No. 12982-20

IN THE UNITED STATES TAX COURT

SYDNEY ANN CHANEY THOMAS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMICUS BRIEF OF THE CENTER FOR TAXPAYER RIGHTS, THE COMMUNITY TAX LAW PROJECT, THE UC HASTINGS LOW-INCOME TAXPAYER CLINIC AND THE VILLLANOVA FEDERAL TAX CLINIC IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS*[1]

The Center for Taxpayer Rights ("the Center") is a § 501(c)(3)[2] not-for-profit corporation dedicated to furthering taxpayers' awareness of and access to taxpayer rights, and operates the Low Income Taxpayer Clinic (LITC) Support Center. The Federal Tax Clinic at Villanova University's Charles Widger School of Law, The Community Tax Law Project, and the U.C. Hastings Low Income Taxpayer Clinic represent low income taxpayers in controversies before the IRS and the United States Tax Court, with the goal of maximizing financial well-being and protecting the rights of low income taxpayers. The Center's Executive Director is Nina E. Olson, who served from 2001 to 2019 as the National Taxpayer Advocate under § 7803(c)(1)(B). In that role, Ms. Olson submitted reports to Congress twice a year urging administrative and legislative improvements to taxpayer rights, including clarifying the standard of review in § 6015(f) cases. The Villanova Clinic's director, Christine Speidel, recently co-authored a revision of the book *A Practitioner's Guide to Innocent Spouse Relief.* Professor Les Book is the

[1] Consent to file this brief was provided by Petitioner and Respondent. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The only persons who contributed money that was intended to fund preparing or submitting this brief are the *amici.* The views expressed herein are those of the Center and the Clinics, not the underlying academic institutions.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.

successor author for the Thomson Reuters treatise *IRS Practice and Procedure* and has written extensively about relief under § 6015.

The *amici* have taken an interest in this case as it involves an issue central to administering a fair and just tax system. Low income taxpayers, including those who appear before the IRS and the courts *pro se* or who are survivors of domestic violence, have difficulty creating a complete administrative record upon requesting relief from joint and several liability under § 6015. The skeletal procedures and guidance established by the IRS for its employees to develop an administrative record, the summary nature of the basis for the IRS's decision to deny relief, and the inability of the requesting spouse to conduct discovery or subpoena witnesses or documents or learn what the non-requesting spouse has proffered at the administrative hearing, render it difficult if not impossible for the requesting spouse to submit for the administrative record all relevant and necessary evidence in support of their claim for relief. Accordingly, the *amici* present this brief in support of the position that exceptions to the administrative record rule of § 6015(e)(7) be applied expansively given the *de novo* review the court must conduct, the requesting spouse's specific circumstances, and the nature of the IRS's administrative procedures.

ARGUMENTS

I. The Tax Court and Courts of Appeals have applied exceptions to the administrative record rule in the context of both *de novo* and abuse of discretion standards of review.

Section 6015(f)(1) provides the Secretary of the Treasury with the discretion to relieve an individual from joint and several liability for a tax debt arising from a joint return where "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 the individual is not otherwise eligible for relief under §§ 6015(b) or (c). Section 6015(e)(1) grants an individual electing to request such relief the opportunity to petition the Tax Court for a determination of the appropriate relief. Such petition can occur after either the IRS's issuance of a Notice of Determination ("NOD") or six months after the date of electing and filing a request for relief. § 6015(e)(1)(A)(i)(I)-(II).

In 2013, the Court of Appeals for the Ninth Circuit held the standard of review for Tax Court determinations of equitable relief under § 6015(f) was *de novo*. *See Wilson v. Commissioner,* 705 F.3d 980 (2013), *aff'g* T.C. Memo. 2010-134. The Court reasoned that the "special statutory review process for administrative action" under § 6015(e) excluded application of the Administrative Procedure Act's (APA's) general provisions for judicial review, which includes the "arbitrary and capricious" standard of review set forth in 5 U.S.C. § 706(2)(A). *Id.*

at 990, citing *Bowen v. Massachusetts*, 487 U.S. 870, 903 (1988). The Court further held the Tax Court correctly considered evidence not included in the administrative record yet necessary for it to conduct a *de novo* review. *Id.* at 992.

