RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

Bruce A. McGovern
Professor of Law and Director, Tax Clinic
South Texas College of Law Houston
Houston, Texas 77002
Tele: 713-646-2920
e-mail: bmcgovern@stcl.edu

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Note: This outline was prepared jointly with Cassady V. ("Cass") Brewer, Professor of Law, Georgia State University College of Law, Atlanta, GA.

I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

1. Next time you earn points by staying at a hotel or use points to pay for a hotel, think of the tax issues you are creating for the hotel! Hyatt Hotels Corp. v. Commissioner, T.C. Memo. 2023-122 (10/2/23). The major issue in this case is whether the taxpayer, Hyatt Hotels Corporation (Hyatt), had gross income from its rewards program, known during the years in issue as its Gold Passport Program. Hyatt owned approximately 25 percent of Hyatt-branded hotels. The remaining 75 percent were owned by third parties and operated under either a management model, pursuant to which Hyatt employees ran the hotel pursuant to a contract, or a franchise model under which the hotel owner obtained a license to use Hyatt's brand name and other intellectual property. When a hotel guest earned rewards points by staying at a Hyatt-branded hotel, Hyatt required the hotel owner to pay a specified amount into an operating fund held by a Hyatt subsidiary. When a hotel guest used points to pay for a room at a Hyatt-branded hotel, Hyatt would make a compensating payment from the fund to the hotel owner. Hyatt also used the assets of the fund to pay administrative and advertising expenses that it determined were related to the rewards program. Some of the assets in the fund were invested in marketable securities, which resulted in interest and realized gains. According to the court, "Hyatt essentially ignored the fund, including none of its revenue in gross income and claiming no deductions for expenses paid." During an audit, the IRS took the position that Hyatt had to include in gross income the payments made into the fund as well as interest accrued and investment gains realized. The IRS also took the position that Hyatt's treatment of the fund was a method of accounting and that, because Hyatt must change the way in which it treats the fund going forward, a change in accounting method has occurred that requires Hyatt to make a positive § 481 adjustment and include in income the net revenue of the fund from its inception in 1987. Hyatt argued that its treatment of the fund was appropriate because it held the fund as a trustee, agent, or conduit for the hotel owners and was not the owner of the fund for federal income tax purposes. Hyatt also argued in the alternative that, if its treatment of the fund was not appropriate, its treatment of the fund was not a method of accounting and therefore no adjustment under § 481 was required. Finally, Hyatt argued in the alternative that, if it must include the fund's revenue in gross income, it is entitled to offset the fund's gross receipts with the estimated cost of future compensation payments to hotel owners under a regulatory provision known as the trading stamp method.

Gross income issue. The Tax Court (Judge Nega) first held that Hyatt had to include the fund's revenue in its gross income. The court rejected Hyatt's argument that the trust fund doctrine applied. Under the trust fund doctrine, recognized by the court in *Seven-Up Co. v. Commissioner*, 14 T.C. 965 (1950), and refined in subsequent decisions such as *Ford Dealers Advertising Fund, Inc. v. Commissioner*, 55 T.C. 761 (1971), aff'd, 456 F.2d 255 (5th Cir. 1972):

> when a taxpayer (1) receives funds in trust, subject to a legally enforceable restriction that they be spent in their entirety for a specific purpose and (2) does not profit, gain, or benefit from spending the funds for that purpose, then the taxpayer may exclude such funds from gross income.

The court concluded that the second element was not met because Hyatt benefitted from the fund. The court found that Hyatt exercised control over and had discretion with respect to spending from the fund for costs such as advertising, and that, as the largest single owner of Hyatt hotels, Hyatt benefitted from this spending.

Change of accounting method. The court concluded that, although Hyatt had to change from excluding the fund's revenue from gross income to including the revenue in gross income, this change was not a change in Hyatt's method of accounting. A change in accounting method, the court reasoned, involves a change in the proper time for the inclusion of income or the taking a deduction. *See* Reg. § 1.446-1(e)(2)(ii)(b). Hyatt's total exclusion of the fund's revenue from gross income did not involve timing. Accordingly, the court concluded, no § 481 adjustment was required. The government argued that this result was inappropriate because, going forward, Hyatt would deduct expenses of the fund but would not have included the fund's prior revenue in gross income. The court responded that a number of doctrines might preclude Hyatt's deductions. Presumably, the court was referring to the concept that a taxpayer cannot deduct amounts paid from funds that have not been subject to tax.

