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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

KIMBERLY HOCKIN,

PLAINTIFF,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

3:17-cv-1926 JR

PLAINTIFF'S SUPPLMENTAL RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. Introduction and Background

Plaintiff submits this Supplemental Response in Opposition to Defendant's Motion to Dismiss in accordance with the Court's Order entered on February 21, 2019 (Docket No. 41).

As the Court knows from prior filings, plaintiff seeks to recover taxes of $10,767.76 "erroneously or illegally collected" from her on three primary grounds: 1) Taxpayer Ms. Hockin qualifies for a refund "because there was no valid joint return filed"; 2) Taxpayer also qualifies for innocent spouse relief under "[26 U.S.C.] § 6015(f) Equitable Relief for 2007"; and 3) Because the IRS granted her relief on identical grounds for tax year 2008, the doctrine of quasi-

estoppel also known as the duty of consistency should be applied to the IRS requiring a refund for tax year 2007 in the same regard as tax year 2008. Plaintiff has provided the Court with authority to support these grounds including 28 U.S.C. § 1346(a)(1), regulations, case law, the plain language of § 6015(e)(1)(A), the DOJ Appellate Section's position in briefs and at oral argument, and the extensive historical, legislative history and statutory analysis in the Memorandum of Law of Amicus Curiae of the Federal Tax Clinic of the Legal Services Center of Harvard Law School. Subsequent to this briefing, two additional arguments were brought to counsel's attention necessitating this supplemental response memorandum. The two arguments are: 1) In 2000, the Chief Legal Authority for the IRS issued a formal Notice N(35)000-338 that the Tax Court, the United States District Courts, (including the bankruptcy courts) and the Court of Federal Claims have jurisdiction to consider § 6015(f) cases; and 2) The plain meaning of § 6015(g) also authorizes a claim for refund in District Court. As will be explained further below, these two additional arguments having been brought to counsel's attention provide additional authority for denying the United States' Motion to Dismiss.

II. The Chief Legal Authority for the Internal Revenue Service sent a nationwide official Notice acknowledging this Court has jurisdiction to consider innocent spouse relief cases under I.R.C. § 6015(f) in the year 2000. That Notice has never been withdrawn.

On the IRS official website, it is explained that "The Chief Counsel of the IRS is appointed by the President of the United States with the advice and consent of the U.S. Senate. As the chief legal advisor to the IRS Commissioner on all matters pertaining to the interpretation, administration and enforcement of the Internal Revenue Laws (as well as all other legal matters) the Chief Counsel provides legal guidance and interpretive advice to the IRS, Treasury and to taxpayers." https://www.irs.gov/about-irs/office-of-chief-counsel-at-a-glance. That same website explains its Mission as "Serve America's taxpayers fairly and with integrity by providing correct and impartial interpretation of the internal revenue laws and the highest quality

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legal advice and representation for the Internal Revenue Service." *Id.*

This background is important because the "Chief Legal Advisor" to the IRS whose mission is to provide "correct and impartial interpretation of the internal revenue laws" takes a position contrary to the government's position in this case. It has been the official position of the IRS Chief Legal Advisor for nearly 20 years that this Court has jurisdiction over plaintiff's assertion that this Court has jurisdiction over her claim for innocent spouse relief under I.R.C. 6015(f).

Specifically, on June 5, 2000, the Office of Chief Counsel of the Internal Revenue Service (the Defendant) issued a notice changing its litigation position agreeing that the District Court has jurisdiction over equitable relief under 26 U.S.C. § 6015(f) cases. OFFICE OF CHIEF COUNSEL, INTERNAL REVENUE SERVICE, N(35)000-338, UIL 6015.00-00, CHANGE IN LITIGATING POSITION (June 5, 2000). The Notice in relevant part states "The Service now agrees that the Tax Court, the United States District Courts, (including the bankruptcy courts) and the Court of Federal Claims have jurisdiction to consider whether the Service abused its discretion in denying equitable relief under I.R.C. § 6015(f)."[1] *Id*. The Notice goes on to state that "With respect to cases presently pending before the United States [D]istrict [C]ourts (including the bankruptcy courts) or the Court of Federal Claims in which a motion to dismiss (in whole or in part) for lack of jurisdiction with respect to the spouse's § 6015(f) claim has been filed by the government, district counsel attorneys should send a letter to the Department of Justice requesting that the Department of Justice take all steps necessary to implement the Service's change in litigating position described in this Notice, such as withdrawing its motion to dismiss for lack of jurisdiction." *Id*.

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[1] The standard for review of a denial of innocent spouse relief is now "*de novo*". The change in standard of review does not alter District Court jurisdiction.

