UNITED STATES TAX COURT

BRENDA TAFT, Petitioner	:	
	:	Case No. 16003-14
v.	:	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	:	

PETITIONER BRENDA TAFT'S OPENING TRIAL BRIEF & MOTION TO INVALIDATE 26 C.F.R. § 1.6015-4

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

PROPOSED FINDINGS OF FACT & CREDIBILITY DETERMINATIONS

1. All of the facts stipulated to by the Parties found at the stipulation of facts (numbered paragraphs 1-19) and supplemental stipulation of facts (numbered paragraphs 20-21).
2. Exhibits 1-J through 5-J.
3. Petitioner is no longer married to Frank Taft. Respondent's Answer to the Petition at 1st paragraph, 8th sentence.
4. Frank Taft is also known as "Rick Taft." Tr. 11:10-11.
5. Petitioner and Mr. Taft were married in 1981. Tr. 27:9-12.
6. Petitioner separated from Mr. Taft in August 2011. Tr. 11:15-17
7. Petitioner's divorce from Mr. Taft was finalized in January 2013. Tr. 34:11-21. *See also* Ex. 3-J.
8. Petitioner is educated as, and is employed as, a registered nurse. Tr. 20:13-19.
9. Petitioner has no background in taxes or accounting. Tr. 36:24-37:6.
10. Petitioner has no background and/or experience in preparation of legal form(s) and/or return(s) with the federal government or the State of Florida. Tr. 37:11-15.
11. Petitioner paid the expenses of the family and for her children. Tr. 20:20-23.
12. Petitioner was in charge of the family finances, which did *not* include investing in stocks or bonds. Tr. 37:7-10.

13. The factual basis for the deterioration of the Petitioner's marriage included that Mr. Taft was financially irresponsible (irresponsible spending habits). Tr. 11:21-25.

14. Mr. Taft had approximately $250,000 in Publix[1] stock, which was titled in his name. Tr. 12:1-9. *See also* Ex. 3-J at § E, ¶ 2.

15. Mr. Taft worked for Publix for over 25 years. Tr. 43:23-15.

16. Mr. Taft was fired from Publix in 2009. Tr. 36:11-18.

17. Mr. Taft was fired from Publix for theft of company time. Tr. 44:1-4.

18. Petitioner believed that Mr. Taft's Publix stock was only available for Mr. Taft's retirement and that Mr. Taft could not access the stock until he (Mr. Taft) retired. Tr. 34:5-10.

19. Mr. Taft concealed his liquidation of his Publix stock from the Petitioner. Tr. 38:10-13.

20. Petitioner only became aware (after the 2010 income tax return bearing Petitioner's and Mr. Taft's names was filed) that Mr. Taft had liquidated his Publix stock because the liquidation was disclosed during Petitioner's divorce litigation (which started in August 2011). Tr. 42:8-16.

21. Petitioner and Mr. Taft had employed the same tax return preparer (Mr. Fred Yankee) since the 1980s. Tr. 27:18-28:6.

[1] The Court can take judicial notice under Fed. R. Evid. 201 that Publix is a supermarket chain. *See* www.publix.com (last accessed Feb. 15, 2016).

22. The 2010 income tax return bearing Petitioner's and her husband's names was timely filed (i.e., not on extension). Tr. 35:13-19.

23. Petitioner did not physically sign the 2010 income tax return before it was filed. Tr. 12:18-23.

24. Petitioner did not sign any document giving authorization for anyone to file the 2010 income tax return. Tr. 13:3-6.

25. Prior to 2010, all of the Petitioner's income tax returns were filed conventionally (paper filing). Tr. 13:7-12.

26. Prior to the 2010 income tax return, Petitioner always signed the income tax return; her husband did not sign for her. Tr. 14:3-8.

27. During the course of the marriage Mr. Taft would mail their joint income tax return to the IRS. Tr. 28:17-20.

28. Petitioner never gave Mr. Taft authority to sign the 2010 income tax return for her. Tr. 14:9-12.

29. Petitioner gave Mr. Taft her Form W-2 for tax year 2010 so that the tax return preparer could prepare the 2010 Form 1040. Tr. 14:13-25.

30. Petitioner was expecting that the 2010 Form 1040 would be given to the Petitioner by Mr. Taft for the Petitioner's signature, which did not occur. Tr. 14:19-15:2.

31. Petitioner asked Mr. Taft about their 2010 income tax return, which Mr. Taft told the Petitioner that "he took care of it." Tr. 37:16-38:3.

32. The 2010 income tax return bearing Petitioner's and Mr. Taft's names was electronically prepared (Tr. 29:10-12) and electronically filed (Tr. 30:6-7; Tr. 30:15-18).

33. Petitioner and Mr. Taft had separate bank accounts. Tr. 15:3-6.

34. Petitioner did not have access to Mr. Taft's bank accounts and *vice versa*. Tr. 15:7-12.

35. Petitioner and Mr. Taft had separate bank accounts for many years, possibly as long as ten years before the tax year at issue (i.e., 2010). Tr. 15:20-25.

36. When Mr. Taft moved out of the martial abode he resided at 3004 Quantum Lakes Drive; the Petitioner never lived at the Quantum Lakes Drive residence. Tr. 16:2-5.

37. Petitioner never personally received mail at the Quantum Lakes Drive residence. Tr. 16:6-8.

38. Petitioner never gave Mr. Taft authorization to forward any of her mail to Quantum Lake Drive residence. Tr. 16:10-12.

39. Petitioner did not personally receive Exhibit 4-J from the IRS. Tr. 39:12-17.

40. Petitioner did not receive Exhibit 4-J because it was sent to the Quantum Lakes Drive residence. Tr. 39:18-22.

41. Petitioner never received a 1099 DIV from Publix. Tr. 16:13-16.

42. Petitioner never went through (i.e., opened and/or looked at) Mr. Taft's mail and *vice versa*. Tr. 16:20-24.

43. Petitioner was unaware that Mr. Taft had received a 1099 DIV from Publix for calendar year 2010. Tr. 16:25-17:3.

44. Petitioner was unaware that Publix issued Mr. Taft a dividend in 2010. Tr. 17:4-6; Tr. 43:4-9.

45. Petitioner believed that Mr. Taft was not receiving dividends from Publix in 2010 because Mr. Taft was fired from Publix in 2009. Tr. 43:4-22.

