Lesson 17

INNOCENT SPOUSE
(March 2012)

CONTENTS

I. OVERVIEW OF I.R.C. § 6015

Generally, married taxpayers who file joint Federal income tax returns are jointly and severally liable for the tax. I.R.C. § 6013(d). Section 6015 offers taxpayers three possible avenues for relief from joint and several liability. First, under section 6015(b), a requesting spouse may elect relief from joint and several liability for an understatement of tax attributable to erroneous items of the spouse with whom the requesting spouse filed the return if the requesting spouse did not know, or have reason to know of the understatement and it would be inequitable to hold the requesting spouse liable. Second, under section 6015(c), a requesting spouse may elect to allocate a deficiency if the requesting spouse is no longer married to, is legally separated from, or is no longer living with, the other spouse filing the joint return. Third, under section 6015(f), if the requesting spouse does not qualify for relief under section 6015(b) or (c), the Commissioner may grant relief from any unpaid tax or any deficiency if it is inequitable to hold the requesting spouse liable. See I.R.C. section 6015(b), (c), and (f). A taxpayer can seek relief from a liability

for an understatement of tax or a deficiency under any subsection of section 6015. For purposes of section 6015, a deficiency and understatement are the same. Relief under subsections 6015(b) and (c) is conditioned on an understatement or a deficiency. In contrast, section 6015(f) allows relief from either a deficiency or an underpayment of tax (i.e., tax correctly shown on a return but not paid with the return). Math errors may be understatements or underpayments, depending on the nature of the math error. For some examples of math errors and whether they constitute understatements or underpayments, see IRM 25.15.7.6.15.

In order to request relief, a spouse generally must file Form 8857 with the Service. The spouse requesting relief is referred to as the requesting spouse and the other spouse is referred to as the nonrequesting spouse. The part of the Service that reviews innocent spouse claims is called the Cincinnati Centralized Innocent Spouse Operation (CCISO).

Below is an outline to assist field attorneys handling section 6015 cases pending in the Tax Court.

If you have any questions about section 6015, you can contact the following people:

- Procedure and Administration, Branches 1 and 2 at (202) 622-4910 and (202) 622-4940, respectively.

- Innocent Spouse Relief Field Coordinators:
  - Steve Roth (805) 371-6702, x718
  - Denise Diloreto (502) 566-2937
  - Horace Crump (205) 912-5457
  - Rick Hassebrock (513) 263-4872

II. INITIAL CONSIDERATIONS/POSSIBLE DISPOSITIVE MOTIONS

A. Is Tax Court Jurisdiction Proper?

The Tax Court has three primary bases for jurisdiction to consider a claim for innocent spouse relief under section 6015. First, when taxpayers petition for redetermination of a deficiency under section 6213(a), they may raise section 6015 as an affirmative defense. Second, taxpayers may raise section 6015 in a petition from a Notice of Determination in a collection due process proceeding under sections 6320 or 6330 in which the taxpayer raised innocent spouse relief. Third, section 6015(e) enables a requesting spouse to petition the Tax Court for review of an administrative determination regarding section 6015 relief. A requesting spouse may file a petition for review with the Tax Court within ninety days of the issuance of the final Notice of Determination denying section 6015 relief, or at any time if the claim has been pending for six months and the Service has not made a determination. I.R.C. § 6015(e)(1)(A). The filing of a petition in response to the final Notice of Determination or after the claim has been pending for six months is often referred to as a "stand-alone" proceeding as the court's jurisdiction is not based on there being some other type of proceeding. "The predicates for [the court's] jurisdiction in a stand-alone proceeding under section 6015 are a claim by a taxpayer, a final

determination, and a timely petition." Gormeley v. Commissioner, T.C. Memo. 2009-252. In stand-alone cases, the only issue before the Court is whether the spouse is entitled to relief. Thus, the court may not adjust or consider the validity of the underlying liability. See Block v. Commissioner, 120 T.C. 62 (2003) (holding that Court lacked jurisdiction to hear whether the assessment was invalid in stand-alone cases).

1. Section 6015(f) underpayment only cases where jurisdiction is predicated on section 6015(e).

a) The Tax Court has jurisdiction to review the Service's determination regarding relief under section 6015(f), without regard to whether the Service determined a deficiency, for all liabilities that

(1) Arose after December 20, 2006 and

(2) Arose on or before December 20, 2006, but remained unpaid as of that date.

Section 408, Division C, Title IV, of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922, 3061 (2006); see Chief Counsel Notice 2007-013 for a discussion of this issue.

b) For liabilities that arose on or before December 20, 2006, but were full paid before that date, the Tax Court only has jurisdiction under section 6015(e) to review the Service's determinations denying relief from joint and several liability under section 6015(f) when the Service has determined a deficiency. Bock v. Commissioner, T.C. Memo. 2007-41; see also Billings v. Commissioner, 127 T.C. 7 (2006); Commissioner v. Ewing, 439 F.3d 1009 (9th Cir. 2006), petition for reh'g en banc denied (May 10, 2006) rev'g Ewing v. Commissioner, 118 T.C. 494 (2002); Bartman v. Commissioner, 446 F.3d 785 (8th Cir. 2006), petition for reh'g en banc denied (August 3, 2006), rev'g T.C. Memo. 2004-93. Thus, pursuant to Chief Counsel Notice CC-2006-020 (August 25, 2006), attorneys should file motions to dismiss for lack of jurisdiction for year(s) that have been full paid prior to December 20, 2006. This notice contains a thorough discussion of the background and development of this issue. If you intend to file this motion, you must submit it to the National Office for review prior to filing.

