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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11 **BARBARA BLADEN PORTER**) **PERSONAL INCOME TAX APPEAL**
12 **(party requesting innocent spouse relief)¹**) Case No. 424104

| <u>Year</u> | <u>Amount of Relief Requested²</u> |
|-------------|---|
| 1994 | \$81,053.37 |

15 Representing the Parties:

16 For Appellant: Karen L. Hawkins, Attorney
17 For Franchise Tax Board: Mark McEvilly, Tax Counsel III

19 QUESTIONS: (1) Whether appellant is barred by the doctrine of res judicata from seeking innocent
20 spouse relief.

21 (2) Alternatively, if res judicata does not apply, whether appellant has demonstrated
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23
24 ¹ Appellant resides in San Miguel De Allende, Mexico. Appellant's husband, William L. Porter is now deceased; he died on
25 March 27, 2006. (App. Opening Br., p. 1.)

26 ² Board records indicate this is the total amount at issue (tax of \$28,882.70, late-filing penalty of \$13,732.75, and an amnesty
27 interest penalty of \$38,437.92) excluding accrued interest. Respondent should provide the accrued interest amount at the
28 time of the oral hearing. Appellant concedes that she is responsible for the tax due on her 1994 wage and interest income to
the extent that it exceeds her W-2 California income tax withholding. (App. Opening Br., p. 10.) Respondent should
therefore be prepared at the time of the oral hearing to provide the amount of tax, penalties and interest due based only on
appellant's 1994 wage and interest income after offsetting her W-2 California income tax withholding.

1 that she is entitled to innocent spouse relief.

2 HEARING SUMMARY

3 I. Background

4 Appellant and her husband, William Porter, who is now deceased, were married since
5 1976. The couple had no children. Appellant and Mr. Porter were still married to each other when
6 Mr. Porter died on March 27, 2006, at the age of 80.

7 The couple did not file a timely 1994 California personal income tax return. Because
8 respondent received information that in 1994 Mr. Porter sold a partial interest in real property located in
9 California, respondent reportedly contacted the couple in order to determine their 1994 tax liability.³
10 Respondent conducted an audit and reportedly prepared a substitute 1994 California nonresident or part-
11 year resident return (Form 540NR) based on information it obtained from the Internal Revenue Service
12 (IRS) and the couple.⁴

13 On April 8, 2002, respondent issued a Notice of Proposed Assessment (NPA) to the
14 couple based on the available income information. Respondent calculated wages of \$33,241, interest
15 and dividends of \$22,474, rents and royalties of \$83,154, gain from the sale of real property of \$599,552
16 and California itemized deductions of \$229,524 for a taxable income of \$508,897 and a tax of \$47,141.
17 Respondent used an apportionment factor of 0.9401 to calculate the portion of the tax apportionable to
18 California to be \$44,317 (\$47,141 x 0.9401). Respondent assessed alternative minimum tax of \$11,969
19 and subtracted appellant's income tax withholding credit of \$1,355 for a total tax liability of \$54,931.
20 Respondent also imposed a late-filing penalty in the amount of \$13,732.75 and applicable interest.
21 (Resp. Opening Br., exhibit A.)

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24 ³ It is not apparent from the record whether respondent sent the couple a notice and demand for their 1994 tax return.

25 ⁴ The Notice of Proposed Assessment states that on January 16, 2002, respondent sent to the couple's representative a
26 prepared substitute part-year resident return for 1994 and a position letter, which explain how respondent determined the
27 couple's 1994 taxable income from all sources and the amounts attributable to California. Staff was not able to locate either
28 of these two documents in the file. The file does contain, however, respondent's schedule showing a computation of the
couple's California total taxable income and liability based on their federal return for 1994. (Resp. Reply Br., exhibit O.)

1 A timely protest of the NPA was reportedly filed on behalf of the couple.⁵ (*Id.*, p. 2.) As
2 part of their protest, the couple submitted a prepared joint 1994 California Nonresident or Part-Year
3 Resident return (Form 540NR), which asserts that \$28,832, rather than \$54,931, is the correct amount of
4 tax due. The submitted return reports appellant's California wages in the amount of \$33,240.62 and the
5 part-sale, part-gift transaction involving Mr. Porter's separate California real property and the City of
6 Corte Madera (Corte Madera). (hereinafter referred to as the subject property). The attached Schedule
7 CA indicates that both appellant and Mr. Porter were California residents until August 1, 1994, and that
8 they moved to Mexico on July 31, 1994. The return is dated April 10, 2002. (Resp. Opening Br.,
9 Exhibit B.) On August 12, 2003, respondent issued a Notice of Action (NOA) affirming the NPA. (*Id.*,
10 Exhibit C.)

11 On September 3, 2003, the Board received an appeal letter signed only by Mr. Porter on
12 that same date. In this letter, Mr. Porter claimed that in 1996 he received a Notice of Failure to File for
13 tax year 1994 and he paid tax, penalties and interest for tax year 1994 at respondent's office in Santa
14 Rosa while vacationing in California. (Resp. Reply Br., exhibit N.) In a letter dated September 10,
15 2003, which is addressed only to Mr. Porter, Board staff acknowledged receipt of Mr. Porter's appeal
16 letter and Board staff stated:

17 We note that the Franchise Tax Board issued the assessment to more than
18 one person and that you were the only person that signed the appeal.
19 Regulation 5012, Form, (attached) requires that each person that is
20 appealing the Franchise Tax Board's assessment sign the appeal. If the
21 other person intended to appeal, please have that person sign the enclosed
22 copy of the appeal letter and return it to us in the enclosed envelope. As
23 an alternative, the other person may write us a separate letter informing us
24 that she is appealing also. In the absence of any such notification, the
25 appeal will remain in your name only.

26 (A copy of this letter is included in the appeal file for Case ID 237222 (Appeal of William L. and
27 Barbara B. Porter); see exhibit A to this Hearing Summary.)

28 On October 15, 2003, Board staff received another copy of the September 3, 2003, appeal
letter, but this copy included appellant's purported signature below Mr. Porter's signature. (App.

⁵ There is no protest letter in the file.

1 Supplemental Br., exhibit A (attachment to appellant's declaration). A copy of this appeal letter with
2 appellant's purported signature is attached to the appeal file for Case ID 237222 (Appeal of William L.
3 and Barbara B. Porter); see exhibit B to this Hearing Summary.) In a letter dated October 20, 2003,
4 which is addressed only to Mr. Porter, Board staff stated:

5 This will acknowledge receipt of the copy of your original appeal letter
6 received October 15, 2003, indicating that you wish to have Barbara B.
7 Porter included in the above-entitled appeal. We have changed our
8 records accordingly.

8 (Resp. Opening Brief, exhibit D.)] For purposes of clarity, Board staff will hereinafter refer to this
9 matter as the "prior appeal."

