

IRS and the Courts Provide Guidance For Taxpayers Seeking Relief as an Innocent Spouse

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Congress dramatically expanded the Code's innocent spouse provisions when it enacted Section 6015 as a part of the Internal Revenue Service Restructuring and Reform Act of 1998. Under this legislation, a taxpayer has three different approaches to pursuing innocent spouse relief: 1. the traditional approach, now in Section 6015(b), which was revised to make it easier for a taxpayer to qualify as an innocent spouse. 2. The separate liability election under Section 6015(c), for spouses who no longer are married, or are legally separated or have lived apart for at least 12 months. This provision is much more advantageous for taxpayers than the traditional approach, because the burden of proof on the knowledge component is shifted to the IRS. 3. A taxpayer may seek innocent spouse relief on equitable grounds, under Section 6015(f), if the taxpayer is ineligible under either of the other two approaches. Although the new legislation took dramatic steps toward making innocent spouse relief more accessible, several questions arose as to how the new legislation would be interpreted by the IRS and the courts.^[1] Now, after five years of case law, the promulgation of final Regulations in July 2002, and the issuance of Rev. Proc. 2003-61, 2003-32 IRB xxx, taxpayers and their advisers have guidance to resolve several of these open issues. Nevertheless, even with all of this new guidance several problems remain unresolved.

TRADITIONAL INNOCENT SPOUSE RELIEF Relief under Section 6015 (b) generally will absolve the requesting spouse of any tax debt with respect to the years in issue. The criteria for relief are as follows:

1. The requesting spouse and the non-requesting spouse must have filed a joint return with an understatement attributable to an erroneous deduction or understatement of income.
2. The requesting spouse did not know, and did not have reason to know, of the statement of income.
3. Considering all of the facts and circumstances, it would be inequitable to hold the requesting spouse liable.
4. The election for relief was made in a timely manner. As the discussion below indicates, many of the considerations applicable to traditional relief under Section 6015(b) will also apply to separate liability election under Section 6015(c).

Joint Return

In order to be eligible for relief under Section 6015, the requesting spouse must have filed a joint return with the nonrequesting spouse. The joint return requirement is expressly stated in Sections 6015(b) and (c), and the Service has extended to the joint return requirement to Section 6015(f).² The tax practitioner needs to examine all of the facts to determine whether a joint return was actually filed. This includes examining the intentions of the parties as well as whether the return was signed

under duress. The joint signature requirement need not be satisfied in order for a joint return to be valid. In *Collier*, TCM 2003-144, the taxpayer's husband signed and filed a joint return. The taxpayer claimed that because she did not sign the return it could not be considered a joint return. The court held that "[w]hen both spouses intend that a tax return to be filed as a joint return, the absence of the signature of one spouse does not prevent their intention from being realized."³ Because the taxpayer in *Collier* intended to file a joint return, she was held jointly liable for the tax and the deficiency on the return. Under the final Section 6015 Regulations, if an individual can establish that he or she signed a return under duress, the return will not be a joint return, and the individual will not be jointly and severally liable for the tax shown on the return or any deficiency with respect to the return.⁴ If the requesting spouse establishes this position, each spouse will be treated as having filed a separate return and will not be entitled to the benefits of a joint (e.g., the earned income credit, the joint return rates, or innocent spouse relief).⁵ The return will be adjusted to reflect only the tax liability of the individual who voluntarily signed the return, and the liability will be determined at the applicable rates for married individuals filing separate returns.⁶ The requesting spouse will be liable for any tax on his or her income, and should take appropriate steps to file his or her own separate return.

Knowledge of the Understatement

Knowledge of the understatement of tax is an issue not only under Section 6015(b) but under the other two relief provisions as well. It can make or break a claim under Section 6015(b) or (c), and under certain circumstances Section 6015(f) as well. Under Section 6015(b), if the requesting spouse cannot prove that he or she lacked actual knowledge and had no reason to know of the deficiency, relief will not be granted. Conversely, under Section 6015(c), relief will be denied only if the Service can prove that the requesting spouse had actual knowledge. Section 6015(f) does not contain an explicit knowledge requirement but, as discussed later in more detail, the Regulations give considerable weight to the knowledge issue, both actual and reason to know, in determinations under this provision. In addition, Rev. Proc. 2003-61 sets forth a revised statement of the weight IRS will give this factor (as will be discussed further, below).

Moreover, as we will shortly see, the test is different for income and deduction cases, depending on the circuit to which an appeal would lie. Under Reg. 1.6015-2(c), a "requesting spouse has...reason to know of an understatement...if a reasonable person in similar circumstances would have known of the understatement." All of the facts and circumstances are considered in determining whether a requesting spouse had reason to know. These include, but are not limited to: 1. The nature of the erroneous item and the amount of the erroneous item relative to other items. 2. The couple's financial situation. 3. The requesting spouse's educational background and business experience. 4. The extent of the requesting spouse's participation in the activity that resulted in the erroneous item. 5. Whether the requesting spouse failed to inquire, at or before the time and return or omitted from the return that a reasonable person would question. 6. Whether the erroneous item represented a departure from a recurring pattern reflected on prior years' returns.⁷ The general test for knowledge of an understatement attributable to omitted income is the "knowledge of the transaction" test.⁸ If a deficiency arose because of omitted income, and the requesting spouse had reason to know of the underlying transaction that produced the omitted income, such reason to know is sufficient to preclude relief

under Section 6015(b)(1).⁹ This test conflicts with the "knowledge of the understatement" language in the Code, but the courts have justified this departure from the actual language to avoid the use of "ignorance of the law" defenses.¹⁰ As we discussed above, in determining whether a requesting spouse had reason to know of a transaction, all of the facts and circumstances are considered. The focus is not whether the requesting spouse knew enough about the transactions to know there was income and enough about the source of the income to be able to determine that it is subject to tax. In *Kling*, TCM 2001-78, relief was granted when the requesting spouse knew the nonrequesting spouse engaged in transactions, but did not know enough about the transactions to have any actual knowledge or reason to know that the transactions produced net income that exceeded the amounts reported on the return. Similarly, in *Braden*, TCM 2001-69, the requesting spouse knew of the receipt of income, but did not have reason to know the source of the income was an IRA distribution. There is a split in the circuits regarding the knowledge requirement for an understatement attributable to a disallowed deduction. A bare majority of appellate courts follow the knowledge of the transaction test, under which the requesting spouse has "reason to know of the understatement if she has reason to know of the transaction that gave rise to the understatement."¹¹ The alternative test, set forth by the Ninth Circuit in *Price*, 887 F.2d 959, 64 AFTR2d 89-5822 (CA-9, 1989), is more liberal.¹² The spouse not only must know about the transaction but also must have reason to know that the deduction relating to the transaction would give rise to a substantial understatement.¹³ The circuits that follow *Price* reason that the knowledge of the transaction test would bar relief for disallowed deductions in every situation because deductions are reported on the face of a return.¹⁴ A requesting spouse always has some duty of inquiry. Cases decided under old Section 6013(e) created this duty,¹⁵ which was preserved under Section 6015(b).¹⁶ A "spouse cannot obtain the benefits of section [6015] by simply turning a blind eye to-by preferring not to know of-facts fully disclosed on a return, of such a large nature as would reasonably put such spouse on notice that further inquiry would

need to be made."¹⁷ A spouse is put on notice after reviewing a return with a deduction. Once on notice, the spouse must inquire as to the validity of the deduction in question,¹⁸ and must be satisfied with the answers to these inquiries.¹⁹ This duty also arises when an item of income is omitted from the return or the family living expenses are significantly greater than the income reported on the return.²⁰ According to *Mitchell*, 292 F.3d 800, 89 AFTR2d 2002-2961 (CA-D.C., 2002), when the requesting spouse knows every fact necessary to determine the legal consequences of income from the nonrequesting spouse's activities, the requesting spouse will be liable for the resulting tax deficiency because ignorance of the law alone is not a defense to overcome knowledge of the transaction.²¹ In *Mitchell*, the requesting spouse knew the source of the distribution was a pension plan and how the nonrequesting spouse used the proceeds. She even questioned her husband regarding the tax consequences of the distribution when she reviewed the tax return and saw that only a portion of the distributions had been reported. Her husband told her that the portion of the distributions that were used to pay off their home mortgage were not taxable and did not need to be reported. The requesting spouse was denied relief because she had sufficient knowledge of the transaction and her only defense was her belief that the distributions were used for a nontaxable purpose. By contrast, in *Braden*, the requesting spouse did not know the distributions consisted of IRA withdrawals and interest income. The requesting spouse inquired of the nonrequesting spouse as to the origin of the income and-based on the information the requesting spouse received in response- reasonably

believed the distributions were nontaxable. In that case, the requesting spouse's ignorance extended beyond the legal consequences of the income. His defense was not based on the fact that he believed the income was not taxable; his defense was that he did not know enough of the facts to determine for himself whether the income was taxable.

