

# A Taxpayer's Prickly Path



## Joint and Several Income Tax Liability

By Michele LaForest Halloran

Unsuspecting and uninformed taxpayers often are saddled with liability for tax, penalties, additions to tax, and interest because they filed an income tax return with their spouse or former spouse using “married filing jointly” status. Under § 6013(d)(3) of the Internal Revenue Code (Code), taxpayers who file joint income tax returns are jointly and severally liable for tax, penalties, additions to tax, and interest due regarding that return. This means that the Internal Revenue Service (IRS) can look to either spouse for payment of the liability—even to the spouse whose financial circumstances are much more perilous than those of the other spouse.

Given the sometimes exceedingly harsh consequences attendant to joint and several liability, taxpayers must focus on mechanisms available to avoid liability at the outset or to separate liability at some later date. An early, effective method to avoid joint and several income tax liability is for a taxpayer to carefully take stock of his or her situation to determine if it is more prudent to

elect “married filing separately” status at the time the returns are filed. However, many individuals don’t make informed filing status decisions because they have antagonistic relationships with their spouses, who may demand use of a joint filing status. And the monetary benefit of filing jointly dissuades many married couples from filing separately because they would become ineligible for valuable tax benefits such as the Earned Income Tax Credit,<sup>1</sup> the student loan interest deduction,<sup>2</sup> the tuition and fees deduction and education-related credits,<sup>3</sup> and the Child and Dependent Care Credit.<sup>4</sup>

Before embarking on a mission to obtain relief from joint and several liability under the Code’s § 6015 provisions, a taxpayer should first confirm that he or she indeed has filed a valid joint income tax return. If the taxpayer’s return does not qualify as a joint return in the first instance, the taxpayer can provide the IRS with supporting evidence and separate his or her liability. Under these circumstances, the spouse need not (and cannot if there has

**Fast Facts:**

Taxpayers must understand the possible adverse consequences of electing the status “married filing jointly” when filing their tax returns.

Sections 6015(b), (c), and (f) of the Internal Revenue Code provide relief from joint and several liability to qualifying taxpayers.

In Notice 2012-8, the Internal Revenue Service proposed a revenue procedure expanding the availability of equitable relief under § 6015(f) of the Code.

been no joint return) resort to the separation of liability provisions set forth in § 6015. For example, a return signed by a spouse under duress does not qualify as a valid joint income tax return, adhering to the rule that legal consequences will not attend an involuntary act.<sup>5</sup> Similarly, if the taxpayers were not lawfully married, their purported joint income tax return is invalid and their liability separate.<sup>6</sup> Although the appearance of a spouse's signature on a joint income tax return is prima facie evidence that the individual signed the return,<sup>7</sup> if one spouse forged the signature of the other so that the other spouse is rightfully viewed as not having intended a joint return, the return is invalid and the IRS will acknowledge it as a married-filing-separately return.<sup>8</sup>

Fortunately for those taxpayers who cannot supply reasons to invalidate their joint income tax returns, § 6015 provides them with several options to obtain relief from joint and several liability. Section 6015 has been part of the Code since 1971 in the more limited former relief provisions of § 6013(e).<sup>9</sup> The current version sets forth three primary provisions under which relief can be obtained—subsections (b), (c), or (f). A taxpayer is not held to electing relief under only a single section, but may assert multiple avenues for relief.

Section 6015(b) allows the spouse requesting relief (“requesting spouse” or “requester”) to separate his or her liability from that of the nonrequesting spouse; this relief is commonly referred to as “innocent spouse” relief. To receive relief under § 6015(b), a taxpayer must prove that:

- he or she filed a joint income tax return;
- there is an understatement or deficiency of tax stemming from the items of the nonrequesting spouse;
- the requesting spouse did not know or had no reason to know of the understatement;
- the facts and circumstances dictate that it would be inequitable to hold the requesting spouse liable for the deficiency that is the outgrowth of the understatement; and
- the request for relief was offered within two years of the date of the IRS's first “collection activity.”