2. Is the petition timely?

a) The requesting spouse must petition the Tax Court within 90 days after the date the final notice of determination was mailed by certified mail to the spouse's last known address, or any time after six months have passed since the date the spouse filed a claim for relief if the Service has not

mailed a final notice of determination to the spouse. I.R.C. § 6015(e)(1)(A).

b) There is no equitable tolling of the 90-day period to petition the Tax Court. Pollock v. Commissioner, 132 T.C. 21 (2009); Gormeley v. Commissioner, T.C. Memo 2009-252.

c) Except as provided in Treas. Reg. § 1.6015-1(h)(5) (with respect to second elections under section 6015(c) when the first election was denied because the requesting spouse was still married), a requesting spouse is entitled to only one request for relief. A petition from a letter denying consideration of a second request does not give the Tax Court jurisdiction where the spouse did not timely petition from the final notice of determination from the first request for relief. Barnes v. Commissioner, 130 T.C. 248 (2008). Further, a letter issued by the Service with respect to a spouse's request for reconsideration under IRM 25.15.17 is not a final notice of determination and does not provide the Tax Court with jurisdiction.

3. Is the Petition moot?

a) If the collection statute has expired, there is no levy or collection suit, and the petitioner is not seeking a refund, then the case is moot with respect to that tax year. If all three elements have been met, you should try to resolve the case by preparing a decision document stating that the petitioner is not entitled to relief and that the collection period for the income tax liabilities at issue has expired. If the petitioner does not agree to sign a decision document, it may be appropriate to consider filing a Motion to Dismiss for Mootness. See Chief Counsel Notice CC-2005-011, Q&A #17. If you believe it is appropriate to file this motion, you must submit the motion to the National Office for review prior to filing. Other issues that may implicate mootness include situations where the tax liability has been discharged in bankruptcy or the liability has been paid in full by the nonrequesting spouse.

b) For a discussion of the suspension of the collection statute under section 6015, see Collection Issues, Section IV below.

c) In some cases, the collection statute of limitations could expire during the pendency of the case. For example, in section 6015(f) cases to which the 2006 amendments don't apply the collection statute is not suspended. If the collection statute is about to expire, notify Collection that the statute expiration is imminent.

4. "S" Status Qualification Issue:

a) Section 7463(f)(1) provides that if a petitioner files a Tax Court petition under section 6015(e) in which the amount of relief sought does not exceed $50,000, then the case may be conducted under the "S case" procedures. The dollar limitation in section 7463(f)(1) references an aggregate amount, rather than an amount determined by reference to a discrete taxable year. Accordingly, in order for a case under section 6015(e) to come within the dollar limitation prescribed in section 7463(f)(1), the entire amount of relief sought must not exceed $50,000 for all years at issue combined, regardless of whether the amount of relief sought for each year is under $50,000. Petrane v. Commissioner, 129 T.C. 1 (2007). If the amount of relief sought exceeds the threshold, then the attorney should file a Motion to Remove the "S" Designation.

b) In stand-alone cases, the amount of relief sought for each year must be determined as of the date the petition was filed. The amount of relief sought equals the total of all assessed tax, interest, and penalties and accrued but unassessed interest and penalties for all years at issue. In a case involving an understatement, the amount of relief sought only includes the additional tax assessed after the issuance of a statutory notice of deficiency or math error notice. In a case involving an underpayment, the amount of relief sought includes only that part of the assessment based on a joint return that was not paid by withholding, estimated tax payments, and any payments made with the return or extension of time to file the return. The amount of relief sought is not reduced by the amount of any payments made after the tax was assessed because the amount of relief sought will include refunds the petitioner may be eligible for if it is determined that the petitioner is eligible for relief under section 6015. If it is determined that the amount of relief sought exceeds $50,000, a motion to remove the "S" case designation should be filed. See Chief Counsel Notice CC-2009-003 (October 20, 2005).

c) Unpaid tax is the amount of tax shown on the return not paid with the return. Thus, for example, withholding credits and payments made with the return are deducted from the amount of tax reported on the return (TC 150 on a TAXMOD transcript) to determine the amount of unpaid tax. The amount of relief sought is not reduced by the amount of any payments made after the return was filed, because the amount of relief sought includes refunds due to the fact that refunds may be available if relief is granted.

d) In cases where the petitioner raises section 6015 as a defense in response to a statutory notice of deficiency, section 7463(a) controls whether the case may be conducted under the "S" case procedures. If a petitioner raises section 6015 as part of a lien or levy case in the Tax

Court, the procedures in Chief Counsel Notice CC-2009-003 applicable to lien or levy cases should be followed.

