

Recent Tax Court Innocent Spouse Rulings Under §6015(f) Have Made §6015(b) and (c) Virtually Superfluous¹

By Eric L. Green and Carlton M. Smith²

A taxpayer seeking innocent spouse relief from tax debts attributable to joint return liabilities currently has three options for seeking relief: §6015(b)³ (complete or partial relief from certain deficiencies), §6015(c) (separation of liability for deficiencies), and §6015(f) (equitable relief from deficiencies and underpayments).

Three recent Tax Court opinions have raised the issue of whether §6015(b) and §6015(c) are still relevant. We suggest that the answer is, in nearly all cases now, “no”. Here’s why:

§6015

In 1998, Congress was of three minds as to how to replace and expand the original “innocent spouse” provision (formerly contained at §6013(e)). There were different House and Senate versions of the bills providing for expanded coverage, and the Conferees couldn’t decide which to choose. So, they created a new §6015 with both expanded versions and an extra provision for when a taxpayer could not win under either of the two other versions, but equity dictated that relief should still be given. Of course, this created a messy statute – hardly a model of clear thinking or drafting.

The first type of relief created under §6015 was similar to the prior innocent spouse provision at §6013(e), but slightly expanded. Under §6015(b), three conditions must be met: (1) there must be a tax “deficiency” (i.e., the tax must have been understated) due to an erroneous item of the other spouse, (2) the spouse electing relief must not have known or had reason to know of the erroneous item, and (3) it would be “inequitable” to hold the electing spouse liable for the tax deficiency. Under case law under former §6013(e) (which was repealed), the courts had decided the third issue (inequity) largely on whether the spouse seeking relief had significantly benefitted from the tax not paid because of the deficiency, whether he or she would undergo a hardship if now forced to pay, and the current marital status of the taxpayers.⁴

The second type of relief under §6015 was to be easier to get than that at §6015(b). So, it was made available only to spouses more likely to suffer – i.e., those who were, at the time of the relief election, divorced, separated, or living apart for at least 12 months. This second provision, at §6015(c), allows an electing spouse to obtain relief from a tax deficiency by allocating the deficiency between the spouses in proportion to whose items

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² Eric Green is a partner at Convicer, Percy & Green, LLP in Glastonbury, Connecticut and Newton, Massachusetts. Carlton M. Smith is a Clinical Associate Professor of Law and the Director of the Tax Clinic at the Benjamin N. Cardozo School of Law, as well as an Adjunct Professor of Law at the New York University School of Law.

³ Unless otherwise indicated, all section references are to the Internal Revenue Code.

⁴ See, e.g., Reser v. Commissioner, 112 F.3d 1258, 1269-1270 (5th Cir. 1997).

created the deficiency. Doing so should reduce the tax liability of the electing spouse roughly to the amount that he or she would have owed had he or she filed separately. The calculation splitting the deficiency usually gives about the same result as would be obtained under (b), so practitioners are usually indifferent about whether relief is awarded under (b) or (c). The big benefits of (c) over (b), though, are that, under (c), but not (b): (1) a taxpayer can obtain relief even if he or she had reason to know (but not actual knowledge) of the item giving rise to the deficiency and (2) if the IRS wants to prevent (c) relief, the IRS must shoulder the burden of proof of showing that the electing spouse actually knew of the erroneous item – often a very difficult fact to prove.⁵

For both §6015(b) and (c), the taxpayer may make an election for relief (usually by filing a Form 8857) no later than 2 years after the start of any IRS collection activity. But, (b) and (c) may also be raised in a pre-assessment deficiency proceeding in the Tax Court (the place where repealed §6013(e) came up) or in the course of a Collection Due Process lien or levy hearing under §6320 or §6330.

Section 6015(f) was the third new provision. It simply 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.” Revenue Procedure 2003-61⁶ lists factors that the IRS currently considers when making equitable relief determinations under §6015(f), including current marital status, economic hardship, knowledge, the spouses’ legal obligation with respect to tax debts, if there was a significant benefit to the requesting spouse, if the requesting spouse was the victim of abuse, and the requesting spouse’s mental and/or physical health. All these facts and circumstances are considered together, but no one factor is determinative.