Equity

The requesting spouse must show that under all of the facts and circumstances it would be inequitable to hold him or her liable for the deficiency. Under Reg. 1.6015-2(d), the factors that will be considered are: Whether the requesting spouse significantly benefited from the understatement. Whether the requesting spouse has been deserted by the nonrequesting spouse. Whether the spouses are divorced or separated. Whether the requesting spouse received a benefit on the return from the understatement. Additional guidance is provided by Rev. Proc. 2002-61, which will be discussed later in this article, in connection with Section 6015(f).

Partial Relief

If the requesting spouse had knowledge of some, but not all the transactions giving rise to the understatement the spouse will be granted relief from joint liability for the portion of the understatement of which the requesting spouse did not know or have reason to know, but will remain jointly liable for the portion of the understatement of which the spouse had or should have had knowledge. [22](#)

Timing of Election

Under Section 6015(b)(1)(E), and election under Section 6015(b) must be made no later than the date that is two years after the date on which the IRS began collection activities with respect to the individual making the election. [23](#) Collection activities include: 1. A Section 6330 notice (a notice of the right to a hearing before a levy is made on any property or right to property). 2. An offset of an overpayment of the requesting spouse against liability under Section 6403. 3. The filing of a suit by the U.S. against the requesting spouse for the collection of the joint tax liability. 4. The filing of a claim by the U.S. in a court proceeding in which the requesting spouse is a party or which involves property of the requesting spouse. Collection activities do not include 9!) a notice of deficiency, (2) the filing of a notice of federal tax lien, or (3) a demand for payment of tax. [24](#)

Separate Liability Election

Under Section 6015(c), a requesting spouse may elect to allocate a deficiency, arising from a joint return, if the requesting spouse is (1) "no longer married to, or is legally separated from," the individual with whom the joint return was filed, or (2) is "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 such election is filed." [25](#) Relief from the liability may be limited to the extent that a portion of the deficiency attributable to the erroneous item is allocable to the requesting spouse. The requesting spouse may only seek relief from liabilities yet unpaid; this provision applies only to deficiencies and will not provide the requesting spouse with a refund

of those liabilities that already have been paid. If a refund is desired, the requesting spouse must seek relief under Section 6015(b) or (f). If the liability is not a deficiency but the result of taxes reported but unpaid on the tax return, relief is available only under Section 6015(f). The requirements under Section 6015(c) are:

1. The requesting spouse is no longer married to or is legally separated from the other spouse, or has not been a member of the same household as the other spouse for the 12-month period leading up to the election for relief.
2. At the time of signing the return, the requesting spouse did not have actual knowledge of the item(s) giving rise to the deficiency.
3. The requesting spouse and the nonrequesting spouse have not transferred assets between themselves as part of a fraudulent transfer.
4. The requesting spouse made a timely election for relief under Section 6015(c).

Status Prerequisites

The applicability of Section 6015(c) depends on the requesting spouse's being no longer married, being legally separated, or not being a member of the same household (for at least 12 months) as the nonrequesting spouse. A person is no longer married if he or she is widowed or divorced.²⁶ According to Reg. 1.6015-3(b)(3), a "requesting spouse and a nonrequesting spouse are considered members of the same household during either spouse's temporary absences from the household if it is reasonable to assume that the absent spouse will return to the household, and the household or a substantially equivalent household is maintained in anticipation of such return. Examples of temporary absences include, but are not limited to, absence due to incarceration, illness, business, vacation, military service, or education." This definition is based on the concept that spouses will cease being members of the same household only when they are estranged.²⁷

Case law. Before the regulations were promulgated, some cases adopted different definitions of "members of the same household." In *Martin*, TCM 2000-346, the wife was granted relief under Section 6015(c), even though she was still legally married to her husband and was not legally separated. The husband, however, had been in a federal penitentiary for three years prior to the taxpayer's claim for relief. The IRS conceded that the taxpayer was eligible for relief under Section 6015(c) for some of the tax liability. The Regulations fail to clarify what length of time would be necessary for incarceration to be deemed something more than just a temporary absence. Accordingly, the resolution of this issue will depend on facts and circumstances as interpreted by the courts.

When tested. For the taxpayer to be eligible for relief under Section 6015(c), the status of the marriage must be established as of the time the requesting spouse filed a claim for relief. In the case of a deceased requesting spouse, the marital status will be determined on the earlier of the date of the election or the date of death.²⁸ If the requesting spouse cannot establish this element, relief under Section 6015(c) will not be granted.²⁹

Actual Knowledge.

In an attempt to make relief more accessible, the separate liability relief provision does not apply the hypothetical reasonable person standard but instead looks to the taxpayer's actual, subjective knowledge. In addition, the difficult burden of proving such knowledge is placed on the Service.³⁰ The Service can prove the requesting spouse had actual knowledge of omitted income by showing that the requesting

spouse had knowledge of the receipt of the income.³¹ Where there are erroneous deductions, the IRS must show that the requesting spouse had knowledge of the facts that made the item not allowable in order to prevent the granting of relief.³² For fictitious or inflated deductions, the Service must establish that the requesting spouse knew that the expenditure was not incurred or not incurred to the extent reported.³³ Mere knowledge of the source of an erroneous item, however, is not sufficient to establish actual knowledge.³⁴

All of the facts and circumstances will be considered in determining whether the requesting spouse had actual knowledge. Under Reg. 1.6015-3(c)(2)(iv), some of the items to be considered are: Whether the requesting spouse made a deliberate effort to avoid learning of the item. Whether the requesting and the nonrequesting spouse jointly owned the property that resulted in the erroneous item. The complexity of the transactions.³⁵ What facts the spouse knew regarding the transaction or the source of omitted income.

In two cases, the Service has shown actual knowledge in the following circumstances: The requesting spouse who knew her husband had received a pension distribution, and how her husband had invested the proceeds had actual knowledge of the item giving rise to a deficiency.³⁶ The requesting spouse who was fully aware of all the underlying facts concerning the rental of a condominium unit to her daughter had actual knowledge of the factual basis for the disallowance of the loss (limitation of passive activity losses).³⁷

By contrast, the Service was unable to prove actual knowledge in the following three circumstances: The requesting spouse knew the nonrequesting spouse sold real estate, but the couple did not receive any cash or property as a result of the transaction and the transaction was purely superficial.³⁸ The requesting spouse knew the nonrequesting spouse's cattle ranch was not profitable, but the IRS could not prove that the requesting spouse lacked a profit motive for engaging in the activity, which was the critical fact in disallowing the deduction.³⁹ The Service failed to show that the requesting spouse had actual knowledge that charitable deductions in issue were false.⁴⁰

Abuse exception to actual knowledge. Under Reg. 1.6013-4(d), a spouse who signs a return under duress will not be liable for any deficiency on the return. The IRS will treat the return as a separate return of the nonrequesting spouse. A requesting spouse in an abusive situation who does not establish that he or she signed the joint return under duress and elects relief from joint liability under Section 6015(c) can receive such relief regardless of the requesting spouse's knowledge of the erroneous item at the time the return was signed.⁴¹ As discussed previously, however, there may be an obligation for a requesting spouse to file his or her own tax return as a married person filing separately, especially considering the potential effects in community property states. If a requesting spouse establishes that he or she was the victim of domestic 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 item on the return for fear of the nonrequesting spouse's reprisal, the actual knowledge limitation will not apply.⁴² Establishing prior abuse can be difficult. Generally the court requires more than just the self-serving testimony of the requesting spouse.⁴³ In *In re Hinckley*, 256 B.R. 814, 86 AFTR2d 2000-7198 (Bkrptcy. DC Fla., 2000), the requesting spouse had actual knowledge of the understatement but was not held liable for the deficiency. The requesting spouse had

questioned. The contents but the nonrequesting spouse got very angry and went into a rage. While her husband never physically abused her nor did he threaten to, she was afraid of him and signed the return to appease him in order to avoid further verbal and mental assaults. The requesting spouse also provided evidence of her husband's legal and tax background, strong-willed personality, and declining mental acuity.

