

**CALIFORNIA STATE BOARD OF EQUALIZATION**

**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Claim for Refund )  
 Under the Sales and Use Tax Law of: )  
 JANICE GROSHAK LAMI ) Account Number: SR BH 52-037495  
 Claimant ) Case ID 476370  
 ) Redwood City, San Mateo County

Claim Period: 08/01/04 – 06/30/05

<u>Item</u>	<u>Claimed Refund</u>
Offsets of state income tax refunds	\$2,495 <sup>1</sup>
Funds levied from joint checking account	\$ 58

This matter was scheduled for Board hearing on March 25, 2010, but was postponed because claimant had a scheduling conflict and requested that the oral hearing be held in September 2010.

Claimant filed a claim for refund for \$5,995.08 levied from three bank accounts she held jointly with her former spouse, Raymond Lami, and \$2,494.92 in offsets of state income tax returns applied to liabilities owed by Mr. Lami. As explained under “Resolved Issue” below, the Sales and Use Tax Department (Department) has issued a refund of \$5,897.06, and the amount remaining in dispute is \$2,552.94 (\$2,494.92 + \$58.02).

**UNRESOLVED ISSUES**

**Issue 1:** Whether claimant is entitled to a refund of the state income tax refunds intercepted by FTB and paid to the Board or the funds collected by levy from the joint checking account. We conclude she is not entitled to a refund of these funds.

Mr. Lami was the corporate president of RC Mulligan’s Pub & Grill, Inc. (RC Mulligan’s), which operated under seller’s permit number SR BH 97-797878 until June 30, 2005. Mr. Lami has been held personally responsible under Revenue and Taxation Code section 6829 for the unpaid tax-

<sup>1</sup> Petitioner also requested reimbursement for the costs associated with claimant’s pursuit of this appeal, in the aggregate amount of \$219.67. However, as explained in the D&R, there are no statutes or regulations that authorize the payment of compensation to claimant for any of these expenses, and we will not address this issue herein.

1 related liabilities of RC Mulligan's. As part of its collection efforts, the Department served a Notice of  
2 Levy upon Bank of America on October 12, 2006, for \$42,204.17, describing the property to be levied  
3 as "all monies, debts, credits and other personal property belonging to [Raymond Lami] in [the bank's]  
4 possession or under [its] control." A total of \$6,783.76 was levied from bank accounts of Mr. Lami  
5 and claimant between October 23, 2006, and November 2, 2006. Also, on or about November 14,  
6 2006, the Franchise Tax Board (FTB) intercepted, on behalf of the Board, state income tax refunds  
7 totaling \$2,494.92 due Mr. Lami and claimant on joint returns filed for tax years 2003 and 2004  
8 (\$1,829.62 and \$665.30, respectively).

9 A claim for refund was filed on behalf of Raymond Lami, Janice Groshak Lami, and Joseph  
10 John Lami, their minor son, which was assigned case ID 394838. The appeals conference was held for  
11 that appeal, but neither Mr. Lami nor claimant attended (the Notice of Conference had been mailed  
12 only to Mr. Lami). After a D&R was issued, claimant requested a Board hearing and that hearing was  
13 scheduled for December 16, 2008. However, since we found mistakes in the D&R issued in case ID  
14 394838 and claimant had not had the opportunity to participate in the prior appeals conference, we  
15 asked that the appeal be removed from the Board hearing calendar so that we could hold another  
16 appeals conference in which claimant could participate. Since Mr. Lami is not pursuing the claim for  
17 refund, a separate account number (SR BH 52-037495) and case ID (476370) were assigned to the  
18 claim for refund for claimant. Following the appeals conference with claimant in case ID 476370, we  
19 issued a D&R that supersedes the D&R issued for case ID 394838.

20 Claimant contends that she is entitled to a refund of the \$2,494.92 state income tax refunds  
21 applied to Mr. Lami's liability and the remaining \$58.02 of the amounts levied, which was from the  
22 joint checking account. Claimant asserts that she legally separated from Mr. Lami on April 29, 2005,  
23 the date she filed a petition for legal separation with the court, and states that she and Mr. Lami have  
24 lived separate lives since that date. Claimant contends that she is not liable for Mr. Lami's debt  
25 because it accrued after claimant and Mr. Lami legally separated. Claimant further asserts she is  
26 entitled to the income tax refunds because the refunds arose out of income that she, not Mr. Lami,  
27 earned from employment and reported for tax years 2003 and 2004. Claimant also contends that the  
28 funds levied from the joint checking account belonged to her, as her separate property.