Thus, if a spouse who elected relief under (b) or (c) was denied relief because he or she knew or had reason to know of the item giving rise to the deficiency, he or she could still sometimes get relief under (f) by proving, say, hardship and lack of significant benefit. Initially, this presented a problem, though: Why even bother to elect relief under (b), since (1) while under both (b) and (f), one had to prove that it was inequitable to hold the spouse liable, (2) only under (b) did the electing spouse also have to show that he or she had no knowledge or reason to know of the deficiency? Why not just skip arguing for (b) relief altogether?

There were two answers to these questions:

First, the initial conclusion of the courts looking at (f) was that (f) granted the IRS discretion in deciding what was inequitable. Thus, courts held that they could review an IRS determination not to grant (f) relief due to inequity only on an “abuse of discretion”

⁵Under (c), though, the spouses cannot have transferred any assets between them as part of a fraudulent scheme.

⁶2003-2 C.B. 296.

standard.⁷ By contrast, under (b) and (c), the courts had held that they would decide the questions of knowledge and equity on a de novo legal standard.⁸ Thus, a taxpayer had a lesser burden to prove inequity under (b) than under (f), since the courts would not defer to the discretion of the IRS's conclusion on the issue of inequity in a (b) case.

The second answer goes to the mechanism by which §6015 relief could be raised when not in the course of a deficiency proceeding or in a Collection Due Process case. When Congress created the new section in 1998, it also added §6015(e), which allowed a taxpayer who filed a request for relief from a deficiency under (b) or (c) a special “stand-alone” proceeding in the Tax Court if the request was denied or ignored by the IRS for more than 6 months. A few years after the enactment of §6015, the IRS began to argue that, in a stand-alone proceeding brought in the Tax Court under (e), the Tax Court was limited to considering only the evidence that the taxpayer had submitted in the administrative proceeding before the IRS – i.e., that the taxpayer could not introduce additional evidence before the Tax Court. Further, the IRS argued that the language of §6015(e) did not permit a stand-alone proceeding for the Tax Court to review IRS denials of requests for relief under (f).

In Ewing v. Commissioner,⁹ in 2002, the Tax Court held that it did have jurisdiction to decide the question of equitable relief under (f) in a stand-alone proceeding brought under the version of (e) in effect at that time. Ewing was not a case involving a tax deficiency, but rather one simply where the parties to the joint return did not send in checks with the return for the full balance due shown on the return. Equitable relief under (f) may be possible for such balance due liabilities, though it is not possible under (b) or (c) because (b) and (c) relief only apply where there is a deficiency (an understatement of the correct tax on the return).

Two years later, in the same Ewing case, the Tax Court also held that a stand-alone proceeding before the Tax Court under (e) was a trial de novo in which the taxpayer could introduce testimony and other evidence that had not been presented to the IRS at the administrative level.¹⁰ The Tax Court so held, in part, because it saw no reason that Congress to want the court to decide (b), (c), and (f) relief issues in deficiency proceedings through the traditional Tax Court trial de novo, but the same issues in stand-alone proceedings under (e) only on the administrative record. Further, the court pointed out that, if the IRS ignored a request for relief under (f), and the taxpayer brought a stand-alone proceeding under (e) after six months, there would be no administrative record for the court to review. The court saw no reason Congress would have wanted (f) relief to be decided by the Tax Court on the basis of no record at all.

⁷See, e.g., Johnson v. Commissioner, 118 T.C. 106, 125 (2002), affd. 353 F.3d 1181 (10th Cir. 2003); Cheshire v. Commissioner, 115 T.C. 183, 198 (2000), affd. 282 F.3d 326,338 (5th Cir. 2002); Mitchell v. Commissioner, 292 F.3d 800, 807 (D.C. Cir. 2002).

⁸Porter v. Commissioner, 132 T.C. No. 11 (Apr. 23, 2009) (“We have always applied a de novo scope and standard of review in determining whether relief is warranted under subsections (b) and (c) of section 6015. See, e.g., Alt v. Commissioner, 119 T.C. 306, 313-316 (2002), affd. 101 Fed. Appx. 34 (6th Cir. 2004).”).