In *Peters*, TC Sum. Opn. 2003-10, the requesting spouse, who had actual knowledge of the disqualified deduction, claimed the return was signed under duress. She claimed she was pressured by the nonrequesting spouse to sign the return without reviewing the contents of the return. The court did not find credible the requesting spouse's threats to discontinue telephone or electrical service to his own home. The Tax Court determined that the returns to review them or to question any items appearing thereon. As such, the requesting spouse was not granted relief for the liability that arose from the disqualified deduction.

Disqualified Asset Presumption.

Reg. 1.6015-3(c)(A)(ii) defines disqualified assets as "any property or right to property that was transferred from the nonrequesting spouse to the requesting spouse if the principle purpose of the transfer was the avoidance of tax or payment of tax (including additions to tax, penalties, and interest)." If a spouse requests relief and the Service determines that an asset was transferred with the principle purpose of avoiding tax or the payment of tax, the spouse who received the asset will have his or her portion of the liability increased.⁴⁴ Any property transferred within one year prior to the Service's sending a first notice of a proposed deficiency will be presumed to be a disqualified asset.⁴⁵ The requesting spouse may rebut this presumption by showing another purpose for the transaction. For example, if the spouse can establish that the property was transferred pursuant to a divorce decree, the presumption will not apply.⁴⁶ Property transferred pursuant to a divorce decree will not be presumed to be a disqualified asset, but still may be subject to the principal avoidance of tax test or a fraudulent scheme. If the IRS can establish that the requesting spouse received an asset in a divorce decree, the purpose of which "was the avoidance of tax or payment of tax, the asset will be disqualified, and its value will be added to the amount of the deficiency for which the requesting spouse remains liable."

Allocating the Deficiency.

Under Section 6015(d)(3), items generally are to be attributed to the spouses for purposes of Section 6015(c) in the same manner as they would have been had the spouses filed separate returns. If a deficiency is fully attributable to the nonrequesting spouse, the entire liability will be allocated to the nonrequesting spouse (except for any amount from which the requesting spouse received a tax benefit, as discussed below). If a portion of the liability is attributable to the requesting spouse, the nonrequesting spouse also must make an innocent spouse election to seek relief from that portion of the liability in order to have that portion of the liability allocated to the original requesting spouse.⁴⁷ When allocating the deficiency between the spouses, the Service will take into consideration not only any tax benefits but also any fraud by either spouse. Items giving rise to a deficiency that are attributable to the nonrequesting spouse also must be attributed to the requesting spouse if the requesting spouse received a tax benefit from the items in

the joint return.⁴⁸ Items that provide a tax benefit from the items in the joint return.⁴⁹ An example of a tax benefit is a reduction in the tax paid on the requesting spouse's income as a result of a disallowed deduction. The Service may allocate any item between the spouses if it establishes that the allocation is appropriate because of fraud on the part of one or both spouses.⁵⁰ For purposes of Section 6015(c), fraud is "any fraud of either spouse including, but not limited to, the fraudulent filing of a return or claim for relief, or any other fraud that may be relevant to the claim of relief."⁵¹

Equitable Relief

Section 6015(f) states: "Under procedures prescribed by the Secretary, if (1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either); and (2) relief is not available to such individual under subsection (b) or (c), the Secretary may relieve such individual of such liability." Several issues immediately arose under Section 6015(f) with regard to, e.g. the scope of authority for the IRS and the Tax Court, who could seek relief under this provision, and in the circumstances in which equitable relief would apply. The IRS remedied some of these omission in Rev. Proc. 2000-15, 2000-1 CB 447, which has been superseded (generally effective 11/1/03) by Rev. Proc. 2003-61.⁵²

Threshold Conditions

Both Rev. Proc.2000-15 and Rev. Proc. 2003-61 list threshold conditions that must be satisfied before the IRS will consider a request for equitable relief. Once all of the conditions are met, the Service will look at all of the facts and circumstances to determine if it would be inequitable to hold the taxpayer liable. ⁵³ The threshold conditions⁵⁴ are as follows: 1. The requesting spouse filed a joint return for the tax year in issue. 2. Relief is not available under Section 6015(b) or 6015(c). 3. Relief is requested no later than two years after the date of the Service's first collection activity after 7/22/98 with respect to the requesting spouse. 4. No assets were transferred as part of a fraudulent scheme. 5. There were no disqualified assets transferred to the requesting spouse; if such a transfer did occur, relief will be available only to the extent the income tax liability exceeds the value of the disqualified assets. 6. The requesting spouse did not file the return with the fraudulent intent. 7. In a new provision added by Rev. Proc. 2003-61, the income tax liability from which the requesting spouse seeks relief must be attributable to the nonrequesting spouse.

The last condition has four useful exceptions: The IRS will disregard community property laws if the operation of such statutes are the sole reason an item otherwise would be attributable to the requesting spouse. The possibility of nominal ownership is recognized, so that the requesting spouse has an opportunity to rebut the presumption that an item titled in the name of the requesting spouse is attributable to that spouse. Even if an underpayment stems from an item of the requesting spouse is attributable to that spouse.⁵⁵ The requesting spouse establishes prior abuse on the part of the nonrequesting spouse, as a result of which the requesting spouse did not challenge the treatment of any items on the return for fear of retaliation. In this situation, where the abuse does not rise to the level of duress (which would void the joint return and make Section 6015 inapplicable), the Service will consider granting

equitable relief even though the deficiency or underpayment may be attributable in full or part to an item of the requested spouse.

"Safe harbor" relief where there is an underpayment. Once the threshold conditions have been met, section 4.02(1) of Rev. Proc. 2003-61⁵⁶ sets forth the threshold conditions have been met, sets forth the circumstances under which IRS ordinarily will grant equitable relief with respect to an underpayment on a joint return. All of the following elements must be satisfied for the requesting spouse to come within this "safe harbor": 1. On the date relief was requested, the requesting spouse was no longer married to, or was legally separated from the nonrequesting spouse, or had not been a member of the same household as the nonrequesting spouse at any time during the 12 month period ending on the date of the request. 2. At the time the return was signed, the requesting spouse had no knowledge or reason to know that the tax would not be paid by the nonrequesting spouse. The requesting spouse must establish that it was reasonable for him or her to believe that the nonrequesting spouse would pay the reported liability. If a requesting spouse otherwise would qualify for relief under this provision except that the required lack of knowledge or reason to know related only to a portion of the unpaid tax liability is attributable to that portion. 3. The requesting spouse will suffer economic hardship if relief is not granted.⁵⁷ Under Rev. Proc. 2003-61, relief is subject to the following limitation: if the IRS adjusts the return to reflect an understatement of tax, relief will be available only to the extent of the liability shown on the return prior to any such adjustment.