Trading stamp method. Hyatt argued that the trading stamp method permitted Hyatt to reduce the fund's revenue that it includes in gross income by the estimated cost of future compensation payments to hotel owners. The trading stamp method is an exception to the normal rules that require an accrual method taxpayer to include amounts in gross income when the all events test is satisfied. Under the trading stamp method, if an accrual method taxpayer issues trading stamps or premium coupons with sales that are redeemable in merchandise, cash, or other property, then the taxpayer can offset against gross receipts the estimated cost of its future provision of merchandise, cash, or other property. See Reg. § 1.451-4(a)(1). The court rejected Hyatt's argument on the ground that the future hotel stays to which rewards program members were entitled were not merchandise, cash, or other property within the meaning of the regulation.

B. <u>Deductible Expenses versus Capitalization</u>

C. <u>Reasonable Compensation</u>

D. <u>Miscellaneous Deductions</u>

E. <u>Depreciation & Amortization</u>

F. <u>Credits</u>

G. <u>Natural Resources Deductions & Credits</u>

H. <u>Loss Transactions, Bad Debts, and NOLs</u>

I. <u>At-Risk and Passive Activity Losses</u>

III. INVESTMENT GAIN AND INCOME

A. <u>Gains and Losses</u>

B. <u>Interest, Dividends, and Other Current Income</u>

C. <u>Profit-Seeking Individual Deductions</u>

D. <u>Section 121</u>

E. <u>Section 1031</u>

F. <u>Section 1033</u>

G. <u>Section 1035</u>

H. <u>Miscellaneous</u>

IV. COMPENSATION ISSUES

A. Fringe Benefits

B. Qualified Deferred Compensation Plans

C. Nonqualified Deferred Compensation, Section 83, and Stock Options

D. Individual Retirement Accounts

1. Honey, I shrunk the IRAs! Being incarcerated is bad enough without learning that your wife has depleted your IRAs and other accounts and filed for divorce and that the IRS seeks to collect tax on the withdrawals Balint v. Commissioner, T.C. Memo. 2023-118 (9/25/23). The taxpayer was incarcerated from late 2013 through January 6, 2015. While incarcerated, he wrote a letter to his wife that stated:

> You do need to get power-of-attorney!! ASAP!! Call Glen Abbott & explain the situation. He will help us! And remember, it's confidentia[l] so don[']t be worried. Tell him I want to give you everything! House, cars, motorcycles & my bank accounts—all of them in your name, making me beneficiary! He will know what to do. You need to do this now!! In case something happens to me. And the state can[']t take it when this is all over. Call now!! Meet with him & get it done. I will have to sign, but he will know how to take care of that with me here. Ok!! Now! . . . So you won[']t lose anything [&] you have access to everything. Use this letter if he needs it!

His attorney, Glenn Abbott, then prepared a proposed power of attorney for the taxpayer's signature. The power of attorney was broadly worded and gave his wife "full power and authority to perform any act, power, or duty that I may now or hereafter have and to exercise any right that I now have or may hereafter acquire." It specifically authorized her to withdraw money from financial and retirement accounts, to make gifts of his property, and to engage in acts that otherwise would constitute prohibited self-dealing. Pursuant to this authority, his wife withdrew large amounts of money from the taxpayer's IRAs and his pension and annuity accounts and transferred the money from the couple's joint checking account into her own separate bank account. She used the funds to move from their residence in Florida to Kentucky, to renovate a house there, and to pay living expenses and care for her ailing mother. She then initiated a proceeding for divorce. After the taxpayer was released from prison in early 2015, he filed a federal income tax return for 2014 with the filing status of married filing separately on which he reported all withdrawals from the accounts, including those taken by his wife, as income because he received information returns (presumably Forms 1099-R) that reported the withdrawals as taxable to him. When he could not pay the balance due, the IRS issued a final notice of intent to levy, in response to which the taxpayer requested a collection due process (CDP) hearing. The IRS Settlement Officer who conducted the CDP hearing issued a notice of determination sustaining the proposed levy, and the taxpayer then filed a petition in the U.S. Tax Court. While the taxpayer's case in the Tax Court was pending, the taxpayer filed his own action for divorce and the state court issued an order in which it concluded that his wife should be liable for tax on the amounts she withdrew because the taxpayer did not benefit from the withdrawals and they were made without his knowledge or consent.

Issues. The Tax Court (Judge Gale) addressed two issues: (1) whether the government was bound through the doctrines of res judicata or collateral estoppel by the state court's order that the wife was liable for the tax due on the withdrawals, and (2) whether the taxpayer had to include the disputed withdrawals in gross income.