> Even assuming, arguendo, that the APA applies here, the usual exceptions apply so as to permit the Tax Court to consider additional evidence. Although typically APA review of an agency decision is limited to the administrative record, *see Camp v. Pitts,* 411 U.S. 138, 142 (1973), there are, as the government concedes, exceptions to this general rule. We have acknowledged that a "reviewing court may require supplementation of the administrative record if it is incomplete." *Lands Council v. Powell,* 395 f.3d 1019, 1030 (9th Cir. 2005) . . . . Though exceptions to the APA's record rule are to be "narrowly construed and applied," they can be necessary "to plug holes in the administrative record." *Id.* at 991.

In 2019 Congress added § 6015(e)(7), which affirmed the standard of review in § 6015 cases was indeed *de novo*. At the same time, Congress clarified that *de novo* review "shall be based upon—(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence." Thus, while it appears that Congress imported exceptions in a manner generally consistent with the APA into *de novo* judicial review, we are still faced with determining when and how the Tax Court may go beyond the four corners of the administrative record. Neither the statute nor administrative guidance define the terms "newly discovered" or "previously unavailable," and there is no legislative history addressing those terms.

The Tax Court's whistleblower jurisdiction provides some insight into how to apply the administrative record rule. While this court has held the standard of review in whistleblower claims under § 7623(b)(4) is abuse of discretion, *Kasper v. Commissioner,* 150 T.C. No. 8, 22 (2018), and the scope of review is limited to the administrative record, it acknowledged that courts have recognized exceptions to the administrative record rule:

> • when agency action is not adequately explained in the record;
>
> • when the agency failed to consider relevant factors;
>
> • when the agency considered evidence which it failed to include in the record;
>
> • when a case is so complex that a court needs more evidence to enable it to understand the issues clearly;
>
> • where there is evidence that arose after the agency action showing whether the decision was correct or not; and
>
> • where the agency's failure to take action is under review.

Id. at 20-21, citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). In *Van Bemmelen v. Commissioner*, 155 T.C. No. 64 (2020), another whistleblower case, the court identified two categories of exceptions to the administrative record rule: (1) a request to include omitted evidence in the administrative record, and (2) a request to permit consideration of supplemental evidence. With respect to omitted evidence, the court noted the "strong presumption of regularity" that the party must overcome, but found that "[i]f it can be shown that the materials sought to be

included in the record before the court were indeed before the agency, supplementation is appropriate." *Id.* at 75, quoting *Cape Hatteras Access Pres. All. v. U.S. Dep't. of Interior,* 667 F.Supp. 2d 111, 114 (D.D.C. 2009). The court also identified three exceptions allowing supplemental evidence to be considered: (1) if the agency "deliberately or negligently excluded documents that may have been adverse to its decision," (2) if background information was needed "to determine whether the agency considered all the relevant factors," or (3) if the "agency failed to explain administrative action so as to frustrate judicial review . . ." *Id.* at 22, quoting *City of Dania Beach v. FAA*, 629 F. 3d 581, 590 (D.C. Cir. 2010) (citations omitted).

Wilson also sheds light on this question. That Court found that it may be necessary for the reviewing court to "fill the gap" in a record in order to determine whether the IRS considered all relevant factors in denying relief, or where "restricted access to important documents can be a significant barrier to establishing an adequate administrative record." *Wilson*, 705 F.3d at 991-92. In the next section we demonstrate how the IRS's procedures can lead to an inadequate administrative record that may require a later evidentiary hearing to determine whether the record should be completed or supplemented.[3]

[3] For a discussion of the dichotomy between completion of the administrative record and supplementation of the record, *see* Peter Constable Alter, *A Record of*

II. The IRS's Administrative Procedures for Evaluating Innocent Spouse Claims Led to An Inadequate Record for a De Novo Determination

The IRS's procedures for evaluating innocent spouse claims[4] are found in the Internal Revenue Manual ("IRM"), in Part 25.15.1 (Apr. 2, 2020).[5] Spousal relief claims are evaluated by the IRS's Cincinnati Centralized Innocent Spouse Operation ("CCISO"). CCISO investigated Ms. Thomas's claim and issued the IRS's final determination in this case.[6]

CCISO employees are described by the IRM as "technicians." "First Read technicians" review each claim for basic eligibility and processibility criteria including the existence of a joint return, a valid signature on Form 8857, and the existence of competing IRS functions. IRM 25.15.18.5.1 (July 11, 2016). If a request passes this stage, it is handed off to a "Financial Technician" who investigates and evaluates.[i] IRM 25.15.18.5.2 (July 11, 2016). CCISO technicians

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What? The Proper Scope of an Administrative Record for Informal Agency Action, 10 U.C. IRVINE L. REV. 1045, 1057-1058 (2020). A motion to complete involves materials that should be part of the administrative record but were omitted. For example, in this case the preliminary determination sent to Ms. Thomas was omitted. A motion to supplement involves materials that were not before the agency during its decision-making process but fall within one of the recognized exceptions to the record rule.

