



Recent Developments in Innocent Spouse Litigation

Pro Bono & Tax Clinics Committee

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Today's Agenda

- IRS Updates
- Assessment Issues
- Standard & Scope of Review
- Collection Issues
- Reconsiderations vs New Claims
- § 6015 Claims in Refund Litigation
- Q & A

IRS UPDATES

Most Common Problems with Administrative Claims

- Form 2848 does not reference Form 8857
- Form 8857 is incomplete, unsigned and/or unsupported
- Duplicate submissions of tax returns
- Amended tax returns not yet processed
- RS was party to an accepted Offer in Compromise
- No notice of RS change of address
- Appeals protest/statement of disagreement is incomplete

Docketed Tax Court Cases

- 300-350 cases brought under section 6015(e) are pending in U.S. Tax Court; 15-18 cases pending appeal
- When Counsel answers a petition, it also notifies NRS; Tax Court eService results in disclosure of RS and NRS contact information
- Need for discovery is limited; a redacted copy of the administrative file is available on request
- Tax Court litigation is stipulation-based; parties should stipulate to facts but may reserve objections

Other IRS Updates

- Upcoming additions to IRS.gov and other messaging regarding selection of filing status
 - Joint effort by numerous IRS functions
 - Designed to educate taxpayers and representatives, and reduce need for innocent spouse relief



ASSESSMENT ISSUES

Evaluating the Tax Assessment

1. Was there a valid joint return?
2. Other infirmities with the assessment

Is the Return a Joint Return?

- Innocent Spouse Relief Requires a Joint Return. *See* I.R.C. § 6015(a)(1).
- But, your client may not need Innocent Spouse Relief if the return was not a valid joint return in the first place.
- *See* Joint Return of Income Tax by Spouses – I.R.C. § 6103

Intent to File a Joint Return

The determining factor is whether “the spouses intended to file a joint return, their signatures being but indicative of such intent. This intent may be inferred from the acquiescence of the nonsigning spouse.” *Hennen v. Comm’r*, 35 T.C. 747, 748 (1961).

Joint Assessment/One Signature

- There can be a binding originally filed joint return even if one spouse failed to sign the return, if the parties intended to file a joint return. Thus, one must examine the parties intentions to ascertain whether the absence of one signature invalidated the return. See *Federbush v. Comm’r*, 34 T.C. 740 (1960), *aff’d* 325 F.2d 1 (2d Cir. 1963). See IRM 25.15.19.3.3.1, *Tacit Consent Factors* for determining the intent to file a joint return.
- If an invalid deficiency assessment or an assessment due to an amended return was made against a non-signing spouse, the IRS may not be able to assess the proper amount against the non-signing spouse because the statute of limitations may have expired based on the originally filed return. See IRM 25.15.19.3.1, *Assessment Based on One Signature - Barred Statute One Signature (BSOS)* for more information.

Intent to Sign Joint Return

Three factors generally are considered to determine intent with respect to the “particular return in question”:

- (1) whether the petitioner filed a separate return;
- (2) whether petitioner objected to the joint filing; and
- (3) whether the petitioner filed joint returns in previous years.

Shea v. Comm’r, 780 F.2d 561, 567 (6th Cir. 1986).

Joint Returns – Invalidated

There are three situations where a joint return is invalid:

- Invalid election - One of the individuals on the joint return did not elect to file a joint return.
- Forgery - One spouse did not sign the return.
- Unlawful - Taxpayers had no legal right to file jointly.
- IRM 25.15.19.3.3

Tax Returns Signed Under Duress

- If a spouse establishes that he or she signed a return under duress, that return is not a joint return and the individual who signed that return is not jointly and severally liable for any deficiency in tax with respect to the return. Treas. Reg. § 1.6013–4(d).
- A tax return is signed under duress where “(1) A spouse was unable to resist demands to sign the return; and (2) she would not have signed the return except for the constraint applied to her will.” *Stergiou v. Comm’r*, T.C. Memo. 2009-15; *see also Wilson v. Comm’r*, 705 F.3d 980, 983 n. 10 (9th Cir. 2013) (defining duress in the tax context as “a constraint of will so strong that it makes a person reasonably unable to resist a demand to sign”).

