

# Practice

By *Charles P. Rettig*

## Innocent Spouse: Separating the Marital Tax Liability

**M**arried taxpayers may elect to file joint returns with their spouse.<sup>1</sup> Generally, taxpayers filing joint returns are jointly and severally responsible for all liabilities associated with the joint return.<sup>2</sup> As such, each spouse is individually responsible for the accuracy and completeness of the return and payment of the income tax liability as reported on the return as well as any additional tax, penalties, additions to tax, and interest. Thus, under the joint and several liability concept, each spouse is responsible for the entire income tax liability even though all or part of the liability arises from income earned by or a deduction attributable to the other spouse. Because of this joint and several liability, either spouse, including one which had no involvement in the activity generating the taxable income, can be individually liable for the entire tax deficiency.

Under Code Sec. 6015, innocent spouse relief may be granted when one spouse establishes that a federal tax liability is attributable to the other spouse and the spouse requesting relief has satisfied all of the requirements for relief.<sup>3</sup>

Code Sec. 6015(a)(1) provides that a spouse may request relief from joint and several liability under Code Sec. 6015(b) for an understatement of tax on a joint return. Additionally, Code Sec. 6015(a)(2) provides that an eligible spouse may request to limit her liability for any deficiency with respect to a joint return under Code Sec. 6015(c). If complete relief is not available under Code Sec. 6015(b) or (c), a spouse may request equitable relief under Code Sec. 6015(f). Code Sec. 6015(e) confers jurisdiction on the Tax Court to review requests for relief from joint and several liability under Code Sec. 6015. A spouse who has requested relief may contest the IRS's denial of that relief by timely filing a Petition for Determination of Relief From Joint and Several Liability on a Joint Return with the Tax Court.<sup>4</sup>



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If the income tax liability is relieved under Code Sec. 6015, related penalties, additions to tax, additional amounts and interest are relieved. Taxpayers may request relief from joint and several liability on Form 8857, Request for Innocent Spouse Relief, or a similar statement containing the same information signed under penalties of perjury. Upon receipt of Form 8857, the IRS will consider relief under subsections Code Sec. 6015(b), (c) and (f).<sup>5</sup> The nonrequesting spouse (NRS) must receive notice of, and an opportunity to participate in, any proceeding with respect to an election of relief from joint and several liability under Code Sec. 6015.<sup>6</sup>

Under Code Sec. 6015(b) and (c), relief is available only from an understatement or a deficiency. Code Sec. 6015(b) and (c) do not authorize relief from an underpayment of income tax reported on a joint return. Code Sec. 66(c) and Code Sec. 6015(f) permit equitable relief from an underpayment of income tax or from a deficiency. The legislative history of Code Sec. 6015 provides that Congress intended for the Secretary to exercise discretion in granting equitable relief from an underpayment of income tax if a requesting spouse “does not know, and had no reason to know, that funds intended for the payment of tax were instead taken by the other spouse for such other spouse’s benefit.”<sup>7</sup> Congress also intended for the Secretary to exercise the equitable relief authority under Code Sec. 6015(f) in other situations if, “taking into account all the facts and circumstances, it is inequitable to hold an individual liable for all or part of any unpaid tax or deficiency arising from a joint return.”<sup>8</sup>

If a spouse is relieved of a tax liability, the IRS will no longer pursue the innocent spouse for payment of the liability. However, even though an innocent spouse is not personally liable, the innocent spouse’s interest in community property, and other property jointly owned with the responsible spouse, may continue to be subject to collection of the liability. If under the law of the state in which the spouses reside, the IRS can look to jointly owned property interests to collect a liability of either spouse, a determination that one spouse is entitled to relief under Code Sec. 6015 does not affect the IRS’s ability to collect the liability from the jointly held property. In certain circumstances such as where the tax has been assessed and the property is encumbered by the federal tax lien, an otherwise innocent spouse who receives jointly owned property in a marital dissolution or separation agreement may find this

property interest remains subject to collection by the IRS despite the fact the former jointly owned property might now be deemed to be separate property as a result of a proper division of property.

## Structure of Innocent Spouse Relief

Code Sec. 6015 sets forth various forms of potential relief from joint and several liability,<sup>9</sup> including:

- Innocent Spouse Relief Relating to all Joint Filers (Traditional), Code Sec. 6015(b);
- Innocent Spouse Relief for Divorced or Legally Separated Taxpayers (the “Separate Liability Election”), Code Sec. 6015(c); and
- Innocent Spouse Relief for Those Otherwise Deserving (Equitable Relief), Code Sec. 6015(f).

### Traditional Innocent Spouse Relief—Code §6015(b)

The basic elements for traditional innocent spouse relief are set forth in Code Sec. 6015(b)<sup>10</sup> as follows:

- (1) A joint return must have been made for the tax year;<sup>11</sup>
- (2) There must be an understatement of tax attributable to “erroneous” items of one of the individuals filing the joint return.<sup>12</sup> Examples of erroneous items include unreported income from an investment asset resulting in an understatement or deficiency in tax; ordinary income improperly reported as capital gain resulting in an understatement or deficiency in tax; a deduction for an expense that is personal in nature that results in an understatement or deficiency in tax; or an improperly reported item that affects the liability on other returns;
- (3) The other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such an understatement.<sup>13</sup> (i) Omitted income cases—If the culpable spouse has omitted income from the joint tax return, the putative innocent spouse must prove that they were not aware of the transaction leading to the understatement in order to show that there was no reason to know that there was a substantial understatement.<sup>14</sup> However, a Tax Court case denied relief on the grounds that the wife knew or should have known that unexplained deposits into her bank account were coming from somewhere, *i.e.*, husband’s

trade or business activity. Thus, in signing the return, the wife knew or should have known that there was an understatement of tax with respect to the items deposited in her account that were unreported gross income.<sup>15</sup> (ii) Deduction cases—The innocent spouse must generally demonstrate that they had no reason to know of the tax consequences of the transaction. A spouse has reason to know of a substantial understatement if a reasonably prudent taxpayer in their position at the time the tax return is signed could be expected to know the return contained a substantial understatement or that further inquiry was warranted.<sup>16</sup>

- (4) Taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such tax year attributable to such understatement.<sup>17</sup> Factors used to examine whether it would be inequitable to hold the putative innocent spouse liable for the taxes taking into account all of the facts and circumstances include: (i) Whether the requesting spouse significantly benefitted, directly or indirectly, from the understatement of tax. A significant benefit is any benefit in excess of normal support. A direct or indirect benefit may include a transfer of property or rights to property, even if the transfer occurs several years after the understatement.<sup>18</sup> (ii) Whether the requesting spouse has been deserted. (iii) Whether the spouses have been divorced or separated. (iv) The probable future hardship that the requesting spouse would suffer if the relief were denied. In a Tax Court memorandum, the court held that it would be inequitable to hold the requesting spouse (the wife) liable under Code Sec. 6015(b) given her lack of knowledge, lowered standard of living, near retirement age and relatively modest assets. The court considered whether there had been a significant benefit to the requesting spouse and whether the failure to report the correct tax liability on the joint tax return resulted from concealment, overreaching or any other wrongdoing on the part of the non-requesting spouse. The court held that the wife did not benefit from the transaction.<sup>19</sup>
- (5) The taxpayer must elect the benefits of Code Sec. 6015(b) no later than two years after the date of the commencement of enforced

collection action with respect to the individual making the election.<sup>20</sup>