B. Was the Claim for Relief Timely Filed?

1. Limitations for 6015(b) and (c) claims:

a) Claims for relief based on sections 6015(b) and (c) must be made no later than two years from the date of the first collection activity against that spouse after July 22, 1998. I.R.C. § 6015(b)(1)(E) & (c)(3)(B);

b) Collection activities include:

(1) Refund offsets:

The offset of an overpayment of the requesting spouse (RS) against the joint liability under section 6402 constitutes collection activity. See Campbell v. Commissioner, 121 T.C. 290 (2003). This could include an offset of a joint overpayment if the requesting spouse had an interest in the overpayment. Both spouses have an interest in a joint overpayment relative to each spouse's contribution to the overpayment. See e.g. Gordon v. United States, 757 F.2d 1157, 1160 (11th Cir. 1985).

(2) Section 6330 notices (notice that provides taxpayer with notice of Service's intent to levy and the right to a CDP hearing):

For claims filed on or after July 18, 2002, the sending of a section 6330 notice to the taxpayer will trigger the two-year period. A section 6330 notice is the notice sent, pursuant to section 6330, which provides the taxpayer with notice of the Service's intent to levy and of their right to a collection due process (CDP) hearing. The trial attorney should obtain any records that show where the section 6330 notice was sent. This includes the certified mail list and the applicable pages from the Service's CDP Certified Mail System Research database. 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. See Mannella v. Commissioner, 132 T.C. 196 (2009), rev'd on other grounds, 631 F.3d 115 (3d Cir. 2011).

(3) The filing of a suit by the United States against the requesting spouse for the collection of a joint tax liability:

The filing of a suit by the United States against the requesting spouse for the collection of a joint tax liability triggers the two-year period. If a collection suit was filed, the two-year period will begin to run from the date the suit is filed. See Treas. Reg. § 1.6015-5(b)(4), example 4.

(4) Claims in judicial proceedings:

The filing of a claim by the Service in a court proceeding in which the requesting spouse is a party, or which involves the property of the requesting spouse, including claims in bankruptcy and claims in interpleader actions involving property of the requesting spouse, also triggers the two-year period.

2. Claims for relief under section 6015(f):

a) No Two-Year Deadline

The Service is no longer following Treas. Reg. § 1.6015-5(b)(1), which states that claims under section 6015(f) must be filed within two years after the first collection activity. The Tax Court had taken the position that the two-year deadline for filing section 6015(f) claims set forth in Treas. Reg. § 1.6015-5(b)(1) was invalid. The Service disputed this conclusion, and the Circuit Courts that heard the issue upheld the validity of the deadline. See Lantz v. Commissioner, 607 F.3d 479 (7th Cir. 2010), Mannella v. Commissioner, 631 F.3d 115 (3rd Cir. 2011), Jones v. Commissioner, 642 F.3d 459 (4th Cir. 2011). Notwithstanding these decisions, Treasury and the Service concluded that the regulations under section 6015 will be revised so that individuals who request equitable relief will no longer be required to submit a request for equitable relief within two years of the Service's first collection activity. See Notice 2011-70 and Chief Counsel Notice CC-2011-017.

b) Claims for relief from liability or portions of liability that remain unpaid must be made before the expiration of the period of limitation on collection of income tax liability. Generally, that period expires 10 years after the assessment of tax. See Notice 2011-70; I.R.C. § 6502.

c) Claims for credit or refund of amounts paid must be made before the expiration of the period of limitation on credit or refund. Generally, that period expires three years from the time the return was filed or two years from the time the tax was paid, whichever is later. See Notice 2011-70; I.R.C. § 6511.

d) Chief Counsel Notice CC-2011-017 provides guidance regarding litigating cases in which the Service had denied relief under section 6015(f) solely based on the two-year deadline.

C. Other Possible Defects

If any of these situations are present, consider filing a Motion for Summary Judgment. Remember, all motions for summary judgment must be submitted to the National Office for review prior to filing.

