

National Taxpayer Advocate

Annual Report to Congress

2010 Annual Report to Congress

**UNLIMIT INNOCENT SPOUSE
EQUITABLE RELIEF**

Unlimit Innocent Spouse Equitable Relief*

EXECUTIVE SUMMARY	3
INTRODUCTION	4
Prior Law Did Not Contain a Statute of Limitations	5
RRA 98 Limited Expanded Provisions	5
Congress Heard Testimony on Post-Hoc Circumstances	6
IRS Guidance Encompasses Post-Hoc Factors	7
Appealed Cases Turn on Post-Hoc Facts	7
<i>Ms. Lantz’s Husband Had Advised the IRS that She Was an Innocent Spouse</i>	7
<i>Ms. Mannella’s Husband Had Not Shared IRS Notices with Her</i>	8
<i>Ms. Hall’s Husband Was Legally Obligated to Pay Their Joint Liability</i>	8
<i>Ms. Coulter Was Intimidated by Her Husband</i>	8
RRA 98 Was Not Ambiguous	9
The Regulatory Period is Not Reasonable	9
A Statute of Limitations is Inappropriate to Equitable Relief	10
CONCLUSION	11
RECOMMENDATION	11

* The principal author of this study is Eric San Juan, Attorney Advisor to the National Taxpayer Advocate.

EXECUTIVE SUMMARY

Background

The validity of a Treasury Regulation effectively imposing a two-year statute of limitation on an innocent spouse's request for equitable relief from income tax liability has been denied by the U.S. Tax Court and is pending before multiple circuits of the U.S. Court of Appeals. The two-year regulatory period, which the IRS continues to enforce despite the National Taxpayer Advocate's recommendation for legislative removal and the Tax Court's invalidation, leaves innocent spouses in a quandary. Many requests for equitable relief filed after the two-year period cannot be resolved until the appellate courts rule, and thereafter, there may be divergent rules among circuits.

Analysis

In developing the applicable legislation, Congress heard testimony from innocent spouses who described circumstances that could delay a request for relief. Congress then affirmatively omitted from the equitable relief provision any statute of limitation (other than the pre-existing one on tax collection), while specifically prescribing a two-year period for traditional or separately allocated relief elsewhere within the same statute. Unlike traditional and separately allocated relief, which covered only understatements of tax, equitable relief covered underpayments as well, thereby affording relief even if there is no deficiency. Accordingly, equitable relief extended the innocent spouse provision into the realm of collection, which already had a statute of limitations (generally ten years). Consequently, the two-year limit on equitable relief under the regulation is not a reasonable interpretation of the statute. It forecloses a class of requests that equitable relief was designed to reach, namely those in which an innocent spouse delayed a request for relief upon being misled or intimidated by a joint filer.

Recommendation

The National Taxpayer Advocate believes the law should be clarified, whether by administrative, judicial, or legislative means, to confirm the permissibility of equitable relief at any time within the applicable limitation period on collection. As a matter of tax administration, this rule should apply uniformly to taxpayers across the country. In short, a setting aside of the invalidated regulation would allow for effective and consistent implementation of the statutory scheme.

INTRODUCTION

The validity of a Treasury Regulation that effectively imposes a two-year statute of limitation on a request for equitable relief by an innocent spouse is pending before multiple circuits of the U.S. Court of Appeals, with the putative innocent spouse represented *pro bono* by a Low Income Taxpayer Clinic (LITC) in several cases.¹ Already, the Seventh Circuit has disagreed with a majority of the U.S. Tax Court which, in a court-reviewed opinion, had invalidated the regulation, leaving the innocent spouse subject only to an underlying limitation period for collecting tax under Internal Revenue Code (IRC) § 6502 (generally ten years).² For cases subject to review in other circuits, the Tax Court has reiterated its majority opinion invalidating the regulation.³

