Comments on Proposed Regs. Under §§ 66 and 6015 Issued 8-12-13

These comments were prepared by individuals working in low income taxpayer clinics: Jamie Andree, Indiana Legal Services; Professor Keith Fogg, Villanova Law School; Professor Kathryn Sedo, University of Minnesota Law School; and Professor Carl Smith (retired), Cardozo Law School. In those clinics we have the opportunity to regularly represent clients facing tax liabilities generated on a joint return. These comments reflect the views of the individuals making this submission and not those of the organizations with which we work.

Our comments address three areas in which we suggest revisions to the proposed regulations. First, we believe that the events triggering the two year statute of limitations for requesting relief under 6015(b) or (c) after the initiation of collection action by the IRS incorrectly include certain correspondence. Second, we believe that for purposes of §§ 66 and 6015 only, the Internal Revenue Service should consider claims for refunds that would otherwise be barred by § 6511 if, during the period for making a timely refund claim, the requesting spouse was subject to physical, emotional, psychological, or financial abuse. Third, we believe that the circumstances under which a taxpayer may request a second final administrative determination should be expanded.

I. Limit of Time to Elect Relief Under § 6015(b) or (c)

Background

Under former § 6013(e), innocent spouse relief was available pre-payment by challenging joint liability in response to a notice of deficiency; see *Bliss v. Commissioner*, 59 F.3d 374 (2d Cir. 1995); *Hayman v. Commissioner*, 992 F.2d 1256 (2d Cir. 1993); or post-payment through the refund route. See *Farmer v. United States*, 794 F.2d 1163 (6th Cir. 1986); *Sanders v. United States*, 509 F.2d 162 (5th Cir. 1975). But the innocent spouse statute contained no time limit in which to seek innocent spouse relief.

The Internal Revenue Service Restructuring and Reform Act of 1998 was designed, in part, to expand the opportunities of taxpayers to challenge various liabilities pre-payment. The expansions consisted of both the Collection Due Process provisions at section 6320 and 6330 and a new innocent spouse provision at section 6015.

The new innocent spouse provision originated in the House in H.R. 2676. While the House bill contained a proposed new innocent spouse provision, it did not contain Collection Due Process provisions.

The House wanted to expand entitlement to innocent spouse relief by removing certain substantive obstacles (e.g., the need under § 6013(e) to show an adjustment was grossly erroneous or that the liability involved exceeded a certain threshold) and procedural obstacles.

A common procedural problem under former § 6013(e) was one that usually came up after a deficiency case in the Tax Court was mishandled by the spouse whose taxes caused the problem. Often, the IRS issued a joint notice of deficiency to both spouses, and the spouse whose items were being adjusted (the "culpable spouse") would file a Tax Court petition under § 6213(a) in the name of both spouses. The culpable spouse would tell the "innocent spouse," "Honey, I'll handle it for both of us." In fact, the culpable spouse might end up not raising § 6013(e) relief in the proceeding, but instead would unsuccessfully focus on proving the

correctness of the return. As a result, the Tax Court would enter a decision finding a joint deficiency. By relying on the culpable spouse, the "innocent spouse" would end up prevented by *res judicata* by the Tax Court decision from ever raising § 6013(e) relief in any future court proceeding.[1]

Another common fact pattern involved the culpable spouse intercepting the notice of deficiency, so the innocent spouse never saw it. In such a case, if the culpable spouse filed what purported to be a joint petition and again failed to argue for §6013(e) relief, a decision could be entered against both spouses. In this case, since the "innocent spouse" did not know of the Tax Court petition, the "innocent spouse" might be able to successfully argue that he or she did not authorize or ratify the Tax Court petition and so was not a party to the suit or bound by the Tax Court's adverse decision. See *Abeles v. Commissioner*, 90 T.C. 103 (1988); *cf*. *Leavitt v. Commissioner*, 97 T.C. 437 (1991). However, that would mean that the "innocent spouse" had not timely filed a Tax Court petition, so the taxes shown in the notice of deficiency could be assessed and collected from the "innocent spouse". Now, the "innocent spouse" would have to bring a refund action in which he or she could raise § 6013(e) relief in court. To do so, that "innocent spouse" would have to first pay the assessed tax in full. See *Flora v. United States*, 362 U.S. 145 (1960). However, many spouses could not afford to pay in full, and so lacked a way back into court to litigate their entitlement to relief under §6013(e).

In 1997, to remedy the problems with § 6013(e), the House Ways and Means Committee voted out a version of H.R. 2676 attempting to address both the substantive and procedural limitations of § 6013(e) by repealing it and creating a new § 6015. The text of the committee's proposed version of new § 6015 appears at H. Rep. 105-364 (Part 1) at 19-20, 1998-3 C.B. at 391-392. Substantively, the House bill only slightly altered the language of § 6013(e), but made the new provision applicable to any erroneous item of the culpable spouse – an expansion of the types of items as to which relief could be granted.

Procedurally, the House bill also created a mechanism for a new Tax Court pre-payment proceeding to supplement existing avenues for "innocent spouse" relief. To create that mechanism, § 321(b) of H.R. 2676 first ordered the Secretary to create "a separate form with instructions for use by taxpayers in applying for relief under section 6015(a)." In new § 6015(a), the House inserted a requirement that the "innocent spouse" "claim[] (in such form as the Secretary may prescribe) the benefits of this subsection not later than the date which is 2 years after the date of the assessment of the deficiency." H.R. 2676, § 321(a). The House bill also contained a version of the finally-enacted § 6015(e) allowing both (1) a new (usually pre-payment) "stand-alone" Tax Court "innocent spouse" proceeding if the IRS ruled adversely or failed to rule in six months and (2) a suspension of the running of the collections statute of limitations under § 6502 while the IRS considered the application for relief and continuing while any Tax Court proceeding under § 6015(e)(1) was pending. *Id*.

The reason for the 2-year period was not explained in the Committee report, but its effect (combined with the lifting of the bar of *res judicata* in certain cases) was to give additional time for a spouse to request relief who had missed the opportunity to properly contest the notice

[1] That this was a common problem is shown by the addition of language in § 6015(g)(2) lifting the bar of *res judicata* if the spouse did not meaningfully participate in the prior judicial proceeding in which the innocent spouse issue could have been, but was not, raised.

of deficiency under a Tax Court § 6213(a) proceeding before assessment of the deficiency – perhaps because she never received the notice of deficiency.

The Senate Finance Committee proposed more radical changes in the innocent spouse provisions in a substitute for H.R. 2676 The full text proposed by the Finance Committee concerning new § 6015 can be found at 144 Cong. Rec. S4160-S4162 (May 4, 1998). The Senate proposed that the taxpayer could make an "election" for innocent spouse relief -- both with respect to deficiencies and unpaid amounts shown on tax returns (underpayments). See § 6015(a)(1)(A) and (B), as they appeared in § 3201(a) of the H.R. 2676 Senate amendment. The relief available was separation of liability. Under the Senate approach, any taxpayer could elect not to be liable for more than his or her fair share of a tax underpayment or deficiency. There were to be certain limits on the election, among them that if the taxpayer actually knew (not just had reason to know) of an item giving rise to a deficiency, the election was not valid as to that item; but the burden of proof was switched to the Secretary to prove that actual knowledge. § 6015(a)(3)(C) at *id*.

The Senate Finance Committee pushed back the date by which the "election" should be made from "not later than the date which is 2 years after the date of the assessment of the deficiency" (from the House bill) to "not later than 2 years after the date on which the Secretary has begun collection activities with respect to the individual making the election." § 6015(a)(3)(A), as it appeared in § 3201(a) of the H.R. 2676 Senate amendment. The Finance Committee report, in the "Reasons for Change" section, states: "The Committee believes that taxpayers need to be informed of their right to make this election and that the IRS is the best source of that information. The Committee also believes that the IRS should take appropriate steps to insure that both spouses are made aware of their tax situation, and not rely on a single notice sent to a single address to inform both spouses." S. Rep. 105-174 at 56, 1998-3 C.B. at 592. In the "Explanation of Provisions" section, the report went on to state:

> The Committee intends that 2 year period not begin until collection activities have been undertaken against the electing spouse that have the effect of giving the spouse notice of the IRS's intention to collect the joint liability from such spouse. For example, garnishment of wages, a notice of intention to levy against the property of the electing spouse[[2]] would constitute collection activity against the electing spouse. The mailing of a notice of deficiency and demand for payment to the last known address of the electing spouse, addressed to both spouses, would not.

