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Three at Bats Against Joint and Several Tax Liability: (1) Innocent Spouse (2) The Election to Limit Liability and (3) Equitable Relief:

The Treasury and Courts Begin to Interpret IRC 6015 after Enactment of the IRS Restructuring and Reform Act of 1998

by
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I. Introduction

The IRS Reform and Restructuring Act of 1998 enacted new separate liability and revamped innocent spouse rules.[1] This article will discuss the more recent and significant developments relating to these provisions including issuance by IRS of Proposed Regulations, a Revenue Procedure dealing with equitable relief and some interesting and important Tax Court decisions.[2]

II. Historical Reference

Before the changes discussed below, each spouse was potentially liable for the full amount of the tax or any deficiency in tax, penalties or interest; and, one spouse could not insist that the IRS first collect the tax or deficiency against the other. The existing relief provision contained in IRC Section 6013 (e), the so-

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1 Internal Revenue Code Section 6015 became law on July 22, 1998. To be distinguished from "injured spouse" claim arising when the IRS offsets a refund due on a joint tax return to collect tax owed by one of the spouses. An injured spouse may seek relief by filing Form 8379, Injured Spouse Claim and Allocation.

2 For a discussion of the Act see, Robert S. Steinberg. *Domestic Relations Provisions of the IRS Restructuring and Reform Act of 1998*, 72 FLA. B.J. 41 (Dec. 1998).

called "innocent spouse" rule, was difficult to satisfy with both factual, dollar limitation and percentage-of-income tests to overcome.[3] Not surprisingly, rarely did courts find people qualified as innocent spouses. There was thus no open avenue to relief from joint and several liability.

III. Election to Limit Liability

New IRC Section 6015 (c) offers an election which, if properly effectuated, limits one spouse's tax liability to that portion of the tax deficiency attributable to his or her own erroneous items on a joint return and excludes those attributable to his or her spouse. The election applies to tax liabilities arising after the date of enactment as well as to any liability arising on or before the date of enactment that remains unpaid on the date of enactment. The two year election period will not expire before two years after the first qualifying collection activity taken by the IRS after the date of enactment.[4] Generally, the items allocated to a spouse are those that would have been allocated to that spouse on a married filing separate return.

A. *Who May Elect to Limit Liability*

Marital status is the linchpin. The election is available to one who has filed a joint return; and, at the time the election is filed, with regard to the other spouse, is either: (a) no longer married, (b) legally separated, or (c) not a member of the same household with the other spouse at any time during the 12-month period immediately preceding the election.

B. *Not All Taxes Subject to Relief*

Relief from joint and several liability applies only to those taxes imposed by Subtitle A of the Internal Revenue Code.[5] These include federal income and self-employment taxes includ-

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3 For a complete discussion of the old rules see, Frumkes and Steinberg, *Florida Divorce Tax Made Easy*, Professional Education Seminars, Inc., January 26, 1993, page II -25 et. seq.

4 Conference Committee Report (H.R. Conf. Rep. No. 105-599).

5 Unless otherwise indicated references to The Code or section number are to Internal Revenue Code of 1986, as amended (26 USC).

ing penalties, additions to tax and interest levied on such taxes.[6] Not eligible for the election are employment taxes on household employees although such taxes are reported on Form 1040.[7] Unpaid household employment taxes can accumulate over the years. For example, assume a couple have been married for ten years and have employed a live in housekeeper, paying her $150 per week. Assume that the combined Social Security and Medicare tax rate was 7.65 percent for the entire period and that the maximum wage base exceeded the housekeeper's annual compensation of $7,800 throughout the period. The annual combined employer and employee tax (7.65% x 2) would amount to $1,193. The liability for ten years would amount to $11,930 exclusive of penalties and interest.

