Innocent Spouse Litigation After the Taxpayer First Act

Pro Bono & Tax Clinics Committee

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Speakers

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Today’s Agenda

• Standard and scope of judicial review in administrative law
• Section 6015(e) as amended by the Taxpayer First Act
• Challenges, concerns, and strategies
  – Establishing the administrative record
  – Supplementing the administrative record
  – Participation by the non-requesting spouse
  – Moving forward: practice tips
STANDARD AND SCOPE OF REVIEW
Standard of Review vs. Scope of Review

Standard of Review: How Much Deference?
• De novo: Was Decision Right? Substituted Judgment.
• Abuse of discretion: Was Decision Reasonable?

Scope of Review: What is the Information Set?
• De novo record: New information not before the agency
• Administrative record: Only information before the agency
Background: Standard and Scope of Review


• In most cases where the court’s **standard** of review is de novo, the court’s **scope** of review is also de novo

• In most cases where the court’s **standard** of review is abuse of discretion, the court’s **scope** of review is the administrative record
Standard of Review vs. Scope of Review

**Standard of Review**
- De novo
- Abuse of discretion

**Scope of Review**
- De novo
- Limited to the administrative record
Complications

• Tax Court exceptionalism
• Mixed questions of law and fact
• The oddness of CDP review
• Fuzzy boundaries
  – de novo standard of review vs. abuse of discretion standard of review
  – de novo record vs. administrative record

See Bryan Camp, *Lesson From The Tax Court: The Scope And Standard Of Review In CDP Cases*
Standard and Scope of Review

• The U.S. Tax Court’s jurisdiction is established by Congress
• Spousal relief can arise in three types of Tax Court cases
  – Deficiency redetermination cases: section 6213
  – CDP cases: section 6330(d)(1)
  – Standalone innocent spouse cases: section 6015(e)
Two Tickets to Tax Court: 6015 Claims in CDP

• *Francel v. Commissioner*, T.C. Memo. 2019-35 (4/10/19)
• Depending on the procedural history of the case, a taxpayer may have two independent bases for Tax Court jurisdiction
• Consider which standard and scope of review is more favorable to your case
  – From the viewpoint of a requesting spouse, section 6015(e) generally provides a friendlier standard & scope of review than section 6330(d)(1)
6015 Claims in Deficiency Cases

- The Tax Court’s section 6213 jurisdiction to “redetermine” a deficiency allows the court to determine a requesting spouse’s eligibility for spousal relief under section 6015, if raised as an affirmative defense to the deficiency.

- Do the TFA amendments to section 6015(e) affect the Court’s scope of review in deficiency cases where spousal relief is asserted?
SECTION 6015(e) AMENDED BY THE TAXPAYER FIRST ACT
New IRC 6015(e)(7):

STANDARD AND SCOPE OF REVIEW.—Any review of a determination made under this section shall be reviewed de novo by the Tax Court and shall be based upon—

(A) the administrative record established at the time of the determination, and

(B) any additional newly discovered or previously unavailable evidence.

Public Law No. 116-25, sec. 1203
**Similar Standards: FOIA**

**1986 FOIA Amendments:** 5 U.S.C. 552(a)(4)(A)(vii): De novo court review limited to the “record before the agency.” The “record before the agency” includes:
- initial FOIA request and agency response;
- subsequent materials related to administrative appeal;
- prior FOIA requests (and administrative proceedings) if relevant to current dispute;

*Jarvik v. CIA*, 495 F.Supp.2d 67 (DDC.2007)

*Larson v. CIA*, 843 F.2d 1481 (DC Cir. 1988)
Initial Reactions to 6015(e)(7) in Pending Cases

• “The amendments made by this section shall apply to petitions or requests filed or pending on or after the date of the enactment of this Act.” [7/1/19]

• Several judges issued orders asking the parties to address how the TFA applied to their cases. E.g. Robinson v. Comm’r, Docket No. 12498-16, Order (Aug. 6, 2019)
  – Tried in February 2018
  – The full administrative record was not offered in evidence
Judicial Orders in Pretrial Cases

• Judges Thornton and Marvel have issued detailed orders in the months before calendar call
  – Yerushalmi v. Comm’r, Docket No. 5520-08
  – Iussa v. Comm’r, Docket No. 24775-18 (continuance subsequently granted)

• Parties are to identify the administrative record and any disputes as to its contents, and

• Whether any additional evidence will be offered
Initial Opinions

• Two opinions have been issued where the Court found that the Taxpayer First Act did not require a new trial
  – *Kruja v. Commissioner, T.C. Memo 2019-136* (trial evidence merely cumulative)
  – *Sleeth v. Commissioner, T.C. Memo 2019-138* (record stipulated and trial testimony not available in the administrative record)

*See* Keith Fogg, *First Tax Court Opinions Mentioning Section 6015(e)(7)*
CHALLENGES, CONCERNS, AND STRATEGIES
What is the Administrative Record?

• What is “the administrative record established at the time of the determination”?
  – IRS looks to CDP for guidance: Reg. § 301.6330-1(f)(2) Q&A-F4

• What happens if there is no determination when the petition is filed?
  – E.g. if the case is filed 6 months after the request is made under section 6015(e)(1)(A)(i)(II)
Identifying Administrative Record Disputes

• The *Branerton* process (and discovery if appropriate) could be used proactively to identify disputes over the administrative record

• Pretrial orders may be helpful (e.g. Yerushalmi, Iussa)
Resolving Administrative Record Disputes

• If there is a disagreement regarding the items in the administrative record, how should it be resolved?
  – Filings in response to pretrial orders (Yerushalmi/Iussa)
  – Motions in limine
  – Pretrial hearings
  – Supplemental hearings with IRS Appeals?
    • See Carlton Smith, Should the Tax Court Allow Remands in Light of the Taxpayer First Act Innocent Spouse Provisions?
When can the Administrative Record be supplemented at trial?

• “Newly discovered or previously unavailable evidence” may be admitted under section 6015(e)(7)(B)

• There are also established exceptions within the administrative record rule
  – See Kaspar v. Commissioner, 150 T.C. No. 2 (citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989))
  – Circuit court precedent will be important
When can the Administrative Record be supplemented?

• In the D.C. Circuit:
  – when agency action is not adequately explained in the record;
  – when the agency failed to consider relevant factors;
  – when the agency considered evidence which it failed to include in the record;
  – when a case is so complex that a court needs more evidence to enable it to understand the issues clearly;
  – where there is evidence that arose after the agency action showing whether the decision was correct or not; and
  – where the agency’s failure to take action is under review.

Non-Requesting Spouses

• The non-requesting spouse (NRS) may intervene if a requesting spouse (RS) appeals an administrative denial to the Tax Court. The NRS has party status. IRC § 6015(e)(4).

• How will an NRS intervenor be able to participate in TC, if they did not participate during the administrative phase of the case?
• Will the TFA result in a greater presence of the non-requesting spouse at the administrative level?
• If so, will this have a chilling effect on requests for innocent spouse relief?
Best Practices: Building an Administrative Record

• During the administrative process, build the record for a potential appeal
  – Documentation of every phone call with IRS
  – Organization of evidence; exhibit lists
  – Legal arguments?
  – Witness testimony
• Demand disclosure and/or cross-examination of adverse witnesses?
• Should Appeals conferences be recorded?