1           Since the income tax refund related to income earned during the marriage prior to any  
2 separation, the income was community property income, whether earned by claimant or by Mr. Lami.  
3 As such, if Mr. Lami's debt were his separate property debt as asserted by claimant, then one-half of  
4 the community property franchise tax refund (his share) would be properly allocable to Mr. Lami's  
5 debt. If, however, the debt were a community property debt, having been incurred prior to an actual  
6 separation between claimant and Mr. Lami, then the entire community property income tax refund  
7 would be properly allocable to that community property debt. Thus, the issue here with respect to the  
8 income tax refund is whether one-half should be refunded to claimant since at least one-half was  
9 properly applied to Mr. Lami's debt. With respect to the \$58.02 levied from the joint checking  
10 account, the funds in the account were either held in joint tenancy or as community property. If the  
11 former, then all of those funds would be available for payment of the debts of either joint tenant  
12 without regard to the marital status of either joint tenant. If the funds were held as community  
13 property, then, as above, the issue would be whether one-half should be refunded to claimant since the  
14 other one-half would have been properly applied to Mr. Lami's debt even if it were his separate  
15 property debt. Thus, one-half of the claim must be denied in any event, and with respect to the  
16 remaining one-half, the determinative issue is whether Mr. Lami's tax debt is a community debt.

17           During a marriage, unless the spouses commence living separate and apart within the meaning  
18 of Family Code section 771, all property they acquire is presumed to be community property. If they  
19 commence living separate and apart, the community is terminated and all future income and debts are  
20 the separate property of the respective spouses. The mere filing of a petition for legal separation does  
21 not constitute living separate and apart for these purposes. The critical inquiry is whether the parties'  
22 conduct evidences a complete and final break in the marital relationship. (*In re Marriage of Baragry*  
23 (1977) 73 Cal.App.3d 444, 448.) “[S]pouses are not ‘living separate and apart’ within the meaning of  
24 the statute unless they reside in different places. Typically, that would entail each spouse taking up  
25 residence at a different address.” (*In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 1163.) It is  
26 possible for spouses to live apart physically while still occupying the same dwelling, but “the evidence  
27 would need to demonstrate unambiguous, objectively ascertainable conduct amounting to a physical  
28 separation under the same roof.” (*Id.* at 1164.)

1 Mr. Lami incurred the debt at issue here on June 30, 2005, so the issue is whether claimant can  
2 establish that, prior to that date, she and Mr. Lami were living separate and apart within the meaning of  
3 Family Code section 771. This issue is obviously dependent on deeply personal and sensitive facts.  
4 Nevertheless, it is an inquiry that is required to resolve the present dispute. In order to prevail as to 50  
5 percent of the property in dispute, the available facts must establish that at least one of the spouses had  
6 a clear intent that the marital relationship was terminated prior to June 30, 2005, including evidence of  
7 unambiguous, objectively ascertainable conduct amounting to a physical separation.

8 Claimant concedes that Mr. Lami stayed as a guest in her house for a little more than  
9 50 percent of the time after the petition for legal separation was filed, which she explains as the result  
10 of financial difficulties on his part. She states that these stays have been periodic in nature rather than  
11 continuous. According to claimant, during these stays Mr. Lami slept in a separate bedroom and does  
12 not pay rent to claimant or share utility expenses. Claimant provided various documents in support of  
13 her contention that she and Mr. Lami are separated, as detailed in the D&R. However, we find that  
14 claimant has not provided persuasive evidence to establish that the parties were living separate and  
15 apart for purposes of Family Code section 771 on or prior to June 30, 2005. We conclude that the debt  
16 was a community debt for which the community estate is liable, and that the claim therefore must be  
17 denied.

18 **Issue 2:** Whether claimant is entitled to innocent spouse relief with respect to the amounts at  
19 issue. We conclude that innocent spouse relief is not applicable to the claim for refund at issue.

20 Claimant contends that she is entitled to relief as an innocent spouse in the form of a refund of  
21 the funds at issue. However, the purpose of innocent spouse relief is to allow a truly innocent spouse,  
22 as defined in Revenue and Taxation Code section 6456, to obtain relief from his or her own personal  
23 liability. Thus, innocent spouse relief is relevant only when the liability is imposed on both spouses,  
24 including the purported innocent spouse. Here, the only issue is whether the funds obtained by the  
25 Board were properly applicable to Mr. Lami's liability or were solely the funds of claimant.  
26 Therefore, innocent spouse relief is not relevant to this claim.

#### 27 **RESOLVED ISSUE**

28 Based on the bank records claimant provided, the Department concluded that claimant and

1 Mr. Lami held the amounts of \$5,306.07 and \$590.99 in two separate accounts in a custodial capacity  
2 in trust for their minor son. We find that the evidence supports the Department's conclusion. Thus,  
3 the D&R concluded that funds totaling \$5,897.06 were wrongly levied from two accounts because they  
4 belonged to claimant's son, and did not belong to claimant and Mr. Lami. The Department issued a  
5 refund of \$6,526.06, \$5,897.06 plus \$629.00 credit interest, on December 9, 2009.

6 **OTHER DEVELOPMENTS**

7 None.

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10 Summary prepared by David H. Levine, Tax Counsel IV

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