

When the Tax Court Takes the Taxpayer's Side in Collection Disputes

By Morgan D. King

Morgan D. King takes a look at how courts examine and reject as arbitrary the IRS rationale for turning down a delinquent taxpayer's proposals for dispute resolution.

The IRS is typically less than liberal in granting taxpayers relief for delinquent taxes. The remedies, including offer-in-compromise (OIC), innocent spouse, injured spouse, due process hearings and others, are on the books, but tax professionals generally experience more denials than approvals. In many cases the denials or rejections seem unfair or arbitrary. For example, for OICs, some professionals have become so discouraged that they have simply stopped looking for or processing such cases. But IRS decisions are not always sacrosanct, and are sometimes upset by the courts. We discuss those situations here.

Upon receiving a notice of denial or rejection, the taxpayer (or his or her representative) may in some cases appeal the denial administratively, particularly for results of due process hearings,¹ and rejected offers-in-compromise or innocent spouse status. Appeals go to a neutral and objective IRS Appeals officer, who takes a fresh look at the case and may reverse the negative decision and issue a new notice of determination.²

In the event the appeal is denied, the taxpayer may have one more opportunity for relief: petition the U.S. Tax Court for a judicial review of the case.³ Where the taxpayer is asserting an abuse

of discretion by the IRS, the court proceeding is technically not an appeal⁴ *per se*, but is actually a trial, which in most jurisdictions allows witness testimony and new evidence to be introduced.⁵

The weight of court opinions is that the jurisdiction of the court does not include substituting its opinion about the merits of the IRS action in place of the IRS. Thus, the court will not reverse an IRS administrative decision merely because the court thinks the remedy should have been more sympathetic to the taxpayer.⁶

What the court can do is look at the manner in which the case was handled and ask the question, in this case, was the IRS guilty of "abuse of discretion" in arriving at a denial or rejection? Sometimes the concept of abuse of discretion is further defined by the terms "arbitrary," "capricious" or "whimsical": "An abuse of discretion occurs when the decision is arbitrary, capricious or whimsical, or results in a 'manifestly unreasonable judgment.'"⁷ This standard of review provides an opportunity for a sympathetic court essentially to overrule the IRS on the merits, but couch its opinion in the language of abuse of discretion. The distinction: The court is loath to interpret the evidence at odds with the IRS, but will criticize whether or not the IRS considered the evidence or gave it proper weight. It is a subtle distinction that is blurred somewhat in the cases discussed below.

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How Successful Are Appeals to the Tax Court Based on “Abuse of Discretion”?

The bad news is that the courts uphold the vast majority of IRS decisions. The good news is that several courts have found abuse of discretion and either outright reversed the denials or remanded the cases back to the appeals section of the IRS for reconsideration.

Looking at the circumstances in which the courts have upset IRS denials or rejections provides some clues as to how to prepare the original application for the remedy and how to handle the appeal of a denial. In other words, an application for a delinquent tax remedy should be framed to give the taxpayer the best chance for a favorable court ruling in the event of an administrative denial.

OIC Denied Without Determining Liability

In one case (*J.B. Borges*⁸) following a final notice of intent to levy, the taxpayers submitted a timely request for a collection due process hearing. During the due process proceedings the taxpayers asserted that the assessment of tax was incorrect. They also submitted an OIC and requested an installment plan pending a determination of the offer. The IRS denied the taxpayers' installment plan as well as the proposal for an OIC. IRS appeals determined that an installment plan would not be viable for three reasons. First, Plaintiffs had a history of compliance problems. Second, J & M Dairy's financial information did not show enough cash flow to make reasonable installment payments. Third, a monthly payment of \$2,500 would not even cover the interest on Plaintiffs' tax debt. In addition, the IRS determined that Plaintiffs did not qualify to make an offer of compromise due to a missing 2002 tax deposit and because Plaintiffs had incorrectly filed a Form 941 for tax year 2001 instead of a Form 943.

