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US TAX COURT
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JESSICA LYNN GRADY A.K.A. JESSICA LYNN GANS,
Petitioner,

ELECTRONICALLY FILED

v.

Docket No. 16411-17S

COMMISSIONER OF INTERNAL REVENUE,
Respondent

RESPONDENT'S RESPONSE TO ORDER DATED 07/24/2019

CERTIFICATE OF SERVICE

UNITED STATES TAX COURT

JESSICA LYNN GRADY A.K.A. JESSICA LYNN GANS,	)	
Petitioner,	)	
v.	)	Docket No. 16411-17S
COMMISSIONER OF INTERNAL REVENUE,	)	Filed Electronically
Respondent.	)	

RESPONDENT'S RESPONSE TO COURT ORDER

PURSUANT to the Court's order dated July 24, 2019, respondent hereby files a response.

IN SUPPORT THEREOF, respondent respectfully states:

The Court's order arises from amendments to section 6015 of the Internal Revenue Code following enactment of the Taxpayer First Act (TFA), Pub. L. No. 116-25, sec 1203(a)(1), 133 Stat. at_ (2019) (hereinafter "TFA"). Subsection (e)(7) was added to section 6015 to codify the Court's standard and scope of review of respondent's determination in an equitable claim for relief from joint and several liability on a joint return (also known as a claim for innocent spouse relief).

In the past, respondent argued, and the Tax Court agreed, that judicial review of respondent's denial of an equitable claim for innocent spouse relief should proceed under an abuse of discretion standard. Johnson v. Commissioner, 118 T.C. 106, 125 (2002). Respondent also maintained that the scope

of review should be limited to the administrative record before the IRS. Ewing v. Commissioner, 122 T.C. 32, 39 (2004), rev'd on other grounds, 439 F.3d 1009 (9th Cir. 2006). Several circuit courts of appeal agreed with respondent. See, e.g., Mitchell v. Commissioner, 292 F.3d 800, 807 (D.C. Cir. 2002); Chesire v. Commissioner, 282 F.3d 326, 337-338 (5th Cir. 2002). However, first in Ewing, and then in the Porter cases, the Tax Court held that the standard and scope of review for equitable claims was in fact de novo. Porter v. Commissioner, 130 T.C. 115 (2008); Porter v. Commissioner, 132 T.C. 203 (2009). Despite the Court's holding, respondent maintained its earlier position with respect to the proper standard and scope of review. See Notice CC-2009-021 (June 30, 2009) (advising Chief Counsel Attorneys to continue to argue in section 6015(f) cases that the proper standard of review is abuse of discretion and that the scope of the Tax Court's review is limited to issues and evidence presented before Appeals or Examination).

In Wilson v. Commissioner, T.C. Memo. 2010-134, at *3-4, the Court held as it had in the Porter cases, prompting an appeal by respondent. Following the Eleventh Circuit's lead in Commissioner v. Neal, 557 F.3d 1262 (11th Cir. 2009), the Ninth Circuit affirmed the Tax Court's decision, holding that the

scope and standard of review is de novo. Wilson v. Commissioner, 705 F.3d 980, 994 (9th Cir. 2013). Although respondent did not agree with the Court's reasoning, after Wilson respondent abandoned its prior position, Action on Decision 2012-07, I.R.B. 2013-25 (June 17, 2013), and proceeded, instead, under the Tax Court's de novo scope and standard of review, Notice CC-2013-011 (June 7, 2013).

Congress' enactment of section 1203(a)(1) of the TFA now sets forth the appropriate standard and scope of review for all avenues of innocent spouse relief. See H.R. Rep. 115-637(I), 2018 WL 1779390, at *27-28 (stating that "disparity of treatment can be avoided if the statute is clarified to confer a right to judicial review in all cases, and to specify the scope of such review).

