Department of the Treasury | **Internal Revenue Service** | **Office of Chief Counsel**

Notice

CC-2004-26

July 12, 2004

Subject: Litigating Cases Involving Claims for Relief From Joint and Several Liability Under Section 6015(f)

Cancel Date: Upon Incorporation Into the CCDM

Purpose

This Notice provides guidance to Chief Counsel attorneys in litigating cases involving requests for relief from joint and several liability under I.R.C. § 6015(f).

Discussion

The Tax Court, in Ewing v. Commissioner, 122 T.C. 32 (2004), involving the Service's denial of relief under section 6015(f), purported to apply an "abuse of discretion" standard, but concluded that the Tax Court's "determination whether petitioner is entitled to equitable relief under section 6015(f) is made in a trial de novo and is not limited to matter contained in respondent's administrative record." Id. at 44. The Commissioner has filed a Notice of Appeal in this case.

A. Motions for Summary Judgment

Pending further notice, Chief Counsel attorneys should not file motions for summary judgment arguing that, based solely on the administrative record, the Commissioner did not abuse his discretion in denying relief from joint and several liability under section 6015(f). In light of Ewing, these motions have little chance for success. Chief Counsel attorneys should continue to prepare and submit for National Office review motions for summary judgment based on other arguments.

B. Trial of Section 6015(f) Issues

Chief Counsel attorneys should continue to argue in all section 6015(f) cases that the Tax Court may not consider issues or evidence other than the issues or evidence presented before Appeals or Exam in determining whether the Service abused its discretion in denying relief to the petitioner. This argument is based on the principle that the Service could not have abused its discretion by failing to consider issues or evidence the petitioner did not present to the Service during the administrative process.

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The Tax Court has recognized this principle in the context of other abuse of discretion cases. See Magana v. Commissioner, 118 T.C. 488 (2002) (holding that, in reviewing for abuse of discretion under section 6330(d)(1), the Tax Court considers only issues brought before the Commissioner in making his determination); Sego v. Commissioner, 114 T.C. 604, 612 (2000) (stating "[m]atters raised after a hearing do not reflect on whether the determinations that are the basis of [the] petition were an abuse of discretion.")

In order to establish what issues or evidence the Service reviewed in making its determination, Chief Counsel attorneys should work with the petitioner to stipulate the administrative record in cases in the Tax Court. The administrative record is that part of the petitioner's administrative file that the Service considered, or the petitioner or nonrequesting spouse submitted to the Service for consideration, with respect to petitioner's claim for relief. This includes, but is not limited to, Form 8857, Request for Innocent Spouse Relief; Form 12507, Innocent Spouse Statement; Form 12508, Questionnaire for Nonrequesting Spouse; Form 12510, Questionnaire for Requesting Spouse; all written correspondence between the petitioner and the Service; all written correspondence between the nonrequesting spouse and the Service; any documents presented to the examiner or Appeals officer; the preliminary notice of determination; the final notice of determination; any written analysis by the examiner or Appeals officer; and the Appeals Case Memorandum.

In order to preserve the Ewing issue for appeal, Chief Counsel attorneys should raise a continuing evidentiary objection, coupled with the statement that we are considering an appeal of Ewing, if the petitioner attempts to testify or otherwise enter evidence into the record that was not made available to the Service's examiner or Appeals officer. Chief Counsel attorneys also should consider filing motions in limine on the ground that information not raised during the administrative process is not relevant to the question of whether the Service abused its discretion in denying relief under section 6015(f). If the parties have not stipulated to the administrative record, filing a motion in limine with the administrative record as an exhibit to a declaration from the examiner or Appeals officer may be the only way of placing the administrative record before the Tax Court without calling the examiner or Appeals officer to testify. If the Tax Court denies the evidentiary objection or motion in limine, or if the court reserves ruling on the objection or motion until after the trial, then, and only then, should Chief Counsel attorneys present any additional evidence not reviewed by the examiner or Appeals officer that may strengthen the Service's case. Even if the Tax Court admits evidence of matters not available to the Service during the administrative proceeding, the alternative argument we should make is that the petitioner is still ineligible for relief from joint and several liability under section 6015(f). If your facts do not support making this alternative argument, please contact Branch 2, Administrative Provisions and Judicial Practice Division, at (202) 622-4940.

C. Motions for Remand to the Service to Make a Determination

In cases where a taxpayer raises relief from joint and several liability under section 6015 for the first time in a petition in the Tax Court from a notice of deficiency, or when the taxpayer petitions after six months from filing a claim for relief with the Service, the Chief Counsel attorney should request that the Tax Court remand the case to the Service to make a determination regarding relief under section 6015(f). In addition to Motions for Remand, Chief Counsel attorneys should file accompanying Motions for Continuance as early as possible in the proceeding if the case is calendared. If the case is not calendared, only a Motion for Remand should be filed. The Tax Court should grant this Motion for Remand because it has reasoned "that it cannot find an abuse of discretion where there is no evidence that the Commissioner exercised any discretion at all." McCoy Enterprises, Inc. v. Commissioner, 58 F.3d 557, 563 (10th Cir. 1995) (citations to a series of Tax Court opinions omitted). Although the Tax Court has never discussed whether it has the authority to remand a case involving section 6015(f), the court has determined that it does have the authority to remand in collection due process cases brought under section 6330. See, e.g., Keene v. Commissioner, 121 T.C. 8 (2003); Harrell v. Commissioner, T.C. Memo. 2003-271. In addition, in several collection due process cases, Motions for Remand to the Appeals Office have been granted.

