April 4, 2016

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Re: Comments on Relief From Joint and Several Liability

Dear Commissioner Koskinen:

Enclosed please find comments in response to a Notice of Proposed Rulemaking relating to relief from joint and several liability under section 6015 (“Comments”). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

CCs: William Wilkins, Chief Counsel, Internal Revenue Service
     Erik Corwin, Deputy Chief Counsel (Technical), Internal Revenue Service
     Drita Tonuzi, Associate Chief Counsel (Procedure & Administration), Internal Revenue Service
     Ashton Trice, Branch Chief, Office of Associate Chief Counsel (Procedure & Administration), Internal Revenue Service
     Nancy Rose, Senior Counsel, Office of Associate Chief Counsel (Procedure & Administration), Internal Revenue Service
These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by the Section’s Committee on Pro Bono and Tax Clinics (PBTCC) Chair, Andrew R. Roberson, and Vice Chair, Christine Speidel. Substantive contributions were made by Carlton Smith, Kathryn Sedo, Jamie Andree, Anna Tavis, and Jacquelyn Griffin. The Comments were reviewed by T. Keith Fogg, the Section’s Council Director for PBTCC; Julian Y. Kim, of the Section’s Committee on Government Submissions; and Peter Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact: Andrew R. Roberson  
aroberson@mwe.com  
(312) 984-2732

Date: April 4, 2016
DISCUSSION

These Comments are in response to a Notice of Proposed Rulemaking published in the Federal Register on November 20, 2015, regarding proposed regulations relating to relief from joint and several liability under section 6015 of the Internal Revenue Code. These Comments focus on the specific changes proposed in these proposed regulations, and do not express any view on any prior proposed regulations under section 6015 or other matters under section 6015.

RES JUDICATA

The Section commends the Treasury Department and the Service for providing additional guidance on the judicial doctrine of res judicata and the section 6015(g)(2) exception to res judicata when a requesting spouse did not meaningfully participate in a prior court proceeding. However, the Section believes that the Treasury Department and the Service should consider modifying the proposed regulations when they are finalized to reflect additional guidance provided by the courts and to ensure that taxpayers are not precluded from seeking relief from joint and several liability in certain situations.

The Tax Court has described res judicata as follows: “Under the doctrine of res judicata, when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to the action are bound by every matter that was or could have been offered and received to sustain or defeat the claim.”\(^1\) Section 6015(g)(2) provides an exception to the general res judicata rule by providing that the doctrine does not apply when a requesting spouse did not “meaningfully participate in a prior court proceeding.” In other words, res judicata under section 6015 applies “only if: (1) Such relief was an issue in the prior proceeding; or (2) the Court decides that the taxpayer participated meaningfully in the prior proceeding and could have raised relief under section 6015.”\(^2\) The proposed regulations address both when an issue could have been raised in a prior court proceeding and factors to be considered in determining whether the taxpayer participated meaningfully in such prior proceeding.

Whether Section 6015(c) Relief Was at Issue or Could Have Been Raised In A Prior Court Proceeding

We agree with proposed § 1.6015-1(e)(2) that if a requesting spouse requested relief generally under section 6015 in prior court proceeding without specifying under which subsection relief was being requested, and the requesting spouse was not eligible for relief under section 6015(c) (relating to taxpayers no longer married, or legally separated or no longer living together), then relief under section 6015(c) will not be considered to have been at issue in the prior proceeding. However, we are concerned that the proposed regulations could be read to mean that if a taxpayer who is not eligible for relief under section 6015(c) specifically pleads relief under that subsection in a prior proceeding, then he or she will be barred by res judicata from later seeking such relief when he or she becomes eligible. Our concerns are based on the Service’s interpretation of the eligibility prong of the inquiry and the potential differing treatment of taxpayers in the same, or substantially the same, position. We recommend that the

\(^1\) Diehl v. Commissioner, 134 T.C. 156, 160 (2010).
final regulations clarify this issue. An election of section 6015(c) relief made at a time the requesting spouse was not eligible for such relief should not trigger res judicata, because such relief was not available to that spouse and therefore was not substantively at issue in the prior proceeding.