[4] We focus on so-called "standalone" claims, which are submitted to the IRS outside of a deficiency or a collection due process proceeding.

[5] Innocent spouse procedures for the IRS Independent Office of Appeals are located at IRM 8.7.12 (June 10, 2021).

[6] If the preliminary determination is timely appealed, Appeals will issue the final determination. Here, the preliminary determination was not appealed.

evaluate cases using various internal case building tools and worksheets. IRM 25.15.18.3 (July 11, 2016). They must conduct internal research in various IRS databases. IRM 25.15.18.5.2.5 (July 11, 2016).

The IRM lists additional research services available to employees, including Accurint and the internet, but does not give employees any direction on when to use them. IRM 25.15.18.5.2.8 (July 11, 2016). General guidance to all IRS employees working spousal relief cases states that phone calls with the requesting spouse and non-requesting spouse "are helpful" but are not required. IRM 25.15.3.12 (Dec. 12, 2016). To determine constructive and actual knowledge, the IRM directs workers to use "all resources at your disposal" to research the facts of the case, IRM 25.15.3.12.3 (Dec. 12, 2016), but this directive is not repeated for the other factors. There is no mention (let alone a requirement) of sharing the information found by the technician (or any information submitted by the non-requesting spouse) with the requesting spouse to give them the opportunity to rebut it or to submit additional evidence before the preliminary determination letter is issued.

The instant case is an example of an incomplete administrative record created by deficiencies in the IRM procedures.[7] First, the record is incomplete even

[7] The First Stipulation of Facts states in paragraph 18 that the administrative file consists of exhibits 5-J through 10-R, excluding non-substantive internal

if it is defined narrowly, as in the CDP context, to include written communications, notes, memoranda, and other documents or materials relied upon by CCISO in reaching its determination.[8] For example, the record submitted to the court lacks the job aids and internal tools that were used by CCISO to determine Ms. Thomas's eligibility for relief, it lacks screenshots or copies of the results from the internal research that was conducted, and most glaringly it lacks the preliminary determination letter which contains the IRS's evaluation of the factors and explanation for denying relief.[9] However, even a complete copy of the administrative record as currently maintained by the IRS would present an incomplete factual record for the Court's *de novo* review, in this case and likely in all cases, for the reasons described below.

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documents. This is clearly incorrect unless one considers CCISO's evaluation of the factors to be non-substantive.

[8] Treas. Reg. § 301.6330-1. Note that this definition would not include correspondence from CCISO to the taxpayer, which may be necessary to understand the taxpayer's subsequent submission. See, e.g., First Stipulation of Facts Exhibit 6-J. It appears that CCICO's letter to Ms. Thomas which begins Exhibit 6-J is only included in the record because Ms. Thomas included a copy of it with her response.

[9] The Final Determination letters do not explain why relief was denied. Rather, they state, "For additional details regarding your claim, please refer to the preliminary determination previously issued to you." Exbt 1-J, pp. 1, 7, 13. While in our experience the preliminary determination letter does not provide a particularly detailed explanation, it does tell the taxpayer which factors the IRS believes were unfavorable, and usually includes a sentence or two explaining why.

The second sense in which the administrative record is incomplete is that it does not provide an adequate picture of the evidence presented below. Documents submitted by the requesting spouse are included in the record, but for oral communications only the IRS's viewpoint is reflected. The IRS thus controls the record for review. There are no call transcripts or even recordings of fact-finding calls made by CCISO employees.[10] Here, CCISO held one phone call with Ms. Thomas, and as per the IRM the call is reflected in the record solely via the IRS employee's notes.[11] In its entirety, the record of the call reads:

> On 03-12-2020 I contacted the RS [requesting spouse] for calcification [sic] on income and expenses she had stated on form 8857, mainly that her figures did not explain how she was paying her expenses of over $6000.00 per month on a monthly income of $1800.00 She then changed those figures to state she was making $6800.00 monthly and was "Rent Free" her words. RS stated that she had rental income and teaches at UC Berkely [sic]. [S]tated she was helping her college bound daughters, I did explain that college tuition was not a basic living expense. I explained that "knowledge" was not a criteria when determining her underpayments of tax, I explained the law states 6015f looks at "reasonable expectation the NRS [non-requesting spouse] was going to pay" I explained that she had no expectation at the time the returns were going to be filed because the[y] were experiencing financial problems, she explained loss of job by NRS, having to take out of retirement to pay mortgage, NRS being unemployed.