Id.

Subsection (e) of the Senate amendment provided for reallocation of items between spouses in the event that the rules of the main Senate version of innocent spouse relief produced inequitable results.

The conferees on H.R. 2676 adopted the House approach in new § 6015(b) (except this was now made an "election", as well). The primary Senate approach (now at new § 6015(c))

[2] The Senate amendment was also the source of the Collection Due Process procedures that set up hearings in the Office of Appeals in response to notices of intention to levy. However, notices of intention to levy had long been required before any levy. They were not creations of the CDP provisions. See § 6331(d).

was adopted only for deficiencies (not, also, underpayments) and only for spouses who were divorced, separated, or living apart. From subsection (e) of the Senate amendment, the conferees created a new subsection (f) allowing the IRS to grant relief from underpayments or deficiencies where a taxpayer did not qualify for relief under subsections (b) or (c) and it would be inequitable to hold the taxpayer liable. The Conferees decided that both the (b) and (c) elections should be made within the time period set out in the Senate amendment – not later than 2 years from the time the IRS began collection activity. § 6015(b)(1)(E) and (c)(3)(B). In describing the Senate amendment, the Conference Committee Report repeated, in the "Explanation of Provisions" section, the same sentences from the Senate report in the indented quote above, except changing "The Committee intends" to "It is intended"; H.R. Rep. (Conf.) 105-599 at 250, 1998-3 C.B. at 1004-1005 (emphasis added); and stated: "The conference agreement follows the House bill and the Senate amendment with respect to procedural rules . . . ." Id., at 255. 1998-3 C.B. at 1009.

Current Regulation

In 2001, the Treasury proposed Reg. § 1.6015-5(b), which was to provide, among other things:

> (b) *Time period for filing a request for relief* -(1) *In general.* To elect the application of § 1.6015-2 or § 1.6015-3, or to request equitable relief under § 1.6015-4, a requesting spouse must file Form 8857 or other similar statement with the Internal Revenue Service no later than two years from the date of the first collection activity against the requesting spouse after July 22, 1998, with respect to the joint tax liability.
>
> (2) *Definitions* -(i) *Collection activity.* For purposes of this paragraph (b), collection activity means an administrative levy or seizure described by section 6331 to obtain property of the requesting spouse; an offset of an overpayment of the requesting spouse against a liability under section 6402; the filing of a suit by the United States against the requesting spouse for the collection of the joint tax liability; or the filing of a claim by the United States in a court proceeding in which the requesting spouse is a party or which involves property of the requesting spouse. Collection activity does not include a notice of intent to levy under sections 6330 and 6331(d); the filing of a Notice of Federal Tax Lien; or a demand for payment of tax. The term *property of the requesting spouse*, for purposes of this paragraph, means property in which the requesting spouse has an ownership interest (other than solely through the operation of community property laws), including property owned jointly with the nonrequesting spouse.
>
> (ii) *Date of levy or seizure.* For purposes of this paragraph (b), if tangible personal property or real property is seized and is to be sold, a notice of seizure is required under section 6335(a). The date of levy or seizure is the date the notice of seizure is given. For more information on the rules regarding notice of seizure, see section 6502(b) and the regulations thereunder. For purposes of this paragraph (b), if a levy is made on cash or intangible personal property that will not be sold, the date of levy or seizure is the date the notice of levy is made. For more information on the rules regarding levy, see section 6331 and the regulations thereunder. For purposes of this paragraph (b), if a notice of levy is served by mail, the date of levy or seizure is the date of delivery of the notice of levy to the person on whom the levy is made. For more information on notices of levy served by mail, see § 301.6331-1(c) of this chapter.
>
> (3) . . . .

(4) *Examples.* The following examples illustrate the rules of this paragraph (b):

Example 1. On January 11, 2000, a notice of intent to levy is mailed to H and W regarding their 1997 joint Federal income tax liability. The Internal Revenue Service levies on W's employer on June 5, 2000. The Internal Revenue Service levies on H's employer on July 10, 2000. W must elect or request relief by June 5, 2002, which is two years after the Internal Revenue Service levied on her wages. H must elect or request relief by July 10, 2002, which is two years after the Internal Revenue Service levied on his wages.

Example 2. The Internal Revenue Service levies on W's bank, in which W maintains a savings account, to collect a joint liability for 1995 on January 12, 1998. The bank complies with the levy, which only partially satisfies the liability. The Internal Revenue Service takes no other collection actions. On July 24, 2000, W elects relief with respect to the unpaid portion of the 1995 liability. W's election is timely because the Internal Revenue Service has not taken any collection activity after July 22, 1998; therefore, the two-year period has not commenced.

Example 3. Assume the same facts as in *Example 2*, except that the Internal Revenue Service delivers a second levy on the bank on July 23, 1998. W's election is untimely because it is filed more than two years after the first collection activity after July 22, 1998.

REG-106446-98, 2001-1 C.B. 945, 958-959.

Note that the definition of "collection activity" in the regulation left out the "notice of intention to levy" mentioned in the Senate Finance and Conference Committee reports. No doubt this was done because the Committee reports made little sense by including that notice. The Committee reports listed both wage garnishment and a notice of intention to levy as constituting "collection activity". But, it is impossible for the IRS to properly garnish wages (a form of levy) until at least the taxpayer was previously sent a notice of intention to levy. So, only either an actual levy or the notice of intention to levy could constitute the *beginning* of collection activity – not both. In choosing the actual levy to be the beginning of collection activity, not the earlier notice of intention to levy, the IRS chose the more taxpayer-friendly version of the report. So, no doubt as a result, it appears no taxpayer or pro-taxpayer group submitted comments asking the IRS to modify the proposed regulation on this point.

However, in the final regulation, adopted in 2002, the IRS, apparently on its own, reversed its position on when collection activity started and eliminated the actual levy in favor of the notice of intention to levy. In the preamble to the final regulation, the IRS explained:

Section 1.6015-5(b)(2) of the proposed regulations defines *collection activity* as, among other things, an administrative levy or seizure described by section 6331. Section 1.6015-5(b)(2) of the final regulations provides that the term *collection activity* includes a collection due process (CDP) notice under section 6330. That notice, which occurs in all cases before levy or seizure except in the case of levies on state tax refunds and in jeopardy situations, provides taxpayer notice of the Service's intent to levy and the taxpayer's right to a pre-levy CDP hearing. This change is consistent with the legislative history of section 6015(e). See H.R. Conf. Rep. No. 599, 105th Cong. 2d Sess. 250-251 (1998).

T.D. 9003, 2002-2 C.B. 294, 301 (emphasis in original).

The final Reg. § 1.6015-5(b) provides, among other things:

(b) Time period for filing a request for relief –

(1) In general. To elect the application of § 1.6015-2 or 1.6015-3, or to request equitable relief under § 1.6015-4, a requesting spouse must file Form 8857 or other similar statement with the Internal Revenue Service no later than two years from the date of the first collection activity against the requesting spouse after July 22, 1998, with respect to the joint tax liability.

(2) Definitions -- (i) Collection activity. For purposes of this paragraph (b), collection activity means a section 6330 notice; an offset of an overpayment of the requesting spouse against a liability under section 6402; the filing of a suit by the United States against the requesting spouse for the collection of the joint tax liability; or the filing of a claim by the United States in a court proceeding in which the requesting spouse is a party or which involves property of the requesting spouse. Collection activity does not include a notice of deficiency; the filing of a Notice of Federal Tax Lien; or a demand for payment of tax. . . .

(ii) Section 6330 notice. A section 6330 notice refers to the notice sent, pursuant to section 6330 providing taxpayers notice of the Service's intent to levy and of their right to a collection due process (CDP) hearing.

(3) . . . .