Prior to the Ninth Circuit's opinion in *Wiksell*,<sup>21</sup> it was believed that a spouse could not be partially innocent. For example, assume that husband had omitted \$1,000,000 worth of income and the innocent spouse knew or had reason to know of a portion of that amount. The general view had been that since the spouse knew or had reason to know of the item, innocent spouse relief was not available for any portion of the \$1,000,000 adjustment. In *Wiksell*, the Ninth Circuit held that the innocent spouse's knowledge would only preclude relief to the extent of the amounts the innocent spouse knew of or had reason to know. Code Sec. 6015(b)(2) now expressly provides that if the individual knew or had reason to know of an item, but did not know or have reason to know the extent of such understatement, the individual shall be relieved of liability to the extent attributable to the portion of the understatement which the innocent spouse did not know of or have reason to know about.<sup>22</sup>

Traditional relief from joint and several liability is heavily dependent upon the particular facts and circumstances involved. Relevant inquiries often include the spouse's level of education; the spouse's involvement in the family business and financial affairs; the presence of expenditures that appear lavish or unusual when compared to the family's past levels of income, standard of living and spending patterns; the culpable spouse's evasiveness and deceit concerning the couple's finances; whether the requesting spouse failed to inquire, at or before the time the return was signed about items on the return or omitted from the return that a reasonable person would question; whether the erroneous item represented a departure from a recurring pattern reflected in prior year's returns and whether claimed expenses exceed reported income.

### **Separate Liability Election—Relief for Taxpayers No Longer Married or Taxpayers Which Are Legally Separated or Not Living Together—Code Sec. 6015(c)**

Under Code Sec. 6015(c), a taxpayer who has filed a joint return may elect under Code Sec. 6015(c)(3) to limit his or her liability for any deficiency to the amount of deficiency which would be allocated to the innocent spouse if the spouse had filed a separate

return.<sup>23</sup> For purposes of making a determination under Code Sec. 6015, including income allocations as if separate returns were filed, community property laws are ignored.<sup>24</sup>

The separate liability election only applies to an individual (a) who is no longer married to, (b) who is legally separated from, or (c) who was not a member of the same household as the individual with whom such joint return was filed at any time during the 12-month period ending on the date the separate liability election is filed.<sup>25</sup> Taxpayers who are divorced or are legally separated have a more definite bright line test. Individuals no longer residing in the same household must confront the issue as to whether they were “a member of the same household” at any time during the prior 12-month period. A temporary absence exists if it is reasonable to assume the absent spouse will return to the household, or a substantially equivalent household is maintained in anticipation of such a return. Some examples may include absence due to incarceration, illness, business, vacation, military service or education. A separate liability election under Code Sec. 6015(c) is required to be made no later than two years after the date on which enforced collection activities commenced with respect to the individual making the election. Refunds are not allowed under Code Sec. 6015(c).

If the IRS can demonstrate the spouse had actual knowledge of the item giving rise to the deficiency (or a portion thereof) at the time such individual signed the joint tax return, the separate liability election is not available.<sup>26</sup> The critical inquiry is “actual knowledge” as opposed to a “reason to know” standard as set forth in traditional relief. The Conference Report provides that “[s]uch actual knowledge *must be established [by the IRS]* by the evidence and shall not be inferred based upon indications that the electing spouse had reason to know.” Prior law contained a “reason to know” standard which made the question of innocent spouse relief an uncertainty and created much of the litigation between taxpayers and the IRS. For example, a spouse may not know of unreported income, but courts would consider the lifestyle of the spouse and whether the couple was living beyond their reported means in determining whether the spouse had “reason to know.”

While the reason to know standard is still present in the general innocent spouse relief provision of Code Sec. 6015(b), that inquiry is foreclosed by the actual knowledge standard by the separate property election rendering the separate property election of

Code Sec. 6015(c), where available (*i.e.*, divorced, legally separated, etc.), an extremely valuable tool to innocent spouses and one which might be much more effectively administered with less chance of factual dispute. In an omitted income case, actual knowledge includes knowledge of the receipt of the income. Knowledge of only the source of the income may not be sufficient. Actual knowledge in an erroneous deduction or credit case means knowledge of the facts that made the item not allowable as a credit or a deduction. For example, in an erroneous deduction case involving disallowed deductions generated by a partnership, the IRS must establish that the IRS had actual knowledge of the factual circumstances which made the partnership items erroneous deductions.<sup>27</sup>

A spouse who was disqualified for innocent spouse relief due to constructive knowledge under Code Sec. 6015(b) may qualify for relief under Code Sec. 6015(c) if he or she did not have actual knowledge. Actual knowledge of a portion of the deficiency does not make the spouse ineligible for Code Sec. 6015(c) relief for the entire deficiency. It merely invalidates the allocation with respect to the specific items for which the spouse had actual knowledge.

There may be a question of whether a requesting spouse has actual knowledge of an item giving rise to a deficiency if she does not know that the item is improperly reported. The Fifth Circuit Court of Appeals has held<sup>28</sup> that the wife was not entitled to allocate liability to her husband under Code Sec. 6015(c) because she had actual knowledge of the income-producing transaction even though she lacked knowledge that it was incorrectly reported. The underlying issue related to a retirement distribution which was reported erroneously on the joint return as only partly taxable because the husband believed the portion used to retire home mortgage debt to be nontaxable. The court found that its conclusion was supported by the general rule that ignorance of the tax law is not a defense to a tax deficiency.<sup>29</sup>

If the requesting spouse establishes he or she was the victim of domestic abuse prior to the time the return was signed, but did not sign the return under duress (which might invalidate the joint election), and as a result of the prior abuse, did not challenge any of the items on the return for fear of retaliation, the actual knowledge limitation of Code Sec. 6015 (c) will not apply. This exception only applies if the IRS first establishes actual knowledge of the item giving rise to the deficiency.<sup>30</sup>

### *When Would It Be More Beneficial for a Divorced or Separated Spouse to Elect Innocent Spouse Relief?*

One question which has arisen is under what circumstances it might be more beneficial to elect under the general innocent spouse provision as compared to the separate liability election where the taxpayer would qualify under both provisions. For divorced and separated taxpayers, the separate liability election would appear to be more generous since it would generally apply unless the innocent taxpayer has actual knowledge (see below) of the item creating the understatement. Eliminating the reason to know standard forecloses a major inquiry in almost every case because it allowed the IRS to argue the innocent spouse should have known based upon the standard of living. Thus, the separate liability election may be preferable where it provides the better result.

