UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIMBERLY HOCKIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

3:17-cv-1926-JR

FINDINGS & RECOMMENDATION

RUSSO, Magistrate Judge:

Plaintiff Kimberly Hockin brings this action against the United States seeking a refund for tax year 2007. The government moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). The Federal Tax Clinic of the Legal Services Center of Harvard Law School filed a memorandum amicus curiae in support of the plaintiff. The court heard argument on April 25, 2019. The motion to dismiss should be granted in part and denied in part.

ALLEGATIONS

Plaintiff alleges she married Shawn Harrison in 1997. Complaint (doc. 1) at ¶ 5. In 2007 and 2008, Shawn Harrison worked as a civil engineer, however, he also derived income from a side

business renting out heavy equipment with which plaintiff was not involved. Id. at ¶ 6. Plaintiff alleges Shawn Harrison had complete control of the family finances including preparing and filing their joint tax returns. Id. at ¶ 6. Plaintiff believed the family finances were "fine" during 2007 and 2008. During that time, Shawn Harrison was working on a project in Columbia, purchased recreational vehicles and a Hummer H3, sent plaintiff on a trip to Las Vegas, and traveled frequently to Florida and Latin America. Id. at ¶¶ 7-8.

However, by the end of 2008, the recreational vehicles were repossessed and the bank foreclosed on the family's home. Id. at ¶ 9. Plaintiff alleges Shawn Harrison was abusing drugs at this time, and having affairs with Columbian women while working in Latin America. Id.

Plaintiff and Harrison filed a joint petition for divorce on July 30, 2009, which was finalized on August 5, 2009. Id. at ¶ 10. The divorce decree provided:

> The parties anticipate no income tax problems from their previously filed Income Tax Returns, other than known tax debt owed for 2007 and 2008, which Husband has agreed to pay. Husband and Wife agree that any further, currently unknown income tax obligations for any past tax years, 2008 and earlier, which may arise in the future, shall be paid by the party whose income and/or deductions results in such tax liability, including any penalty, interest, accounting fees or other professional fees.

(doc. 1-1) at ¶ 16.

Plaintiff alleges Shawn Harrison filed the tax return for 2007 on August 3, 2009, and the tax return for 2008, on October 26, 2009. Plaintiff alleges she did not sign the returns and was not aware of their filings. Complain (doc. 1.) at ¶ 11.

In 2014, after discovering she owed about $10,000 for tax year 2007, and approximately $80,000 for tax year 2008, plaintiff filed for innocent spouse relief. The Internal Revenue Service (IRS) granted relief for the 2008 tax year[1], however, retained plaintiff's tax refunds for tax years

[1]The exhibits attached to plaintiff's complaint demonstrate that on September 18, 2017, (continued...)

2014 and 2015 as payments for the 2007 tax year liability. Id. at ¶ 12.

Plaintiff alleges she

> filed a claim for refund for the payments made on the 2007 tax liability including: (1) a payment constituting her 2014 tax refund in the amount of $5,913 paid on April 15, 2015, a payment consisting of her 2015 tax refund in the amount of $4,018 paid on April 15, 2016, (3) a payment of $418.06 made by personal check in March of 2016, and (4) a second payment of $418.70 taken from her 2016 joint tax refund in March of 2017.

Id. at ¶ 13.

Plaintiff asserts the IRS treated the claim for refund as a request for reconsideration of her prior innocent spouse relief claim and affirmed its denial of relief. Id. at ¶ 14. The government moves to dismiss asserting it is immune from suit in this Court, and that the Tax Court has exclusive jurisdiction to review the IRS's determination.

DISCUSSION

A. Sovereign Immunity

"[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Testan, 424 U.S. 392, 399 (1976)(quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity cannot be implied but must be "unequivocally expressed." Tobar v. United States, 639 F.3d 1191, 1195 (9th Cir. 2011) (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)). Similarly, "[L]imitations and conditions upon which the

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[1](...continued)
the IRS denied plaintiff's request for innocent spouse relief pursuant to 26 U.S.C. § 6015(f) for both years. Ex. 9 (doc. 1-1) at pp. 49-50. At oral argument the government clarified that plaintiff was granted due process collection relief because of a lack of signature on the 2008 return pursuant to 26 U.S.C. § 6330. See also Ex. 5 (doc. 1-1) at pp. 35, 37 (write-off of $74,374.11 in tax liability). As discussed infra, plaintiff may pursue a similar refund claim on the theory that she did not sign the 2007 return.