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[10] The IRM notes that "toll free" incoming calls to CCISO are recorded and may be obtained by FOIA. By inference, taxpayers who choose the non-tollfree number do not get the benefit of recording. Individuals who call CCISO are not permitted to record the call. IRM 25.15.18.9.2 (Feb. 6, 2017). No mention is made in the IRM of recording outgoing CCISO calls.

[11] First Stipulation of Facts, Exhibit 10-R. A clearer copy of this document is found in Respondent's proposed trial exhibits, exhibit 1010-R (page 216 of the pdf).

> RS brought up abuse, I explained abuse did not mitigate her knowledge of the source of reason for the underpayments and abuse did not effect [sic] the filing of the tax returns. RS stated financial abuse, I stated that the info provided did not indicate financial control, RS had joint bank accts, RS sought for OIC, RS communicated with the IRS for debt relief, RS was aware the retirement needed to be withdrawn to make mortgage payments, RS sent in emails between her and NRS, NRS was questioning her hard about credit card charges, I explained that was not considered abuse since at the time they were experiencing financial problems and NRS appeared concerned for the what he may have considered unnecessary spending, I did explain the abuse she stated was irrelevant to the tax return filings[.]

Some facts asserted by Ms. Thomas appear in the record but others do not. We know that CCISO thought Ms. Thomas's statements about abuse were irrelevant to the filing of the joint returns, but not why this was so, or exactly what she said. Perhaps Ms. Thomas brought up the 2016 texts and emails that she had submitted, *see* Exhibit 6-J, pp. 19-28, or perhaps she mentioned new information that is not in the paper file. We do not know. Ms. Thomas's responses to the technician's admonishments about the irrelevancy of abuse are not recorded. The record thus reflects the IRS's position, but it does not permit the Court to fully evaluate the taxpayer's position.

Third, even if the administrative record included all relevant CCISO documents and a transcript of CCISO's phone call with Ms. Thomas, it would give the Court an incomplete picture of the facts because the IRM procedures do not require CCISO to develop a factual record to maximize consideration of the case

on its merits. For example, rather than inform Ms. Thomas that her allegations of abuse were irrelevant to the filing of the tax returns (perhaps due to a misunderstanding of the relevant timeframe), a neutral fact finder might ask open-ended questions such as, "how does that relate to the filing of the tax returns" or "what was your relationship with your spouse at the time the tax returns were filed"? The CCISO call notes read more like an argument than a fact-finding call. This is not to fault the specific employee in this case; the IRM does not instruct the technician to engage in fact-finding in the way that a judge might question a self-represented taxpayer on *de novo* review.[12]

By mandating *de novo* review, Congress indicated that it wanted the Tax Court to evaluate spousal relief cases on their merits. In most cases this will be impossible if § 6015(e)(7) is narrowly construed.

III. Section 6015(e)(7) should be Interpreted Expansively Based on the Unique Circumstances of Innocent Spouse Relief and Requesting Spouses.

The Tax Court Rules of Practice and Procedure do not explicitly address the application of § 6015(e)(7) to cases involving requests for relief from joint and several liability. The Tax Court has broad authority to define its rules of practice and procedure under § 7453, which states that "the proceedings of the Tax Court

[12] The employee was not required to call Ms. Thomas at all under the IRM.

and its divisions shall be conducted in accordance with such rules of practice and procedure . . . as the Tax Court may prescribe." In the absence of an applicable rule of procedure, Rule 1(b) states that "the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand." The Court's rules must be "construed to secure the just ... determination of every case." Rule 1(d). In its order dated April 26, 2022, this Court asks whether Fed. R. Civ. P. 60(b)(2) should inform the Court on the definition of "newly discovered evidence." While we agree with petitioner that in general the rule may inform the determination of whether "newly discovered evidence" should be considered in the context of § 6015 cases, the Court should use a more expansive standard than in the case law applying Fed. R. Civ. P. 60(b)(2).