46. Petitioner had no ability to control Mr. Taft's Publix stock during Mr. Taft's lifetime. Tr. 20:2-4.

47. Petitioner was a credible witness.

APPELLATE VENUE

Appellate venue is controlled by 26 U.S.C. § 7482(b), which provides that, in certain limited circumstances, venue for appellate review is in the Circuit where the appellant/petitioner (in the Tax Court proceeding) is located at the time of the filing of the petition to the Tax Court. *See* 26 U.S.C. § 7482(b)(1)(A)-(F). However, as the D.C. Circuit recognized in *Byers v. C.I.R.*, 740 F.3d 668, 675 (D.C. Cir.) *cert. denied,* 135 S. Ct. 232 (2014), *reh'g denied,* 135 S. Ct. 887 (2014), "[t]he statute's plain language says that, '[i]f for any reason no subparagraph of the preceding sentence applies, then [Tax Court] decisions may be reviewed by the Court of Appeals for the District of Columbia.'" (quoting 26 U.S.C. § 7482(b)(1) (flush language)). Here, none of the subparagraphs under 26 U.S.C. § 7482(b)(1) apply and thus this case is controlled by D.C. Circuit precedent.

PROCEDURAL HISTORY

The Service assessed additional tax in the amount of $1,468.00 plus interest and a penalty for the 2010 taxable year. In 2012 the Petitioner's income tax return reported a refund due to her in the amount of $5,261.00, of which $1,570.40 was offset against the outstanding amount owed for 2010.

On April 24, 2013, Petitioner requested innocent spouse relief from the Service.

On April 22, 2014, the IRS Office of Appeals issued the Petitioner a "Final Appeals Determination" allowing the Petitioner innocent spouse relief under 26 U.S.C. § 6015(c), but denied the Petitioner any refund. Ex. 1-J. The Determination also

concluded that the Petitioner did not quality for relief under § 6015(b), because, allegedly, the Petitioner was aware of her ex-spouse's income that was not reported on the joint 2010 Form 1040 bearing Petitioner's and her husband's names. *Id.* According to the Determination "[t]o qualify for relief under 26 U.S.C. § 6015(b), you must establish that you had no reason to know, at the time the return was filed, of your spouse's unreported income. (Taxpayers who qualify for relief under IRC § 6015(b) may receive a refund of their eligible payments)." *Id.* However, the Determination made no mention of, let alone a proper determination of, whether the Petitioner was entitled to relief under § 6015(f). *See id.*

In turn, the Petitioner timely filed her Petition with this Court contesting Respondent's Determination.

On November 19, 2015, Respondent filed his pretrial memorandum, where Respondent takes a new position, i.e. that Petitioner is entitled to § 6015(c) relief, since Petitioner did not have actual knowledge of the unreported dividends, but Petitioner is not entitled to § 6015(b) relief, since Petitioner did have reason to know of the underpayment due to a history of reporting dividends in prior years.

On December 14, 2015, the undersigned entered his appearance as *pro bono* counsel for the Petitioner. Also on December 14th the case was tried before Judge Vasquez in Miami, Florida.

APPLICABLE LAW

I. STANDARD OF REVIEW

Both the scope and standard of this Court's review in 26 U.S.C. § 6015 cases is *de novo*. *Porter v. Comm'r*, 132 T.C. 203, 210 (2009).

II. STATUTORY PROVISION - SECTION 6015

26 U.S.C. § 6015 was added to the Internal Revenue Code by Section 3201 of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 (112 Stat. 685) (1998), effective for any joint liability that was unpaid as of July 22, 1998, and for any liability that arises after July 22, 1998. 26 U.S.C. § 6015 was amended by Section 313 of the Community Renewal Tax Relief Act of 2000, which was enacted as part of the Consolidated Appropriations Act, 2001, P.L. 106-554 (114 Stat. 2763)(2000).

26 U.S.C. § 6015 allows for relief from joint and several liability on joint income tax returns. "There are three grounds for relief under section 6015, set out respectively in subsections (b), (c), and (f) thereof." *Mitchell v. Comm'r*, 292 F.3d 800, 802 (D.C. Cir. 2002).

A. Subsection (b) Relief

26 U.S.C. § 6015(b)(1) allows for relief when the spouse claiming innocent spouse relief "establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement," *id.* at (b)(1)(C), and "taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement," *id.* at (b)(1)(D). This Court has recognized that, "[i]n general,

subsection (b) provides full or apportioned relief from joint and several liability for understatements of tax on a return…." *Sapp v. Comm'r*, T.C. Memo. 2015-143.

B. Subsection (c) Relief.

"Unlike subsection (b), subsection (c) has no statutory antecedent …. subsection (c) was enacted in 1998 to liberalize and expand innocent spouse relief." *Mitchell,* 292 F.3d at 804 (citing *Cheshire v. Comm'r,* 115 T.C. 183, 189 (2000)). "[S]ubsection (c) provides apportioned relief in respect of a deficiency to taxpayers who are divorced or separated." *Sapp, supra* at 2.

C. Subsection (f) Relief

"Subsection (f) provides in full as follows: Under procedures prescribed by the Secretary, if-(1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either); and (2) relief is not available to such individual under subsection (b) or (c), the Secretary may relieve such individual of such liability." *Mitchell,* 292 F.3d at 806 (citing 26 U.S.C. § 6015(f)). *See also Sapp, supra* (discussing subsection (f)). "[U]nder section 6015(f)(2), the equitable remedy is available only if * * * relief is not available to such individual under subsection (b) or (c). That is, by its very nature the equitable relief under subsection (f) is to be broader than relief under subsection (b) or (c)." *Lantz v. Comm'r*, 132 T.C. 131, 139 (2009) (internal quotations omitted).

III. INNOCENT SPOUSE REGULATIONS

A. Notice of Proposed Rulemaking

A notice of proposed rulemaking (REG-106446-98) was published in the Federal Register, *see* 66 FR 3888-01 (January 17, 2001), with minor subsequent corrections, *see* Relief From Joint and Several Liability, Correction, 66 FR 17130-02 (March 29, 2001).