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The Office of Chief Counsel's Notice is still valid. The IRS issued this notice after it unsuccessfully argued that no court has jurisdiction over § 6015(f) because 26 U.S.C § 6015(e) (2000) did not explicitly mention § 6015(f). *Butler v. Comm'r*, 114 T.C. 276, 290 (2000). Since June 5, 2000, there have been virtually no changes to § 6015(e) which would render this litigating position invalid. Notably, the version of § 6015(e) in effect in 2000 included the same language cited by opposing counsel, in this case, to conclude that the District Court does not have jurisdiction over 6015(f) claims; namely "the tax court shall have jurisdiction." 26 U.S.C § 6015(e)(1)(A) (2000); 26 U.S.C. § 6015(e)(1)(A) (2012). This is also true of Section 6015(e)(3), which is identical in both versions of the statute. 26 U.S.C § 6015(e)(3) (2000); 26 U.S.C. § 6015(e)(3) (2012). Thus, there have been no changes to the statute which would invalidate the Notice. Therefore, it appears that the United States' position conflicts with their attorney's (Chief Legal authority of the IRS) position in this case.

In fact, the most significant change to § 6015(e) since the IRS issued their Notice has clarified that the District Court has jurisdiction over innocent spouse claims. A year after the Notice, Congress added the language "in addition to any other remedy provided by law" specifically to clarify that the District Court still has jurisdiction over innocent spouse claims. H.R. Rep. No. 106-1033, at 1023 (2000) (Conf. Rep.); Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-544, App'x G, § 313(a), 114 Stat. 2673, 2763A–641 (2001). This further underscores the variance between the United States and the IRS's litigating position because the legislative intent that the District Court has jurisdiction is clearer now than when the Notice was issued.

Hence, again, the United States' Motion to Dismiss should be denied.

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III. The plain meaning of § 6015(g) expressly authorizes a claim for refund under § 6511.

In addition to the other statutory and legislative history arguments set out in prior briefing, the plain meaning of 26 U.S.C. § 6015(g) also expressly authorizes a claim for refund in District Court. In relevant part § 6015(g) states "[e]xcept as provided in paragraphs (2) and (3), notwithstanding any other law or rule of law (other than § 6511, 6512(b), 7121, or 7122), credit or refund shall be allowed or made to the extent attributable to the application of this section."

The statute has one independent clause and two dependent clauses. The independent clause of § 6015(g) reads a "credit or refund shall be allowed or made to the extent attributable to the application of this section." § 6015(g). This section is the independent clause because it can stand alone as a complete sentence. The subject of the independent clause is a "credit or refund" because it is the thing described by the predicate. The predicate describes the subject in that it "shall be allowed or made to the extent attributable to the application of this section." *Id.* The word shall in a statute generally is the "language of command." *Serv. Employees Int'l Union v. United States*, 598 F.3d 1110, 1113 (9th Cir. 2010) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). The independent clause commands that refunds or credits are "allowed or made to the extent attributable to the application of this section."

However, the two dependent clauses of § 6015(g) modify the independent clause. The first dependent clause states: "except as provided in paragraph (2) and (3)." This clause is a dependent clause because it does not function alone as a complete sentence. Further, it begins with the subordinating conjunction "except as." The subordinating conjunction is a preposition which sets the dependent clause's relationship to the independent clause. "Except as" thus carves out two exceptions to the independent clause command that refunds or credits are "allowed or made to the extent attributable to the application of this section." § 6015(g).

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In the same way the clause "notwithstanding any other law or rule of law (other than §§ 6511, 6512(b), 7121, or 7122)" is also a dependent clause. Like the first dependent clause, the second dependent clause begins with a subordinating conjunction or preposition. In this case, the subordinating conjunction or preposition is "notwithstanding[.]" § 6015(g). Per Merriam-Webster's Dictionary, notwithstanding, when used as a preposition, means despite or regardless. Notwithstanding, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/notwithstanding. Thus, the second dependent clause provides four other statutes which apply to whether a claim for refund or credit shall be "allowed or made." Note the four alternative statutes are combined by "or[.]" The use of "or" not "and" makes each listed statute alternatives to each other. Thus, together with the independent clause, § 6015(g) authorizes claims for refund or credit for innocent spouse exclusively under §§ 6015, 6511, 6512(b), 7121, or 7122. Since Hockin's claim for refund was made pursuant § 6511 she has made a valid claim for innocent spouse relief per the plain reading of § 6015(g).

IV. Sections 6511 and 6512(b) cannot both simultaneously apply to limit Tax Court jurisdiction.

The references within § 6015(g) lead to the same conclusion. Section 6511, referenced in § 6015(g), provides the jurisdictional statute of limitation for refund claims in District Court and the Court of Federal Claims. *Comm'r v. Lundy*, 516 U.S. 235, 240 (1996). For either court to have jurisdiction the taxpayer must file a claim for refund "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." § 6511(b)(1) (incorporating by reference § 6511(a)). In contrast, under § 6512(b)(1) the Tax Court does not require a claim for refund to be filed to have jurisdiction so long as the payment fits within the lookback periods ascribed in § 6512(b)(3). *Comm'r v. Lundy*, 516 U.S. at 240 (citing § 6512(b)(1)). Thus, "a taxpayer who seeks a refund in the Tax Court . . . does not need to

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actually file a claim for refund with the IRS; the taxpayer need only show that the tax to be refunded was paid during the applicable look-back period." *Comm'r v. Lundy*, 516 U.S. at 240. This difference in jurisdictional prerequisites between the two courts strongly implies that the District Court also has jurisdiction over innocent spouse claims.

