UNITED STATES TAX COURT

BRENDA TAFT,	)	
	)	
Petitioner,	)	
v.	)	Docket No. 16003-14
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE HARVARD FEDERAL TAX CLINIC IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICUS[1]

The Harvard Federal Tax Clinic ("the Clinic") was established in the summer of 2015 to represent low-income taxpayers before the IRS and in the courts. Already, the Clinic has begun representing clients in the Tax Court, including clients with section 6015[2] relief cases pending in the Tax Court. The Clinic also advises taxpayers who are not yet in court as to the availability of section 6015 relief under their particular facts and how best to

[1] This brief was not written, in whole or in part, by counsel for any party, and no person or entity other than Harvard University has made a monetary contribution to the preparation and submission of this brief.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code.

act in accordance with those facts. While, so far, the Clinic has not had a client who is seeking a refund under section 6015(f) that would be denied under Reg. § 1.6015-4(b) on the grounds that relief was otherwise available to the taxpayer under section 6015(c), the Clinic reasonably anticipates that the issue will come up in client matters in the foreseeable future.

From 2007 until 2015, before he established the Clinic and became its Director, T. Keith Fogg was Professor of Law at Villanova School of Law and the Director of the Villanova Tax Clinic.

From 2003 until 2013, Carlton M. Smith, of counsel to the Clinic, was a Clinical Associate Professor of Law at the Benjamin N. Cardozo School of Law and the Director of the Cardozo Tax Clinic. He has since retired, but continues pro bono litigation.

In their combined experience of over 18 years as Directors of the Cardozo and Villanova Tax Clinics, Professors Fogg and Smith have, combined, represented almost 100 taxpayers who have come to their clinics seeking section 6015 relief and have advised those clients as to what relief was possible and what was not under both the statute and the regulations. As a result, they have considerable experience in the section 6015 area.

Further, Professor Smith, when at Cardozo, represented Heather Coulter in her case, Coulter v. Commissioner, Tax Court Docket No. 1003-

09, Second Circuit Docket No. 10-680, in the appeal that the government brought of her pro se Tax Court stipulated decision. In her case, the IRS stipulated that she would be entitled to section 6015(f) relief but for the fact that she filed her Form 8857 beyond the 2-year period provided for in Reg. § 1.6015-5(b)(1). After Lantz v. Commissioner, 132 T.C. 131 (2009), revd. 607 F.3d 479 (7th Cir. 2010), where the Tax Court first invalidated that provision of the regulations – and on which the stipulated decision was based – the government appealed Ms. Coulter's case the Second Circuit. Professor Smith fully briefed and argued her case challenging the regulation, but the case was dismissed by stipulation of the parties when the IRS abandoned enforcing the provision of the regulation in Notice 2011-70, 2011-2 C.B. 135. Accordingly, Professor Smith has familiarity with the history of the regulations under section 6015 and making challenges thereto. Professor Smith was also counsel or record in another Lantz-type case, Iljazi v. Commissioner, T.C. Summary Op. 2010-59.

In the several decades before 2007 in which he worked at the IRS, Professor Fogg litigated an innocent spouse case to opinion in this Court; Trimmer v. Commissioner, T.C. Memo. 1983-131 (involving former section 6013(e) relief); and also supervised other attorneys in trying and settling innocent spouse cases in this Court.

Finally, Professors Fogg and Smith submitted comments regarding proposed regulations under section 6402 that, inter alia, concerned the interaction of that proposed regulation with the authority to issue refunds under section 6015(f). See "Law Professors Suggest Changes to Proposed Regs on Filing of Credit, Refund Claims", Tax Notes Today, 2011 TNT 166-5 (Aug. 26, 2011) ; T.D. 9727, 80 FR 43949, 2015-32 I.R.B. 154 (preamble responding to their comments).

The Clinic has read petitioner's brief, and while the Clinic generally supports what was said therein, the Clinic has additional reasons for disallowing the rule of Reg. § 1.6015-4(b). Further, the Clinic disagrees with the petitioner that 28 U.S.C. § 2401(a) has any applicability to the challenge to the regulation made under the Administrative Procedure Act.

ARGUMENT

I. Regulation § 1.6015-4(b)'s Prohibition of Refunds Under Section 6015(f) Where Relief is Available Under Section 6015(c) Fails the Chevron Tests.

