IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

KIMBERLY HOCKIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 3:17-CV-1926-JR
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW OF *AMICUS CURIAE* FEDERAL TAX CLINIC OF THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL IN SUPPORT OF THE PLAINTIFF

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INTEREST OF THE *AMICUS*[1]

The Federal Tax Clinic of the Legal Services Center of Harvard Law School ("the Clinic") was formed in 2015 to represent low-income taxpayers before the Internal Revenue Service and in tax matters before the courts. The Clinic's clients or individuals seeking its advice often have filed joint returns and seek to be relieved of joint and several liability with respect to income taxes relating to such

[1] *Amici* certifies that: No party's counsel authored this memorandum in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this memorandum. The only person who contributed money that was intended to fund preparing or submitting this memorandum is Harvard University (of which the *amicus* is a part), who paid for the printing and mailing of this memorandum.

returns. So, the Clinic regularly advises clients and prospective clients concerning "innocent spouse" relief and related arguments.

In a series of recent court of appeals cases, the Clinic has represented taxpayers who had filed late *pro se* petitions in the Tax Court under § 6015(e)(1)(A)[2] seeking innocent spouse relief under § 6015(b), (c), and/or (f). In each case, the IRS misled the taxpayers with respect to the last date to file such petitions. The Tax Court dismissed the petitions for lack of jurisdiction as untimely – despite the taxpayers' arguments (made after the Clinic's attorneys entered appearances for the taxpayers) that the deadline for filing Tax Court innocent spouse petitions is not jurisdictional and is subject to equitable tolling. On behalf of these clients, the Clinic appealed the Tax Court's ruling to three different Circuit courts of appeal. All three Circuits affirmed the Tax Court. *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017); *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017); *Nauflett v. Commissioner*, 892 F.3d 649 (4th Cir. 2018). In each case, the Department of Justice ("DOJ") Tax Division Appellate Section attorneys involved assured the courts, both in their briefs and at oral argument, that the courts should not worry that the taxpayers were left without a remedy because each could pay the liability in full and sue for a refund in district court or the Court of Federal Claims, where each could still seek relief under §

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

6015. At least one of those clients, Ms. Nauflett, is currently considering paying the tax and suing for a refund in district court – at least for one of the years involved in her dispute. The DOJ Tax Division Trial Attorney in the instant case argues that no refund suit involving § 6015 relief is permitted in district court unless a Tax Court suit under § 6015(e)(1)(A) is brought while a refund suit is pending. He admits only that the Tax Court suit should be transferred over to the district court in that case. That argument, however, is directly contrary to what the DOJ Tax Division Appellate Section has recently argued in the cases of the other Clinic clients.

Both Professor Fogg and Mr. Smith each have well over 30 years of experience in tax controversy matters. From 2003 to 2013, Mr. Smith (who now volunteers with the Clinic *pro bono*) was the Director of a tax clinic at the Cardozo School of Law in Manhattan. In his retirement, Mr. Smith now volunteers with the Clinic. Over the last decade, both men have submitted comments to the IRS concerning proposed regulations and proposed Revenue Procedures under § 6015 – including comments on refund procedures under § 6015. Both men have written on the subject of innocent spouse relief. Mr. Smith has also written on the issue of how to make the alternative argument that a taxpayer is not jointly liable because no joint return was ever filed. *See* Carlton M. Smith, "How Can One Argue 'It's

Not My Joint Return' in Tax Court?", *Tax Notes Today*, 2009 TNT 180-9 (Sept. 21, 2009).

The Clinic also recently filed an amicus brief in *Taft v. Commissioner*, T.C. Memo. 2017-66 – a Tax Court case brought under § 6015(e) in which the court granted a refund to the taxpayer under § 6015(b). The brief had to do with the validity of a regulation limiting refund relief under § 6015(f) – an issue the court ended up not reaching.

Thus, the Clinic has extensive experience with § 6015 relief and related arguments and believes that it can be of assistance to this Court in the instant case.

ARGUMENT

INTRODUCTION

The government in this case makes the arguments that there can be no refund suits in the district court involving relief under § 6015, unless a Tax Court suit under § 6015(e)(1)(A) is brought while a refund suit is pending and the Tax Court suit is then transferred over to the district court. This argument is entirely novel. With the exception of one recent district court, the Clinic cannot find any court to have ever expressed a view on this argument. The likely reason that almost no court has expressed a view is that the government's argument in this case is ahistorical. For decades, the courts have allowed district court and Court of Federal Claims refund suits considering relief under § 6015 and its predecessor

innocent spouse provision without discussion or government objection. Moreover, the government's argument in this case is in direct conflict with the government's arguments in cases handled by the Clinic. In enacting and amending § 6015, Congress expressed its understanding that district court refund suits raising innocent spouse relief were permitted under former § 6013(e). Congress did not repeal this prior law by implication when, in 1998, it added additional ways to raise innocent spouse relief under §§ 6015(e)(1)(A), 6320, and 6330.

I. Prior to the Enactment of the First Innocent Spouse Provisions, the District Courts Heard Refund Suits Involving the Issue of Whether the Taxpayer Had Filed a Joint Return.

Before discussing joint and several liability and the procedural pathways to obtain relief from it, a little background in tax procedure is in order.

Prior to the creation of the income, estate, and gift taxes in the early years of the last Century, the government's prime source of revenue was from tariffs. If the government asserted a higher tariff than the importer believed was correct, the importer had to pay the tariff in full and sue for a refund in district court or the predecessor of the Court of Federal Claims. When the income, estate, and gift taxes were adopted, taxpayers demanded from Congress an additional prepayment forum to contest these new taxes. Accordingly, in 1924, Congress created the Board of Tax Appeals, which later became the Tax Court. The Tax Court was given jurisdiction to redetermine "deficiencies" (i.e., understatements) in these

three taxes. For a more detailed history of the general refund suit regime and the creation of the Board of Tax Appeals, *see* Harold Dubroff and Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2d ed. 2014), at pp. 27-37; *Flora v. United States*, 362 U.S. 145, 151-160 (1960). The Dubroff and Hellwig book is the Tax Court-authorized history of that institution and is available through a link on the home page of the Tax Court's website.