⁹ 118 T.C. 494 (2002).

¹⁰ 122 T.C. 32 (2004).

The IRS appealed Ewing to the Ninth Circuit, which overruled the Tax Court on the issue of jurisdiction.¹¹ The Ninth Circuit held that the version of (e) then in effect did not allow for the Tax Court to decide (f) relief under a stand-alone petition. After so holding, the Ninth Circuit vacated the Tax Court's opinions in the case – thus leaving it unclear what the Tax Court would do as to the scope of trials in any stand-alone proceeding – even ones only arguing for (b) or (c) relief relating to deficiencies.

In response to the Ninth Circuit's opinion, later in 2006, Congress amended IRC §6015(e) to explicitly give the Tax Court jurisdiction to decide the issue of (f) equitable relief, as well, in a stand-alone petition.¹²

Then came Mrs. Porter and Cathy Lantz:

*Porter v. Commissioner (“Porter I”)*¹³

Mrs. Porter's husband received an IRA distribution and nonemployee compensation. The joint return filed by the Porters reported the IRA distribution and Mrs. Porter's wages, but did not report Mr. Porter's nonemployee compensation or the §72(t) 10% pre-59-1/2 early withdrawal penalty on the IRA distribution. The IRS sent the Porters a notice of deficiency asserting a deficiency attributable to income and self-employment tax on the nonemployee compensation and a 10% early withdrawal penalty. Neither spouse petitioned the Tax Court, so the IRS assessed the deficiency and issued collection notices. At that point, Mrs. Porter filed a Form 8857 requesting relief under §6015(c) and (f).

The IRS Appeals Officer granted Mrs. Porter relief under (c) with respect to the portion of the deficiency attributable to her husband's nonemployee compensation, but denied relief from the §72(t) penalty because Mrs. Porter (1) knew of the premature distribution – it being shown on the return -- and (2) knew that her husband had not reached 59-1/2. In response, Mrs. Porter brought a stand-alone petition under (e) in the Tax Court, arguing that, at least, she should be relieved from the penalty under (f) because she did not significantly benefit from the deficiency and it would be a hardship for her to pay it. In the Tax Court, the IRS first filed a motion in limine to exclude from the trial any evidence not contained within the administrative record. The Court, revisiting in detail its reasoning in one of its vacated Ewing opinions, denied the IRS' motion and again held that the scope of the trial would be de novo. Thus, the court would allow in new evidence that was not part of the administrative record.

The IRS has not yet appealed this aspect of Porter I, but is expected to. Yet, the Tax Court's position with respect to the scope of the record before it was affirmed earlier this year in a different case whose appeal was pending in a Court of Appeals. In

¹¹ 439 F.3d 1009 (9th Cir. 2006).

¹² Tax Relief and Health Care Act of 2006, Pub. L. 109-432, Div. C, §408(a), 120 Stat. 3061.

¹³ 130 T.C. 115 (2008). [Note: the decision was entered in Porter on April 30, giving the government 90 days to appeal, which should run out on July 29. Although an appeal is expected, as of 7/24/09 Tax Court records do not show a notice of appeal. Please monitor this before publishing.]

Commissioner v. Neal,¹⁴ the Eleventh Circuit quoted extensively from the Tax Court's Porter I opinion and agreed with the Tax Court's conclusion about the scope of a Tax Court trial in a stand-alone proceeding – i.e., the Tax Court may take in additional evidence. No other Circuit has faced this issue to date.

Porter v. Commissioner (“Porter II”)¹⁵

Mrs. Porter's case then proceeded to trial, where she testified. After trial, she argued that the amendment to (e) made in 2006 primarily to clarify the Tax Court's stand-alone jurisdiction for (f) cases was grounds for the Tax Court to reconsider its previous holdings (and those of several Courts of Appeals) that the IRS' denial of equitable relief under (f) should be reviewed by the courts under an abuse of discretion standard. Mrs. Porter argued that no deference should be given to how the IRS weighed the factors under the Revenue Procedure to reach its conclusion. Rather, the Tax Court should make its own conclusion as to equity using a de novo standard – just as the Tax Court would make its decision under a de novo standard if relief were at issue under (b) or (c). The Tax Court again agreed with her, and using the de novo standard, it held that Mrs. Porter was entitled to equitable relief under §6015(f) for the §72(t) early withdrawal penalty.

