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#10**Relief from Joint and Several Liability Under IRC § 6015****SUMMARY**

Married couples may elect to file their federal income tax returns jointly or separately. Spouses filing joint returns are jointly and severally liable for any deficiency or tax due.<sup>1</sup> Joint and several liability permits the IRS to collect the entire amount due from either taxpayer.<sup>2</sup>

Internal Revenue Code (IRC) § 6015 provides three avenues for relief from joint and several liability. Section 6015(b) provides “traditional” relief for deficiencies. Section 6015(c) also provides relief for deficiencies for certain spouses who are divorced, separated, widowed, or not living together, by allocating the liability between the spouses. Section 6015(f) provides “equitable” relief from both deficiencies and underpayments, but only applies if a taxpayer is not eligible for relief under IRC § 6015(b) or (c).

We reviewed 31 federal court opinions involving relief under IRC § 6015 that were issued between June 1, 2012, and May 31, 2013. The most significant issues the courts addressed this year are the Tax Court’s scope and standard of review of claims for relief under IRC § 6015(f) and whether district courts have jurisdiction to decide innocent spouse claims raised as a defense in a collection suit or in an interpleader suit.<sup>3</sup> The Tax Court also noted how proposed guidance, if applicable, would have affected its analysis of claims for relief under IRC § 6015(f).

**PRESENT LAW****Three Avenues for Relief from Joint and Several Liability*****Traditional Innocent Spouse Relief Under IRC § 6015(b)***

IRC § 6015(b) provides that a requesting spouse shall be partially or fully relieved from joint and several liability, pursuant to procedures established by the Secretary, if the requesting spouse can demonstrate that:

1. A joint return was filed;
2. There was an understatement of tax attributable to erroneous items of the nonrequesting spouse;<sup>4</sup>
3. Upon signing the return, the requesting spouse did not know or have reason to know of the understatement;

1 IRC § 6013(d)(3). We use the terms “deficiency” and “understatement” interchangeably for purposes of this discussion and the case table in Appendix 3, even though IRC § 6015(b)(1)(D) and IRC § 6015(f) expressly use the term “deficiency” and IRC § 6015(b)(1)(B) refers to an “understatement of tax.”

2 The National Taxpayer Advocate, in the 2005 Annual Report to Congress, proposed legislation that would eliminate joint and several liability for joint filers. See National Taxpayer Advocate 2005 Annual Report to Congress 407.

3 Rule 22 of the Federal Rules of Civil Procedure permits a party to a lawsuit to join others to the suit — to interplead them — when the party may otherwise be exposed to double or multiple liability. For example, a party may hold property to which more than one other person claims an interest, and honoring one claim may expose the party to liability to other claimants. By joining interested parties in an interpleader suit, the claimants litigate among themselves to resolve the competing claims.

4 An erroneous item is any income, deduction, credit, or basis that is omitted from or incorrectly reported on the joint return. See Treas. Reg. § 1.6015-1(h)(4).

4. Taking into account all the facts and circumstances, it is inequitable to hold the requesting spouse liable; and
5. The requesting spouse elected relief within two years after the IRS began collection activities against him or her.<sup>5</sup>

A requesting spouse is eligible for a refund under this subsection so long as the requesting spouse made the payment and the requirements of IRC § 6511 have been met.<sup>6</sup>

#### *Allocation of Liability Under IRC § 6015(c)*

IRC § 6015(c) provides that the requesting spouse shall be relieved from liability for deficiencies allocable to the nonrequesting spouse, pursuant to procedures established by the Secretary. To obtain relief under this section, the requesting spouse must demonstrate that:

1. A joint return was filed;
2. At the time relief was elected, the joint filers were unmarried, legally separated, widowed, or had not lived in the same household for the 12 months immediately preceding the election; and
3. The election was made within two years after the IRS began collection activities with respect to the requesting spouse.

This election allocates to each joint filer the portion of the deficiency attributable to each filer as calculated under the allocation provisions of IRC § 6015(d). A taxpayer is ineligible to make an election under IRC § 6015(c) if the IRS demonstrates that, at the time he or she signed the return, the requesting taxpayer had “actual knowledge” of any item giving rise to the deficiency.<sup>7</sup> Relief is not available for amounts attributable to fraud, fraudulent schemes, or certain transfers of disqualified assets.<sup>8</sup> Finally, no credit or refund is allowed as a result of relief granted under IRC § 6015(c).<sup>9</sup>

#### *Equitable Relief Under IRC § 6015(f)*

IRC § 6015(f) provides that the Secretary may relieve a taxpayer from liability for both deficiencies and underpayments<sup>10</sup> where the taxpayer demonstrates that:

1. Relief under IRC § 6015(b) or (c) is unavailable; and
2. Taking into account all the facts and circumstances, it would be inequitable to hold the taxpayer liable for the underpayment or deficiency.

Previously, the IRS incorporated the statutory two-year deadline found in IRC § 6015 (b)(1)(E) and (c)(3)(B) into the § 6015 regulations and thereby imposed the two-year rule on requests for equitable

<sup>5</sup> Not all actions that involve collection will trigger the two-year period of limitations. Under the regulations, only the following four events constitute “collection activity” that will start the two-year period: (1) an IRC § 6330 notice; (2) an offset of an overpayment of the requesting spouse against the joint income tax liability under IRC § 6402; (3) the filing of a suit by the United States against the requesting spouse for the collection of the joint tax liability; and (4) the filing of a claim by the United States to collect the joint tax liability in a court proceeding in which the requesting spouse is a party or which involves property of the requesting spouse. Treas. Reg. § 1.6015-5(b)(2).

<sup>6</sup> IRC § 6015(g)(1). See note 19 for an explanation of the general time period for filing refund claims under IRC § 6511.

<sup>7</sup> IRC § 6015(c)(3)(C).