Note that § 6015(b) does not require spouses on a joint return to be divorced, separated, or living in separate households as a precondition for obtaining relief. Under certain circumstances, § 6015(c)—the proportionate liability provision—allows a taxpayer to apportion his or her liability for a deficiency<sup>10</sup> so the taxpayer is solely responsible for the part of the deficiency attributable to him or her. To obtain relief under § 6015(c), at the time the election or request is made a taxpayer must show:

- that the requester (1) was not married to, (2) was legally separated from, or (3) was not a member of the same household for the previous 12-month period as the person with whom the joint return was filed;
- that the request for relief was made within two years of the date of the first collection activity;
- the part of the deficiency that is attributable to the requester; and
- that the couple filed a joint income tax return.

Certain situations—such as when spouses transfer assets between themselves as part of a fraudulent scheme—will bar taxpayers from electing relief under this provision.<sup>11</sup> No relief is available under this provision if, at the time he or she signed the return, the requester had actual knowledge of the items giving rise to the deficiency, defined in caselaw as actual knowledge of the source and amount giving rise to the deficiency.<sup>12</sup> Constructive knowledge will not disqualify a spouse from obtaining relief under § 6015(c) as it will under § 6015(b); therefore, a taxpayer who had constructive knowledge and is unable to secure relief under § 6015(b) may qualify for relief under § 6015(c). The formula used to allocate a deficiency under this provision is the net amount of items taken into account in computing the deficiency that are allocable to the requester over the net amount of all items used to compute the deficiency times the total deficiency.

Finally, the most controversial and widely applied provision, § 6015(f), permits the IRS to award relief to the requester when it would be inequitable to require joint and several liability. Over time, the IRS has issued multiple guidance addressed to relief under § 6015(f). Most recently, on January 5, 2012, the IRS issued Notice 2012-8 alluding to adoption of a proposed revenue procedure that updates Rev. Proc. 2003-61, which since 2003 has

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addressed the factors considered in the context of equitable relief under § 6015(f). Essentially, Notice 2012-8 indicates that the proposed revenue procedure “revises the factors for granting equitable relief...to ensure that requests for innocent spouse relief are granted under section 6015(f) when the facts and circumstances warrant and that, when appropriate, requests are granted in the initial stage of the administrative process.”<sup>13</sup> The proposed revenue procedure also “expands how the IRS will take into account abuse and financial control by the nonrequesting spouse in determining whether equitable relief is warranted” and allows for “certain streamlined case determinations; new guidance on the potential impact of economic hardship; and the weight to be accorded to certain factual circumstances in determining equitable relief.”<sup>14</sup>

Rev. Proc. 2003-61 indicates that there are six threshold requirements for an award of relief under § 6015(f):

- (1) Relief must be sought for a taxable year for which a joint income tax return was filed.
- (2) The requester must not be eligible for relief under §§ 6015(b) or (c).
- (3) The spouses must not have transferred assets between themselves as part of a fraudulent scheme.
- (4) The requester must not have received disqualified assets from the nonrequesting spouse.

- (5) There was no fraudulent intent underlying the requester's filing or failure to file the joint return.
- (6) The liability for which relief is sought must be attributable to an item of the nonrequesting spouse absent application of a listed exception.<sup>15</sup>

Under Rev. Proc. 2003-61, once these threshold conditions are met, the IRS ordinarily will grant relief for a liability resulting from an underpayment provided certain other conditions are met. These conditions (Tier I factors) are that (1) the requester can no longer be married to, or is legally separated from, the spouse with whom he or she filed the joint return or has not shared a household with the nonrequesting spouse at any time during the 12-month period preceding the request; (2) with respect to an underpayment of tax, the requester, when signing the joint return, did not know and had no reason to know that his or her spouse would not pay the tax; and (3) the requesting spouse will suffer an economic hardship absent a grant of relief. If the requester does not satisfy all Tier I factors, other factors (Tier II factors), none of which are singly determinative, are considered as well. These factors include marital status, spousal abuse, and compliance with the tax laws.