1. No relief available if a joint return was not filed. See Raymond v. Commissioner, 119 T.C. 191 (2002).

2. Is the proceeding barred by res judicata or collateral estoppel? See I.R.C. § 6015(g)(2) and Treas. Reg. § 1.6015-1(e). Section 6015(g)(2) provides an exception to the judicial doctrine of res judicata if the requesting spouse did not meaningfully participate in the prior proceeding and relief under section 6015 was not at issue in that proceeding. The requesting spouse bears the burden of proving, by a preponderance of the evidence, that the spouse did not meaningfully participate. Diehl v. Commissioner, 134 T.C. 156, 162 (2010). Even though the requesting spouse bears this burden, before submitting a motion for summary judgment based on res judicata to the National Office for review, the Field attorney should investigate the prior proceeding to determine whether the petitioner "meaningfully participated" in the case. Whether the requesting spouse meaningfully participated is a question of fact, which can derail a motion for summary judgment if the facts regarding the spouse's participation are in dispute. Evidence of meaningful participation can include the petitioner's participation in the IRS appeals process while the case was docketed; the petitioner's participation in pretrial meetings, settlement negotiations, and at trial (such as by being present or testifying); the petitioner's signature on court documents (such as the petition, stipulation of facts, decision documents, etc.); and whether petitioner was represented by counsel (especially by separate counsel from the nonrequesting spouse). For cases discussing res judicata and meaningful participation, see Deihl v. Commissioner, 134 T.C. 156 (2010); Thurner v. Commissioner, 121 T.C. 43 (2003); Vetrano v. Commissioner, 116 T.C. 272 (2001); Monsour v. Commissioner, T.C. Memo. 2004-190; Huynh v. Commissioner, T.C. Memo. 2006-180; and Moore v. Commissioner, T.C. Memo. 2007-156.

3. Was any year full paid by July 22, 1998? If so, section 6015 does not apply, but section 6013(e) does. Section 6013(e), however, can't be raised in a section 6015(e) proceeding. Brown v. Commissioner, T.C. Memo. 2002-187; Thurner v. Commissioner, 121 T.C. 43 (2003).

4. Did the petitioner enter into an offer-in-compromise or a closing agreement after July 22, 1998? If so, then the requesting spouse is not eligible for relief. Treas. Reg. § 1.6015-1(c); see also Dutton v. Commissioner, 122 T.C. 133 (2004).

III. NOTIFICATION OF NONPETITIONING SPOUSE

A. Tax Court Rule 325

1. Requires notification of the nonpetitioning spouse (Notice of Filing) within sixty days from service of the petition. CCDM 35.2.2.12.2 describes how to notify nonpetitioning spouses of the filing of a petition raising relief under section 6015. The requirement to notify the nonpetitioning spouse does not apply to a claim for relief from the operation of community property laws under section 66.

2. If notification to the nonrequesting spouse is not provided within the 60-day period, the attorney should file a motion for leave to file the motion Out of Time while lodging the notice with the court and serving the petitioner and the nonpetitioning spouse.

3. Respondent must allow the nonpetitioning spouse 60 days to intervene. If the 60 day period is close to, or after the calendar date, contact the National Office to discuss whether to file a Motion for Continuance, or alternatively, a Motion to Shorten the Time for the intervenor to respond.

B. Notice of Filing Returned Undeliverable

1. If the Notice of Filing is sent to the last known address of the nonpetitioning spouse and is returned undeliverable, you should file a Supplement to the Notice of Filing advising the Court that you sent the original Notice of Filing to the nonpetitioning spouse at their last known address, but that it was returned undeliverable and you have made a diligent effort to locate a more current address. The Supplement should explain in detail the steps you took to locate a new address.

2. If you subsequently find an updated address for the nonpetitioning spouse, file an Amended Notice of Filing of Petition and Right to Intervene. Service of the Amended Notice of Filing will start anew the 60 day period to intervene.

C. Deceased Nonpetitioning Spouse

1. The right of the nonpetitioning spouse to intervene under section 6015(e)(4) survives the death of the nonpetitioning spouse. Fain v. Commissioner, 129 T.C. 89 (2007).

2. If the nonpetitioning spouse is deceased, serve the personal representative of the nonpetitioning spouse's estate with the notice of filers petition and right to intervene, even if the petitioner is the personal representative.

3. If neither the Service nor the petitioner knows whether there is an estate or whether a personal representative has been appointed, then the attorney should attempt to the best of their abilities to identify the names and addresses of the nonpetitioning spouse's heirs at law under the law of the jurisdiction where the nonpetitioning spouse lived when the spouse died. In Fain, the court had respondent provide the names and addresses to the court for the court to notify the heirs, akin to the court's Nordstrom procedures. A sample notice for doing this is provided on the PA website. However, in at least one case the court ordered respondent to provide the notice to the heirs directly instead of providing the names to the court for the court to notify.

D. Other Considerations

1. Note that the nonpetitioning spouse can intervene to support a petitioner's section 6015 claim. Van Arsdalen v. Commissioner, 123 T.C. 135 (2004).

2. Once a nonpetitioning spouse intervenes in a case, that spouse becomes a party to the Tax Court proceeding and you should serve on the intervenor any document that would normally be served on a party to a case. Note, however, that the nonpetitioning spouse lacks standing to appeal a Tax Court decision granting innocent spouse relief to the petitioning spouse. Baranowicz v. Commissioner, 432 F.3d 972 (9th Cir. 2005).

3. If you agree to a settlement with the petitioner in a case in which the nonrequesting spouse has intervened, you cannot settle with the petitioner unless the intervenor agrees and is a party to the settlement. Corson v. Commissioner, 114 T.C. 354 (2000). If you have reached a settlement with the petitioner but cannot locate the intervenor to get agreement or objection with regard to the settlement, you should enter into a stipulation of settled issues with the petitioner and then file a Motion for Entry of Decision. The motion should detail your attempts to reach the intervenor.