In *Flora*, the Supreme Court (1) noted that the jurisdictional basis of a district court or Court of Federal Claims refund suit is 28 U.S.C. § 1346(a)(1) and (2) held that a jurisdictional requirement of a tax refund suit is full payment of the tax prior to the commencement of suit. As is evident from *Flora*, going to the Tax Court pre-payment and going to district courts or the Court of Federal Claims post-payment are still-authorized alternative ways of contesting income taxes in the federal courts.

Not long after the income tax was first adopted, the IRS began asserting that individuals who filed joint income tax returns were jointly and severally liable for the taxes thereon. In an Office Ruling in 1923, the Bureau of Internal Revenue first took the position that any taxpayer who was a party to a joint income tax return was subject to joint and several liability for the entire tax shown thereon or any deficiency concerning that return. I.T. 1575, II-1 C.B. 144. Taxpayers quickly challenged this position.

In 1935, in *Cole v. Commissioner*, 81 F.2d 485 (9th Cir. 1935), the Ninth Circuit departed from holdings of other courts and held that the income tax laws did not provide for joint and several liability with respect to joint returns. Congress resolved potential further litigation over this point by legislatively overruling *Cole* through §51(b) of the Revenue Act of 1938, 52 Stat. 476. Currently and for over 80 years, § 6013(d)(3) and its predecessors have provided that "if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."

Before and after the clarification as to joint and several liability, however, spouses occasionally argued in the courts that they were not jointly and severally liable with respect to tax deficiencies proposed with respect to joint returns because the complaining spouse had not been a party to those joint returns. Since, initially, these cases arose at a time when a spouse did not have to sign a joint return to be held to have filed it, the courts tried to determine whether the taxpayer intended to file a joint return, even when he or she did not sign it.[3] A nonexclusive list of facts and circumstances considered by the courts included: (1) whether the spouse authorized someone else to sign the return;[4] (2) whether the spouse

[3] *Parsons v. Commissioner*, 43 T.C. 378, 392 (1964); *Federbush v. Commissioner*, 34 T.C. 740, 754-758 (1960), *aff'd* 325 F.2d 1 (2d Cir. 1963); *Helfrich v. Commissioner*, 25 T.C. 404, 407 (1955); *Calhoun v. Commissioner*, 23 T.C. 4, 6 (1954).

[4] *Helfrich v. Commissioner*, *supra*, at 407.

participated in the preparation of the return;[5] (3) the spouse's mere awareness of the fact that a joint return was being filed;[6] (4) whether the spouse earned enough money to have to file a separate return or thought that he or she had an obligation to file a separate return;[7] (5) whether the spouse filed or tried to file a separate return;[8] (6) whether there was a history of joint filing or separate filing;[9] (7) whether the spouses kept their financial lives separate;[10] (8) any strains in the marital relationship at the time of filing that might cast doubt on the authority of one spouse to sign for the other;[11] and (9) whether the purported joint return included both spouses' items of income and expense.[12] Further, even when a taxpayer did sign the return, the court could find that he or she did not file a joint return if the taxpayer's signature was obtained by duress.[13]

While, prior to the first innocent spouse provisions, most of the cases involving the issue of whether a taxpayer filed a joint tax return were litigated in

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[5] *Manton v. Commissioner*, 11 T.C. 831, 835 (1948).
[6] *Id.*; *Helfrich v. Commissioner*, *supra*, at 407.
[7] *Federbush v. Commissioner*, *supra*, 34 T.C. at 755; *Manton v. Commissioner*, *supra*, at 835; *Cassity v. Commissioner*, T.C. Memo. 1987-181.
[8] *McCord v. Granger*, 201 F.2d 103, 107-108 (3d Cir. 1952).
[9] *Cassity v. Commissioner*, *supra*.
[10] *Id.*
[11] *Pirnia v. Commissioner*, T.C. Memo. 1990-444; *Lucas v. Commissioner*, T.C. Memo. 1989-320; *Snyder v. Commissioner*, T.C. Memo. 1983-751.
[12] *McCord v. Granger*, *supra*, at 107-108; *Federbush v. Commissioner*, *supra*, at 755.
[13] *Brown v. Commissioner*, 51 T.C. 116, 118-121 (1968).

the Tax Court,[14] some were litigated in district court refund suits. *See, e.g.*, *McCord v. Granger*, 201 F.2d 103 (3d Cir. 1952); *Anderson v. United States*, 48 F.2d 201 (5th Cir. 1931).

To this day, the issues of whether one filed a joint return, and if one did, whether one can be relieved of joint and several liability under § 6015 are distinct issues handled separately by the courts. For example, in Collection Due Process cases, the Tax Court considers the issues separately. See *Downing v. Commissioner*, T.C. Memo. 2007-291 (deciding no joint return issue as part of its Collection Due Process appeal opinion); *Magee v. Commissioner*, T.C. Memo. 2005-263 (same); *James v. Commissioner*, 322 Fed. Appx. 503 (9th Cir. 2009) (same).

It is not surprising that there are not many district court refund suits filed each year, much less refund suits raising issues concerning joint and several income tax liability. Few people want to pay the tax first before litigating. Thus, while in the fiscal year ended September 30, 2017, 26,856 petitions were filed in the Tax Court, only 188 complaints seeking a refund were filed in all the district courts and the Court of Federal Claims combined. 2017 IRS Data Book at Table 27, p. 62, available on the IRS website. A table on p. 909 of Dubroff and Hellwig's book on the Tax Court contains statistics on the Tax Court's case load

[14] Tax Court cases are those whose caption shows the Commissioner of Internal Revenue as the respondent.

by jurisdiction. The table shows that, in the most recent years available (up to 2013), Tax Court innocent spouse cases brought under § 6015(e)(1)(A) made up only from 1% to 2% of all Tax Court cases.[15] If a 2% ratio were applied to total district court and Court of Federal Claims refund suits, one would expect only about 4 district court and Court of Federal Claims refund suits involving § 6015 annually – nearly all of which would be expected to be resolved without any opinion. This likely explains the small amount of pertinent authority on the question of whether district court and Court of Federal Claims refund suits involving § 6015 are permitted, even in the absence of a filing in the Tax Court under § 6015(e)(1)(A).