The National Taxpayer Advocate, after monitoring the implementation of the current innocent spouse provisions since they were enacted,⁴ observes that equitable relief would be administered most effectively and consistently with the statutory scheme without limitation by the regulation in question.⁵ As discussed below, the statutory scheme contemplates cases like those in the appellate courts, when delay in requesting relief – typical of an innocent spouse who has been misled or intimidated by a joint filer – is itself an equitable factor. Accordingly, the National Taxpayer Advocate believes the law should be clarified by administrative, judicial, or legislative means, to conform with the congressional intent implicit in the statutory scheme and confirm the permissibility of equitable relief at any time within the applicable limitation period on collection.⁶ Although statutory amendment would be unnecessary absent the IRS regulatory position, which the Tax Court has held invalid, harm to taxpayers from the current uncertainty in the law makes clarification necessary now. In short, a setting aside of the invalidated regulation would allow for effective and consistent implementation of the statutory scheme.

¹ See *Mannella v. Comm’r*, 132 T.C. 196 (2009), appeal docketed No. 10-1308 (3rd Cir. Jan. 25, 2010) (reflecting counsel by Duquesne Univ. School of Law Low Income Tax Practicum); *Buckner v. Comm’r*, T.C. Docket No. 12153-09, appeal docketed No. 10-2056 (6th Cir. Aug. 18, 2010) (reflecting counsel by Mich. State Univ. LITC); *Coulter v. Comm’r*, T.C. Docket No. 1003-09, appeal docketed No. 10-680 (2d Cir.) (reflecting counsel by Cardozo School of Law Tax Clinic and Vt. Legal Aid); *Jones v. Comm’r*, T.C. Docket No. 17359-08, appeal docketed No. 10-1985 (4th Cir. Aug. 30, 2010).

² See *Lantz v. Comm’r*, 132 T.C. 131 (2009), *rev’d and remanded by* 607 F.3d 479, 483 (7th Cir. 2010) (reflecting counsel by Valparaiso Univ. Law Clinic and Legal Aid Soc’y of Mid. Tenn. & the Cumberlandians) (stating “the 10-year limit in section 6502 is not a constraint on taxpayer action” but rather on IRS collection action).

³ See *Hall v. Comm’r*, 135 T.C. No. 19 (Sept. 22, 2010).

⁴ See National Taxpayer Advocate 2009 Annual Report to Congress 378; National Taxpayer Advocate 2008 Annual Report to Congress 524; National Taxpayer Advocate 2007 Annual Report to Congress 549; National Taxpayer Advocate 2006 Annual Report to Congress 540; National Taxpayer Advocate 2005 Annual Report to Congress 326, 407; National Taxpayer Advocate 2004 Annual Report to Congress 490; National Taxpayer Advocate 2003 Annual Report to Congress 170; National Taxpayer Advocate 2002 Annual Report to Congress 150; National Taxpayer Advocate 2001 Annual Report to Congress 159; National Taxpayer Advocate 2000 Annual Report to Congress 97.

⁵ See Treas. Reg. § 1.6015-5(b)(1).

⁶ See 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*, *supra*; National Taxpayer Advocate 2006 Annual Report to Congress 540.

Prior Law Did Not Contain a Statute of Limitations

As enacted in 1971, an innocent spouse provision of the tax law under certain circumstances relieved a married taxpayer who had filed a joint return from liability attributable to her or his spouse's omission of over 25 percent of gross income of which she or he did not know, or have reason to know, and from which she or he did not significantly benefit.⁷ Because this provision did not contain a statute of limitations, the effective limitation was the period generally applicable to federal tax collection.⁸

In 1984, Congress believed that the “rules relieving innocent spouses from liability for tax on a joint return are not sufficiently broad to encompass many cases where the innocent spouse deserves relief.”⁹ Consequently, the Tax Reform Act of 1984 expanded relief from liability to encompass any substantial understatement (*i.e.*, over \$500) attributable to a spouse's grossly erroneous items (including any omission) of which the taxpayer did not know or have reason to know.¹⁰ There was still no statute of limitations within the provision.