**Apportionment of Liability**—As long as the eligibility requirements are met, any deficiency is limited to the portion which is properly allocable to the innocent taxpayer under Code Sec. 6015(d).<sup>31</sup> Items are allocated in a manner they would have been had the individuals filed separate returns for the tax year.<sup>32</sup> The amount of deficiency allocated to an individual is the amount which bears the same ratio to such deficiency as the amount of items taken into account in computing the deficiency bears to all items taken into account in computing the deficiency.<sup>33</sup>

If a deficiency arises as the result of the denial of an item of deduction or credit, the amount allocated to a spouse to whom the deduction is otherwise allocated is limited to the amount of income or tax allocated. The remainder of the liabilities are allocated to the other spouse to reflect the fact that income or tax allocated to that spouse was originally offset by a portion of the disallowed deduction.<sup>34</sup>

**Disqualified Assets**—Separate liability is increased by the value of any “disqualified asset” transferred to the individual.<sup>35</sup> A disqualified asset is any property (or right to property) transferred to an individual if the principal purpose of the transfer was the avoidance of tax or the avoidance of payment of tax.<sup>36</sup> There is a presumption that any assets transferred within a year before a proposed deficiency which would allow the taxpayer to go to the Internal Revenue Service Appeals Division has as a principal purpose the avoidance of tax.<sup>37</sup>

The foregoing presumption does not apply to any transfer pursuant to a divorce decree or separate

maintenance or written instrument incident to such decree or to any transfer which an individual establishes did not have as its principal purpose the avoidance of tax.<sup>38</sup> Property transferred pursuant to a divorce decree could still be subject to the principal avoidance of tax test, although the presumption would not apply.

**Fraudulent Schemes**—The separate liability election will not apply if assets were transferred as part of a fraudulent scheme. If the IRS demonstrates that assets were transferred as part of a fraudulent scheme, the election is invalid.<sup>39</sup> As in the case of the actual knowledge requirement, the burden of proof is upon the IRS to demonstrate a transfer pursuant to a fraudulent scheme. Unlike the treatment of so-called “disqualified assets” which increases the separate liability for assets transferred to avoid tax, a fraudulent scheme invalidates the separate property election. Is any transfer pursuant to a divorce decree which does not split marital property subject to a challenge under the principle avoidance test (even though the presumption does not apply)?

**Right to Intervene**—The individual filing a joint return but not making the election under subsection Code Sec. 6015(b) or (c) is entitled to adequate notice and an opportunity to become a party to the proceeding.<sup>40</sup> Tax Court Rule 325 provides the Petition for Determination of Relief From Joint and Several Liability on a Joint Return must be provided to the non-petitioning spouse and the non-petitioning spouse has 60 days to file with the Court a Notice of Intervention.<sup>41</sup> Even if the IRS concedes that a petitioning spouse qualifies for relief pursuant to Code Sec. 6015(b) or (c), the non-electing spouse has a right to intervene in both the administrative process and the judicial process.<sup>42</sup> This is true whether the spouse was part of the deficiency proceeding or if he or she seeks to intervene pursuant to Tax Court Rule 325.<sup>43</sup> Thus, it would appear that the United States Tax Court may be a battleground for a continuation of the divorce proceedings.

### **Discretionary Equitable Relief—Code Sec. 6015(f)**

Under circumstances in which relief is not available under the general innocent spouse relief provisions<sup>44</sup> of Code Sec. 6015(b), or a separate liability election under Code Sec. 6015(c),<sup>45</sup> the IRS is given discretion to provide relief, if taking into account all facts and circumstances, it would otherwise be inequitable to hold the individual liable for any unpaid tax.<sup>46</sup>

Importantly, the provision provides that “the Secretary may relieve such individual of such liability.”<sup>47</sup> As the “may” language makes such relief discretionary with the IRS, it would generally not provide a separate taxpayer right to relief as under the general innocent spouse provision or the separate liability election.

The IRS has provided guidance to taxpayers seeking equitable relief in Rev. Proc. 2003-61 and Notice 2012-8 proposing a new revenue procedure revising the threshold requirements for requesting equitable relief by the IRS.<sup>48</sup> Notice 2012-8 expands how the IRS will take into account abuse and financial control by the nonrequesting spouse, noting that these factors may mitigate other factors that might otherwise weigh against granting relief. The proposed revenue procedure also provides for streamlined case determinations, new guidance on the potential impact of economic hardship and the weight to be accorded to some factual circumstances in determining equitable relief. Notice 2012-8 includes the proposed text of the revenue procedure. Until the guidance becomes final, the IRS will apply the provisions in the proposed revenue procedure instead of Rev. Proc. 2003-61, unless otherwise noted. These procedures provide for the following: (1) threshold conditions that must be satisfied in order for an individual to be considered for relief; (2) circumstances in which equitable relief under Code Sec. 6015(f) (as well as under Code Sec. 66(c)) will ordinarily be granted; and (3) a partial list of factors to be considered in determining whether it would be inequitable to hold an individual liable for a deficiency or unpaid liability.<sup>49</sup>

### ***Threshold Requirements for Equitable Relief***

Notice 2012-8 and Rev. Proc. 2003-61 set forth various threshold requirements for equitable relief, including:

- (1) The requesting spouse filed a joint return for the tax year for which he or she seeks relief;
- (2) Relief is not available under traditional innocent spouse relief of Code Sec. 6015(b) or the separate liability election of Code Sec. 6015(c);
- (3) Time for filing claim for relief: (a) If the requesting spouse is applying for relief from a liability or a portion of a liability that remains unpaid, the request for relief must be made before the expiration of the period of limitation on collection of the income tax liability, as provided in Code Sec. 6502. Generally, that period

expires 10 years after the assessment of tax under Code Sec. 6502; (b) Claims for credit or refund of amounts paid must be made before the expiration of the period of limitation on credit or refund, as provided in Code Sec. 6511. 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;

- (4) No assets were transferred between the individuals filing the joint return as part of a fraudulent scheme by such individuals;
- (5) The nonrequesting spouse did not transfer disqualified assets to the requesting spouse. For this purpose, the term “disqualified asset” has the meaning given the term by Code Sec. 6015(c)(4)(B). If the nonrequesting spouse transferred disqualified assets to the requesting spouse, relief will be available only to the extent that the income tax liability exceeds the value of the disqualified assets. This condition will not result in the requesting spouse being ineligible for relief if the nonrequesting spouse abused the requesting spouse or maintained control over the household finances by restricting the requesting spouse’s access to financial information, or the requesting spouse did not have actual knowledge that disqualified assets were transferred;
- (6) The requesting spouse did not knowingly participate in the filing of a fraudulent joint return;
- (7) The income tax liability from which the requesting spouse seeks relief is attributable (either in full or in part) to an item of the nonrequesting spouse or an underpayment resulting from the nonrequesting spouse’s income. If the liability is partially attributable to the requesting spouse, then relief can only be considered for the portion of the liability attributable to the nonrequesting spouse.