II. Under the First Innocent Spouse Provision at Former § 6013(e)(1), District Courts Heard Refund Suits.

Prior to 1971, the only way to argue for relief from joint and several liability was for the taxpayer to contend that he or she had not filed a joint return. Perceiving the sometime harshness of joint liability, in 1971, Congress enacted the original "innocent spouse" provision at § 6013(e)(1),[16] which stated:

> Under regulations prescribed by the Secretary or his delegate, if –

[15] As noted below, since 1998, the Tax Court also hears innocent spouse issues in deficiency and Collection Due Process cases. However, the experience of Prof. Fogg and Mr. Smith is that the vast majority (probably over 95%) of innocent spouse issues since 1998 have been considered in Tax Court cases brought under its § 6015(e)(1)(A) jurisdiction.

[16] Pub. L. No. 91-679, §1, 84 Stat. 2063.

> (A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,
>
> (B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and
>
> (C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,
>
> then the other spouse shall be relieved of liability for tax . . . for such taxable year to the extent that such liability is attributable to such omission from gross income.

Section 6013(e)(1) was a substantive provision for relief from liability that could be raised during independent court proceedings that had their own jurisdictional bases and statutes of limitations. *Kirtley v. Bickestaff*, 488 F.2d 768, 770 (10th Cir. 1973) ("Nothing in §6013(e) or its legislative history indicates any intent by Congress to create a new exception to § 7421 [the tax anti-injunction act] or a new procedure for litigating tax questions . . . . The subject section provides only for a new substantive tax relief element"). Note that § 6013(e)(1) only applied to provide relief with respect to a "deficiency in tax." A "deficiency" is essentially the difference between the correct tax and the tax shown on the return – i.e., the amount by which the return understates the tax. § 6211(a).

The most common proceeding where former § 6013(e)(1) was raised was as a defense in a pre-assessment Tax Court deficiency action under § 6213(a) involving other issues. *See, e.g., Clevenger v. Commissioner*, 826 F.2d 1379 (4th Cir. 1987); *Ratana v. Commissioner*, 662 F.2d 220 (4th Cir. 1993). Before assessing a deficiency, the IRS must first issue a notice of deficiency under § 6212, giving the taxpayer the right to petition the Tax Court under § 6213(a).

But, former § 6013(e)(1) relief could also be raised by a taxpayer who paid an assessed deficiency in full and brought a refund suit in district court or the Court of Federal Claims. Yuen v. United States, 825 F.2d 244 (9th Cir. 1987); *Busse v. United States*, 542 F.2d 421, 425-427 (7th Cir. 1976); *Sanders v. United States*, 509 F.2d 162 (5th Cir. 1975); *Dakil v. United States*, 496 F.2d 431 (10th Cir. 1974); *Mlay v. IRS*, 168 F. Supp. 2d 781 (S.D. Ohio 2001). As best the Clinic can tell, no one ever argued (as the government does at pp. 5-8 of its motion) that such a suit was barred because the taxes were not "erroneously or illegally assessed or collected", within the meanings of § 7422(a) and 28 U.S.C. § 1346(a)(1). *The government in this case seems wholly ignorant of the refund suit avenue of obtaining innocent spouse relief under the 1971 legislation.*

Former § 6013(e)(1) could also be raised as a defense in district court suits brought by the United States to reduce tax assessments to judgment under § 7402; *United States v. Grable*, 946 F.2d 896 (table), 1991 U.S. App. LEXIS

24484 (unpublished opinion) (6th Cir. 1991); *United States v. Diehl*, 460 F. Supp. 1282 (S.D. Tex. 1976), *aff'd per curiam*, 586 F.2d 1080 (table), 1978 U.S. App. LEXIS 6785 (unpublished opinion) (5th Cir. 1978); or to foreclose on tax liens under § 7403. *United States v. Shanbaum*, 10 F.3d 305 (5th Cir. 1994); *United States v. Hoffmann*, 1993 U.S. Dist. LEXIS 15872 (D. Utah 1993).

Former § 6013(e)(1) relief could also be raised in a bankruptcy proceeding. *In re Hopkins*, 146 F.3d 729 (9th Cir. 1998); *In re Lilly*, 76 F.3d 568 (4th Cir. 1996).

Thus, there were a number of ways in a number of courts to raise innocent spouse relief under former § 6013(e)(1). There is no evidence that Congress, in updating and expanding innocent spouse avenues and procedures for relief, intended to curtail any of those prior judicial avenues for relief.

III. Section 6015 Was Enacted to Expand Both Substantive and Procedural Avenues for Raising Innocent Spouse Relief, Not to Eliminate Any Prior Avenues for Raising Such Relief, Including Refund Suits.

After 27 years, former § 6013(e)(1) was thought inadequate and was repealed and replaced by § 6015, as enacted by §3201 of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206. The primary problems with former § 6013(e)(1) were both that the substantive conditions for granting relief were too narrow and the procedural avenues to obtaining relief were too limited. In proposing the new section, the Ways and Means Committee explained:

> *The proper forum [under present law] for contesting a denial by the Secretary of innocent spouse relief is determined by whether an underpayment is asserted or the taxpayer is seeking a refund of overpaid taxes. Accordingly, the Tax Court may not have jurisdiction to review all determinations of innocent spouse relief* . . . . The Committee is concerned that the innocent spouse provisions of present law are inadequate. . . . The bill generally makes innocent spouse status easier to obtain. The bill eliminates all of the understatement thresholds and requires only that the understatement of tax be attributable to an erroneous (and not just a grossly erroneous) item of the other spouse. . . . The bill specifically provides that the Tax Court has jurisdiction to review any denial (or failure to rule) by the Secretary regarding an application for innocent spouse relief. The Tax Court may order refunds as appropriate where it determines the spouse qualifies for relief . . . .

H. Rep. 105-364 (Part 1), at 61 (emphasis added). Thus, in the first two quoted sentence above, Congress implicitly acknowledged that it understood that § 6013(e) issues could be raised in refund suits in district courts or the Court of Federal Claims brought under 28 U.S.C. § 1346(a)(1). Congress nowhere stated in its Committee reports that it intended to remove the jurisdiction of those courts to hear innocent spouse refund suits.