The facts of this case are easily stated: Petitioner jointly filed a return with her then husband that omitted dividends from PUBLIX stock. He had worked for PUBLIX, but was fired for stealing overtime. He apparently spent the unreported dividends on himself and a girlfriend, not petitioner. The petitioner and her husband thereafter divorced. In the meantime, the

IRS sent a notice of deficiency adding the unreported income to the joint return and seeking about $1,500. The notice was not contested, so the taxes were assessed. A later year overpayment from a return filed only by the petitioner was applied by the IRS to fully pay the joint tax liability. Petitioner then filed a Form 8857 seeking refund of the amount that the IRS had taken to satisfy the joint deficiency. The Form 8857 was filed within two years after the first collection activity – the taking of the overpayment for the liability. The Form 8857 was also filed within the 2-year period after payment of the deficiency, so constitutes a timely refund claim under section 6511(a).

In this case, the IRS concedes that petitioner qualifies for relief under section 6015(c) because she was divorced at the time she filed the Form 8857, did not have actual knowledge of the dividends, and filed the Form 8857 within two years after the first collection activity. But, subsection (c) does not allow for refunds. Section 6015(g)(3).

Section 6015 (b) does allow for refunds, but respondent contends that relief is unavailable under that subsection because petitioner had reason to know of the understatement from the unreported dividends, since on prior joint tax returns the spouses had reported similar dividends from PUBLIX. Relief under section 6015(b) requires proof both that the taxpayer did not

have reason to know of the understatement and that it would be inequitable to hold the taxpayer liable for the deficiency.

The parties contest whether relief is available under subsection (b). Petitioner argues that relief is available under subsection (b) because petitioner did not have reason to know that her husband had received the dividends and because it would be inequitable to hold her liable for the deficiency. It is not clear whether the IRS contest the inequity issue. If the Court agrees with the petitioner that she is entitled to relief under subsection (b), there is no need for the Court to inquire into the validity of any regulation under subsection (f). However, if the Court finds that the petitioner did have reason to know of the unreported dividends and so does not qualify for relief under subsection (b), then the Court must move on to subsection (f). Subsection (f) relief also allows for refunds.

The Court's first issue under subsection (f) should be whether the petitioner qualifies for relief under that subsection because it would be inequitable for petitioner not to receive the refund. In a situation where, we assume, the Court has found that petitioner had reason to know of the unreported dividends (a negative factor), it is clear that relief would still be available to the petitioner because at least two factors (and possibly more) are positive factors that outweigh that knowledge factor: petitioner was

divorced when she applied for relief, and petitioner did not significantly benefit from the unreported dividends. Any other factors in this case would be either positive for relief or neutral.

The second issue under subsection (f) is that the petitioner must show that relief was not available under subsection (b) or (c). In the situation in which this Court might find that the taxpayer had reason to know of the understatement, clearly relief would not be available under subsection (b). However, respondent argues that relief was available under subsection (c) because he relieved petitioner of the deficiency under subsection (c) – even though there was no longer an unpaid deficiency to be relieved of at the time petitioner filed the Form 8857, so that relief, practically speaking, did nothing.

Respondent's position is based on Reg. § 1.6015-4(b), which provides: "This section may not be used to circumvent the limitation of § 1.6015-3(c)(1) (i.e., no refunds under § 1.6015-3). Therefore, relief is not available under this section to obtain a refund of liabilities already paid, for which the requesting spouse would otherwise qualify for relief under § 1.6015-3."

Should the Court find that it would be inequitable not to refund the deficiency, then the validity of this regulation must necessarily be

considered, as it would be this regulation's reading of the interaction of subsections (c) and (f) that precludes petitioner from getting a refund in this case.

In discussing the regulation, the petitioner's brief makes extensive reference to the Administrative Procedure Act. Amicus in no way disagrees with the petitioner in how that act has been violated herein. However, this Court need not reach those Administrative Procedure Act issues. Reg. § 1.6015-4(b) is invalid under either prong of the rules for judicial review of regulations set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

In Mayo Foundation for Med. Educ. & Research v. United States, 562 U.S. 44 (2011), the Supreme Court held that the tests for judicial review laid out in Chevron apply equally to general authority and specific authority tax regulations. Under Chevron Step One, a regulation is invalid if Congress has already spoken unambiguously on the matter. If Congress has not so spoken, then Chevron Step Two permits an agency, in its regulations, to choose among reasonable interpretations of the statute, but not choose unreasonable interpretations.

A. Application of Chevron Step One to This Case

Reg. § 1.6015-4(b) fails Step One of Chevron because it creates a barrier to Mrs. Taft's ability to receive a refund when Congress clearly spoke to allow refunds to taxpayers seeking relief under section 6015(f). This Court has already instructed the IRS about another attempt to create barriers to relief under subsection (f) that Congress did not adopt.