No preclusive effect of state court order. The Tax Court concluded that the government was not bound by the state court's order through the doctrines of res judicata or collateral estoppel. Both doctrines, the court reasoned, generally require identity of parties, i.e., the party against whom the doctrine is asserted must have been a party to the prior action in order for the prior action to bind the party. The government, the court concluded, was not a party to the taxpayer's divorce proceeding, and therefore was not bound by the state court's order that his wife should be liable for tax on the amounts she withdrew.

No gross income from the disputed withdrawals. The taxpayer argued that he should not have to include approximately $159,811 that his wife had withdrawn from his IRAs and life insurance policy. The Tax Court held that these distributions were not includible in the taxpayer's gross income under § 408(d)(1), which provides that the "payee or distributee" must include in gross income in the manner provided under § 72 any amount paid or distributed out of an individual retirement plan. The court reasoned that the taxpayer was not a payee or distributee within the meaning of § 408(d)(1) because he had not authorized the withdrawals and did not benefit from them. Although the power of attorney signed by the taxpayer was broadly worded and gave his wife authority to make gifts of his property and to engage in acts that otherwise would be prohibited self-dealing, the court interpreted the power of attorney as limiting her authority to actions undertaken for the purpose of financial or estate planning for the taxpayer's benefit or for qualifying for public assistance for which the taxpayer might be eligible. The relevant language in the power of attorney, the court concluded,

> strictly construed, does not amount to an openended authorization for [the taxpayer's wife] to exercise her authority under the POA for her own benefit. Instead, its clear implication is that [she] was authorized to take actions that would benefit herself only if the benefit to her was incidental to planning undertaken primarily to benefit petitioner, or to ensuring that petitioner would qualify for public assistance.

In reaching its conclusion that the taxpayer did not have to include the disputed amounts in gross income, the court relied on its prior decision in *Roberts v. Commissioner*, 141 T.C. No. 569 (2013), in which the court concluded that a taxpayer did not have to include in gross income IRA withdrawals taken by his wife, who had forged the taxpayer's signature on the withdrawal requests. The court also relied on prior decisions in which it had held that a taxpayer did not have to include in gross income amounts withdrawn from retirement or other financial accounts by the taxpayer's agent when the agent's actions were unauthorized and the taxpayer received no economic benefit from the withdrawn funds. *See Grant v. Commissioner*, T.C. Memo. 1995-29; *Wilkinson v. Commissioner*, T.C. Memo. 1993-336. The court upheld the IRS's levy, but only to the extent of the taxpayer's correct tax liability after reduction for the tax attributable to the amounts withdrawn by his wife.

V. PERSONAL INCOME AND DEDUCTIONS

VI. CORPORATIONS

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

1. The 90-day period specified in § 6213(a) for filing a petition in the U.S. Tax Court is jurisdictional and is not subject to equitable tolling, according to the Tax Court. Hallmark Research Collective v. Commissioner, 159 T.C. No. 6 (11/29/22). In a unanimous, reviewed opinion by Judge Gustafson, the Tax Court has held that the 90-day period specified by § 6213(a) within which taxpayers can challenge a notice of deficiency by filing a petition in the Tax Court is jurisdictional and is not subject to equitable tolling. In this case, the IRS sent a notice of deficiency to the taxpayer. Pursuant to § 6213(a), the taxpayer then had 90 days within which to challenge the notice of deficiency by filing a petition in the U.S. Tax Court. The last day of this 90-day period was September 1, 2021. The taxpayer electronically filed its petition on September 2, 2021, which was one day late. In the petition, the taxpayer stated: "My CPA . . . contracted COVID/DELTA over the last 40 days and kindly requests additional time to respond." In other words, it appears that the taxpayer was requesting an extension of the § 6213(a) 90-day period.

Procedural history. The Tax Court issued an order to show cause in which it ordered the parties to respond as to why the court should not, on its own motion, dismiss the action for lack of jurisdiction. The taxpayer requested that the court defer ruling on the matter until the U.S. Supreme Court issued its opinion in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (4/21/22), which was pending in the Supreme Court. The Tax Court declined to defer ruling and dismissed the taxpayer's action. After the U.S. Supreme Court issued its opinion in *Boechler*, the taxpayer moved to vacate the court's order of dismissal. After receiving briefing, the court issued a unanimous, reviewed opinion denying the motion to vacate its prior order of dismissal.