Equitable relief factors. A requesting spouse who does not satisfy the conditions for the "safe harbor" still may be eligible for full or partial relief. Several factors are listed in both Rev. Proc. 2000-15 and Rev. Proc. 2003-61. Under Rev. Proc. 2000-15, section 4.03(1), factors weighing in favor of relief include (but are expressly not limited to), the following: Marital status, i.e., is the requesting spouse separated (whether legally or living apart) or divorced from the nonrequesting spouse. Economic Hardship. Abuse (not rising to the level of duress). Lack of knowledge or reason to know. The nonrequesting spouse's legal obligation pursuant to a divorce decree or agreement to pay the outstanding liability, so long as the requesting spouse did not know (or have reason to know) at the time the decree or agreement was entered into that the nonrequesting spouse would not pay. The liability is solely attributable to the nonrequesting spouse.

Factors set forth in section 4.03(2) of Rev. Proc. 2000-15 as weighing against relief include (but again are not limited to) the following: The liability is attributable to the requesting spouse. The requesting spouse did have knowledge or reason to know of the item giving rise to a deficiency or that the reported liability would be unpaid.⁵⁸ The requesting spouse significantly benefited from the deficiency or unpaid liability. Lack of economic hardship if relief is not granted. Noncompliance with federal income tax laws and the requesting spouse's legal obligation pursuant to divorce decree to pay the liability.

The new rules. Rev. Proc. 2003-61 takes a slightly different approach, listing factors "that may be relevant" to whether IRS will grant equitable relief as well as factors "that, if present in a case, will weigh in favor of equitable relief, but will not weigh against equitable relief if not present." Under section 4.03 (2) (a), factors in favor include: Marital status. Rev. Proc. 2003-61 expands on the earlier Procedure, tracking Reg. 1.6015-3(b)(3) (discussed above) and providing that a temporary absence

(due, e.g., to incarceration, illness, business, vacation, military service, or education) is not a separation for this purpose it can be reasonably anticipated that the absent spouse will return to a household maintained in anticipation of such return. Economic hardship. Knowledge or reason to know. There are three elements to this factor under the new Procedure. First, in underpayment cases, whether the requesting spouse did not know and had no reason to know that the nonrequesting spouse would not pay the tax liability reported on the return. Second, in deficiency cases, whether the requesting spouse did not know and had no reason to know of the item giving rise to the deficiency, the IRS states that "[r]eason to know of the item giving rise to the deficiency will not be weighed more heavily than other factors. Actual knowledge of the item giving rise to the deficiency, however, is a strong factor weighing against relief. This strong factor may be overcome if the factors in favor of equitable relief are particularly compelling. In those limited situations, it may be appropriate to grant relief...even though the requesting spouse had actual knowledge of the item giving rise to the deficiency." Third, in both types of cases, in determining whether the requesting spouse had reason to know, IRS will take into account that spouse's level of education, degree of involvement in the activity generating the tax liability, involvement in the activity generating the tax liability, involvement of business and household financial matters, level of business and financial expertise, and deceit or evasiveness on the part of the nonrequesting spouse, and any lavish or unusual spending (as compared with past levels). The nonrequesting spouse's legal obligation to pay the outstanding liability (again, unless the requesting spouse knew when the divorce decree or agreement was entered into that the nonrequesting spouse would not pay). Whether the requesting spouse received a significant benefit (beyond normal support) from the unpaid liability or the item giving rise to the deficiency. Whether the requesting spouse made good faith efforts to comply with the income tax laws in the years following the year(s) for which relief is sought.

Under Rev.Proc.2003-61, section 4.03(2)(b), the additional factors that, if present, will support the granting of relief but the absence of which will not weigh against relief include: Whether the nonrequesting spouse abused the requesting spouse; a history of abuse "may mitigate a requesting spouse's knowledge or reason to know." Whether the requesting spouse was in poor mental or physical health on the date he or she signed the return or the date he or she signed the return or the date he or she requested relief; IRS will consider the nature, extent, and duration of illness.

How the Courts Have Interpreted the Factors

In many cases, various courts have interpreted the same factors that appear-albeit under different heading or with different emphasis-in both Rev.Proc. 2000-15 and Rev.Proc. 2003-61.

Significant benefit. The IRS in the Regulations and the courts have both refrained from creating any clear definition of substantial or significant benefit because the determination will vary, depending on the taxpayers standard of living.[59](#)

Under case law, taxpayers have been held to receive substantial benefits in the following situations: The couple's standard of living was greater than usual in the years of the tax deficiency.[60](#) The unreported income was used to pay off the mortgage on the family home.[61](#) For a disallowed business deduction, where the business benefited from the disallowed deduction the requesting spouse was held

also to have benefited from the work of the business.⁶² The requesting spouse received a portion of dividends, which were not reported and resulted in a deficiency, in a divorce settlement. ⁶³

Economic hardship. In several cases, the finding of equity has been heavily influenced by whether the requesting spouse can prove that payment of the liability will result in economic hardship. When making a determination of economic hardship, the IRS and the courts look to Reg.301.6343-1(b)(4), relating to the release of a levy on account of economic hardship. Under these provisions, an individual suffers economic hardship if the individual is unable to pay his or her reasonable basic living expenses. Several factors are taken into consideration, including, but not limited to: 1. The taxpayer's age, employment status and history, ability to earn an income, number of dependents, and status as a dependent of someone else. 2. The amount reasonably necessary for food, clothing, housing, medical expenses, alimony, child support, or other court-ordered payments and expenses. 3. The cost of living in the geographical area in which the taxpayer resides. 4. The amount of property exempt from levy that is available to pay the taxpayer's expenses. 5. Any extraordinary circumstances, such as educational expenses, a medical catastrophe, or natural disaster. 6. Any other factor that the taxpayer claims bears on economic hardship.⁶⁴ The burden of proof is on the taxpayer. In general, the Tax Court has been unwilling to infer hardship without sufficient evidence to support the claim, although in one recent case the taxpayer's oral testimony at trial was found to be sufficient.⁶⁵ The courts found no economic hardship in the following circumstances: Where a requesting spouse offered documented evidence about his income but only testimonial evidence of some but not all of his expenses. In addition, the evidence of some of the requesting spouse's recent purchases (over \$22,000 from an Internet bidding service) went against a finding of economic hardship.⁶⁶ The requesting spouse owned a home that could be refinanced to pay off the tax liability, and had a regular income sufficient to pay off the refinanced home.⁶⁷

In the following circumstances, the courts determined the requesting spouse would suffer economic hardship if made to pay the liability:

The requesting spouse owned a condominium but was living on a fixed income, with no means to pay the interest on any refinancing.⁶⁸ The requesting spouse had a mental disorder that precluded her from obtaining steady employment and was living on government aid.⁶⁹ The requesting spouse did not receive any assets on the dissolution of her marriage, did not own a house or an automobile, did not take vacations, and the IRS lien for the tax liability would harm her credit rating and ability to obtain a loan. The levy against the requesting spouse would leave her with income below the poverty level, which would be insufficient to pay her basic living expenses.⁷⁰

Knowledge. According to the courts, knowledge under Section 6015 (f) is not a determinative factor.⁷¹ It is one of several factors that must be considered in deciding whether it would be inequitable to hold the taxpayer liable. If the requesting spouse had no knowledge or reason to know the tax would not be paid, or in the case of a deficiency if the requesting spouse did not know or have reason to know of the items giving rise to deficiency, the lack of knowledge will weigh in favor of granting relief.⁷² If, however, the requesting spouse knew or had reason to know of the nonpayment of tax or reason to know of the items giving rise to the deficiency,

that knowledge will weigh against relief.⁷³ Actually knowledge of the item giving rise to the deficiency will weigh more heavily against relief than any of the other factors.