Insofar as 26 U.S.C. § 6015(f) is concerned, The Treasury Department in its notice of proposed rulemaking (REG-106446-98), stated that: "section 6015(f) may not be used to circumvent the 'no refund' rule of section 6015(c). Therefore, equitable relief under section 6015(f) is not available to refund liabilities already paid, for which the requesting spouse would otherwise qualify for relief under section 6015(c)." Relief From Joint and Several Liability, 66 FR 3888-01 (January 17, 2001). Further, the Treasury Department was explicit that:

> It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to the regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Relief From Joint and Several Liability, 66 FR 3888-01 (January 17, 2001).

B. Comments Submitted in Response to the Proposed Regulation & Final Agency Rulemaking

The comments to the proposed regulations are not available on www.regulations.gov because none of the comments submitted to the Treasury Department before 2008 have been uploaded to the website. As a result the undersigned issued a FOIA request on January 11, 2016 to the IRS requesting the

comments on REG-106446-98 (26 C.F.R. § 1.6015-1, *et seq.*). On January 15, 2016, the Legal Processing Division provided via email (Exhibit A) the undersigned with the comments, which are appended hereto as composite Exhibit B. Of particular relevance to this issues presented in this motion are the following comments:

Donald R. Williams, Esq. noted that the innocent spouse proposed regulations "incorporates by reference the equitable factors contained in Rev. Proc. 2000-15. This incorporation is improper. Rev. Proc. 2000-15 was not subject to public comment and other procedures governing the promulgation of regulations. Such a procedure is not in the public interest. The factors to determine equity should be specifically stated in the regulation." Ex. B at p. 78.

Mr. Williams goes on to comment that:

> Proposed Section 1.6015-4(a) states, "A requesting spouse who files a joint return for which a liability **remains unpaid** and who does not qualify for full relief under Sec. 1.6015-2 or 1.6015-3 may request equitable relief under this section." This is contrary to the wording of I.R.C. Section 6015(e)(3)(A) which clearly provides for refunds under the equitable relief provisions of subsection (f). As worded, no refund would be possible under subsection (f). This section should be reworded to state the conditions under which a refund is available under subsection (f).
>
> Proposed Section 1.6015-4 also states that refunds are not available under this section if granting such relief would circumvent Section [1.]6015-3. This interpretation is suspect due to the express provision contained in Section 6015(f) for relief when Section 6015(c) relief is not available.

Ex. B at p. 78 (emphasis in original).

Marjorie A. O'Connell, Esq. provided comments in the form of excerpts from *Divorce Taxation* Report Bulletin Number 51, including that:

> Equitable Relief. IRC § 6015(f) provides relief only to requesting spouses who do not qualify under IRC § 6015(b) or (c). This section is discretionary based on whether the Secretary finds that granting relief would be equitable. IRC § 6015(f) cannot be used to circumvent the "no refund" rule contained in IRC § 6015(c). "Therefore, equitable relief under section 6015(f) is not available to refund liabilities already paid, for which the requesting spouse would otherwise qualify for relief under section 6015(c)." This will result in too harsh a penalty in some cases. One may be able to avoid application of this rule, if the requesting spouse files quickly, perhaps early in the separation, before he or she can qualify for relief under IRC § 6015(c).

Ex. B. at p. 98.

C. The Final Rule

"Sections 1.6015–0 through 1.6015–9, Income Tax Regs., were published on July 17, 2002 (effective July 18, 2002), pursuant to a mandate from Congress to promulgate regulations pertaining to section 6015 in general under section 6015(h) and procedures concerning requests for equitable relief under section 6015(f) in particular." *Lantz v. C.I.R.*, 132 T.C. 131, 135 (2009) *rev'd on other grounds*, 607 F.3d 479 (7th Cir. 2010). However, yet again, the Treasury Department took the position that "section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to the regulations…" Relief From Joint and Several Liability, T.D. 9003, 67 FR 47278-01 (July 18, 2002).

1. The Preamble to the Final Rule & Response to Comments

In respect to the final regulations, specifically, in respect to proposed reg. § 1.6015-4, the Treasury Department stated, in full, that:

> Section 1.6015-4 of the proposed regulations provides the rules regarding equitable relief from joint and several liability under section 6015(f). *Section 1.6015-4(b) of the proposed regulations provides that relief under § 1.6015-4 is not available to circumvent the "no refund" rule of § 1.6015-3(c)(1). Several commentators suggested that this rule be removed.* Under Rev. Proc. 2000-15, refunds under section 6015(f) are generally limited to amounts paid pursuant to an installment agreement, on which the requesting spouse is not in default, from the date the claim for relief is filed until a final determination is made. The rule regarding installment payments is intended to encourage individuals to remain current on their installment agreements. Therefore, the Treasury and IRS determined that limited refunds would be appropriate to encourage such compliance. Section 6015(g)(3), however, precludes the allowance of a credit or refund under section 6015(c). *It would be inappropriate to circumvent the rule of section 6015(g)(3) by giving equitable relief in the form of a refund when the requesting spouse qualifies for relief under section 6015(c). Thus, the final regulations do not adopt this recommendation.*

Relief From Joint and Several Liability, T.D. 9003, 67 FR 47278-01 (July 18, 2002) (emphasis added).

2. The Text of the Final Rule

The text (subsection (b)) of the final rule provides that:

> 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.

26 C.F.R. § 1.6015-4(b).

And subsection (c) provides that:

> For guidance concerning the criteria to be used in determining whether it is inequitable to hold a requesting spouse jointly and severally liable under

> this section, see Rev. Proc. 2000–15 (2000–1 C.B. 447), or other guidance published by the Treasury and IRS (see § 601.601(d)(2) of this chapter).

26 C.F.R. § 1.6015-4(c).

IV. ADMINISTRATIVE PROCEDURES ACT – 5. U.S.C. §§ 500-596

A. Notice & Comment Rulemaking

General notice of proposed rulemaking shall be published in the Federal Register, 5 U.S.C. § 553(b), and

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Id. at § 553(c). *See also Altera Corp. & Subsidiaries v. C.I.R.*, 145 T.C. No. 3, 2015 WL 4522662, at *14 (T.C. July 27, 2015).