(4) *Examples*. The following examples illustrate the rules of this paragraph (b):

Example 1. On January 11, 2000, a section 6330 notice is mailed to H and W regarding their 1997 joint Federal income tax liability. The Internal Revenue Service levies on W's employer on June 5, 2000. The Internal Revenue Service levies on H's employer on July 10, 2000. An election or request for relief must be made by January 11, 2002, which is two years after the Internal Revenue Service sent the section 6330 notice.

Example 2. The Internal Revenue Service offsets an overpayment against a joint liability for 1995 on January 12, 1998. The offset only partially satisfies the liability. The Internal Revenue Service takes no other collection actions. On July 24, 2001, W elects relief with respect to the unpaid portion of the 1995 liability. W's election is timely because the Internal Revenue Service has not taken any collection activity after July 22, 1998; therefore, the two-year period has not commenced.

Example 3. Assume the same facts as in Example 2, except that the Internal Revenue Service sends a section 6330 notice on January 22, 1999. W's election is untimely because it is filed more than two years after the first collection activity after July 22, 1998.

<u>Proposed Regulation Changes</u>

The new proposed regulations substantially decrease the number of situations where a timely election within the 2-year period under § 6015(b) and (c) is necessary to obtain innocent spouse relief. This is because of the Service's extension of the period to request equitable relief under subsection (f) if the taxpayer does not qualify for relief under subsections (b) or (c) --- say, because the taxpayer did not elect relief under subsections (b) or (c) on time. But, that 2-year period still matters to taxpayers who might not qualify for relief under subsection (f) because it was not inequitable to hold them liable (e.g., they would suffer no hardship in paying the deficiency and significantly benefited from the deficiency), but they would qualify for relief under subsection (c) because of their marital status and lack of actual knowledge with respect to the item giving rise to the deficiency.[3]

With respect to the 2-year period in those fewer situations where subsection (c) relief might matter, the proposed regulations tighten the time period in which the taxpayer may make an election. The preamble to the proposed regulations explains:

> The proposed regulations clarify what constitutes collection activity for purposes of starting the two-year deadline that continues to apply to section 1.6015-2 and 1.6015-3.
>
> A notice of intent to levy and right to request a CDP hearing (section 6330 notice) is a type of collection activity that starts the two-year period applicable to applications to elect relief under section 1.6015-2 and 1.6015-3. The proposed regulations at section 1.6015-5(b)(3)(ii) clarify that the two-year period will start irrespective of a requesting spouse's actual receipt of the section 6330 notice, if the notice was sent by certified or registered mail to the requesting spouse's last known address. This clarification is consistent with the holding in *Mannella v. Commissioner*, 132 T.C. 196 (2009), rev'd on other grounds, 631 F.3d 115 (3d Cir. 2011).

The proposed regulations would not modify the definition of "collection activity", but they modify the definition of "Section 6330 notice" to read: "A section 6330 notice refers to the notice sent, pursuant to section 6330, providing taxpayers notice of the IRS's intent to levy and of their right to a CDP hearing. *The mailing of a section 6330 notice by certified mail to the requesting spouse's last known address is sufficient to start the two-year period, described in paragraph (b)(1), regardless of whether the requesting spouse actually receives the notice.*" (Emphasis added.)

Further, the proposed regulations would provide the following two new replacement examples:

> *Example 1*. On January 12, 2009, the IRS mailed a section 6330 notice to H and W, by certified mail to their last known address, regarding their 2007 joint Federal income tax liability, which was the result of an understatement. The section 6330 notice was the first

[3] The 2-year period to elect under subsection (b) has now become irrelevant, since a person who was entitled to subsection (b) relief but for making a timely election would always be entitled to subsection (f) relief if a timely request for relief was made under the longer period provided under subsection (f). A person needs to show inequity and certain other items to get relief under subsection (b), but inequity alone is enough to get relief under (f) where a person did not timely elect the provisions of subsection (b).

collection activity the IRS initiated against H and W to collect the 2007 joint liability. H and W did not request a CDP hearing in response to the section 6330 notice. On June 5, 2009, the IRS issued a levy on W's wages to W's employer. On July 10, 2009, the IRS issued a levy on H's wages to H's employer. To be considered for relief under section 1.6015-2 or 1.6015-3, a Form 8857 or other request for relief must be filed on or before January 12, 2011, which is two years after the IRS sent the section 6330 notice. The two-year period for purposes of section 1.6015-2 and 1.6015-3 (not applicable to section 1.6015-4) runs from the date the section 6330 notice was mailed and not from the date of the actual levy.

. . . .

Example 4. On April 15, 2008, H and W filed a joint Federal income tax return for tax year 2007. On October 1, 2009, additional liability was assessed against H and W as a result of income attributable to H being omitted from the return. H and W divorced soon after and, in late December 2009, W moved out of the family home without notifying the United States Postal Service or the IRS of her change of address until the end of January 2010. On January 15, 2010, the IRS mailed a section 6330 notice regarding H and W's 2007 joint Federal income tax liability to H and W's last known address (the address on H and W's joint Federal income tax return for tax year 2008, filed on April 15, 2009). H and W did not request a CDP hearing in response to the section 6330 notice. The IRS issued a levy on W's wages to W's employer on June 2, 2010. W filed Form 8857 requesting relief under section 6015 on May 15, 2012. Actual receipt of a section 6330 notice is not required to start the two-year period for purposes of section 1.6015-2 or 1.6015-3, as long as the notice is sent to the taxpayer at the taxpayer's last known address by certified or registered mail. The two-year period, therefore, expired on January 15, 2012. Accordingly, W's request for relief is too late to be considered for any relief under section 1.6015-2 or 1.6015-3, as the request was filed more than two years after the IRS sent the section 6330 notice. But because the period of limitation on collection was open (generally until October 1, 2019) when W filed the Form 8857, the IRS will consider whether W is entitled to equitable relief under section 1.6015-4. Further, to the extent W's request for equitable relief under section 1.6015-4 seeks a refund of tax W paid through the levy, W's Form 8857 is a timely claim for refund because it was filed within the applicable period of limitation for credit or refund of tax (in this case, two years from payment of the tax).

Our Primary Recommendation

We believe that, rather than clarify that the 2-year period from the beginning of collection activity starts when the notice of intention to levy is mailed (and not when, or if, it is received), the IRS should revert to the definition of "collection activity" it employed in the 2001 proposed regulations as being more consistent with the thrust of the 1998 legislation as a whole and the intent of Congress as shown in the Committee reports. Thus, we recommend that "collection activity" not include notices of intention to levy, but should include actual levies to the extent they produce seized assets or funds. We believe that the proposed 2001 regulations were correct to adopt an actual seizure rule as a collection activity that could start the 2-year period. We further believe that those proposed regulations presented a highly reasonable rule when they stated that "if a levy is made on cash or intangible personal property that will not be sold, the date of levy or seizure is the date the notice of levy is made." Under this last rule, we assume, that in the case of a levy on a bank -- an event that causes the bank to freeze the account and wait 21 days after service of the levy to turn over the funds in the account to the

IRS; see § 6332(c) -- "collection activity" would be deemed to occur on the date of service of the levy on the bank, not on the date the bank turned over the funds to the IRS. A taxpayer normally becomes aware of a levy on his or her bank account (either by notice from the bank or by being unable to access the funds in the account) long before the bank turns over the account's funds to the IRS.

It is clear from the Finance Committee report that, except for the one aberrational mention of the notice of intention to levy, Congress expected collection activity to encompass actual takings, not just threatening notices. The Finance Committee report stated: "The Committee intends that 2 year period not begin until collection activities have been undertaken against the electing spouse that have the effect of giving the spouse notice of the IRS's intention to collect the joint liability from such spouse." S. Rep. 105-174 at 56, 1998-3 C.B. 537, 592. Actual takings, not just threatening notices, demonstrate to taxpayers the seriousness of the IRS' intention to collect the balance of what is owed. A notice of intention to levy is just another threatening notice. The IRS does not always follow such notices with actual levies. Actual levies may not happen, for example, because the IRS has placed the taxpayer into currently not collectible status based on information that it later developed internally or because an IRS employee later concluded that the amount of the liability is simply too small to justify the employee time and expense of making an actual levy.