Proposed § 1.6015-1(e)(2) addresses only the situation where a requesting spouse – ineligible for relief under section 6015(c) – makes a general request for relief under section 6015 without specifically requesting which subsection applies. Thus, it appears that under the proposed regulations in situations where all other facts are identical, a requesting spouse who specifically mentions section 6015(c) but is not eligible to make such election would be barred from later asserting such a claim while another requesting spouse who simply mentions only section 6015 would not be barred. This conflicts with the oft-enunciated principle, acknowledged by the Service, that similarly situated taxpayers should be treated the same.\(^3\) We recommend that the proposed regulations be revised to address this potentially disparate treatment. We suggest that final § 1.6015-1(e)(2) omit the requirement that relief under section 6015 have been only generally raised in the prior proceeding.

In addition, we are concerned that the proposed regulation fails to clarify the application of res judicata in situations where the threshold conditions for relief under section 6015(c) are met at some point during a prior deficiency proceeding but after the Tax Court petition was filed. This issue should be clarified both in final § 1.6015-1(e)(2) and also in final § 1.6015-1(e)(3). Section 6015(c)(3)(A) provides that a taxpayer is ineligible to elect relief under section 6015(c) unless: (1) “at the time such election is filed, [the requesting spouse] is no longer married to, or is legally separated from, [the nonrequesting spouse];” or (2) the requesting spouse “was not a member of the same household as [the nonrequesting spouse] during the 12-month period ending on the date such election is filed.” The statutory language directs that the eligibility requirement be analyzed at the time the election is made. The Tax Court has held that the time for electing relief under section 6015(c) is when the petition is filed.\(^4\)

Proposed § 1.6015-1(e)(2) states that the requesting spouse must not be eligible under section 6015(c) “during the prior proceeding,” which implies that if the requesting spouse were to meet one of the eligibility requirements of section 6015(c)(3)(A) prior to a final decision then res judicata might apply. Further, the preamble to the proposed regulations describes the Tax Court’s opinion in Diehl v. Commissioner as holding that relief will not be treated as being at issue in the prior proceeding if “the requesting spouse was not divorced, widowed, legally separated, or living apart for 12 months at any time during the prior proceeding.” This issue is not directly addressed or refuted in proposed § 1.6015-1(e)(3). Thus, it is unclear under the proposed regulations whether the Service is testing eligibility for relief at the time the petition was filed or at any point prior to the entry of a final decision.


\(^4\) Diehl, 134 T.C. at 165; Stergios v. Commissioner, T.C. Memo. 2009-15; see also Thurner v. Commissioner, 121 T.C. 43, 47 (2003) (“The record indicates that, at the time the petitions were filed in these cases, petitioners were not divorced or legally separated and that petitioners continued to live together. Therefore, petitioners would not qualify for relief from joint and several liability under section 6015(c).”) (emphasis added); Cheshire v. Commissioner, 282 F.3d 326, 335 (5th Cir. 2002) (“Appellant falls within the class of taxpayers permitted to make a § 6015(c) election since she and Mr. Cheshire were divorced when she filed her petition with the Tax Court.”) (emphasis added).
We suggest that the Treasury Department and the Service, in accordance with Tax Court precedent, clarify that a requesting spouse who was not eligible for relief at the time the petition was filed, but becomes eligible at some later point prior to entry of a final decision, is not barred under section 6015(g)(2) from later requesting relief under section 6015(c). The Tax Court has discretion under Rule 41 to grant a motion for leave to file an amended petition. Such motions are not automatically granted. Thus, it would defeat the purpose of the doctrine of res judicata and section 6015(g)(2) to bar a requesting spouse from seeking relief under section 6015(c) in these circumstances.

Whether A Requesting Spouse Participated Meaningfully In A Prior Court Proceeding

The Section supports the Treasury Department and the Service’s inclusion of a list of relevant factors in proposed § 1.6015-1(e)(3) to be considered in determining whether a requesting spouse participated meaningfully in a prior court proceeding. We agree that this is a facts and circumstances test and that the degree of importance of any particular factor depends on the specific situation. However, we do want to highlight some potential concerns with how some of the proposed factors may be applied.