Fed. R. Civ. P. 60(b)(2) provides for the admission of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)," when a party requests relief from final judgment, order, or proceeding of the court. Case law applying Fed. R. Civ. P. 60(b)(2) further defines situations in which "newly discovered evidence" may be considered in a motion under Fed. R. Civ. P. 60(b)(2): (1) the newly discovered evidence is of facts existing at the time of the trial; (2) of which the movant is

excusably ignorant and that are discovered after trial, despite what the movant could have discovered through due diligence; and (3) the newly discovered evidence is material, not merely cumulative or impeaching, as to clearly change the outcome of the trial. *N.L.R.B. v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978).

The Tax Court has previously applied the definition of "newly discovered evidence" in Fed. R. Civ. P. 60(b)(2) in cases involving Rule 161 (Motion for Reconsideration of Findings or Opinion) and Rule 162 (Motion to Vacate or Revise Decision). In each of these cases, the Tax Court defined "newly discovered evidence" as "that, with reasonable diligence, could not have been discovered." The Tax Court looks to the case law applying Fed. R. Civ. P. 60(b)(2) to inform its interpretation of "newly discovered evidence" when applying the standard to Tax Court Rules 161 and Rule 162.[13]

The case law applying and defining the additional factors of Fed. R. Civ. P. 60(b)(2) is not suitably adaptable to govern the case in question because the case law addresses whether to accept newly discovered evidence to overturn a previous opinion or final decision of the court. Applying this same narrow standard to

[13] *See Est. of Kraus v. Comm'r*, 875 F.2d 597, 602 (7th Cir. 1989) ("The Tax Court has held that decisions interpreting Rules 59 and 60 of the Federal Rules of Civil Procedure apply to motions for reconsideration and further trial under Rule 161 of the Rules of the United States Tax Court"); *see also Wheeler v. Comm'r*, 46 T.C.M. (CCH) 642 (1983).

define "newly discovered evidence" in § 6015(e)(7)(B) would result in its application to the skeletal administrative proceedings of the IRS rather than to prior court proceedings. As discussed above, the IRS's administrative procedures in deciding an innocent spouse case do not afford the same level of procedural rights for litigants as does a court proceeding. Testimony is not taken on the record; there is no ability to subpoena witnesses or documents. The preliminary and final determinations issued by CCISO generally contain only stock language stating the elements considered, without reference to specific deficiencies in the requesting spouse's legal argument or documentation. Taxpayers, particularly *pro se* taxpayers without sufficient legal knowledge of IRS and court processes, may be unaware of what additional documents or information would support their case. Under the IRS's innocent spouse processing procedures, CCISO has no requirement to provide a requesting spouse with documents or information supplied by the non-requesting spouse at the pre-Appeals stage. *See* IRM 25.15.18 (Jan. 15, 2020). To the extent that CCISO relies on information from a non-requesting spouse to deny the requesting spouse's innocent spouse claim, taxpayers may be unaware of the need to submit additional documents to rebut that information.

The *Wilson* court recognized that the challenges of reviewing a case on IRS records are compounded by "an administrative system where the only opportunity

to present a case is through telephonic interviews with an agent in a remote location." 705 F.3d at 991. Also, additional relevant evidence may be in the requesting spouse's possession at the time of the IRS's final determination, unbeknownst to them. As the Ninth Circuit recognized, "the taxpayer often has limited or no access to critical records" during the administrative determination of innocent spouse claims. *Id.* The *Wilson* court observed that "[t]he innocent taxpayer who has been misled by a spouse often may not understand the full extent or scope of the erring spouse's misdeeds." *Id.*

A court proceeding may be the first opportunity for the requesting spouse to learn the complete reason(s) for denial of relief, because the parties are required to exchange documents and information before trial, giving the parties time and notice to supplement their evidence before a trial or hearing. Thus, in the context of a § 6015 determination, a reading of the phrase "newly discovered evidence" to allow submission of additional evidence because the necessity of this evidence is "newly discovered" by the taxpayer during pretrial exchanges would better comport with the Tax Court's obligation to make a *de novo* determination.