Our Secondary Recommendation

In the event that the Service declines our primary recommendation and still treats the notice of intention to levy as a collection activity, we believe that the proposed amendment to the existing regulations to follow *Mannella* and clarify that mere mailing of the notice of intention to levy (and not receipt of the notice) starts the 2-year period running is both bad policy and inconsistent with the thrust of the legislation and its legislative history. We recommend that, if a notice of intention to levy is considered a collection activity, the 2-year period start from the date of actual receipt of that notice.

For the IRS to determine whether, or if, a taxpayer actually received a notice of intention to levy would be similar to a determination the IRS must currently make under the Collection Due Process provisions. Section 6330(c)(2)(B) allows a taxpayer to whom a notice of deficiency had been sent, but who did not receive the notice, to challenge the underlying liability in a Collection Due Process hearing. Section 6330(c)(2)(B) is but one demonstration of the 105th Congress' concern that taxpayers not lose the right of a pre-payment challenge to tax liability just because the taxpayers did not actually receive important notices.

Another demonstration can be found within the legislative history of the Collection Due Process provisions. There, a similar rule is stated with respect to non-receipt of a notice of intention to levy not causing the loss of the right to a pre-payment Collection Due Process hearing. The statute does not itself say that, in the case of failure to receive a properly addressed notice of intention to levy, the taxpayer may still get a Collection Due Process hearing, but the legislative history effectively does. A paragraph from the Conference Committee Report reads:

> If a return receipt is not returned, the Secretary may proceed to levy on the taxpayer's property or rights to property 30 days after the Notice of Intent to Levy was mailed. The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending the completion of a hearing that is

> not requested within 30 days of the mailing of the Notice. *If the taxpayer did not receive the required notice and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer*.

H.R. Rep. (Conf.) 105-599 at 266, 1998-3 C.B. at 1020 (emphasis added). The second and third sentences of this paragraph are the origin of the so-called "equivalent hearing" in Collection Due Process, discussed in detail at Reg. § 301.6330-1(i). The last sentence, though, appears to be a command to hold a regular Collection Due Process hearing when a properly addressed notice of intention to levy was not received within the 30-day period. Only in a real Collection Due Process hearing must the IRS suspend collection action. § 6330(e)(1).

Finally, we repeat sentences from the Senate Finance Committee report addressed to the innocent spouse rules that show Congress' concern that taxpayers have actual knowledge before losing innocent spouse rights:

> The Committee believes that taxpayers need to be informed of their right to make this election and that the IRS is the best source of that information. The Committee also believes that the IRS should take appropriate steps to insure that both spouses are made aware of their tax situation, and not rely on a single notice sent to a single address to inform both spouses.
>
> . . . .
>
> The Committee intends that 2 year period not begin until collection activities have been undertaken against the electing spouse *that have the effect of giving the spouse notice of the IRS's intention to collect the joint liability from such spouse.*

S. Rep. 105-174 at 56, 1998-3 C.B. at 592 (emphasis added). Obviously, a notice that does not reach a potential innocent spouse – i.e., one that is not received, perhaps because it is intercepted by the requesting spouse – does not have the effect of giving the potential innocent spouse notice of the IRS' intention to collect that joint liability from such spouse.

The IRS should not rely on the Tax Court's opinion in *Mannella* as support for its current position that mere mailing of the notice of intention to levy (and not receipt) is enough to start the 2-year period in which the taxpayer may elect relief under subsections (b) and (c). Although that is one holding of *Mannella*, the taxpayer in *Mannella* was pro se and so did not apparently bring to the attention of the court the Collection Due Process legislative history quoted above concerning non-received notices of intention to levy not precluding later Collection Due Process hearings. In *Mannella*, the husband was willing to testify that he had received the notice of intention to levy, but he had hidden it from his wife for more than 2 years after it was mailed. The reasoning of the Tax Court in *Mannella* was as follows:

> The notice of intent to levy must be given in person, left at the person's dwelling or usual place of business, or sent by certified or registered mail to the person's last known address. Secs. 6330(a)(2), 6331(d)(2); secs. 301.6330-1(a), 301.6331-2(a)(1), Proced. & Admin. Regs. If the notice is properly sent to the taxpayer's last known address or left at the taxpayer's dwelling or usual place of business, it is sufficient to start the 30-day period within which an Appeals hearing may be requested. Sec. 301.6330-1(a)(3), A-A9, Proced. & Admin.

> Regs. Actual receipt of the notice of intent to levy is not required for the notice to be valid for purposes of starting the 30-day period. *Id.*
>
> We see no reason the notice of intent to levy, including information about her right to section 6015 relief, mailed to petitioner at her last known address but not received by her should start the 30-day period to request an Appeals hearing but not start the 2-year period to request relief under section 6015(b) or (c). Nothing in section 6015 or the corresponding regulations requires that petitioner actually receive the notice of intent to levy for the 2-year period to begin. We conclude that her actual receipt of the notice of intent to levy is not required for the 2-year period in which to request relief under section 6015(b) or (c) to begin.

Mannella v. Commissioner, 132 T.C. 196, 200 (2009).

The Collection Due Process regulation cited by the court in *Mannella*, Reg. § 301.6330-1(a)(3), more fully states:

> Q-A9. What are the consequences if the taxpayer does not receive or accept the notification which was properly left at the taxpayer's dwelling or usual place of business, or properly sent by certified or registered mail, return receipt requested, to the taxpayer's last known address?
>
> A-A9. Notification properly sent to the taxpayer's last known address or left at the taxpayer's dwelling or usual place of business is sufficient to start the 30-day period within which the taxpayer may request a CDP hearing. See paragraph (c) of this section for when a request for a CDP hearing must be filed. Actual receipt is not a prerequisite to the validity of the CDP Notice.
>
> Q-A10. What if the taxpayer does not receive the CDP Notice because the IRS did not send that notice by certified or registered mail to the taxpayer's last known address, or failed to leave it at the dwelling or usual place of business of the taxpayer, and the taxpayer fails to request a CDP hearing with Appeals within the 30-day period commencing the day after the date of the CDP Notice?
>
> A-A10. When the IRS determines that it failed properly to provide a taxpayer with a CDP Notice, it will promptly provide the taxpayer with a substitute CDP Notice and provide the taxpayer with an opportunity to request a CDP hearing. Substitute CDP Notices are discussed in Q&A-B3 of paragraph (b)(2) and Q&A-C8 of paragraph (c)(2) of this section.

The problem with what the Tax Court concluded about the Collection Due Process regulation is that the cited regulation is a limited paraphrase of the Conference Committee report passage quoted above, but the regulation – unlike the report – nowhere specifically discusses the consequences of non-receipt of a *properly-addressed* notice of intention to levy on the ability of a taxpayer later to obtain a Collection Due Process hearing. The regulation only indicates that an *improperly-addressed* un-received notice of intention to levy does not cut off the right to a later Collection Due Process hearing. A fair reading of the report, though, is that Congress intended that while a properly-addressed un-received notice of intention to levy is sufficiently valid to entitle the IRS to begin levying, it is not sufficiently valid to preclude the taxpayer from obtaining a later Collection Due Process hearing (during which any levy “shall be suspended”).

Regardless of whether the regulation under the Collection Due Process section correctly embodies Congress' intention, the Tax Court in *Mannella* also failed to appreciate that there might be good reasons for having a different rule concerning un-received notices of intention to levy under the innocent spouse relief provisions than under the Collection Due Process provisions:

First, a taxpayer who does not receive a notice of intention to levy and so does not obtain a Collection Due Process hearing has not lost all right to challenge the underlying liability. He or she can always still pay the liability, make an administrative refund claim, and, if necessary, pursue a challenge to the liability in a refund lawsuit. By contrast, a taxpayer who does not receive a notice of intention to levy and so fails to make a timely election under § 6015(c) can never again get relief under the terms of that subsection.

Second, under the innocent spouse provisions, Congress specifically expressed its concern that taxpayers be informed by the IRS of their rights to elect or request relief. In the innocent spouse area, as the IRS has recognized in Notice 2012-8, 2012-1 C.B. 309, often a taxpayer who might be entitled to relief is either being subjected to abuse or being financially controlled by the non-requesting spouse. Such a taxpayer might not be in the position of an ordinary taxpayer likely to view the contents of his or her mail for purposes of seeking a Collection Due Process hearing. Further, unlike a normal taxpayer, the non-requesting spouse has a financial incentive to hide the notice of intention to levy from the potential requesting spouse, since keeping the latter spouse on the hook for the liability potentially reduces the amount that the non-requesting spouse might have to pay on the liability.