Forged Signatures

- When a spouse establishes his or her signature on a joint return was forged and there was no tacit (implied) consent to jointly file the return, the joint election is invalid. Again, the relief from joint and several liability provisions do not apply. See IRM 25.15.19.3.3.1, *Tacit Consent Factors* for more information.
- The individual claiming his or her signature was forged is not jointly or severally liable for liabilities arising from such a return if the signature was indeed forged. However, CCISO should work the forged signature issue, along with the Form 8857, *Request for Innocent Spouse Relief*.

Tacit Consent Factors

- Check the filing status for prior and subsequent tax years.
- Did the RS participate in the preparation of the return by providing return information such as Form W-2s and/or Form 1099s?
- Was there a tax benefit to filing jointly, such as reduced income tax or Earned Income Tax Credit?
- Check the entire return for signature, forms filed after the return was filed, extension requests, and installment agreements.
- Check the entire return for schedules that belong to or include the RS. Were there any gains or losses belonging to the RS?
- Did RS have another reason to file jointly: for example, due to a divorce decree, or for immigration purposes or other reason?

Unlawful Joint Returns

- Unlawful returns are returns filed when the taxpayers were not legally married at the end of the tax year.
 - Exception: If the taxpayers resided in a common law marriage state and presented themselves as married, then the return could be a legal return, but the joint election may be invalid.
 - See the Job Aids Accounts Management web page at <http://serp.enterprise.irs.gov/databases/job-aids/am/state-information/common-law-marriage.html> for information on how to determine if there is a common law marriage.

Tax Court Review of Whether the Return Was Joint?

- In connection with a Petition for Redetermination of a Deficiency, the Tax Court had jurisdiction to determine whether a joint return was filed. *See e.g., Hiramaneck v. Comm’r*, T.C. Memo. 2011-280; *Pirnia v. Comm’r*, T.C. Memo. 1990-444.
- But, in connection with a Petition for Review of Denial of Claim for Relief From Joint and Several Liability under Section 6015(e) (“stand-alone” petition), the Tax Court does NOT have jurisdiction to consider whether a joint return was filed. *See Abdelhadi v. Comm’r*, T.C. Memo. 2018-183.

Other Issues with an Assessment

- Challenges to an assessment (or part of it) sometimes coexists with a 6015 claim
- Requests for 6015 relief will not be processed simultaneously with other challenges to an assessment
 - IRM 25.15.7, Innocent Spouse Shared Processing Responsibilities

Other Issues with an Assessment (2)

- The Tax Court's jurisdiction under section 6015(e) does not encompass challenges to the assessment
 - Taxpayer claimed the SNOD was sent too late, after the ASED: no jurisdiction. *Asad v. Comm'r*, 122 AFTR 2d 2018-XXXX (3d Cir. Oct. 25, 2018)
 - Taxpayer wanted to challenge supervisory approval of penalties under 6751(b): no jurisdiction. *Rogers v. Comm'r*, T.C. Memo. 2019-61 (May 30, 2019)



STANDARD AND SCOPE OF REVIEW

Abdelhadi v. Commissioner

- *Abdelhadi v. Comm’r*, T.C. Memo. 2018-83
 - The Tax Court held that in a stand alone case under I.R.C. § 6015(e), the Tax Court’s only jurisdiction is to determine whether relief is available under I.R.C. § 6015, and that such relief is only available if a joint return has been filed.

Taxpayer First Act

New IRC 6015(e)(7):

STANDARD AND SCOPE OF REVIEW.—Any review of a determination made under this section shall be reviewed de novo by the Tax Court and shall be based upon—

- (A) the administrative record established at the time of the determination, and
- (B) any additional newly discovered or previously unavailable evidence.