IV. INNOCENT SPOUSE RELIEF

A. Requirements for Relief Under I.R.C. § 6015(b)

1. Under section 6015(b)(1), relief may be granted under section 6015(b) if the following requirements are met:

a) a joint return has been made for the taxable year;

b) on such return there is an understatement of tax attributable to erroneous items of the other individual filing the joint tax return;

c) the spouse seeking relief establishes that in signing the return he or she did not know, nor have reason to know, that there was an understatement of tax;

d) taking into account all of the facts and circumstances, it is inequitable to hold the requesting spouse liable for the deficiency in tax for the taxable year attributable to the understatement; and

e) the claim is filed within two years from the Service's first collection activity against the requesting spouse.

The requesting spouse's failure to meet any one of these requirements prevents him or her from qualifying for full or apportioned relief under section 6015(b). Alt v. Commissioner, 119 T.C. 306, 313 (2002), aff'd, 101 Fed. Appx. 34 (6th Cir. 2004).

2. A requesting spouse has knowledge or reason to know of an understatement if she/he actually knew of the understatement or if a reasonable person in similar circumstances would have known of the understatement. Treas. Reg. § 1.6015-2(c). In the case of an erroneous deduction or credit, knowledge of the item means knowledge of the facts that made the item not allowable as deduction or credit. Treas. Reg. § 1.6015-3(c)(2)(B)(1). A requesting spouse's actual knowledge of the proper tax treatment of an item is not relevant for purposes of demonstrating that the requesting spouse had actual knowledge of an erroneous item. Treas. Reg. § 1.6015-3(c)(2)(ii).

B. Requirements for Relief Under I.R.C. § 6015(c)

1. Under section 6015(c), an individual is generally eligible to elect relief if such individual is no longer married, or is legally separated from the individual with whom such individual filed the joint return to which the election relates. For purposes of this section, a taxpayer is no longer married if he or she is widowed. See H. R. Rep. No. 105-599, at 252 n. 16 (1988) (Conf. Rep.). The electing individual's liability for any deficiency which is assessed with respect to the joint return shall not exceed the portion properly allocable to that individual under section 6015 (d). I.R.C. § 6015(c)(1).

2. In general, the individual who elects the application of subsection (c) has the burden of proof to establish the portion of any deficiency allocable to that individual. I.R.C. § 6015(c)(2).

3. Under section 6015(d), for purposes of allocating a deficiency, erroneous items are generally allocated to the spouses as if separate returns were filed. I.R.C. § 6015(d)(3)(A). Section 6015(d)(3)(B), however, provides an exception to this general rule where the other spouse received a tax benefit from the item giving rise to a deficiency. Section 6015(d)(3)(B) requires an allocation between

individuals who filed a joint return no matter who is requesting or electing relief, because under section 6015(c), either or both of the spouses who filed a joint return may elect relief. Therefore, under Section 6015(d)(3)(B), an item that otherwise would have been allocable to an individual under the general rule, is allocable to the other spouse to the extent the item gave rise to a tax benefit to the other spouse. Its purpose is to allocate liability between the spouses who filed a joint return on the basis of the extent to which each spouse received the tax benefit of an erroneous deduction. See Hopkins v. Commissioner, 121 T.C. 73 (2003).

4. The requesting spouse's election to allocate the deficiency can be undone if the Service demonstrates:

a) That assets were transferred between the spouses as part of a fraudulent scheme by the spouses. I.R.C. § 6015(c)(3)(A)(ii).

b) That the requesting spouse had actual knowledge at the time the spouse signed the return of any item giving rise to a deficiency (or portion thereof). I.R.C. § 6015(c)(3)(C).

(1) Respondent has the burden of establishing actual knowledge. Treas. Reg. § 1.6015-3(c)(2)(ii). Thus, affirmative allegations regarding actual knowledge should be made in the Answer.

(2) If you don't have the administrative file, do not file the answer. Instead, file a Motion for an Extension of Time to Answer. If you don't have sufficient information at the time you file the Answer to allege actual knowledge, you should not make the allegations. If you later obtain such information, you should file a Motion to Amend the Answer out of time, and then amend the Answer to allege the actual knowledge defense. You should attempt to make this determination as soon as possible so that the court doesn't find raising the defense is prejudicial to the petitioner (i.e., very close to trial).

(3) If the taxpayer had actual knowledge of only a portion of an item giving rise to a deficiency, you should allege in the answer a partial actual knowledge defense for that portion. Treas. Reg. § 1.6015-3(c)(2)(ii).

C. Requirements for Relief Under I.R.C. § 6015(f)

1. Notice 2012-8:

The Service issued Notice 2012-8 on January 5, 2012. Notice 2012-8 contains a proposed revenue procedure regarding the availability of equitable relief under

section 6015(f). Per the Notice, the Service will apply the revised factors in the proposed revenue procedure until a final revenue procedure is issued. This includes using the revised factors in all cases in litigation. Chief Counsel Notice CC-2012-004 provides guidance for handling docketed cases involving a claim for relief under section 6015(f).