Section 6015 will not protect a spouse who is liable to creditors of the transferor, including the IRS, under state law rules of transferee liability.[8] The IRS likely will not resort to state debtor-creditor laws because built into Section 6015 are rules that parrot some of the fraudulent transfer protections. For example, The IRS must find it is inequitable to hold the innocent spouse jointly liable,[9] a spouse's proportionate liability is increased by certain asset transfers to avoid tax[10] and the commissioner may reorder the deficiency allocation rules because of the fraud of one or both of the spouses.[11]

C. *Revised and Somewhat Liberalized Innocent Spouse Rule*

Old IRC Section 6013 (e) was repealed and replaced with new subsection 6015 (b). The effective date is the same as for IRC Section 6015 (c), the separate liability election. This escape hatch has more difficult qualification rules than those for the section 6015 (c) election but will be available to those still married at the time of collection activity, not legally separated and not living apart for the 12 month period immediately preceding the initial IRS collection activity. The new requirements for inno-

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6 Prop. Treas. Reg. § 1.6015-1(a), 66 Fed. Reg. 3888-01, 2001 WL 37398 (Fed. Reg.); and, Commissioner's explanation of Proposed Regulations at p. 3.

7 Prop. Treas. Reg. § 1.6015-1(a)(3).

8 Prop. Treas. Reg. § 1.6015-1(h)(1). *See also* Code Section 6901.

9 Section 6015(b)(1)(D).

10 Section 6015(c)(4).

11 Section 6015(d)(3)(C).

cent spouse treatment are: (a) a joint return has been filed; (b) there is understatement of tax attributable to erroneous items in the return; (c) the "innocent spouse" establishes that, at the time of signing the return, he or she did not know and had no reason to know that there was an understatement; (d) taking into account all of the facts and circumstances, it is inequitable to hold the "innocent spouse" liable for the deficiency in tax; and, (e) the "innocent spouse" elects, on a Form 8857, the benefits of section 6015 (b).

D. *Equitable Relief*

A spouse who is neither eligible for the limited liability election under Section 6015(c) nor for the status of innocent spouse under Section 6015(b) may under the new law petition the IRS for equitable relief. In such circumstances the IRS under Section 6015(f) is given discretion to determine that it is nonetheless inequitable, under all of the facts and circumstances, to hold the spouse liable for all or a part of the deficiency. If such a finding is made, the person is relieved from liability. Equitable relief may be appropriate, for example, where funds earmarked for the payment of a joint return tax liability are instead misappropriated to another non-marital purpose by the non-electing spouse. The conditions for meeting the IRS criteria for equitable relief are discussed in greater detail below.

E. *IRS Consideration of Election*

An election of relief under sections 6015(b) (innocent spouse relief) and 6015(c) (separate liability) will automatically be considered by the IRS as an application for equitable relief under Section 6015(f).[12] Contrastingly, since an application under Section 6015(f) alone must establish that the petitioning spouse does not qualify for relief under Sections 6015(b) or (c), the IRS ostensibly will not consider the application for relief under the later two provisions. Therefore, a spouse filing for relief should elect relief under all three provisions. This may be accomplished by filing a single Form 8857[13].

12 Rev. Proc. 2000-15, 2000-5 I.R.B. 447, Sec. 5 (2000).

13 Prop. Treas. Reg. § 1-6015-1(a)(2).

F. *The Early Bird Gets Wormed*

Generally, the election must be made within two years after the start of the first IRS collection activity after July 22, 1998, against the spouse who seeks to invoke the election. Collection activity means action by the collection division such as by an administrative levy or seizure under Section 6331 to obtain property of the electing spouse or an offset of an overpayment of the electing spouse against a liability for past due support.[14]

The hubbub over whether one should file protective elections is now moot. The IRS had been deluged with an overwhelming number of prophylactic elections. Most of these were filed following the final judgement in a divorce cases because Section 6015 (c)(3)(B), as enacted, delineated the outer time limit for making an electing but said nothing about how early the election might be made. Administratively, the IRS was ill prepared for the onslaught of attempted elections and asked Congress for assistance. An amendment, effective December 21, 2000, provides that a spouse, at the earliest, may file for relief only after a deficiency is asserted.[15]

That one may file early, however, does not necessarily mean that one always should file immediately after a deficiency is asserted. Generally, a spouse gets only one bite at the apple under Sections 6015(b) and (f). And, while Section 6015(g)(2) allows the filing of a second election for the same year under 6015(c),[16] it will not necessarily rescue a spouse whose case is docketed in the Tax Court. For example, a spouse who filed for relief under section 6015(c) and who had petitioned the Tax Court while still married, was not permitted to withdraw and re-file her election without prejudice.[17] She had filed her divorce action 12 days before filing her post-trial brief with the Tax Court and could not show that she was legally separated or living apart for a 12 month period. Thus, to be entirely safe make sure your client is divorced, legally separated or living apart for 12 months before filing for relief under Section 6015(c).[18]

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14 Section 6402(c).