The proposed revenue procedure revises Rev. Proc. 2003-61 in several significant ways. It allows relief under § 6015(f) for understatements of income tax as well as for tax underpayments. It specifies that no single factor and no majority of factors will necessarily control the determination, so relief can be given even if a greater number of factors weigh against an award of relief. It addresses the economic hardship factor and states that an absence of economic hardship does not weigh against relief. It looks to the requesting party's actual knowledge of the item and says that actual knowledge will not be given more weight than other factors. Further, even if the requester had actual knowledge or reason to know of the items giving rise to the understatement or deficiency, the fact that the other spouse abused the requester or controlled the household finances to prevent the requester from challenging how items were treated on the joint return weighs in favor of relief. It indicates that the IRS, in identifying whether the requester knew or had reason to know that his or her spouse would not pay the tax, will consider whether the requesting spouse “reasonably expected that the nonrequesting spouse would pay the tax liability within a reasonable prompt time.”<sup>16</sup> It states that

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the requester's legal obligation to pay the liabilities and his or her subsequent compliance with the Code are factors to be considered. Finally, the proposed revenue procedure amplifies the availability of refunds in deficiency matters.

For a taxpayer to receive relief under either § 6015(b) or (c), he or she must initiate the request for relief within two years of the date the IRS commences collection activity against the taxpayer. Treas. Reg. 1.6015-5(h)(2) defines collection activity to include active situations such as an administrative levy or seizure and the initiation of suit against the requesting spouse to collect the joint liability. On the other hand, collection activity does not include mere notice, so the issuance of a notice of deficiency or demand for payment of a tax will not suffice to prompt the running of the two-year limitations period applicable for relief sought under §§ 6015(b) and (c). Importantly, although the IRS formerly had in place a treasury regulation declaring that a similar two-year period applied for requests tendered under § 6015(f) even though the Code provision set forth no such requirement,<sup>17</sup> a recent hard-fought battle with the IRS spawned by litigation<sup>18</sup> and supported by the National Taxpayer Advocate resulted in retraction of the IRS's position.<sup>19</sup> The proposed revenue procedure announces that the requesting spouse must request relief under § 6015(f) before the expiration of the collections statute of limitations provided for in IRC § 6502 or, if applicable, the limitations period specified in IRC § 6511 for a refund for overpaid taxes.

A request for innocent-spouse-type relief can be initiated in several ways. Taxpayers can complete and file Form 8857 with the IRS to seek an administrative determination, bring their spousal claims to the forefront at a collection due process hearing before the IRS, or raise spousal defenses in the context of a proceeding initiated in tax court or bankruptcy court.

Taxpayers who obtain adverse administrative determinations of their innocent-spouse-type claims can appeal those decisions to the United States Tax Court. The doctrine of res judicata applies to prevent taxpayers from obtaining repeated consideration of their spousal defenses, so if a litigant has had a full opportunity to bring those defenses forward in the context of a matter brought before the tax court, he or she will be prevented from doing so a second time.<sup>20</sup> However, the very nature of innocent spouse proceedings is such that one spouse may hide documentation from the other to prevent him or her from participating in a proceeding in which spousal defenses could have been raised. Therefore, res judicata principles will not apply to prevent an individual from raising spousal defenses in a later proceeding if he or she did not have an opportunity to "meaningfully participate" in the prior case.<sup>21</sup>

When a taxpayer has requested innocent-spouse-type relief, his or her spouse is invited to enter the case as an intervening party to supply facts showing relief should not be given.<sup>22</sup> This prompts an important consideration: because many situations in which a request for innocent-spouse-type relief arises involve allegations of spousal abuse, it is imperative that practitioners carefully assess a client's situation and ensure that information about the spouse's address, telephone number, and employment is not inadvertently supplied to the intervenor.<sup>23</sup>