The Signing of Court Documents

The proposed regulations state that the signing of court documents is a factor in determining whether the requesting spouse participated meaningfully in the prior court proceeding. While the Section does not disagree that the signing of documents may be a relevant factor, the type of document signed may impact the weight given to this factor. A requesting spouse may sign a petition, either because he or she was not represented by counsel, counsel prepared the petition but chose not to sign it, or the nonrequesting spouse prepared the petition. This act alone is not supportive of a requesting spouse having participated meaningfully in a prior court proceeding. The same holds true for a stipulated decision document that the requesting spouse merely signed without prior meaningful participation in the proceeding. The Section believes that the more pertinent inquiry is whether the requesting spouse drafted (or assisted in drafting) or negotiated the document. We therefore recommend that the final regulations indicate that the mere signing of documents does not give rise to an inference of having participated meaningfully. The Section’s proposal is consistent with Example 5 under proposed § 1.6015-1(e)(4), which indicates that an unrepresented requesting spouse does not meaningfully participate simply by signing a petition.

The Ability to Effectively Contest Liability

The Section also is concerned with the intent, reflected in the proposed regulations, to overrule part of the Tax Court’s holding in Harbin v. Commissioner. In Harbin, the Tax Court looked at the level of control exercised by the nonrequesting spouse in the prior court proceeding over the items for which the requesting spouse was currently seeking relief. In the preamble to

---

6 137 T.C. 93 (2011).
the proposed regulations, the Service states that the Tax Court applied the incorrect standard in _Harbin_ and that the purpose of the meaningful participation standard is not to ensure that a taxpayer had the opportunity to contest the deficiency but rather to ensure that the taxpayer could have raised relief under section 6015.

Whether one spouse is precluded by the other from contesting the underlying deficiency in a prior court proceeding is but one of several factors that can, and should, be considered in determining whether res judicata applies. The importance of this factor may vary depending on the circumstances, and should at least be considered as part of the meaningfully participated analysis. Section 6015(g)(2) itself is a limitation on the application of the doctrine of res judicata, and Congress’s intent to not preclude taxpayers from seeking relief in situations where the doctrine would otherwise apply supports consideration of whether a requesting spouse was precluded by the nonrequesting spouse from seeking relief in determining whether the requesting spouse meaningfully participated in the prior proceeding. We therefore suggest that proposed § 1.6015-1(e)(3)(iii) be revised to permit consideration of this factor.

The preamble to the proposed regulations does not mention other parts of the Tax Court’s holding in _Harbin_, namely, that a conflict of interest by an attorney representing both parties in the prior court proceeding can obscure and obstruct a taxpayer’s ability to raise a claim for relief under section 6015. Conflicts of interest, and their impact on a taxpayer’s ability to raise a claim for relief, can be a serious issue as reflected by the facts in _Harbin_. We recommend that the Treasury Department and the Service incorporate the Tax Court’s holding on this point in any final regulations.

**Examples**

Examples in regulations can be very helpful to taxpayers and their advisors. However, we are concerned that the examples in the proposed regulations may be viewed as providing bright-line rules. As the preamble and the proposed regulations acknowledge, the determination of whether a taxpayer meaningfully participated in a prior court proceeding is a facts and circumstances test and the weight to be given to such factors may differ depending on the taxpayer’s specific situation. We suggest that the examples be revised to reflect that the conclusion in each example is illustrative only and may not apply to a seemingly similar situation where there are additional relevant facts that are not part of the example.

**Lack of Jurisdiction to Raise Section 6015 Relief in a Tax Collection Suit under Sections 7402 or 7403**

The Department of Justice has successfully argued in several cases that federal courts lack jurisdiction to consider relief under section 6015 as a defense in a tax collection suit under section 7402 or section 7403. The Service and the Tax Court have taken the opposite view, leaving taxpayers in an impossible position. The proposed regulations are silent on whether, as a result of a prior suit under section 7402 or section 7403, a requesting spouse is barred by res judicata from raising relief under section 6015 in a later proceeding in the Tax Court.
As the National Taxpayer Advocate ("NTA") has repeatedly noted to Congress when she has sought a statutory clarification on this jurisdiction issue, the district courts have almost uniformly held, except in the case of tax refund suits, that they lack jurisdiction to consider section 6015 relief. Bankruptcy courts have also held that they lack jurisdiction to rule on section 6015 relief.

The Service has successfully argued in the Tax Court that taxpayers could raise section 6015 relief as a defense in a suit brought by the government to collect taxes. For example, in Thurner v. Commissioner, the Service argued, and the Tax Court agreed, that the taxpayer was barred by res judicata from raising section 6015 relief in the Tax Court because he could have raised it in a prior district court collection suit.