10 The prior appeal was submitted to the Board for decision based on the memoranda on file
11 and without oral hearing. The following issues were presented in the prior appeal: whether appellants⁶
12 were part-year residents of California in 1994; whether 58.1 percent of appellants' total interest,
13 dividends and royalties earned in 1994, and Mrs. Porter's 1994 California wages, are subject to taxation
14 by California; whether appellants' deduction for their real property charitable contribution to Corte
15 Madera is limited to 30 percent of their federal adjusted gross income for 1994; whether appellants are
16 liable for the late-filing penalty; whether appellants have shown that respondent abused its discretion in
17 denying their request for interest abatement; and whether appellants should be credited with an alleged
18 but unsubstantiated payment of their 1994 liability. (Resp. Open. Br., Exhibit E; see exhibit C to this
19 Hearing Summary.) The Board adopted its decision on May 25, 2004, in which it sustained
20 respondent's action of assessing additional tax of \$54,931 and imposing a late-filing penalty plus
21 accrued interest. As a basis for the decision, the Board made findings that appellants failed to show
22 error in respondent's assessment and respondent correctly determined that appellants were part-year
23 California residents subject to taxation in 1994. (*Ibid.*) Neither spouse filed a petition for
24 reconsideration and the Board's decision became final.

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28 ⁶ Although appellant argues that she did not meaningfully participate in the prior appeal, Board staff refers to appellant and Mr. Porter collectively as "appellants" with respect to the prior appeal since this is how they are identified in the Board's May 25, 2004, decision.

1 According to respondent, it subsequently commenced billing and collection activities
2 with respect to the 1994 tax liability. (Resp. Opening Br., p. 3.) Respondent reportedly applied the
3 following payments to the 1994 tax deficiency on the following dates: \$5,000 on December 7, 2004,
4 and \$12,596 on May 31, 2005. (*Ibid.*) After Mr. Porter died on March 27, 2006, respondent issued a
5 Tax Lien Notice dated September 20, 2006, to appellant for a total tax liability of \$179,081.80 for the
6 1994 tax year; the tax lien notice acknowledges the prior payments of \$17,596 (\$5,000 + \$12,596).
7 (App. Opening Br., exhibit Q.) At the time of Mr. Porter's death, the couple had a single joint bank
8 account, which reportedly contained less than \$20,000. (App. Opening Br., p. 4.) On November 17,
9 2006, respondent issued an order to Citibank to withhold funds from Mr. Porter and appellant's accounts
10 in the amount of \$210,862.39 for tax deficiencies for the 1994 and 2004 tax years. (*Id.*, exhibit R.) On
11 December 28 2006, respondent applied a payment of \$8,452 to the 1994 tax year account. (Resp.
12 Opening Br., p. 3.)

13 Request for Innocent Spouse Relief

14 On December 15, 2006, appellant filed a request for innocent spouse relief. (Resp.
15 Opening Br., p. 3, exhibit F.) In her attached statement, appellant requests separate liability election
16 under R&TC section 18533, subdivision (c), from the 1994 joint California liability to the extent of the
17 items attributable to Mr. Porter or, alternatively, appellant requests equitable relief under R&TC section
18 18533, subdivision (f). Appellant further states that she has not requested relief from the IRS because it
19 has never examined or adjusted the 1994 federal return. (*Id.*, exhibit F, pp. 2-3.)

20 Respondent informed Mr. Porter's estate that appellant had requested innocent spouse
21 relief and requested information from the estate. (Resp. Opening Br., exhibit G.) Respondent did not
22 receive any response from the estate. (Resp. Opening Br., p. 3.) After an exchange of correspondence
23 between appellant and respondent, respondent issued a Notice of Action dated June 21, 2007, denying
24 appellant's request for innocent spouse relief; respondent also issued a Notice of Action-Denial Non-
25 Requesting Taxpayer dated June 21, 2007, which is addressed to Mr. Porter and his estate. (*Id.*, exhibits

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1 K, L.)⁷ This timely appeal followed.

2 Request for Additional Briefing

3 In order to further develop the issues, the Appeals Division requested additional briefing
4 by letter dated April 23, 2009, in which the parties were requested to discuss the following:

- 5 1. Under R&TC section 18533, subdivision (e)(3)(B), the Board's prior determination is
6 conclusive unless: (1) the qualifications for relief in this appeal are different than the
7 qualifications for relief in the prior appeal, and (2) appellant did not participate
8 meaningfully in the prior proceeding. The qualifications for relief as an innocent
9 spouse appear to be the same now as they were when the Board considered the prior
10 appeal of the 1994 tax year in 2004. Therefore, it appears that the crucial area of
11 further inquiry is whether appellant meaningfully participated in the prior appeal. To
12 date, appellant has maintained that respondent has not provided evidence that she
13 participated in the prior appeal. We note, however, that it is appellant's burden, not
14 respondent's, to prove that she did not meaningfully participate in the prior appeal of
15 this tax year. (*Monsour v. Commissioner*, T.C. Memo. 2004-190.) Appellant should
16 consider addressing whether there are circumstances that would shift the burden of
17 proof to respondent and providing any legal authority placing the burden of proof on
18 this issue with respondent.
- 19 2. Board Staff has obtained the appeal file for Case ID 237222 (Appeal of William
20 L. and Barbara B. Porter. In that file, a letter dated October 15, 2003 was sent by
21 William L. and Barbara B. Porter that was signed by both Mr. and Mrs. Porter. The
22 letter is a copy of Mr. Porter's initial appeal with the addition of Mrs. Porter's
23 signature. The letter was sent in response to Board correspondence dated September
24 10, 2003, informing Mr. Porter that:
25 a. Franchise Tax Board (FTB) issued the 1994 assessment to more than one person;
26 b. only one of those people (Mr. Porter) had filed an appeal;
27 c. Mrs. Porter could join the appeal by completing the form provided with the letter, by
28 signing a copy of the appeal letter and returning it to the Board, or by submitting a
written statement informing the Board that she is also appealing.
The file also contains correspondence related to the status of the appeal that is
addressed to both William and Barbara Porter at Ms. Porter's current address in San
Miguel de Allende. No oral hearing was requested or held. The matter was submitted
for decision on the basis of the memoranda on file.
3. Both parties should address what would constitute meaningful participation in an
appeal that was submitted for decision on the basis of the memoranda contained in the
appeals file where no oral hearing was requested or held. Please discuss relevant legal
authority as well as the factual circumstances of this appeal.
4. In light of the fact that the NPA, Notice of Action and Board of Equalization
correspondence related to the prior appeal were addressed to both appellant and/or her
husband at their address in San Miguel De Allende, appellant should consider
providing evidence and information to explain the circumstances surrounding the prior
appeal and why she decided to sign the appeal letter.
5. Both parties should address whether if appellant-wife knew about the prior appeal
and was invited to participate, joined the appeal in name only, but purposely did not
involve herself in the appeal, can she obtain another hearing with regard to that tax year
even though she was invited to, but chose not to, participate.

⁷ Respondent inadvertently states in its opening brief that the Notice of Action and Notice of Action –Denial Non-Requesting Taxpayer were mailed on March 23, 2007. (Resp. Opening Br., p. 4.)

1 The parties submitted responsive supplemental briefing.

2 II. Question (1): Whether appellant is barred by the doctrine of res judicata from seeking innocent
3 spouse relief.

4 Contentions

5 Appellant's Contentions

6 Appellant argues that R&TC section 18533, subdivision (e)(3)(B), does not bar the Board
7 from considering the merits of her request for innocent spouse relief. Appellant argues that at the time
8 she requested innocent spouse relief the qualifications for relief were different than at the time of the
9 prior appeal because Mr. Porter was alive at the time of the prior appeal and Mr. Porter's death on
10 March 27, 2006, changed her qualifications for relief. (App. July 9, 2009, Reply to Resp. Supplemental
11 Br., p. 2.) Appellant is apparently arguing that the res judicata exception applies because she did not
12 qualify for separate liability election under subdivision (c) until after the prior appeal was finalized.