In Lantz, for purposes of applying Chevron Step One, this Court recognized that Congress may speak by its silence. The issue in Lantz was the validity of the regulatory addition of a 2-year period after the commencement of collection activities for seeking relief under section 6015(f). This Court wrote:

> To be eligible for relief under section 6015(b) or (c), the statute explicitly provides that the requesting spouse must elect relief not later than the date that is 2 years after the date the Secretary has begun collection activities with respect to the individual making the election. Sec. 6015(b)(1)(e) and (c)(3)(B). However, there is no such limitation in section 6015(f). '"It is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another'". City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 338 (1994) (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993)). We find that by explicitly creating a 2-year limitation in subsection (b) and (c) but not subsection (f), Congress has "spoken" by its audible silence. Because the regulation imposes a limitation that Congress explicitly incorporated into subsection (b) and (c) but omitted from subsection (f), it fails the first prong of Chevron.

Lantz, 131 T.C. at 138-139.

For similar reasons, Reg. § 1.6015-4(b) is invalid under Chevron Step One. Section 6015(g)(3) precludes credits or refunds being allowed "as a result of an election under subsection (c)". No provision of section 6015 explicitly precludes credits or refunds as a result of a request for relief under subsection (f). Therefore, Congress has spoken by its silence, and there is no ambiguity that the IRS may remedy by a regulation prohibiting credits or refunds as a result of a request for relief under subsection (f).

B. Application of Chevron Step Two to This Case

Even if this Court finds that Reg. § 1.6015-4(b) is valid under Chevron Step One because Congress had not spoken by its silence, would be invalid under Chevron Step Two. The rationale of the regulation is that there is a circumvention of the no refund rule of subsection (c) if relief in the form of a refund were to be allowed under subsection (f) when a taxpayer could otherwise qualify for relief under subsection (c).

The IRS raised a similar circumvention rationale to defend the regulation involved in Lantz. That circumvention rationale was accepted by the Seventh Circuit in Lantz, but was rejected by the Tax Court in Hall v. Commissioner, 135 T.C. 374 (2010), where this Court wrote:

> The relationship of subsections (b) and (c) to subsection (f) is fundamental to the issue before us. The Court of Appeals found that without a 2-year statute of limitations for subsection (f), the limitations for subsections (b) and (c) are made ineffective. Lantz v.

> Commissioner, 607 F.3d at 484. Therefore, the Court of Appeals held that silence in subsection (f) did not support a different rule but rather that the context of subsection (f) after subsections (b) and (c) required the same rule. Id. at 484-485. We believe the Court of Appeals' opinion overlooks the very specific and different purpose of subsection (f).
>
> As applied by the IRS in Rev. Proc. 2003-61, 2003-2 C.B. 296, subsection (f) requires a decision about whether collecting a joint liability yields an inequitable result. The revenue procedure and this Court have consistently looked beyond the taxable year at issue to apply subsection (f). The facts relevant to subsections (b) and (c) are primarily those of the taxable year in issue and whether the party claiming relief is liable for a joint deficiency. In the case of subsection (f), relief from the deficiency under subsections (b) and (c) is not available and underpaid taxes already assessed on the basis of the joint return as filed are possibly subject to relief. Rev. Proc. 2003-61, secs. 4.01(2), 4.02, 4.03, 2003-2 C.B. at 297-298. While facts from the year the return was filed may be relevant in applying subsection (f), those facts are not exclusive. The application of subsection (f) also depends on current economic hardship and marital circumstances after the year of the joint liability. Id. sec. 4.03(2)(a)(i) and (ii), 2003-2 C.B. at 298. Such circumstances are to be weighed together with the events during the year in question, and no one factor is determinative. Id. The consideration of contemporaneous circumstances distinguishes subsection (f) analysis from the taxable year factual analysis required under subsections (b) and (c).

Hall, 135 T.C. at 380-381 (footnote omitted).

In the case of Reg. § 1.6015-4(b), the stated IRS concern is that the no refund limitation of subsection (c) would be circumvented. But, there would be no circumvention, for several reasons:

First, as in Hall, subsection (f) relief differs from subsection (c) relief. Subsection (c) relief is based only on circumstances existing at the time the

return was filed (expect for the possible qualification for subsection (c) relief by divorce or separation after the filing of the return). By contrast, subsection (f) relief is predicated on a number of facts that can change after the return is filed, such as financial hardship, ill health, abuse, and subsequent-return filing compliance.