It should be noted that, while the Tax Court's ruling on its standard of review under (f) was issued in a stand-alone case brought under (e), nothing in the Court's opinion limits its logic only to stand-alone (e) petitions. Thus, it appears that the Tax Court will review (f) equitable relief determinations by the IRS on a de novo standard whether the challenge arises in a deficiency, Collection Due Process, or stand-alone proceeding. In no proceeding will the Tax Court use an abuse of discretion standard for (f) relief.

No Court of Appeals has yet considered whether it agrees or disagrees with this recent change of Tax Court precedent. One can anticipate that, at least for a few years, the Courts of Appeals may be wrestling with whether they similarly have to overrule their “abuse of discretion” review standard where the issue is review of the IRS' denial of equitable relief under (f).

Lantz v. Commissioner¹⁶

Cathy Lantz and her husband, Dr. Richard Chentnik, filed a joint tax return for 1999. Dr. Chentnik was later convicted of Medicare fraud and sent to jail. The IRS then sent the spouses a notice of deficiency seeking a large tax deficiency and penalty with respect to 1999. Neither spouse responded to the notice of deficiency, so the IRS assessed the tax and penalty set forth therein. In 2003, while Dr. Chentnik was in jail, the IRS issued a notice of intention to levy for the 1999 liability, and Dr. Chentnik requested a Collection Due Process hearing. As a result of the hearing, the spouses were placed into currently not collectible status. During the CDP hearing, Dr. Chentnik did not himself raise any issue under §6015 or get his wife to request relief under §6015. In 2006, after Dr.

¹⁴ 557 F.3d 1262 (11th Cir. Feb. 10, 2009).

¹⁵ 132 T.C. No. 11 (Apr. 23, 2009)

¹⁶ 132 T.C. No. 8 (2009)

Chentnik had died, the IRS applied an overpayment from Cathy Lantz' 2005 single return as a credit against the joint 1999 liability. This prompted her to file a Form 8857 electing and requesting relief under §6015(b), (c), and (f). The IRS denied her relief, noting that the Form 8857 was filed more than two years after the IRS had begun collection action (the notice of intention to levy). To get relief under §6015(b) and (c), the statute requires that an election be filed within the 2-year period. While §6015(f) contains no such 2-year limitation, Regulation §1.6015-5 also imposed the same 2-year time period to request equitable relief under (f), and so the IRS also denied relief under (f). In response, Ms. Lantz filed a stand-alone petition in the Tax Court under §6015(e) now seeking relief only under §6015(f) and arguing that the regulation was invalid.

Noting that the 2-year time period is only in the statute at §6015(b) and (c), the Tax Court stated that if Congress had wished to create a 2-year requirement for requesting equitable relief, this language would have been reflected in §6015(f), as well. In addition, the court noted that imposing a 2-year time period for equitable relief seemed to contradict the thrust of §6015(f), which was to grant equitable relief when necessary, regardless of time. The court held the regulation to be an invalid interpretation of §6015(f). Thereafter, the court went on to hold that it would be inequitable to hold Ms. Lantz liable for the deficiency in the particular circumstances of her case.¹⁷

Conclusion

By its recent Porter I and Porter II opinions, the Tax Court has created a situation where an election of relief from a deficiency under §6015(b) or (c) is virtually unnecessary. As noted above, prior to 2006, there were basically three reasons why (f) relief was potentially not as good as (b) or (c) relief: (1) Tax Court review of (f) relief was done only under an abuse of discretion standard, (2) it was unclear that the Tax Court could even review a denial of (f) relief in a stand-alone proceeding under (e); and (3) it was unclear whether, in a stand-alone proceeding, the taxpayer could expand on the administrative record and introduce new evidence. The Tax Court has now cleared up all these issues by holding that review under (f) is de novo, both as to scope of the Tax Court proceeding and the Tax Court's standard of review, and that the Tax Court has jurisdiction to decide (f) relief in a stand-alone proceeding. Moreover, (b) and (c) relief have to be elected within a two-year period after the IRS commences collection activity. But, now, by contrast, under Lantz, (f) relief is unlimited by time and apparently can be raised at any time that the IRS is still seeking to collect the liability.¹⁸