Divorce agreements. A divorce decree, or agreement, stating that the nonrequesting spouse is to be fully liable for any tax deficiency, is a factor that is considered in determining equitable relief. A divorce agreement alone is not sufficient evidence for the requesting spouse to be granted relief under Section 6015(f). The requesting spouse still will have to establish the evidence needed for relief under Section 6015(f) ⁷⁴ In addition, if the divorce agreement is silent as to either spouse's liability for any unpaid tax or tax deficiency, this will be a neutral factor. ⁷⁵

Abuse. A showing that the requesting spouse was abused by the nonrequesting spouse was abused by the nonrequesting spouse will weigh in favor of granting relief; the absence of abuse by the nonrequesting spouse, however, will not weigh against a finding for relief.⁷⁶

Tax Court Jurisdiction

When section 6015 was enacted, the code expressly gave the Tax Court jurisdiction to review determinations by the Service regarding traditional relief under Section 6015 (b) and the separate liability election under Section 6015 (c), but was silent as to Section 6015 (f).⁷⁷ The wording of the latter provision-the Service "may relieve" an individual of liability where not doing so would be inequitable-and the fact that jurisdiction was expressly granted for Sections 6015 (b) and (c) but not (f) was intended to be a completely discretionary tool for the IRS, not subject to Tax Court review. This review did not last long. In *Butler*, 114 TC 276 (2000), the Tax Court held that it had the jurisdiction to review the Service's determination of equitable relief in deficiency cases, provided it had jurisdiction under Section 6015(b) or (c). The court later clarified that rule in *Ferrarese*, TCM 2002-249, in which it determined that it could also review Section 6015(f) determinations in "stand alone cases." In so doing, the court established that it could review determinations where there is no deficiency but an under payment of taxes reported on the return.⁷⁸

Equity in (b) and (f)

The equity factors for Sections 6015 (b) and 6015(f) are very similar. The Regulations direct the IRS and the courts to refer to Rev. Proc. 2000-15 or other published guidance (now, presumably, Rev. Proc. 2003-61) when making equity determinations. A recent Tax Court case has held that if there is no inequity under Section 6015(b), there is no inequity under Section 6015(f) either.⁷⁹ If the equity analysis is the same under Sections 6015(b) and (f), there are only two situations where a requesting spouse will be granted relief under the latter. The first is when the liability from which relief is sought is from taxes reported on the return but not paid. The other is when the requesting spouse has actual knowledge or reason to know of an understatement, but all of the other equity factors outweigh the existence of knowledge. ⁸⁰

Common Issues In 6015

In addition to the particular provisions affecting the three different approaches to relief discussed above, there are issues that involve all of Section 6015.

Unpaid liability. Section 6015 applies only to liabilities that arose after the date of enactment (7/22/98) or remain unpaid as of that date.⁸¹ For purposes of Section 6015, an "unpaid liability" is any liability that was not fully paid as of the date of enactment.⁸²

Refunds. If a requesting spouse is granted relief for a deficiency under Section 6015 (b), the innocent spouse is entitled to a refund of amounts paid or applied to the deficiency, including payments that were applied to the liability prior to 7/22/98.⁸³ This also appeared to be the result in Section 6015(f) cases prior to Rev. Proc. 2003-61. In *Washington*, 120 TC 137 (2003), the taxpayer was relieved of joint and several liability, and became entitled to a refund of all amounts applied to her unpaid taxes, including overpayments of tax that were applied to the liability prior to 6/22/98. The court noted, however, that a refund could be limited under Sections 6511, 6512 (b), 7121, and 7122. Rev. Proc. 2003-61 has adopted the rationale in *Washington*, but with a number of limitations, some of which appear to be inconsistent with the Code. The new Procedure differentiates between refunds that were due to deficiency cases and refunds that were a result of underpayment cases. With respect to underpayment cases, the innocent spouse is entitled to a refund for payments made after 7/22/98, subject to the limitations set forth in *Washington*. In a case involving an underpayment of income tax, section 4.04(2) provides that a requesting spouse is eligible for a refund of separate payments that he or she made after 7.22.98 if the requesting spouse establishes that he or she provided the funds used to make the payment for which the refund is sought. A requesting spouse is not eligible for refunds of payments made with the joint return, joint payments, or payments that the nonrequesting spouse made. Rev. Proc. 2003-61 thus now limits refunds under Section 6015 (f), which appears to directly contravene one of the stated purposes for this Procedure, i.e., section 3.03 provides that it "broadens the availability of refunds if equitable relief is granted under section...6015(f)." First, it places a limitation on any refund from the time that the actual claim for innocent spouse is filed. There is no such limitation in the Code. Second, it makes a distinction regarding the source of funds for purposes of granting a refund, which is within neither code nor the purview of *Washington*.⁸⁴ Thus, any refund sought under Section 6015(f) will be more narrowly construed than if brought under Section 6015(b). As with any request for a refund, the claim must inform the IRS that a claim for a tax refund is being asserted, detail each asserted ground for the refund, and provide sufficient facts so that the IRS can adequately examine the merits of the claim.⁸⁵

Fraudulent schemes. Under Section 6015, if the IRS shows that assets were transferred between individuals filing a joint return as part of a fraudulent scheme, the requesting spouse will be denied relief. When Section 6015 was first enacted, "fraudulent scheme" was not defined.⁸⁶ Reg. 1.6015-1(d) now provides that "a fraudulent scheme includes a scheme to defraud the Service or another third party, including, but not limited to, creditors, ex-spouses, and business partners." Although the definition may give some guidance, the determination of what is a fraudulent scheme is still left to one's imagination. The IRS, however, might scrutinize any transfers under the Uniform Fraudulent Conveyance Act or the Uniform Fraudulent Transfer Act.⁸⁷

Rights of the nonrequesting spouse. Under the prior innocent spouse provision, the nonrequesting spouse did not have any right to receive notice or participate in the determination of relief for the requesting spouse.⁸⁸ Section 6015 gives the

nonrequesting spouse the right to be notified of the requesting spouse's claim for relief, access to all of the information in the proceeding, and a right to participate in the proceeding administratively before the IRS and in the Tax Court.⁸⁹ Rev. Proc. 2003-19, 2003-5 IRB 371, expanded the rights of the nonrequesting spouse. The IRS determined that the nonrequesting spouse may file a written protest and receive an Appeals conference with respect to the Service's decision to grant partial or full relief to the requesting spouse. Prior to this Procedure, only the requesting spouse had the right to file a written protest and receive an administrative conference with the Service's Appeals office. Under this guidance, the nonrequesting spouse may not appeal a decision by the Service to deny relief to the requesting spouse. Section 6015(e)(1)(A) allows the requesting spouse to petition the Tax Court for review of a notice of final determination. There are no provision in Section 6015 that allows the nonrequesting spouse to petition the Tax Court for such review.⁹⁰ If the requesting spouse petitions the Tax Court, however, Section 6015 (e)(4) authorizes the Tax Court Rules to allow the nonrequesting spouse to become a party to the proceeding.⁹¹ The participation of the nonrequesting spouse in the proceedings can assist the IRS and the courts in making more informed decision. For example, in Penfield, TCM 2003-254, the nonrequesting spouse's testimony regarding the requesting spouse's knowledge enabled the Tax Court to determine that equity would not be advanced by granting relief.

Executor's rights. An executor has the authority to assume the rights of the deceased person, including the right to seek relief pursuant to Section 6015. Thus, an executor has the right to pursue a request for relief from joint and several liabilities under Section 6015 made during the decedent's lifetime.⁹² In addition, an executor may file a Section 6015 request for relief from joint and several liability on behalf of the descendant must have the eligibility on behalf of the decedent. A prerequisite is that the decedent must have the eligibility requirements for relief while still alive.⁹³

Prior arrangements with IRS. Under Reg. 1.6015-1(c), a requesting spouse is not entitled to relief from joint and several liability under Reg. 1.6015-4 for any tax year for which the requesting spouse had entered into an offer in compromise with the IRS. Similarly, a requesting spouse is not entitled to relief from joint and several liability under any of the same three regulations for any tax year for which the requesting spouse has entered into a closing agreement with the Service that disposes of the same liability that is the subject of the claim for relief.