The notice and comment requirements of 5 U.S.C. § 553 "are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule." *Id.* at *15 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)). "Accordingly, there must be an exchange of views, information, and criticism between interested persons and the agency. *Id.* (quotations omitted). And "because the opportunity to comment is meaningless unless the agency responds to significant points raised by the public, an agency is required to respond to significant comments." *Id.* (citations and quotations omitted). But "the failure to respond to comments is

significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Id.* (internal citations, quotation, and brackets omitted).

B. Substantive Rules

Substantive (a/k/a legislative) rules "create rights, impose obligations, or effect a change in existing law". *Id.* (internal citation omitted). "[L]egislative rules, unlike interpretive rules, have the 'force of law.'" *Id.* (citing, *inter alia, Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–302 (1979)).

C. Judicial Review of Agency Decision Making – *State Farm*[2] Review

Under 5 U.S.C. § 706(2)(A), a court must "hold unlawful and set aside agency action, findings, and conclusions" that the court finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Altera, supra* at *15. "A court's review under this 'standard is narrow and a court is not to substitute its judgment for that of the agency.'" *Id.* (quoting *State Farm*, 463 U.S. at 43). "In reviewing an agency action a court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quotation and citation omitted). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,

[2] *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *State Farm,* 463 U.S. at 43).

"In examining an agency's explanation for issuing a rule a reviewing court 'may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Id.* at * 16 (quoting, in turn, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

D. Judicial Review of Agency Statutory Construction – *Chevron*[3] Review

This Court's review over Treasury Regulation is performed under *Chevron's* two step analysis. *Altera, supra* at *16. Under Step 1 "a court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (internal quotations and citations omitted). "The first prong of *Chevron* requires the Court to employ the traditional tools of statutory construction to try to determine the intent of Congress." *Lantz*, 132 T.C. at 138 (citing *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 123 (1987); *INS v. Cardoza–Fonseca,* 480 U.S. 421, 447–448 (1987)). "It is a central tenet of statutory construction that, when interpreting any one provision of a statute, the entire statute must be considered." *Fla. Country Clubs, Inc. v. Comm'r*, 122 T.C. 73, 79 (2004) *aff'd* 404 F.3d 1291 (11th Cir. 2005).

[3] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)

Under Step 2, "a court must defer to the agency's authoritative interpretation of an ambiguous statute unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Altera, supra* at *16 (internal quotations and citations omitted).

FACTS/RECORD EVIDENCE

Petitioner incorporates by reference the proposed findings of fact listed above at paragraphs 1 – 47. The 2010 income tax return does not have the Petitioner's handwritten signature on it. Ex. 2-J at p. 2.

The Hon. Martin Colin entered a "Final Judgment of Dissolution of Marriage" on January 22, 2013, in the case styled as *In re: The Marriage of Taft,* case no. 502011DR009354SBFX (15th Judicial Circuit in and for Palm Beach County, Florida). Ex. 3-J. Judge Colin made certain factual findings, including that:

> the Husband [Mr. Taft] has chosen to voluntarily terminate his employment, has engaged in an affair with another woman and has liquidated all of the parties savings/retirement funds for his own use. Further, the Court finds that the Husband has economically devastated the family as a direct result of this Husband's wasteful liquidation of the parties' savings. Most disturbing to the Court is the Husband's rapid spending of the parties savings in less than six (6) months' time.

Ex. 3-J at § C, ¶ 9. Mr. Taft's claim for alimony was denied by Judge Colin. Ex. 3-J at § C (flush language).

ARGUMENT

I. PETITIONER IS ENTITLED TO SUBSECTION (f) RELIEF

Under 26 U.S.C. § 6015(f), a taxpayer is able to obtain innocent spouse relief when it would be "inequitable to hold a taxpayer liable for any unpaid tax or any

deficiency (or any portion of either)." In this case it would be inequitable to hold the Petitioner liable for the taxes that arose directly from the dividends paid on Publix stock owned by Mr. Taft, exclusively enjoyed by Mr. Taft, and concealed from the Petitioner by Mr. Taft.

The Service has issued revenue procedures regarding innocent spouse relief, *see* Rev. Proc. 2013-34, however the Petitioner contests the use of any revenue procedure because they are not compliant with the Administrative Procedures Act ("APA") (*see* discussion *infra*), and the Court should view any non-APA compliant guidance as nothing more than the Government's litigating position. *See Bowen v. Georgetown University Hospital,* 488 U.S. 204, 212 (1988)(rejecting *Cheveron* deference to agency litigation positions).

This Court has stated that "[a]lthough not bound by IRS revenue procedures, the Court can look to them for guidance." *Hollimon v. Comm'r,* T.C. Memo. 2015-157 (internal citation omitted). The Petitioner contests such a position as a *de facto* acceptance of non-APA compliant guidance, thus this Court should not look to Rev. Proc. 2013-34 whatsoever.

In this case the record evidence is clear that at the time the Petitioner requested relief under Section 6015 (April 24, 2013) she was no longer living with Mr. Taft, and was in fact divorced from Mr. Taft (the divorce was finalized in January 2013, *see* Ex. 3-J).

Petitioner was unware that Mr. Taft received dividends from Publix in 2010 because she never saw a 1099 DIV issued to Mr. Taft and never had access to Mr. Taft's bank accounts. Further, Petitioner did not believe that Mr. Taft was receiving dividends from Publix because Mr. Taft was fired from Publix in 2009.