RRA 98 Limited Expanded Provisions

The IRS Restructuring and Reform Act of 1998 (RRA 98) expanded innocent spouse relief.¹¹ First, as introduced in the House of Representatives, RRA 98 removed the thresholds for substantial understatement and grossly erroneous items. As long as the innocent spouse did not know or have reason to know of understatements attributable to erroneous items in any amounts, this provision affords “traditional” relief.¹² Second, as modified by a Senate bill, RRA 98 allowed certain separated or divorced taxpayers to segregate tax liability from that of the joint filer, except with respect to items of which she or he actually knew.¹³ The Senate provision enacted within RRA 98 stipulated that the innocent spouse must make an election within two years after IRS collection activities began.¹⁴ Under RRA 98, the two-year rule applied to traditional as well as separately allocated relief.¹⁵

Third, if relief is not available under these two provisions, RRA 98 as modified by conference agreement created equitable relief.¹⁶ Thus, equitable relief is “a safety-valve provision

⁷ See Pub. L. No. 91-679 (adding IRC § 6013(e)).

⁸ See IRC §§ 6502, 6503 (applying a ten-year period after 1990 but before then a six-year period, which in any case may be suspended for various reasons). IRC § 6511 provides that a taxpayer may file a claim for credit or refund of overpayment within the later of three years from the time the return was filed or two years from the time the tax was paid. IRC § 6511(b) sets forth rules for calculating the amount of credit or refund that can be allowed on a timely filed claim.

⁹ H. Rept. No. 98-432, 98th Cong., 2nd Sess. 1502 (1984).

¹⁰ See Pub. L. No. 98-369, Div. A, § 424, 98 Stat. 801 (1984).

¹¹ See Pub. L. No. 105-206, § 3201 (adding IRC § 6015).

¹² See IRC § 6015(b). Under the House version of the bill, which would have allowed relief “on an apportioned basis,” a taxpayer “must claim innocent spouse status with regard to any assessment not later than two years after the date of such assessment.” H.R. Conf. Rept. No. 105-599, 105th Cong., 2nd Sess. 250-51 (1998).

¹³ See IRC § 6015(c).

¹⁴ See H.R. Conf. Rept. No. 105-599, 105th Cong., 2nd Sess. 250-51 (1998); S. Rep. No. 105-174, 105th Cong., 2nd Sess. 55-60 (1998).

¹⁵ See H.R. Conf. Rept. No. 105-599, 105th Cong., 2nd Sess. 254 (1998).

¹⁶ See H.R. Conf. Rept. No. 105-599, 105th Cong., 2nd Sess. 251-55 (1998).

Unlimit Innocent Spouse Equitable Relief

for innocent spouses who fall through cracks” in the first two provisions.¹⁷ Specifically, relief is available if, under procedures prescribed by the IRS, taking into account all the facts and circumstances, it is inequitable to hold an innocent spouse liable for a joint deficiency or unpaid tax. The statute is silent on any time for requesting equitable relief.¹⁸

Unlike traditional and separately allocated relief, which covered only understatements of tax, the provision for equitable relief as enacted in the RRA 98 conference agreement covered underpayments as well, thereby affording relief even if there is no deficiency. Accordingly, equitable relief extended the innocent spouse provision into the realm of collection, which already had a statute of limitations (generally ten years).¹⁹

Congress Heard Testimony on Post-Hoc Circumstances

In widely publicized hearings leading up to enactment of RRA 98, the Senate Finance Committee had entertained testimony from innocent spouses, among other witnesses. Overall, as a senator put it, “the testimony we heard before the Finance Committee was that it is virtually impossible for the standards of that innocent spouse provision to be met.”²⁰ Another senator agreed “that the current law innocent spouse provisions are weak at best, and need dramatic change.”²¹

In pertinent part, the testimony described situations in which an innocent spouse might not, under the circumstances, request relief within two years. For example, a witness stated that when the IRS placed a lien on her home, “It was only after I informed my ex-husband of this problem that he confessed that he had, in fact, been receiving mail from the IRS addressed to both of us for years.”²² Thus, a husband’s deceptive silence was a reason for an innocent spouse’s delay. Another witness asserted that “the IRS continues to send mail to the old marital address to both parties, even though these individuals have been filing separately and unmarried from different addresses for many years.”²³ In other words, circumstances typical of separated or divorced spouses could impede effective communica-

¹⁷ Lantz, 607 F.3d at 484.