IV. The Standard of Reasonable Diligence Should be Applied Based on a Reasonable Person Standard

The reasonable diligence standard in Fed. R. Civ. P. 60(b)(2) and the Tax Court's application in Rules 161 and 162 should be relaxed for purposes of §

6015(e)(7) and applied based on a reasonable person standard for equitable application to taxpayers and the IRS. In the Court's prior use, the reasonable diligence standard applied to a taxpayer who was participating in a court proceeding and was afforded sufficient due process, document exchange, and opportunity to provide additional evidence. By contrast and as discussed above, taxpayers may not have the opportunity to learn from the IRS during the administrative proceeding what additional evidence is required to sufficiently prove their case. For example, where the non-requesting spouse provides testimony or documents that are considered by the CCISO technician, "reasonable diligence" should be evaluated in the context of a requesting spouse who is unaware of the specific documents or evidence that needs rebutting.

As stated in petitioner's Motion to Strike dated July 1, 2022, a reasonable person standard would also allow the Court to take into consideration the different level of resources between a taxpayer and the IRS. Motion to Strike, ¶¶ 27-34. The expectations of the IRS's reasonable diligence will differ from that of a reasonable taxpayer in that an IRS representative may have more resources at their disposal, a better understanding of what evidence is pertinent in an innocent spouse case and how to obtain it, and more skill in using resources to obtain documentation, information, and testimony relevant to the case.

Some evidence may be unobtainable by the taxpayer, even with the exercise of reasonable diligence because of domestic violence in the taxpayer's relationship with the non-requesting spouse. Thus, a court should consider the effects of domestic violence when evaluating what is due diligence for a reasonable person. Domestic violence is an important factor in the IRS's consideration of innocent spouse cases.[14] However, although the IRS specifically inquires during the administrative process about any potential domestic violence in the requesting spouse's relationship with the non-requesting spouse[15], domestic violence may go unreported nonetheless.[16]

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[14] *See* IRS Pub. 971, *Innocent Spouse Relief*, at 8 (rev. Dec. 2021), *available at* https://www.irs.gov/pub/irs-pdf/p971.pdf. Even if a taxpayer had actual knowledge of an erroneous item of income on a joint tax return when the taxpayer signed the joint tax return, the taxpayer may be eligible for relief from joint and several liability if the taxpayer was a victim of domestic violence before signing the return and because of the abuse the taxpayer did not challenge the treatment of any items on the return.

[15] *See* IRS Form 8857, *Request for Innocent Spouse Relief* (rev. June 2021), *available at* http://www.irs.gov/pub/irs-pdf/f8857.pdf.

[16] Only about half of all domestic violence incidents are reported to law enforcement, according to the National Crime Victimization Survey. *Data says domestic violence incidents are down, but half of all victims don't report to police,* USAFACTS, https://usafacts.org/articles/data-says-domestic-violence-incidents-are-down-but-half-of-all-victims-dont-report-to-police/ (last visited July 19, 2022).

V. The Potential of Domestic Violence in Innocent Spouse Cases Warrants Special Consideration in Applying the Reasonable Diligence Standard

The unique element of domestic violence in innocent spouse cases warrants a relaxing of the reasonable diligence standard in considering evidence submitted by a taxpayer in the administrative record.[17] Domestic violence affects all aspects of a victim's life.[18] Survivors are often left with long-lasting and sometimes permanent effects to their mental and physical health.[19] Long-term mental health effects of violence against women can include post-traumatic stress disorder (PTSD).[20] This can be a result of experiencing trauma or having a shocking or frightening experience, such as sexual assault or physical abuse.[21] People with PTSD may reexperience the traumatic event through flashbacks, nightmares, or memories they cannot control and these thoughts can create serious emotional pain

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[17] The National Network to End Domestic Violence defines domestic violence as a pattern of coercive, controlling behavior that can include physical abuse, emotional or psychological abuse, sexual abuse, or financial abuse (using money and financial tools to exert control). *What is DV?*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, https://nnedv.org/about-dv/what-is-dv/ (last visited July 19, 2022).

[18] *Dynamics of Abuse*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, https://ncadv.org/dynamics-of-abuse (last visited July 19, 2022).