The taxpayers sent correspondence to the IRS pointing out that the proposed levy would cause the taxpayers' business (a dairy) to close, resulting in hardship to the dairy's employees and possible death to the dairy cows and cattle, and requested that the IRS accept the installment agreement as an

interim measure until Plaintiffs qualified to submit an offer in compromise. The appeals officer discussed this proposal with the taxpayer, but, again, decided against an installment plan.

The taxpayer petitioned the tax court, which ruled that the IRS appeals officer had, indeed, been arbitrary or capricious in denying the offer, because any denial was premature pending a determination of exactly how much in delinquent taxes the taxpayer actually owed:

IRS decisions are not always sacrosanct, and are sometimes upset by the courts.

Plaintiffs challenged the amount of their total tax delinquency at their CDP hearing. The Appeals Of-

ficer, however, issued her Notice of Determination prior to determining the amount of Plaintiffs' tax delinquency. As a result, the Notice of Determination rejected Plaintiffs' request for an installment plan based on erroneous information, including an overstatement of Plaintiffs' outstanding employment taxes by at least \$170,000.00 and an understatement of Plaintiffs' proposed monthly payment by \$3,095. These errors may or may not have affected the Appeals Officer's ultimate determination. However, the court finds that when a challenge to the amount of delinquent taxes has been raised and the viability of a proposed collection alternative depends, in part, on the amount of taxes due, issuing the Notice of Determination prior to determining the correct amount of taxes due is an abuse of discretion. Therefore, the court will remand this matter to IRS Appeals for a new CDP hearing and Notice of Determination.⁹

Denied Installment Plan but Same Issue

A similar case (*B.D. Clarke*¹⁰) dealt with an issue involving IRS responsibility under the collection due process hearing procedures in which the argument also pivoted around whether the correct assessment should have been determined before a final Appeals decision was made.

Following receipt of a final notice of intent to levy on a delinquent tax liability, the taxpayer filed a timely request for a due process hearing, and as part of that process indicated he was amenable to an installment payment plan that he thought would pay off his entire liability (for tax year 1999). At the time the

taxpayer offered the proposed plan he was unaware that the IRS asserted that he owed additional taxes for another, more recent year (2004). The proposed IRS installment agreement included the alleged additional tax liability.

The taxpayer declined to sign the agreement on the basis that he did not owe for the additional year, and had not been given prior notice that the IRS asserted that he owed for that year. He was, however, willing to do an installment plan for the taxes he agreed he owed, and had even begun making voluntary monthly payments without a signed installment agreement.

On the basis that the taxpayer would not agree to include the additional year, the IRS refused to approve an installment plan. The taxpayer petitioned the court on the basis that the IRS, in refusing to enter into an installment agreement unless it included the disputed liability, had abused its discretion. The taxpayer also asserted that the IRS allocation of a refund due him for a more recent year (2005) to offset the amount owed for the disputed year was arbitrary, and that it should have been applied to the year for which the taxpayer admitted liability.

The court agreed with the taxpayer. Although the IRS argued that its policies prohibited entering an installment agreement that did not include all liabilities for all tax periods,¹¹ and the court agreed with this argument, the Tax Court nevertheless held that the IRS could not proceed with the proposed levy, even for the uncontested year. The authorizing Code section for due process hearings provides, in part:

The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.¹²

The due process statute provides that at the conclusion of the hearing, the Appeals officer must determine whether and how to proceed with collection and shall take into account (1) the verification that the requirements of any applicable law or administrative procedure have been met; (2) the relevant issues raised by the taxpayer; (3) challenges to the underlying tax liability by the

taxpayer, where permitted; and (4) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that the collection action be no more intrusive than necessary.¹³

In this case it is evident the Appeals officer did not consider all relevant issues raised by the taxpayer, in particular his challenges to the underlying tax liability. The court held:

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We hold that respondent's application of petitioner's tax refund amount from 2005 to the

year 2004, in the absence of respondent's establishing that there was any tax liability for 2004, even though petitioner repeatedly asserted, and his 2004 return showed, that there was no such liability, was an error of law. The Appeals officer's verification that the requirements of applicable law had been met was incorrect. Accordingly, levy to collect the 1999 assessment may not proceed. We shall remand the determination for 1999 to respondent's Office of Appeals for reconsideration of petitioner's claim that he owed no taxes for 2004 and thus the amount of the refund due him for tax year 2005 should have been applied entirely to tax year 1999.