15 As enacted by Community Renewal Tax Relief Act, HR 5662, Section 313(a) signed by President Bush on December 21, 2000.

16 *See also* Prop. Treas. Reg. § 1.6015-1(g)(5).

17 *See* Michael Vetrano, 116 T.C. 272 (2001).

18 Section 6015(c)(3)(A).

G. *"Knowledge or Reason to Know" Under Section 6015(b)*

Under Section 6015(b) the spouse seeking relief must prove that he or she did not know or have reason to know of the item causing the deficiency.[19] The proposed regulations provide that in determining whether a spouse had reason to know, the IRS should consider all of the facts and circumstances, including:

1. The nature of the erroneous item.
2. The amount relative to other items in the return.
3. The couple's financial situation.
4. The educational and business experiences of requesting spouse.
5. The extent of the requesting spouse's participation in the activity from which the erroneous item stems.
6. Whether the requesting spouse failed to inquire when a reasonable person would have questioned the erroneous item.
7. Whether the erroneous items represented a departure from a previous pattern of reporting.[20]

H. *"Not Members of the Same Household" Under Section 6015(c)*

In determining whether a couple has been living apart for 12 months the IRS will ignore temporary absences where 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.[21] Temporary absences include time in jail, hospital stays, business and vacation travel, military service or education away from home.[22] Some have questioned the appropriateness of including incarcerations and hospitalizations in the category of temporary absences.[23]

I. *"Actual Knowledge" Under Section 6015(c)*

The election to limit liability does not apply to any portion of a deficiency about which the electing spouse had actual knowledge at the time of signing the joint return.[24]

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[19] Section 6015(b)(1)(C) and Prop. Treas. Reg. § 1.6015-2(c).

[20] Prop. Treas. Reg. § 1.6015-2(c).

[21] Prop. Treas. Reg. § 1.6015-3(b)(3).

[22] *See supra* note 13.

[23] *See* Marjorie A. O'Connell, *Proposed Regulation Restricts Availability of Joint and Several Liability Relief*, Divorce Taxation, Bulletin 51 (Mar. 30, 2001).

[24] Section 6015(c)(3)(C).

In *Kathryn Cheshire*[25] the Tax Court defined actual knowledge as being, "an actual and clear awareness (as opposed to a reason to know) of the existence of an *item* which gives rise to the deficiency (or a portion thereof)."[26] The Court held that Mrs. Cheshire, aware that her husband had received and deposited an IRA distribution, possessed actual knowledge even though she had been mislead into believing that the distribution was not taxable. According to the court, knowledge of the item, not its incorrect tax treatment, is the touchstone.[27] The U.S. Court of Appeals for the Fifth Circuit has recently affirmed the Tax Court's decision in Cheshire.[28] The Fifth Circuit agreed with the Tax Court that Mrs. Cheshire had "actual knowledge" at the time she signed the return of the item *giving rise* to the deficiency, namely her husband's unreported pension distribution. A trial court's determination on whether the commissioner has satisfied his burden of proof regarding the presence of actual knowledge is a factual issue that will not be reversed on appeal unless it is clearly erroneous.[29]

The court stated "the plain meaning of § 6015 (c)(3)(C) suggests that a spouse with actual knowledge of the income-producing transaction cannot receive innocent spouse relief even if he or she lacks knowledge of the incorrect tax reporting of that transaction. This reading of the plain meaning of § 6015 (c) (3) (C) is compelling in light of the general principle that ignorance of the law is not a defense."[30] The proposed regulations follow *Cheshire* in providing that the IRS must prove only that a spouse had knowledge of the item and need not establish that the spouse actually was aware of adverse tax treatment.[31]

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25 115 T.C. 183 (2000).