Petitioner was also never given the opportunity to review the 2010 income tax return before it was electronically filed. Thus, Petitioner did not have an opportunity to object to the filing of the 2010 income tax return based on any understatement or underpayment arising out of Mr. Taft's omitted income. Moreover, the Petitioner's failure to review the 2010 income tax return cannot be attributed to her because she never gave the tax return preparer authorization to file the return electronically. *Cf. Demeter v. Comm'r,* T.C. Memo. 2014-238 (imputing to a taxpayer knowledge of what he/she could have gleaned from a tax return that was signed if the taxpayer had taken the time to review it); *Rosenthal v. Comm'r,* T.C. Memo. 2004-89 (holding that the time for determining whether the requesting spouse knew or should have known of the omitted item for purposes of innocent spouse relief was at the time she executed the original return, and not the time she executed a subsequently filed amended return for the same year). However, given that Mr. Yankee, the return preparer, had been the Petitioner's and Mr. Taft's long-time tax return preparer, it was not unreasonable for the Petitioner to believe that Mr. Yankee properly prepared the 2010 income tax return.

Moreover, Mr. Taft dismissed the Petitioner's attempt to review the 2010 income tax return by telling the Petitioner that he "took care of it."[4] *Accord Sunleaf v. Comm'r,* T.C. Memo. 2009-52 (where requesting spouse has complete lack of knowledge of the tax and financial matters *and her husband assures her that the tax matters are handled* this Court concluded that, at the time the requesting spouse signed the return, she had no knowledge or reason to know that the taxes would not be paid).

Additionally, Mr. Taft had the financial ability to pay the tax related to the Publix Dividends, as evidenced by the value of the Publix stock itself. Indeed, the Palm Beach County Circuit Court judge overseeing the Petitioner's divorce case opined that Mr. Taft was improperly dissipating assets and was under employed, and denied Mr. Taft's request for alimony on that basis. Ex. 3-J at § C, ¶¶ 5 & 9.

Finally, Petitioner did not obtain a benefit from Mr. Taft's Publix dividends as Mr. Taft lavishly spent the proceeds on himself and/or his paramour. Ex. 3-J at § C, ¶ 9. Under no reasonable view of the facts can it be argued that Petitioner benefited from the underreported income and underpaid taxes. This Court has held that when a taxpayer who requests Section 6015(f) relief obtains no benefit from the underreported and/or underpaid income, such facts cuts in favor of providing innocent spouse relief. *Wang v. Comm'r,* T.C. Memo. 2014–206, at *40 (citing *Butner v. Comm'r,* T.C. Memo. 2007–136, at *45–*46 ("we consider the lack of significant benefit by the taxpayer

[4] As an aside, there is no record evidence that the Petitioner is currently, or has previously been, non-complaint with her tax obligations.

seeking relief from joint and several liability as a factor that favors granting relief under section 6015(f).")).

In sum, Mr. Taft kept his finances from, and hid the 2010 tax return from the Petitioner, while spending his money on himself. The innocent spouse provisions of the Code were "originally designed to protect one spouse, for example, where the other spouse secretly embezzled or squandered funds." *Bokum v. Comm'r*, 992 F.2d 1132, 1134 (11th Cir. 1993). That is precisely the case here; Petitioner did not receive a single iota of benefit from the underreported income (and attendant underpaid tax liability).

Based on these facts, the Petitioner is entitled to Section 6015(f) relief. The Service's conclusion to the contrary was erroneous and this Court must provide the Petitioner with the relief that the Service has improperly withheld, i.e., with a refund (with attendant statutory interest).

II. PETITIONER IS ENTITLED TO A REFUND NOTWITHSTANDING 26 C.F.R. § 1.6015-4(b), AS THE REGULATION IS INVALID

A. Threshold Considerations

1. Standing

To establish standing, a plaintiff/petitioner must demonstrate "(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Neale v. Volvo Cars of N. Am., LLC,* 794 F.3d 353, 358-59 (3d Cir. 2015) (internal quotation marks omitted and punctuation modified) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)).

In this case the final regulation, 26 C.F.R. § 1.6015-4(b), prevents the Petitioner from obtaining a refund of her income taxes that she has paid to the IRS and that resulted from her ex-husband's malfeasance. In other words, but for 26 C.F.R. § 1.6015-4(b), the Petitioner would be eligible for the relief she seeks. Accordingly, 26 C.F.R. § 1.6015-4(b) creates the injury-in-fact that the Petitioner is subject to, there is a causal connection between 26 C.F.R. § 1.6015-4(b) and Respondent's refusal to refund the Petitioner's monies, and the injury that the Petitioner is being subjected to is redressable by this Court with a decision holding that 26 C.F.R. § 1.6015-4(b) is invalid.

And in respect to 26 C.F.R. § 1.6015-4(c), the final regulation creates factual limitations that Respondent uses to determine whether a taxpayer is able to obtain innocent spouse relief. Petitioner contests any attempt to create extra-statutory limitations on innocent spouse relief that was, is, or will be, used by Respondent to deny her refund.

2. Ripeness

In general, the Supreme Court has held that ripeness requires a two-part inquiry - the fitness of the issues for determination and the hardship to the parties if the court withholds review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Devia v. Nuclear Regulatory Commission*, 492 F.3d 421, 423-25 (D.C. Cir. 2007). As discussed below this issue is ripe for consideration.

i. Fitness

"Among other things, the fitness of an issue for judicial decision depends on whether it is 'purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Atlantic States Legal Found., Inc. v. EPA,* 325 F.3d 281, 284 (D.C. Cir. 2003) (quoting *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998)).

If the issue presented involves purely a question of law or a concrete factual context that would not be enhanced by further factual development, there is a greater chance of finding the claim to be ripe. *Compare Ruckleshaus v. Monsanto*, 467 U.S. 986 (1984) (takings claim not ripe because of insufficient factual development) *with Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) (claim that Article III prohibited Congress from selecting binding arbitration as a means for resolving disputes in the Federal Insecticide, Fungicide, and Rodenticide Act's registration scheme was ripe because it was purely legal). *See also National Assoc. of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281-82 (D.C. Cir. 2005) (claim that agency action was arbitrary and capricious presented issues of law that were presumptively reviewable).

In this case the issue of the validity of the innocent spouse regulations, and 26 C.F.R. § 1.6015-4 in particular, is a purely legal consideration. Thus this issue is fit for a judicial decision. Further, the IRS's action denying the Petitioner her request for innocent spouse relief is sufficiently (or better said completely) final; the validity of the innocent spouse regulations are ripe for this Court's consideration.

ii. Hardship

In *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003), the Supreme Court reasoned that the ripeness doctrine is designed in part to defer a court decision until an administrative decision's "'effects [are] felt in a concrete way by the challenging parties'" (quoting *Abbott Labs.*, 387 U.S. at 148–49). *See also Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967) (describing the hardship factor as relating to "the degree and nature of the regulation's present effect on those seeking relief").