Under section 6015(b) and (c), relief is available only from a proposed or assessed deficiency. Section 6015(b) and (c) does not authorize relief from an underpayment of tax reported on a joint return. Section 6015(f), however, permits equitable relief for an underpayment of tax. In the event that relief is not available to the requesting spouse under section 6015(b) or (c), the Service has the discretion to grant equitable relief from joint and several liability to a requesting spouse when, considering all the facts and circumstances, it would be inequitable to hold the requesting spouse jointly and severally liable. I.R.C. § 6015(f); Treas. Reg. § 1.6015-4(a).

Section 4.01 of the Proposed Rev. Proc. provides a list of seven threshold requirements that a requesting spouse must satisfy in order to be eligible to be considered for equitable relief under section 6015(f). Section 4.02 provides a list of circumstances under which the Service generally grants equitable relief with respect to both underpayments and understatements. If the conditions of section 4.02 is not satisfied, the section 4.03 factors are applicable. The factors under section 4.03 are nonexclusive and no single factor or even the satisfaction, of lack thereof, of majority of the factors will be determinative of whether to grant equitable relief. The Service will consider and weigh all factors.

D. Scope of Review and Standard of Review

1. The Tax Court reviews claims for relief under subsections (b) and (c) using a *de novo* standard and scope of review.

2. Initially, the Tax Court reviewed the Commissioner's denial of relief under section 6015(f) for abuse of discretion. In Porter v. Commissioner, 130 T.C. 115 (2008) ("*Porter I*"), the Tax Court, following its prior opinion in Ewing v. Commissioner, 122 T.C. 32 (2004), vacated, 439 F.3d 1009 (9th Cir. 2006)**,** denied the Commissioner's motion in limine and held that in determining whether the Commissioner abused his discretion in denying the petitioner relief under section 6015(f), the court conducts a trial *de novo* and may consider evidence introduced at trial that was not included in the administrative record developed during the administrative consideration of the claim. In Porter v. Commissioner, 132 T.C. 203 (April 23, 2009) ("Porter II"), the court reconsidered the standard of review in section 6015(f) cases and concluded that a de novo standard of review is proper. Under Porter I and Porter II, the Tax Court now will make its own *de novo* determination regarding whether a requesting spouse is entitled to relief under section 6015(f) (not giving any deference to the Commissioner's

determination) and will not be limited to evidence in the administrative record.

3. Counsel's position is that the standard of review should be abuse of discretion i.e., the determination should be sustained unless arbitrary, capricious, or made without a rational explanation. In addition, Counsel's position is that the court's review of the evidence should be limited to administrative record created during the administrative proceeding ("record rule"). See Chief Counsel Notice CC-2009-021 (June 30, 2009). The government has a pending appeal in the Ninth Circuit Court of Appeals on the issues of the scope of review and standard of review. Karen Marie Wilson v. Commissioner, T.C. Memo. 2010-134, argued, No. 10-72754 (9th Cir. Nov. 15, 2011).

4. Support for the position that review for abuse of discretion should be limited to the administrative record can be found in the CDP context. In Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), the Eighth Circuit Court of Appeals, reversing the Tax Court, agreed with the Service that judicial review of a collection due process (CDP) determination should be limited to the record developed during the administrative hearing process. The Eighth Circuit held that the Tax Court had erred in holding that the Administrative Procedure Act did not apply to its judicial review and could therefore consider evidence outside the administrative record when reviewing for abuse of discretion under section 6330. See also Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006). The Eleventh Circuit, however, has held that a trial *de novo* is appropriate with review for abuse of discretion for section 6015(f) cases, although there was a well-reasoned dissent arguing for the record rule. See Neal v. Commissioner, 557 F.3d 1262 (11th Cir. 2009).

5. In addition to the First and Eight Circuits, the Third and Seventh Circuits may be good circuits to raise the record rule based on language in the Lantz and Mannella opinions regarding how section 6015(f) operates. Note that these cases also involved the two-year deadline rule, which the Service is no longer enforcing. See CC Notice 2011-70.

6. In order to preserve these issues for appeal, attorneys should raise a continuing evidentiary objection 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. Attorneys may also want to consider filing a Motion in Limine on the grounds that information not raised during the administrative process is not relevant to the question of whether or not the Service abused its discretion in denying relief under section 6015(f), noting the Porter cases and respondent's disagreement. See Chief Counsel Notice CC-2009-021 for further information.