Innocent Spouse Status Denied

In another case, the IRS denied an application for innocent-spouse status (*G.A. Ewing*¹⁴). The taxpayer filed Form 8857, *Request for Innocent Spouse Relief*,¹⁵ in which she sought relief from joint liability for a portion of the amount of the unpaid tax liability shown on the couple's 1995 joint return. The IRS sent the taxpayer a letter which said that the IRS had preliminarily determined that the taxpayer was not entitled to relief under Code Sec. 6015(f).

The taxpayer appealed the decision. An Appeals officer met with petitioner's representative. The Appeals representative determined that the taxpayer was not entitled to equitable relief under Code Sec. 6015(f) for 1995. The IRS's only stated reasons were as follows: "You had knowledge of the liability, and you are still married and living with the non-requesting spouse." The taxpayer timely filed a petition with the court.

The Internal Revenue Code provides that a taxpayer against whom a deficiency has been asserted may petition the court "to determine the appropriate relief

available to the individual” under Code Sec. 6015.¹⁶ To prevail under Code Sec. 6015(f), the taxpayer must show that the IRS’s denial of relief from joint liability was an abuse of discretion.

IRS Procedures¹⁷ prescribe a nonexclusive list of factors the IRS should consider in determining whether to grant or deny relief to a spouse. In nutshell, these factors follow:

- **Marital status**—whether the requesting spouse is separated (whether legally separated or living apart) or divorced from the nonrequesting spouse
- **Economic hardship**—whether the requesting spouse would suffer economic hardship if the IRS does not grant relief from the income tax liability
- **Knowledge or reason to know:**
 - (A) **Underpayment cases**—in the case of an income tax liability that was properly reported but not paid, whether the requesting spouse did not know and had no reason to know that the nonrequesting spouse would not pay the income tax liability.
 - (B) **Deficiency cases**—in the case of an income tax liability that arose from a deficiency, whether the requesting spouse did not know and had no reason to know of the item giving rise to the deficiency. Actual knowledge of the item giving rise to the deficiency is a strong factor weighing against relief. This strong factor may be overcome if the factors in favor of equitable relief are particularly compelling.
 - (C) **Reason to know**—for purposes of (A) and (B) above, in determining whether the requesting spouse had reason to know, the IRS will consider the requesting spouse’s level of education, any deceit or evasiveness of the nonrequesting spouse, the requesting spouse’s degree of involvement in the activity generating the income tax liability, the requesting spouse’s involvement in business and household financial matters, the requesting spouse’s business or financial expertise, and any lavish or unusual expenditures compared with past spending levels.
- **Nonrequesting spouse’s legal obligation**—whether the nonrequesting spouse has a legal obligation

“An abuse of discretion occurs when the decision is arbitrary, capricious or whimsical, or results in a ‘manifestly unreasonable judgment.’”

to pay the outstanding income tax liability pursuant to a divorce decree or agreement

- **Significant benefit**—whether the requesting spouse received significant benefit (beyond normal support) from the unpaid income tax liability or item giving rise to the deficiency
- **Compliance**—whether the requesting spouse has made a good faith effort to comply with income tax laws in the tax years following the tax year or years to which the request for relief relates
- **Abuse**—whether the nonrequesting spouse abused the requesting spouse. The presence of abuse is a factor favoring relief. A history of abuse by the nonrequesting spouse may mitigate a requesting spouse’s knowledge or reason to know.
- **Mental or physical health**—whether the requesting spouse was in poor mental or physical health on the date the requesting spouse signed the return or at the time the requesting spouse requested relief. The IRS will consider the nature, extent, and duration of illness when weighing this factor.