The bill that ultimately emerged from the Conference Committee had three substantive subsections for relief: (b) (essentially, the House version), (c) (essentially, the Senate version), and (f) (so-called equitable relief, taken from a small provision in the Senate version). Subsections (b) and (c) relief only apply to "deficiencies", while subsection (f) relief applies both to deficiencies and amounts reported on returns that have not yet been paid. At issue in this case is relief under subsection (f) for amounts not paid with original returns.

As enacted (and still today), new subsection (f) read:

> (f) Equitable relief. 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.

New § 6015(e) provided various procedural rules, including for what the Tax Court calls a "stand-alone innocent spouse case". Both the Tax Court and the Ninth Circuit call suits for innocent spouse relief under § 6015(e) "stand-alone" because innocent spouse relief is not being raised as a defense in an existing Tax Court deficiency suit under § 6213(a). *See Wilson v. Commissioner*, 705 F.3d 980, 994 (9th Cir. 2013); *Davidson v. Commissioner*, 144 T.C. 273, 276 (2015). The Tax Court today not only hears stand-alone innocent spouse suits under § 6015(e)(1), but, as before, can consider § 6015 relief in the course of a timely-brought deficiency suit under § 6213(a). *Cheshire v. Commissioner,* 282 F.3d 326 (5th Cir. 2002); *Porter v. Commissioner*, 130 T.C. 115, 124 (2008) ("[I]n a deficiency case we hold a trial de novo relating to a taxpayer's affirmative defense that he or she is entitled to innocent spouse relief under section 6015(f)."); *Ewing v. Commissioner*, 122 T.C. 32, 42 (2004) ("[T]axpayers should have the same opportunity to have a trial de novo relating to entitlement to relief under section

6015(f) whether relief was raised as an affirmative defense in a deficiency proceeding, in a stand alone proceeding where the Commissioner has issued a final determination denying the taxpayer's request for relief, or in a stand alone proceeding where the Commissioner has failed to rule on the taxpayer's claim within 6 months of its filing.").

Upon initial enactment, § 6015(e) stated, in relevant part:

> (e) Petition for Review by Tax Court.—
>
> (1) In general.--In the case of an individual who elects to have subsection (b) or (c) apply—
>
> (A) In general.--The individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed during the 90-day period beginning on the date on which the Secretary mails by certified or registered mail a notice to such individual of the Secretary's determination of relief available to the individual. Notwithstanding the preceding sentence, an individual may file such petition at any time after the date which is 6 months after the date such election is filed with the Secretary and before the close of such 90-day period.
>
> (B) Restrictions applicable to collection of assessment.--
>
> (i) In general.--Except as otherwise provided in section 6851 or 6861, no levy or proceeding in court shall be made, begun, or prosecuted against the individual making an election under subsection (b) or (c) for collection of any assessment to which such election relates until the expiration of the 90-day period described in subparagraph (A), or, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. . . .
>
> (ii) Authority to enjoin collection actions.--Notwithstanding the provisions of section 7421(a), the beginning of such levy or proceeding during the time the prohibition under clause (i) is in force may be enjoined by a proceeding in the proper court, including the Tax Court. . . .
>
> (2) Suspension of running of period of limitations.--The running of the period of limitations in section 6502 on the collection of the assessment to which the petition under paragraph (1)(A) relates shall be suspended for

the period during which the Secretary is prohibited by paragraph (1)(B) from collecting by levy or a proceeding in court and for 60 days thereafter.

(3) Applicable rules.--

(A) Allowance of credit or refund.-- Except as provided in subparagraph (B), notwithstanding any other law or rule of law (other than section 6512(b), 7121, or 7122), credit or refund shall be allowed or made to the extent attributable to the application of this section.

(B) Res judicata.--In the case of any election under subsection (b) or (c), if a decision of the Tax Court in any prior proceeding for the same taxable year has become final, such decision shall be conclusive except with respect to the qualification of the individual for relief which was not an issue in such proceeding. The exception contained in the preceding sentence shall not apply if the Tax Court determines that the individual participated meaningfully in such prior proceeding.

(C) Limitation on tax court jurisdiction.--If a suit for refund is begun by either individual filing the joint return pursuant to section 6532--

(i) the Tax Court shall lose jurisdiction of the individual's action under this section to whatever extent jurisdiction is acquired by the district court or the United States Court of Federal Claims over the taxable years that are the subject of the suit for refund, and

(ii) the court acquiring jurisdiction shall have jurisdiction over the petition filed under this subsection.

In addition, at Pub. L. 105-206, §3401, Congress created new "Collection Due Process" hearings at the IRS Office of Appeals. Under new §§ 6320 and 6330, those hearings were primarily to review the propriety of proposed levies and notices of federal tax lien, but also could include assertions of "spousal defenses"; § 6330(c)(2)(A)(i); such as § 6015 relief. 26 C.F.R. 301-6320-1(e)(2) and 301.6330-1(e)(2). Adverse Collection Due Process notices of determination at the conclusion of such hearings could be appealed to the Tax Court within 30 days under new § 6330(d)(1).

Thus, Congress created two new jurisdictional pathways into the Tax Court for asserting innocent spouse relief. (Jumping a little out of chronological order, in 2006, Congress amended § 6015(e)(1) to also authorize Tax Court stand-alone innocent spouse suits seeking subsection (f) equitable relief. Tax Relief and Healthcare Act of 2006, § 408(a) and (b)(1), Pub. L. 109-432, Div. C.)