26 Cheshire, *supra*. p 190 (emphasis added).

27 The court's interpretation comports with literal language of Section 6015(c)(3)(C) although the legislative history states to the contrary "if the IRS proves that the electing spouse had actual knowledge that an item on a return is incorrect, the election will not apply" H CONF. REPT. No. 105-599 at 253 (1998); *see* S. REP. No. 105-174 at 70 (1998).

28 Cheshire v. Commissioner, 282 F.3d 326 (5th Cir. 2002).

29 *Id.* at 332, citing Reser v. Comm'r, 112 F.3rd 1258, 1262 (5th Cir. 1997).

30 *Id.* at 334-35.

31 Prop. Treas. Reg. § 1.6015-3(c)(2).

The IRS has the burden of proving actual knowledge by a preponderance of the evidence.[32] Here the path to liberation from liability grows murky. For in determining whether "actual knowledge" is present, the Tax Court has entertained circumstantial evidence similar to the factual indicators used in determining whether a reasonably prudent person is deemed to have had "reason to know." For example, in *Michael Culver*[33] the court upheld an election under Section 6015(c) with regard to embezzlement income. The court based its holding in part on findings that the embezzlement had been hidden from the guilty spouse's employer, the family expenses were not out of line with reported income, and the electing spouse did not encourage the crime and suffered greatly when it was discovered.[34] Scrutinizing family expenses seems more appropriate to Section 6015(b) elections that require a finding that the electing spouse had no knowledge or reason to know[35] and that it would be inequitable to hold the electing spouse liable.[36] Congress intended Section 6015(c) as a no fault election. Utilizing indirect proof to establish actual knowledge would seem to erode the intent of 6015(c) and reduce to a matter of degree the difference between "actual knowledge" and "reason to know."

The Proposed Regulations do not go as far as *Culver* in examining circumstantial evidence to ascertain the presence or absence or actual knowledge. The Regulations provide that "knowledge may not be inferred when the requesting spouse merely had reason to know of the erroneous item."[37] Thus, a wife is not disqualified because she knows that her husband is a habitual gambler and that he keeps a separate bank account when she does not know of his actual winnings or losses.[38]

The regulations go on to state that all of the facts and circumstances will be considered in determining whether a spouse had actual knowledge. Unlike the regulations dealing with "reason to know" under 6015(b), the regulations here give few exam-

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[32] Michael Culver, 116 T.C. 189 (2001).

[33] *Id.*

[34] *See supra* note 21.

[35] Section 6015(b)(1)(B).

[36] Section 6015(b)(1)(D).

[37] Note the use of the word "requesting" instead of "electing."

[38] Prop. Treas. Reg. § 1.6015-3(c)(4), Example 2.

ples of the factors to be considered other than the obvious "whether the requesting spouse made a deliberate effort to avoid learning about the item."[39] The regulations further provide that joint ownership of property giving rise to the erroneous item will be deemed a factor favoring actual knowledge.[40] Joint ownership by itself would seem a spurious connector to "actual knowledge" but should certainly be considered as one factor in a "reason to know" inquiry. Ultimately, courts will determine whether any evidence apart from direct evidence of actual knowledge, such as an admission, will be admissible towards determining eligibility under Section 6015(c).

Counsel as a protective measure should consider a stipulation in the Martial Settlement Agreement or finding of fact in the proposed Final Judgement that a passive spouse, at the time of filing returns, possessed no actual knowledge of the active spouse's business income or deductions.

J. *Tax Court Review*

The Tax Court obtains jurisdiction to review an election under Section 6015 in two ways. Either a spouse raises the claim as an affirmative defense in a petition for re-determination of the entire deficiency for the year in question[41]; or, a spouse files a separate stand alone petition with regard to the 6015 claim.[42] An electing spouse may seek review by the Tax Court of an election under either Section 6015(c) or (b) or a request for equitable relief under Section 6015(f).[43]

K. *Notice to Non-Electing Spouse*

The IRS must serve the non-electing spouse with a notice of the pending proceedings in Tax Court[44] that such spouse may have an opportunity to participate in the proceedings. It matters not whether the petition is of the stand-alone variety or the claim

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39 Prop. Treas. Reg. § 1.6015-3(c)(2)(iii).

40 *Supra*, note 37.