[19] *Id.*

[20] *Id.*

[21] *Effects of violence against women*, OFFICE ON WOMEN'S HEALTH, https://www.womenshealth.gov/relationships-and-safety/effects-violence-against-women (last visited July 19, 2022).

for the person and problems at home, work, school, or with relationships.[22] The American Psychological Association explains that psychological trauma interferes with an individual's ability to function as he or she would under normal circumstances.[23] Psychological abuse also increases the trauma of physical and sexual abuse, and a number of studies have demonstrated that psychological abuse independently causes long-term damage to a victim's mental health.[24]

Due to the impact and effects of domestic violence on a victim, their reasonable diligence may differ from that of a taxpayer who is not a victim of domestic violence. Navigating the U.S. tax system can be a challenging task for the average taxpayer, and the added layer of domestic violence can make it even more difficult for a taxpayer to engage with the tax system. Victims of psychological abuse often experience depression, post-traumatic stress disorder, suicidal ideation, low self-esteem, and difficulty trusting others.[25] These conditions can affect how

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[22] *Post-traumatic stress disorder,* OFFICE ON WOMEN'S HEALTH, https://www.womenshealth.gov/mental-health/mental-health-conditions/post-traumatic-stress-disorder (last visited July 19, 2022).

[23] *The Psychological Wounds of Domestic Violence*, GOODTHERAPY, https://www.goodtherapy.org/blog/the-psychological-wounds-of-domestic-violence (last visited July 19, 2022).

[24] *Facts about Domestic Violence and Psychological Abuse*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, https://assets.speakcdn.com/assets/2497/domestic_violence_and_psychological_abuse_ncadv.pdf (last visited July 19, 2022).

[25] *Id.*

they function doing the most basic of tasks in their everyday lives.[26] Further, pursuing civil justice often involves fees and time off of work or school and survivors may have to obtain transportation and childcare, which can be costly or inaccessible.[27]

Victims of domestic violence who are foreign born may have an additional challenge of navigating language and cultural barriers when attempting to engage with the tax system to get relief from a joint debt for which they should not be held liable. In the United States, intimate partner violence ("IPV")[28] against women disproportionately affects ethnic minorities.[29] Marginalized populations such as

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[26] Studies have shown that PTSD symptoms exert a clear negative influence on a woman's ability to use positive resources and on her functioning following IPV [intimate partner violence]. J. Gayle Beck et al, *The Association of Mental Health Conditions With Employment, Interpersonal, and Subjective Functioning After Intimate Partner Violence*, 20 VIOLENCE AGAINST WOMEN 1321, 1321-1337 (2014).

[27] Asha DuMonthier & Malore Dusenbery, *Intersections of Domestic Violence and Economic Security*, INST. FOR WOMEN'S POL'Y RES., 2 (October 2016), *available at* https://iwpr.org/wp-content/uploads/2020/11/B362-Domestic-Violence-and-Economic-Security.pdf.

[28] The Centers for Disease Control and Prevention define intimate partner violence as "abuse or aggression that occurs in a romantic relationship" where "intimate partner" refers to a current or former spouse or dating partner. *#TakeAStand Against Domestic Violence*, CNTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/injury/features/intimate-partner-violence/, (last visited July 20, 2022).

[29] Jamila K. Stockman, et. al, *Intimate Partner Violence and Its Health Impact on Disproportionately Affected Populations, Including Minorities and Impoverished Groups*, 24 J. OF WOMEN'S HEALTH 62, 62 (2015).

women who are foreign born are also more likely to experience IPV than those born in the U.S.[30] Victims must navigate a bureaucracy that uses specialized language and specific procedures - all at a time when they are traumatized, sleep deprived, and have more basic needs to meet such as shelter, food, clothing, and safe transportation to work, school, or court."[31] Many immigrant women experience intimate partner violence in the context of language difficulties, confusion over their legal rights, and the overall stress of adaptation to new cultural and social structures.[32] Immigrant women are especially vulnerable because of poverty, social isolation, disparities in economic and social resources (between the woman and her partner), and immigration status.[33]

A domestic violence victim taxpayer may be reluctant to provide probative evidence for fear of retaliation from their abuser. Data on domestic violence show that victims are 500 times more at risk when they leave their abuser.[34]

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[30] *Id.*

[31] Alesha Durfee, *"Usually it's Something in the Writing": Reconsidering the Narrative Requirement for Protection Order Petitions*, 5 U. MIAMI RACE & SOC. JUST. L. REV 469, 482 (2015).

[32] Stockman, *supra* note 30.

[33] *Id.*

[34] Jerry Mitchell, *Most Dangerous time for battered women? When they leave.*, THE CLARION-LEDGER (Jan. 28, 2018), https://www.clarionledger.com/story/news/2017/01/28/most-dangerous-time-for-battered-women-is-when-they-leave-jerry-mitchell/96955552/.