Public Law No. 116-25, sec. 1203

Taxpayer First Act (2)

- “The amendments made by this section shall apply to petitions or requests filed or pending on or after the date of the enactment of this Act.” [7/1/19]
- Robinson v. Comm’r, [Docket No. 12498-16](#), Order (Aug. 6, 2019)
 - Tried in February 2018
 - The entire administrative record was not offered in evidence

Taxpayer First Act (3)

- What is “the administrative record established at the time of the determination”?
 - If there is no determination when the petition is filed?
6015(e)(1)(A)(i)(II)
- What is “newly discovered or previously unavailable evidence”?
- Impacts on non-requesting spouses

Steve Milgrom, Procedurally Taxing, [Innocent Spouse Relief and the Administrative Record](#)

Two Tickets to Tax Court: 6015 Claims in CDP

- [*Francel v. Commissioner*](#), T.C. Memo. 2019-35 (4/10/19)
- Depending on the procedural history of the case, a taxpayer may have two independent bases for Tax Court jurisdiction
- Consider which standard and scope of review is more favorable to your case
 - Generally, section 6015(e) provides a more taxpayer-friendly standard & scope of review than section 6330(d)(1)



COLLECTION ISSUES

IRS Collections and § 6015

- IRC § 6015(e)(1)(B): “no levy or proceeding in court shall be made, begun, or prosecuted”
 - while claim is pending
 - during 90-day USTC appeal period
 - if an appeal is timely filed, until the decision of the Tax Court is final
- IRS policy is not to collect while 6015 cases are on appeal from the Tax Court
 - IRM 25.15.1.7 (03-04-2012), Prohibition Against Collection Actions
 - Preamble to T.D. 9003, 67 Fed. Reg. 47,278 at 47,285 (July 18, 2002)

IRS Collections and § 6015 (2)

- Offsets are not levies, but “the Service has made a business decision not to offset refunds while a claim is pending.” IRM 25.15.3.5 (12-12-2016) (defining a Prohibited Collection Action)
 - “If a prohibited collection action or refund offset has occurred after a claim is filed, corrective actions must be taken to release the funds to RS.”



RECONSIDERATIONS

Innocent Spouse Reconsiderations

- A final determination will be reconsidered when a RS submits information not previously considered (new information or information that the IRS failed to previously consider) as long as the collection statute expiration date (CSED) or refund statute expiration date (RSED) is still open. IRM 25.15.17.1.1
- Although the final determination will be reconsidered, the request for reconsideration is not a qualifying request for relief under IRC 6015(b), (c), or (f)

Reconsideration vs. New Claim

See Treas. Reg. Section 1.6015-1(h)(5):

- A qualifying election also includes a requesting spouse's second election to seek relief from joint and several liability for the same tax year under § 1.6015-3 when the additional qualifications of paragraphs (h)(5)(i) and (ii) of this section are met -
 - **(i)** The requesting spouse did not qualify for relief under § 1.6015-3 when the Internal Revenue Service considered the first election solely because the qualifications of § 1.6015-3(a) were not satisfied; and
 - **(ii)** At the time of the second election, the qualifications for relief under § 1.6015-3(a) are satisfied.

Res Judicata and 6015

- If the only basis for not considering or initially denying a claim under IRC 6015(c) was that the RS was still married when the original claim was made or considered, and RS files a new claim, **then res judicata does not apply to bar the new claim from being considered under IRC 6015(c) only.**

§ 6015 CLAIMS IN REFUND LITIGATION

Can § 6015 Justify a Refund Suit?

- *Chandler v. United States* (N.D. Tex. Oct. 9, 2018)
 - Keith Fogg, Procedurally Taxing: [Does the DOJ Tax Trial Section Talk to Its Appellate Section?](#)
- [Hockin v. United States](#) (D. Or. Aug. 15, 2019)
 - Sarah Lora, Procedurally Taxing: Innocent Spouse Survives Motion to Dismiss in Jurisdictional Fight with the IRS

Judicial Review Through Refund Jurisdiction

- Taxpayers can get judicial review by paying the tax and timely filing a refund claim, followed by a refund suit if the claim is denied. *See e.g., Hockin v. United States*, -- F. Supp. 3d -- , 2019 WL 3845380 (D. Or. Aug. 15, 2019).
- What about Mrs. Abdelhadi?

Other Ways to Obtain Relief?

- What if client cannot pay in full for refund jurisdiction and the time to file a Tax Court petition has already expired or there was no Notice of Deficiency?
- Raise the claim as a defense against a suit filed by the government? Could the issue be determined by a bankruptcy court?
- Try again through Audit Reconsideration, or another Form 8857?