¹⁸ See IRC § 6015(f). The legislative history states: “The conferees do not intend to limit the use of the Secretary’s authority to provide equitable relief to situations where tax is shown on a return but not paid. The conferees intend that such authority be used where, taking into account all the facts and circumstances, it is inequitable to hold an individual liable for all or part of any unpaid tax or deficiency arising from a joint return. The conferees intend that relief be available where there is both an understatement and an underpayment of tax.” H.R. Conf. Rept. No. 105-599, 105th Cong., 2nd Sess. 254-55 (1998).

¹⁹ See Bryan T. Camp, *Interpreting Statutory Silence*, Tax Notes 501, 503 (Aug. 2, 2010).

²⁰ 144 Cong. Rec. (May 7, 1998) S4473-74 (recording statement of Sen. Bob Graham, D-Fla.).

²¹ *Id.* at S4474 (recording statement of Sen. Alfonse D’Amato, R-N.Y.).

²² Sen. Comm. on Finance, *IRS Restructuring Hearings*, 105th Cong., 2nd Sess. 149 (Jan. 28-29; Feb. 5, 11 & 25, 1998).

²³ *Id.* at 147.

tion. In sum, the Committee heard allegations of circumstances that could delay a request for relief. These circumstances were among concerns that RRA 98 addressed.²⁴

IRS Guidance Encompasses Post-Hoc Factors

In 2000, the IRS prescribed applicable procedures for equitable relief under IRC § 6015(f), setting as a threshold condition a request not later than two years after the first IRS collection activity, but encompassing future economic hardship absent relief as a necessary circumstance.²⁵ Thus, eligibility for equitable relief may turn on facts to occur later than two years after the IRS begins collection activity. In 2002, the IRS issued regulations containing the two-year limit and incorporating the other procedures by reference.²⁶

Appealed Cases Turn on Post-Hoc Facts

The facts of cases in the appellate courts help to illustrate the point that equitable relief is designed to be broader than traditional or separate relief, and that delay due to fear, intimidation, fraud, or ignorance brought on by the foregoing, is itself an equitable factor.²⁷ In each case summarized below, there was a reason why the innocent spouse did not request relief within the two-year period. Either her husband was taking care of the tax liability, or he told her that he would do so, or he did not tell the innocent spouse about the liability in the first place. In another case, an innocent spouse was intimidated by her husband until they divorced. The point is not just that relief would have been available on the merits but for delay, but that the delay itself was indicative of the spouse's innocence.

Ms. Lantz's Husband Had Advised the IRS that She Was an Innocent Spouse

Cathy Marie Lantz filed a joint return for 1999 with Richard Chentnik, a dentist who, as it turned out, was engaged in Medicare fraud. In 2000, Dr. Chentnik was arrested and subsequently convicted and sent to prison. In 2002, the IRS assessed a deficiency of several hundred thousand dollars on the 1999 joint return due to the fraud. In 2003, the IRS sent letters to the couple that proposed a levy and constituted the first collection activity.²⁸ From prison, Dr. Chentnik advised Ms. Lantz that he would handle communication with the IRS. In 2004, the IRS issued notices to Dr. Chentnik, who had "characterized petitioner [Ms. Lantz] as 'the innocent spouse,'" indicating that the joint liability "should be moved into currently noncollectible status."²⁹ Later in 2004, Dr. Chentnik was released to a halfway house

²⁴ In view of such circumstances, RRA 98 § 3201(d), required the IRS to send a separate notice to each individual spouse filing a joint return. Nevertheless, the Committee was apprised of issues beyond those that separate notices could resolve. For instance, another witness statement was that when collection activity occurred, "I called my former husband about all that had taken place and he assured me that he would take care of the problem. I still trusted him, since he was the one who handled all our finances while we were married." Thus, an innocent spouse's misplaced reliance on her husband was a reason for delay. Sen. Comm. on Finance, *IRS Restructuring Hearings*, 105th Cong., 2nd Sess. 149 (Jan. 28-29; Feb. 5, 11 & 25, 1998).

²⁵ See Rev. Proc. 2000-15, 2000-1 C.B. 447, *superseded by* Rev. Proc. 2003-61, 2003-2 C.B. 296 (containing parallel provisions).