IMPACT OF NON-TAX LAW

Assuming that the requester taxpayer does qualify for innocent spouse relief, there are still at least two other obstacles to overcome before the innocent spouse's assets are safe from the Service or the nonrequesting spouse: Contribution rights. Community property.

Accordingly, it is extremely important at the outset for the practitioner to review all of the implications of obtaining innocent spouse relief.

Contribution rights. Qualifying under Section 6015 will not relieve the innocent spouse from any right to contribution the nonrequesting spouse may have.⁹⁴ In a large majority of the innocent spouse cases, the parties are either in the process of obtaining a divorce or legal separation or one already has been granted. If a judgment of dissolution or decree of legal separation has already been granted, the

first step the attorney should take would be to review the marital settlement agreement or legal separation agreement (MSA), if there is one.⁹⁵ If the requesting spouse has agreed to be fully or partially liable for any tax liability that the requesting spouse is now "relieved" from under Section 6015, that spouse still may be required to contribute his or her share to the other spouse by reason of the MSA or as otherwise provided for under state law.⁹⁶

Collection of community property. Even if the innocent spouse is not personally liable, the community property of the spouse may be subject to collection for the liability.⁹⁷ "If under the law of the community property state in which the spouses reside, the IRS can look to community property to collect a liability of one of the spouses, the determination that the other spouse is entitled to relief under section 6015 does not affect the Service's ability to collect the nonrequesting spouse's liability from the community property."⁹⁸

In California, for example, this may be true despite the fact that the community property is deemed to be separate property as a result of a divorce, and even if section 916 of the California Family Law Code applies. That section provides: "The separate property owned by a married person at the time of the division and the property received by the person in the division is not liable for a debt incurred by the person's spouse before or during marriage, and the person is not personally liable for the debt, unless the debt was assigned for payment by the person in the division of the property." Section 6321 creates a federal lien on the property." Section 6321 creates a federal lien that covers unpaid taxes, interest, additions to tax, and any assessable penalties. The lien arises when the assessment is made and the taxpayer neglects or refuses to pay a tax liability after the IRS has properly sent a notice of assessment and no notice of assessment and a notice and demand. The tax lien relates back to the date of assessment-not the date of notice and demand.⁹⁹

Accordingly, for any tax, which was assessed prior to the division of community property, it appears that all the community property will be liable. If, however, tax is assessed after the division of community property and the requesting spouse is granted innocent spouse status, his or her share of community property might very well be protected, absent a fraudulent scheme.

CONCLUSION

The revised innocent spouse law has afforded taxpayers a much broader range in which to qualify. Moreover, in those cases in which the IRS has tried to narrow the scope of the legislation, the courts have for the most part adopted a broad interpretation of the statute, thereby protecting the rights of taxpayers to obtain innocent spouse status. Nevertheless, tax advisors must be extremely careful in determining not only whether the client will qualify for innocent spouse relief personally but also whether the client's property will be protected. In addition, because the right to contribution is determined at the state level, it is extremely important for the tax advisor to review any MSA to insure that the granting of innocent spouse relief will truly protect the spouse against having paid the tax.

Practice Notes

Because Congress, in its attempt to right the wrongs done to innocent spouses over the years, provided multiple avenues for relief, practitioners must be careful to seek the route likely to be successful.

The choice between Sections 6015(b) and (c). If a spouse is potentially eligible under both Sections 6015(b) and 6015(c), the practitioner will have to weigh the potential advantages of each. Relief under Section 6015(c) may be more attainable because the Service has the burden to prove knowledge on the part of the requesting spouse. Traditional relief under Section 6015(b) may have more beneficial effect, however, because it allows for complete relief from liability, whereas Section 6015(c) may allocate some of the liability to the requesting spouse.

If the requesting spouse received a disqualified asset or tax benefit from the other spouse's deduction or credit against his or her own income, the allocation rules under Section 6015(c) will attribute a part of the liability to the requesting spouse. (If the benefit is substantial, the requesting spouse might not qualify under Section 6015(b), as a court could determine that in light of the benefit, it would not be inequitable to deny relief.) In addition, if the taxpayer is seeking a refund for liabilities already paid, a refund is available under Section 6015(b) but not under Section 6015(c).

The choice between Sections 6015(b), (c), and (f). If the requesting spouse potentially is eligible for relief under Section 6015(f) as well as Section 6015(b) or (c), the requesting spouse must seek relief under either Section 6015(b) or (c) before or in conjunction with a claim for relief under Section 6015(f). Under Section 6015(b) and (c). If only equitable relief is requested and, in the course of reviewing the request under Section 6015(f), the Service determines that the requesting spouse may be eligible for relief under either Section 6015(b) or (c), Reg. 1.6015-1(a)(2) provides that the IRS will contact the requesting spouse and ask whether he or she would like to amend the request to elect the applicable subsection.

Section 6015(f) may not be used to circumvent the limitation of Section 6015(c) that refunds are not available. That is, Reg. 1.6015-3 makes it clear that relief is not available under Section 6015(f) to obtain a refund of liabilities already paid, for which the requesting spouse otherwise would have qualified for relief under Section 6015(c).

Even if the requesting spouse is likely to be successful only under Section 6015(f), a request for relief under Section 6015(b) or (c) should be made, if there is any merit at all, in order to have the collection of the liability tolled. Under Section 6015(e), the statute of limitations for collecting liabilities is suspended and the IRS is prohibited from pursuing certain collection activities until a claim for relief under Section 6015(b) or (c) is resolved. A request under Section 6015(f) alone will not suspend the statute of limitations, and the Service may continue to collect the liability.

In addition, seeking relief under Section 6015(b) or (c) may be more beneficial because the requirements that have to be met are more concrete. Relying on equitable relief is a gamble that often is dependent on the whim of the IRS and the Tax Court. In equity cases, the Service and courts can consider any factors they wish

and may choose to emphasize one factor and downplay others in one case, while another case that seems almost identical may have different outcome.

[\[1\]](#) See Toscher, "The Restructuring Act Reforms the Doctrine of Joint and Several Liability," 22 Los Angeles Lawyer 24 (May 1999). See also Feldman, "Has the Innocent Spouse Become the Overprotected Spouse? Reflections on Recent Cases," 94 JTAX (January 2001).

[2](#) See. Rev. Proc. 2003-61, 2003-32 IRB xxx, superseding Rev. Proc. 2000-15, 2000-1 CB 447, effective for requests for relief filed on or after 11/1/03, and for those requests pending on that date for which no preliminary determination letter has yet been issued. See Also H. Rep't No. 105-599, 105th Cong. 2d Sess. 254 (1998)("Conference Report") It was Congress's intent that Section 6015(f) apply where a joint return was filed.

[3](#) See also Estate of Campbell, 56 TC 9003, 7/17/02

[4](#) Reg. 1.6015-1(b), referring to Reg. 1.6013-4(d).

[5](#) See the Preamble to TD 9003. 7/17/02.

[6](#) Reg. 1.6013-4(d). This Regulation specifically deals with a return signed under duress and may not address the problems dealt with in community property states. In the Preamble to the final Regulations (see note 5, supra) it is clear that if the requesting spouse and income, he or she will have to file a tax return reporting that income as a married person filing separately. The Regulations do not specifically address the problems that might arise if any of the income is deemed community income. Under community property laws, when spouses file separate returns, each spouse must report one half of the community income and pay tax on that half. In some circumstances the spouse may seek relief under Section 66, which provides that community property may be treated as the income of the separate spouse who earned the income when the income is not transferred between the spouses and the spouses live apart and do not file a joint return.