Even before *Mannella* was litigated, the problem of one spouse intercepting and hiding important notices from the other spouse was the subject of an example in the IRS National Taxpayer Advocate 2005 Annual Report to Congress (December 31, 2005) at 408. The example was meant to show the harshness of a 2-year time limit for requesting relief under § 6015(f). The example stated, in part: "The husband ignores the assessment and conceals all of the collection notices sent to the couple's home, including Letter 1058(c), *Notice of Intent to Levy and Notice of Your Right to a Hearing*, addressed to the wife. Three years after the IRS sends the Letter 1058(c), the wife learns of the understatement and separates from the husband. She is not eligible for 'innocent spouse' relief under IRC § 6015 because more than two years have passed since the IRS began collection activities with respect to her." *Id*. (footnotes omitted).

Thus, the position that the Tax Court adopted in *Mannella* is both unsound policy and likely not reflective of Congress' intention in this matter. Instead, if a properly addressed and mailed notice of intention to levy is a "collection activity" that can start the 2-year election period running under subsections (b) and (c), that election period should start from the date of the taxpayer's actual receipt of the notice, not the date of the notice's mailing (the date only of constructive notice).

II. For purposes of §§ 66 and 6015 only, the Internal Revenue Service should consider claims for refunds that would otherwise be barred by § 6511 if, during the period for making a timely refund claim, the requesting spouse was subject to physical, emotional, psychological, or financial abuse.

<u>The limitation periods generally applicable to claims for refunds</u>

Before a taxpayer may file suit to recover an overpayment of tax in a U.S. District Court or in the Court of Federal Claims, the taxpayer must file a timely and proper claim for refund with the Service. IRC § 7422(a). Such refund claims generally must be filed with the Service within the later of (i) three years from the return's due date or its actual filing date (the "three-year" rule) or (ii) two years from when the tax was paid with respect to which the taxpayer seeks refund (the "two-year" rule.) IRC § 6511(a). Section 6511(b) restricts the maximum amount of the refund to the tax paid during a "look-back period." The running of the limitations period for filing a claim for refund with the Service may be suspended during any period in which a person is unable to manage his or her affairs because of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 6 months. IRC § 6511(h)

A civil suit for refund cannot be filed before the Service has formally disallowed the claim for refund or until six months has passed since the claim was filed, if sooner. IRC § 6532(a)(1). A suit for refund of taxes, penalties, and interest collected from a taxpayer must be filed no later than two years after a claim for refund has been formally disallowed. IRC § 6532(a)(1). This two-year limitations period may be extended by written agreement between the taxpayer and the Service. IRC § 6532(a)(2). Such an agreement can be executed after the statutory deadline for filing a refund claim in court has expired. *Kaffenberger v. United States*, 314 F.3d 944 (8th Cir. 2003).

How domestic violence impacts its victims' ability to attend to attend to their tax matters in a timely manner

In the United States today, an average of 24 people suffer rape, assault, or stalking by an intimate partner every minute.[4] Domestic violence (DV) has a grave and lasting impact on victims: abusers inflict physical, emotional, and psychological injuries, often over a period of years. Abusers employ a variety of insidious tricks to gain and maintain control over their victims: they equate jealousy with love; they make unrealistic demands; their isolate their victims from family and friends; and they use force or threat of force to accomplish their will.[5]

In light of this abuse, victims of DV often struggle to manage their financial affairs, particularly if those affairs involve complex processes or unfamiliar forms. As Karen Mikus, Rita Benn, & Deborah Weatherston noted in their SOURCEBOOK OF TRAINING ACTIVITIES FOR EARLY INTERVENTION, safety needs are foundational to Maslow's hierarchy, and safety from domestic abuse precedes a sense of efficacy and capability as well as an ability to cope with or solve problems.[6]

According to a report by psychologist Adrienne Adams and the University of Wisconsin-Madison Center for Financial Security, economic abuse—*controlling a victim's ability to acquire, use, and maintain economic resources*—is as prevalent in violent relationships as is physical

[4] Nat'l Ctr. for Injury Prevention & Control, Div. of Violence Prevention, CDC, Understanding Intimate Partner Violence 1 (2012).
[5] *See, e.g.*, *Abuser Tricks*, New Hope for Women, http://www.newhopeforwomen.org/abuser-tricks (last visited Oct. 11, 2013).
[6] On Behalf of Families: A Sourcebook of Training Activities for Early Intervention (Karen Mikus et al., eds., 1994), *available at* http://www.waisman.wisc.edu/birthto3/hierarchy.pdf.

abuse. In fact, one study found that 102 out of 103 DV survivors suffered economic abuse.[7] Batterers may use economic abuse to control all household assets, including those held solely in their victims' names. They may also use their victims' identities to accumulate debt, only to subsequently strand them with ruined credit and unpaid bills.[8] Some abusers strip their victims of access to credit cards and bank accounts, while others force their victims to account for every penny spent.[9] Abusers may prevent their victims from attending school or acquiring and maintaining employment.[10] Even when victims manage to secure employment, they may struggle to keep their jobs and earn sufficient wages: in the aggregate, abuse costs victims nearly eight million days of paid work each year, the equivalent of nearly 32,000 full-time jobs.[11]

DV victims are particularly vulnerable to tax abuse. Abusers may forge their victims' signatures on falsified returns or file them electronically, or they may provide their victims with insufficient time to review returns for accuracy. *See Nihiser v. Comm'r*, 95 T.C.M. (CCH) 1531 (2008) (abuser kept victim away from tax returns, letting her see them only when he presented them for her signature on or near the due date). If the Service files a Substitute for a Return or examines a return associated with the victim's Social Security number, she may never become aware of the audit. Moreover, a victim who is under the complete financial control of her abuser may not have access to bank statements or online bank accounts: thus, she may not know if her refund has been seized or her bank account levied. *See Stephenson v. Comm'r*, 101 T.C.M. (CCH) 1048 (2011) (abuser did not allow victim to access filing cabinet that contained checkbook and financial documents); *Thomassen v. Comm'r*, 101 T.C.M. (CCH) 1397 (2011) (abuser kept separate accounts and had office employee pay bills, so victim was uninformed about household finances). A victim of such financial abuse may genuinely believe she is in tax compliance, or she may be unaware of her filing and payment obligations: in either case, she is at a marked disadvantage compared with taxpayers who manage their own money.

The extent to which abuse adversely impacts a taxpayer's ability to manage financial affairs has already been recognized by the Service and incorporated into its policy for dealing with requests for equitable relief from income tax liability under § 6015(f). Rev. Proc. 2013-34, § 4.03(2)(c)(iv) provides:

> Abuse comes in many forms and can include physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate the requesting spouse, or to undermine the requesting spouse's ability to reason independently and to be able to do what is required under the tax laws.

Under Rev. Proc. 2013-34, the Service gives greater weight to the presence of abuse when its presence impacts the analysis of other factors. Indeed, the Service expanded its definition of

---

[7] Adrienne E. Adams, Ctr. for Fin. Sec., Measuring the Effects of Domestic Violence on Women's Financial Well-Being 1 (2011).
[8] Janet Fender & Laurie Holmes, Econ. Stability Working Grp. of the Transition Subcomm. Of the Governor's Comm. on Domestic Violence, Voices of Survival: The Economic Impacts of Domestic Violence, a Blueprint for Action 11 (2002).
[9] Taxpayer Advocate Serv., Recognizing and Working with Taxpayers Who Have Experienced Domestic Violence and or Abuse 54 (2011).
[10] *Id.*
[11] H. Lien Bragg, U.S. Dep't of Health & Human Servs., Child Protection in Families Experiencing Domestic Violence 16 (2003).

abuse so that it now includes children and other family members residing with the taxpayer. Furthermore, the Service similarly acknowledges the potentially long term consequence of abuse by considering the mental and/or physical health of the requesting spouse at the time the returns were signed or at the time a request for innocent spouse relief is made.