Note that "injured spouse relief" differs from "innocent spouse relief"—the terms are often confused.<sup>24</sup> An injured spouse typically is married to a taxpayer who incurred a tax liability before the marriage. To prevent a tax refund applicable to the new spouse from being seized and applied to the other spouse's premarital tax liability, the new spouse can prepare and file (either with or independently of the couple's tax return) a request for injured spouse relief via Form 8379 to ensure receipt of the portion of the refund to which he or she is entitled.

Taxpayers forced to travel the Internal Revenue Code's prickly path of joint and several liability can obtain relief—and this is particularly the case in the modern setting in which the IRS has significantly expanded opportunities for relief under the equitable provision of § 6015(f). ■

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*Michele LaForest Halloran is a clinical professor of law, director of clinical programs, and director of the Alvin L. Storrs Low-Income Taxpayer Clinic at Michigan State University College of Law. She received her BA summa cum laude from Le Moyne College in 1973 and her JD cum laude from Thomas M. Cooley Law School in 1979. She formerly was a partner with Howard & Howard Attorneys and an administrative law judge with the Michigan Tax Tribunal.*

## FOOTNOTES

- 26 USC 32.
- 26 USC 221.
- See, e.g., 26 USC 25A.
- 26 USC 21.
- Internal Revenue Manual 25.15.1.2.3; see generally *Stanley v Comm'r*, 45 TC 555, 561 (1966) (reviewing caselaw that addresses spouses signing joint returns under duress); *Berger v Comm'r*, 71 TCM 2160 (1996) (holding that a taxpayer's fear of disobeying a court order directing her signature on a joint income tax return did not give rise to duress sufficient to invalidate the return).
- Lee v Comm'r*, 64 TC 552, 560 (1975), aff'd 550 F2d 1201 (CA 9, 1977); *Von Tersch v Comm'r*, 47 TC 415, 420-421 (1967).
- 26 USC 6064; see *Shea v Comm'r*, 780 F2d 561, 567 (CA 6, 1986) (holding that a taxpayer's failure to sign a joint income tax return does not invalidate the return if the taxpayer intended a joint return).
- Internal Revenue Manual 25.15.1.2.4; *Carrick v Comm'r*, 62 TCM 938 (1991).
- PL 91-679, 1, 84 Stat 2063 (1971).
- Note that relief sought under § 6015(c) extends only to deficiencies and not to underpayments of tax. 26 CFR § 1.6015-3.
- Id.*; see Joint Comm on Taxation staff report, *Overview of Present Law Relating to the Innocent Spouse, Offers-In-Compromise, Installment Agreement, and Taxpayer Advocate Provisions of the Internal Revenue Code*, April 3, 2001, available at <<https://www.jct.gov/publications.html?func=startdown&id=2058>>.
- King v Comm'r*, 116 TC 198, 203 (2001).
- IRS Notice 2012-8.
- Id.*
- IRS Notice 2003-61.
- IRS Notice 2012-8.
- 26 CFR § 1.6015-5(b)(1).
- See, e.g., *Lantz v Comm'r*, 607 F3d 479 (CA 7, 2010); *Jones v Comm'r*, 642 F3d 459 (CA 4, 2011); *Manella v Comm'r*, 631 F3d 115 (CA 3, 2011).
- See IRS Notice 2011-70.
- 26 USC 6015(g)(2); *Vetrano v Comm'r*, 116 TC 272, 280 (2001).
- Deihl v Comm'r*, 134 TC 156, 162 (2010).
- 26 CFR § 1.6015-6(a)(1).
- See, e.g., Internal Revenue Manual 25.15.1.9.2 (setting forth certain disclosure rules to be adhered to by IRS personnel relative to joint income tax returns).
- Internal Revenue Manual 25.15.1.2.2.