[couple's finances, and expenditures that appear lavish or unusual when compared with the family's standard of living and 7](#) See also Price, 887 F.2d 959, 64 AFTR2d 89-5822 (CA-9, 1989) (additional factors that are considered are the requesting spouse's involvement in family business and financial affairs, the culpable spouse's evasiveness and deceit concerning the

[8](#) See Reser, 112 F.3d 1258. 79 AFTR2d 97-2743 (CA-5, 1997).

[9](#) See Cheshire, 115 TC 183 (2000)

[10](#) See Cheshire, supra note 9, tn.16.

[11](#) Jonson, 118 TC 106 (2002), citing Bokum, 94 TC 126 (1990), aff'd 992 F.2d 1132, 72 AFTR2d 93-5111 (CA-11, 1993). Thus, the court followed the knowledge requirements established under old Section 6013(e). For more on those rules, see also Strikis, "Elements Required for Qualifying as an innocent Spouse Still Far From Clear." 81TAX 354 (December 1994).

[12](#) The five circuits that follow the Ninth are the Second, Fifth, Seventh, Eighth, and Eleventh, See Bliss, 59F.3d 374, 76 AFTR2d 95-5621 (CA-2, 1995); Reser, supra note 8; Resser, 74 F.3d 1528, 77 AFTR2d 96-477 (CA-7 1996); Erdahl, 930 F.2d 585, 67AFTR2d 91-790 (CA-8, 1991); Kistner, 18F.3d 1521, 73 AFTR2d 94-1026 (CA-11, 1994).

[13](#) As illustrated by Price, supra note 7, a requesting spouse will not be eligible for relief under Section 6015(b) if he or she had knowledge or reason to know that the item in question would give rise to the understatement. Mere knowledge of the underlying transaction will not preclude relief.

[14](#) See Cheshire, 282 F.3d 326, 89 AFTR2d 2002-900 (CA-5, 2002).

[15](#) Levin, TCM 1987-67; Cohen, TCM 1987-37

[16](#) See Braden, TCM 2001-69

[17](#) Levin, supra note 15. See also Cohen, supra note 15, and Skoller, TC Sum. Opn. 2002-137.

[18](#) See Braden, supra note 16 (the taxpayer satisfied his "duty of inquiry" by asking, on at least two occasions, about the tax consequences of the distributions).

[19](#) See Gurr, TC Sum. Opn. 2002-7 (the wife questioned her ex-husband's credibility, but failed to look beyond the inquiries she made to her divorce attorney despite his unsatisfactory answers and lack of tax knowledge; held, she had reason to know of the understatement on the tax return and was not entitled to innocent spouse relief); Price supra note 7 (the taxpayer satisfied her duty of inquiry when she questioned her spouse about the deductions and obtained sufficient assurance that the deduction was appropriate).

[20](#) See Barranco. TCM 2003-18.

[21](#) See also Cheschire, supra note 14.

[22](#) Reg. 1.6015-2(e).

[23](#) This period is extended for any person in the armed forces serving in a combat zone by 280 days plus the time actually spent in the combat zone. See Notice 2003-21, 2003-17 IRB 817, and Rev. Proc. 2002-71, 2002-46 IRB 860.

[24](#) Reg. 1.6015-5(b)(2)(I)

[25](#) Sections 6015(c)(3)(A)(i)(I) and (II)

[26](#) Reg. 1.6015-3(a)

[27](#) See the Preamble, *supra* note 5.

[28](#) Reg. 1. 6015-3(a). See also *Jonson*, *supra* note 11.

[29](#) See *Vetrano*, 16 TC 272 (2001). At the same time this case came before the Tax Court, the taxpayer was divorced from her husband. The taxpayer, however, could not prove that she was no longer married, legally separated, or had not been a member of her husband's household for 12 months before she filed a request for relief. Because the taxpayer could not prove this element, she was denied relief under Section 6015(c). See also *Jonson*, *supra* note 11.

[30](#) Section 6015(c)(3)(C)

[31](#) Reg. 1.6015-3(c)(2)(I)(A)

[32](#) Reg. 1.6015-3(c)(2)(i)(B)(1).

[33](#) Reg. 1.6015-3(c)(2)(i)(B)(2). See, e.g. *Peters*, TC Sum, Opn. 2003-10 (for IRS to prove a requesting spouse has actual knowledge of a false deduction. It must prove that the requesting spouse know the claimed deduction was false)

[34](#) Reg. 1.6015-3(c)(2)(iii) (erroneous items include omitted income and erroneous, fictitious, or inflated deductions.)

[35](#) See *Martin*, TCM 2000-346 (the transaction that gave rise to the tax deficiency was made up of a complex series of steps, set up by the nonrequesting spouse; the court found the requesting spouse's knowledge to be purely superficial, which was not sufficient to be actual knowledge).

[36](#) *Mitchell*, 292 F.3d 800, 89 AFTR2d 2002-2961 (CA-D.C., 2002)

[37](#) *Peters*, *supra* note 33.

[38](#) *Martin*, *supra* note 35.

[39](#) *King*, 116 TC 198 (2001)

[40](#) *Peters*, *supra* note 33.

[41](#) Reg. 1.6015-3(c)(2)(v)

[42](#) *Id.* See also in *Re Hinckley*, 256 B.R. B14, 86 AFTR2d 2000-7198 (Bkrptcy. DC Fla. 2000) Where requesting spouse knew of the understatement, the knowledge requirement was not applied because she was able to establish prior domestic abuse and that she signed the return out of fear of reprisal from her abusive husband).

[43](#) Collier, TCM 2002-144 (Tax Court was unwilling to rely on the opinion of a friend of the requesting spouse when the opinion set forth by the friend was conclusory and lacking in any specificity as to the facts on which her conclusion was based.).

[44](#) Section 6015(c)(4)

[45](#) Sections 6015(c)(4)(A) and (B); Reg.1.6015-3(c)(3).

[46](#) Reg. 1.6015-3(c)(3)(iii)

[47](#) Reg. 1.6015-3(d)(1)(ii)

[48](#) Reg. 1.6015-3(d)(2)(i). See e.g., Gurr, supra note 19 (the requesting spouse was not entitled to relief from liability for a percentage of the understatement where the requesting spouse received a tax benefit from the losses claimed); Mora, 117 TC 279(2001) the requesting spouse was entitled to relief under Section 6015(c) but will be silocated some liability to the extent a portion of her income was offset by her husband's disqualified deduction).

[49](#) Section 6015(d)(3)(B).

[50](#) Section 6015(d)(3)(C)

[51](#) See the Preamble, supra note 5, noting that the IRS and Treasury declined in the final Regulations to create a distinction between fraud in Reg. 1.60159d)(2)(ii) and a fraudulent scheme in Reg. 1.6015-1(d) because they may overlap in some circumstances.

[52](#) Rev. Proc. 2003-61 also includes guidance applicable to relief under Section 66, relating to community income, issues arising under this section are beyond the scope of this article.

[53](#) See section 4.01 of both Rev. Proc. 2000-15 and Rev. Proc 2003-61. See also Reg. 1.6015-4(c), which specifically refers to Rev. Proc. 2000-15" or other guidance published by the Treasury and IRS" with respect to "the criteria to be used in determining whether it is inequitable to hold a requesting spouse jointly and severally liable under this section."

[54](#) Rev. Proc. 2000-15 included the following condition (as number 4), which was dropped in Rev. Proc. 2003-61: The liability remained unpaid, except when a requesting spouse was eligible to be considered for relief in the form of a refund of liabilities for (a) amounts paid after 7/2/98 and before 4/16/99, and (b) installment payments made after 7/22/98 pursuant to an installment entered into with the Service and with respect to which an individual was not in default, that were made after the claim for relief was requested.

[55](#) Rev. Proc. 2003-61, section 4.01(7)(c), apparently adapted from section 4.02(1)(b) of Rev. Proc. 2000-15, which was not one of the original threshold conditions: see the text accompanying note 56, infra.