13 Appellant also argues that she has met her burden of proof in establishing she did not
14 "meaningfully participate" in the prior appeal, which would have precluded the instant appeal under
15 R&TC section 18533, subdivision (e)(3)(B), because she did not join in the prior appeal. Appellant
16 contends that the signature on the appeal letter is not her signature and she did not know of the prior
17 appeal until 2006 when respondent levied her bank account. Appellant contends that Mr. Porter signed
18 her name on the appeal letter without her knowledge. Appellant contends that she recognizes the
19 signature on the appeal letter as Mr. Porter's signature of her name. Assuming, for argument's sake, that
20 she had signed the appeal letter, appellant argues that her signature alone would not establish meaningful
21 participation. Appellant contends that she did not participate in any manner in the prior appeal,
22 meaningfully or otherwise.

23 Appellant contends that the prior appeal largely concerned the tax consequences of the
24 transfer to Corte Madera of the subject property, which was Mr. Porter's separate property throughout
25 their marriage. Appellant contends that she had no interest in the subject property and she was not
26 apprised of any details involving the transfer of the subject property to Corte Madera. According to
27 appellant, in 1949 Mr. Porter and his sister, Jess Porter Cooley, each inherited from their father a 50
28 percent interest in undeveloped land located mostly in Corte Madera; a small section of the land was

1 located in the City of Larkspur. Appellant contends that in 1983 Northwestern Pacific Railroad
2 Company quitclaimed its right of way on the subject property to Mr. Porter and Ms. Cooley. (App.
3 Opening Br., exhibit E.) Appellant contends that several lawsuits were filed after Corte Madera
4 attempted to condemn the subject property for public use. She contends that Mr. Porter and Ms. Cooley,
5 who were represented by counsel, negotiated a settlement agreement with Corte Madera, which involved
6 a part sale and part gift transfer of the subject property to Corte Madera. Appellant contends that Ms.
7 Cooley's husband, Crawford Cooley, assisted in the settlement agreement negotiations. Appellant
8 submitted a copy of the settlement agreement, which identifies Mr. Porter, Ms. Cooley and Corte
9 Madera as the only parties to the settlement agreement and states that they executed it on July 1, 1994.
10 (App. Opening Br., exhibit G, p. 1.) Appellant points out that the settlement agreement requires that "all
11 spouses of [Mr. Porter and Ms. Cooley] . . . must execute all documents . . . conveying any interest in
12 the subject property . . ." (*Id.*, p. 3.) Appellant contends that this is the only reason she signed, along
13 with Mr. Porter, Ms. Cooley and Mr. Cooley, the grant deed on July 13, 1994, transferring the subject
14 property to Corte Madera. (App. Opening Br., exhibit I.) Appellant points out that the grant deed does
15 not set forth any of the terms or conditions of the transfer, such as the amount of financial consideration
16 or the monetary amount of charitable real property contribution. (*Ibid.*) Appellant contends that she
17 never saw any of the transaction documents other than the grant deed and she always believed that Mr.
18 Porter gifted his interest in the subject property to Corte Madera for a nominal amount.

19 Appellant submitted a declaration from Mr. Cooley, signed under penalty of perjury, in
20 which he states that throughout his involvement on behalf of his wife and Mr. Porter concerning the
21 subject property transactions he "always spoke about these matters separately with [Mr. Porter] and sent
22 any correspondence addressed only to him." (App. Opening Br., exhibit C, p. 1.) He stated that the title
23 company wrote checks to his wife and Mr. Porter, individually, for their net one-half of the proceeds of
24 the sale portion of the transfer of the subject property. (*Id.*, p. 2.) He also stated that it was the title
25 company that required appellant and him to sign the transfer deed, even though title to the subject
26 property was not in their names. (*Id.*, p. 1.) He further stated:

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1 I am aware that title companies in California routinely require spouses of
2 sellers of property to execute either the transfer deed or a quit claim deed as
3 a precaution to protect title from the spouse making any future claim that the
4 property was really community property. I know that the Corte Madera
5 property was [his wife and Mr. Porter's] separate property and signed the
6 transfer deed knowing that I was transferring nothing and giving up no
7 community property rights because I never had any community property
8 rights. This would apply to [appellant's] signature as well.

9 (*Ibid.*)

10 Appellant contends that Mr. Porter's decision not to involve her in the prior appeal is
11 consistent with the pattern and practice throughout their marriage of Mr. Porter insisting that they keep
12 their finances separate and he kept very private about his financial affairs and did not discuss his assets
13 or finances with appellant. Appellant contends that throughout their marriage she and Mr. Porter
14 maintained separate bank accounts and she always believed she was not entitled to question Mr. Porter
15 concerning his separate assets and finances. Appellant contends that Mr. Porter was a retired attorney
16 who never worked while they were married. Appellant contends that Mr. Porter received a steady
17 stipend from various trusts and provided the two of them a comfortable lifestyle. Appellant contends
18 that she worked as a freelance writer until December 1994 when she retired at Mr. Porter's request.
19 Appellant contends that while she was working she used her modest earnings for personal items and
20 after her retirement she received retirement income from her former employer until 2004, which she
21 used for personal items; she continues to receive social security benefits. Appellant contends that in
22 1993 the couple sold their residence in San Francisco and officially established residence in Mexico in
23 August 1994. She contends that in December 1994 they used the proceeds from the sale of their prior
24 residence to purchase and furnish a residence in San Miguel de Allende in Mexico. Appellant contends
25 that Mr. Porter was almost 70 years old when the couple acquired their San Miguel de Allende
26 residence. Appellant contends that Mr. Porter became reclusive and withdrawn in his later years and
27 after his death, she discovered years of unopened correspondence, including birthday cards, personal
28 letters, and business and financial documents, in his dresser drawers. Based on his behavior and neglect
of personal hygiene and correspondence, she now believes that he may have been suffering from the
early stages of Alzheimer's disease.

According to appellant, Mr. Porter prepared the 1993 California return and the 1994

1 federal return and Melanie Nance, an enrolled agent living in Mexico, prepared the 1995 return.⁸
2 Appellant contends that in the years up to and including 1994 (the year she retired), she gave Mr. Porter
3 her W-2 and Wage Summary Form and Form 1099-Interest Income to include with his substantial trust
4 income on the income tax returns. Appellant contends that she believed that the federal and California
5 returns for 1994 were filed in approximately August 1995. Appellant contends that she later ascertained
6 that respondent contacted Mr. Porter sometime in 2000 asserting that the couple did not file a 1994
7 return and, without her knowledge or participation, Mr. Porter retained Ms. Nance to communicate with
8 respondent concerning this matter. Appellant contends that she never saw the substitute 1994 return that
9 respondent reportedly completed. Appellant contends that Mr. Porter informed her that respondent did
10 not have a record of their joint 1994 return and he requested her to sign the 1994 return that Ms. Nance
11 prepared; she signed it on April 10, 2002. Appellant contends that at the time she signed the 1994 return
12 she saw that it included her W-2 income and interest income, and she believed that the other items on
13 the return had been reported correctly. Appellant contends that Mr. Porter informed her that he was
14 sending a check for the balance due along with the return. Appellant contends that she did not receive
15 and was not informed of the NPA or NOA for tax year 1994 until after respondent began collection
16 action and she did not know that Mr. Porter protested the NPA or appealed the NOA to the Board.
17 Appellant submitted declarations she signed under penalty of perjury in support of the above
18 contentions. (App. Opening Br., exhibit K; App. Suppl. Br., exhibit A.)