The court summarized the case:

Petitioner (taxpayer) has presented an especially strong case for relief from joint liability under factors promulgated by the Commissioner in Rev. Proc. 2000-15, supra: all of these factors either weigh in favor of petitioner or are neutral, and none of those factors weigh against granting relief to petitioner. Petitioner did not significantly benefit from the underpayment, the underpayment was solely attributable to Mr. Wiwi, she has complied with Federal tax laws at least since 1995, she did not know or have reason to know Mr. Wiwi would not pay the unpaid tax for 1995, and payment of the tax would cause economic hardship. The neutral factors include petitioner’s marital status and lack of spousal abuse. The legal obligation factor does not apply here because petitioner and Mr. Wiwi are still married. [Emphasis added.]

Based on these considerations the denial of relief was found to be an abuse of discretion, and that, on

the basis of all the facts and circumstances, it would be inequitable to hold petitioner liable for the underpayment of tax for 1995.

The lesson of this case is that where the IRS states its reasons for denying the requested relief, there should be an explanation of why the factors that were considered weigh against the taxpayer; merely reciting a few facts without evidence and sound reasoning that these are negative facts is too cavalier an approach. For example, in this case, IRS Appeals cited the fact that the taxpayer was still married to the nonapplying spouse, but failed to explain why in this case that was a bad thing; without more, the court found that this factor argued neither for nor against the taxpayer, and should not have been considered.

The good news is, several courts have found abuse of discretion, and either outright reversed the denials, or remanded the cases back to the appeals section of the IRS for reconsideration.

Another Innocent Spouse Case

In this case (*Beatty*¹⁸) the taxpayer submitted Form 886-A, *Innocent Spouse Questionnaire*. Subsequently, Appeals sent the taxpayer a “Notice of Determination Concerning Your Request for Relief under the Equitable Relief Provision of Code Sec. 6015(f).” The notice of determination stated in pertinent part:

We’re writing to tell you that we’ve made a decision about your ... request for innocent spouse relief under Section 6015(f) of the Internal Revenue Code... . We’ve determined that we cannot allow your request. It has been determined that you do not meet the statutory criteria for granting of the innocent spouse relief.

The Appeals Office implicitly acknowledged in the notice of determination that payment of the unpaid liabilities for the years at issue would cause even greater economic hardship than already existed. Thus, the court found that the economic hardship factor weighed in favor of granting petitioner relief under Code Sec. 6015(f).

The court also said that the taxpayer’s lack of enjoyment of the benefit of the underpaid tax should not have been used against her, but rather deemed a factor in her favor. Said the court:

As we understand it, although the Appeals Office found in the notice of determination that petitioner did not receive a significant benefit from the failure to pay the unpaid liabilities for the years at issue, that office did not conclude that therefore the significant benefit factor weighed in favor of granting petitioner relief under section 6015(f). We reject as unfounded the Appeals Office’s failure to conclude in the notice of determination that the significant benefit factor favored granting petitioner such relief. Under cases where Revenue Procedure

2003-61 is applicable, we consider the lack of significant benefit by the taxpayer seeking relief from joint and several liability to be a factor that favors granting relief under section 6015(f). We find that the significant benefit factor weighs in favor of granting petitioner relief under section 6015(f).

The notice of determination also failed to mention that the taxpayer had been in compliance with tax laws; the court found that this should have been included as a factor arguing in favor of granting the relief.

The Husband Is the Innocent Spouse in This Case

In a recent innocent spouse case (*D.B. Billings*¹⁹), the wife had committed embezzlement and not reported the income on the couple’s joint tax return. At the time the parties signed the original tax return the husband was in the dark about all this. Later, he and his wife signed and filed an amended return disclosing the true facts. The husband sought innocent-spouse status, which was rejected.

In rejecting the request, Appeals asserted that at the time he signed the amended return, he knew the tax would not be paid, and accordingly he was not eligible for innocent-spouse status. Appeals also showed that the husband had benefited to a modest degree from the money saved by not paying taxes.

The Tax Court reversed the IRS decision, primarily on the ground that the factors cited by the IRS to

support its decision in fact, according to the court, favored the taxpayer's right to innocent spouse status. It held that to show the applicant had benefited to the extent required to disqualify innocent spouse status, the evidence would have to show he "significantly benefited (beyond normal support) from the unpaid liability ..." The Tax Court's view of the evidence showed no such significant benefit, and the court ruled that this factor favored granting the relief.