[United States] Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 276 (1957). The party asserting a claim against the United States bears "the burden of establishing that its action falls within an unequivocally expressed waiver of sovereign immunity by Congress." Dunn & Black P.S. v. United States, 492 F.3d 1084, 1088 (9th Cir. 2007). The waiver of sovereign immunity is a prerequisite to federal court jurisdiction. United States v. Mitchell, 463 U.S. 206, 212 (1983).

Plaintiff seeks a refund of $10,767.76 plus applicable interest and penalties charged by the IRS based on the 2007 "joint" return and alleges the court has jurisdiction pursuant to 28 U.S.C. §§ 1340, 1346(a)(1), and 26 U.S.C. § 7422(a).

Pursuant to 28 U.S.C. § 1340, district courts have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. The statute encompasses actions to collect taxes and is not a consent by the United States to suites against it. De Masters v. Arend, 313 F.2d 79, 84 (9th Cir. 1963). Therefore, jurisdiction here does not lie within this statute.

Pursuant to 28 U.S.C. § 1346(a)(1), district courts and the Court of Federal Claims have original jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws."[2] As noted below, plaintiff alleges one theory of recovery that is encompassed within this waiver of immunity, however, her other stated theories do not fall within this express waiver of immunity.

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[2]Plaintiff may not seek a refund pursuant to this grant of authority to sue the United States in district court until a claim for refund has been filed with the IRS. 26 U.S.C. § 7422(a). Plaintiff alleges she did file a claim for refund from the IRS. Complaint (doc. 1) at ¶¶ 1, 13-15.

B. Jurisdiction over Innocent Spouse Relief

Plaintiff clarified the theories of her case alleged in the complaint:

> 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's Response (doc. 35) at p. 2. The government concedes plaintiff should be allowed to proceed on the alternative theory that she did not sign the 2007 "joint" return and thus the collection of the underpayment from her for that return was allegedly erroneously or illegally assessed or collected. Accordingly, the motion to dismiss should be denied to this extent. However, the court should dismiss the claim for refund asserted under plaintiff's other two theories as the United States has not waived immunity pursuant to 26 U.S.C. § 6015(f).

1. Signature requirement

It should be noted that regardless of whether this court has jurisdiction to entertain an action seeking a refund based on a failure to provide innocent spouse relief pursuant to section 6015(f), plaintiff's signature on the 2007 return would be a prerequisite to obtaining such relief.

As noted above, plaintiff sought relief for the unpaid taxes for tax years 2007 and 2008 allegedly computed in a joint return with her ex-husband. 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. 26 U.S.C. § 6013(d). In the situation where income on the return is correctly stated, but there is an underpayment of the tax owed, a spouse who is subject to joint and several liability may petition the IRS for innocent spouse relief under 26 U.S.C. § 6015(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.

However, a husband and wife's joint return (if not made by an agent of one or both spouses) shall be signed by both spouses. 26 C.F.R. § 1.6013-1(a)(2). If, as plaintiff alleges, she did not sign the returns and was not aware of their filings, they are not joint returns for purposes of section 6013(d) and plaintiff cannot avail herself of the innocent spouse provisions of section 6015. See 26 U.S.C. § 6015(a) (notwithstanding section 6013(d)(3) an individual who made a joint return may elect to seek relief from liability applicable to joint filers ...).[3] The parties indicate that neither the original nor a copy of the 2007 return can be located and thus whether plaintiff signed the return may be an issue that will be difficult to resolve. However, assuming facts developed during the course of discovery establish plaintiff signed the return and is therefore subject to joint and several liability, she presumably will assert that she is entitled to innocent spouse relief under section 6015(f).