The application of § 6511 to § 6015 cannot be read to add a filed claim requirement to Tax Court jurisdiction. It is well settled Supreme Court precedent that the Tax Court does not require a claim to be filed with the IRS prior the gaining jurisdiction over a refund claim. *Comm'r v. Lundy*, 516 U.S. at 240; *Borenstein v. Comm'r of Internal Revenue*, 149 T.C. 263, 267 (2017); *Healer v. Comm'r*, 115 T.C. 316, 319 (2000). This is consistent with Treasury Department's interpretation of § 6015 which states, "[t]he [T]ax [C]ourt also may review a claim for [innocent spouse] relief if Tax Court jurisdiction has been acquired under another section of the Internal Revenue Code such as section 6213(a) or 6330(d)." 26 C.F.R. § 1.6015-7. Section 6213(a) does not require a claim to be filed before the court obtains jurisdiction. *Tadros v. Comm'r*, 763 F.2d 89, 91 (2d Cir. 1985). Therefore, § 6511 cannot add a jurisdictional requirement that a claim for relief must be filed before the Tax Court has jurisdiction over refund claims under § 6015 because it would be contrary to *Lundy* as well as 26 C.F.R. § 1.6015-7.

If the Tax Court has exclusive jurisdiction, as the government suggests, the only alternative interpretation is to make § 6511(b)(1) inoperative. Such a reading is contrary to the basic canon of construction that requires "a statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018). Therefore, the opposing counsel's argument that § 6015(e) restricts jurisdiction to the Tax Court is incorrect under the plain meaning of § 6015(g) and per basic cannons of construction.

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The most natural interpretation of the inclusion of §§ 6511 and 6512(b) in § 6015(g) is that they each apply to their respective courts as authorized by § 6015(e)(1)(A). Section 6015(e)(1)(A) provides that an individual may petition the Tax Court, "[i]n addition to any other remedy provided by law." As noted by The National Taxpayer Advocate, there are differences in the remedies available to a taxpayer in Tax Court and District Court.[2] Nat'l Taxpayer Advocate, I.R.S., 2018 Annual Report to Congress 387 (2018), 2019 Purple Book, Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration. https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_PurpleBook_07_StrenghtTPR_e.pdf. In Tax Court, a prevailing taxpayer on an innocent spouse claim for refund is entitled to an interest rate on any amount returned of either: The Federal short-term rate or the Federal short-term rate plus three, depending on whether they make a deposit per § 6603(d)(1). § 6603(d)(1); § 6621(a). Also, a taxpayer has no right to a jury trial in Tax Court. *Statland v. U.S.*, 178 F.3d 465, 472-73 (7th Cir. 1999). In contrast, a prevailing taxpayer receives the Federal short-term rate interest rate plus three percent in District Court. § 6621(a). However, the taxpayer must pay the entire tax liability before filing their claim for refund in District Court. *Flora v. U.S.*, 362 U.S. 145, 148 (1960). Moreover, a taxpayer has a right to a jury trial in District Court. U.S. Const. amend. VII. These differences in remedy support the conclusion that § 6015(g) read together with § 6015(e)(1)(A) does not preclude District Court jurisdiction over 6015(f) refund claims.

[2] While the National Taxpayer Advocate in its 2018 Recommendation to Congress is not binding, its conclusion that taxpayers may seek innocent spouse relief in refund suits in Federal District Courts is persuasive. The National Taxpayer Advocate's recommendation is to clarify 6015 to avoid confusion and litigation over jurisdiction in District Court. Nat'l Taxpayer Advocate, I.R.S., 2018 Annual Report to Congress 387 (2018), 2019 Purple Book, Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration. https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_PurpleBook_07_StrenghtTPR_e.pdf.

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Thus, the District Court has jurisdiction over § 6015(f) refund claims because the above interpretation of § 6015: (1) is consistent with the plain meaning of the statute (2) gives operation to every provision of the statute, and (3) is shared by the Taxpayer Advocacy Office and the Office of Chief Counsel.

V. Conclusion

Based upon the foregoing, and "Plaintiff's Response in Opposition to Defendant's Motion to Dismiss", and the "Memorandum of Law of Amicus Curiae Federal Tax Clinic of the Legal Services Center of Harvard Law School in Support of the Plaintiff", plaintiff respectfully requests that the United States' Motion to Dismiss be denied.

Dated: February 26, 2019

Respectfully submitted,

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