The court also held that in order to be disqualified on the basis of his knowledge of the facts, the time at which this factor should be considered was when the husband signed the original tax return, when he was still ignorant of the facts, rather than the second, amended return.

OIC Not Reinstated

Another interesting case (*J.M. Robinette*²⁰) found that the IRS committed an abuse of discretion in declaring a signed OIC to be in default. The terms of the OIC executed by the taxpayer and the IRS covered both personal income and payroll trust-fund taxes and included the requirement that the taxpayer file all of his returns for certain tax years in a timely manner. The IRS did receive most of the returns timely. However, the IRS claimed it did not receive one of the returns in a timely manner, and consequently declared the agreement in default.

Based on its finding that the OIC was in default, the IRS issued a Final Notice of Intent to Levy. In response, the taxpayer filed a timely request for a due process hearing. At the hearing the taxpayer pointed out that he had a consistent record of filing timely tax returns, including the returns for both the year before the missing return, and the year after. The taxpayer's accountant explained that he had, in fact, posted the return before midnight on the last day in which the return was due, and he backed up his testimony with a record of his office postage machine and his daily time log. When the dispute came up, the accountant had mailed a copy of the return in question to the IRS, approximately four months after the due date. Apparently brushing off the taxpayer's and accountant's testimony, the appeals officer found that the return had not been filed timely and that this constituted a default on the OIC. Accordingly, the IRS stated its intention to proceed with the levy.

The court found that the taxpayer had not proven he had filed the return on time. However, after examin-

ing all of the facts and circumstances, the Tax Court determined that the appeals officer (Mr. Talbott) should have taken into consideration circumstantial evidence supporting the taxpayer's representation that he filed the return, including the taxpayer's "pattern of filing returns" as well as the taxpayer's "good faith." The court found that even though the taxpayer may not have filed a timely return, he was nevertheless in "substantial compliance" with the terms of the OIC. Said the court:

Mr. Talbott did not have an open mind regarding reinstatement. Moreover, he failed to independently analyze whether the terms of the offer-in-compromise had been materially breached. Mr. Talbott believed he had no authority to reinstate petitioner's offer-in-compromise. He believed only the National Office could reinstate the offer-in-compromise. Neither the Internal Revenue Code nor the Internal Revenue Manual, however, states that he could not reinstate the offer-in-compromise. ... we conclude that petitioner did not materially breach the terms of the offer-in-compromise. As the offer-in-compromise was not in default, it was an abuse of discretion for respondent to determine to proceed with collection of petitioner's tax liability.

Proposed Installment Plan Rejected

In another variation of the theme, a case found the IRS' refusal to approve a taxpayer's proposed installment agreement to be an abuse of discretion (*R.T. Lites*²¹). At a due process hearing, the taxpayers asserted that they should be permitted to do an installment agreement based on their available surplus income, which their arithmetic showed was \$750 per month, then raised it to \$1,200. The due process decision rejected the request on the basis that by the IRS' arithmetic, the surplus income was actually more like \$2,732. This formed the basic justification for the IRS decision.

However, at trial, the IRS reversed itself, conceding that the actual surplus income was closer to \$888 per month, but then arguing that the installment agreement should be declined because even at \$888 a month the taxpayers' actual surplus income was insufficient to fund it, and thus the payment plan was unfeasible! This contradictory departure from the reasons originally given in the Notice of Determination was picked up by the Tax Court:

We are confused and perplexed by respondent's position. In the first instance, by respondent's²² admission, petitioners had available excess monthly income of \$888, which would have more than covered their offer of \$750 per month. ... most fundamentally respondent's position on brief conflicts directly with the rationale articulated in the Notice of Determination. The appeals Office rejected petitioner's installment agreement proposals largely on the basis that petitioners could afford to pay much more than they offered. Now, apparently, respondent seeks to defend this action on the opposite ground that petitioners could not afford to pay as much as they had offered. Respondent cannot have it both ways.

Based largely on this inconsistency, and other inconsistencies found in the IRS position, the court nullified the IRS rejection of the proposed installment plan and sent it back to IRS Appeals for a reconsideration based on a fair evaluation of the taxpayers' budget.