19 Appellant argues that the facts in the present appeal are distinguishable from the facts in
20 *Monsour v. Commissioner*, supra, and *Huynh v. Commissioner*, T.C. Memo 2006-180, because the
21 parties requesting relief in those two cases actively participated in the prior substantive proceedings,
22 such as participating in pretrial proceedings, signing briefs, and testifying at trial, whereas there is no
23 evidence that she participated in the prior appeal. Appellant contends that if there had been an oral
24 hearing in the prior appeal in which she had participated, then such participation would have been
25 evidence of material participation. Appellant argues that under *Monsour v. Commissioner*, supra, and
26 *Huynh v. Commissioner*, supra, the sole act of signing a document (i.e., the appeal letter) would not
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28 ⁸ Staff notes appellant does not delineate whether she is referring to the 1995 federal return, 1995 California return, or both.

1 raise the participation level to meaningful participation under the facts of the present appeal. Appellant
2 also contends that *United States v. Young* (9th Cir. 2006) 458 F.3d 998 is distinguishable because that
3 decision examines notice and the opportunity to participate, but did not address meaningful
4 participation. Appellant argues that opportunity to participate and meaningful participation are different
5 concepts and an opportunity to participate is not meaningful participation under *Monsour v.*
6 *Commissioner, supra*, or *Huynh v. Commisisoner, supra*. Appellant argues that the present appeal does
7 not involve the issue of whether a spouse waived a right to request innocent spouse relief by consciously
8 and deliberately deciding not to participate in an earlier proceeding in which the underlying tax liability
9 was contested. Appellant further contends that *Lincir v. Commissioner*, T.C. Memo 2007-86, is
10 distinguishable because counsel for Ms. Lincir, the requesting individual, stipulated for purposes of a
11 motion for summary judgment that she had meaningfully participated in the prior proceeding and the
12 court found based on this stipulated concession that Ms. Lincir meaningfully participated in the prior
13 proceeding.

14 In her reply brief, appellant contends that if appellant and Mr. Porter both filed the protest
15 letter and the appeal letter in the prior appeal, then these documents would be significant evidence of
16 whether appellant was involved in the prior proceeding. Appellant contends that respondent is
17 deliberately withholding these documents because they do not support respondent's position that
18 appellant meaningfully participated in the prior proceedings.

19 Respondent's Contentions

20 Respondent contends that R&TC section 18533, subdivision (e)(3)(B), bars the Board
21 from considering the merits of appellant's request for innocent spouse relief. Respondent asserts that
22 three cases, *Noons v. Commissioner*, T.C. Memo 2004-243 [88 T.C.M. 388], *Huynh v. Commissioner*,
23 *supra*, and *Lincir v. Commissioner, supra*, address the issue of meaningful participation and are,
24 therefore, relevant to this appeal. (Resp. Opening. Br., pp. 5-6.) In each of those cases, the court ruled
25 that the taxpayer had participated meaningfully in a prior proceeding within the meaning of Internal
26 Revenue Code (IRC) section 6015, subdivision (g)(2), the parallel federal statutory provision to R&TC
27 section 18533, subdivision (e)(3)(B).

1 Citing *Monsour v. Commissioner, supra*, respondent contends that appellant bears the
2 burden to demonstrate that she did not meaningfully participate in the prior appeal and appellant has not
3 met this burden of proof. Respondent contends that appellant meaningfully participated in the prior
4 appeal because, after the Board received the original September 3, 2003, appeal letter, it informed Mr.
5 Porter that appellant's name would only be included in the prior appeal if the Board received a written
6 submission from appellant. Respondent contends that appellant voluntarily chose to be a party to the
7 prior appeal when she signed the October 3, 2003, appeal letter. Respondent contends that, since the
8 Board subsequently included appellant in the prior appeal, the Board did in fact receive the written
9 submission from appellant. According to respondent, the October 3, 2003, appeal letter with appellant's
10 signature was submitted directly to the Board, as it does not have any written documentation of
11 receiving the copy of the October 3, 2003, appeal letter with appellant's signature. Respondent also
12 contends that appellant meaningfully participated in the prior appeal, because the signature on the
13 September 3, 2003, appeal letter is *virtually identical* to appellant's admitted signature on the submitted
14 1994 California return and appellant admits she signed this return. Respondent further contends that
15 appellant had the opportunity to participate in the prior appeal and it was incumbent upon her to
16 determine her level of participation. Respondent contends that, although appellant and Mr. Porter
17 elected not to have an oral hearing in the prior appeal, the Board nonetheless heard and determined the
18 appeal. Respondent contends that appellant should not be entitled to avoid the prohibitions of R&TC
19 section 18533, section (e)(3)(B), simply because she chose not to have an oral hearing for the prior
20 appeal.

21 Respondent contends that it has not deliberately withheld any pertinent documents in the
22 present appeal. Attached to its December 22, 2008, reply brief, respondent submitted copies of the
23 following additional documents: 1) a grant deed transferring the subject property; 2) the original appeal
24 letter dated September 3, 2003; 3) respondent's December 22, 2003, memorandum to the Board
25 concerning the prior appeal; 4) a copy of the couple's 1994 federal return; 5) respondent's schedule
26 showing a computation of the couple's 1994 tax liability; and 6) the couple's federal Individual Master
27 File. (Resp. Reply Br., exhibits M – O.) Respondent contends that there are no other documents that
28 have not been previously submitted to appellant and the Board.

1 Respondent does not discuss the provision of subdivision (e)(3)(B) that provides a res
2 judicata exception if the qualification for relief was not an issue in the prior appeal.

3 Applicable Law

4 R&TC section 18533, subdivision (e)(3)(B), states in its entirety:

5 In the case of any election under subdivision (b) or (c), if a decision of the
6 board in any prior proceeding for the same taxable year has become final,
7 that decision shall be conclusive except with respect to the qualification of
8 the individual for relief that was not an issue in that proceeding. The
exception contained in the preceding sentence does not apply if the board
determines that the individual participated meaningfully in the prior
proceeding.

9 From the above-quoted statutory language, it follows that the Board's determination in a prior
10 proceeding controls the outcome in a subsequent proceeding involving the same taxable year unless:
11 (1) the qualifications for relief in the subsequent proceeding were not at issue in the prior proceeding,
12 and (2) the taxpayer did not participate meaningfully in the prior proceeding. (See *Vetrano v.*
13 *Commissioner* (2001) 116 T.C. 272, 278.)

14 The federal counterpart to R&TC section 18533 is IRC section 6015. IRC section 6015
15 is organized similar to R&TC section 18533, containing provisions for traditional relief under
16 subdivision (b), separate liability election under subdivision (c), and equitable relief under subdivision
17 (f). In addition, IRC section 6015(g)(2) contains language that is substantially identical to R&TC
18 section 18533, subdivision (e)(3)(B), providing for the conclusive effect of prior proceedings.

19 While there is not yet authority interpreting R&TC section 18533, subdivision (e)(3)(B),
20 there is now considerable federal authority interpreting IRC section 6015(g)(2). When a California
21 statute is substantially similar to a federal statute, federal law interpreting the federal statute is generally
22 considered highly persuasive. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835.) In particular,
23 the Board has noted that "federal precedent is applied extensively in California innocent spouse cases."
24 (*Appeal of Patricia Tyler-Griffis* (2006-SBE-004) *supra*, citing Rev. & Tax. Code, § 18533, subd.
25 (g)(2).)