<sup>8</sup> IRC § 6015(c)(4),(d)(3)(C).

<sup>9</sup> IRC § 6015(g)(3).

<sup>10</sup> An underpayment of tax occurs when the tax is properly shown on the return but is not paid. *Washington v. Comm’r*, 120 T.C. 137, 158-59 (2003).

relief under IRC § 6015(f).<sup>11</sup> In 2009, the Tax Court, in *Lantz v. Commissioner*, held the regulation imposing the two-year rule invalid.<sup>12</sup> The IRS appealed *Lantz* and similar decisions, and three U.S. Courts of Appeal ultimately held that the regulation was valid.<sup>13</sup> In the meantime, the Tax Court continued, where permitted, to hold the regulation invalid, and the issue was appealed to other U.S. Courts of Appeal.<sup>14</sup> The National Taxpayer Advocate consistently advocated for removal of the two-year rule that prevented taxpayers from obtaining equitable relief.<sup>15</sup> In July 2011, the IRS changed its position and now considers requests for equitable relief under IRC § 6015(f) submitted after July 25, 2011, without regard to when the first collection activity was taken.<sup>16</sup> Proposed Treasury regulations to reflect the change in the two-year rule were published on August 13, 2013.<sup>17</sup> Requests for equitable relief may be filed within the period of limitation on collection in IRC § 6502<sup>18</sup> or, for any credit or refund of tax, within the period of limitation in IRC § 6511.<sup>19</sup>

Revenue Procedure 2003-61 lists some of the factors the IRS has considered in determining whether equitable relief is appropriate.<sup>20</sup> In January 2012, the IRS issued a proposed revenue procedure to supersede Revenue Procedure 2003-61.<sup>21</sup> IRS Chief Counsel attorneys immediately applied the provisions of the proposed revenue procedure in docketed Tax Court cases.<sup>22</sup> However, taxpayers were advised to notify the IRS in their applications for relief (or supplement existing applications) if they would receive more favorable treatment under one or more of the factors provided in Revenue Procedure 2003-61. The IRS

11 Treas. Reg. § 1.6015-5(b)(1).

12 132 T.C. 131 (2009).

13 *Mannella v. Comm'r*, 631 F.3d 115 (3d Cir. 2011) *rev'g and remanding* 132 T.C. 196 (2009); *Jones v. Comm'r*, 642 F.3d 459 (4th Cir. 2011), *rev'g and remanding* T.C. Docket No. 17359-08 (May 28, 2010); *Lantz v. Comm'r*, 607 F.3d 479 (7th Cir. 2010) *rev'g and remanding* 132 T.C. 131 (2009).

14 Adhering to the rule in *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd* 445 F.2d 985 (10th Cir. 1971), that the Tax Court will defer to a U.S. Court of Appeals decision which is squarely on point where appeal from the Tax Court decision lies to that U.S. Court of Appeal, the Tax Court continued to hold the regulation invalid in cases appealable to other circuits. See, e.g., *Young v. Comm'r*, T.C. Docket No. 12718-09 (May 12, 2011); *Pullins v. Comm'r*, 136 T.C. 432 (2011); *Stephenson v. Comm'r*, T.C. Memo. 2011-16; *Hall v. Comm'r*, 135 T.C. 374, *appeal dismissed* (6th Cir. Aug. 2, 2011); *Buckner v. Comm'r*, T.C. Docket No. 12153-09, *appeal dismissed* (6th Cir. July 27, 2011); *Carlile v. Comm'r*, T.C. Docket No. 11567-09, *appeal dismissed* (9th Cir. Dec. 8, 2010); *Payne v. Comm'r*, T.C. Docket No. 10768-09, *appeal dismissed* (9th Cir. July 25, 2011); *Coulter v. Comm'r*, T.C. Docket No. 1003-09, *appeal dismissed* (2d Cir. Aug. 4, 2011).

15 National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*); vol. 2 at 1-12 (*Unlimit Innocent Spouse Equitable Relief*); National Taxpayer Advocate 2006 Annual Report to Congress 540 (Legislative Recommendation: *Eliminate the Two-Year Limitation Period for Taxpayers Seeking Equitable Relief under IRC § 6015 or 66*).

16 Notice 2011-70, 2011-2 C.B. 135 (July 25, 2011), available at <http://www.irs.gov/pub/irs-drop/n-11-70.pdf>. The Notice provides transitional rules and provides that pending litigation will be managed consistently with the removal of the two-year rule. See also CC-Notice 2011-017 (July 25, 2011) (providing direction for Chief Counsel attorneys handling cases docketed with the Tax Court that involve the two-year deadline).

17 78 Fed. Reg. 49,242 (Aug. 13, 2013). Written or electronic comments were invited. Comments and requests for a public hearing were to be received by Nov. 12, 2013.

18 The statutory period of limitations on collection is generally ten years after the date the tax is assessed. IRC § 6502(a). However, a variety of statutory provisions may extend or suspend the collection period. For example, if a court proceeding to collect the tax is brought, such as a suit to reduce a tax liability to judgment, the period of limitations on collection is extended. Therefore, the period of limitations on collection could exceed ten years, and a claim for innocent spouse relief would be valid at any point during that time.

19 Generally, taxpayers must request a refund within three years from the date their return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a). If taxpayers meet the three-year requirement, they can recover payments made during the three-year period that precedes the date of the refund request, plus the period of any extension of time for filing the return. However, taxpayers who do not meet the three-year requirement can recover only payments made during the two-year period preceding the date of the refund request. IRC § 6511(b)(2).

20 Rev. Proc. 2003-61, 2003-2 C.B. 296.

21 Notice 2012-8 (Jan. 5, 2012), 2012-4 C.B. 309, available at [http://www.irs.gov/irb/2012-04\\_IRB/ar09.html](http://www.irs.gov/irb/2012-04_IRB/ar09.html). The Department of Treasury and the IRS invited public comment on the proposed guidance and on the administration of the IRS's innocent spouse program by Feb. 21, 2012.