Note that § 6015(e)(3)(A) specifically contemplated refunds being found by the courts. The Tax Court has found refunds due the taxpayers in stand-alone cases brought under § 6015(e). *Washington v. Commissioner*, 120 T.C. 137 (2003) (refund granted under subsection (f)); *Taft v. Commissioner*, T.C. Memo. 2017-66 (refund granted under subsection (b)). The principal difference between (1) a Tax Court stand-alone innocent spouse suit under § 6015(e) or a deficiency suit under § 6213(a) in which the taxpayer seeks a refund under the innocent spouse provisions,[17] and (2) a district court or Court of Federal Claims refund suit under 28 U.S.C. § 1346(a)(1) in which the taxpayer seeks a refund under § 6015(b) or (f) is that, in the former, the taxpayer can seek a refund without first fully paying the tax liability, while in the latter case, *Flora* requires full payment before a refund suit is brought. Of course, for the reason of not having to fully pay before filing

[17] Section 6512(b) gives the Tax Court overpayment jurisdiction in suits initially commenced in response to a notice of deficiency. Section 6015(e)(3)(A) (now found at § 6015(g)(1)) specifically cites the Tax Court's overpayment jurisdiction under § 6512(b) when providing that refunds should be made under § 6015.

suit, most taxpayers prefer seeking innocent spouse relief refunds through Tax Court suits.

Note also that what was once in § 6015(e)(3)(C) (but has since been moved to § 6015(e)(3)) is not a general provision denying district courts and the Court of Federal Claims the ability to consider § 6015 relief in refund suits, but simply a provision to deal with the rare situation of a simultaneously-existing district court or Court of Federal Claims refund suit and a suit in the Tax Court under § 6015(e). Section 6015(e)(3)(C) simply directs that the innocent spouse suit be transferred over from the Tax Court to a jurisdictionally-sufficient district court or Court of Federal Claims refund suit. This coordinating provision was no doubt inspired by § 7422(e) – a provision discussed in *Flora* as one of the reasons the Court thought that full payment was required as a predicate to any refund suit. Section 7422(e) provides that, if, while a refund suit is pending in district court or the Court of Federal Claims, the IRS issues a notice of deficiency under § 6212, then the district court or Court of Federal Claims shall lose jurisdiction if a deficiency suit is brought in the Tax Court under § 6213(a) in response to the notice. In that event, the Tax Court will decide the alleged overpayment issue as part of its overpayment jurisdiction at § 6512(b). If the taxpayer files no Tax Court suit, the IRS may counterclaim in the refund suit for the tax deficiency.

Finally, the transfer provision now at § 6015(e)(3) easily refutes the government's argument made at pp. 5-8 of its motion that refund suits may not involve relief under § 6015(b) or (f) because there has been nothing "erroneously or illegally assessed or collected", within the meaning of § 7422(a) and 28 U.S.C. § 1346(a)(1). The only jurisdictional basis of a "suit for refund . . . begun by either individual filing the joint return pursuant to section 6532" (i.e., the suit to which the Tax Court proceeding would be transferred) is 28 U.S.C. § 1346(a)(1). Even if language in § 7422(a) and 28 U.S.C. § 1346(a)(1) might arguably not cover innocent spouse relief under the government's reading, Congress clearly legislated in 1998 on the assumption that refund suits raising innocent spouse relief had been proceeding under the 1971 legislation and should continue to proceed under the 1998 legislation. The language of § 7422(a) and 28 U.S.C. § 1346(a)(1) should be given a practical construction regarding innocent spouse relief in accordance with Congress' clear intentions.

IV. Confusion About the Wording of § 6015(e) Led Congress to Amend It in 2000 to Clarify That No Other Prior Avenues For Asserting Innocent Spouse Relief Had Been Repealed.

Almost immediately after its adoption, concern was expressed that since a provision about refunds was located under § 6015(e) (a subsection entitled "Petition for Review by Tax Court"), Congress may have intended that only the Tax Court henceforward should order refunds on account of innocent spouse relief,

and district courts and the Court of Federal Claims should not entertain refund lawsuits concerning innocent spouse relief (except in the simultaneous suit situation).

Also, one district court promptly held that it did not have jurisdiction to consider § 6015 relief in a quiet title action in which the government counterclaimed for foreclosure of its tax lien under § 7403. *Andrews v. United States*, 69 F. Supp. 2d 972 (N.D. Ohio 1999), *aff'd per unpublished opinion*, 225 F.3d 658 (table), 86 A.F.T.R.2d (RIA) 5466 (opinion) (6th Cir Jul. 27, 2000). The district court believed that either the taxpayer should have gone to the Tax Court under § 6015(e)(1)(A) or brought a jurisdictionally-sufficient refund suit under § 7422(a). The court noted that the instant suit was not a refund suit.[18] Although not stated, it appears that the court was concerned about the full payment rule of *Flora*

[18] The district court wrote:

> [A]n individual seeking to file an election under the innocent spouse statute must do so in the first instance with the Secretary of the IRS and then may appeal to the Tax Court. Plaintiffs' assertion that § 6015(e)(3)(C) completely obviates the jurisdictional requirements of § 6015(e)(1)(A) and § 7422 does not make sense. Rather, defendant asserts that § 6015(e)(3)(C) only means that the Tax Court cedes jurisdiction over a claim for innocent spouse relief to a district court that acquires jurisdiction over a refund suit with respect to the same tax years. This Court agrees. Accordingly, where a refund suit has already been *properly* filed with the district court for the same years in question, a new claim filed with the Secretary of the IRS asserting innocent spouse relief would be turned over to the district court to be heard with the refund suit. As a refund suit has not been properly filed herein, this Court is without jurisdiction to reevaluate Rosalind Taylor's tax liability for the years 1989 and 1990. [69 F. Supp. 2d at 978-979 (emphasis in original).]

not having been complied with, since this was only a quiet title action. Oddly, there was no discussion in the opinion of whether a quiet title action or a counterclaim seeking to foreclose under § 7403 might be sufficient jurisdictional grants to consider § 6015 relief in light of the fact that other courts had allowed former § 6013(e) relief to be considered as a defense in § 7403 suits. The Sixth Circuit in *Andrews* simply affirmed based on "the well-reasoned opinion of the district court". 86 A.F.T.R.2d (RIA) 5466.