While some victims endure long-term abuse, others leave: they may move temporarily into a shelter, or they may permanently relocate. The average female victim in a heterosexual relationship temporarily leaves her abuser seven times before leaving for good, according to one study.[12] Many victims find themselves homeless as a consequence of domestic abuse: for instance, 25% of homeless heads of household in New York City become homeless as a consequence of violence.[13] Moreover, the National Law Center on Homelessness and Poverty found that between 22% and 57% of homeless women attribute their homelessness to domestic or sexual violence.[14]

The Service should adopt a more expansive view of § 6511(h) so as not to exclude abuse victims

Taxpayers seeking relief from joint and several tax liability under §§ 6015(b) and (f) may be entitled to a refund or credit under § 6015(g) subject to the provisions in § 6511 including § 6511(h). However, Rev. Proc. 99-21, which describes the information the Service requires to make a determination under § 6511(h), is so narrowly drawn that many abuse survivors who are actually financially disabled will be barred from obtaining a refund. It is the abuser's controlling or violent behavior that prevents a victim from pursuing tax relief, notwithstanding that she may have also suffered psychological and physical injury. For this reason, Rev. Proc. 99-21 is too narrow to enable this population to obtain the relief a broader reading of § 6511(h) would permit.

Section 6511(h) was enacted by Congress as a response to the specific facts in the Supreme Court's decision in *United States v. Brockamp*, 519 U.S. 347 (1997). *Brockamp* involved two taxpayers, both of whom suffered physical and or mental impairments (alcoholism and senility) that prevented them from attending to their financial affairs. Section 6511(h) responded directly to the specific hardship faced by those taxpayers by carving out an exception for certain taxpayers with disabling physical or mental impairments. Congress left it to the Service to determine what evidence of such impairments would be required.

The Service responded by issuing Rev. Proc. 99-21, and set a stringent standard for taxpayers to meet when documenting physical or mental impairments. Included in the documentation requirements is a five-point statement by the taxpayer's physician, including the specific time period during which the taxpayer was under a financial disability, and a statement from the taxpayer that she did not authorize anyone to act on her behalf. This documentation requirement does not take into account the real life experiences of an abuse victim: her physical

[12] Jennifer Johnsen, Planned Parenthood Fed'n of Am., Inc., Relationship Abuse, Intimate Partner Violence, & Domestic Violence Threaten Individuals and Society 4 (2005).
[13] *Domestic Violence: Statistics and Facts*, Safe Horizon, http://www.safehorizon.org/index/what-we-do-2/domestic-violence--abuse-53/domestic-violence-the-facts-195.html (last visited Oct. 11, 2013).
[14] Nat'l Law Ctr. on Homelessness & Poverty, Some Facts on Homelessness, Housing, and Violence Against Women, *available at* http://www.nlchp.org/content/pubs/Some%20Facts%20on%20Homeless%20and%20DV.pdf.

and emotional safety may be jeopardized, and her abuser may prevent her from making her own decisions or even accessing health care. For those taxpayers dealing with abuse, Rev. Proc. 99-21 presents an insurmountable barrier to demonstrating financial disability.

The Rev. Proc. does not address and, in fact, fails to acknowledge the role the abuser plays in preventing the requesting spouse from seeking health care. The Rev. Proc. also fails to recognize the difficulties abuse victims face in obtaining the required documentation. It has been shown that domestic abuse victims face a range of barriers limiting their access to health care.[15] Taxpayers fleeing abuse may have no access to a health care provider. Their abuser may have restricted or prevented them from seeking medical help or they live in a rural area where medical practitioners are too far away. They may be unable, due to inadequate finances, loss of health insurance coverage previously maintained by their abuser, or the destabilizing impact of moving repeatedly, to maintain a relationship with a physician sufficient to meet the narrow listing of Rev. Proc. 99-21's documentation requirements. Taxpayers who have been abused and need the extra time to file claims for refund under § 6511(h) find themselves in the perverse situation of having to document not only their medical conditions but also the fact that they have been abused. The Service can remedy this problem by modifying Rev. Proc. 99-21 to include abuse as a reason to extend the time period for a requesting spouse to obtain a refund and relaxing the medical documentation requirements.

> The limitation periods specified in § 6511 for claiming a refund should be suspended during any period when abuse by the nonrequesting spouse significantly inhibited the requesting spouse from filing a claim within such period.

Even modifying Rev. Proc. 99-21 as suggested above may not be enough to remedy the problem that victims of domestic abuse face in filing timely refund claims. Indeed, these victims may never even receive notice of adverse IRS action and may be wholly unaware of levies on their assets, see for example, *Manella v. Commissioner*, 631 F.3d 115 (3d Cir. 2011), cited by IRS in its Notice of Proposed Rulemaking. Therefore, the proposed regulations could be modified to create a tolling for § 6015(f) refund claims of the periods under §§ 6511(a), (b), or (c) similar to that currently done by § 6511(h) – but which includes taxpayers who are not financially disabled as that term is currently defined and is not dependent on a letter from a medical professional about the nature of abuse or financial control. This flexibility is consistent with the elastic § 6015(f) determination process IRS just announced and with other current comparable IRS procedures.

During the Examination process, for instance, the Service invites taxpayers to participate by submitting documentation to clarify income sources or substantiate deductions. Some taxpayers participate meaningfully at this stage; others do not, either because they are unaware of the significance of an IRS Examination or because they never receive notice. In any event, while the Examination itself may result in a Statutory Notice of Deficiency, and while the right to petition Tax Court is statutorily fixed by the issuance of that Notice, the Service has created an alternate administrative remedy for taxpayers who did not meaningfully participate in the audit proceedings. Under I.R.M. § 4.13.1, taxpayers may participate in an "Audit Reconsideration," a discretionary and extra-statutory process whereby taxpayers may submit information that IRS did not previously consider and receive a "second look" at their liability.

[15] Richard M. Carpiano, Minnesota Center Against Violence and Abuse, THREE STEPS FORWARD, TWO STEPS BACK: Personal Health Perceptions and Needs of Female Domestic Violence Victims and Their Access to Health Care (1998).

The Service's administrative flexibility does not stop with Audit Reconsideration. For taxpayers who fail to challenge liability and who end up in Collections, the Service is statutorily required to issue certain notices prior to filing a Notice of Federal Tax Lien or initiating a levy—including, importantly, the § 6320 or § 6330 Collection Due Process notice. Once taxpayers receive this notice, they have thirty days to request a CDP hearing. Yet for taxpayers who miss this window, the Service has established an administrative alternative—the "Equivalent Hearing." This hearing, which is conducted by an Appeals Officer and which follows much the same format as a CDP hearing, is nowhere commanded by statute—yet Treasury has promulgated a regulation establishing a taxpayer's right to this supplemental layer of review. Treas. Reg. § 301.6320-1(i) (as amended in 2006). Additionally, during either a CDP or Equivalent hearing, the Appeals Officer may, at her discretion, consider the underlying tax liability even though the taxpayer has already received a Notice of Deficiency. I.R.M. § 8.22.8.5 (4)

Perhaps most compelling is the Service's treatment of innocent spouse reconsideration requests. Under Treas. Reg. § 1.6015-5(c)(1), a requesting spouse is generally entitled to submit one request for relief—and accordingly, the Service will issue only one final administrative decision. Yet as per the Notice of Proposed Rulemaking, the Service has carved out an alternative to "provide flexibility within that framework." Under I.R.M. § 25.15.17.1, a final determination of innocent spouse relief "will be determined at any time a Requesting Spouse (RS) submits information not previously considered . . . as long as the collection statute expiration date (CSED) or refund statute expiration date (RSED) is still open." The provision goes on to note that there is "no limit as to how many times a case can be reconsidered."

Through administrative remedies such as Audit Reconsideration, the Equivalent Hearing, and Innocent Spouse Reconsideration requests, the Service has demonstrated an awareness that the strict confines of statutory procedure do not always provide meaningful due process for taxpayers in unique or trying situations. Of course, the Service cannot implement procedures that contravene Congress' intent as evidenced by the statutory scheme it has established—however, we do not believe that an equitable tolling provision for domestic abuse victims would contravene Congress' intent as evidenced by its swift response in adopting § 6511(h) after the *Brockamp* decision. This suggestion is also consistent with the statutory grant of authority in IRC § 6532(a)(2) to the Service to agree with the taxpayer to extend the period for filing a civil suit for refund.