Nonetheless, the IRS will consider granting relief regardless of whether the understatement, deficiency or underpayment is attributable (in full or in part) to the requesting spouse if any of the following exceptions applies:

- (a) *Attribution solely due to the operation of community property law.* If an item is attributable or partially attributable to the requesting spouse solely due to the operation of community property law, then for purposes of this revenue procedure, that item (or portion thereof) will be considered to be attributable to the nonrequesting spouse.

- (b) *Nominal ownership.* If the item is titled in the name of the requesting spouse, the item is presumptively attributable to the requesting spouse. This presumption is rebuttable. For example, H opens an individual retirement account (IRA) in W's name and forges W's signature on the IRA in 2006. Thereafter, H makes contributions to the IRA and in 2008 takes a taxable distribution from the IRA. H and W file a joint return for the 2008 tax year, but do not report the taxable distribution on their joint return. The IRS later determines a deficiency relating to the taxable IRA distribution. W requests relief from joint and several liability under Code Sec. 6015. W establishes that W did not contribute to the IRA, sign paperwork relating to the IRA or otherwise act as if W were the owner of the IRA. W thereby rebutted the presumption that the IRA is attributable to W.
- (c) *Misappropriation of funds.* If the requesting spouse did not know, and had no reason to know, that funds intended for the payment of tax were misappropriated by the nonrequesting spouse for the nonrequesting spouse's benefit, the IRS will consider granting equitable relief although the underpayment may be attributable in part or in full to an item of the requesting spouse. The IRS will consider granting relief in the case only to the extent that the funds intended for the payment of tax were taken by the nonrequesting spouse.
- (d) *Abuse not amounting to duress.* If the requesting spouse establishes that he or she was the victim of abuse prior to the time the return was signed, and that, as a result of the prior abuse, the requesting spouse did not challenge the treatment of any items on the return, or question the payment of any balance due reported on the return, for fear of the nonrequesting spouse's retaliation, the IRS will consider granting equitable relief even though the deficiency or underpayment may be attributable in part or in full to an item of the requesting spouse.
- (e) *Fraud committed by nonrequesting spouse.* The IRS will consider granting relief notwithstanding that the item giving rise to the understatement or deficiency is attributable to the requesting spouse, if the requesting spouse establishes that the nonrequesting spouse's fraud is the reason for the erroneous item. For example, W fraudulently accesses H's brokerage account

to sell stock that H had separately received from an inheritance. W deposits the funds from the sale in a separate bank account to which H does not have access. H and W file a joint federal income tax return for the year, which does not report the income from the sale of the stock. The IRS determines a deficiency based on the omission of the income from the sale of the stock. H requests relief from the deficiency under Code Sec. 6015(f). The income from the sale of the stock normally would be attributable to H. Because W committed fraud with respect to H, however, and because this fraud was the reason for the erroneous item, the liability is properly attributable to W.<sup>50</sup>

### ***Circumstances in Which Equitable Relief Will Be Granted***

If a requesting spouse who filed a joint return, or a requesting spouse who filed a separate return in a community property state, satisfies the threshold conditions of section 4.01 of Notice 2012-8 and Rev. Proc. 2003-61 above, the IRS will consider whether the requesting spouse is entitled to a streamlined determination of equitable relief under Code Sec. 66(c) or Code Sec. 6015(f) under section 4.02. If a requesting spouse is not entitled to a streamlined determination because the requesting spouse does not satisfy all the elements in section 4.02, the requesting spouse is still entitled to be considered for relief under the equitable factors in section 4.03.

The IRS will make streamlined determinations granting equitable relief under Code Sec. 66(c) or Code Sec. 6015(f), in cases in which the requesting spouse establishes that the requesting spouse: (1) is no longer married to the nonrequesting spouse as set forth in section 4.03(2)(a); (2) would suffer economic hardship if relief were not granted as set forth in section 4.03(2)(b); and (3) did not know or have reason to know that there was an understatement or deficiency on the joint return, as set forth in section 4.03(2)(c)(i), or did not know or have reason to know that the nonrequesting spouse would not or could not pay the underpayment of tax reported on the joint income tax return, as set forth in section 4.03(2)(c)(ii). If the nonrequesting spouse abused the requesting spouse or maintained control over the household finances by restricting the requesting spouse's access to financial information, and therefore, because of the abuse or financial control the requesting spouse was not able to challenge

the treatment of any items on the joint return, or to question the payment of the taxes reported as due on the joint return or challenge the nonrequesting spouse's assurance regarding payment of the taxes, for fear of the nonrequesting spouse's retaliation, then the abuse or financial control will result in this factor being satisfied even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement or deficiency or had knowledge or reason to know that the nonrequesting spouse would not pay the tax liability.

### ***List of Factors To Be Considered in Determining Equitable Relief***

In determining whether it is inequitable to hold the requesting spouse liable for all or part of the unpaid income tax liability or deficiency, and full or partial equitable relief under Code Sec. 66(c) or Code Sec. 6015(f) should be granted, all the facts and circumstances of the case are to be taken into account. The degree of importance of each factor varies depending on the circumstances of the requesting spouse and the factual context surrounding the marriage. The factors are designed as guides. It is not intended that only the factors described in this paragraph are to be taken into account in making the determination. No one factor or a majority of factors necessarily determines the outcome. Section 4.03 of Notice 2012-8 and Rev. Proc. 2003-61 provides the following partial list of factors that will be taken into account in determining whether to grant equitable relief:

(a) *Marital status.* Whether the requesting spouse is no longer married to the nonrequesting spouse as of the date the IRS makes its determination. If the requesting spouse is still married to the nonrequesting spouse, this factor is neutral. If the requesting spouse is no longer married to the nonrequesting spouse, this factor will weigh in favor of relief. For purposes of this section, a requesting spouse will be treated as being no longer married to the nonrequesting spouse only in the following situations: (i) the requesting spouse is divorced from the nonrequesting spouse, (ii) the requesting spouse is legally separated from the nonrequesting spouse under applicable state law, (iii) the requesting spouse is a widow or widower and is not an heir to the nonrequesting spouse's estate which would have sufficient assets to pay the tax liability, or (iv) the requesting spouse has not been a member of the same household as the nonrequesting

spouse at any time during the 12-month period ending on the date relief was requested. For these purposes, a temporary absence (e.g., due to incarceration, illness, business, military service or education) is not considered separation if the absent spouse is expected to return to the household.<sup>51</sup> A requesting spouse is a member of the same household as the nonrequesting spouse for any period in which the spouses maintain the same residence.

(b) *Economic hardship.* Whether the requesting spouse will suffer economic hardship if relief is not granted. For purposes of this factor, an economic hardship exists if satisfaction of the tax liability in whole or in part will cause the requesting spouse to be unable to pay reasonable basic living expenses. Whether the requesting spouse will suffer economic hardship,<sup>52</sup> and will take into consideration a requesting spouse's current income and expenses and the requesting spouse's assets. In determining the requesting spouse's reasonable basic living expenses, the IRS will consider whether the requesting spouse shares expenses or has expenses paid by another individual (such as a spouse). If denying relief from the joint and several liability will cause the requesting spouse to suffer economic hardship, this factor will weigh in favor of relief. If denying relief from the joint and several liability will not cause the requesting spouse to suffer economic hardship, this factor will be neutral.