41 Section 6213(a).

42 Section 6015(e).

43 *See* Kathy A. King, 115 T.C. 118 (2000); Diane Fernandez, 114 T.C. 324 (2000), acq. 2000-23 IRB; Thomas Corson, 114 T.C. 354 (2000).

44 The non-electing spouse can also participate in IRS appeals division review following the filing of a 6015(e) petition filed by the electing spouse.

arose by way of affirmative defense.[45] This right to participate in the proceeding may become another opportunity for an angry spouse to perpetuate the divorce litigation in another forum. Judge Paige L. Marvel of the United States Tax Court suggested that possibility in a presentation to the ABA, Section of Taxation, Domestic Relations Subcommittee. Judge Marvel admonished lawyers to avoid extraneous accusations that aggravate already heightened emotions.[46] Interestingly enough in the Tax Court case *Culver*[47] it was the wife's testimony about her own embezzlement that helped establish that her husband, who was the electing spouse, had no "actual knowledge." Such unselfish honestly, however, cannot be counted upon in matrimonial matters.

At least the Tax Court has considered the necessity of protecting the electing spouse in cases where spousal abuse is indicated.[48] The IRS is also sensitized to the problem of domestic abuse and has suggested that a spouse who fears filing of a 6015 claim may lead to retaliation should write "Potential Domestic Abuse Case" at the top of Form 8857. This is supposed to alert the IRS to protect sensitive information such as the electing spouse's whereabouts. It remains to be seen how effectively this procedure will work. In appropriate cases consider using the lawyer's address and telephone number on Form 8857.

One suggested solution is to insist that the spouses in the Marital Settlement Agreement waive the right to intervene. The statute is silent on whether a spouse may waive the right to intervene at the administrative level and in the Tax Court. State courts, however, have enforced agreements between the spouses to file jointly.[49] Thus, one would think that similar agreements to waive a right of intervention would be upheld. On the other hand, state courts have not generally required spouses to file

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45 *See* Hale Exemption Trust, 81 T.C.M. (CCH) 1507 (2001).

46 Minutes, Domestic Relations Subcommittee Section of Taxation, Paige L. Marvel, "The Perils of Paul and Pauline-Litigating Divorce Cases in the US Tax Court, Judge's Perspective."

47 116 T.C. 189 (2001).

48 Comments, Chief Judge Wells, U.S. Tax Court, to ABA Section of Taxation Meeting on May 11, 2001.

49 *See* Melvyn B. Frumkes. DIVORCE TAXATION HANDBOOK, *supra.* at p. 170 citing Johansen v. Johansen*,* 365 N.W. 859 (S.D. 1985).

jointly[50] and would likely not attempt to proscribe a spouse from intervening before the IRS or in the Tax Court. Even were a state court to issue such an order, the Tax Court might not give it full faith and credit. The state court could enforce its violation with contempt sanctions but that would not diminish divorce confrontation. Thus, the answer awaits experience.

L. *Application for Equitable Relief:*

The IRS has issued Rev. Proc. 2000-15[51] to provide guidance for those seeking equitable relief under Section 6015(f).[52] The Revenue Procedure lists three sets of criteria for those seeking equitable relief from the IRS. The first part lists seven threshold requirements that must be met before the IRS will consider an application for equitable relief. The second part enumerates the conditions, which, if present, ordinarily will result in the IRS granting relief. Lastly, the Revenue Procedure enumerates some positive and negative factors that the IRS will consider in all equitable relief applications when the ordinary conditions for granting relief are not satisfied.

IV. Threshold Requirements for Equitable Relief Consideration by IRS

Section 4 of the Revenue Procedure enumerates seven preliminary hurdles that must be overcome before the IRS will consider an application for equitable relief:

1. The individual filed a joint return for the year.
2. Relief is unavailable under either Sec. 6015(b) or (c).
3. Relief is requested not more than two years after the first IRS collection effort directed at the applicant that occurs after July 22, 1998.
4. Generally, the liability remains unpaid.
5. No fraudulent transfers have occurred between the spouses.
6. No transfers to applicant of disqualifying assets have occurred within the meaning of Section 6015(c)(4)(B). It seems harsh to

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50 *See* Frumkes, *supra* note 49, at 168.