Tax Court's holding. In a lengthy (57 pages) and extraordinarily thorough opinion, the Tax Court examined the text and history of § 6213(a) and concluded that Congress had clearly indicated that the 90-day period specified in the statute is jurisdictional. The court observed that the Tax Court is a court of limited jurisdiction and has only whatever jurisdiction it has been granted by Congress. Accordingly, because the 90-day period is jurisdictional, in the court's view, the court must dismiss cases, such as this one, in which the taxpayer's petition is filed late. And because the statute is jurisdictional, the court concluded, it is not subject to equitable tolling, i.e., taxpayers cannot argue for exceptions on the basis that they had good cause for failing to meet the deadline. The court also concluded rather briefly that its view on the jurisdictional nature of § 6213(a) was not affected by the U.S. Supreme Court's decision in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (4/21/22). In *Boechler*, the Court held that the 30-day period specified in § 6330(d)(1) for requesting review in the Tax Court of a notice of determination following a collection due process hearing is *not* jurisdictional and *is* subject to equitable tolling. According to the Tax Court, *Boechler* "emphatically teaches that" § 6213(a) and § 6330(d)(1) "are different sections" that "[e]ach must be analyzed in light of its own text, context, and history." The fact that, in *Boechler*, the Supreme Court concluded that the 30-day period specified in § 6330(d)(1) is *not* jurisdictional did not change the Tax Court's view that the 90-day period specified in § 6213(a) *is* jurisdictional. Accordingly, the Tax Court dismissed the taxpayer's action.

a. The Third Circuit disagrees. The 90-day period specified in § 6213(a) for filing a petition in the U.S. Tax Court is *not* jurisdictional and *is* subject to equitable tolling. Culp v. Commissioner, 75 F.4th 196 (3d Cir. 7/19/23). In an opinion by Judge Ambro, the U.S. Court of Appeals for the Third Circuit has held that the 90-day period specified by § 6213(a) within which taxpayers can challenge a notice of deficiency by filing a petition in the Tax Court is *not* jurisdictional and *is* subject to equitable tolling. Although the Third Circuit's opinion does not provide specific dates, it states that the IRS mailed a notice of deficiency to the taxpayers, a married couple, as well as a second notice of deficiency, both with respect to the taxable year 2015. The taxpayers filed a petition in the Tax Court seeking redetermination of the deficiency well outside the 90-day period specified in § 6213(a) for doing so. In an unpublished order, the Tax Court dismissed the taxpayers' petition for lack of jurisdiction. On appeal, the taxpayers, backed by amicus curiae represented by the Legal Services Center of Harvard Law School, argued that the 90-day period provided by § 6213(a) is not jurisdictional and is subject to equitable tolling in appropriate circumstances. The court framed the issue in this way:

> The central question in this appeal is whether the Culps' late filing deprives the Tax Court of jurisdiction to consider their petition. Put another way, is § 6213(a)'s 90-day requirement jurisdictional or is it a claims-processing rule?

The court first analyzed the text of § 6213(a), which provides in part:

> Within 90 days … after the notice of deficiency authorized in section 6212 is mailed …, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. … The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

The court concluded that the provision's text did not indicate that the 90-day period specified in § 6213(a) is jurisdictional. The language Congress used, the court reasoned, does not link the 90-day deadline to the Tax Court's jurisdiction. The statute provides that the Tax Court has no jurisdiction to enjoin actions or order a refund if the taxpayer's petition is not timely filed, which indicates that "Congress knew how to limit the scope of the Tax Court's jurisdiction." But the provision does not similarly limit the Tax Court's jurisdiction to review petitions that are not timely filed. Further, according to the court, neither the context of the statute nor the court's own precedent interpreting § 6213(a) indicates that the 90-day period is jurisdictional.

After holding that the 90-day period specified in § 6213(a) is not jurisdictional, the court considered whether the period is subject to equitable tolling. According to the court, neither the text nor the context of the statute suggests that Congress intended the period not to be subject to equitable tolling. Accordingly, the court remanded the case to the Tax Court with instructions for the Tax Court to consider whether the taxpayers could demonstrate sufficient grounds for the 90-day period to be equitably tolled.