Additionally, in *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43 (1993) the Supreme Court distinguished between rules that regulate behavior and rules that govern the potential receipt of benefits, holding that challenges to benefit rules are generally not ripe until the agency receives and denies the application, even though those rules may have deterred applications.

In this case the hardship is plain to see; if the Court were not to rule on the validity of 26 C.F.R. § 1.6015-4 the Petitioner would be deprived of an adjudication of her entitlement to the sole relief she seeks before this court. In other words, 26 C.F.R. § 1.6015-4's effects are acutely felt by the Petitioner as it forms the legal basis to deny her the refund she seeks. Moreover, Respondent has denied Petitioner's request for innocent spouse relief and has denied the refund she seeks, thus under *Catholic Soc. Servs.* Petitioner's claim is ripe for this Court's consideration.

3. Statute of Limitations & Equitable Tolling

28 U.S.C. § 2401 provides for a statute of limitations for commencing an action against the federal government. 28 U.S.C. § 2401(a) provides, in pertinent part, that 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.

Traditionally, the District of Columbia Circuit has strictly construed the six-year statute of limitations found at 28 U.S.C. § 2401(a) as a jurisdictional condition attached to the government's waiver of sovereign immunity. *See Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). *But see Recent Past Preservation Network v. Latchar*, 701 F. Supp. 2d 49 (D.D.C. 2010) (finding § 2401(a) is non-jurisdictional and stating equitable tolling would be available to plaintiffs for their claims that National Park Service acted arbitrary and capriciously in violation the APA (5 U.S.C. § 706)).

However, last year the Supreme Court issued its opinion in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), which addressed whether 28 U.S.C. § 2401(b) was subject to equitable tolling. The Supreme Court held that it was. *Id.* at 1629.

While *Wong* did not address 28 U.S.C. § 2401(a) the logic of *Wong* requires this Court to conclude that 28 U.S.C. § 2401(a) is subject to equitable tolling. Thus any Court of Appeals case that holds that 28 U.S.C. § 2401(a) is not subject to equitable tolling has been abrogated. As discussed below equitable tolling is appropriate in this case, which, in turn, allows the Petitioner to bring her APA challenge to the Treasury Regulations at issue in this case.

The running of the statute of limitations can be equitably tolled for a complaint filed after its expiration where the plaintiff demonstrates: 1) the petitioner has been pursuing his rights diligently, and 2) some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also Felter v. Norton*, 412 F. Supp. 2d 118, 126 (D.D.C. 2006). "Extraordinary circumstances are circumstance beyond the control of the complainant which makes it impossible to file a complaint within the statute of limitations…." *Felter*, 412 F. Supp. 2d at 126.

In this case the Petitioner could not have brought her APA challenge because that tax year at issue – 2010 – was outside of the six year period proscribed by 28 U.S.C. § 2401(a). In other words, by the time Petitioner's APA claim became ripe (when the IRS issued its determination denying innocent spouse relief) she was already outside of the statutory period found at 28 U.S.C. § 2401(a). Accordingly, factual and legal impossibility was an extraordinary circumstance that stood in the Petitioner's way.

Further, Petitioner has been diligently pursuing her rights: she timely petitioned this Court, and she is litigating her APA challenge now, at the first possible moment, before a court of competent jurisdiction (only this Court has jurisdiction to review Respondent's denial of innocent spouse relief).

In sum, 28 U.S.C. § 2401(a) does not operate to bar this Court's consideration of this issue; the Court must proceed to the merits of the Petitioner's APA challenge.

B. The APA Applies to the Final Rule

The Supreme Court in *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011), held that the APA applies to Treasury Department regulations. *See also id.* at 55 ("[t]he principles underlying our decision in *Chevron* apply with full force in the tax context."). Indeed, this Court has recognized that the "Commissioner's regulatory efforts are generally entitled to the same *Chevron* standard as those of any other agency." *Carpenter Family Investments, LLC v. Comm'r*, 136 T.C. 373, 377 (2011). Accordingly, the APA applies in full to the regulation at issue in this case.

C. 26 C.F.R. § 1.6015-4 Violates the APA

"Pursuant to APA sec. 706(2)(A), a court must 'hold unlawful and set aside agency action, findings, and conclusions' that the court finds to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'." *Altera Corp, supra* at *15. As discussed below 26 C.F.R. § 1.6015-4 was not promulgated in accordance with law and the regulation is invalid.

1. The Procedural Requirements of the APA Were Not Complied With

"The APA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and 'a concise general statement of (the) basis and purpose' of the rules ultimately adopted." *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977) (citing 5 U.S.C. [§] 553(b)-(c)). As the D.C. Circuit has stated:

> Under APA notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and

> data upon which the agency relies in its rulemaking. Construing section 553 of the APA, the court explained long ago that in order to allow for useful criticism, it is especially important for the agency to identify and make available ***technical studies and data*** that it has employed in reaching the decisions to propose particular rules. More particularly, disclosure of ***staff reports*** allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it. Public notice and comment regarding relied-upon technical analysis, then, are the safety valves in the use of ... sophisticated methodology.

Am. Radio Relay League, Inc. v. F.C.C., 524 F.3d 227, 236 (D.C. Cir. 2008) (internal citations, brackets, and quotations omitted)(emphasis in original).

In this case none of the Treasury Department's technical studies or data has been revealed. Surely the Treasury Department would have studied 26 U.S.C. § 6015's effect on both the fisc and the individual taxpayers to which innocent spouse relief could, potentially, apply. Additionally, given the staff that the Treasury Department has (including but not limited to the attorneys, economists, and accountants), surely staff reports were created in respect to innocent spouse relief. *Cf. Am. Radio Relay League,* 524 F.3d at 237 ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency.")(internal citation omitted). Given the failure to disclose the technical studies, data, and staff reports, the Treasury Department violated the APA in respect to 26 C.F.R. § 1.6015-4, and the regulation is invalid.