²⁶ See Treas. Reg. §§ 1.6015-4(c), -5(b)(1), 67 Fed. Reg. 47,278 (July 18, 2002).

²⁷ See *Hall*, slip op. at 12 (stating where "a spouse is prevented from acting by fear, intimidation, or fraud, an administrative procedural hurdle would eliminate consideration of relief").

²⁸ See *Lantz*, 132 T.C. at 132 (stating these "letters conformed with the notice requirements of section 6330").

²⁹ *Lantz*, 132 T.C. at 132-33.

Unlimit Innocent Spouse Equitable Relief

where he passed away. In 2005, the IRS applied an overpayment by Ms. Lantz against the 1999 liability. In 2006, Ms. Lantz filed Form 8857, *Request for Innocent Spouse Relief*, which the IRS denied as late.³⁰

Ms. Mannella's Husband Had Not Shared IRS Notices with Her

From 1996 through 2000, Denise and Anthony Mannella filed joint returns on which they did not pay the tax. On June 4, 2004, the IRS sent the couple “notice[s] of intent to levy.”³¹ Mr. Mannella signed the certified mail receipts but did not share the notices with Ms. Mannella.³² On November 1, 2006, Ms. Mannella filed Form 8857, but the IRS denied her request as several months late.

Ms. Hall's Husband Was Legally Obligated to Pay Their Joint Liability

In 1998 and 2001, Audrey Marie and Etheridge Hall filed joint returns but did not pay all of their tax. In 2003, they divorced under a decree that obliged Mr. Hall to pay their joint liabilities. On July 6, 2004, the IRS “initiated collection activity . . . by issuing an intent to levy notice.”³³ On August 1, 2008, Ms. Hall requested innocent spouse relief, which the IRS denied as untimely, although the IRS agreed she would be entitled to equitable relief on the merits.³⁴

Ms. Coulter Was Intimidated by Her Husband

Heather Coulter (Hoyt) filed a joint return with Kevin Hoyt for 2001. On August 31, 2004, the IRS sent Ms. Coulter a notice of intent to levy to collect unpaid tax on the return.³⁵ On April 15, 2008, Ms. Coulter requested innocent spouse relief, which the IRS denied as late, but still stipulated that she otherwise would be entitled to equitable relief on the merits.³⁶ Ms. Coulter said she had not filed a timely request because “I was still married and had I filed an innocent spouse claim at that time it would have made an already volatile living situation much worse for my children.”³⁷

³⁰ See *Lantz*, 132 T.C. at 133.

³¹ *Mannella*, 132 T.C. at 197, 199 (stating “issuance of a notice of intent to levy under section 6330 is a collection activity”); see also Treas. Reg. § 1.6015-5(b)(2).

³² Even though RRA 98, § 3201(d) requires a separate notice to each individual spouse filing a joint return, as a practical matter, a recipient of mail at an address can sign certified mail receipts on behalf of the household. In any case, the Tax Court assumed that Ms. Mannella did not actually receive notice. See *Mannella*, 132 T.C. at 199-200.

³³ *Hall*, slip op. at 3.

³⁴ While the Tax Court did not specifically set forth factual findings as to whether Mr. Hall failed to satisfy his divorce decree obligation to pay the joint tax liabilities, as a legal matter, a divorce decree obligation is a factor in determining equitable relief. See *Hall v. Comm’r*, 135 T.C. No. 19 (Sept. 22, 2010); see also Rev. Proc. 2003-61, § 4.03(2)(a)(iv), 2003-2 C.B. at 298 (considering whether “the nonrequesting spouse has a legal obligation to pay the outstanding income tax liability pursuant to a divorce decree or agreement”).

³⁵ The facts stipulated by both parties in *Coulter v. Comm’r*, on which the Tax Court entered a Decision in Docket No. 1003-09, are reflected in Brief for the Appellant 4, No. 10-680 (2d Cir.), which refers to “a notice of intent to levy and of her right to a collection-due-process (CDP) hearing before such levy under § 6330 of the Code with respect to unpaid tax due for 2001.”

³⁶ See Brief for the Appellant 9.