In December 2000, Congress amended § 6015(e) in several ways, including that

(1) it moved the language that had been at § 6015(e)(3)(A) and (B) concerning credits and refunds out from under subsection (e) concerning the Tax Court and to a new subsection (g) (paragraphs (1) and (2)),

(2) it amended the opening language of § 6015(e)(1)(A) to begin with the phrase, "In addition to any other remedy provided by law", and

(3) it added to new subsection (g) a new paragraph (3) providing: "No credit or refund shall be allowed as a result of an election under subsection (c)". Community Renewal Tax Relief Act of 2000, Pub. L. 106-554, Appx. G, § 313(a)(2) and (3). The Conference Committee report described the reason for these changes as follows:

> *Allowance of refunds*.—The current placement in the statute of the provision for allowance of refunds may inappropriately suggest that the provision

> applies only to the United States Tax Court, whereas it was intended to apply administratively *and in all courts*. The bill clarifies this by moving the provision to its own subsection.
>
> *Non-exclusivity of judicial remedy.*—Some have suggested that the IRS Restructuring Act administrative and judicial process for innocent spouse relief was intended to be the exclusive avenue by which relief could be sought. The bill clarifies Congressional intent that the procedures of section 6015(e) were intended to be additional, non-exclusive avenues by which innocent spouse relief could be considered.

H. Rep. 106-1033 at 1023 (emphasis added).

Although the government's motion herein does not note them, after these 2000 amendments, there have been a small number of refund suits seeking § 6015 relief brought in the district courts or the Court of Federal Claims.

A few have been dismissed on procedural grounds that did not involve the issue of the alleged lack of the court's jurisdiction to hear such claims. *See, e.g.*, *Langley v. United States*, 716 Fed. Appx. 960 (Fed. Cir. 2017) (claim for 2004 year untimely).

However, in *Jones v. United States*, 322 F. Supp. 2d 1025 (D.N.D. 2004) – a refund suit predicated originally on former § 6013(e) relief – during the course of the case, Congress enacted § 6015, and thereafter, the taxpayer filed a Form 8857 requesting § 6015 relief and sought a refund under the new provision for some taxable years. The government counterclaimed for the unpaid tax for other taxable years. The court remanded the matter to the IRS for consideration of § 6015 relief, and, when relief was denied, held a trial and found the taxpayer entitled to § 6015

relief and refunds for two of the taxable years. There is no evidence in the opinion that the government made the claim that it makes here that the district court lacked jurisdiction to conduct a refund suit under § 6015 in the absence of a petition to the Tax Court under § 6015(e). Probably for that reason, the court does not even discuss this potential jurisdictional issue.

In *Favret v. United States*, 2003 U.S. Dist. LEXIS 21969 (E.D. La. 2003), the court denied a government motion to dismiss an innocent spouse refund suit for failure to state a claim (i.e., a motion on the merits). The case later settled. There is again no evidence in the opinion that the government made any claim that the court lacked jurisdiction of § 6015 refund suits in the absence of a prior petition to the Tax Court under § 6015(e).

In *Flores v. United States*, 51 Fed. Cl. 49 (2001), the Court of Federal Claims heard a refund suit where the taxpayer sought relief under § 6015(f). The court found the taxpayer entitled to relief. In a footnote, the court indicated that it had considered whether it had jurisdiction to so hold and explained (rather summarily) that both the government thought so and the court did, as well. The court wrote:

> The court initially was concerned with whether it had jurisdiction to review a determination made by the Secretary of the Treasury not to render innocent spouse relief under section 6015(f) of the Code (discussed, *infra*). In their supplemental memoranda, both parties argue that this court has such jurisdiction, directing this court to the legislative history of section 6015, the cases construing that legislative history, and the amendments made to

> section 6015 by section 1(a)(7) of the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763. Based on its review of these materials, the court now agrees that it has jurisdiction to review whether the Commissioner has abused his discretion under section 6015(f), as well as to determine whether that subsection is applicable to plaintiff under the effective date provisions of the Act. *See, e.g., Butler v. Commissioner*, 114 T.C. 276, 290 (2000) (concluding that Congress did not intend to commit the determination under section 6015(f) to unreviewable agency discretion).

Id. at 50 n. 1. One suspects that the concern was simply whether the determination under subsection (f) was subject to the complete unreviewable discretion of the IRS, not whether no refund suit may be maintained concerning the applicability of any subsection of § 6015 in the absence of a petition to the Tax Court under § 6015(e).

In sum, in a few instances, refund suits involving § 6015 have been allowed to proceed in the absence of a petition to the Tax Court under § 6015(e).

The Clinic could locate only one opinion (decided after the government filed its motion herein) that specifically supports the government herein. In *Chandler v. United States*, 2018 U.S. Dist. LEXIS 174482 (N.D. Tex. Sept. 17, 2018), *adopted by district court at* 2018 U.S. Dist. LEXIS 173880 (N.D. Tex. Oct. 9, 2018), the government moved to dismiss for lack of jurisdiction a district court suit seeking a refund on account of § 6015 relief, where the case had not been transferred over from the Tax Court under § 6015(e)(3). The government argued that, with the exception of such transfer instances, only the Tax Court has jurisdiction to hear cases seeking a refund on account of § 6015 relief. The taxpayer, although

represented by counsel, filed no papers responding to the motion. The magistrate accepted the government's argument, citing several opinions that held that district courts could not consider § 6015 relief as a defense in a collection suit brought by the government. As noted below in Part VI., the Clinic believes that all of those cited opinions are either wrong or distinguishable. And neither the collection suit opinions nor the *Chandler* opinion discussed the history of district court refund suits considering former § 6013(e) relief or the 1998 and 2000 legislative history of the adoption and amendment of § 6015. *Chandler* is simply wrongly decided.

V. Congress Did Not Impliedly Repeal District Court Refund Suits Raising Innocent Spouse Relief

Since Congress never amended 28 U.S.C. § 1346(a)(1) to remove district court and Court of Federal Claims refund suit jurisdiction over innocent spouse claims, and since § 6015(e)(3) does not literally bar district courts or the Court of Federal Claims from deciding refund issues under § 6015, the only way the government's motion should be granted in this case is if Congress repealed those courts' jurisdiction by implication when Congress created the new avenue for a Tax Court stand-alone innocent spouse suit at § 6015(e).

There are several reasons not to accept this idea of repeal by implication of district court or Court of Federal Claims refund suit jurisdiction concerning innocent spouse relief:

First, everyone understands that § 6015(e) did not repeal by implication the ability to raise innocent spouse relief in a Tax Court deficiency suit under § 6213(a). Why should § 6015(e) only impliedly repeal district court and Court of Federal Claims refund suit jurisdiction over innocent spouse relief?

