to equitable relief under section 4.02. Appellant should thus consider submitting  
22 documentation that supports her contention that she did not receive a significant benefit (beyond  
23 normal support) from the nonpayment of the 2005 and 2006 tax liabilities. (See Treas. Reg. § 1.6015-  
24 2(d).)

#### 25 Federal Innocent Spouse Relief

26 The parties should be prepared to discuss and submit supporting documents indicating  
27 whether appellant requested federal innocent spouse relief for 2005 or 2006 and, if so, whether the IRS  
28 granted such relief.

1                    Court-Ordered Relief

2                    R&TC section 19006, subdivision (b), provides that a court may revise the joint and  
3 several liability of spouses in a proceeding for dissolution of marriage. Appellant has not elected to go  
4 to court to take advantage of this provision. The Board's jurisdiction in this appeal is provided by  
5 R&TC section 18533, subdivision (e), and neither this provision nor R&TC section 19006 provide an  
6 avenue for the Board to provide relief under R&TC section 19006, subdivision (b). (Contrast Rev.  
7 &Tax Code, § 19006, subd. (c)(4), which provides an appeal right from respondent's determination of  
8 whether it would be inequitable to hold the requesting spouse liable.) If either party disputes this  
9 interpretation, it should explain its position at the hearing, with reference to supporting legal authority.

10                   Additional Evidence

11                   If appellant has any additional evidence to provide, it should be submitted to the Board  
12 and respondent at least 14 days prior to the hearing date.<sup>22</sup>

13                   Recommendation for Formal Opinion

14                   In the view of the Appeals Division, a Formal Opinion may be appropriate in order to  
15 provide more current guidance regarding innocent spouse law than the guidance found in the *Appeal of*  
16 *Patricia Tyler-Griffis, supra*, which is the most recent Formal Opinion in this area. Since that decision,  
17 there have been changes in the law, including the Ninth Circuit Court of Appeal's decision in *Wilson,*  
18 *supra*, 705 F.3d 980, earlier this year. *Wilson* holds that denials of equitable relief are reviewed  
19 de novo and thus, in the opinion of the Appeals Division, the abuse of discretion standard of review (as  
20 set forth in the *Appeal of Patricia Tyler-Griffis, supra*) should no longer be applied. In addition, it may  
21 be helpful to provide guidance regarding the extent of the Board's jurisdiction under R&TC section  
22 19006, subdivision (b). Also, the Board may want to provide guidance as to whether parties to appeals  
23 before the Board may expect the proposed revenue procedure to be applied (unless and until it is  
24 revised or superseded). The Appeals Division notes that the proposed revenue procedure is more  
25 favorable to requesting spouses than Revenue Procedure 2003-61 and that respondent and the IRS both  
26 have indicated that they are applying the proposed revenue procedure. As discussed above, the Tax  
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<sup>22</sup> Exhibits should be submitted to: Claudia Madrigal, Board of Equalization, Board Proceedings Division, P.O. Box 942879  
MIC:80, Sacramento, CA 94279-0080.

1 Court has taken a cautious approach by continuing to apply Revenue Procedure 2003-61, albeit with  
2 consideration of the proposed revenue procedure. Neither Revenue Procedure 2003-61 nor the  
3 proposed revenue procedure is binding on the Board or on the courts. Although the proposed revenue  
4 procedure has not been adopted, it is being applied by the IRS and the FTB, and the Appeals Division  
5 believes the Board may wish to provide guidance as to whether it also will rely on the proposed  
6 revenue procedure unless and until it is superseded or revised. For these or other reasons, the Board  
7 may find that a Formal Opinion would modify a rule (i.e., the standard of review set forth in the *Appeal*  
8 *of Patricia Tyler-Griffis, supra*), involve a legal issue of continuing public interest (e.g., the extent to  
9 which the Board will apply the proposed revenue procedure), make a significant contribution to the law  
10 by reviewing the relevant legislative and judicial history, or that other factors favor a Formal Opinion.  
11 (See Cal. Code Regs., tit. 18, § 5452, subdvs. (e)(1), (3) & (4).) The determination of whether to direct  
12 preparation of a Formal Opinion for the Board's review is subject to the Board's discretion, and the  
13 Appeals Division will prepare a nonprecedential Letter Decision unless the Board directs otherwise.

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