³⁷ Petition ¶ 1, T.C. Docket No. 1003-09.

Unlimit Innocent Spouse Equitable Relief

RRA 98 Was Not Ambiguous

When Congress imposed a statute of limitations in two provisions but not in the third provision within the same section, the omission was affirmative.³⁸ Although precedents uphold regulatory limitation under silent statutes,³⁹ they are not on point because the relevant section of RRA 98 was not silent on the two-year period. Ever since enactment of the 1971 innocent spouse statute, the effective statute of limitation had been the underlying one for collection of tax.⁴⁰ Nevertheless, in the appellate cases, the IRS argues essentially that Congress did not preclude regulatory promulgation of a limit.⁴¹ As a matter of statutory construction, it would be possible to dismiss this argument, but the regulation may fall even on its own merits.

The Regulatory Period Is Not Reasonable

As stated above, an affirmative omission, what the Tax Court majority called “audible silence,” does not result in an ambiguous statute.⁴² To the extent that the lack of express preclusion of a regulatory limit may be perceived as creating ambiguity, the question is whether the regulation is a reasonable interpretation.⁴³ Here the regulation is not a reasonable interpretation because it forecloses a class of requests that equitable relief was designed to reach, namely those in which an innocent spouse delayed a request for relief upon being misled or intimidated by a joint filer.⁴⁴

In a case where the tax law authorized the IRS to prescribe the “manner” of a claim, leading to a regulation that contained a time limit, an appellate court has upheld IRS regulatory authority.⁴⁵ Here, however, the time-bar exceeded a procedural prescription of time or manner because it precluded a substantive kind of request.⁴⁶ Moreover, an innocent spouse equitable request, which may encompass an underpayment as well as an understatement, is more like a defense against federal tax collection than a claim of the type foreclosed by a statute of limitations.⁴⁷

³⁸ See *General Motors Corp. v. U.S.*, 496 U.S. 530, 538 (1990); *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (stating “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).

³⁹ See, e.g., *Withey v. Perales*, 920 F.2d 156, 159 (2d Cir. 1990) (stating that “Congress frequently fails to address the issue of a limitations period”).

⁴⁰ *But see Lantz*, 607 F.3d at 482 (stating “the fact that Congress designated a deadline in two provisions of the same statute and not in a third is not a compelling argument that Congress meant to preclude the Treasury Department from imposing a deadline applicable to cases governed by that third provision”).

⁴¹ See *Mannella*, No. 10-1308 (3d Cir.) Brief for the Appellant 36.

⁴² *Lantz*, 132 T.C. at 138.

⁴³ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁴⁴ *Contra Lantz*, 607 F.3d at 481 (upholding administrative position because “regulations issued pursuant to authority delegated by Congress must be upheld unless unreasonable”).

⁴⁵ See *Swallows Holding, Ltd. v. Comm’r*, 515 F.2d 162 (3d Cir. 2008), *vacating* 126 T.C. 96 (2006).

⁴⁶ See *Hall*, slip op. at 13 (stating that the invalidated regulation “has the substantive effect of making one circumstance, the time of the claim, the only relevant factor”).

⁴⁷ See Patrick J. Smith, *Gaps in the Seventh Circuit’s Reasoning in Lantz*, Tax Notes (Aug. 24, 2010).

Unlimit Innocent Spouse Equitable Relief

By comparison, under a federal statute that authorized an administrative agency to designate placement of certain prisoners considering five factors, a regulation purported to place prisoners in a halfway house for a certain period at the end of their sentences. Appellate courts invalidated this regulation because designation solely based on time served eviscerated consideration of the five prescribed factors.⁴⁸

In the case of an innocent spouse, the Treasury Regulation eviscerated consideration of equitable factors by time-barring all cases after two years. Moreover, a delay may be indicative of fear, intimidation, fraud, or ignorance due to abuse, which even the IRS counts as a factor that should be considered in determining equitable relief.⁴⁹

A Statute of Limitations Is Inappropriate to Equitable Relief

Legislative history, typical fact patterns, and regulatory deference do not support imposition of the two-year period on equitable relief. Additionally, the logic underlying related common-law doctrines and regulatory provisions leads to the conclusion that a statute of limitations should not apply.