51 Effective 1/18/2000. Modifies and supercedes Notice 98-61, 1998-51 IRB.

52 Prop. Treas. Reg. § 1.6015-4 prescribes no detailed rules for seeking equitable relief but subsection (c) provides that the Commissioner may provide guidance and rules for those seeking relief.

disqualify an applicant simply because there have been transfers of disqualified assets. A more equitable approach would require examining the intent of the parties in making the transfer.
7. The joint return was not filed with fraudulent intent.[53]

An applicant is not home free merely because he or she has satisfied the threshold conditions for equitable relief. The spouse must still establish an equitable argument for the granting of relief, or, put another way, that it would be inequitable for the spouse to be held liable for the tax.

V. Criteria for Those Seeking Relief Due to an Unpaid Tax Liability Return

The Revenue Procedure contains specific guidance of what the IRS considers inequitable for spouses seeking relief due to an unpaid tax liability on a joint return such as where funds were set aside to pay the tax on the return but were instead misapplied to another purpose by the non-electing spouse. The Revenue Procedure provides that, in such cases, equitable relief will normally be granted under the following circumstances:

1. The liability reported on a joint return for the year was unpaid at the time of filing the return. The relief will not be available with regard to any portion of the liability not shown on the return (e.g. where audit adjustments have increased the liability). Also, the relief is only to the extent that the unpaid liability is allocable to the non-requesting spouse.
2. At the time relief is sought, the individual is divorced or legally separated from the offending spouse or has not shared a household with that spouse within the preceding 12 months.
3. At the time the return was filed, the individual did not know and had no reason to know that the tax would not be paid. The person seeking relief must show that it was reasonable to believe that the other spouse would pay the tax due.
4. The individual would suffer economic hardship if relief from the liability were granted.

The IRS will make this determination under rules similar to those used in considering offers in compromise.[54]

Many if not most spouses will not fall within the four-corners of the IRS specific safe harbor for equitable relief regarding an unpaid tax liability. For spouses not meeting these conditions

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53 Rev. Proc. 2000-15, *Supra*. Section 4.

54 *See* Treas. Regs. § 301.6343-1(b)(4).

the IRS has laid out additional factors that while not conclusive will favorably influence its decision whether to grant equitable relief in a particular case.

VI. Factors that Will Support an Application for Equitable Relief

The Revenue Procedure indicates some but not all of the factors that the IRS would view with favor when reviewing an application for equitable relief. The factors that will make a positive impact on the IRS deliberations are as follows:

1. Marital status. The requesting spouse is separated (whether legally or just living apart) or divorced from the non-requesting spouse. Thus, the Revenue Procedure follows the disparity between Sections 6015(b) and (c) in making it easier for a divorced, separated or living apart spouse to obtain relief for a married spouse.
2. Economic hardship. That the individual will suffer economic hardship if relief is denied is a factor that will positively influence the IRS in its review of the application.

This is one of the factors included in the safe harbor example as the kind of circumstances under which the IRS will ordinarily grant equitable relief. Thus, one's ability to demonstrate economic hardship is essential to a successful application for relief. The Revenue Procedure states that the IRS will use as a standard to determine if economic hardship is present rules similar to those employed to ascertain whether an IRS levy should be released due to economic hardship.[55] These rules consider whether satisfaction of the tax liability would cause the spouse to be "unable to pay his or her reasonable basic living expenses."[56] Reasonable basic living expenses would include, among other items, alimony, child support and other court ordered payments. The IRS Collection Division employs the very same analysis in routine collection cases. Thus, spouses should anticipate being asked to complete Form 433-A, Collection Information Statement, that requests details about assets, liabilities, income and living expenses.