Furthermore, in *Brockamp* the Supreme Court nowhere stated that the government could not administratively provide additional exceptions to the time periods in § 6511 in limited circumstances. Equally important, *Brockamp* did not hold that the time periods in § 6511 are "jurisdictional." The issue was not even discussed in the opinion. And the Court has, in recent years, limited the use of the "jurisdictional" label – admitting to having overused that label in the past. E.g. *Henderson v. Shinseki*, 131 S.Ct. 1197 (2011).

Our request that the Service provide a regulatory extension of the § 6511 periods for refund claims predicated on § 6105(f) relief in the case of abuse or financial control is akin to what another agency did in the recent case of *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013). In that case, there was a statutory 180-day time period in which providers could file a dispute in an administrative board regarding the adequacy of their of Medicare reimbursement. The agency involved had, by regulation, extended the 180-day period to 3 years if there was "good cause" for a delay in filing. The litigants in the case filed beyond the 3-year period, but argued that the doctrine of equitable tolling applied to the 180-day time period.

The Supreme Court rejected equitable tolling of the time period, but upheld the regulation as valid, since the Court found that the 180-day statutory time period was a typical claims processing rule that was not jurisdictional. Asking the Treasury to provide a limited regulatory exception to the rules of § 6511, is no more than what the Supreme Court recently approved regarding a regulatory extension created by another agency.

The Innocent Spouse Unit already makes determinations of abuse or financial control as part of its multi-factor analysis under § 4.03(2)(c) of Rev. Proc. 2013-34. Thus it is able to determine the extent of abuse or financial control in the particular case and its likely effects on the taxpayer and her ability to file a timely refund claim. Accordingly, we suggest adding to the proposed regulation a sentence reading:

> In the case of a claim for credit or refund on account of relief under § 6015(f), the running of the periods specified in subsections (a), (b), and (c) of § 6511 shall be suspended during any period during which it is determined that abuse or financial control by the nonrequesting spouse likely would have significantly discouraged the requesting spouse from filing the claim within such periods (not counting any such suspension).
>
> <u>The more flexible and taxpayer-sensitive approach to refund claims described above is warranted in light of the special importance of refunds to victims of abuse.</u>

In conclusion, a federal tax refund can provide much-needed funding for housing, food and clothing, education, and safety. Crucially, refund dollars may enable victims to end economic dependence on abusers who are "their spouses, their children's parent, the name on the apartment lease or mortgage, the sole breadwinner, owner of the family car and name on the bank account.[16] That refund facilitates the victim's ability to leave her abuser permanently.[17] A refund of tax, paid out in a lump sum, provides a lifeline to emergency and transitional funds. For some victims, these substantial infusions of cash enable them to pay security deposits on apartments and utilities or down payments on cars. For others, tax refunds replenish empty bank accounts and provide a buffer against bounced checks or credit card debt. At bottom, a federal tax refund may financially empower DV survivors to resist the campaign of violence, escape abuse, and achieve a fresh start.

In the same spirit of equity that compelled Congress to enact § 6015(f) and the Commissioner to expand the window for submitting § 6015(f) requests, we encourage the Service to adopt a more flexible and taxpayer-sensitive approach to refund claims made by requesting spouses who allege domestic abuse.

III. Expanding the Circumstances for a Second Final Administrative Determination

<u>Background</u>

Section 6015 provides a mechanism for requesting relief from joint liability where a taxpayer who signed a joint return can satisfy certain conditions. The statute provides that "Any determination under this section shall be made without regard to community property laws."[18] It

[16] Fender & Homes, *supra* note 8, at 13.
[17] *Id.* at 3.
[18] IRC § **6015** (a) In general**.—**Notwithstanding section 6013(d)(3) –
(1) an individual who has made a joint return may elect to seek relief under the procedures prescribed under subsection (b); and

does not limit the number of determinations but simply provides that the determination should not consider community property laws. The jurisdiction of the Tax Court to review the determination requires that the taxpayer file a petition with the Court within 90 days of the "notice of the Secretary's final determination of relief available to the individual." IRC 6015(e)(1)(A)(i)(I). This provision also places no limit on the number of final determinations the Service can issue.

As authorized by the statute, the Service created a process for applying for the relief provided by the statute. The process is found in the regulations. Section 1.6015-1 (a)(2) provides that "A requesting spouse may submit a single claim electing relief under both or either §§ 1.6015-2 and 1.6015-3, and requesting relief under § 1.6015-4." That single claim rule is subject to an exception where the request is premature for relief under notice of the Secretary's final determination of relief available to the individual § 1.6015-3 for spouses who have divorced, separated or otherwise terminated the marriage and who seek to allocate the liability.[19]

So, the Service acknowledges that taxpayers can submit more than one request for relief in certain circumstances described by regulation and the taxpayer can receive more than one final administrative determination.[20] Nothing in the statute limits the number of requests or the number of determinations. Given that it is possible to submit and to receive a second determination making the taxpayer eligible for Tax Court review, this comment proposes expanding the circumstances in which the Service issues a second determination.

Despite the ability of the Service to issue more than one determination letter, the proposed regulations state in their preamble that the Service will generally issue only one final administrative determination. The regulations acknowledge that the Service will issue a second determination in circumstances in which it previously issued a determination disallowing innocent spouse status because the taxpayer's request was untimely where the determination was based on the failure to submit a request for (f) relief within two years of the initiation of collection activity.[21] Because of the reversal of its decision on the applicability of the two year

---

(2) if such individual is eligible to elect the application of subsection (c), such individual may, in addition to any election under paragraph (1), elect to limit such individual's liability for any deficiency with respect to such joint return in the manner prescribed under subsection (c). Any determination under this section shall be made without regard to community property laws.

[19] The absence of a limitation parallels the absence of the number of statutory notices of deficiency that the Service can issue. If the taxpayer does not petition the Tax Court following the issuance of a notice of deficiency, the Service, subject to certain restrictions on the examination of returns, can issue a second, third or more statutory notices of deficiency. The language in IRC 6015 similarly does not restrict the number of notices of determination. As discussed below, the Service already identifies one situation in which it can issue a second notice of determination.

[20] The Service sometimes refers to the determination as a determination, a final determination or a final administrative determination. Each of these references, used interchangeably herein, refers to a determination the taxpayer can appeal to the Tax Court for a review of the decision of the Service.

[21] 78 FR 49242-01 Supplementary Information: Background "As for past requests for equitable relief—requests that the IRS denied as untimely under the two-year deadline—the notice allows the individuals who filed those requests to reapply for equitable relief, unless the individual litigated the denial or the denial included a determination that the individual was not entitled to

rule in (f) cases, the Service will entertain second requests for relief and issue a second final determination in those situations.

In addition to making clear that the Service, except in one circumstance, will not issue a second notice of determination[22], the proposed regulations create an administrative process through which taxpayers may submit additional claims for relief.[23] This reconsideration process did not exist in any formal manner prior to March, 2013.[24] The reconsideration process parallels the audit reconsideration process available to taxpayers who fail to petition the Tax Court during the 90 day period following the issuance of a statutory notice of deficiency and later seek to show that the assessed liability is incorrect without going through the formal refund procedure. While we applaud the increased flexibility demonstrated in formally creating an innocent spouse reconsideration procedure, we suggest that with little additional administrative burden to the Service it could offer the opportunity for a final determination in certain circumstances.

Current Regulation

The current regulations do not address the possibility of a second notice of final administrative determination. The current regulations also do not address the administrative reconsideration of the innocent spouse request by the Service.

Proposed Regulation Changes

The proposed regulations provide for a second notice of final determination. They also provide for administrative reconsideration of a prior adverse determination. We recommend that

---

equitable relief on the merits. In addition, Notice 2011-70 provides separate rules for claiming equitable relief with respect to litigated cases."

[22] Proposed Regulation 1.6015-5(c) * * *—(1) * * * A requesting spouse who receives a final administrative determination of relief under § 1.6015-1 may not later elect the application of § 1.6015-2 or 1.6015-3, or request equitable relief under § 1.6015-4, including through the CDP hearing procedures under sections 6320 and 6330.