(c) *Knowledge or reason to know.*

(i) *Understatement cases.* Whether the requesting spouse knew or had reason to know of the item giving rise to the understatement or deficiency at the time the requesting spouse signed the joint return (including a joint amended return). In the case of an income tax liability that arose from an understatement or a deficiency, this factor will weigh in favor of relief if the requesting spouse did not know and had no reason to know of the item giving rise to the understatement. If the requesting spouse knew or had reason to know of the item giving rise to the understatement, this factor will weigh against relief. Actual knowledge of the item giving rise to the understatement or deficiency will not be weighed more heavily than any other factor. Depending on the facts and circumstances,

if the requesting spouse was abused by the nonrequesting spouse (as described in section 4.03(2)(c)(iv)), or the nonrequesting spouse maintained control of the household finances by restricting the requesting spouse's access to financial information and, therefore, the requesting spouse was not able to challenge the treatment of any items on the joint return for fear of the nonrequesting spouse's retaliation, this factor will weigh in favor of relief even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement or deficiency.

- (ii) **Underpayment cases.** In the case of an income tax liability that was properly reported on a joint return (including a joint amended return) but not paid, whether the requesting spouse knew or had reason to know at the time the requesting spouse signed the joint return that the nonrequesting spouse would not or could not pay the tax liability at the time the joint return was filed or within a reasonably prompt time after the filing of the joint return. This factor will weigh in favor of relief if the requesting spouse reasonably expected the nonrequesting spouse to pay the tax liability reported on the joint return. This factor will weigh against relief if, based on the facts and circumstances of the case, it was not reasonable for the requesting spouse to believe that the nonrequesting spouse would or could pay the tax liability shown on the joint return within a reasonably prompt time after filing of the return. For example, if prior to signing the return, the requesting spouse knew of the nonrequesting spouse's prior bankruptcies, financial difficulties or other issues with the IRS or other creditors, or was otherwise aware of difficulties in timely paying bills, then this factor will generally weigh against relief. Depending on the facts and circumstances, if the requesting spouse was abused by the nonrequesting spouse (as described in section 4.03(2)(c)(iv)), or the nonrequesting spouse maintained control of the household finances by restricting the requesting spouse's access to financial information and, therefore, the requesting spouse was not able to question the payment of the taxes reported as due on the joint return or challenge the nonrequesting spouse's assur-

ance regarding payment of the taxes for fear of the nonrequesting spouse's retaliation, this factor will weigh in favor of relief even if the requesting spouse had knowledge or reason to know regarding the nonrequesting spouse's intent or ability to pay the taxes due.

- (iii) **Reason to know.** The facts and circumstances that are considered in determining whether the requesting spouse had reason to know of an understatement, or reason to know the nonrequesting spouse could not or would pay the reported tax liability, include, but are not limited to, the requesting spouse's level of education, any deceit or evasiveness of the nonrequesting spouse, the requesting spouse's degree of involvement in the activity generating the income tax liability, the requesting spouse's involvement in business and household financial matters, the requesting spouse's business or financial expertise, and any lavish or unusual expenditures compared with past spending levels.
- (iv) **Abuse by the nonrequesting spouse.** If the requesting spouse clearly establishes that he or she was the victim of abuse,<sup>53</sup> then depending on the facts and circumstances of the requesting spouse's situation, the abuse may result in certain factors weighing in favor of relief when otherwise the factor may have weighed against relief. 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 be able to do what is required under the tax laws. All the facts and circumstances are considered in determining whether a requesting spouse was abused. However, courts require substantiation, or at a minimum, specificity, with regard to allegations of abuse.<sup>54</sup> A generalized claim of abuse is insufficient. The impact of a nonrequesting spouse's alcohol or drug abuse is also considered in determining whether a requesting spouse was abused.
- (d) **Legal obligation.** Whether the requesting spouse or the nonrequesting spouse has a legal obligation to pay the outstanding federal income tax liability. For purposes of this factor, a legal obligation is an obligation arising

from a divorce decree or other legally binding agreement. This factor will weigh in favor of relief if the nonrequesting spouse has the sole legal obligation to pay the outstanding income tax liability pursuant to a divorce decree or agreement. This factor, however, will be neutral if the requesting spouse knew or had reason to know, when entering into the divorce decree or agreement, that the nonrequesting spouse would not pay the income tax liability. This factor will weigh against relief if the requesting spouse has the sole legal obligation. The fact that the nonrequesting spouse has been relieved of liability for the taxes at issue as a result of a discharge in bankruptcy is disregarded in determining whether the requesting spouse has the sole legal obligation. If, based on an agreement or consent order, both spouses have a legal obligation to pay the outstanding income tax liability, the spouses are not separated or divorced, or the divorce decree or agreement is silent as to any obligation to pay the outstanding income tax liability, this factor is neutral.

- (e) *Significant benefit.* Whether the requesting spouse received significant benefit (beyond normal support) from the unpaid income tax liability or item giving rise to the deficiency.<sup>55</sup> If the requesting spouse enjoyed the benefits of a lavish lifestyle, such as owning luxury assets and taking expensive vacations, this factor will weigh against relief. If the nonrequesting spouse controlled the household and business finances or there was abuse (as described in section 4.03(2)(c)(iv)) such that the nonrequesting spouse made the decision on spending funds for a lavish lifestyle, then this mitigates this factor so that it is neutral. If only the nonrequesting spouse significantly benefitted from the unpaid tax or item giving rise to an understatement or deficiency, and the requesting spouse had little or no benefit, or the nonrequesting spouse enjoyed the benefit to the requesting spouse's detriment, this factor will weigh in favor of relief. If the amount of unpaid tax or understated tax was small such that neither spouse received a significant benefit, then this factor is neutral.
- (f) *Compliance with income tax laws.* Whether the requesting spouse has made a good faith effort to comply with the income tax laws in

the tax years following the tax year or years to which the request for relief relates. (1) If the requesting spouse is compliant for tax years after being divorced from the nonrequesting spouse, then this factor will weigh in favor of relief. If the requesting spouse is not compliant, then this factor will weigh against relief. If the requesting spouse made a good faith effort to comply with the tax laws but was unable to fully comply, then this factor will be neutral. For example, if the requesting spouse timely filed an income tax return but was unable to fully pay the tax liability due to spouse's poor financial or economic situation after the divorce, then this factor will be neutral. (2) If the requesting spouse remains married to the nonrequesting spouse, whether or not legally separated or living apart, and continues to file joint returns with the nonrequesting spouse after requesting relief, then this factor will be neutral if the joint returns are compliant with the tax laws, but will weigh against relief if the returns are not compliant. (3) If the requesting spouse remains married to the nonrequesting spouse but files separate returns, this factor will weigh in favor of relief if the requesting spouse is compliant with the tax laws and will weigh against relief if the requesting spouse is not compliant with the tax laws. If the requesting spouse made a good faith effort to comply with the tax laws but was unable to fully comply, then this factor will be neutral. For example, if the requesting spouse timely filed an income tax return but was unable to fully pay the tax liability due to the requesting spouse's poor financial or economic situation as a result of being separated or living apart from the nonrequesting spouse, then this factor will be neutral.

