

#48 PROVIDE THAT THE SCOPE OF JUDICIAL REVIEW OF DETERMINATIONS UNDER IRC § 6015 IS *DE NOVO*

Present Law

Taxpayers who file joint federal income tax returns are jointly and severally liable for any deficiency or tax due with respect to their joint returns. Internal Revenue Code (IRC) § 6015, sometimes referred to as the “innocent spouse” rules, provides relief from this joint and several liability. If “traditional” relief from a deficiency is unavailable under subsection (b) and “separation of liability” from a deficiency is unavailable under subsection (c), a taxpayer may qualify for “equitable” innocent spouse relief from deficiencies and underpayments under subsection (f). Relief under IRC § 6015(f) is appropriate when, taking into account all the facts and circumstances of a case, it would be inequitable to hold a joint filer liable for the unpaid tax or deficiency. If the IRS denies relief under any subsection of IRC § 6015, or a request for relief has gone unanswered for six months, the taxpayer may petition the Tax Court.

In 2008, the Tax Court held that the scope of its review in IRC § 6015(f) cases, like its review in IRC § 6015(b) and (c) cases, is *de novo*, meaning that it may consider evidence introduced at trial that was not included in the administrative record.¹⁸⁵ In 2009, the Tax Court held that the standard of review in IRC § 6015(f) cases is also *de novo*, meaning that the Tax Court will consider the case anew, without deference to the IRS’s determination.¹⁸⁶

In 2009, the IRS Office of Chief Counsel (Chief Counsel) issued guidance to its attorneys instructing them to argue, contrary to the Tax Court’s holdings, that the scope of review in all IRC § 6015(f) cases is limited to issues and evidence presented before the IRS Appeals or Examination functions and that the proper standard of review is abuse of discretion.¹⁸⁷ In 2011, the National Taxpayer Advocate recommended that Congress amend IRC § 6015 to reflect the Tax Court’s holdings.

In June 2013, following an appellate court decision affirming the Tax Court’s holdings, Chief Counsel issued guidance instructing its attorneys to cease arguing that the scope and standard of review in IRC § 6015(f) cases are not *de novo*.¹⁸⁸ In June 2013, Chief Counsel also issued an Action on Decision stating that although the IRS disagrees that section 6015(e)(1) provides for both a *de novo* standard of review and a *de novo* scope of review, the IRS would no longer argue that the Tax Court should limit its review to the administrative record or review section 6015(f) claims solely for an abuse of discretion.¹⁸⁹

In 2019, Congress added paragraph (7) to IRC § 6015(e). It provides that “any review of a determination made under this section is *de novo* by the Tax Court.”¹⁹⁰ However, this *de novo* review is limited to consideration of “(A) the administrative record established at the time of the determination, and (B) any

¹⁸⁵ *Porter v. Comm’r*, 130 T.C. 115 (2008).

¹⁸⁶ *Porter v. Comm’r*, 132 T.C. 203 (2009) (a continuation of the same case that produced the 2008 holding, discussed above, that Tax Court review of denials of relief under IRC § 6015(f) is not limited to the administrative record).

¹⁸⁷ Notice CC-2009-021, Litigating Cases Involving Claims for Relief from Joint and Several Liability Under Section 6015(f): Scope and Standard of Review (June 30, 2009).

¹⁸⁸ Notice CC-2013-011, Litigating Cases That Involve Claims for Relief from Joint and Several Liability Under Section 6015 (June 7, 2013).

¹⁸⁹ Action on Decision (AOD) 2012-07, I.R.B. 2013-25 (June 17, 2013), issued in response to *Wilson v. Comm’r*, 705 F.3d 980 (9th Cir. 2013), *aff’g* T.C. Memo. 2010-134. An AOD is a formal memorandum prepared by Chief Counsel that announces the future litigation position the IRS will take with regard to the issue addressed in the AOD.