22 Notice CC-2012-004 (Jan. 5, 2012).

would then apply those factors until the proposed revenue procedure was finalized. The proposed revenue procedure was finalized as Revenue Procedure 2013-34 and became effective for requests for equitable relief pending on September 16, 2013.<sup>23</sup> As discussed below, the Tax Court continued to apply Revenue Procedure 2003-61 pending finalization of the new revenue procedure. However, it occasionally considered whether the revenue procedure as proposed would change its analysis.<sup>24</sup>

Factors common to Revenue Procedure 2003-61, the proposed revenue procedure, and Revenue Procedure 2013-34 include

- Marital status;
- Economic hardship;
- Knowledge or reason to know of the understatement or that the tax would not be paid;
- Legal obligations of the nonrequesting spouse;
- Significant benefit to the requesting spouse; and
- Compliance with income tax laws.

Abuse was an additional factor under Revenue Procedure 2003-61; the new guidance removed abuse as a separate factor, but clarified the effect abuse has on the analysis generally and on the knowledge factor and significant benefit factors specifically.<sup>25</sup>

### *Rights of Nonrequesting Spouse*

The individual with whom the requesting spouse filed the joint return is generally referred to as a “nonrequesting spouse” and is granted certain rights by IRC § 6015. The nonrequesting spouse must be notified and given an opportunity to participate in any administrative proceedings concerning a claim under IRC § 6015.<sup>26</sup> Further, if during the administrative process full or partial relief is granted to the requesting spouse, the nonrequesting spouse can file a protest and receive an administrative conference in the IRS Appeals function.<sup>27</sup> The nonrequesting spouse does not have the right to petition the Tax Court in response to the IRS’s administrative determination regarding IRC § 6015 relief.<sup>28</sup>

If the requesting spouse files a Tax Court petition, the nonrequesting spouse must receive notice of the Tax Court proceeding and has an unconditional right to intervene in the proceeding to dispute or support the requesting spouse’s claim for relief.<sup>29</sup> However, an intervening spouse has no standing to appeal the Tax Court’s decision to the United States Court of Appeals.<sup>30</sup>

23 2013-42 I.R.B. 1.

24 *Sriram v. Comm’r*, T.C. Memo. 2012-91, was the first case in which the Tax Court analyzed the IRC § 6015(f) claim under the provisions of both Rev. Proc. 2003-61 and Notice 2012-8. More recent examples of this approach are discussed below.

25 Notice 2012-8 and Rev. Proc. 2013-34, §§ 4.01(5), (7)(d); 4.02(3); 4.03(2)(c)(iv), (e).

26 IRC § 6015(h)(2).

27 Rev. Proc. 2003-19, 2003-5 C.B. 371.

28 *Maier v. Comm’r*, 119 T.C. 267 (2002), *aff’d*, 360 F.3d 361 (2d Cir. 2004) (holding that there are no provisions in IRC § 6015 that allow the nonrequesting spouse to petition the Tax Court from a notice of determination).

29 *Van Arsdalen v. Comm’r*, 123 T.C. 135 (2004).

30 *Baranowicz v. Comm’r*, 432 F.3d 972 (9th Cir. 2005).

### Judicial Review

Taxpayers seeking relief under IRC § 6015 generally file Form 8857, *Request for Innocent Spouse Relief*.<sup>31</sup> After reviewing the request, the IRS issues a final notice of determination granting or denying relief in whole or in part. The taxpayer has 90 days from the date the IRS mails the notice to file a petition with the Tax Court.<sup>32</sup> The Tax Relief and Health Care Act of 2006 amended IRC § 6015(e) to expressly provide that the Tax Court has jurisdiction in “stand-alone” cases to review IRC § 6015(f) determinations, even where no deficiency has been asserted.<sup>33</sup>

## ANALYSIS OF LITIGATED CASES

We analyzed 31 opinions issued between June 1, 2012, and May 31, 2013, including 21 Tax Court opinions, one each from the United States Courts of Appeals for the First, Fifth, Ninth, Eleventh, and Federal Circuits, two from the Court of Appeals for the Sixth Circuit, and three from U.S. District Courts. Sixty-five percent of the cases (20 of 31) were decided in favor of the IRS and 32 percent (10 of 31) in favor of the requesting spouse (including two cases in which only the intervenor opposed granting relief). One case (three percent) ended in a split decision. In 35 percent (11 of 31) of the cases, the taxpayers appeared *pro se* (i.e., they represented themselves). Taxpayers who proceeded *pro se* prevailed in spite of opposition from the IRS in three cases out of 11 (27 percent).<sup>34</sup> One *pro se* taxpayer obtained a split decision. The nonrequesting spouse intervened in 23 percent of the cases (seven of 31).

Seventy-one percent of the cases (22 of 31) involved an analysis of whether to grant relief. Twenty-nine percent of the cases (nine of 31) involved procedural issues, with 78 percent (seven of nine) of these cases decided in favor of the IRS, and 22 percent (two of nine) in favor of the taxpayer.

Of the 22 cases decided on the merits, 59 percent (13 of 22) were decided in favor of the IRS, and 36 percent (eight of 22) in favor of the taxpayer. In five percent (one case) the court split its decision. See Table 10 in Appendix 3 for a detailed breakdown of the cases.