V. ESTABLISHING THE ADMINISTRATIVE RECORD

A. Determine what constitutes the administrative record in your case. The administrative record is that part of the petitioner's administrative file that the Service considered, or that 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, the following:

1. Form 8857, "Request for Innocent Spouse Relief"

2. Form 12507, "Innocent Spouse Statement"

3. Form 12508, "Questionnaire for Nonrequesting Spouse"

4. Form 12510, "Questionnaire for Requesting Spouse"

5. All written correspondence between petitioner and IRS

6. All written correspondence between the nonrequesting spouse and the Service

7. Any documents presented to the examiner or Appeals Officer (if the case went to Appeals before the final notice was issued)

8. The preliminary notice of determination and the final notice of determination

9. The written analysis prepared by the Examiner ("Workpapers")

10. The Appeals Case Memorandum (if the case went to Appeals before the final notice was issued)

B. Work with the petitioner to stipulate the administrative record in cases in the Tax Court, and advise the Court as to what constitutes the administrative record at trial. If the parties have not stipulated to the administrative record, filing a Motion in Limine with the administrative record as an exhibit to the declaration from the examiner or Appeals Officer may allow you to place the administrative record before the Tax Court without having to call the examiner or appeals officer to testify.

C. If the Service has not already considered the claim administratively, i.e., when innocent spouse relief is raised for the first time in a petition from a notice of deficiency, attorneys should follows the procedures set forth in Chief Counsel Notice CC-2009-021 (June 30, 2009) and transfer the case to CCISO for an administrative determination. If there is insufficient time, consider filing a Motion for Continuance.

VI. COLLECTION ISSUES

A. Prohibited Collection Activity

1. Except when collection is determined to be in jeopardy pursuant to section 6861, the Service is prohibited from pursuing certain collection activities while the taxpayer's claim is pending. I.R.C. § 6015(e)(1)(B) ("no levy or proceeding in court shall be made, begun, or prosecuted."). The prohibition only applies to collection of any assessment to which the claim for relief relates, thus collection may continue with respect to liabilities not including in the claim for relief. If only one spouse files a claim for relief there is no prohibition on collection (and thus no tolling of the collection statute, see Section B. below) against the nonrequesting spouse.

2. The prohibition on collection runs from the date the form 8857 is filed until (i) a waiver (form 870-IS) pursuant to section 6015(e)(5) is filed with the Service; (ii) the close of the 90-day period in which to file a petition to the Tax Court following a notice of determination, or (iii) if a petition is filed, until the decision of the Tax Court has become final. If the requesting spouse appeals the decision of the Tax Court and does not file an appeal bond under the rules of section 7485, the Service may resume collection as of the date the notice of appeal was filed. See Treas. Reg. § 1.6015-7(c)(1). The Service's policy is to not collect under these circumstances unless the expiration of the statute of limitation on collection is imminent (which is possible as the tolling of the statute of limitation ends with the ending of the prohibition on collection, see section B. below) or collection may be jeopardized by delay.

3. Although only certain collection activities are prohibited, as a policy matter, the Service generally does not pursue collection while a requesting spouse's claim is pending. For example, refund offsets are not prohibited collection actions, however, the Service's policy is to not offset a refund against the joint liability at issue in the claim (a refund may be offset against other liabilities not at issue in the claim). If a refund is offset against the Service's policy, corrective measures must be taken to refund the monies to the requesting spouse. See I.R.M. 25.15.3.4.5(2).

4. The Service is not prohibited from filing a notice of federal tax lien after a claim for relief under section 6015 has been filed. Beery v. Commissioner, 122 T.C. 184 (2004). IRM 25.15.8.11.1(2), however, instructs revenue officers to "consider the provisions of Policy Statement 5-16 prior to filing a NFTL when a taxpayer has filed a claim for relief from joint and several liability and the determination is pending. Refer to IRM 1.2.14.1.4 , Policy Statement 5-16, for guidance." The Policy Statement does not reference section 6015, but rather discusses when forbearance of collection measures would be appropriate. IRM 1.2.14.1.4(2) provides that "whenever a taxpayer raises a question or presents information creating reasonable doubt as to the correctness or validity of an assessment, reasonable forbearance will be exercised with respect to collection

provided: 1. adjustment of the taxpayer's claim is within control of the Service; and 2. the interests of the Government will not be jeopardized."

5. Levies. A levy is "made" on the date on which the notice of levy is served upon the person in possession of, or obligated with respect to, property or rights to property, subject to levy. Treas. Reg. § 301.6331-1(a)(1). If a notice of levy is mailed, the levy is considered to be "made" when the notice is delivered to the person to be served. Treas. Reg. § 301.6331-1(c). If the innocent spouse claim (Form 8857) is received by the Service prior to the date the notice of levy is served, then the prohibitions on collection in section 6015(e)(1)(B) apply even if the Service had mailed the notice of levy to the person prior to receipt of the Form 8857. If, however, the notice of levy is received by the person prior to receipt of the Form 8857, then the levy has already been "made" and there is no violation of the prohibition on collection. The Service does have a policy that would require the levy to be released unless there is a determination that collection is in jeopardy. See I.R.M. 25.15.8.8.

B. Suspension of the Collection Statute

1. During the time the Service is prohibited from collecting, the statute of limitations on collection is suspended (plus 60 days). I.R.C. § 6015(e)(2). Unless the claim for relief was made on a version of the Form 8857 dated June 2007 or earlier, the suspension of the collection statute will start on the date the claim for relief was received by CCISO. Unfortunately, the Service's computer systems cannot track the suspension of the collection statute while the section 6015 case is still open.