Remanded cases[1] should be sent to the Cincinnati Centralized Innocent Spouse Operation (CCISO) for a determination regarding equitable relief under section 6015(f). In addition, although the Tax Court will review any claims made under section 6015(b) or (c) de novo, CCISO will also review these claims.[2] This procedure has multiple benefits. First, except when the nonrequesting spouse is a party, CCISO may be able to dispose of the case. Second, CCISO will create an administrative record from which Counsel may argue that the Service did not abuse its discretion. Third, CCISO will prepare a written report setting forth the analysis used in arriving at the determination. Finally, having CCISO make the determination eliminates any conflict problems that may arise if the trial attorney made the determination and then needs to testify about the process.

[1] If the Tax Court denies or fails to rule on a Motion for Remand, Chief Counsel attorneys should nevertheless send the case to CCISO for a determination regarding relief.

[2] If the petitioner only raises relief under section 6015(b) or (c) in the petition, Chief Counsel attorneys should still submit the case to CCISO for review, but without filing a motion for remand. If CCISO denies relief under section 6015(b) or (c), CCISO will consider equitable relief under section 6015(f), even if not requested by the petitioner. See Rev. Proc. 2003-61, 2003-32 I.R.B. 296, superseding Rev. Proc. 2000-15, § 5, 2000-1 C.B. 447. See also I.R.M. 25.15.13.2.

Requests for determinations regarding relief should be submitted to:

IRS - CCISO
Stop 840F
P.O. Box 120053
Attn: Department One Manager
Covington, KY 41012

Requests should be marked "EXPEDITE-TAX COURT CASE PENDING" and include the Form 8857 (if the petitioner has prepared one), the Tax Court petition, and any other relevant documents. CCISO will contact the Chief Counsel attorney via telephone upon receipt of the case. Questions regarding submitting requests for determinations can be addressed to CCISO at (859) 669-3477.

Although CCISO will make the determination regarding relief in these cases, the Service should not issue preliminary or final determination letters for a case in docketed status. Instead, CCISO should send all evidence the petitioner presented (or that was otherwise considered) and its written analysis to the Chief Counsel attorney handling the docketed case. If CCISO determines the petitioner is entitled to relief, the Chief Counsel attorney should consider whether settlement is appropriate. If CCISO determines the petitioner is not entitled to relief, the Chief Counsel attorney should submit a status report to the Tax Court setting forth the Service's determination. The CCISO's written analysis should be attached to the status report as an exhibit.

In addition, for cases docketed in the Tax Court, the Service should not provide relief to, nor settle with, the requesting spouse unless a nonrequesting spouse who is a party to the proceeding is a party to the settlement. Corson v. Commissioner, 114 T.C. 354 (2000). The nonrequesting spouse can be a party to the proceeding by either jointly petitioning with the requesting spouse or by intervening within the 60-day period provided by T.C. Rule 325(b). If the nonrequesting spouse is deceased, the personal representative of the nonrequesting spouse's estate may intervene on behalf of the nonrequesting spouse. If the nonrequesting spouse did not jointly petition with the requesting spouse or has not intervened within the 60-day period, then the Service may settle the case with the requesting spouse.

D. Additional Documents Required for Brief Review

For cases involving relief from joint and several liability under section 6015 for which a motion or brief is required to be reviewed by the National Office, in addition to the documents required to be submitted for pre-brief review, see CCDM 35.11.7.5(4), field attorneys handling these cases should also submit the following items (if applicable):

- A copy of the final notice of determination
- The examiner's write-up of the case
- The Appeals Case Memorandum

All documents required to be reviewed by the National Office must be referred to the Technical Services Support Branch (TSS 4510) for assignment. Electronic submissions may be sent to the "TSS4510" mailbox. E-mail submissions to the “TSS4510” mailbox should not be marked “Private.”

The mailing address for the Technical Services Section is:

Technical Services Support Branch
CC:PA:LPD:TSS
1111 Constitution Ave., N.W., Room 5329
Washington, D.C. 20224

When sending in documents for review via the United States Postal Service or private delivery service, Chief Counsel attorneys should send an e-mail to the “TSS4510” mailbox indicating the method of delivery.

Any questions regarding litigating section 6015(f) cases, including assistance on preparing motions for remand, should be addressed to Branch 2, Administrative Provisions and Judicial Practice Division, at (202) 622-4940.

/s/
DEBORAH A. BUTLER
Associate Chief Counsel
(Procedure & Administration)