2. Estoppel

Plaintiff asserts that because she was granted innocent spouse relief for the 2008 tax year and she made identical arguments with respect to the 2007 tax year, the IRS is estopped from denying such relief for the 2007 tax year based on a "duty of consistency." As noted above, the IRS did not grant section 6015(f) relief for either tax years 2007 or 2008. However, even if the 2008 tax write-off was attributable to innocent spouse relief, plaintiff does not allege she raised an estoppel claim

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[3]Subsections (b) and (c) of section 6015 provides innocent spouse relief to joint filers for an understatement of the tax owed, not an underpayment as alleged in this case. Thus, plaintiff must avail herself of the relief made available to joint filers pursuant to subsection (f). 26 U.S.C. § 6015.

before the IRS. Pursuant to 26 U.S.C. § 7422(a), "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary." In plaintiff's 2007 tax year refund claim, she asserted she did not sign the 2007 return and thus cannot be jointly liable; alternatively, plaintiff argues she is entitled to innocent spouse relief. See Ex. 1 (attached to the motion dismiss) (doc. 15-1). Plaintiff did not assert the IRS has a duty of consistency to apply innocent spouse relief for 2007 because such relief was granted for 2008 under the same facts.[4] Accordingly, to the extent plaintiff now raises an estoppel claim, that claim is barred and should be dismissed. See Bear Valley Mut. Water Co. v. R.A. Riddell, 493 F.2d 948, 951 (9th Cir. 1974) (The filing of a claim with the Internal Revenue Service is a jurisdictional prerequisite to a suit for refund and, in the absence of a waiver by the government, the taxpayer cannot recover in a suit for refund on a different ground than that set forth in the claim for refund.).

3. Immunity From Suit in District Court Regarding Refund Claims Asserting Relief pursuant to 26 U.S.C. § 6015(f)

The government asserts it has not consented to be sued for equitable relief under 26 U.S.C. § 6015(f). As noted above, this court has jurisdiction over actions against the United States for the recovery of any internal-revenue tax or penalty alleged to have been erroneously or illegally assessed

[4]At oral argument, plaintiff asserted she did raise such a claim. However, the administrative claim does not include it. Plaintiff's claim asserts there was not a valid 2007 joint return filed due to the lack of plaintiff's signature, and alternatively, plaintiff argues she qualifies for innocent spouse relief. See doc. 15-1 at p.7-8. The argument regarding innocent spouse relief does not raise a duty of consistency claim. See doc. 15-1 at pp. 7-12 (discussing the threshold conditions and factors for relief).

or collected. 28 U.S.C. § 1346(a)(1). The government argues failure to relieve plaintiff of joint and several liability for underpayment of the joint 2007 tax return pursuant to the equitable considerations provided for in section 6015(f) does not provide the court with jurisdiction to hear a refund claim because it is not a tax "erroneously or illegally assessed."

Section 6015 provides a pathway for review of the IRS's decision regarding innocent spouse relief:

> (e) Petition for review by Tax Court.--
>
> (1) In general.--In the case of an individual against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply, or in the case of an individual who requests equitable relief under subsection (f)--
>
> (A) In general.--In addition to any other remedy provided by law, 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--
>
> (I) at any time after the earlier of--
>
> (I) the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual, or
>
> (II) the date which is 6 months after the date such election is filed or request is made with the Secretary, and
>
> (ii) not later than the close of the 90th day after the date described in clause (i)(I).

26 U.S.C.A. § 6015(e).

The statute recognizes a limitation on the Tax Court's jurisdiction when a suit for refund is begun by either individual filing the joint return. In such a case,

> (A) 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
> (B) the court acquiring jurisdiction shall have jurisdiction over the petition filed under this subsection.