55 Rev. Proc. 2000-15, *supra*. Sec. 4.02(c).

56 Treas. Reg. § 301.6343-1(b)(4).

3. Abuse. The IRS will weigh that the other spouse abused the individual but the abuse did not amount to duress (note: duress would vitiate the joint return and obviate the need for relief).[57]
4. Lack of knowledge or reason to know. If the application is for a reported but unpaid liability, a favorable factor is that the requesting spouse had no knowledge or reason to know that the liability would not be paid. Similarly, where the liability arose from a deficiency, (i.e., audit adjustments for which additional tax assessed by IRS), the IRS will view with favor that the requesting spouse did not know and had no reason to know of the items resulting in the additional tax.
5. Non-requesting spouse's legal obligation. Another favorable factor is that the non-requesting spouse had a legal obligation created by agreement or divorce decree to make the tax payment and the other spouse had no knowledge or reason to believe at the time of the decree or agreement that the payment would not be made.
6. Attributable to non-requesting spouse. The liability can be attributed solely to the non-requesting spouse. For example, the tax deficiency arose from the non-requesting spouse failing to report business income received in cash.[58]

VII. Factors that Will Militate Against the IRS Granting of Equitable Relief

These are negative influences, essentially the countervailing attributes of those factors mentioned above, that the IRS views unfavorably when deciding whether to grant equitable relief are as follows:

1. The unpaid liability is attributable to items allocated to the individual seeking relief.
2. The individual significantly benefited (beyond normal support) from the unpaid liability or items giving rise to the deficiency.
3. The divorce decree or agreement legally obligates the individual seeking relief to pay the tax liability.
4. The requesting spouse knew or had reason to know of the items giving rise to the deficiency or that the liability shown on the return would not be paid. This is an extremely strong factor weighing against relief.
5. The requesting spouse will suffer no economic hardship.
6. The requesting spouse has not been a model tax citizen for years following the year for which relief is sought. That is, he or she has

[57] Prop. Treas. Reg. § 1.6013-4. *See also*, *supra* note 23 at p. 5, 3/30/01.

[58] Rev. Proc. 2000-15, *supra.* Sec. 4.03(1).

not made a good faith effort to comply with the income tax laws for those years.[59]

VII. IRS "Spousal Tax Relief" Web Site

The IRS has created an interactive question and answer web-site for "Spousal Tax Relief." The program asks a series of questions to determine eligibility for Section 6015 relief. The program then offers to download the application form. The data can be accessed by going to *www.irs.gov.*[60]

IX. Conclusion

The new innocent spouse rules greatly improve those preexisting July 22, 1998 but they are imperfect. For example, there is the bias against married spouses exists in the discrepancy between the ease of qualifying for relief under Sections 6015(b) versus (c). There is the disparity between the legislative history and the statute whether "actual knowledge" for purposes of Section 6015(c) (3)(C) means knowledge of the tax consequences of an erroneous item or merely knowledge of the item itself as the Fifth Circuit Court of Appeals found in *Cheshire.* It would also appear that the IRS initially has adopted an overly restrictive interpretation of Section 6015 given the remedial nature of the legislation. Indicative of the IRS restrictive attitude is the title of the form the agency has created for electing relief. Instead of using the words "Election of Innocent Spouse Relief," the IRS lexicographers chose to use the words "Request for Innocent Spouse Relief."[61] Perhaps this is only semantics, but the choice of the language may indicate that the IRS views its role more as the gatekeeper than the gate opener. Thus, it remains to be seen, how conservatively or liberally the IRS will enforce the rules it has promulgated in Revenue Procedure 2000-15. For example, if

59 Rev. Proc. 2000-15, supra. Sec. 4.03(2).

60 When you open the IRS web-site search 6015 GO/click on Tax Professionals to get to Q & A. Note that this web-site is intended for lay persons and should not be relied upon as the sole source for resolving issues pertaining to joint and several liability.

61 The form was last revised October 1999, after much public comment on this point. The complete title is Form 8857, Request for Innocent Spouse Relief (And Separation of Liability and Equitable Relief)

the IRS places too much emphasis on economic hardship and therefore examines reasonably necessary living expenses the inquiry becomes no different than a debt collection proceeding and the relief sought becomes a victim of the process itself.[62]

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[62] For additional developing views, *see* John B. Harper, *Federal Tax Relief for Innocent Spouses: New Opportunities Under the IRS Restructuring and Reform Act of 1998.* 61 ALA. LAW. 204 (2000); Frances D. Sheehy & Anthony J. Scaletta, *The Continuing Evolution of the "New" Innocent Spouse Rules as Implemented and Interpreted by the Internal Revenue Service and the Courts Parts I & II*, 76 FLA. B.J. 41 (Feb. 2002) and 76 FLA. B.J. 53 (Mar. 2002), respectively.