¹⁹⁰ Taxpayer First Act, Pub. L. No. 116-25, § 1203, 133 Stat. 981 (2019).

additional newly discovered or previously unavailable evidence.” The provision does not define the terms “newly discovered” or “previously unavailable.”

Reasons for Change

IRC § 6015(e)(7), which limits the Tax Court’s scope of review, applies to determinations made “under this section” (*i.e.*, IRC § 6015). Thus, the provision supersedes Tax Court jurisprudence with respect to the scope of review not only in IRC § 6015(f) cases, but also in IRC § 6015 (b) and (c) cases.

The provision may be intended to encourage the IRS and taxpayers to compile a complete administrative record or resolve cases without litigation. In some cases, however, taxpayers — and particularly taxpayers not represented by counsel — may not appreciate the significance of certain evidence or the consequences of failing to present it to the IRS. In other cases, taxpayers may be willing to present relevant evidence during trial to a neutral third party — the judge — that they are reluctant to share with the IRS, such as evidence of the other joint filer’s domestic violence or abuse.¹⁹¹

Moreover, some taxpayers could be deprived of meaningful Tax Court review — particularly taxpayers who filed Tax Court petitions when their requests for relief went unanswered for six months — because the administrative record may consist of little more than the taxpayer’s skeletal responses to the information solicited by Form 8857, Request for Innocent Spouse Relief, and the IRS may argue that the taxpayer’s evidence is not “newly discovered” or “previously unavailable.”¹⁹² If the court accepts the IRS’s argument that under IRC § 6015(e)(7) the taxpayer’s evidence should not be considered because it was available but not presented at the time of the IRS’s determination, the court may decide the case *de novo* on the basis of the scant evidence contained in the administrative record.¹⁹³ To enable the Tax Court to make the correct decision based on the merits of the case, the National Taxpayer Advocate believes the court should be permitted to consider all relevant evidence, whether or not it could have been provided to the IRS in a prior administrative proceeding.

Finally, some taxpayers who wish to obtain review by a federal court that is *de novo* in scope may choose to pay the asserted tax and bring a refund suit before a U.S. district court or the U.S. Court of Federal Claims. But this approach carries the risk that these courts may conclude they lack jurisdiction to hear innocent spouse claims.¹⁹⁴ To address these cases, the National Taxpayer Advocate recommends the statute be amended to allow courts to consider all relevant evidence in IRC § 6015 cases.

191 Abuse that prevented a taxpayer from challenging the treatment of an item on the joint return out of fear the other spouse might retaliate would weigh in favor of granting relief. *Stephenson v. Comm’r*, T.C. Memo. 2011-16, is an example of a case in which the Tax Court’s finding that the petitioner was physically and verbally abused by her husband was largely based on evidence produced at trial because the issue of abuse was not fully developed administratively.

192 Chief Counsel has not yet issued guidance to its attorneys about what arguments to make in cases in which IRC § 6015(e)(7) may apply.

193 Where the IRS did not answer the taxpayer’s request for relief for more than six months, the court may remand the case and direct the IRS to do so, which may prolong resolution of the case.

194 The National Taxpayer Advocate recommends that Congress address this risk. See *Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits*, *infra*.

Recommendation

- Remove IRC § 6015(e)(7)(A) and (B) and revise IRC § 6015(e)(7) to provide: “The standard and scope of any review of a determination made under this section by the Tax Court or other court of competent jurisdiction shall be *de novo*.”¹⁹⁵

¹⁹⁵ This recommendation averts the possibility that the language in IRC § 6015(e)(7) that “[a]ny review of a determination under this section shall be reviewed *de novo* by the Tax Court” could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would preclude innocent spouse relief in collection, bankruptcy, and refund cases litigated in other federal courts and would be inconsistent with IRC § 6015(e)(1)(A) (conferring Tax Court jurisdiction “in addition to any other remedy provided by law”). Such an interpretation would also be inconsistent with the legislative recommendations *Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases*, *infra*, and *Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits*, *infra*.