Second, subsection (c) relief is designed to be quite easily obtained by a divorced or separated spouse. It requires only an election to separate liability, without any required proof that it would be inequitable to hold the spouse liable for the deficiency. For example, a spouse could gain relief under subsection (c) even though the spouse significantly benefited from the deficiency and would experience no hardship in paying the deficiency. Because spouses can get relief under subsection (c) without proof of inequity, Congress chose not to allow such spouses, merely by electing subsection (c) relief, also to obtain credits or refunds of taxes already paid. By contrast, to get a refund under subsection (f), a spouse must show it would be inequitable for the IRS to keep the overpayment. Thus, not every spouse who elects relief under subsection (c) can get a refund under subsection (f) if the regulatory limit on refunds under subsection (f) is declared invalid. Subsection (f) contains its own provision that prevents

taxpayers from receiving refunds by requiring the additional proof of inequity.

Third, subsection (f) relief is predicated on a spouse not being able to get relief by an election under subsection (c). Because it does not allow for refunds, subsection (c) does not provide as complete relief as can be provided under subsection (f). In cases where the taxpayer is not seeking a refund under subsection (f), but only a reduced balance due, no one would argue that subsection (f) could not provide additional relief to that available under subsection (c). There is no reason why getting a refund under subsection (f) is any different from getting additional relief under (f) from a balance due where the relief under subsection (c) is incomplete. Even the IRS seems to acknowledge this. It recently proposed a replacement to Reg. § 1.6015-4(b). The proposed replacement reads:

> This section may not be used to circumvent the limitation of § 1.6015-3(c)(1). Therefore, relief is not available under this section to obtain a refund of liabilities already paid, for which the requesting spouse would otherwise qualify for relief under § 1.6015-3. See § 1.6015-1(k)(3). <u>If the requesting spouse is only eligible for partial relief under § 1.6015-3 (*i.e.*, some portion of the deficiency is allocable to the requesting spouse), then the requesting spouse may be considered for relief under this section with respect to the portion of the deficiency for which the requesting spouse was not entitled to relief.</u>

REG-134219-08, 80 F.R. 72649, 2015-49 I.R.B. 842, 856 (emphasis added). Relief from taxes on one's own income is not available under subsection (c),

but can be available under subsection (f). See § 4.01(7), Rev. Proc. 2013-34, 2013-2 C.B. 397.

Fourth, it is hard to argue that any practical relief is ever given under subsection (c) in cases where the tax deficiency as to which an election was made has already been fully paid, since subsection (c) precludes refunds. In a situation where only a refund is sought, therefore, one cannot get relief under subsection (c), so only relief under subsection (b) or (f) is possible. It is illogical to preclude relief under subsection (f) because non-existent relief under subsection (c) is "available".

Finally, Reg. § 1.6015-4(b)'s rule precluding subsection (f) relief in the form of a refund where a taxpayer qualified for relief under subsection (c) is totally inconsistent with the regulations' treatment of the situation where a taxpayer could simultaneously qualify for relief under subsections (b) and (c). If allowing a refund under subsection (f) in a situation where a taxpayer also qualifies for relief under subsection (c) would circumvent the no refund limitation of subsection (c), then allowing a refund under subsection (b) in a situation where a taxpayer also qualifies for relief under subsection (c) would similarly circumvent the no refund limitation of subsection (c). Yet the regulations under subsection (b) do not contain a similar limitation on refunds under subsection (b) where a taxpayer qualifies

for relief under subsection (c). Under subsection (f), a taxpayer must show inequity to qualify for a refund. Under subsection (b), a taxpayer must show both inequity and that he or she did not know or have reason to know of the understatement to qualify for a refund. It is hard to see how one situation should be treated differently from the other. And, the regulations make no attempt to justify their distinction of allowing refunds under subsection (b), but not under subsection (f), where a taxpayer also qualified for relief from any balance due under subsection (c). Thus, the disparate treatment alone under the regulations makes the rule under subsection (f) not a reasonable one for purposes of Chevron Step Two.

In sum, Reg. § 1.6015-4(b)'s limitation on refunds under subsection (f) where relief is otherwise available under subsection (c) is inconsistent with both the letter and purpose of the statute. Therefore, it fails Chevron Step Two.

II. 28 U.S.C. § 2401(a) Has No Applicability to the Administrative Procedure Act Challenge in this Case.

In her brief, petitioner is apparently concerned that, since the regulation involved was adopted in 2002, and her challenge to the regulation is being made more than 6 years later, 28 U.S.C. § 2401(a) might preclude consideration of an Administrative Procedure Act challenge to the

regulation. Therefore, she requests equitable tolling of the 6-year period in that section.