### Procedural Issues

The Court of Appeals for the Ninth Circuit affirmed the Tax Court’s holding in *Wilson v. Commissioner*, discussed in the National Taxpayer Advocate’s 2011 Annual Report to Congress, that the Tax Court provides *de novo* review of claims for relief under IRC § 6015(f).<sup>35</sup> Additionally, two district courts

31 See IRS Form 8857, *Request for Innocent Spouse Relief, Instructions* (Sept. 2010).

32 IRC § 6015(e)(1)(A)(ii).

33 Pub. L. No. 109-432, Div. C, § 408(a), (c), 120 Stat. 2922, 3061-62 (2006). Prior to amendment, IRC § 6015(e) provided for Tax Court review of determinations under IRC 6015(b) or (c), but it was not clear that the Tax Court had jurisdiction to review requests for relief made only under IRC § 6015(f) when no deficiency had been asserted. The 2006 amendment followed the National Taxpayer Advocate’s recommendation that IRC § 6015(e) be amended to clarify that taxpayers have the right to petition the Tax Court for review of determinations made only under IRC § 6015(f). See National Taxpayer Advocate 2001 Annual Report to Congress 159-65 (*Key Legislative Recommendation: Joint and Several Liability Final Determination Rights*). The filing of a Tax Court petition in response to the final notice of determination or after the IRC § 6015 claim is pending for six months is often referred to as a “stand-alone” proceeding, because jurisdiction is predicated on IRC § 6015(e) and not deficiency jurisdiction under IRC § 6213.

34 Taxpayers who proceeded *pro se* prevailed in an additional two cases in which only the intervenor (and not the IRS) opposed relief.

35 *Wilson v. Comm’r*, 705 F.3d 980 (9th Cir. 2013) *aff’g* T.C. Memo. 2010-134; National Taxpayer Advocate 2011 Annual Report to Congress 655 (Most Litigated Issue: *Relief from Joint and Several Liability under IRC § 6015*) at 661.

continued the disturbing trend of holding that a taxpayer was not entitled to raise innocent spouse relief as a defense in a collection suit.<sup>36</sup> A third district court refused to allow the defense in an interpleader suit.<sup>37</sup>

### *Wilson v. Commissioner*

In *Wilson v. Commissioner*,<sup>38</sup> Mr. Wilson, an insurance salesman, generated additional income by steering people into a Ponzi scheme. Mrs. Wilson was aware of the additional income but believed it derived from legitimate business operations. The additional income, which arose in 1997-1999, was not reported on the joint returns the couple filed for 1997 or 1998. The couple later filed amended 1997 and 1998 returns that reported the income, and included the additional income on their 1999 joint return. The resulting \$540,000 tax debt from the returns for the three years remained unpaid. In 2002, Mrs. Wilson requested innocent spouse relief under IRC § 6015(f) in a stand-alone petition.<sup>39</sup>

In the Tax Court proceeding, pursuant to *Porter v. Commissioner (Porter I)*,<sup>40</sup> the Tax Court's scope of review was *de novo*, which means that the court could and did consider evidence introduced at trial that was not part of the administrative record. The Tax Court's decision in *Porter I* was in turn based on its earlier holding in *Ewing v. Commissioner*,<sup>41</sup> in which the Tax Court found that the Administrative Procedure Act (APA),<sup>42</sup> which limits the scope of judicial review to the administrative record, was not applicable to Tax Court proceedings, including IRC § 6015 proceedings. Further, the Tax Court found that the use of the word "determine" in IRC § 6015 is similar to the use of the word "redetermination" in IRC § 6213(a) under which it is unquestioned that the scope of its review is *de novo*. The Tax Court concluded that the use of this term meant that Congress intended the court to have *de novo* review authority for IRC § 6015 cases. The Court of Appeals for the Eleventh Circuit had also held that *de novo* review is appropriate for Tax Court review of stand-alone claims under IRC § 6015(f).<sup>43</sup> However, the IRS did not agree with the decision in *Porter I*, and instructed Chief Counsel attorneys to, among other things, continue to raise the scope of review argument whenever appropriate.<sup>44</sup>

36 *U.S. v. Popowski*, 110 A.F.T.R.2d (RIA) 6997 (D.S.C. 2012); *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993 (N.D. Ill. 2012). The National Taxpayer Advocate has recommended that Congress address this problem in three Annual Reports to Congress. National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*); National Taxpayer Advocate 2009 Annual Report to Congress 378 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*); National Taxpayer Advocate 2007 Annual Report to Congress 549 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*).

37 *Simmons Perrine Moyer Bergman, PLC v. Coleman*, 1111 A.F.T.R.2d (RIA) 1237 (N.D. Iowa 2013).

38 T.C. Memo. 2010-134, *aff'd* by 705 F.3d 980 (9th Cir. 2013).

39 The trial began in 2005, but the Tax Court suspended the case due to the questioned jurisdiction of the Tax Court over stand-alone innocent spouse cases. See *Comm'r v. Ewing*, 439 F.3d 1009 (9th Cir. 2006), *rev'g* 118 T.C. 494 (2002) and vacating 122 T.C. 32 (2004). As discussed *supra*, the Tax Relief and Health Care Act of 2006 amended IRC § 6015(e) to expressly provide that the Tax Court has jurisdiction to review IRC § 6015(f) determinations even when no deficiency has been asserted, permitting Mrs. Wilson's case to go forward.

40 130 T.C. 115 (2008) (*Porter I*). In *Porter I*, the Tax Court denied the IRS's motion *in limine* (i.e., as a preliminary matter), which sought to preclude the taxpayer from offering evidence not already contained in the administrative record.

41 118 T.C. 494 (2002), vacated on other grounds sub nom. *Comm'r v. Ewing*, 439 F.3d 1009 (9th Cir. 2006).

42 5 U.S.C. §§ 551-559, 701-706 (2000).

43 *Neal v. Comm'r*, 557 F.3d 1262 (11th Cir. 2009), *aff'g* T.C. Memo. 2005-201.