26 The IRS's interpretation of IRC section 6015(g)(2) is set forth in Treasury Regulation
27 1.6015-1(e), which states in pertinent part:

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1 A requesting spouse has not meaningfully participated in a prior
2 proceeding if, due to the effective date of section 6015, relief under
3 section 6015 was not available in that proceeding. Also, any final
4 decisions rendered by a court of competent jurisdiction regarding issues
relevant to section 6015 are conclusive and the requesting spouse may be
collaterally estopped from relitigating those issues.

5 The tax court has held that IRC section 6015(g)(2) applies to claims for equitable relief under
6 subdivision (f). (*Thurner v. Commissioner* (2003) 121 T.C. 43, 51.) This is because a claim for
7 equitable relief is “subordinate and ancillary” to traditional claims for relief under subdivisions (b) and
8 (c). (*Id.*; see also *Appeal of Patricia Tyler-Griffis, supra.*) There was meaningful participation in a prior
9 proceeding where the taxpayer was made aware of her right to elect innocent spouse relief. (*Moore v.*
10 *Commissioner*, T.C. Memo 2007-156.) There was meaningful participation in a prior proceeding where
11 the taxpayer participated in pretrial preparations and testified at trial, even though the prior case only
12 involved the underlying tax liability. (*Huynh v. Commissioner, supra.*) Where there was meaningful
13 participation in a prior proceeding, the prior proceeding is conclusive even though the more recently
14 enacted and expanded relief provisions of section 6015 were not available at the time. (*Lincir v.*
15 *Commissioner, supra.*) Finally, the requesting spouse bears the burden of proving by a preponderance
16 of the evidence that she did not participate meaningfully in the prior proceeding. (*Monsour v.*
17 *Commissioner, supra.*)

18 Staff Comments

19 Absent an exception from res judicata, appellant is barred under R&TC section 18533,
20 subdivision (e)(3)(B), from seeking relief under subdivision (c) in the present appeal. It is appellant’s
21 burden to prove that she did not meaningfully participate in her prior appeal. (*Monsour v.*
22 *Commissioner, supra.*) The parties should be prepared to discuss whether the presence of appellant’s
23 purported signature on the appeal letter is sufficient evidence that appellant meaningfully participated in
24 the prior appeal, which was decided without oral arguments. The parties should also be prepared to
25 discuss whether there is any evidence that appellant participated in any contacts with respondent or was
26 otherwise involved in the prior appeal, including the protest stage.

27 In determining whether an appeal letter is valid, it appears that the controlling question is
28 one of intent and the presence of a proper signature is only one factor in determining whether both

1 spouses intended to file an appeal. (Compare *Shea v. Commissioner* (6th Cir. 1986) 780 F.2d 561, 567
2 (In determining whether a joint return is valid, the controlling question is one of intent and the presence
3 of a proper signature is only one factor in determining whether the parties intended to file a joint
4 return.)) There is a factual dispute as to whether the appeal letter was filed without appellant's
5 knowledge or consent and whether her signature on the appeal letter is authentic. Although respondent
6 contends that appellant's signature on the 1994 joint return is *virtually identical* to her signature on the
7 appeal letter and she admitted to having signed the 1994 joint return, staff notes that appellant's
8 signature on the appeal letter appears different than her signature on the grant deed. (App. Opening Br.,
9 exhibit I; exhibit B to this Hearing Summary.)

10 It is unclear from the record whether a protest letter was filed in addition to a 1994
11 California joint return. In its opening brief, respondent states that a timely protest against the NPA was
12 filed, that "the couple maintained that the correct tax due was \$28,832.00 instead of the \$54,931.00
13 proposed by respondent" and that "[a]t protest, the couple submitted a prepared 1994 California
14 nonresident return (540NR)[.]" (Resp. Opening Br., p. 2.) Staff notes that respondent contends that it
15 has produced all relevant documents in its possession concerning the present appeal. Respondent should
16 nonetheless ascertain whether a protest letter (or other document) was filed in conjunction with the
17 substitute 1994 part-year or nonresident return. If so, respondent should be prepared to provide the
18 Board and appellant a copy of the protest letter (or other document) at least 14 days prior to the
19 hearing.⁹ Staff notes that the prior appeal file indicates that, other than the September 3, 2003, appeal
20 letter, no other brief was filed on behalf of the couple in the prior appeal.

21 Appellant contends that she now qualifies for separate liability election under R&TC
22 section 18533, subdivision (c), which was not available to her while Mr. Porter was alive. (See R&TC
23 § 18533, subd. (c)(3)(A)(i)(I).) The parties should be prepared to discuss whether appellant
24 meaningfully participated in the prior appeal in view of the fact that she did not qualify for relief under
25 R&TC section 18533, subdivision (c). Specifically, the parties should be prepared to discuss whether
26 appellant could have claimed innocent spouse relief under subdivision (c) or (f) in the prior appeal while
27

28 ⁹ Exhibits should be submitted to: Claudia Madrigal, Board of Equalization, Board Proceedings Division, P. O. Box 942879
MIC: 80, Sacramento, CA 94279-0080

1 Mr. Porter was still alive. Staff notes that the Board has determined that it does not have jurisdiction to
2 hear a request for equitable relief under subdivision (f) absent a request for relief under subdivision (b)
3 or (c) (*Appeal of Patricia Tyler-Griffis, supra*, and appellant only claims to be entitled to relief under
4 subdivision (c) or, alternatively, subdivision (f).

5 If the Board concludes that appellant participated meaningfully in the prior appeal or the
6 qualifications for relief at issue in this appeal are the same as those at issue in the prior appeal, then the
7 Board's prior decision is conclusive in this matter. If the Board concludes that neither of those
8 conditions is satisfied, then it must move on to the final issue and consider appellant's request for
9 innocent spouse relief.

10 III. Question (2): Alternatively, if res judicata does not apply, whether appellant has demonstrated
11 that she is entitled to innocent spouse relief.

12 Contentions

13 Appellant's Contentions

14 Appellant's Contentions Regarding R&TC Section 18533, Subdivision (c)

15 Appellant contends that she is entitled to innocent spouse relief pursuant to R&TC
16 section 18533, subdivision (c). Appellant contends that she and Mr. Porter were no longer married as of
17 the date of his death, March 27, 2006, and she made a timely election for separate liability within two
18 years of collection action against her; appellant contends that the first collection action against her
19 occurred in 2006 when a levy was made on her bank account. As discussed in detail above, appellant
20 asserts that she had no actual knowledge of the understatement for 1994 and it was attributable to a
21 claimed deduction for the real property charitable contribution for the transfer to Corte Madera of the
22 subject property, which was Mr. Porter's separate property. Appellant contends that there is no evidence
23 that she had any interest at any time in the subject property and the Board determined in the prior appeal
24 that the subject property was Mr. Porter's separate property; appellant cites to the Board's written
25 decision for the prior appeal (Resp. Opening Br., exhibit E, p. 2, fn. 2 & 4; see Exhibit C to this Hearing
26 Summary.) Appellant contends that her knowledge was limited to knowing that she was requested to
27 sign a document (i.e., the grant deed) relating to property that was indisputably her husband's separate
28 property and the document contains no reference to a sale or a sale price. Citing *Rowe v. Commissioner*,

1 T.C. Memo 2001-325, appellant contends that there is no definite evidence that shows that appellant had
2 an actual and clear awareness (as opposed to reason to know) of the omitted capital gain income
3 attributable to Mr. Porter's share of the bargain-sale of his separate property to Corte Madera. Appellant
4 contends that she had no direct tax benefit because no overstated deductions or other benefits claimed on
5 the 1994 return acted to shelter any of her income in 1994. She also contends that no assets have been
6 transferred between Mr. Porter and herself as part of a fraudulent scheme and there are no disqualified
7 assets. Appellant does not seek relief for that portion of the 1994 tax liability attributable to her wages
8 and interest income that has not already been satisfied by her W-2 withholding.