28 U.S.C. § 2401(a) provides, in relevant part: "Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

This section has no applicability to the Administrative Procedure Act challenge raised by the petitioner in this case. Under the jurisdictional grant given to this Court under section 6015(e)(1)(A), since petitioner is adversely affected by the regulation's application, she is accorded standing to contest its validity on any ground. See Hall, supra, Tax Court Docket No. 30685-08 (filed December 22, 2008), involving a section 6015(e)(1)(A) case invalidating under Chevron a similar regulation under section 6015 adopted in 2002 by T.D. 9003, 67 FR 47278, 47294 (July 18, 2002) – more than 6 years earlier. It is true that in the past, including in Hall, most regulations challenged in this Court were not specifically challenged under the Administrative Procedure Act, but under other authorities. However, this Court has never precluded regulatory challenges simply because they were made in cases before this Court filed more than 6 years after the regulations were adopted. See Swallows Holding, Ltd. v. Commissioner, 126 T.C. 96

(2006), revd. 515 F.3d 162 (3d Cir. 2008) (in a case brought under section 6213(a) in 2002, Tax Court invalidated under Chevron and National Muffler Dealers Assn. v. United States, 440 U.S. 472 (1979), a regulation promulgated in 1990).

Section 6015(e)(1)(A) contains its own 90-day filing period for an action. Because that provision contains a more narrowly-tailored grant of authority, it applies in lieu of the more general, catch-all federal statute of limitations at 28 U.S.C. § 2401(a). Cf. Detroit Trust Co. v. United States, 131 Ct. Cl. 223, 130 F. Supp. 815 (1955) (because tax refund suit was filed within 2 year of administrative refund claim disallowance, the 6-year general statute of limitations at 28 U.S.C. § 2501 did not apply; this was true even though suit could have been brought almost 30 years earlier, after expiration of 6 months from time of filing of administrative refund claim).

III. If the Court Uses Rev. Proc. 2013-34 to Decide the Inequity Issue, Then the Court Should Not Follow the Part of the Significant Benefit Discussion Therein That is Contrary to the Court's Precedent.

In her brief at page 13, petitioner argues that the Court should view any non-APA-compliant guidance as nothing more than the Government's litigating position; thus, the Court should ignore Rev. Proc. 2013-34. Amicus disagrees.

In Pullins v. Commissioner, 136 T.C. 432 (2011), this Court made clear that the predecessor of Rev. Proc. 2013-34 was entitled to some deference, though it was not entitled to the force of law. The Court wrote: "Revenue Procedure 2003-31, supra, lists the factors that IRS employees should consider, and the Court consults those same factors when reviewing the IRS's denial of relief." Id. at 439. It appears proper for the Court to give Rev. Proc. 2013-34's inequity factor analysis the deference accorded in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.)

This Court has already noted that one factor within Rev. Proc. 2013-34 – significant benefit – is inconsistent with this Court's precedent, however, and should be ignored. This factor may come into play if this Court does not agree with the petitioner and consults the Revenue Procedure

inequity factors. The omitted dividend income in this case was modest (it only resulted in a deficiency of about $1,500) – an amount that might seem small to some. The facts also show that the petitioner did not receive any benefit from the unreported dividends. Section 4.03(2)(e) states, in part:

> If the amount of unpaid tax or understatement was small such that neither spouse received a significant benefit, then this factor is neutral. Whether the amount of unpaid tax or understatement is small such that neither spouse received a significant benefit will vary depending on the facts and circumstances of each case.

Recently, in Hollimon. V. Commissioner, T.C. Memo. 2015-157 at p. *13, this Court rejected these sentences of the Revenue Procedure, noting that "this Court has held that this factor weighs in favor of relief if the requesting spouse received little or no benefit." Consistent with Hollimon, the Court should consider the petitioner's lack of benefit to be a factor favoring relief, regardless of whether the omitted income was "large" or "small".

CONCLUSION

In sum, amicus' primary argument is that to the extent that the regulation precludes petitioner from obtaining a refund under section 6015(f) because she might have qualified for relief under section 6015(c), the regulation is invalid.

Respectfully submitted,

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Dated: March __, 2016

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served on Kimberly A. Daigle and Kenneth Allan Hochman, Esqs., counsel for respondent, by mailing the same on March __, 2016, in a postage-paid wrapper addressed to them at IRS Counsel's Office, 1000 South Pine Island Road, Suite 300, Royal Palm One, Plantation, FL 33224.

This is to further certify that a copy of the foregoing paper was served on Joseph A. DiRuzzo, III and Christopher J. Rajotte, Esqs., counsel for petitioner, by mailing the same on March __, 2016, in a postage-paid wrapper addressed to them at Fuerst Ittleman David & Joseph, 32nd Floor, 1001 Brickell Bay Drive, Miami, FL 33131

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