44 Notice CC-2009-021 (June 30, 2009) supplementing Notice CC-2004-26 (July 12, 2004).

Pursuant to its decision in *Porter v. Commissioner (Porter II)*,<sup>45</sup> the Tax Court used the *de novo* standard of review, rather than an abuse of discretion standard of review. Under a *de novo* standard, the court considers the facts of the case anew and determines whether it is inequitable to hold the requesting spouse liable for the unpaid tax or deficiency. Under an abuse of discretion standard, the court reviews the IRS's denial of relief and overturns that determination only where it is shown to be arbitrary, capricious, or without sound basis in fact, and the requesting spouse bears the burden of proving that the Commissioner abused his discretion in denying relief.<sup>46</sup> The IRS also did not agree with the decision in *Porter II*, and instructed Chief Counsel attorneys to, among other things, continue to raise the standard of review argument whenever appropriate.<sup>47</sup>

The Tax Court held that Mrs. Wilson was entitled to relief under IRC § 6015(f), and articulated the ways in which its conclusions, based on *de novo* review, differed from the IRS's conclusions that were based solely on the administrative record.<sup>48</sup> The IRS appealed the Tax Court's decision to the Court of Appeals for the Ninth Circuit. While the appeal was pending, the National Taxpayer Advocate recommended that Congress clarify that the scope and standard of Tax Court determinations under IRC § 6015(f) is *de novo*.<sup>49</sup>

The Court of Appeals for the Ninth Circuit affirmed the Tax Court's decision. The court noted that the statutory mandate in IRC § 6015(e) that the Tax Court "determine" the appropriate relief "in light of all the facts and circumstances" suggests a *de novo* scope of evidentiary review; the Court of Appeals for the Eleventh Circuit had arrived at this conclusion; and a different approach would produce inconsistencies in different types of IRC § 6015(f) claims.<sup>50</sup> The court did not decide whether the APA applies to Tax Court proceedings (although it acknowledged that there is "considerable doubt" on this point).<sup>51</sup> However, it noted that even if the APA applies, an exception to the general rule that review is limited to the agency record permits a reviewing court to require supplementation of an incomplete administrative record, and that "[t]he ability to supplement the administrative record is particularly important in equitable relief cases, which require a fact-intensive inquiry of sensitive issues that may not come to light during the administrative phase of review."<sup>52</sup> Supplementing the administrative record was critical to determining whether the IRS had properly considered Mrs. Wilson's claim, and the Tax Court properly considered the additional evidence.<sup>53</sup>

45 132 T.C. 203 (2009); *Porter II* is a continuation of the same case that produced the 2008 holding (*Porter I*, see *supra* note 40) that Tax Court review of denials of relief under IRC § 6015(f) is not limited to the administrative record.

46 *Jonson v. Comm'r*, 118 T.C. 106, 125, *aff'd* by 353 F.3d 1181 (10th Cir. 2003).

47 Notice CC-2009-021 (June 30, 2009), supplementing Notice CC-2004-26 (July 12, 2004).

48 For a complete discussion of the Tax Court's analysis of the relevant factors, see National Taxpayer Advocate 2011 Annual Report to Congress (Most Litigated Issue: *Relief from Joint and Several Liability Under IRC § 6015*) at 661.

49 National Taxpayer Advocate 2011 Annual Report to Congress 531 (Legislative Recommendation: *Clarify that the Scope and Standard of Tax Court Determinations Under Internal Revenue Code Section 6015(f) is De Novo*).

50 705 F.3d 980, 988-989. For example, if a taxpayer petitions the Tax Court after the request for relief has been pending for six months, as permitted by IRC § 6015(e)(1)(A)(i)(II), there may be no administrative record. As another example, a taxpayer may, in a deficiency proceeding, raise IRC § 6015(f) as an affirmative defense. Again, there would be no administrative record to consult, and the scope of review would be *de novo*. Moreover, Congress provided for intervention by nonrequesting spouses, which suggests it intended trials *de novo* under IRC § 6015(f) to permit the other spouse to offer evidence.

51 705 F.3d 980, 990, n. 16.

52 705 F.3d 980, 991, citing the National Taxpayer Advocate 2011 Annual Report to Congress (Most Serious Problem: *The IRS Does Not Sufficiently Recognize and Address Domestic Violence and Abuse and its Effects on Tax Administration*).

53 The court noted that many taxpayers claiming innocent spouse relief like Mrs. Wilson proceed *pro se*, citing the National Taxpayer Advocate 2011 Annual Report to Congress 589 (Most Litigated Issues: *Introduction, Analysis of Pro Se Litigation*).

The court also held that the Tax Court properly reviewed Wilson’s claim anew, rather than for an abuse of discretion. Because the Tax Court may consider a claim in which there is no administrative record at all, it would be illogical to require review only for abuse of discretion. The IRS agreed that a *de novo* scope of review is incompatible with review for abuse of discretion because such an approach may result in the Tax Court finding the IRS abused its discretion in denying relief based on evidence not before the IRS. The court noted that it would be pointless for the Tax Court to compile a *de novo* record by considering evidence not in the administrative record if the court could then only review the claim for an abuse of discretion.<sup>54</sup> “Finally,” the court noted, “the nature of equitable relief also favors *de novo* review. ... The award of equitable spouse relief often turns on credibility, which is best tested in the crucible of trial rather than in a bureaucratic office in which the officer is unlikely even to meet the claimant. In this unique context, *de novo* review of the agency decision is particularly appropriate.”<sup>55</sup>

On June 17, 2013, the IRS announced its acquiescence in the *Wilson* decision, stating that “[a]lthough the Service disagrees that section 6015(e)(1) provides both a *de novo* standard and a *de novo* scope of review, the Service will no longer argue that the Tax Court should review section 6015(f) cases for an abuse of discretion or that the court should limit its review to the administrative record.”<sup>56</sup> Chief Counsel attorneys were instructed to proceed accordingly.<sup>57</sup>

### *U.S. v. Popowski, U.S. v. Elman, and Simmons v. Coleman*

The *Popowski* and *Elman* cases<sup>58</sup> further illustrate the need for legislative clarification to counter the judicial view, identified by the National Taxpayer Advocate in past Annual Reports to Congress, that a taxpayer may not raise IRC § 6015 as a defense in district court proceedings.<sup>59</sup> IRC § 6015 (e)(1)(A) provides that an individual who seeks relief from joint liability may, “in addition to any other remedy provided by law,” petition the Tax Court to determine the appropriate relief available. At least one district court has considered the defense in a suit to reduce joint federal tax assessments to judgment and to foreclose federal tax liens.<sup>60</sup> Other statutory provisions and judicial precedent support the conclusion that taxpayers may raise IRC § 6015 in a variety of contexts.<sup>61</sup> However, in the *Popowski* and *Elman* cases, two district courts, one in South Carolina and one in Illinois, held that they do not have jurisdiction over IRC

54 705 F.3d 980, 992-993.