Further, 26 C.F.R. § 1.6015-4(c) expressly incorporates by reference Rev. Proc. 2000-15, which (as Mr. Williams pointed out to the Treasury Department, *see supra* at p.

11) was not subject to notice and comment and was not published in the federal register. This is particularly problematic as after the innocent spouse regulations were finalized, on August 11, 2003, Respondent issued Rev. Proc. 2003-61 (which superseded Rev. Proc. 2000-15), and on October 21, 2013 Respondent issued Rev. Proc. 2013-34 (which superseded Rev. Proc. 2003-61). Consequently, neither Rev. Proc. 2000-15, nor Rev. Proc. 2003-61, nor Rev. Proc. 2013-34, was subject to the mandatory requirement of notice and comment, as required under the APA. Thus, 26 C.F.R. § 1.6015-4(c) is invalid and this Court must declare as such.

Additionally, the regulation failed to comply with 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."). The D.C. Circuit has interpreted the "concise and general statement" requirement to mean that:

> must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. * * * (The record must) enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Home Box Office, 567 F.2d at 36 (internal citation omitted).

In this case, the preamble does not enable this Court to see what major issues were addressed in respect to 26 C.F.R. § 1.6015-4, nor can this Court glean from the preamble why the Treasury Department reacted to the relevant matter presented to it.

Accordingly, the regulation was issued in violation of the APA and this Court must hold it invalid.

2. The Final Rule Failed to Satisfy *State Farm's* Reasoned Decision Making Standard

It is well established that "[t]he reviewing court should not attempt itself to make up for such deficiencies: '[w]e may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). In this case the agency has failed to establish that its regulation was the result of reasoned decision making.

i. The Final Rule lacks a basis in fact

The final rules lacks a basis in fact because 26 C.F.R. § 1.6015-4 was apparently issued without any evidence, data, or technical studies. At best the regulation is nothing more that the agency's *ipse dixit*.[5] But is it beyond cavil that *ipse dixit* is not a "reasoned conclusion." *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 & n. 4 (1993).

ii. The Treasury Dept. failed to rationally connect the choice it made with the facts it found

An "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and

[5] The term *ipse dixit* in this context refers to a logical fallacy wherein a supposed legal conclusion merely "assum[es] the very point in issue." *Northbrook Ins. Co. v. Kuljian Corp.*, 690 F.2d 368, 375 (3d Cir. 1982)

the choice made." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (internal citation and quotation omitted). In reviewing an agency's explanation, a Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (internal citation and quotation omitted). In this case the agency never found any facts and, necessarily, it failed to rationally connect the choice it made in respect to 26 C.F.R. § 1.6015-4 with those non-existent facts.

And "where an agency has articulated no reasoned basis for its decision—where its action is founded on unsupported assertions or unstated inferences—* * * a court will not abdicate the judicial duty carefully to review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence." *Altera, supra*, at *21 (internal citation, quotations, and brackets omitted). Such is the case here, as the Treasury Department has failed "failed to provide a reasoned basis for reaching this conclusion from any evidence in the administrative record." *Id.* (internal citation omitted).

iii. The Treasury Dept. failed to respond to significant comments

A public hearing was held on May 30, 2001, on the proposed regulations but it appears that a transcript of the public hearing was not made (or if made, it was not ordered). Thus the Treasury Department cannot demonstrate compliance with the APA's requirement that it respond to the significant comments provided at the public hearing.

Moreover, and perhaps more importantly, the preamble to the final regulation (*see supra* at p. 13), failed to respond to the significant comments submitted to it. Simply stated, the preamble is, at best, a non-answer to the commentators, it merely reiterates what was said in the past. Furthermore, the comment on installment agreements are irrelevant to the issue as to the ability to obtain a refund under 26 U.S.C. § 6015(f).[6]

Indeed, the comments submitted by Mr. Williams and Ms. O'Connell called the agency's attention to: (i) the proposed regulation's apparent conflict with the plain text of the statute, i.e., § 6015(f), and (ii) that the proposed regulation (now found at 26 C.F.R. § 1.6015-4(c)) violated the APA by improperly incorporating by reference Rev. Proc. 2000-15. As to subsection (b) of the proposed regulation, the agency's discussion provided no serious response to the comments, and as to subsection (c) of the proposed regulation, the agency provided no comment whatsoever. "Treasury's failure to meaningfully respond to numerous relevant and significant comments certainly is" *Altera, supra* *26, fatal to the final rule. And that is so since the "Treasury[] [Department's] failure to adequately respond to commentators frustrates [this Court's] review of the final rule and [is] prejudicial to [the Petitioner and] affected [taxpayers]." *Id.*

[6] Interestingly, the IRS has abandoned the position set forth in Rev. Proc. 2000-15, which limited refunds to payments made on installment agreements. Under Rev. Proc. 2013-34 (and under new proposed regulations, *see* Relief From Joint and Several Liability, 80 FR 72649-01 (November 20, 2015)), the IRS will also now refund under § 6015(f) amounts taken from later year tax overpayments, which is what happened in this case.

iv. The Final Rule is contrary to the evidence before the Treasury Dept.

Since the agency never released to the public the evidence, data, or technical studies this Court must conclude that the final rule is contrary to such evidence. To conclude otherwise would operate to provide perverse incentives to the agency – by not releasing the information upon which the proposed regulation is founded the agency would skirt the APA's judicial review function.

3. The Final Rule Failed to Satisfy *Chevron*

Every court's inquiry into the meaning of a statute begins with its plain language. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Subsection (c) does not permit a taxpayer to obtain a refund, 26 U.S.C. § 6015(g)(3), but no such limitation exists for either subjection (b) or (f). However, 26 C.F.R. § 1.6015-4(b) limits the ability of a taxpayer to obtain relief, i.e., a refund, under subsection (f); this limitation found in the regulation is extra-textual to the statue and creates a limitation where Congress created none. Using standard rules of statutory construction, *see Shays v. FEC*, 414 F.3d 76, 84 (D.C. Cir. 2005), it is clear that the intent of Congress was that subsection (f) relief did not limit the ability to obtain a refund.