26 U.S.C.A. § 6015(e)(3) (emphasis added).[5]

Amicus provides the court with an extensive history of the innocent spouse provisions and refund suits prior to enactment of innocent spouse provisions. See Amicus Memorandum (doc. 28) at pp. 5-26. In reviewing this history, Amicus asserts that to accept that the district court does not have jurisdiction to hear a stand-alone 6015(f) determination would require the court to determine Congress impliedly repealed jurisdiction to hear such cases. However, before the enactment of section 6015, there was no judicial review provision for stand-alone innocent spouse claims. Section 6015(f) created an entirely new form of equitable relief that did not exist prior to 1998. Accordingly, the history does little to inform the jurisdictional boundaries of section 6015(f). This expansion of equitable relief available to a joint filer for underpayment limited review to the Tax Court when Congress recognized a lack of an appeal route for section 6015(f) stand-alone determinations. In solving this problem, Congress did not unambiguously waive the United States' immunity from suit in district court.

a. History of 26 U.S.C. § 6015(f)

Amicus correctly points out that a jurisdictional requirement for a refund suit is full payment of the tax prior to commencement of the suit. Therefore, to obtain relief before paying the tax allegedly due, a taxpayer is limited to the Tax Court. See Flora v. United States, 362 U.S. 145, 150-

[5]This provision covers the rare situation of a district court (or Court of Claims) refund suit and a Tax Court suit under section 6015(e)(1) pending simultaneously.

60 (1960). In 1971, Congress enacted innocent spouse relief, but that relief applied only to deficiency tax (joint returns with understated tax due). Pub. L. No. 91-679 (former 26 U.S.C. § 6013(c)(1)). Amicus notes there is no authority holding that suit for refund for a deficiency charged to an imocent spouse in a district court was prohibited on jurisdictional grounds for not being "erroneously or illegally assessed or collected."

In 1998, Congress enacted 26 U.S.C. § 6015 and the House Ways and Means Committee explained:

> The proper forum 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 denials of innocent spouse relief.
> ...
> The Committee is concerned that the innocent spouse provisions of present law are inadequate.... The Committee also believes ... that all taxpayers should have access to the Tax Court in resolving disputes concerning their status as an imocent 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 and an overpayment exists as a result of the innocent spouse qualifying for such relief. The taxpayer must file his or her petition for review with the Tax Court during the 90-day period that begins on the earlier of (1) 6 months after the date the taxpayer filed his or her claim for innocent spouse relief with the Secretary or (2) the date a notice denying innocent spouse relief was mailed by the Secretary. Except for termination and jeopardy assessments (secs. 6851, 6861), the Secretary may not levy or proceed in court to collect any tax from a taxpayer claiming innocent spouse status with regard to such tax until the expiration of the 90-day period in which such taxpayer may petition the Tax Court or, if the Tax Court considers such petition, before the decision of the Tax Court has become final. The running of the statute of limitations is suspended in such situations with respect to the spouse claiming innocent spouse status.

H.R. REP. 105-364, 61. Accordingly, Congress enacted section 6015 which included the following

in section (e):

> (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.

INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, PL 105–206, July 22, 1998, 112 Stat 685. This section also included the provision for the Tax Court's loss of jurisdiction in the event a refund suit is instituted separate from the innocent spouse claim to "whatever extent jurisdiction is acquired by the district court." The acquiring court shall then have jurisdiction over the innocent spouse petition. Id. at (e)(3)(C)(I) and (ii).

While the Committee's discussion of the proper forum could be read to suggest that Congress understood that district courts had jurisdiction to review innocent spouse claims, the resultant legislation does not specifically and "unequivocally" waive immunity to suit in district court other than to whatever extent jurisdiction is acquired by the district court. It is not clear that the resulting legislation vested in the district court, in the first instance under a suit for refund, the ability to hear a stand-alone innocent spouse claim as the basis for the refund claim.

More importantly, the 1998 law, for the first time, added innocent spouse relief for an underpayment, rather than just an understatement, in subsection (f) of section 6015 which did not exist in the prior 26 U.S.C. § 6013. Similarly, the 1998 Act expanded opportunities for taxpayers to seek administrative relief, and subsection (e) directs review of these administrative decisions to the Tax Court. Other than when an otherwise available jurisdictionally sound refund claim is subsequently filed that overlaps with the innocent spouse claim, Congress did not address review to the district court. Specifically, regarding subsection (f), Congress provided for no review at all because subsection (e) referred only to subsections (b) and (c). See, e.g., In re French, 255 B.R. 1, 2 (Bankr. N.D. Ohio 2000) (Congress chose to exclude from review the issues of relief pursuant to subsection (f)).