When interpreting a statute, the purpose is to give effect to Congress' intent. Bronstein v. Commissioner, 138 T.C. 382, 386 (2012) (citing United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 542-543 (1940). The starting point in this endeavor is the statutory language itself, "which is the most persuasive evidence of statutory purpose." Id.; Sundstrand Corp. and Consol. Subsidiaries v. Commissioner, 98 T.C. 518, 542 (1992). Words of a statute, including those of revenue acts,

should be interpreted in their "ordinary, everyday senses," Crane v. Commissioner, 331 U.S. 1, 6 (1947); see also Hewlett-Packard Co. & Consol. Subsidiaries v. Commissioner, 137 T.C. 255, 264 (2012) (stating that "[u]ndefined words take their ordinary, *contemporary*, common meaning") (emphasis added), unless such interpretation would lead to absurd or unreasonable results, Union Carbide Corp. v. Commissioner, 110 T.C. 375, 384 (1998). Usually, the plain meaning of statutory language is conclusive. United States v. Ron Pair Enters, Inc., 489 U.S. 235, 242 (1989).

Section 6015(e)(7) as enacted reads:

> **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.

The requirement that "[a]ny review of a determination under this section shall be reviewed de novo by the Tax Court" is straightforward and sets forth the standard of review. The amendment makes clear that the standard of review of *any*

determination under section 6015 shall be de novo. Accordingly, the standard of review of innocent spouse claims under all avenues for relief, whether subsections (b), (c), or (f), shall henceforth be de novo.

The latter portion of newly enacted subsection (e)(7), commencing with "shall be based upon" and encompassing subsections (A) and (B), addresses the appropriate scope of review. Upon initial review of the language contained therein, three issues are immediately apparent. First, the scope of review is clearly something other than de novo. Congress demonstrated it knows how to use the words "de novo" by so labeling the standard of review in the first clause of subsection (e)(7). Its choice not to similarly mark the scope of review should be considered deliberate. Shoshone Indian Tribe of Wind River Reservation v. United States, 364 F.3d 1339, 1347 (Fed. Cir. 2004) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12, 436 (1987)) (stating that "[t]here exists a strong presumption that 'Congress expresses its intent through the language it chooses' and that the choice of words in a statute is therefore deliberate and reflective"). Instead, Congress stated the scope of review should be based upon the administrative record, (e)(7)(A), and any "additional newly

discovered or previously unavailable evidence," (e)(7)(B).[1]

Second, it is necessary to determine the meaning of "administrative record" under subsection (e)(7)(A). Though not defined in amended section 6015 or in pre-existing related regulations, the term "administrative record" is commonly understood within the context of administrative law. Review of administrative decisions is "ordinarily limited to consideration of the decision of the agency . . . and of the evidence on which it was based." United States v. Carlo Bianchi & Co., 373 U.S. 709, 713-14 (1963). To apply this principle in a context specific to tax, the term "administrative record" is defined in regulations pertaining to collection due process.[2] In collection due process cases, a taxpayer first exercises his or her rights at the administrative level where a record of proceedings is created or supplemented. Section 301.6330-1(f)(2) Q&A-F4 of the Treasury regulations defines administrative record as:

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[1] By so doing, Congress chose not to act upon the National Taxpayer Advocate's recommendation to create a de novo standard and scope of review. See National Taxpayer Advocate, 2019 Purple Book: Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 91-92 (2019).

[2] "Administrative record" is also defined in regulations relating to Whistleblower actions, § 301.7623-3(e), and Rulings and Determination Letters, § 601.201(*o*)(8), but the definition appears more narrow in focus in those sections.

> The case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3), will constitute the record in the Tax Court review of the Notice of Determination issued by Appeals.

Respondent submits that "administrative record" should have substantially the same meaning as the quoted text above when applied to innocent spouse claims, with some modifications.[3]

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[3] Obvious changes might include substituting "IRS or IRS employee" for "Appeals Officer or employee" and removing references to section 6330, as appropriate. Relevant documents could include: tax returns; notice of deficiency; documents where petitioner acknowledges deficiency (e.g., form 4549, statement of income tax changes); account transcripts; Form 8857 and any attachments; any documents submitted by petitioner; any documents submitted by non-requesting spouse; CCISO's or

Third, the language of subsection (e)(7)(B) is somewhat vague. Specifically, Congress did not define the terms "additional newly discovered," or "previously unavailable" within section 6015.

The language of subsection (e)(7)(B) does not appear in the Internal Revenue Code or Treasury regulations. In the absence of a statutory definition, one turns to the plain meaning. Friends of Yosemite Valley v. Norton, 348 F.3d 789, 796 (9th Cir. 2003). In determining the plain or ordinary meaning of words, it is appropriate to consult dictionaries. Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 480 n.10 (1979); Rome I, Ltd. v. Commissioner, 96 T.C. 697, 704 (1991).