In 2006, the National Taxpayer Advocate recommended legislation to clarify the availability of equitable relief beyond the two-year period. A logical basis for the recommendation, by analogy to common law doctrines, was that a taxpayer who has a claim against a third party may obtain relief from tax liability as long as the IRS collection statute remains open.⁵⁰ That is, the statutory scheme that was “audibly silent” on the two-year period with respect to equitable relief incorporates the logic of the doctrines of equitable recoupment and setoff, given that an innocent spouse necessarily has a claim against a joint filer.

Another relevant doctrine is equitable tolling.⁵¹ Generally, equity may toll the running of a period of limitations as long as the latter seeks to protect a case-specific interest in timeliness rather than a systemic goal of facilitating the administration of claims.⁵² Naturally, equitable relief is case-specific because it proceeds from case-by-case requests from innocent spouses. When the IRS imposed the two-year period arguably to facilitate administration, the regulation exceeded statutory authority. Thus, equitable tolling could apply but for the invalidity of the limitation period. In any case, a purportedly systemic statute of limitations is inapposite to equitable relief.

⁴⁸ See *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007); *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006); *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005).

⁴⁹ See Rev. Proc. 2003-61, § 4.03(2)(b)(i), 2003-2 C.B. at 299.

⁵⁰ See National Taxpayer Advocate 2006 Annual Report to Congress 540.

⁵¹ See *Hall*, slip op. at 20 (Wells, J., concurring).

⁵² See *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130 (2008).

In fact, the number of equitable cases foreclosed by the two-year rule would be relatively low. Historically, tens of thousands of Forms 8857 are filed annually,⁵³ yet only hundreds or thousands of equitable requests per year have been precluded by the two-year rule.⁵⁴

Similarly, discretionary extensions of time to make certain tax elections are available under regulations that consider factors such as a taxpayer's good faith, reasonable reliance on professional advice, and any prejudice to the government's interest.⁵⁵ Even if these regulations do not specifically provide for innocent spouse requests,⁵⁶ they underscore the point that in equitable cases, the IRS should not apply a statute of limitations as such.

CONCLUSION

Allowance of equitable relief even after the two-year statutory period for traditional or separate relief would complete rather than undermine the legislative scheme.⁵⁷ As discussed above, Congress contemplated cases in which an innocent spouse might not lodge a request within two years. At the same time, an exception for equitable relief does not swallow the two-year rule because the substantive provisions are different.

The two-year regulatory period for filing a request for equitable relief, which the IRS continues to enforce despite the National Taxpayer Advocate's recommendation for a legislative amendment that would allow the filing of requests for equitable relief so long as the period for collection remains open and the Tax Court's invalidation, leaves innocent spouses in a quandary. Many requests for equitable relief filed after the two-year period cannot be resolved until the appellate courts rule, and thereafter, there may be divergent rules among circuits.

RECOMMENDATION

As a matter of law, the availability of equitable relief beyond the two-year period should be clarified by administrative, judicial, or legislative means.⁵⁸ As a matter of tax administration, this rule should apply uniformly to taxpayers across the country. In sum, a setting aside of the invalidated regulation would allow for effective and consistent implementation of the statutory scheme.

⁵³ See National Taxpayer Advocate 2005 Annual Report to Congress 329.

⁵⁴ The numbers of IRC § 6015(f) disallowed untimely claims in FY 2004-10 were 1,127, 377, 1,175, 1,752, 2,053, 2,396, and 1,555. E-mail from IRS Wage & Investment Division Compliance function (Dec. 7, 2010) (on file with TAS).

⁵⁵ See *Lantz*, 132 T.C. at 150 (Halpern, J., dissenting).

⁵⁶ See Treas. Reg. § 301.9100-0 *et seq.*

⁵⁷ *Contra Lantz*, 607 F.3d at 484 (stating "if there is no deadline in subsection (f), the two-year deadlines in subsections (b) and (c) will be set largely at naught because the substantive criteria of those sections are virtually the same as those of (f)").

⁵⁸ See 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, supra.*

Unlimit Innocent Spouse Equitable Relief

This page intentionally left blank.