Under the venerable rule of *unius est exclusio alterius* (the inclusion of one is the exclusion of others), "'[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.'" *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942)).

Such is the case here; Congress knew how to limit the ability of a taxpayer to obtain a refund, and made its intent explicit in respect to subsection (c), and only subsection (c). *Compare* 26 U.S.C. § 6015(g)(1) ("In general.--Except *as provided in paragraphs (2) and (3)*, notwithstanding any other law or rule of law (other than section 6511, 6512(b) , 7121, or 7122), credit or refund shall be allowed or made to the extent attributable to the application of this section.")(emphasis added) *with id.* at (g)(3) ("Credit and refund not allowed under subsection (c).--No credit or refund shall be allowed as a result of an election under subsection (c)."). Thus, the inclusion of the limitation of a refund under subjection (c) means that refunds are allowed under both subsections (b) and (f); 26 U.S.C. § 6015(g)(1) could not be any clearer.

Moreover, if there was no need for Congress to expressly limit refunds, as it did in respect to subsection (c), then the refund limitation language of 26 U.S.C. § 6015(g)(3) would be "mere surplusage," which would violate a well-established cannon of statutory construction. *See Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (discussing rule against surplusage). *See also Bailey v. United States*, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense); *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001) ("[W]hen interpreting a statute, courts should endeavor to give meaning to

every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous.").

Thus, under *Chevron* step 1 the agency's regulation limiting refunds under subsection (f), *viz.* 26 C.F.R. § 1.6015-4(b), is invalid.

However, assuming *arguendo* that the statute is ambiguous, one would proceed to *Chevron* step two. But this Court has recognized that *Chevron* step 2 incorporates the reasoned decision making standard of *State Farm*. *Altera, supra* at *1 (citing *Judulang v. Holder,* 132 S.Ct. 476, 483 n .7 (2011)). Thus, for the reasons articulated above, because the regulation at issue fails the reasoned decision making standard of *State Farm, i*t also fails Chevron step 2. The Court must hold the regulation to be invalid and order the Service to issue the Petitioner her refund, in the amount of $1,570.40 (with statutory interest thereon).

III. PETITIONER IS ENTITLED TO SUBSECTION (b) RELIEF[7]

26 U.S.C. § 6015(b) provides for relief where:

> 1. A joint return is filed;
> 2. On the joint return there is an understatement due to an erroneous item of one of the joint filers;
> 3. The other joint filer establishes that he did not know, and had no reason to know, of the understatement; and

[7] The Petitioner is seeking Section 6015(b) relief in the alternative to 6015(f) relief, but asserts that since 6015(b) relief is more difficult to obtain that 6015(f) relief the Court can, and should, first determine if 6015(f) relief is available. If Section 6015(f) relief is available the Court need not reach the question as to whether the Petitioner qualifies for Section 6015(b) relief.

> 4. Taking into account all facts and circumstances, it would be inequitable to hold the other joint filer (the filer making the claim for relief) liable for the tax attributable to the understatement.

26 C.F.R. § 1.6015-2(a). *See also Agudelo v. Comm'r,* T.C. Memo. 2015-124 (same). Each condition is met here.

First, a joint return was made. Second, the understatement, as determined by the IRS, arose solely from the Publix dividends received by Mr. Taft. In this case "the understatement of tax is attributable to erroneous items of the nonrequesting spouse." *Id.* "Generally, an erroneous item is attributed to the individual whose activities gave rise to the item." *Id.* (internal citations omitted); *see also* 26 C.F.R. § 1.6015-3(d)(2)(iii) ("Erroneous items of income are allocated to the spouse who was the source of the income."). In the case at bar, the erroneous item is attributable to Mr. Taft.

Third, the Petitioner did not know, and had no reason to know, of the understatement. General knowledge of past dividends is not sufficient to establish knowledge of the dividends at issue; there is no evidence of the regularity of past dividends and consequently Petitioner could not predict whether, or when, dividends might be paid. The Petitioner was unaware of the Publix dividends Mr. Taft received (but was aware that Mr. Taft was fired from Publix), and she was also unaware of Mr. Taft's personal financial situation because the Petitioner and Mr. Taft had separate bank accounts (and did not have access to each other's bank accounts). Furthermore, the Petitioner was not aware of any lavish expenditures, the Petitioner largely paid for her

own expenses and family expenses, thus the Petitioner had no reason to believe Mr. Taft was not meeting all of his federal tax obligations.

Fourth, and finally, it would be inequitable to hold the Petitioner liable for payment of the tax on the understatement in 2010. The Petitioner did *not* substantially benefit (better said, she did not benefit at all) from the income giving rise to the understatement.[8] *See Varela v. Comm'r,* T.C. Memo 2014-222 (factor in favor of 6015(b) relief is that no significant benefit to requesting spouse). Instead, the Petitioner made a good faith effort to comply with her tax obligations, including hiring experienced professional, i.e., Mr. Yankee, to assist in the preparation of the 2010 income tax return. Now, notwithstanding her good faith efforts to comply, the Petitioner faces tax liabilities on income she never received and never benefitted from. And, as stated above, the failure to properly report (and pay) was the fault of Mr. Taft. *See id.* (factor in favor of 6015(b) relief is that "the failure to report the correct tax liability on the joint return results from concealment, overreaching, or any other wrongdoing on the part of the other spouse.")(internal citation omitted).

The Court should provide the Petitioner with Section 6015(b) relief and order the Service to provide the Petitioner with a refund, in the amount of $1,570.40 (with attendant statutory interest).

[8] A substantial benefit is any benefit in excess of normal support. 26 C.F.R. § 1.6015-2(d).

CONCLUSION

WHEREFORE, based the foregoing reasons, the Petitioner respectfully requests that this Court provide the Petitioner with relief under Section 6015(f), invalidate 26 C.F.R. § 1.6015-4, and order the Service to refund the Petitioner's funds, in the amount of $1,570.40 (with statutory interest thereon). Or, in the alternative, provide the Petitioner with relief under Section 6015(b), and order the Service to refund the Petitioner's funds (with statutory interest thereon).

Respectfully Submitted,

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