- (g) *Mental or physical health.* Whether the requesting spouse was in poor physical or mental health. This factor will weigh in favor of relief if the requesting spouse was in poor mental or physical health at the time the requesting spouse signed the return or returns for which the request for relief relates or at the time the requesting spouse requested relief. The IRS will consider the nature, extent and duration of the condition. If the requesting spouse was in neither poor physical nor poor mental health, this factor is neutral.

## Community Property Overview

Federal law determines how property is taxed, but state law determines whether, and to what extent, a taxpayer has “property” or “rights to property” subject to taxation.<sup>56</sup> Accordingly, federal tax is assessed and collected based upon a taxpayer’s state created rights and interest in property. Community property is generally, and broadly, defined as all property acquired during marriage that is not established to be separate property. Community property is the default characterization of all marital assets. It is highly favored by the laws of the Community Property States. Community property typically includes salary, wages and other compensation for work performed during marriage, the fruits resulting from the labor and skills of each spouse, income derived from community property assets and separate property that has been changed (“transmuted”) into community property. Community property states typically have laws creating a rebuttable presumption that property owned by spouses is community property. In many community property states, unless otherwise proven, property in the possession of spouses during the marriage is presumed acquired during marriage, thus triggering application of the community property presumption.

Under community property law, title to property generally carries relatively little weight in determining whether property is separate or community property. The property is presumed to be community property in spite of the form in which title is held. When property is acquired as community property, each spouse acquires an automatic half interest. No special acts are required to vest interest in the non-acquiring spouse, such as conveyance of title, or obtaining dominion and control over the property. Thus, the fact that title is held solely in the name of the spouse who acquired the property, by itself, is insufficient to rebut the community property presumption. The community property presumption could only be rebutted by evidence that the property was acquired with the separate property of the titled spouse with the specific intention of holding the property as separate.

Separate property is all property acquired before the creation or after termination of the community property estate and property acquired by one spouse during marriage through gift, inheritance, or an award for personal injury damages. Property received in exchange for separate property of a spouse is typically separate property. Community property states have created laws allowing spouses to contract out of the

application of normal community property laws. The states have different rules concerning when this may occur and how notice of these pre-marital or marital property agreements is given to affected third parties, such as the IRS. These rules vary greatly between the community property states.

The theory underlying community property is analogous to that of a partnership. Each spouse contributes labor (and in some states, capital) for the benefit of the community, and shares equally in the profits and income earned by the community. Each spouse owns an undivided 50-percent interest in each item of community property. Community property is created by operation of law, so no affirmative acts are required to create community property. Each spouse has a 50-percent interest in the community property regardless of which spouse earned the community property income or acquired the community property asset. Spouses may also hold separate property, which they solely own and control.

In most community property states, creditors may use community property to satisfy debts arising from the marriage, no matter which spouse incurred the liability or which spouse earned the community property income or acquired the community property asset. Spouses are also considered to share debts. Depending on state law, creditors of spouses may be able to reach all or part of the community property, regardless of how it is titled, to satisfy debts incurred by either spouse. State laws vary greatly on what property can be reached.<sup>57</sup> Innocent Spouse relief is intended to provide an equitable resolution to protect the unwary spouse against a tax liability which they did not know existed or knowingly helped create. However, many potential advantages provided by innocent spouse relief can be eliminated by applicable state laws governing the division of property.

If there is a joint federal income tax liability that is secured by a federal tax lien encumbering community assets, although the taxpayer may be innocent as defined by Code Secs. 66(c) and 6015(f) or a non-debtor spouse, the innocent spouse or non-debtor’s share of the community property remains subject to the IRS tax lien. For collection purposes, the IRS (depending on state law) may collect taxes owed by only one spouse entirely from community assets or a portion thereof. This includes community property earned by or titled in the name of the other spouse. Also under most state community property laws, upon division of community property, the property received by one spouse in the division is no longer

liable for a debt incurred by the other spouse before or during marriage. However, if there is a lien on the property at the time of the division that property will continue to be subject to the lien and available to satisfy the liability of the other spouse even though it is now the innocent spouse's separate property. The ineffective nature of innocent spouse relief in a community property state can be illustrated in the three following examples:

1. Taxpayer husband incurs \$200,000 of joint income tax liability with his ex-wife for the years 2005 through 2008. The IRS filed tax liens in the county recorder's office. The couple obtains a divorce in 2009 and taxpayer husband leaves the divorce with no property. Taxpayer husband remarries in 2009 and current wife, not having any knowledge of taxpayer husband's previous liability, owns real estate with taxpayer husband in 2011 as a community property asset worth \$200,000. The real estate was purchased with assets belonging to the non-debtor wife and transmuted to community property. The taxpayers were residents of a community property state at the time of their marriage. The IRS is attempting to foreclose on the community property real estate jointly owned by taxpayer husband and non-debtor (second) wife. Under current law, the non-debtor's share of real estate is still subject to the IRS tax lien as under state law, all community property is liable for debts of either spouse incurred before or during marriage.<sup>58</sup>
2. A taxpayer husband and innocent spouse wife were married in 2000. The taxpayers were residents of California at the time of their marriage. In or around 2009, taxpayer husband earned \$100,000 from his law practice and taxpayer wife earned \$100,000 from her medical practice. Taxpayer wife filed her married, separate return and reported her complete share of the community income and paid the tax liability. Taxpayer husband failed to file a 2009 return or pay his share of the tax liability. The taxpayers owned certain real estate as a community asset. Upon a dissolution in 2010, the real estate was awarded to innocent spouse wife as her share of the community assets. Now, after the divorce, the IRS is attempting to foreclose on innocent spouse wife's real estate obtained in the divorce. Under current law, the innocent spouse's real estate remains subject to the IRS tax lien as under state law, all community prop-

erty is liable for debts of either spouse incurred before or during marriage.

3. A taxpayer husband and innocent spouse wife were married in 2000. The taxpayers were residents of a community property state at the time of their marriage. In or around 2009, taxpayer husband filed for divorce. During their marriage, the taxpayers owned certain real estate as a community asset. Upon dissolution, the real estate was awarded to innocent spouse wife as her share of the community assets. Before the dissolution of marriage, taxpayer husband invested in an oil and gas tax shelter that caused the taxpayers to report substantial deductions for the years 2003, 2004 and 2005 on their joint income tax returns. Ultimately, the deductions were questioned by the IRS and the case was tried in the United States Tax Court. The decision was entered in 2008 in favor of the IRS except that innocent spouse wife was granted relief. The IRS filed tax liens in the county recorder's office. Now, after the divorce, the IRS is attempting to foreclose on innocent spouse wife's real estate obtained in the divorce. Under current law, the innocent spouse's real estate is still subject to the IRS tax lien as under state law, all community property is liable for debts of either spouse incurred before or during marriage. It should be noted that the same result would occur if a separate liability arose against the taxpayer husband (*i.e.*, Code Sec. 6672) and an IRS tax lien attached to the non-debtor spouse's community property asset.