In 2000, Congress amended subsection (e) to include the language, **"in addition to any other remedy provided by law**, 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**." CONSOLIDATED APPROPRIATIONS—FY 2001, PL 106–554, December 21, 2000, 114 Stat 2763 (emphasis added). But, because the section did not explicitly include subsection (f), the Tax Court still did not have jurisdiction to hear a subsection (f) claim. See Comm'r of Internal Revenue v. Ewing, 439 F.3d 1009, 1013-14, n. 4 (9th Cir. 2006).

In 2006, Congress sought to remedy the lack of an appeal route for subsection (f) innocent spouse claims. Congress extended Tax Court review explicitly to subsection (f) claims in addition to subsections (b) and (c) claims. In advocating for the change, Representative Elain Tauscher, the Bill's sponsor, stated:

> Recent decisions by the Eighth and Ninth Circuit Courts of Appeals have denied the tax court jurisdiction over petitions for equitable relief. Consequently, there are no mechanisms for review or appeal of these IRS decisions. The aim of this legislation is to provide an avenue through which these decisions may be appealed. This bill in no way guarantees relief, but rather fixes the broken appeals process for these IRS decisions.

152 Cong. Rec. H8700-01. Thus, prior to 2006, determination of a subsection (f) innocent spouse claim lay exclusively with the Secretary with no review routes. Congress waived this immunity to the extent that it allowed review to the Tax Court. Thus, the government does not argue Congress implicdly repealed refund jurisdiction for subsection (f) claims as Amicus suggests, instead Congress provided for an appeal route for subsection (f) relief for the first time in 2006. To the extent Amicus suggests refund jurisdiction existed for other innocent spouse claims existing prior to 1998, even if a handful of court cases so found, the Congressional waiver of immunity is implied at best and thus insufficient to provide this court with jurisdiction.

b. The Waiver of Immunity in 26 U.S.C. § 6015(e)

As noted above, in addition to any other remedy provided by law, an individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under subsection (f) (as well as subsections (b) and (c)). 26 U.S.C.A. § 6015(e)(1). The waiver does not mention district court review. Plaintiff and Amicus assert the language, "in addition to any other remedy provided by law," refers to refund suits in district court under 28 U.S.C. § 1346(a)(1). Indeed, the Conference Committee Report states:

> 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.R. CONF. REP. 106-1033, 1023. However, this does not make explicit that an innocent spouse claim, after denial by the Secretary, may be made in a refund suit. The "any other remedy" language does not create jurisdiction where jurisdiction did not exist prior to the 2000 amendments. When Congress enacts a specific remedy when no remedy was previously recognized, or where it was "problematic" whether any judicial relief existed at all, the remedy provided is generally regarded as exclusive. Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 285 (1983).

In Hinck v. United States, 550 U.S. 501 (2007) the Supreme Court interpreted 26 U.S.C. § 6404(h). The Court's discussion is instructive:

> In 1996, as part of the Taxpayer Bill of Rights 2, Congress again amended § 6404, adding what is now subsection (h). As relevant, that provision states:
>
> > "Review of denial of request for abatement of interest
> >
> > "(1) In general.
> >
> > "The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest."
>
> ....
>
> Our analysis is governed by the well-established principle that, in most contexts, " 'a precisely drawn, detailed statute preempts more general remedies.' " EC Term of Years Trust v. United States, ante, at 434 ... (quoting Brown v. GSA, 425 U.S. 820, ... (1976)); see also Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U.S. 273, 284–286 ... (1983). We are also guided by our past recognition that when Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were "problematic," the remedy provided is generally regarded as exclusive. Id., at 285 ....
>
> Section 6404(h) fits the bill on both counts. It is a "precisely drawn, detailed statute" that, in a single sentence, provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief. And Congress enacted this provision against a backdrop of decisions uniformly rejecting the possibility of any review for taxpayers wishing to challenge the Secretary's § 6404(e)(1) determination. Therefore, despite Congress's

> failure explicitly to define the Tax Court's jurisdiction as exclusive, we think it quite plain that the terms of § 6404(h)—a "precisely drawn, detailed statute" filling a perceived hole in the law—control all requests for review of § 6404(e)(1) determinations. Those terms include the forum for adjudication.