With respect to the phrase "additional newly discovered or previously unavailable evidence," a modern dictionary defines its component parts as follows: "additional" is defined as "more than is usual or expected." *Additional Definition*, merriam-webster.com, https://www.merriam-webster.com/dictionary/additional (last visited 8/22/2019). The

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Appeal's final determination; allocation/attribution worksheets; any statement of disagreement by petitioner and/or non-requesting spouse; CCISO's or Appeal's workpapers; Integrated Collection System (ICS) history, or financial information.

adverb, "newly," is defined as lately, recently, anew, or afresh. *Newly Definition*, merriam-webster.com, https://www.merriam-webster.com/dictionary/newly (last visited 8/22/2019). The present tense "discover" is defined as "to make known or visible, to display, to obtain sight or knowledge of for the first time," or "to find out." *Discover Definition*, merriam-webster.com, https://www.merriam-webster.com/dictionary/discovered (last visited 8/22/2019). "Previously," in noun form, is defined as "going before in time or order." *Previous Definition*, merriam-webster.com, https://www.merriam-webster.com/dictionary/previously (last visited (8/22/2019). And lastly, "unavailable" is defined as "not possible to get or use." *Unavailable Definition*, merriam-webster.com, https://www.merriam-webster.com/dictionary/unavailable (last visited 8/22/2019).

Combining these various dictionary definitions suggests the scope of review should encompass supplementary evidence of which a party was recently made aware, but could not get or use before.[4] Applied specifically to innocent spouse claims, the

[4] As to words of the statute that denote timing, i.e. "newly" and "previously," (e)(7)(B), these are perhaps best understood with reference to the administrative determination. Accordingly, "newly" would cover the period of time after the administrative determination, whereas "previously" would encompass the time

plain meaning suggests that the scope of review is limited to evidence not already provided or existing in the administrative record, of which the party introducing the evidence became aware since the administrative determination, and which the party introducing the evidence could not have obtained and provided before the administrative determination.

These conclusions about the plain meaning of the statutory terms are buttressed by the interpretation of similar language in other areas of law. For example, the phrase "newly discovered evidence" appears in Fed. R. Civ. P. 60(b)(2) as a ground for relief from a judgment or order. Similar phrases also appear in opinions addressing requests for a new trial pursuant to Fed. R. Crim. P. 33(b)(1), see, e.g., Giglio v. United States, 405 U.S. 150, 152 (1972); United States v. Axsom, 761 F.3d 895, 900 (8th Cir. 2014); United States v. Goodwin, 41 Fed. App'x 115, 116 (9th Cir. 2002), or Fed. R. Civ. P. 59, see Colon-Millin v. Sears Roebuck De Puerto Rico, Inc., 455 F.3d 30, 36 n.4 (1st Cir. 2006). And in the tax arena, similar language is present in at least one opinion addressing a motion for reconsideration of findings or opinion under T.C. Rule 161.

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period before the determination.

Estate of Quick v. Commissioner, 110 T.C. 440, 441 (1998). [5]

As the plain meaning suggests, there is general consensus among courts that newly discovered or previously unavailable evidence is evidence that could not have been discovered at the time of the prior proceeding. See footnote 4 supra. Rules and court opinions clarify the plain meaning by imposing a duty to diligently search. Fed. R. Civ. P. 60(b)(2) states, for example, that newly discovered evidence is evidence "that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Likewise, the Tax Court explained that newly discovered evidence is "evidence that the moving party could not have introduced, by the exercise of due diligence, in the prior proceeding." Estate of Quick 110 T.C. at 441. Generally, courts have required the proponent of newly discovered evidence to provide a convincing explanation why the evidence could not have been offered at an earlier proceeding. See, e.g., Anderson v. Catholic Bishop of Chicago, 759 F.3d 645, 653 (7th Cir. 2014); Crawford v. TRW

[5] Similar phrases also appear in the context of Social Security Hearings, 42 U.S.C. § 405(g) (permitting additional evidence to be taken before the Commissioner of Social Security); Federal Communications Commission hearings, Schoenbohm v. FCC, 204 F.3d 243, 250 (D.C. Cir. 2000); immigration hearings, Leon-Barrios v. INS, 116 F.3d 391, 394 (9th Cir. 1997); and National Labor Relations Board hearings, N.L.R.B. v. Sunrise Lumber & Trim Corp., 241 F.2d 620, 625-626 (2d Cir. 1957).