This leads one to wonder why one would even to raise (b) relief anymore. Relief under (b) not only requires the taxpayer to prove all the factors going to inequity (the only issue under (f)), but also his or her lack of knowledge or reason to know of the item giving rise to the deficiency.

¹⁷ Lantz v. Commissioner, 132 T.C. No. 8 (Apr. 7, 2009).

¹⁸ Absent certain tolling events, the IRS has 10 years to levy or bring suit for collection after it has assessed a liability. §6502(a).

And, with respect to (c) relief, one can imagine very few situations where a spouse could get separation of deficiency liability relief, even though it was still equitable to hold her liable under (f). In a rare example, relief could be given under (c) if the taxpayer did not know of the erroneous item, even though he or she would suffer no hardship by being forced to pay the deficiency and significantly benefited from the deficiency. By contrast, under (f), those factors arguing against equitable relief (significant benefit and lack of hardship) might outweigh the factor arguing for equitable relief – i.e., that the spouse did not know of the erroneous item. People raising innocent spouse relief even under (c), though, usually do so because of hardship and/or lack of significant benefit, as well. So, this is quite an uncommon example.

Indeed, the main reason still to raise relief under §6015(b) and (c) appears to be to protect one's client just in case a Court of Appeals reverses one of the Tax Court's recent rulings under (f).

Frankly, given the Tax Court's rulings, and if no Court of Appeals disagrees, it would now greatly simplify the statute to just repeal (b) and (c) entirely. Then, let (f) – the sole remaining avenue for innocent spouse relief -- be shortened to read: "Under procedures prescribed by the Secretary, if, 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), the Secretary may relieve such individual of such liability." In this way, the Tax Court would (1) ignore what, if anything, the IRS was told at the administrative level, (2) merely take testimony and evidence on the factors for relief under (f) set out by the IRS in Revenue Procedure 2003-61, and (3) make its own facts and circumstances determination about what was equitable. The court and the parties could then save a lot of time thinking about -- and a lot of ink writing about -- the issues in (b) and (c) that do not anymore ultimately decide whether a spouse will be relieved of joint liability under §6015.

One could even simplify the statute further: The factors chosen by the IRS for consideration under (f) in the Revenue Procedure were largely taken from the case law under former §6013(e) deciding the issue of inequity under that provision. Why let the IRS decide what are the appropriate factors for inequity under (f), when those factors derived from case law in the first place? Why not just go back to the old case law as to what circumstances indicate inequity and devise new case law, as needed, to cover the few things (e.g., underpayment cases not involving deficiencies) that are also now covered by (f) but were not by §6013(e)?

The Tax Court has not been fully deferential to the IRS' Revenue Procedures, anyway. For example, in Ewing,¹⁹ the Tax Court refused to follow a predecessor of Rev. Proc. 2003-61 to the extent that the predecessor treated the absence of significant benefit as not a factor favoring equitable relief.²⁰ Rather, the Tax Court held that the absence of significant benefit under its old case law was a factor favoring a finding of inequity under

¹⁹ Supra, 122 T.C. at 45.

²⁰ See Rev. Proc. 2000-15, 2000-1 C.B. 447.

§6013(e)(1)(D), so lack of significant benefit would be treated as a favorable factor for granting relief under §6015(f).

Thus, to simplify the statute even more and completely eliminate all deference to the IRS, why not amend §6015(f) to simply read: “If, 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), the individual shall be relieved of such liability”? Relief under current §6015(b), (c), and (f) would all be folded into this one sentence. After the recent opinions, that is largely what the Tax Court is now doing, anyway. Why not let the statute fully conform to the holdings and get rid of all this deadwood in §6015?