### **Relief from Omitted Community Income under Code Sec. 66(c)**

For income tax purposes, if spouses file separate returns, each spouse is taxed on 50 percent of the total community property income regardless of which spouse acquired the income.<sup>59</sup> In addition, each spouse is taxed upon 100 percent of his or her separate property income. Community property may also affect basis in property. However, a spouse may not be aware of the community income earned by the other spouse. If such income is omitted from their Married Filing Separate (MFS) return, relief may be available under Code Sec. 66(c) on an item-by-item basis if: (1) a joint return is not filed but community income is omitted from the return, (2) an understatement of

tax exists that is attributable to the other spouse, (3) MFS return omitted items of community income attributable to the other spouse, (4) the spouse did “not know or have reason to know” of such community property income, (5) taking into account all of the facts and circumstances, it is inequitable to include the community property income in the spouse’s MFS return, and (6) the excluded community property income shall be included in the income of the other spouse. The claim under Code Sec. 66(c) should be submitted on Form 8857, Request for Innocent Spouse Relief. If unable to satisfy the foregoing, the spouse may be eligible under the alternative equitable method for deficiencies that arise from either a deficiency or unpaid tax<sup>60</sup>—similar to relief under Code Sec. 6015 (f) above.

## Injured Spouse Relief

To be considered an injured spouse, a taxpayer must have made and reported tax payments, such as federal income tax withheld from wages or estimated tax

payments, or claimed a refundable tax credit, such as the earned income credit or additional child tax credit on the joint return, and not be legally obligated to pay the past-due amount. A claim for relief should be submitted on Form 8379, Injured Spouse Claim and Allocation. A spouse may be considered an “injured spouse” when his or her interest in a refund from a joint return is applied to the other spouse’s past-due child and/or spousal support, a past-due federal tax or non-tax debt or past-due state income tax and such spouse is not legally obligated. Requirements for Injured Spouse Relief include: (1) a joint return was filed (this is the only requirement if in a community property state), (2) the injured spouse received income (such as wages, interest, etc.), (3) the injured spouse made tax payments (such as withholding or estimated tax payments) or claimed the earned income credit or other refundable credit on the joint return, (4) the income and tax payments were reported on the joint return, and (5) an overpayment exists, all or part of which was applied to the past-due amount of the other spouse.

## ENDNOTES

<sup>1</sup> Code Sec. 6013(a); an election to file a joint return may only be revoked before the due date of the return, including extensions. However, an executor or administrator may revoke a joint return election made by a surviving spouse within one year of the due date of the surviving spouse’s return, including extensions (time for filing such return). See Reg. §1.6013-1(d)(5).

<sup>2</sup> Code Sec. 6013(d)(3); *M.B. Butler*, 114 TC 276, 282, Dec. 53,869 (2000).

<sup>3</sup> Code Sec. 6015(a).

<sup>4</sup> Code Sec. 6015(e).

<sup>5</sup> Internal Revenue Manual (IRM) 25.15.3.2 (07-17-2009)—*Election for Relief under IRC 6015*.

<sup>6</sup> Code Sec. 6015(h)(2); IRM 25.15.3.3 (03-01-2011)—*Notification to Nonrequesting Spouse (NRS)*.

<sup>7</sup> H.R. Conf. Rep. No. 105-599, at 254 (1998).

<sup>8</sup> H.R. Conf. Rep. No. 105-599, at 254 (1998).

<sup>9</sup> Code Sec. 6015; to the extent relief is granted pursuant to Code Sec. 6015, although a taxpayer may qualify pursuant to more than one subsection, the courts will only grant relief pursuant to one subsection. See *T.R. Livingston*, 79 TCM 1828, Dec. 53,837(M), TC Memo. 2000-121.

<sup>10</sup> Code Sec. 6015(b); *R.E. Alt*, 119 TC 306, 313, Dec. 54,961 (2002), *aff’d*, CA-6, 2004-1 USTC ¶50,279, 101 FedAppx 34. The requesting spouse bears the burden of proving that he or she satisfies each requirement of Code Sec. 6015(b)(1).

<sup>11</sup> Code Sec. 6015(b)(1)(A).

<sup>12</sup> Code Sec. 6015(b)(1)(B).

<sup>13</sup> Code Sec. 6015(b)(1)(C). *A.M. Resser*, CA-7, 96-1 USTC ¶50,045, 74 F3d 1528.

<sup>14</sup> *J.A. Guth*, CA-9, 90-1 USTC ¶50,133, 897 F2d 441.

<sup>15</sup> *B.J. Clark*, T.C. Summary Opinion 2006-34.

<sup>16</sup> *P.A. Price*, CA-9, 89-2 USTC ¶9598, 887 F2d 959.

<sup>17</sup> Code Sec. 6015(b)(1)(D); See also *E.R. Pietromonaco*, CA-9, 93-2 USTC ¶50,509, 3 F3d 1342; *F.H. Robertson*, 63 TCM 1822, Dec. 47,935(M), TC Memo. 1992-32.

<sup>18</sup> Reg. §1.6015-2(d).

<sup>19</sup> *P.E. Campbell*, 91 TCM 735, Dec. 56,430(M), TC Memo. 2006-24.

<sup>20</sup> Code Sec. 6015(b)(1)(E); see IRM 25.15.3.4.4 (03-01-2011)—*Collection Activity*.

<sup>21</sup> *D.L. Wiksell*, CA-9, 96-2 USTC ¶50,398, 90 F3d 1459.

<sup>22</sup> Code Sec. 6015(b)(2); see also Reg. §1.6015-2(e).

<sup>23</sup> Code Sec. 6015(c)(1) and 6015(d)(3)(A); if an item giving rise to a deficiency provided a tax benefit on the joint return to the nonrequesting spouse, the item is allocated to the nonrequesting spouse per Code Sec. 6015(d)(3)(B); *M. Hopkins*, 121 TC 73, 83-86, Dec. 55,243 (2003). The requesting spouse bears the burden of establishing the amount of the deficiency allocable to his or her return. Code Sec. 6015(c)(2).

<sup>24</sup> Code Sec. 6015(a) (flush language).

<sup>25</sup> Code Sec. 6015(c)(3)(A)(ii); Conference

Report Example: “For example, a deficiency is assessed after an IRS audit of a joint return. The deficiency relates to income earned by the husband that was not reported on the return. If the spouses who joined in the return are no longer married, are legally separated or have lived apart for at least twelve months, either may elect limited liability under this provision. If the wife elects, she would owe none of the deficiency. The deficiency would be the sole responsibility of the husband whose income gave rise to the deficiency.” H.R. Conf. Rep. No. 105-599.

<sup>26</sup> Code Sec. 6015(c)(3)(C).

<sup>27</sup> See Reg. §1.6015-3(c)(2).

<sup>28</sup> *K. Cheshire*, CA-5, 2002-1 USTC ¶50,222, 282 F3d 326.

