

Be Careful of What You Post Online

Cross References

- *Thomas*, 160 T.C. No. 4, February 13, 2023

When married couples file a joint tax return, they are both liable for any tax due on the return. A spouse may seek relief from joint and several liability under the procedures established in IRC section 6015(b) if:

- A) A joint return has been filed for the tax year,
- B) On such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return,
- C) The other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement,
- D) Taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such tax year attributable to such understatement, and
- E) The other individual elects (in such form as the IRS may prescribe) innocent spouse relief not later than the date which is two years after the date the IRS has begun collection activities with respect to the individual making the election.

When all of the above conditions are met, the innocent spouse is relieved of liability for tax (including interest, penalties, and other amounts) for such tax year to the extent such liability is attributable to such understatement. If a requesting spouse is dissatisfied with the IRS's decision about the requested relief, the taxpayer may petition the Tax Court to determine the appropriate relief available to the individual.

The taxpayer's husband in this case died in 2016. After his death, the taxpayer asked the IRS for relief from the unpaid joint and several liabilities for tax years 2012, 2013, and 2014 pursuant to IRC section 6015(f). The IRS denied that request on September 8, 2020. The taxpayer then petitioned the Tax Court to determine the appropriate relief available to her.

Because both the taxpayer and the IRS wanted the Court to consider testimony and other evidence that was not part of the original administrative record, the Tax Court tried the case on April 4, 2022. At the trial, the IRS proposed to introduce into evidence a series of posts from the taxpayer's personal online blog. The first post is dated November 2, 2016, and the final post is dated January 5, 2022. The contents of the posts are relevant because they reflect information about the taxpayer's assets, lifestyle, and business, as well as her relationship with her deceased husband. The taxpayer discussed the blog during her direct testimony, and although the IRS did not directly question the taxpayer about specific blog posts during cross-examination, some of the IRS's cross-examination questions relied on matters addressed in the blog posts.

The taxpayer, who represented herself during the trial, expressed some concerns about the admissibility of the blog posts. On April 26, 2022, the Tax Court issued an order addressing the blog post evidence. The court concluded "that it would advance the orderly

resolution of this case to treat [the blog posts] as admitted in full," "without prejudice to the parties' ability to file motions to have an exhibit stricken from the record." The court noted that, "given the novelty and complexity of certain issues [relating to the blog posts] that the taxpayer's presentation on these issues may benefit from the assistance of counsel."

The taxpayer then obtained counsel and filed a motion to strike the blog posts from evidence. The IRS then filed an objection to the petitioner's motion to strike, and the case went back to the Tax Court to consider whether or not the blog posts could be used against the taxpayer in seeking innocent spouse relief.

The court noted that both the taxpayer and the IRS agree that the taxpayer's blog posts are not part of the administrative record and that they are relevant to the disposition of the case. The court stated it must determine whether it should strike the blog posts pursuant to IRC section 6015(e)(7) which requires the tax court to only consider:

- A) The administrative record established at the time of the determination, and
- B) Any additional newly discovered or previously unavailable evidence.

The taxpayer argued that the blog posts should be struck from the evidence because they were publicly available, and the IRS could have found them through an internet search of the taxpayer's name. Thus, they were not "previously unavailable."

The taxpayer also asked the court to conclude that the posts are also not "newly discovered." In her view, to admit newly discovered evidence, the party seeking admission has to have exercised reasonable diligence. The taxpayer argued that the IRS did not exercise reasonable diligence.

The IRS argued that none of the evidence should be stricken. The taxpayer's blog posts were "newly discovered" by the IRS after the administrative proceedings concluded. The IRS argued that the term "newly discovered" should be defined in its ordinary meaning. The IRS did not become aware of the blog materials until after the taxpayer brought the case before the Tax Court, and thus, are "newly discovered" evidence. The IRS pointed to several considerations that favor its reading of the statute.

First, the IRS noted its role in the administrative review process for resolving claims for relief under IRC section 6015 is that of an arbiter, not an advocate. Thus, the IRS does not have a duty to gather evidence to defeat a request for relief.

Second, the IRS stated that because the taxpayer has the burden at the administrative stage to establish that relief is appropriate, if the IRS concludes that the taxpayer has failed to meet that burden, it would be a waste of resources for the IRS to gather additional evidence simply to refute an inadequate claim.

Third, the IRS stated because the relationship between the IRS and a requesting spouse does not become adversarial until a proceeding is instituted in Tax Court, any responsibility for the IRS to begin collecting additional information should not arise until then.

Fourth, the statutory requirement that the court's decision be based on the "administrative record established at the time of the determination," represents an effort to ensure that requesting spouses exhaust their administrative remedies before going to Tax Court.

Since no exhaustion requirement applies to the IRS, the IRS should thus be permitted to look for additional evidence once the case is in court rather than being required to undertake such efforts earlier on pain of losing the right to do so.

Moreover, since the evidence at issue here was within the requesting spouse's control, that factor weighs in favor of the evidence being left in the record. Taxpayers should not be incentivized to hide information from the IRS during the administrative phase.

The Tax Court noted the motion before them presents an issue of first impression concerning the meaning of IRC section 6015(e)(7). This code section does not define the phrase "newly discovered evidence." The court stated it must therefore discern the ordinary meaning of that phrase.

The word "newly" generally is defined to mean "recently" or "lately." The word "discover" generally means "to obtain sight or knowledge of for the first time." No alternative definitions have been provided by the parties, nor do the parties dispute these definitions. The court therefore concluded that the ordinary meaning of "newly discovered" means "recently obtained sight or knowledge of for the first time." The court stated it did not think Congress intended to use the phrase "newly discovered evidence" as a legal term of art.

Applied to this case, the phrase "newly discovered evidence" encompasses the blog posts that the taxpayer seeks to strike. The IRS discovered the posts by searching the internet after the taxpayer filed the petition before the Tax Court. There is no evidence that the IRS obtained the blog posts any sooner, and the taxpayer makes no argument to that effect. Therefore, the court concluded that the blog posts are admissible as "newly discovered evidence" for purposes of reviewing the taxpayer's innocent spouse claim.