Automotive U.S. LLC, 560 F.3d 604, 615-616 (6th Cir. 2009).

Some courts have also interpreted newly discovered evidence to mean evidence that is material, Hafner v. Sullivan, 972 F.2d 249, 250 (8th Cir. 1992), not merely cumulative or impeaching, Smith Intern., Inc. v. Hughes Tool Co., 759 F.2d 1572, 1578 (Fed. Cir. 1985), and evidence not submitted solely for the purpose of re-litigating old matters, Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008). In addition, because newly discovered evidence is frequently examined as a ground to reopen an administrative proceeding, or more drastically, to grant a new trial, some courts require a showing that the evidence would likely produce a different result. See United States v. Singh, 54 F.3d 1182, 1190 (4th Cir. 1995) (requiring, within the context of criminal proceedings, that newly discovered evidence demonstrates that on a new trial it would probably produce an acquittal); Cincinnati Life Ins. Co. v. Beyrer, 722 F.3d 939, 955 (7th Cir. 2013) (requiring, under Fed. R. Civ. P. 59, that the evidence "would probably produce a new result"). The purpose of the statutory language in section 6015(e)(7)(B) is not to reopen a prior proceeding, but rather to set forth the scope of the Tax Court's initial review. Accordingly, it may be unnecessary to apply a similar, stringent

barrier to the admission of newly discovered evidence within the context of innocent spouse claims.

In light of the foregoing, it is respondent's position that, under a plain reading, the scope of review for equitable innocent spouse claims under section 6015(f) is *not* de novo, but should be limited to the administrative record, substantially as defined under section 301.6330-1(f)(2) Q&A-F4, and any evidence that was unavailable to the moving party, or that the moving party was unaware of, in the prior administrative proceeding.

In stating this position, respondent acknowledges the Ninth Circuit's contention in Wilson that "*[i]n the absence of any limiting language*," consideration of all the facts and circumstances necessary to make a determination as required by sections 6015(e) and 6015(f)(1) suggests a de novo scope of review. 705 F.3d at 988 (emphasis added). However, following enactment of the TFA, section 6015(e)(7) now contains precisely the kind of limiting language that was previously absent, and makes clear that the scope of review is no longer de novo.

Because the statutory language of section 6015(e)(7) is unambiguous, it is unnecessary to consult legislative history. Burlington N.R.R. v. Okla. Tax Comm'n, 481 U.S. 454, 461 (1987); Intermountain Ins. Serv. Of Vail, LLC v.

Commissioner, 134 T.C. 211, 222-223 (2010), rev'd 650 F.3d 691 (D.C. Cir. 2011), vacated and remanded, 566 U.S. 972 (2012). In any event, pertinent legislative history materials are sparse and do little to elucidate the meaning of the enacted language. Rather, the only House Report related to the TFA simply states that the scope of review in equitable relief claims should not be limited to the administrative record alone, and sets forth Congress's desire to resolve conflict among various circuits so as to provide consistent treatment of taxpayers. See H.R. Rep. 115-637, No. 637(I) 2018, 2018 WL 1779390, at *27-28 (stating that, as the result of current conflicting appellate decisions, "persons residing in different states but whose circumstances are otherwise similar may be accorded different rights to judicial review under the Code"). Consequently, there is nothing in the legislative history to suggest Congress intended an outcome contrary to the plain meaning.

As to the specific case in issue here, as a result of the amendment, it may be necessary for the parties to either agree what constitutes the administrative file and whether other evidence presented at trial was newly discovered or previously unavailable, or if the parties cannot agree, to hold a supplementary hearing to determine whether the Court is in full

possession of the administrative record, and whether any evidence presented to the Court was not newly discovered or previously unavailable under section 6015(e)(7)(B).

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Docket No. 16411-17S

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing RESPONSE TO ORDER was served on petitioner by mailing the same by certified mail on September 23, 2019 in a postage paid wrapper addressed as follows:

Jessica Lynn Grady Gans
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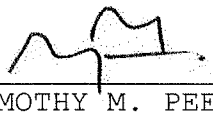
Date: September 23, 2019



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