55 705 F.3d 980 at 993. The court added that the IRC § 6015(e) jurisdictional grant to the Tax Court to “determine” whether relief is appropriate buttressed its conclusion that *de novo* review is appropriate. The Tax Court had always reviewed claims under IRC § 6015 (b) and (c) *de novo*, and the 2006 statutory direction that the Tax Court determine the appropriate relief available under subsections (b), (c), and (f), indicated that uniformity in the standard of review was intended for all claims under IRC § 6015.

56 Action on Dec., 2012-07 (June 17, 2013).

57 Notice CC-2013-11 (June 7, 2013), obsoleting Notice CC-2009-021 (June 30, 2009), and Notice CC-2004-26 (July 12, 2004), *supra* notes 44 and 47.

58 *U.S. v. Popowski*, 110 A.F.T.R.2d (RIA) 6997 (D.S.C. 2012); *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993 (N.D. Ill. 2012).

59 See National Taxpayer Advocate 2012 Annual Report to Congress 648; National Taxpayer Advocate 2010 Annual Report to Congress 504; National Taxpayer Advocate 2009 Annual Report to Congress 487; National Taxpayer Advocate 2008 Annual Report to Congress 524; National Taxpayer Advocate 2007 Annual Report to Congress 631. Moreover, the National Taxpayer Advocate three times recommended that legislation clarify that taxpayers may raise relief under IRC §§ 6015 and 66 as a defense in collection actions. See National Taxpayer Advocate 2010 Annual Report to Congress 377; National Taxpayer Advocate 2009 Annual Report to Congress 378; National Taxpayer Advocate 2007 Annual Report to Congress 549.

60 *U.S. v. Melot*, 109 A.F.T.R.2d (RIA) 1568 (D.N.M. 2012), *appeal dismissed* (10th Cir. Aug. 1, 2012) (holding that relief under IRC § 6015 was not available because the taxpayer requesting relief had not filed a joint return, and that relief under IRC § 66 was not available because the taxpayer did not establish that she did not know, and had no reason to know, of the item of community income giving rise to the unpaid tax).

61 See IRC §§ 6320(c) and 6330(c)(2)(A)(i) (pertaining to collection due process proceedings); IRC § 6213 and *Corson v. Comm’r*, 114 T.C. 354, 363 (2000) (pertaining to deficiency proceedings); 11 U.S.C.A. § 505(a) (pertaining to bankruptcy proceedings); and IRC § 7422 (pertaining to refund suits).

§ 6015 claims raised as a defense in an action to reduce joint federal tax assessments to judgment or in a lien foreclosure suit.

In *Popowski*, Mrs. Popowski alleged that she had sought innocent spouse relief from the IRS, which was denied.<sup>62</sup> Mrs. Popowski did not petition the Tax Court for review of the determination. When Mrs. Popowski sought to raise a claim for innocent spouse relief as a defense in a suit to reduce joint tax liabilities to judgment, the court found that she had not made any evidentiary showing that she qualified for innocent spouse relief. The court held that even if Mrs. Popowski had submitted such evidence, “the Court has no authority to hear it. The defendant essentially concedes and the plaintiff amply demonstrates that the ‘innocent spouse’ defense may only be heard by the Tax Court.”<sup>63</sup> Mrs. Popowski was not permitted to raise her innocent spouse claim as a defense, and the court granted the government’s motion for summary judgment.

In *Elman*, Mrs. Elman sought innocent spouse relief as a defense in a suit to reduce to judgment joint tax liabilities from tax years 1996, 1998, and 1999 and to enforce federal tax liens on her home.<sup>64</sup> The IRS had rejected Mrs. Elman’s request for relief under IRC § 6015(b), (c), and (f) because she did not request relief within two years of August 4, 2003, the date the IRS commenced its first collection activity against her.<sup>65</sup> In addition, the IRS rejected the claim under IRC § 6015(f), because, it said, Mrs. Elman had not shown that at the time the returns were filed, she had reason to believe Mr. Elman (who died in 2005) would pay the tax, and she had not proven her claim of economic hardship. The IRS Office of Appeals agreed with the denial of relief, and Mrs. Elman did not petition the Tax Court for review. The court, citing *U.S. v. Boynton*, noted “[a]lthough the statute itself does not address whether the Tax Court’s jurisdiction is exclusive, courts interpreting the statute have concluded that it is.”<sup>66</sup> The court held that exclusive jurisdiction over Mrs. Elman’s innocent spouse claim lies with the Tax Court and that it lacked jurisdiction to entertain the innocent spouse defense. It therefore granted the government’s motion for summary judgment to reduce the tax liabilities to judgment.<sup>67</sup>

As the National Taxpayer Advocate has pointed out, these district court decisions are inconsistent with the statutory language of IRC § 6015, which does not give the Tax Court exclusive jurisdiction to determine innocent spouse claims, but rather confers Tax Court jurisdiction “in addition to any other remedy

62 *U.S. v. Popowski*, 110 A.F.T.R.2d (RIA) 6997 (D.S.C. 2012).