What Do These Cases Suggest?

Is there anything to be learned from these cases that might help strengthen the odds of success if your case ends up in Tax Court? Here are a few of the author's observations.

Include All Your Issues and Evidence

Put as much evidence as you can, and raise as many issues as you can, at the due process or appeals hearing. Some cases have held that the court can only review the issues introduced along the way and cannot look at new issues raised at the court trial.²³ Although new issues cannot be considered, new evidence may be; the taxpayer has no power to subpoena witnesses for a due process hearing, but may do so for the trial. Because, although a tax court proceeding is often referred to as an appeal of an IRS decision, a proceeding in Tax Court to review for abuse of discretion is not an appeal, *per se*, but is actually a new trial.²⁴

The general rule that new issues may not be raised at a Tax Court trial may also turn against the IRS. In the case described above in connection with a rejected installment plan, the IRS attempted at trial

to argue that the taxpayers did not deserve an installment plan because they had "... continued to live beyond their means as petitioners failed to curb their credit card debt." Notwithstanding that this is, in fact, what the evidence showed, the Tax Court refused to consider it because that reasoning was not included in the Notice of Determination rejecting the taxpayers' request for an installment agreement. This demonstrates that what the court is looking at is not what the IRS can amass as arguments to support its decision, but rather what the IRS relied on to support its administrative decision, and the rationale set forth in the Notice of Deficiency.

Was the Notice of Determination Arbitrary?

You've prepared and presented your case all the way up to the Appeals Office, and your proposals on behalf of your client have been rejected. Many tax professionals figure the decision of the administrative appeal is the end of the road. Don't give up so easily. As we have seen in the cases discussed above, the notice of determination may be vulnerable on several grounds, all centering around the concept of arbitrary and capricious determinations. Examine the reasons given to justify the final determination. Look for weaknesses that may be identified by a Tax Court:

- **Rejecting the offer without determining liability.** As the Tax Court found in two of the cases described above, collection activity without first fixing the correct amount owed could be deemed arbitrary.
- **Failure to address all relevant factors.** As seen in the *Beatty* case discussed above, IRS Appeals may have simply left out consideration of a significant factor (in that case, the taxpayer's track record of compliance). Again, arbitrary.
- **Wrongly interpreting evidence factors against the taxpayer.** In several of the cases noted here,²⁵ the Tax Court simply disagreed with the IRS interpreting one or more factors against the taxpayer, when they should have been deemed either favorably for the taxpayer, or neutral. In *Ewing* the Tax Court found a number of factors in the taxpayer's favor, contrary to the IRS position. In *Billings*, where a request for innocent spouse relief was rejected, the IRS asserted that the requesting spouse (the husband) had benefited from the unpaid taxes, thus disqualifying him from the requested relief. Yet when the Tax

Court closely scrutinized the same evidence in the record, it concluded that the IRS Appeals had misinterpreted the evidence and in fact it did not demonstrate any benefit to the husband beyond ordinary living expenses; thus this factor should have been interpreted in favor of acceptance of innocent spouse status.

- **Inconsistent reasoning.** As seen in *Lites*, discussed above, the IRS was seen to stumble all over the place trying to come up with a reason to deny the taxpayer's requested installment plan,

glaringly contradicting itself in several respects. Similarly, in other cases a search of the IRS offer-in-compromise file²⁶ may reveal contradictions, inconsistencies or other grasping at straws in the rationale used for rejecting the requested relief. At the end of the day, it may not be necessary to roll over and accept a final determination by appeals. Appeals officers are human beings, and sometimes use poor judgment or unfairly gloss over important factors favoring the requested relief. Take a close look at it. You may find an Achilles' heel among the details.

ENDNOTES

¹ The right to a "due process hearing" was created with the *IRS Restructuring and Reform Act of 1998* and is codified in Code Sec. 6330 *et seq.* The taxpayer must submit his or her request for a hearing within 30 days of the date of the final notice of intent to levy (which follows an "urgent" notice of intent), or notice of filing a lien.