2. The filing of a claim for relief under section 6015 is identified on a requesting spouse's transcript by Transaction Code 971 with Action Code 065 (TC 971 AC 065). The TC 971 AC 065 also triggers the hold on collection required by section 6015(e)(1)(B) (see Section A above). When a section 6015 case is closed, Transaction Code 972 with Action Code 065 (TC 972 AC 065) is input. Each transaction code is input with a date – the filing of the form 8857 for the TC 971 and the date the suspension of the collection statute ends pursuant to section 6015(e)(2) for the TC 972. The time between those two dates is the time the collection statute is suspended. However, since the TC 972 is not input until the case is closed (including any litigation) the suspension of the collection statute will not be reflected on the requesting spouse's transcript, and it might appear that the collection statute has expired during the pendency of a case (including litigation) even though the statute has been suspended under operation of law (section 6015(e)(2)). Thus, in determining whether the collection statute has actually expired, it is important to determine whether the statute was open at the time the claim was filed. CCISO does check for expired collection statutes, but if there are any questions the Field attorney should verify.

3. As discussed above in Section A., if the requesting spouse files a notice of appeal and does not post an appeal bond, the prohibition on collection under section 6015(e)(1)(B) ends. Thus, 60 days after the notice of appeal is filed, the suspension of the collection statute also ends. Thus, it is possible that the collection statute could expire during the pendency of the appeal. As a result, the Chief Counsel attorney handling the appeal should notify the Wage and Investment Headquarters Innocent Spouse Policy Analyst of cases where the requesting spouse has appealed the Tax Court decision and not posted an appeal bond. The Policy Analyst will monitor the case to ensure the collection statute does not expire or that the collection of the liability becomes in jeopardy. If the Government files an appeal, the prohibition on collection does not end, and thus, the suspension of the collection statute does not end as a result of the appeal.

VII. REFUNDS

A. In section 6015(b) cases, a requesting spouse is eligible for a refund so long as the refund is not barred by section 6511 and the requesting spouse establishes she/he provided the funds used to make the payment for which she seeks a refund. See I.R.C. § 6015(g)(1).

B. In section 6015(c) cases, no refunds are allowed. I.R.C. § 6015(g)(3).

C. For section 6015(f) cases, whether involving understatement or underpayments, a requesting spouse is eligible for a refund of separate payments that he or she made after July 22, 1998, if the refund is not barred by section 6511 and the requesting spouse establishes that he or she provided the funds used to make the payment for which he or she seeks a refund. See Notice 2012-8.

D. Section 6015(f) may not be used to circumvent the prohibition on refunds as a result of an election under subsection (c). Therefore, equitable relief under section 6015(f) is not available to obtain a refund of liabilities already paid, for which the requesting spouse otherwise qualifies for relief under section 6015(c)). Treas. Reg. § 1.6015-4(b).

E. For purposes of section 6511, the date the requesting spouse filed Form 8857 is treated as the date the requesting spouse filed a claim for refund, unless the requesting spouse filed an earlier claim for refund. See Goldin v. Commissioner, T.C. Memo. 2004-129; Driggers v. Commissioner, T.C. Memo. 2004-76.

F. A requesting spouse is not eligible for refunds of payments made with the joint return, including withholding and estimated tax payments, as those payments are taken into consideration in determining the "unpaid tax" reported on the return. A requesting spouse is also not eligible for a refund of payments that the nonrequesting spouse made, or of joint payments, including an offset of a joint overpayment unless the requesting spouse establishes that the requesting spouse had an interest in the overpayment. Both spouses have an interest in a joint overpayment relative to each spouse's contribution to the overpayment. See, e.g., Gordon v. U.S., 757 F.2d 1157, 1160 (11th Cir. 1985).

G. State law governs the determination of property interests; therefore, you may have to look to state law to determine whether petitioner is entitled to a refund of certain payments. For example, in Ordlock v. Commissioner, 126 T.C. 47 (2006), the Tax Court held that, although petitioner was granted full relief under section 6015(b), she was not entitled to a refund of amounts from community property used to satisfy liabilities solely attributable to the nonrequesting spouse, because a grant of relief under section 6015 does not override state law for purposes of defining property interests subject to a Federal tax lien under section 6321.

VIII. BRIEF REVIEW

A. Within 10 working days after the briefing schedule is set, submit the case to the National Office for prebrief review. See CCDM 35.7.3.2.2. In addition to the other documents for pre-brief review, a copy of the ACM or Examiner's write-up and the Form 8857 should also be provided.

B. Submit the brief to the National Office ten calendar days before the brief is due to the Court. See CCDM 35.7.3.2.2.

IX. DECISION DOCUMENTS

A. Sample decision documents are located on the P&A website.

B. If the nonpetitioning spouse intervenes, he or she is a party to the case and must sign the stipulated decision (as well as any other joint pleadings filed with the Court).