In light of the federal court decisions holding that section 6015 is not available as a defense to a collection suit under section 7402 or section 7403, the proposed regulations should clarify that such prior proceedings cannot form the basis of res judicata.

The doctrine of res judicata is predicated on the ability to raise a defense in an earlier action. If a court in the earlier action lacks jurisdiction to consider a section 6015 defense, it follows that the requesting spouse was not able to raise the defense in the earlier action. The Section respectfully requests that the Treasury Department and the Service add a sentence to that effect to clarify that res judicata does not apply in a later Tax Court proceeding in this situation.

**RELIEF FROM LIABILITY UNDER SECTION 6015(b)**

The proposed regulations discuss some of the factors listed in the current regulations and the most recent revenue procedure under section 6015(f) related to whether it is inequitable to hold a taxpayer liable under this subsection. Under the proposed regulations, subsections (c) and (d) of Treas. Reg. § 1.6015-2 are moved to new subsections (b) and (c), respectively, and they are modified to reflect some of the content of Rev. Proc. 2013-34 (2013-2 C.B. 397) not previously included in the regulations. We support the substantive changes to the knowledge factor in proposed Treas. Reg. § 1.6015-2(b). However, the Section believes that dividing the equity factors between the regulations and revenue procedure is potentially confusing. The Treasury Department and the Service may want to consider whether some of what is in the disputes...
regulations at proposed Treas. Reg. § 1.6015-2(c) should be removed and placed in an update of the revenue procedure.

DEFINITIONS

The proposed regulations add paragraphs (h)(6), (7), and (8) to § 1.6015-1. These additions clarify the definitions of underpayment, understatement, and deficiency applicable to the three forms of relief under section 6015. The Section supports these additions.

The Section in particular supports the proposed definition of abuse at § 1.6015-1(o). This proposed definition properly recognizes the multi-faceted nature of domestic abuse and the variety of ways in which abusers exert control over their partners. The definition appropriately allows for flexibility in considering the circumstances of each requesting spouse.

REFUNDS

The Section has concerns with proposed § 1.6015-1(k)(3) and its interpretation of section 6015(f)(2), which provides that equitable relief is only available to a taxpayer if “relief is not available to such individual under subsection (b) or (c).” The interpretation reflected in the proposed regulations of “relief . . . under subsection. . . (c)” includes situations where no practical relief is in fact available to the requesting spouse because the liability has been fully paid. To say that an individual has obtained full relief by being relieved of a fully-paid tax liability is paradoxical. The result is contrary to the clear intent of the statute.

The regulations should reflect an interpretation of section 6015(f)(2) that is consistent with statutory intent. The Section believes that if a deficiency has been fully paid, relief is not available to the taxpayer under section 6015(c) for purposes of section 6015(f)(2). Therefore, when a tax has been fully paid and relief is not available under section 6015(c) then an individual should still be able to request relief under section 6015(f). This interpretation does not circumvent the no-refund provision of section 6015(c), first because taxpayers with a balance due would not be eligible for equitable relief even if the criteria of section 6015(c) were met, and second because relief under section 6015(f) requires proof of an additional factor not present in section 6015(c): equity.

The addition of proposed § 1.6015-1(k)(4) is helpful, stating that the filing of Form 8857, Request for Innocent Spouse Relief, will generally be considered a claim for refund even if a refund is not specifically requested. The Section supports this addition. It is reasonable to assume that taxpayers desire to pay no more than the correct amount of tax, and that a requesting spouse would like a refund if it is available to him or her. Individuals who fail to check the box on Form 8857 to request a refund should not be barred from seeking a refund at a later date. It seems likely to us that those individuals probably overlooked the question or did not understand it. We support the proposal to treat the filing of any Form 8857 as a claim for refund.
ALL INNOCENT SPOUSE EQUITY FACTORS SHOULD BE FOUND IN ONE PLACE

The equity factors under section 6015(f) are now divided between Rev. Proc. 2013-34 (2013-2 C.B. 397) and the proposed regulations. This makes it unnecessarily complicated for tax practitioners and unrepresented taxpayers who are trying to determine eligibility for relief. The Section recommends that the Service consider placing all equitable factors that it considers in making an innocent spouse determination in one place. The Section would therefore recommend taking the equitable factors out of the proposed regulations and placing all the relevant equitable factors in a revenue procedure.