[23] Proposed Regulation 1.6015-5(c) (2) Pursuant to §§ 1.6015-1(h)(5) and 1.6015-5(c)(1), a requesting spouse is generally entitled to submit only one request for relief and receive only one final administrative determination. Nevertheless, if a requesting spouse submits new information (including new facts, evidence, and arguments not previously considered) to the IRS after the IRS issues a final administrative determination to the requesting spouse, the IRS may reconsider the requesting spouse's request for relief under its established reconsideration process. A 49248 request for a reconsideration is not a qualifying election under § 1.6015-2 or 1.6015-3, or a request under § 1.6015-4, for purposes of § 1.6015-1(h)(5). Any reconsideration of a final administrative determination by the IRS, and any notice or letter issued to the requesting spouse as a result of the reconsideration (such as Letter 4277C, Letter 5186C, Letter 5187C, or Letter 5188C), is not the IRS's final determination for purposes of section 6015(e) and is not subject to review by the Tax Court under section 6015(e) or § 1.6015-7.

[24] Consistent with the general restriction, but to provide flexibility within that framework, the IRS has developed procedures in the Internal Revenue Manual (Chapter 25.15.17 (Rev. 03/08/2013)) to reconsider a final administrative determination if a requesting spouse submits additional information not previously submitted and considered and the requesting spouse did not petition the Tax Court from the prior final administrative determination.

a taxpayer who has unsuccessfully sought innocent spouse relief, received a notice of determination denying the requested relief and failed to petition the Tax Court following receipt of the notice of determination receive the opportunity to request relief again and, under the circumstances described below, receive a notice of final administrative determination with respect to the second request.

Many of our clients make the initial request for innocent spouse relief pro se. They fail to properly fill out the Form 8857, to properly respond to requests for additional information and to petition the Tax Court following the adverse determination. At some subsequent point in the collection phase of the case they arrive at a clinic seeking relief from the burden of the tax collection process. At that point, the clinic determines that the taxpayer qualifies for innocent spouse relief either because of changed circumstances since the initial request, a flaw in the initial request or a failure of the taxpayer to properly follow through with the initial request

The proposed regulation creates a reconsideration process similar to audit reconsideration. The audit reconsideration process essentially uses the claim for abatement procedures since the deficiency procedures no longer apply and the taxpayer has not used the refund procedures – usually because of a lack of funds with which to pay the liability and file a claim. The audit reconsideration process demonstrates the compassion and understanding the Service shows to individuals in this situation who have no legal remedy but who may have a legitimate basis for claiming that the underlying tax liability should not exist.

Applying the same type of audit reconsideration procedures to the innocent spouse circumstances demonstrates the same type of compassion and understanding exhibited by the Service following a failure of the taxpayer to fully avail themselves of the deficiency process; however, the legal setting in the innocent spouse provisions do not dictate the same legal result with respect to the opportunity for a second chance to go to Tax Court. Nothing in 6015 prohibits the Service from issuing a second (or third or fourth) notice of determination. The regulations acknowledge this by permitting a second notice of determination in those 6015 cases in which the Service sent a first notice of determination disallowing the claim for relief under 6015(f) on the basis that the request came more than two years after the start of collection.

We request that the regulations adopt a similar posture allowing a second notice of determination in situations in which the taxpayer did not petition the Tax Court following the first notice of determination. We recommend this as a supplement to the administrative reconsideration process currently in the proposed regulations. We recommend the issuance of a second notice of determination in certain circumstances described below. As mentioned above, we make this recommendation because many clients have changed circumstances, a flawed initial request or a failure to properly through on the initial request. The proposed regulation recognizes that certain circumstances need a relief valve but only offer an administrative one, even though a second opportunity for a court reviewed determination exists as a possibility.

The proposed regulation should offer a second determination letter in the following situations: (1) the second request raises a new basis for relief; (2) the taxpayer can demonstrate that one or more of the factors for equitable relief have changed as applied to their circumstances; or (3) the taxpayer can show that the initial determination resulted from a failure to follow through and the reason for the failure meets certain standards.

First, some taxpayers make a request for (b) or (f) relief at a point in time when they do not qualify for (c) relief. As detailed elsewhere in these comments, it can take an average of nine tries before an abused spouse leaves the relationship. That individual, or even a non-abused spouse, may make a request for relief prior to the opportunity to seek (c) relief. Forever foreclosing the chance for a Court review of the request for (c) relief because a taxpayer was trying to make a relationship work at the time of the first request does not foster the spirit of the statute or the acknowledgment in the proposed regulations that initial submissions sometimes fail when a basis for relief exists.

Second, the factors governing equitable relief do not remain static. Financial circumstances change over time and represent one of the factors used in making an (f) determination. Now that (f) relief exists for at least ten years the need to quickly request relief within two years of collection activity no longer drives early requests for (f) relief. The proposed regulations acknowledge that someone who waited more than two years after collection activity can obtain a new final administration determination from the Service if the previous request for relief was denied on the basis that it was untimely. No similar relief exists in the proposed regulation for the taxpayer who filed with two years to meet the prior requirement but filed before their financial circumstances deteriorated or other factors for determining (f) relief changed. The taxpayer who "timely filed" before the Service changed its position may have done so because of the timing requirement and despite the fact that one or more factors had not yet evolved to a positive status for them. These individuals should also have the opportunity for a court review of an adverse determination with respect to their second request for relief.

This comment does not intend that the Service adopt a rule encouraging taxpayer to file for relief "early and often." Rather, this comment suggests that taxpayers do file at times before their request matures into an allowable equitable claim. Many reasons may exist for filing too early, e.g., no counsel, poor counsel or timing factors such as the prior regulation. Whatever the reason, if a taxpayer can demonstrate changed circumstances, court review of the subsequent determination should be available.

Third, some taxpayers make the request for relief but receive an adverse determination because of their failure to follow through in responding to requests for additional information. The failure to follow through could easily happen to a taxpayer suffering through a domestic violence relationship, or its aftermath. It is also a distinct possibility for low income taxpayers seeking to represent themselves where a change of address without notifying the Service could result in an adverse determination.

Taxpayers receiving an adverse determination for failure to follow through should have the opportunity to demonstrate why the failure occurred. In circumstances in which the failure meets certain reasonable cause standards the taxpayer should receive a second opportunity for court review following a determination regarding the request. In many cases these taxpayers will come back with a pro bono representative or someone from a Low Income Taxpayer Clinic. Reentry into the innocent spouse determination process with the opportunity for court review should be available in these circumstances.

The possibility of a court review of a second innocent spouse request would not overly burden the Service or the Tax Court.[25] The proposed regulation permits second review. The

[25] "Innocent Spouse, Administrative Process: Time for Reform", 2011 TNT 3-3 (Jan. 5, 2011) at n. 24 ("Through conversations with employees of the Tax Court, I understand that for the fiscal year ending September 30, 2009, the Tax Court received 544 petitions involving section 6015

only additional burden is the chance to go to court. Many of the second reviews will result in an administrative determination of relief. Others will result in convincing the taxpayer that a basis for relief does not exist. Only a small percentage will result in additional court proceedings. That opportunity should exists if the taxpayer meets one of the conditions outlined above.[26]

Conclusion

The authors appreciate this opportunity to comment on the proposed regulation. If you have questions concerning these comments, please contact Keith Fogg at (610) 519-3895 or fogg@law.villanova.edu.

___/s/_____
Jamie Andree
Indiana Legal Services

__/s/_____
Professor Keith Fogg
Villanova Law School

__/s/_____
Professor Kathryn Sedo
University of Minnesota Law School

__/s/_____
Professor Carl Smith (retired)
Cardozo Law School

---

issues, 426 of which were filed pro se.") The experience with "regular" innocent spouse cases suggests that the number of petitions based on second opportunity reviews would probably be less than 100 each year.

[26] The second review also provides an opportunity for the Tax Court to look at all of the issues. Limiting the review to the administrative process may change the nature and scope of the review since the opportunity for a fresh look by the Tax Court does not exist after the review. Wilson v. Commissioner, 705 F.3d 980 (9th Cir. 2013), aff'g T.C. Memo. 2010-134, acq. June 17, 2013.