Hinck, 550 U.S. at 504, 506.[6]

The Hinck Court also noted that Congress

> set out a carefully circumscribed, time-limited, plaintiff-specific provision, which also precisely defined the appropriate forum. We cannot accept the Hincks' invitation to isolate one feature of this "precisely drawn, detailed statute"—the portion specifying a standard of review—and use it to permit taxpayers to circumvent the other limiting features Congress placed in the same statute—restrictions such as a shorter statute of limitations than general refund suits, compare § 6404(h) (180–day limitations period) with § 6532(a)(1) (2–year limitations period), or a net-worth ceiling for plaintiffs eligible to bring suit. Taxpayers could "effortlessly evade" these specific limitations by bringing interest abatement claims as tax refund actions in the district courts or the Court of Federal Claims, disaggregating a statute Congress plainly envisioned as a package deal.

Id. at 507–08.

Amicus' insistence that there were multiple avenues of appeal of innocent spouse relief denial before the enactment of 26 U.S.C. § 6015 presupposes, for purposes of this case, that a refund claim for denial of equitable relief of a validly assessed underpayment exists, in the absence of another valid refund claim existing concurrently. But as noted above, a refund claim is only available for erroneously or illegally assessed tax pursuant to 28 U.S.C. § 1346(a)(1). Thus, this "other remedy provided by law" does not exist under plaintiff's alternative claim for innocent spouse relief because she does not allege the underpayment of the 2007 tax was erroneously or illegally assessed. She merely alleges she should not be responsible for the tax based on equitable

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[6]As noted above, in providing for Tax Court review of subsection (f) innocent spouse claims, Representative Elain Tauscher, the bill's sponsor, expressed problems with the mechanisms for review or appeal of these IRS decisions thus necessitating the bill's passage.

considerations. Again, the Hink Court is instructive on this issue:

> The Hincks' other contentions are equally unavailing. First, they claim that reading § 6404(h) to vest exclusive jurisdiction in the Tax Court impliedly repeals the pre-existing jurisdiction of the district courts and Court of Federal Claims, despite our admonition that "repeals by implication are not favored." [citation omitted]. But the implied-repeal doctrine is not applicable here, for when Congress passed § 6404(h), § 6404(e)(1) had been interpreted not to provide any right of review for taxpayers. There is thus no indication of any "language on the statute books that [Congress] wishe[d] to change," [citation omitted], implicitly or explicitly. Congress simply prescribed a limited form of review where none had previously been found to exist.

Hinck, 550 U.S. at 508.

Amicus also notes that IRS National Taxpayer Advocate Nina Olson has alerted Congress to numerous district court rulings finding exclusive jurisdiction in the Tax Court since 2007 as incorrectly decided, citing the "in addition to other remedy provided by law" language. Olson has repeatedly suggested that Congress adopt legislation to clarify that section 6015 relief is available in a district court. However, although Congress acted almost immediately to amend the legislation to provide for review in the Tax Court when alerted by the Eighth and Ninth Circuits that the Tax Court lacked jurisdiction to hear such equitable claims, Congress' decided inaction in the face of the National Taxpayer Advocate's concerns via yearly reports since 2007, suggests Congress intended 26 U.S.C. § 6015(e) to limit review of a stand-alone subsection (f) claim to the Tax Court.