9 Appellant's Contentions Regarding R&TC Section 18533, Subdivision (f)

10 Alternatively, appellant contends that she is entitled to equitable relief pursuant to R&TC
11 section 18533, subdivision (f). Appellant contends that respondent abused its discretion to deny her
12 equitable relief. She contends that she is no longer married to Mr. Porter, Mr. Porter and she filed a joint
13 return for 1994, the request for relief was timely made within four years of the date of first collection
14 efforts began against appellant when respondent issued the bank levy on November 17, 2006. She
15 contends that the liability is based entirely on the capital gain that resulted from the sale portion of the
16 subject property to Corte Madera and the subject property was Mr. Porter's separate property. She
17 contends that she had no material knowledge of the item and its related tax liability other than signing
18 the grant deed at Mr. Porter's request. Appellant accepts responsibility for any unpaid tax related to her
19 own wage and interest income that has not already been satisfied by her W-2 withholding. She contends
20 that there were no fraudulent transfers between Mr. Porter and herself and no disqualified assets were
21 transferred from Mr. Porter to her. She also contends that she did not file or fail to file a return with
22 fraudulent intent; she believed that Mr. Porter had filed all of their returns, including the 1994 return.
23 Appellant signed the 1994 return prepared by Ms. Nance, which showed a modest tax due, believing the
24 tax would be paid. Appellant contends that she had no direct tax benefit because no overstated
25 deductions or other benefits claimed on the 1994 return acted to shelter any of her income in 1994. She
26 claims no spousal abuse or divorce was involved.

27 As for economic hardship, appellant contends that she does not have the ability to pay
28 Mr. Porter's portion of the 1994 tax deficiency, but she intends to pay any tax liability attributable to her

1 items on the 1994 return. Appellant contends she is debt-ridden, elderly, retired, and living in Mexico
2 where she cannot obtain employment that will provide material income. Other than her social security
3 benefits and whatever income distributions might be available to her as income beneficiary of the
4 Barbara Bladen Porter Irrevocable Trust, she has no sources of income and she is not entitled to any of
5 the underlying assets held in that trust; her income is dependent on the royalties controlled by third party
6 oil producers. Furthermore, she contends that she incurred substantial expenses as a result of Mr.
7 Porter's last illness; he was treated in the United States. She contends she resorted to loans and credit
8 cards to meet her living expenses after respondent levied her only two bank accounts. Appellant further
9 contends that after Mr. Porter's death she was forced to retain counsel to represent his interest in tax
10 disputes with the IRS. Appellant contends she is fully compliant with her California income tax filings.
11 She contends that after she discovered Mr. Porter had not filed their returns for several years she
12 immediately took steps to retain professional assistance, which is another incurred expense, in order to
13 prepare and file tax returns for all outstanding years and to pay all tax, interest and penalties due for each
14 year to the IRS and respondent, which is still another incurred expense.

15 Respondent's Contentions

16 Respondent's Contentions Regarding R&TC Section 18533, Subdivision (c)

17 Respondent contends that appellant is not entitled to innocent spouse relief pursuant to
18 R&TC section 18533, subdivision (c), because appellant had actual knowledge of the item giving rise to
19 the 1994 tax deficiency because she admitted she participated in and signed the transaction documents
20 involving the transfer of the subject property to Corte Madera and she signed the 1994 federal joint
21 return, which reported the transfer of the subject property.

22 Respondent's Contentions Regarding R&TC Section 18533, Subdivision (f)

23 Respondent also contends that appellant is not entitled to equitable relief pursuant to
24 R&TC section 18533, subdivision (f). With respect to the criteria set forth in section 4.01 of Revenue
25 Procedure 2003-61, respondent contends that appellant appears to meet all of the threshold
26 requirements, except for the attribution of the item to the non-requesting spouse. According to
27 respondent, it is unclear whether appellant may have obtained any interest in the subject property during
28 her marriage, especially in light of the fact that she was required to sign documents transferring the

1 subject property to third parties. With respect to the criteria set forth in section 4.02 of Revenue
2 Procedure 2003-61, respondent contends that appellant failed to show that she did not know, or have
3 reason to know, that the tax would not be paid and she has provided insufficient evidence to show she
4 would suffer economic hardship if relief were not granted; respondent contends that appellant has
5 revealed very little information concerning her financial situation. With respect to the criteria set forth
6 in section 4.03 of Revenue Procedure 2003-61, respondent contends that appellant had actual knowledge
7 of the item of deficiency and, at the very least, knew, or had reason to know, of the understatement that
8 resulted in the proposed assessment, and has not demonstrated economic hardship. Respondent
9 contends that there is no evidence concerning appellant's access to family financial records and she was
10 likely involved in familial financial affairs because Mr. Porter was reportedly withdrawn in his older
11 years.

12 Applicable Law

13 Background

14 Under R&TC section 19006, subdivision (b), a joint return filed by a husband and wife
15 results in joint and several tax liability; thus, respondent is entitled to assert the entire tax liability
16 against either party. The innocent spouse provisions of R&TC section 18533 allow an individual who
17 files a joint return to be relieved of all or a portion of that joint and several liability. When a California
18 statute is substantially identical to a federal statute (as R&TC section 18533 is to IRC section 6015),
19 federal law interpreting the federal statute is considered highly persuasive. (*Douglas v. State of*
20 *California* (1942) 48 Cal.App.2d 835.) In particular, federal precedent is applied in California innocent
21 spouse cases. (*Appeal of Patricia Tyler-Griffis, supra*; see also Rev. & Tax. Code, § 18533, subd.
22 (g)(2).)

23 The "Taxpayer's Bill of Rights Act of 1999" amended R&TC section 18533 in order to
24 expand the availability of innocent spouse relief. Among other things, the Act conformed the provisions
25 of R&TC section 18533 to federal provisions and provided an avenue by which the FTB may award
26 equitable relief (which equitable relief provision is found in subdivision (f) of R&TC section 18533).
27 The revisions to R&TC section 18533 are generally applicable to any tax liability arising after, or
28 remaining unpaid after, the October 10, 1999 effective date of the Act.

1 There are three types of innocent spouse relief under R&TC section 18533: traditional
2 relief under subdivision (b), separate liability election under subdivision (c), and equitable relief under
3 subdivision (f). Appellant’s request for innocent spouse relief seeks separate liability election under
4 subdivision (c) and equitable relief under subdivision (f).