Second, there is no indication in the 1998 or 2000 Committee reports that Congress thought that it was impliedly repealing district court and Court of Federal Claims jurisdiction to consider innocent spouse relief in refund suits in the absence of a petition to the Tax Court under § 6015(e). Indeed, by (1) acknowledging in 1998 Committee reports that courts other than the Tax Court could decide innocent spouse issues under § 6013(e) in refund suits, (2) stating in the 2000 Committee report that "the procedures of section 6015(e) were intended to be additional, non-exclusive avenues by which innocent spouse relief could be considered", and (3) inserting the phrase "In addition to any other remedy provided by law" in § 6015(e)(1), Congress seems to have rejected any idea of implicit repeal of other avenues to get innocent spouse relief in the courts.

Third, the Supreme Court has held that repeals by implication are not favored. *Hinck v. United States*, 550 U.S. 501, 508 (2007); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987). The Court has stated that

> There are two well-settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly

> intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

Posadas v. National City Bank, 296 U.S. 497, 503 (1936). Clearly, the addition of a stand-alone Tax Court innocent spouse proceeding is not in "irreconcilable conflict" with continued district court and Court of Federal Claims jurisdiction to consider innocent spouse relief in refund suits. Further, stand-alone innocent spouse relief was clearly not intended even as a substitute for all other judicial avenues for innocent spouse relief, since no one argues that it supplants the Tax Court deficiency jurisdiction in which that court can still consider innocent spouse relief.

Since the *Hinck* opinion cited in the prior paragraph addresses the rule of repeals by implication in a tax procedure context that is quite similar to § 6015(e), it deserves to be both described in detail and distinguished. *Hinck* was a refund suit initially brought in the Court of Federal Claims for a refund of interest under § 6404(e). Section 6404(e) allows the IRS to abate interest on account of certain IRS delays. However, as originally enacted in 1986, the statute had no legal standard by which courts might review the IRS' exercise of discretion. Accordingly, district courts and the Court of Federal Claims unanimously held that they lacked jurisdiction to conduct a refund suit under this provision because of the lack of a

review standard – i.e., that Congress had committed to the IRS unreviewable discretion whether or not to abate any interest. In 1996 legislation, Congress both added a standard for review and, at § 6404(h), a provision authorizing a Tax Court suit to review any IRS decision with respect to interest abatement requested under § 6404(e). Lower appellate courts split after 1996 over whether the Tax Court suit created was exclusive and so precluded district court or Court of Federal Claims refund suits concerning interest abatement. In *Hinck*, the Supreme Court held that the specific interest abatement suit in the Tax Court that was created at § 6404(h) was intended to be the sole avenue for judicial review and that no district court or Court of Federal Claims refund suits considering § 6404(e) interest abatement were permitted. The Court noted the much narrower provision at § 6404(h), which the Court felt trumped the usual refund suit option. While the Court noted that repeals by implication are disfavored, it observed that neither the district courts nor the Court of Federal Claims had ever held that they had jurisdiction prior to 1996 to consider interest abatement in a refund suit. So, this narrow statute was not repealing any existing suit by implication. By contrast, as noted above, there were multiple avenues of judicial review of innocent spouse determinations under former § 6013(e) before the enactment of § 6015, so the implied repeal doctrine should preclude the procedures of § 6015(e) displacing all those other avenues for getting innocent spouse relief.

VI. District Court Opinions Holding That § 6015 Relief Is Not Available as a Defense in Collection Suits Are Ill-Reasoned.

At page 9 of its motion in this case, the government cites numerous holdings of district courts (no appeals courts) that, because of § 6015(e), innocent spouse relief under at § 6015(b), (c), or (f) cannot be considered as a defense in a collection suit brought by the government in district court under § 7402 or § 7403. As an initial matter, the Clinic believes that all of those courts ruled incorrectly. None of them discussed the ability of taxpayers to raise innocent spouse relief under former § 6013(e) in district court collection suits under § 7402 or § 7403. Those opinions are also ahistorical.

IRS National Taxpayer Advocate ("NTA") Nina Olson agrees with the Clinic. Since 2007, Ms. Olson has been alerting Congress to these numerous incorrect district court rulings under § 7402 and § 7403. NTA 2007 Annual Report to Congress, Vol. I, p. 631; NTA 2008 Annual Report to Congress, Vol. I, p. 525; NTA 2009 Annual Report to Congress, Vol. I , pp. 494-495; NTA 2010 Annual Report to Congress, Vol. I, pp. 504-505; NTA 2012 Annual Report to Congress, Vol. I., pp. 648, 652; NTA 2015 Annual Report to Congress, Vol. I, pp. 532-536. In her 2013 report, Ms. Olson wrote:

> As the National Taxpayer Advocate has pointed out, these district court decisions are inconsistent with the statutory language of IRC § 6015, which does not give the Tax Court exclusive jurisdiction to determine innocent spouse claims, but rather confers Tax Court jurisdiction "in addition to any other remedy provided by law." Nothing in IRC § 6015 prevents a district

> court from determining, in a collection suit, whether innocent spouse relief is available. . . . Moreover, the refusal to allow a taxpayer to raise IRC § 6015 as a defense in a collection suit may create hardship because a taxpayer may be left without a forum in which to raise IRC § 6015 as a defense before losing her home to foreclosure by the IRS.

NTA 2013 Annual Report to Congress, Vol. I, pp. 416-417. Ms. Olson has asked that, if the courts do not correct their rulings, Congress adopt legislation that would make it even more clear that § 6015 relief is available as a defense in a district court collection suit. NTA 2007 Annual Report to Congress, Vol. I, pp. 549-550; NTA 2009 Annual Report to Congress, Vol. I, pp. 378-380; NTA 2010 Annual Report to Congress, Vol. I, p. 378-382; NTA 2017 Annual Report to Congress, Purple Book, p. 53.

In addition, there is more than the one opinion cited by the government on page 11 of its motion (and discussed in *Chandler*) – a bankruptcy case, *In re Pendergraft*, 2017 WL 1091935 (S.D. Tex. B.R. 2017) – that holds that a court other than the Tax Court may consider innocent spouse relief under § 6015.