<sup>29</sup> *F.L. Charlton*, 114 TC 333, Dec. 53,879 (2000) where the Court held a husband qualified for relief pursuant to Code Sec. 6015(c) even though he was aware of his wife’s omitted business activities because the IRS had not shown that husband had the required actual knowledge of the understatement.

<sup>30</sup> See IRM 25.15.3.7.1 (03-21-2008), Qualifications, regarding the IRS’s burden to establish actual knowledge. See also Reg. §1.6015-3(c)(2)(v).

<sup>31</sup> Code Sec. 6015(c)(1).

<sup>32</sup> Code Sec. 6015(d)(3)(A).

<sup>33</sup> Conference Report Example: “For example, a deficiency is assessed that is attributable

## ENDNOTES

to \$70,000 of unreported income allocable to the husband and the disallowance of a \$30,000 miscellaneous itemized deduction allocable to the wife. If the spouses who joined in the return are no longer married, are legally separated or have lived apart for at least twelve months, either may elect limited liability under this provision. If either the husband or wife elect, the husband's liability would be limited to 70% of the deficiency (if he elects) and the wife's liability limited to 30% (if she elects). This would be the case even if a portion of the miscellaneous itemized deductions have been disallowed under Section 67(a). If the election is required in order to limit liability, if either spouse fails to elect, the spouse would be liable for the full amount of deficiency, unless reduced by innocent spouse relief or pursuant to grant of authority to the secretary to provide equitable relief." H.R. Conf. Rep. No. 105-599.

<sup>34</sup> Conference Report contains an example: "A married couple files a joint return with wage income of \$100,000 allocable to the wife and \$30,000 of self-employment income allocable to the husband. On examination, a \$20,000 deduction allocated to the husband is disallowed resulting in a deficiency of \$5,600. Under the provision, the liability is allocated in proportion to the items giving rise to the deficiency. Since the only item giving rise to the deficiency is allocable to the husband, and because he reported sufficient income to offset the item of deduction, the entire deficiency is allocated to the husband and the wife has no liability with regard to the deficiency, regardless of the ability of the IRS to collect the deficiency from the husband. If the joint return had generally \$15,000 (instead of \$30,000) of self-employment income for the husband, the income offset limitation rule discussed above would apply. In this case, the disallowed \$20,000 deduction entirely offsets the \$15,000 of income of the husband and the \$5,000 remains. This remaining \$5,000 of disallowed deduction offsets income of the wife. The liability for the

deficiency is therefore divided in proportion to the amount of the income offset for each spouse. In this example, the husband is liable for 3/4 of the deficiency (\$4,200) and the wife is liable for the remaining 1/4 (\$1,400)." H.R. Conf. Rep. No. 105-599.

<sup>35</sup> Code Sec. 6015(c)(3)(4).

<sup>36</sup> Code Sec. 6015(c)(3)(4)(B).

<sup>37</sup> Code Sec. 6015(c)(4)(ii).

<sup>38</sup> Code Sec. 6015(c)(4)(ii)(II).

<sup>39</sup> Code Sec. 6015(c)(3)(A)(ii).

<sup>40</sup> Code Sec. 6015(e)(4).

<sup>41</sup> Tax Court Rule 325; the form and content of a Notice of Intervention is set forth in Tax Court Rules, Appendix I, Form 13.

<sup>42</sup> See *T. Corson*, 114 TC 354, Dec. 53,882 (2000).

<sup>43</sup> *K.A. King*, 116 TC 198, Dec. 54,302 (2001).

<sup>44</sup> Code Sec. 6015(b).

<sup>45</sup> Code Sec. 6015(c).

<sup>46</sup> Code Sec. 6015(f).

<sup>47</sup> Code Sec. 6015(f).

<sup>48</sup> Notice 2012-8 (January 5, 2012) provides that "until the revenue procedure is finalized, the Service will apply the provisions in the proposed revenue procedure instead of Rev. Proc. 2003-61 in evaluating claims for equitable relief under section 6015(f)." The Tax Court may consider the guidelines, but is not bound by them, in evaluating the facts and circumstances of a case in order to decide whether equitable relief is appropriate. *S.F. Deihl*, 103 TCM 1935, Dec. 59,098(M), TC Memo. 2012-176.

<sup>49</sup> Rev. Proc. 2003-61, 2003-2 CB 296 and Notice 2012-8, 2012-4 IRB 309.

<sup>50</sup> Rev. Proc. 2003-61, 2003-2 CB 296 and Notice 2012-8, 2012-4 IRB 309.

<sup>51</sup> See Reg. §1.6015-3(b)(3)(i).

<sup>52</sup> See Reg. §301.6343-1(b)(4); in determining whether the requesting spouse would suffer economic hardship if relief is not granted, the IRS will compare the requesting spouse's income to the federal poverty guidelines (as updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 USC §9902(2)) for the requesting spouse's family size and will determine by how much, if at

all, the requesting spouse's monthly income exceeds the spouse's reasonable basic monthly living expenses. If the requesting spouse's income is below 250 percent of the federal poverty guidelines, or if the requesting spouse's monthly income exceeds the requesting spouse's reasonable basic monthly living expenses by \$300 or less, then this factor will weigh in favor of relief unless the requesting spouse has assets out of which the requesting spouse can make payments towards the tax liability and still adequately meet the requesting spouse's reasonable basic living expenses. If the requesting spouse's income exceeds these standards, the IRS will consider all facts and circumstances in determining whether the requesting spouse would suffer economic hardship if relief is not granted. If the requesting spouse is deceased, this factor is neutral.

<sup>53</sup> Not amounting to duress, see Reg. §1.6015-1(b).

<sup>54</sup> *Deihl*, *supra* note 48. See also *C. Nihiser*, 95 TCM 1531, Dec. 57,445(M), TC Memo. 2008-135. A generalized claim of abuse is insufficient. See *J. Thomassen*, 101 TCM 1397, Dec. 58,604(M), TC Memo. 2011-88; *D.H. Knorr*, 88 TCM 273, Dec. 55,752(M), TC Memo. 2004-212. To carry this burden, it is helpful for the requesting spouse to provide corroborating evidence or substantiation of the alleged abuse. See *Thomassen*, 101 TCM 1397, Dec. 58,604(M), TC Memo. 2011-88.

<sup>55</sup> See Reg. §1.6015-2(d).

<sup>56</sup> *R. Aquilino*, SCt, 60-2 USTC ¶9538, 363 US 509, 80 SCt 1277; *J.E. Morgan*, SCt, 40-1 USTC ¶9210, 309 US 78, 60 SCt 424.

<sup>57</sup> The community property system has been adopted by nine states: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin. The U.S. Territory of Puerto Rico is also a community property jurisdiction.

<sup>58</sup> Cal. Family Code Section 910; *In re Sodeling*, CA-9, 998 F2d 730, 733 (1993).

<sup>59</sup> *H.G. Seaborn*, SCt, 2 USTC ¶611, 282 US 101, 51 SCt 58 (1930).

<sup>60</sup> Reg. §1.66-4.

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