63 *Popowski*, 110 A.F.T.R.2d (RIA) 6997 (D.S.C. 2012), slip op. at 7.

64 *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993 (N.D. Ill. 2012).

65 Mrs. Elman requested relief on May 18, 2006. As discussed above, claims for relief under IRC § 6015(b) or (c) must be made within this two-year timeframe, and at the time Mrs. Elman requested relief, the IRS adhered to Treas. Reg. 1.6015-5(b)(1), which imposed the same two-year deadline on requests for relief under IRC § 6015(f). As described above, the IRS no longer applies the two-year deadline to requests for relief under IRC § 6015(f).

66 *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993, slip op. at 8, citing *U.S. v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007) (holding that the district court has no jurisdiction to consider the innocent spouse defense when the taxpayer has not first sought such relief with the IRS, reasoning that otherwise a district court and the Tax Court would have concurrent jurisdiction over the claim and might be placed in the position of adjudicating the same issues at the same time). District courts in California have continued to refuse the defense in collection suits, and district courts in other jurisdictions have also not permitted the defense. See *U.S. v. LeBeau*, 109 A.F.T.R.2d (RIA) 1369 (S.D. Cal. 2012) (relying on *Boynton*); *U.S. v. Miles*, 109 A.F.T.R.2d (RIA) 1602 (N.D. Cal. 2012) (relying on *Boynton*); *U.S. v. Wallace*, 105 A.F.T.R.2d 2827 (S.D. Ohio 2010), adopted by 105 A.F.T.R.2d (RIA) 2831 (S.D. Ohio 2010) (relying on *Boynton*); *U.S. v. Bucy*, 100 A.F.T.R.2d (RIA) 6666 (S.D. W. Va. 2007); *U.S. v. Feda*, 97 A.F.T.R.2d (RIA) 1985, 1989 (N.D. Ill. 2006) (taxpayer could not raise IRC § 6015 as a defense in a suit to reduce joint federal tax assessments to judgment); *U.S. v. Cawog*, 97 A.F.T.R.2d (RIA) 3069 (W.D. Pa. 2006), appeal dismissed (3d Cir. July 5, 2007) (taxpayer could not raise IRC § 6015 as a defense in a suit to foreclose tax liens).

67 Because the government anticipated that proceeds from the sale of Mrs. Elman’s home would be insufficient to pay her tax liabilities, it had invited Mrs. Elman to enter into a compromise of the liability. The court therefore denied without prejudice the government’s motion for summary judgment to foreclose on the liens on Mrs. Elman’s home and strongly urged the parties to settle the dispute.

provided by law.” Nothing in IRC § 6015 prevents a district court from determining, in a collection suit, whether innocent spouse relief is available. As noted above, another district court actually did so last year.<sup>68</sup> Moreover, the refusal to allow a taxpayer to raise IRC § 6015 as a defense in a collection suit may create hardship because a taxpayer may be left without a forum in which to raise IRC § 6015 as a defense before losing her home to foreclosure by the IRS.

This year, a district court also refused to allow a taxpayer to raise innocent spouse relief as a defense in an interpleader suit. In *Simmons v. Coleman*,<sup>69</sup> Mr. Coleman had been injured in a motor vehicle accident, and he and Mrs. Coleman settled a suit for damages for Mr. Coleman’s personal injuries and for Mrs. Coleman’s loss of consortium.<sup>70</sup> The settlement proceeds had been deposited with the Clerk of the Court. Mr. Coleman’s automobile insurance company had paid medical bills resulting from the accident and claimed it was entitled to a portion of the settlement proceeds. The United States also claimed that it was entitled to apply the proceeds to the Colemans’ unpaid joint tax liabilities and to taxes owed by Mr. Coleman separately.<sup>71</sup> The state of Iowa also claimed it was entitled to a portion of the settlement proceeds to satisfy unpaid taxes. Mrs. Coleman claimed she was not liable for the unpaid taxes because she was an innocent spouse under IRC § 6015(f) and that because 40-50 percent of the settlement proceeds were attributable to her loss of consortium claim, she was entitled to those amounts free of any claim for unpaid taxes. The court, citing the *Elman* case, agreed with the government that it did not have jurisdiction to hear Mrs. Coleman’s innocent spouse claim in the interpleader action before it and that she therefore remained jointly and severally liable for unpaid taxes.<sup>72</sup> Even if some of the settlement proceeds were Mrs. Coleman’s separate property, they would still be subject to the government’s tax lien. The court therefore granted the government’s motion for summary judgment on the innocent spouse issue, but noted that its decision did not prevent Mrs. Coleman from seeking a refund by pursuing her innocent spouse claim with the IRS.<sup>73</sup>

Although not addressed by the court in *Simmons*, unlike a suit to reduce an assessment to judgment or to foreclose a tax lien where a taxpayer can challenge the merits of the assessment as part of the proceeding, normally when an interpleader is brought and the Government’s sovereign immunity is waived under 28 U.S.C. § 2410, a taxpayer can only challenge the procedural validity of the federal tax lien, not the merits of the assessment.<sup>74</sup> Because seeking relief under section 6015 would be a challenge to the underlying assessment, prohibiting a taxpayer from raising innocent spouse in an interpleader action seems to be consistent with the existing statutory scheme. Thus, the “in addition to any other remedy provided by law” language found in section 6015 would not provide a basis for raising section 6015 as a defense in

68 *U.S. v. Melot*, 109 A.F.T.R.2d (RIA) 1568 (D.N.M. 2012), appeal dismissed (10th Cir. Aug. 1, 2012) (holding, in a suit to reduce joint federal tax assessments to judgment and to foreclose federal tax liens, that relief under IRC § 6015 was not available because the taxpayer requesting relief had not filed a joint return, and that relief under IRC § 66 was not available because the taxpayer did not establish that she did not know, and had no reason to know, of the item of community income giving rise to the unpaid tax).