Without discussing any possible limitation on its jurisdiction, one district court decided the issue of § 6015 relief in the course of a government collection suit. In *United States v. Haag*, 2004 U.S. Dist. LEXIS 22913 (D. Mass. 2004), *aff'd* 485 F.3d 1 (1st Cir. 2007), the government brought suit to reduce tax assessments to judgment, and the wife pled § 6015 relief in her answer. The government moved for summary judgment, arguing that, since the wife had not

filed a Form 8857 within 2 years of the first collection activity, she could not prevail on such relief. The court granted the government's motion. Later, Mrs. Haag filed a Form 8857 and brought suit in the Tax Court under § 6015(e). The Tax Court ruled that *res judicata* barred it from considering § 6015 relief because the district court had decided the issue on the merits; *Haag v. Commissioner*, T.C. Memo. 2011-87;[19] and the First Circuit affirmed the Tax Court's holding as to *res judicata*, without discussing any possible jurisdictional infirmity with the district court's considering § 6015 relief in the first suit. *Haag v. Shulman*, 683 F.3d 26 (1st Cir. 2012).

However, in any case, opinions issued under §§ 7402 and 7403 are distinguishable, first, because they did not make holdings with respect to refund suits brought under 28 U.S.C. § 1346(a)(1) and its statute of limitations provision at § 6532(a), and second, because Congress in § 6015(e) actually mentioned refund suits brought under § 6532(a), which suggests that Congress may feel differently about refund lawsuits' continued existence as avenues for innocent spouse relief determinations.

[19] *Accord Thurner v. Commissioner*, 121 T.C. 43 (2003), *aff'd on other issues* 255 Fed. Appx. 90 (7th Cir. 2007) (because husband could have raised § 6015 relief as a defense in a suit to reduce tax assessments to judgement, but did not, *res judicata* prevents relitigation of the issue in Tax Court under § 6015(e)).

VII. The Government's Position That Refund Suits Involving § 6015 Are Not Generally Authorized Conflicts with Its Arguments in Recent Appellate Court Cases.

In a series of recent court of appeals cases, the Clinic has represented taxpayers who had filed late *pro se* stand-alone petitions in the Tax Court under § 6015(e)(1)(A) seeking relief under § 6015(b), (c), and/or (f). In each case, the IRS misled the taxpayer with respect to the last date to file such petition. The Tax Court dismissed the petitions for lack of jurisdiction as untimely – despite the taxpayers' arguments (made after the Clinic's attorneys entered appearances for the taxpayers) that the deadline for filing Tax Court stand-alone innocent spouse petitions is not jurisdictional and is subject to equitable tolling. On behalf of these clients, the Clinic appealed the Tax Court's rulings to three different Circuit courts of appeal. All three Circuits affirmed the Tax Court, holding the filing deadline jurisdictional. *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017); *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017); *Nauflett v. Commissioner*, 892 F.3d 649 (4th Cir. 2018). In each case, the Department of Justice ("DOJ") Tax Division Appellate Section attorneys assured the courts, both in their briefs and at oral argument, that the courts should not worry that the taxpayers were left without a remedy because each taxpayer could pay the liability in full and sue for a refund in district court or the Court of Federal Claims, where each could still seek relief under § 6015. For example, at page 48 of its appellee's brief in *Nauflett*, the

Appellate Section attorneys wrote:

> We note, however, that this does not mean that taxpayers who miss the deadline in § 6015(e)(1)(A) may never seek judicial review of the IRS's determination that they are not entitled to innocent-spouse relief. As the Tax Court recognized (A. 29-30), a taxpayer like Nauflett who misses the 90-day filing window may nevertheless pay any assessment made by the IRS, file a timely administrative claim for refund, and then file a refund suit in either a federal district court or the Court of Federal Claims six months later (or earlier, if the refund claim is denied before the expiration of that six-month period). *See* I.R.C. §§ 6511(a), 6532(a)(1), 7422(a); *see also id*. § 6015(e)(3) (stating that jurisdiction over any pending petition for relief under § 6015 is transferred from the Tax Court to any district court that acquires jurisdiction over the relevant years as part of a refund suit filed by either spouse pursuant to I.R.C. § 6532).

At oral argument in the *Matuszak* and *Nauflett* cases, counsel for the taxpayers pointed out that the taxpayers could not afford to fully pay all asserted liabilities for all years before filing district court refund suits, so the alternative remedy of a suggested refund suit was of little practical use to them. Doubtless for this impracticality reason, at footnote 5 of *Matuszak*, the court wrote:

> Although the Tax Court lacks jurisdiction to review an untimely petition for innocent spouse relief, taxpayers who miss the ninety-day deadline in § 6015(e)(1)(A) may have other means, outside the Tax Court, to seek review of the IRS's determination. *See* Appellee's Br. 47 (suggesting that a taxpayer may pay the assessed deficiency and then seek review of the IRS's denial of innocent spouse relief in a refund suit in federal district court or the Federal Court of Claims). We express no opinion on the availability of those alternative remedies *in this case*. [Emphasis added.]

The DOJ Tax Division Trial Section attorney in the instant case argues that no refund suit involving § 6015 relief is permitted in district court unless a Tax Court suit under § 6015(e)(1)(A) is brought while a refund suit is pending. He

admits only that the Tax Court suit should be transferred over to the district court in that situation. That argument, however, is directly contrary to what the DOJ Tax Division Appellate Section has recently argued in the cases of the other Clinic clients. The government should get its story straight. The Appellate Section is right and the Trial Section is wrong.

CONCLUSION

This Court has jurisdiction to determine whether or not Ms. Hockin filed a joint return and, if she did, whether she is due a refund on account of being entitled to relief under § 6015(f).

Respectfully submitted,

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November 20, 2018

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing memorandum was served upon counsel for the plaintiff, J. Scott Moede, Esq., by e-mailing a copy to him on November 20, 2018 at Scott.Moede@portlandoregon.gov.

This is to certify that a copy of the foregoing memorandum was served upon counsel for the defendant, Boris Bourget, Esq., by e-mailing a copy to him on November 20, 2018 at boris.bourget@usdoj.gov.

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November 20, 2018