5 Subdivision (c): Separate Liability Election

6 R&TC section 18533, subdivision (c), allows the electing spouse to limit her liability for
7 a deficiency resulting from a joint return to the amount which would have been allocable to her had she
8 filed a separate return. However, if respondent demonstrates that the electing spouse had actual
9 knowledge, at the time she signed the return, of the particular item giving rise to the deficiency, then the
10 separate liability election will not apply unless the electing spouse signed the return under duress. (Rev.
11 & Tax. Code, § 18533, subd. (c)(3)(C).) Separate liability relief is also not allowed to the extent that the
12 item giving rise to the deficiency gave the electing individual a direct tax benefit. (Rev. & Tax. Code,
13 § 18533, subd. (d)(3)(B).) The actual knowledge requirement under subdivision (c) should be
14 interpreted more narrowly than the “reason to know” standard under subdivisions (b) and (f). *McDaniel*
15 *v. Commissioner*, T.C. Memo 2009-137 (citing *Porter v. Commissioner*, 132 T.C.No. 11 (April 23,
16 2009).)

17 In order to deny separate liability innocent spouse relief, respondent must prove the
18 requisite actual knowledge by a preponderance of the evidence. (*Culver v. Commissioner* (2001) 116
19 T.C. 189.) In the context of omitted income, the requesting individual’s actual knowledge of the
20 underlying transaction that produced the income is sufficient to preclude innocent spouse relief (the
21 “knowledge-of-the-transaction test”). (*Cheshire v. Commissioner* (5th Cir. 2002) 282 F.3d. 326, 332-
22 333.) However, where an electing party has actual knowledge of an income source, but no knowledge
23 of the financial gain, the electing party may still qualify for separate liability election relief. (*Martin v.*
24 *Commissioner*, T.C. Memo, 2000-346.)

25 An alternative knowledge test applies for erroneous deduction cases. In the context of
26 erroneous deductions, actual knowledge of the underlying transaction, standing alone, is not enough to
27 preclude innocent spouse relief. (*Cheshire v. Commissioner, supra*, 282 F.3d. at 333 (citing *Price v.*
28 *Commissioner* (9th Cir. 1989) 887 F.2d 959, 964 and *Reser v. Commissioner* (5th Cir. 1997) 112, F.3d

1 1258, 1267.) In addition, “the requesting spouse must have more than mere ’knowledge that the
2 [improper] deduction appears on the return.” (*McDaniel v. Commissioner, supra* quoting *King v.*
3 *Commissioner* (2001) 116 T.C. 198.) Rather, respondent must show that the electing spouse had actual
4 knowledge of the factual circumstances that resulted in the disallowance of the deduction. Sec. 1.6015-
5 3(c)(2)(k)(B), Income Tax Regs; see *Rowe v. Commissioner, supra*; *King v. Commissioner, supra*; *Mora*
6 *v. Commissioner* (2001) 117 T.C. 279.)

7 The statute of limitations for claims under subdivision (c) of R&TC section 18533
8 appears to be the same as the statute of limitations for claims under subdivision (b) of R&TC section
9 18533. Like subparagraph (b)(1)(E) of R&TC section 18533, subparagraph (c)(3)(B), expressly requires
10 that a claim for innocent spouse relief be filed within two years of the date of first collection activities
11 against the spouse claiming relief. However, subparagraph (h)(2) of R&TC section 18533 states that the
12 two-year limitations period set forth in R&TC sections 18533(b)(1)(E) and 18533(c)(3)(B) “does not
13 expire before the date that is four years after the date of the first collection activity after October 10,
14 1999 [the effective date of the 1999 revisions to R&TC section 18533].”

15 Subdivision (f): Equitable Innocent Spouse Relief

16 R&TC section 18533, subdivision (f), gives respondent the discretion to provide
17 “equitable” innocent spouse relief from “any unpaid tax or any deficiency (or any portion of either),”
18 when a taxpayer does not qualify for innocent spouse relief under subdivisions (b) and (c). If a request
19 for equitable relief is coupled with a request for relief under subdivisions (b) and/or (c), the Board has
20 jurisdiction to determine if respondent’s failure to grant equitable innocent spouse relief amounts to an
21 abuse of discretion. (*Appeal of Patricia Tyler-Griffis, supra.*) Respondent’s denial of equitable relief is
22 respected unless it is arbitrary, capricious, or without sound basis in fact. (*Jonson v. Commissioner,*
23 *(2002) 118 T.C. 106; Pacific First Federal Savings Bank v. Commissioner* (1993) 101 T.C. 117.)

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1 Section 4.01 of Revenue Procedure 2003-61 sets forth general conditions to the grant of
2 equitable relief.¹⁰ Among other things, these conditions generally require that the income tax liability be
3 attributable to an item of the nonrequesting spouse.¹¹ The general conditions set forth in the Revenue
4 Procedure also require, for federal purposes, that relief be claimed within two years of the date of the
5 first collection activities against the requesting spouse. (See also Treasury Regulation § 1.6015-5(b)(1).)

6 If the general conditions for equitable relief are met, Revenue Procedure 2003-61 sets
7 forth a nonexclusive list of factors that are relevant to whether equitable relief should be granted. That
8 list includes:

- 9 • economic hardship – whether the requesting spouse would suffer economic
10 hardship if relief is not granted;
- 11 • knowledge or reason to know – with respect to a deficiency, whether the
12 requesting spouse knew or should have known of the item giving rise to the
13 deficiency and, with respect to an underpayment, whether the requesting spouse
14 knew or had reason to know that the other spouse would not pay the stated tax;
- 15 • significant benefit – whether the requesting spouse received a significant benefit
16 from the underpayment or the item giving rise to the deficiency;

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18
19 ¹⁰ Since Revenue Procedure 2003-61 is effective for innocent spouse relief requests filed on or after November 1, 2003, it
20 applies to the present appeal because appellant filed her innocent spouse request on December 15, 2006. Although sections 3
21 and 6 of Revenue Procedure 2003-61 state that it supersedes Revenue Procedure 2000-15, 2000-1 C.B. 447, appellant argues
22 that Revenue Procedure 2000-15 is controlling in the present appeal, because it addresses the law as it was between 1998 and
23 2000 and the California legislature has not conformed to either the 1998 or 2000 amendments to IRC section 6015. In her
24 reply brief, appellant states, “Respondent’s analysis using a revenue procedure which addresses statutory changes not
25 endorsed by the California legislature is inappropriate and is beyond that agency’s authority.” (App. Reply Br., p. 11.) As
26 discussed above, when a California statute is substantially identical to a federal statute (as R&TC section 18533 is
substantially identical to IRC section 6015), federal law interpreting the federal statute is considered highly persuasive.
(*Douglas v. State of California*, *supra*, 48 Cal.App.2d 835.) We have previously determined that federal precedent is applied
in California innocent spouse cases. (*Appeal of Patricia Tyler-Griffis*, *supra*.) Moreover, R&TC section 18533, subdivision
(g)(2), specifically provides that in construing the California innocent spouse statute, any regulations that the IRS
promulgates under IRC section 6015, as amended by Public Law 105-206, shall apply to the extent that those regulations do
not conflict with R&TC section 18533 or with any regulations that may be promulgated by the FTB. It appears that
appellant’s argument that Revenue Procedure 2000-15, rather than Revenue Procedure 2003-61, applies to the present appeal
is without merit.

27 ¹¹ This general rule will not apply if one of four exceptions applies: (i) the item is attributable to the requesting spouse solely
28 due to the operation of community property laws, (ii) the item relates to an asset that is only nominally owned by the
requesting spouse, (iii) funds intended for the payment of tax were misappropriated by the nonrequesting spouse for the
requesting spouse’s benefit or (iv) the requesting spouse establishes that she was the victim of abuse that caused her not to
challenge the treatment of any items on the return for fear of retaliation.