[56](#) Corresponding generally with section 4.02 of Rev. Proc. 2000-15. See also the Conference Report, *supra* note 2. What sections 4.02 (2) of Rev. Proc. 2000-15 included as one of two limitation on relief-i.e., that relief is available only to the extent the unpaid liability is attributable to the nonrequesting spouse-has, in Rev. Proc. 2003-61, been transformed into a threshold condition with favorable exceptions: see note 55, *supra*. The remaining imitation is discussed in the text following note 57, *infra*.

[57](#) Both procedures provide that in determining economic hardship. IRS will apply the rules of Reg. 301, 6343-1(b)(4), and note that there can no longer be economic hardship after the requesting spouse is deceased (citing *Jonson*, *supra* note 11), This regulation is discussed in more detail in the text, below.

[58](#) Perhaps foreshadowing the changes made by Rev. Proc. 2003-61 (discussed in the text below), section 4.03(2)(b) of Rev. Proc. 2000-15 states that this is "an extremely strong factor weighing against relief," but that it nevertheless 'may be appropriate to grant relief...in limited circumstances where a requesting spouse knew or had reason to know that the liability would not be paid, and in very limited situations where the requesting spouse knew or had reason to know an item giving rise to a deficiency."

[59](#) See *Ferrarese*. TCM 2002-249 (the taxpayer did not receive a substantial benefit from the nonrequesting spouse's embezzlement; but see *Mitchell* *supra* note 36 (the taxpayer received a significant benefit from the portion of a retirement plan that was inaccurately excluded from reportable income on the couple's joint tax return).

[60](#) But see in re *Hinckley*, *supra* note 42 (the court considered the fact that during the tax years at issue, the couple actually had a lesser standard of living than in previous years).

[61](#) *Cheshire*, *supra* note 9 (the nonrequesting spouse used the unreported income to pay off the mortgage on their house and the requesting spouse received the home in the divorce settlement).

[62](#) *Mellan*, TCM 2002-280 (the nonrequesting spouse took a loss deduction, for work equipment damaged in a fire, a year after the loss should have been taken; the court found the taxpayer received a benefit from the spouse's acts even though the deduction taken involved the spouse's business; "Even though the casualty took place in the non-requesting spouse's work environment, the requesting spouse's had the benefit of the results of that work")

[63](#) *Penfield*, *supra* note 63.

[64](#) See *Collier*, *supra* note 43.

[65](#) *Washington*, 120 TC 137 (2003)

[66](#) *Penfield*, *supra* note 63.

[67](#) See *Mellen*, *supra* note 62.

[68](#) Ferrarese, supra note 59.

[69](#) August, TCM 2002-201.

[70](#) Washington, supra note 65.

[71](#) id. (while it is possible that the requesting spouse knew or had reason to know that the tax would not be paid, based on all of the other facts of the case there were compelling reasons to grant innocent spouse relief, notwithstanding the requesting spouse's knowledge).

[72](#) See Rev. Proc. 2003-61, section 4.03(2)(a)(iii), discussed in the text above. If the IRS and the courts put too much emphasis on knowledge in Section 6015(b) except in cases dealing with a liability from taxes shown on a return but not paid.

[73](#) August, supra note 69 (in addition to finding that the taxpayer had no reason to know the taxes would not be paid, the court also found that she would suffer economic hardship if she were made to pay the tax, as she was not earning a steady income, was living on government assistance, and her only asset was an old van). But see Meller supra note 62 (the requesting spouse had knowledge and did not prove she would suffer economic hardship). Compare Ferrarese, supra note 59 (relief granted where the taxpayer had knowledge but would have suffered economic hardship).

[74](#) See Collier, supra note 43 (despite a divorce agreement under which the nonrequesting spouse was to be fully liable for any tax liability that might arise, offered as evidence by the requesting spouse, the Tax Court still found the requesting spouse to be liable for the tax deficiency). See also in re Shafman, 267 B.R. 709, 88 AFTR2d 2001-6693(Bkrptcy. DC W.Va., 2001) (despite a divorce agreement stating the nonrequesting spouse was liable for all tax liabilities, (the requesting spouse still was liable to the IRS for the portion of the deficiency attributable to the requesting spouse).

[75](#) See Washington, supra note 65.

[76](#) id. See also the discussion in the text, above, of Rev. Proc. 2003-61, section 4.03(b)(2).

[77](#) See Section 6015(a) before and after its amendment in December 2000.

[78](#) See Ewing. 118 TC 494 (2002) (the absence of an asserted deficiency does not deprive the Tax Court of jurisdiction over the taxpayer's claim for equitable relief pursuant to Section 6015(f) Compare Bernal. 120 TC 102 (2003) (Tax Court may review a deficiency proceeding under Section 66(c), but not a denial of equitable relief under Section 66(c).

[79](#) Alt, 119 TC 306 (2002).

[80](#) See Rev. Proc. 2000-15, section 4.03(2)(b) Rev. Proc. 2003-61, section 4.03(2)(e)(iii)(B).

[81](#) Reg. 1.6015-8(a)

[82](#) See Flores, 88 AFTR2d 2001-7020 (Fed Cl. Ct., 2001); Brown, TCM 2002-187; Washington, supra note 65 (Section 6015 applies to the full amount of any preexisting tax liability for a particular tax year, if any of that liability remained unpaid as of the date of enactment).

[83](#) See Section 6015(g)(1); compare Section 6015(g)(1); compare Section 6015(g)(3) (no refund under Section 6015©)

[84](#) Since it is equitable relief, there is some sense of fairness in looking at the source of the funds, but there seems to be no reason why the refund should be limited to the time from which the request for innocent spouse relief is filed.

[85](#) See Chicago Milwaukee Corp., 40 F.3d 373, 74 AFTR2d 94-6830 (CA-F.C., 1994); Evans, 618 F. Supp. 621, 56 AFTR2d 85-5615 (DC Pa., 1985), aff'd sub. Nom. Colonial Tire Serv. of West Chester, Inc., 787 F.2d 581 (CA-3, 1986); Reg. 301.6402-2(b)(1).

[86](#) See Tascher, supra note 1.

[87](#) There are several versions of fraudulent transfer laws, including the common law, the Uniform Fraudulent Conveyance Act (UFCA), the Uniform Fraudulent Transfer Act (UFTA), and the provisions of the Bankruptcy Code that are generally based on the UFCA. Most states, at one time, adopted the UFCA, which has, for the most part, been superseded by the UFTA.

[88](#) See Miller, 115 TC 582 (2000) (IRS granted the requesting spouse relief under Section 6013(e), after which the nonrequesting spouse attempted to challenge the determination based on a divorce agreement where in both spouses agreed to be jointly liable for any tax deficiencies that may be found due; the court did not allow this challenge.)

[89](#) See Section 6015(h)(2) and Reg. 1.6015-6.

[90](#) See Major, 119 TC 267 (2002).

[91](#) See Mate Exemption Trust. TCM 2001-89.

[92](#) Rev. Rul. 2003-36, 2003-18 IRS 849. See, e.g., Jonson, supra note 11.

[93](#) id.

[94](#) In re Marriage of Hargrave, 38 Cal. App. 4th 1313 (2d Dist., 1995).

[95](#) See Rice, "Tax Tips: Standard Clauses and the Innocent Spouse," ABA Family Advocate, Vol. 18, No. 2 (Fall 1995). Whether the requesting spouse has agreed to be responsible is one of the factors the IRS applies in determining whether to grant innocent spouse relief.

[96](#) Estate of Ravetti, TCM 1989-45.

[97](#) Several state courts, including those in California, have not found it necessary to prohibit the IRS from looking to community property as a collection source. See Stolls, 86 AFTR2d 2000-5180 (DC Calif., 2000); Hegg v. IRS, 2B P.3d 1004 (Idaho, 2001).

[98](#) See the Preamble, supra note 5, citing Stolle, supra note 97, and Hegg, supra note 97.

[99](#) In re Fidelity Tube Corp., 278 F.2d 776, AFTR2d 1400 (CA-3 1960).