Although it may be possible to construe 26 U.S.C. § 6015(e) in combination with 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422 as implying the district courts have jurisdiction to hear an innocent spouse relief claim in the underpayment context, waiver of the government's immunity requires much more. A waiver of sovereign immunity must be "unequivocally expressed" in statutory text. See, e.g., Lane v. Peña, 518 U.S. 187, 192 (1996). Legislative history cannot supply

a waiver that is not clearly evident from the language of the statute. Id. Any ambiguities in the statutory language are to be construed in favor of immunity. United States v. Williams, 514 U.S. 527, 531 (1995). The Government's consent to be sued can not be enlarged beyond what a fair reading of the text requires. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983). Ambiguity exists if there is a plausible interpretation of the statute that would not authorize suit against the government. United States v. Nordic Village, 503 U.S. 30, 34, 37 (1992). Accepting the interpretation put forth by plaintiff and Amicus would violate this rule of construction.

4. Inconsistent Government Positions on Jurisdiction

Both plaintiff and Amicus assert the government in various cases and through the Chief Counsel of the IRS has taken the position that district courts have jurisdiction to determine an innocent spouse claim. See OFFICE OF CHIEF COUNSEL, INTERNAL REVENUE SERVICE, N(35)000-338, UIL 6015.00-00, CHANGE IN LITIGATING POSITION (June 5, 2000).[7] Amicus notes that the government took the position a taxpayer could pay any liability and seek a refund in district court pursuant to section 6015 in the cases of Rubel v. Comm'r of Internal Revenue, 856 F.3d 301 (3d Cir. 2017), Matuszak v. Comm'r of Internal Revenue, 862 F.3d 192 (2d Cir. 2017), and Nauflett v. Comm'r of Internal Revenue, 892 F.3d 649 (4th Cir. 2018). In the cases cited by Amicus, the refund jurisdiction issue was not directly before the courts, and the government's position refers to potential alternate review routes. Moreover, even if the IRS were to take such a position when confronted directly, it is not a substitute for the court's subject matter jurisdiction provided by

[7]This notice was superceded in 2006. IRS Chief Counsel Notice 2006-020, 2006 WL 2547089. Moreover, Congress subsequently amended 26 U.S.C. § 6015(e) to permit Tax Court review of subsection (f) claims. At any rate, such notices are not binding. In re Peterson, 321 B.R. 259, 261 (Bankr. D. Neb. 2004).

Congress. See Terenkian v. Republic of Iraq, 694 F.3d 1122, 1137 (9th Cir. 2012) (judicial estoppel is not a substitute for subject matter jurisdiction); Mata v. United States, 107 Fed. Cl. 618, 624 (2012) (the Court bases its jurisdictional decision solely on the applicable law, and not on the Government's inconsistent litigation positions).

5. 26 U.S.C. § 6015(g) Jurisdiction

Plaintiff argues that 26 U.S.C.A. § 6015(g) gives the court jurisdiction to make refunds in accordance with innocent spouse provisions. See Supplemental Response (doc. 42) at pp. 6-9. That section provides:

> (g) Credits and refunds.--
>
> (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.
>
> (2) Res judicata.--In the case of any election under subsection (b) or (c) or of any request for equitable relief under subsection (f), if a decision of a 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 court determines that the individual participated meaningfully in such prior proceeding.
>
> (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).

26 U.S.C.A. § 6015(g).

This section merely provides that a taxpayer whose request for relief is granted is entitled to a refund unless barred by the other sections listed. In essence, if a tax is collected despite the grant of innocent spouse relief, the taxpayer may seek a refund for the erroneous collection of that tax. Accepting plaintiff's reading of the interplay of the statutes listed as somehow waiving sovereign

immunity, that reading violates the cannon of construction that any ambiguities in the statutory language are to be construed in favor of immunity.

Because the waiver of immunity Congress provided in granting jurisdiction to the Tax Court to hear innocent spouse claims does not unequivocally express a waiver of immunity to suit in district court, plaintiff's claim that she qualifies for innocent spouse equitable relief should be dismissed.

CONCLUSION

The United States's motion to dismiss (doc. 15) should be granted in part and denied in part. Plaintiff's claim that she did not sign the 2007 "joint" return and the collection of the underpayment from her for that return was erroneously or illegally assessed or collected should proceed. Plaintiff's claim that she qualifies for innocent spouse relief should be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this

recommendation.

DATED this 1st day of May, 2019.

/s/ Jolie A. Russo
JOLIE A. RUSSO
United States Magistrate Judge