- 1 • nonrequesting spouse’s legal obligation – whether the nonrequesting spouse has a
- 2 legal obligation to pay the outstanding tax liability pursuant to a divorce decree or
- 3 settlement;
- 4 • compliance with income tax laws – whether the requesting spouse has made a
- 5 good faith effort to comply with income tax laws in years following the years to
- 6 which the request for relief relates;
- 7 • abuse – whether the requesting spouse was the subject of abuse (but the absence
- 8 of this factor will not weigh against a grant of relief); and
- 9 • mental or physical health – whether the requesting spouse was in poor mental or
- 10 physical health when she signed the return or when she requested relief (but the e
- 11 absence of this factor will not weigh against a grant of relief).

12 (See Rev. Proc. 2003-61, § 4.03, 2003-2 C.B. 298.)

13 STAFF COMMENTS

14 Statute of Limitations Issues

15 Appellant contends that she timely filed her request for relief on December 15, 2006,

16 because respondent first began collection action against her when it issued the November 17, 2006,

17 Order to Withhold. Respondent does not address the timeliness of appellant’s request. It contends,

18 however, that it commenced billing and collection activities after the Board decided the prior appeal on

19 May 25, 2004, and applied the first payment of \$5,000 on December 7, 2004, towards the 1994 tax

20 deficiency. Thus, although there is a factual dispute as to when respondent commenced collection

21 activities against appellant, there is no dispute regarding the statute of limitations. However, staff notes

22 that this is a potential issue that the Board may wish to consider at the hearing. R&TC section 18533,

23 subdivision (f), does not provide a statute of limitations for purposes of equitable relief requests. The

24 IRS applies a two-year statute of limitations to requests for equitable relief under IRC section 6015(f), as

25 indicated by Treasury Regulation section 1.6015-5(b)(1) and section 4.01(3) of Revenue Procedure

26 2003-61, from the date of the first collection activity against the requesting spouse with respect to the

27 joint tax liability . Treasury Regulation section 1.6015-5(b)(2)(i) defines “collection activity” as

28 follows:

1 . . . a section 6330 notice, an offset of an overpayment of the requesting
2 spouse against a liability under section 6402, the filing of a suit by the
3 United States against the requesting spouse for the collection of the joint
4 tax liability; or the filing of a claim by the United States in a court
5 proceeding in which the requesting spouse is a party or which involves
6 property of the requesting spouse. Collection activity does not include a
7 notice of deficiency; the filing of a Notice of Federal Tax Lien; or a
8 demand for payment of tax. [Emphasis supplied.]

9 Subparagraph (b)(2)(ii) of the above regulation further defines a “section 6330 notice” as
10 a notice that is sent pursuant to IRC section 6330 that provides notice of intent to levy and the right to a
11 collection due process hearing.

12 Although the facts and circumstances surrounding the billing and collection activities and
13 the December 7, 2004, and May 31, 2005, payments are not clear from the record, respondent would not
14 have begun collection activity for the 1994 tax liability until after the Board decided the prior appeal on
15 May 25, 2004. As for appellant’s request for separate liability relief, it thus appears that appellant
16 timely filed her request for innocent spouse relief on December 15, 2006, since this date is less than four
17 years from the earliest time when respondent may have commenced collection activities. (R&TC
18 § 18533, subdvs. (c)(3)(B) & (h)(2).)

19 As for appellant’s request for equitable relief, however, there is a potential statute of
20 limitations issue as to whether the four-year period provided by R&TC section 18533, subdivision
21 (h)(2), applies to claims under R&TC section 18533, subdivision (f). Resolution of this issue depends
22 on when respondent commenced collection activity against *appellant*, as she is the requesting individual.
23 (R&TC § 18533, subd. (c)(3)(B).) The IRS applies a two-year period for equitable relief requests, as
24 indicated in Treasury Regulation section 1.6015-5(b)(1) and Rev. Proc. 2003-61, 2003-2 C.B. 296,
25 section 4.01(3). If the two-year period provided by the IRS for equitable claims applies to equitable
26 claims under R&TC section 18533, subdivision (f), it appears that appellant’s claim for equitable relief
27 under subdivision (f) would be barred, assuming that respondent commenced collection activities on or
28 prior to December 7, 2004, when it reportedly applied the first payment of \$5,000 towards the 1994 tax
deficiency. Appellant filed her request for relief on December 15, 2006, which is more than two years
from December 7, 2004, when respondent reportedly applied a payment towards the 1994 tax liability.
At the oral hearing, the parties should address when respondent commenced collection activity against

1 *appellant*. The parties should also discuss the issue of whether the federal two-year statute of limitations
2 for requests for equitable relief applies to appellant's request for equitable relief under subdivision (f) or,
3 alternatively, whether the statute of limitations for equitable relief under subdivision (f) is the same four-
4 year period as appellant's indisputably timely request for separate allocation under subdivision (c).

5 Other Issues

6 In the prior appeal, one of the issues before the Board was whether appellants' deduction
7 for the real property charitable contribution to Corte Madera is limited to 30 percent of their federal
8 adjusted gross income for 1994. The Board determined that respondent properly disallowed that portion
9 of that claimed deduction on the couple's 1994 joint California return that exceeded 30 percent of the
10 couple's federal adjusted gross income. This case thus appears to involve a tax deficiency due to an
11 erroneous deduction, rather than omitted income. The parties, however, appear to discuss the requisite
12 lack of knowledge on the part of appellant under subdivision (c) in the context of omitted income.
13 Respondent contends that appellant is not entitled to separate liability election because she had actual
14 knowledge of the real property transaction, as evidenced by the fact that she participated in and signed
15 the grant deed. Appellant argues that her knowledge of the omitted income cannot be inferred from her
16 signature on a document that contains no reference to a sale or a sale price. As discussed above, in the
17 context of erroneous deductions, it is not enough for respondent to show that a requesting party had
18 knowledge of the transaction underlying the erroneous deduction. Instead, respondent has the burden of
19 proving the requesting individual had actual knowledge of the factual circumstances that resulted in the
20 disallowance of the deduction at the time she signed the 1994 return on April 10, 2002. The parties
21 should be prepared to discuss whether appellant's knowledge under subdivision (c) should be analyzed
22 in the context of omitted income or erroneous deduction.

23 Assuming the 1994 tax deficiency in this case is due to an erroneous deduction, rather
24 than omitted income, respondent has the burden to prove that, at the time appellant signed the return on
25 April 10, 2002, she had actual knowledge of more than the mere transfer of the subject property to Corte
26 Madera. In the context of the disallowed real property charitable deduction for more than 30 percent of
27 the couple's federal adjusted gross income, appellant's signature on the grant deed alone does not appear
28 to be sufficient proof of actual knowledge, especially since the grant deed does not indicate the legal or

1 financial nature or structure of the transfer of the subject property to Corte Madera. The parties should
2 be prepared to discuss the factual circumstances that resulted in the disallowance of the deduction in
3 excess of 30 percent of the couple's federal adjusted gross income and whether respondent has met its
4 burden of establishing that appellant had actual knowledge of such factual circumstances.
5 Appellant should establish that she would suffer economic hardship if her request for innocent spouse
6 relief is denied by submitting financial documentation (such as a current financial summary showing
7 assets, liabilities, income and expenses; recent tax returns, earnings statements and copies of bills for
8 major financial obligations such as housing expenses). (See fn. 9.)

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12 Attachments: Exhibits A-C

13 Porter_lf

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