69 *Simmons Perrine Moyer Bergman, PLC v. Coleman*, 111 A.F.T.R.2d (RIA) 1237 (N.D. Iowa 2013).

70 The Restatement (Second) of Torts § 693 describes the elements of a claim for loss of consortium: “One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.” See also Iowa Code § 613.15. *Injury or Death of Spouse—Measure of Recovery*.

71 In pertinent part, 28 U.S.C. § 2410(a) provides: “[T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—...5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.”

72 *Simmons Perrine Moyer Bergman, PLC v. Coleman*, 111 A.F.T.R.2d (RIA) 1237, slip op. at 22-24.

73 *Simmons Perrine Moyer Bergman, PLC v. Coleman*, 111 A.F.T.R.2d (RIA) 1237, slip op. at 30, n. 20.

74 *Elias v. Connitt*, 908 F.2d 521, 527 (9th Cir. 1990).

an interpleader action. However, as the court points out, the taxpayer in this situation is not without recourse, as he or she can file a refund claim.

### *Relief on the Merits*

While the courts considered many factors in determining the appropriateness of relief on the merits under IRC § 6015, the most significant factor was whether the requesting taxpayer had actual or constructive knowledge that there was a deficiency or that the nonrequesting spouse would not pay the tax. All three avenues for relief contain a knowledge element or factor, making it the linchpin in most of the courts' analyses.<sup>75</sup> Actual or constructive knowledge was a factor in 21 of the 22 cases decided on the merits. These cases suggest that determining what a taxpayer knew or should have known will continue to generate a significant amount of controversy as long as joint filers are taxed on their combined incomes and remain jointly and severally liable for the tax that must be shown on the return.

In addition, five Tax Court cases considered the effect that Notice 2012-8, if final, would have had on the analysis of a claim for relief under IRC § 6015(f). In three of the cases, the court noted that the factors taken into account in evaluating the claim would have weighed the same way (in favor of or against relief) under both Revenue Procedure 2003-61 and the proposed guidance in Notice 2012-8.<sup>76</sup> In two cases, the court noted that a factor would have weighed differently under Notice 2012-8 than under Revenue Procedure 2003-61.

In *Cutler v. Commissioner*,<sup>77</sup> the court found that Mrs. Cutler, who obtained relief from underpayments, did not significantly benefit (beyond normal support) from the unpaid tax liabilities. Revenue Procedure 2003-61 identifies significant benefit as a “relevant” factor, but does not specify whether the absence of significant benefit should weigh in favor of relief.<sup>78</sup> Relying on its own precedent, the Tax Court found this factor weighed in favor of granting relief.<sup>79</sup> In contrast, Notice 2012-8 provides that “[i]f the amount of unpaid tax or understated tax was small such that neither spouse received a significant benefit, then this factor is neutral.”<sup>80</sup> The Tax Court found that neither spouse received a significant benefit from the unpaid liabilities, so this factor would change from favorable to neutral if Notice 2012-8 applied.

In *Hudgins v. Commissioner*,<sup>81</sup> the court found that Mrs. Hudgins did not show that she would suffer economic hardship if denied relief under IRC § 6015(f), a factor Revenue Procedure 2003-61 also identifies as “relevant” without specifying how the absence of the factor should be treated.<sup>82</sup> The Tax Court applied its own precedent and held the absence of economic hardship weighed against granting relief.<sup>83</sup> In contrast, Notice 2012-8 provides that the absence of economic hardship would be considered neutral.<sup>84</sup>

75 See IRC § 6015(b)(1)(C); § 6015(c)(3)(C); Rev. Proc. 2003-61, 2003-2 C.B. 296 §§ 4.02(1)(b) and 4.03(2)(a)(iii); see also Notice 2012-8, §§ 4.02(3) and 4.03(2)(c), 2012-4 C.B. 309.

76 *Henson v. Comm’r*, T.C. Memo. 2012-288; *Stanwyck v. Comm’r*, T.C. Memo. 2012-180, *appeal docketed*, No. 12-73136 (9th Cir. Oct. 1, 2012); *Deihl v. Comm’r*, T.C. Memo. 2012-176, *appeal docketed*, No. 12-74169 (9th Cir. Dec. 21, 2012).

77 T.C. Memo. 2013-119.

78 See Rev. Proc. 2003-61, 2003-2 C.B. 296 § 4.03(2)(a)(v).

79 *Cutler v. Comm’r*, T.C. Memo. 2013-119, 19-21.

80 Notice 2012-8, § 4.03(2)(e).

81 T.C. Memo. 2012-260.

82 Rev. Proc. 2003-61, 2003-2 C.B. 296 § 4.03(2)(a)(ii).

83 *Hudgins v. Comm’r*, T.C. Memo. 2012-260 at 34.

84 Notice 2012-8, § 4.03(2)(b).

The court noted this difference, but also noted it would have denied relief even if the proposed guidance applied.<sup>85</sup>

## CONCLUSION

This year, the Tax Court's holding that its review of IRC § 6015(f) claims is *de novo* was affirmed by a court of appeals and the IRS acquiesced to that position. District courts continued the troubling trend of not permitting the innocent spouse defense in collection actions before them. For this reason, the National Taxpayer Advocate again urges Congress to state definitively that innocent spouse claims can be raised as a defense in collection actions. The Tax Court, in evaluating claims for innocent spouse relief under IRC § 6015(f), indicated in two cases how its analysis would change if the proposed guidance in Notice 2012-8 had applied. The proposed guidance has now been finalized as Revenue Procedure 2013-34. We expect future cases to provide additional insight on how the new guidance affects innocent spouse cases.

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<sup>85</sup> *Hudgins v. Comm'r*, T.C. Memo. 2012-260 at 40, n. 18.