Finally, victims may feel shame that they "allowed" the abuse to occur, and thus they deny it or attempt to minimize or cover up the abuse. They may only be able to acknowledge the abuse in retrospect. Moreover, this shame may cause the victim to not raise the issue of abuse in proceedings where the abuse is dismissed as "irrelevant," as was the case with petitioner.[35] Consideration of these unique characteristics and behaviors of taxpayers who have experienced domestic violence when determining whether a taxpayer has exercised reasonable diligence is crucial to ensuring a fair and just application of § 6015(e)(7).

VI. If the Tax Court Finds It Is Bound To Conduct Its Review On an Inadequate Administrative Record, It Should Reconsider Its Prior Position and Remand the Case for Further Development of the Record.

The Tax Court has held that it lacks the power to remand requests for relief from joint and several liability to the IRS. *Friday v. Commissioner*, 124 T.C. 220 (2005). In *Friday*, the Tax Court denied an IRS motion to remand a stand-alone Section 6105(e) case to CCISO. *Id.* at 220. The IRS argued that CCISO had previously erroneously failed to analyze the merits of a request for equitable relief under § 6105(f). In declining to remand, the Tax Court distinguished requests for relief from joint and several liability from collection due process (CDP) cases, noting there are: "certain specific cases where statutory provisions reserve

[35] First Stipulation of Facts, Exhibit 10-R. A clearer copy of this document is found in Respondent's proposed trial exhibits, exhibit 1010-R (page 216 of the pdf).

jurisdiction to the Commissioner, a case can also be remanded to the Commissioner's Appeals Office." *Friday v. Comm'r*, 124 T.C. 220, 221-22 (2005). The Tax Court further distinguished the review process in CDP from the process in innocent spouse cases, noting that "[a] petition for a decision as to whether relief is appropriate under section 6015 is generally not a "review" of the Commissioner's determination in a hearing but is instead an action begun in this Court." The absence of a statutory link to a review led the Tax Court to note that there "is in section 6015 no analog to section 6330 granting the Court jurisdiction after a hearing at the Commissioner's Appeals Office." *Id.* at 222.

After the Taxpayer First Act (TFA), the statute differs from that on which the Tax Court relied in *Friday.* Spousal requests for relief from joint and several liability are now much more similar to the CDP provisions.[36] Section 6015(e)(7) provides for a "review" by the Tax Court of a "determination made under this section." Section 6015(e)(7)(A) specifically refers to the Tax Court review as one that "shall be based upon" an "administrative record" at the time of the

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[36] Carlton Smith, *Should the Tax Court Allow Remands in Light of the Taxpayer First Act Innocent Spouse Provisions?*, PROCEDURALLY TAXING (Oct. 17, 2019), https://procedurallytaxing.com/should-the-tax-court-allow-remands-in-light-of-the-taxpayer-first-act-innocent-spouse-provisions/ (discussing how the "changes to Section 6015(e) as part of TFA makes the Tax Court's review "much more like that of the Tax Court's Collection Due Process (CDP) jurisdiction"). Smith notes that remand would facilitate a consistent standard and scope of review, especially where jurisdiction originates under § 6015(e)(1)(A)(i)(II).

administrative determination. Accordingly, if the Tax Court finds the administrative record inadequate for it to base a de novo review upon, it could consider a remand to the CCISO or other appropriate IRS function for further development of the record.

CONCLUSION

The language of § 6015(e)(7), which provides for *de novo* judicial review of stand-alone § 6015 cases, excludes application of the APA's general standard of judicial review provisions. Yet, caselaw under the APA regarding the scope of review, along with *Wilson v. Commissioner* and caselaw under the Tax Court's whistleblower jurisdiction, suggest an approach to the administrative record rule of §§ 6015(e)(7)(A) and (B) that allows the court to admit additional evidence in specific instances to complete or supplement the record. Further, the limitations and inconsistencies in the IRS's administrative determination of innocent spouse cases, and the frequency of *pro se* and domestic violence requesting spouses, support a less strict application of "newly discovered evidence" than those that appear in the case law of Fed. R. Civ. P. 60(b)(2), or Rules 161 and 162. The Court's application of a more expansive scope of review will result in a more accurate and just *de novo* determination of innocent spouse cases arising from the IRS's administrative innocent spouse processing procedures.