² "The notice of determination issued in each case describes the facts and reasons supporting the Appeals officer's determination and should provide an adequate basis for the taxpayer's decision whether to seek judicial review." Internal Revenue Bulletin 2006-46 (Nov. 13, 2006).

³ Code Sec. 6330(d); H.R. CONF. REP. NO. 105-599, at 266 (1998): "During the hearing, a taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy, including ... offers of collection alternatives, which may include an offer-in-compromise." Code Sec. 6330(c)(2)(A); *E.F. Murphy*, CA-1, 2007-1 USTC ¶ 50,115, 469 F3d 27; *J.J. Crisan*, 86 TCM 601, Dec. 55,350(M), TC Memo. 2003-318. The court has specific jurisdiction to review innocent-spouse rulings; Code Sec. 6015(e)(1)(A). "The Tax Court has jurisdiction to review the IRS denial of a spouse's innocent-spouse application under the criterion of abuse of discretion." The Court rejected the IRS argument that under the Tax Code whether or not

to grant innocent-spouse was solely within the discretion of the IRS; *D. Fernandez*, 114 TC 324, Dec. 53,875 (2000). Held, the Court could review a case of requested equitable relief under Code Sec. 6015(f); *F.L. Charlton*, 114 TC 333, Dec. 53,879 (2000); *D.B. Billings*, 94 TCM 183, Dec. 57,056(M), TC Memo 2007-234.

⁴ Keep in mind a distinction between an administrative appeal with the IRS versus judicial appeal by the courts.

⁵ But typically the taxpayer may not introduce a new issue not previously pressed by the taxpayer.

⁶ *D.C. Jonson*, 118 TC 106, 125, Dec. 54,641 (2002), *aff'd*, CA-10, 2004-1 USTC ¶ 50,122, 353 F3d 1181. "This standard does not ask us to decide whether in our own opinion we should grant relief, but whether the Commissioner, in refusing to do so, exercised his discretion arbitrarily ..." *Billings*, *supra* note 3.

⁷ *J.B. Borges*, DC-NM, 2004-1 USTC ¶ 50,208, 317 FSupp2d 1276, at 1282; *Jonson*, *id.*; *K. Cheshire*, 115 TC 183, 198, Dec. 54,028 (2000), *aff'd*, CA-5, 2002-1 USTC ¶ 50,222, 282 F3d 326; *M.B. Butler*, 114 TC 276, 292, Dec. 53,869 (2000).

⁸ *Borges*, *supra* note 7.

⁹ While favorable to the taxpayer, the ruling raises the question of how IRS appeals should deal with a taxpayer's bad-faith

objection to the amount owed made solely for purposes of delay.

¹⁰ *B.D. Clarke*, TC Summary Opinion 2007-52 (Mar. 29, 2007).

¹¹ IRM §5.14.1.5.1

¹² Code Sec. 6330(c)(2)(B).

¹³ Code Sec. 6330(c)(3).

¹⁴ *G.A. Ewing*, 122 TC 32, Dec. 55,519, *rev'd*, CA-9, 2006-1 USTC ¶ 50,191, 439 F3d 1009.

¹⁵ Code Sec. 6015.

¹⁶ Code Sec. 6015(e)(1)(A).

¹⁷ Rev. Proc. 2000-15, 2000-1 CB 447, 448, at §4.03.

¹⁸ *C.K. Beatty*, 93 TCM 1422, Dec. 56,984(M), TC Memo 2007-167.

¹⁹ *Billings*, *supra* note 3.

²⁰ *J.M. Robinette*, 123 TC 85, Dec. 55,698.

²¹ *R.T. Lites*, 90 TCM 191, Dec. 56,130(M), TC Memo. 2005-206.

²² The IRS.

²³ "Generally, we may consider only those issues that the taxpayer raised during the section 6330 hearing or otherwise brought to the attention of the Appeals Office." *R.B. Magana*, 118 TC 488, 493, Dec. 54,765 (2002); *Clarke*, *supra* note 11; *Robinette*, *supra* note 20.

²⁴ In court jargon, a trial *de novo*.

²⁵ *Ewing*, *Beatty*, *Billings*, *supra*.

²⁶ Which may be obtained relatively easily with a Freedom of Information Request.

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