b. In a reviewed opinion, the Tax Court has held that it will not follow the Third Circuit's decision in *Culp* in cases appealable to other Circuits. Sanders v. Commissioner, 161 T.C. No. 8 (11/2/23). In a reviewed opinion (10-1-2) by JudgeNega, the Tax Court has reaffirmed its position that the 90-day period specified in § 6213(a) for filing a petition in the Tax Court in response to a notice of deficiency is jurisdictional and therefore not subject to equitable exceptions. In this case, the IRS issued a notice of deficiency that stated the last day to file a petition in the Tax Court to challenge the notice of deficiency was June 21, 2022. The taxpayer mailed her petition to the Tax Court using the U.S. Postal Service's Priority Mail service and the envelope she mailed bore a postmark of June 23, 2022. The IRS moved to dismiss for lack of jurisdiction on the ground that the taxpayer had filed the petition outside the permitted 90-day period and that this time period is jurisdictional. The court reviewed its prior decision in *Hallmark Research Collective v. Commissioner*, 159 T.C. No. 6 (11/29/22), and the Third Circuit's conflicting decision in *Culp v. Commissioner*, 75 F.4th 196 (3d Cir. 7/19/23). Under the rule of *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), the Tax Court follows the precedent of the U.S. Court of Appeals that will hear the appeal of a case from the Tax Court. Therefore, in decisions appealable to the Third Circuit, the Tax Court will follow the holding of *Culp* that the 90-day period of § 6213(a) is not jurisdictional and therefore is subject to equitable exceptions. The present case, however, was appealable to the Fourth Circuit, which has not issued a precedential opinion on point, and therefore the Tax Court was not constrained by the *Golsen* rule. The court reaffirmd its view that the 90-day period of § 6213(a) is jurisdictional:

> After thoroughly considering the Third Circuit's reasoning in *Culp*, we reaffirm *Hallmark* and will continue to treat the 90-day deficiency deadline as jurisdictional in cases appealable outside the Third Circuit, including in cases appealable to the

> First and Fourth Circuits. … Nothing in the Third Circuit's reasoning in *Culp* causes us to abandon or otherwise modify our application of the traditional tools of statutory construction or our holding as to the jurisdictional nature of the 90-day deficiency deadline.

Accordingly, the court granted the government's motion to dismiss for lack of jurisdiction.

Concurring opinion of Judge Buch. In a very thorough concurring opinion, Judge Buch (joined by Judges Kerrigan, Nega, Pugh, Ashford, Urda, Copeland, Toro, Greaves, and Marshall) reviewed both the statutory text and the context of § 6213(a) as well as the historical treatment of the provision and concluded that the 90-day period specified in the statute is jurisdictional.

Dissenting opinion of Judge Foley. In a dissenting opinion, Judge Foley (joined by Judge Weiler) reasoned that a limitations period is jurisdictional only if Congress has clearly stated that it is, and that Congress did not make such a clear statement in § 6213(a). In Judge Foley's view, the 90-day period of § 6213(a) is analogous to the 30-day period for filing a petition in the Tax Court in response to a notice of determination following a collection due process (CDP) hearing, which the U.S. Supreme Court held is not jurisdictional and therefore is subject to equitable exceptions. *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (4/21/22).

2. Despite the availability of electronic filing, if the office of the clerk of the Tax Court is inaccessible on the last day for filing a Tax Court petition, then under § 7451(b), the 90-day period for filing the petition is tolled for the number of days of inaccessibility plus an additional 14 days. Sall v. Commissioner, 161 T.C. No. 13 (11/30/23). The taxpayer received a notice of deficiency that stated the last day to file a petition with the Tax Court was Friday, November 25, 2022, which was the day after Thanksgiving. The Tax Court was administratively closed on that day. The taxpayer, who resided in Colorado, mailed his petition to the court on Monday, November 28, 2022. The court received the petition on December 1, 2022. The IRS filed a motion to dismiss for lack of jurisdiction on the basis that the taxpayer had filed the petition late. The Tax Court (Judge Buch) held that the taxpayer had timely filed the petition and denied the IRS's motion. Section 7451(b), added to the Code in 2021 by the Infrastructure Investments and Jobs Act, tolls the period for filing a Tax Court petition if a filing location is inaccessible. Section 7451(b)(1) provides:

> Notwithstanding any other provision of this title, in any case (including by reason of a lapse in appropriations) in which a filing location is inaccessible or otherwise unavailable to the general public on the date a petition is due, the relevant time period for filing such petition shall be tolled for the number of days within the period of inaccessibility plus an additional 14 days.

Section 7451(b)(2) defines the term "filing location" as either "(A) the office of the clerk of the Tax Court, or (B) any on-line portal made available by the Tax Court for electronic filing of petitions." The court reasoned that, because the office of the clerk of the Tax Court, which is a filing location, was inaccessible on November 25, 2022 (the date the petition was due), § 7451(b) tolled the period for filing the taxpayer's petition by one day (the period of inaccessibility) plus an additional 14 days. Accordingly, the taxpayer had until December 10, 2022, to file the petition. Further, because December 10, 2022, was a Saturday, under § 7503, the taxpayer had until Monday, December 12, 2022, to file the petition. The taxpayer's petition was filed on December 1, 2022, the date on which it was received by the Tax Court, and therefore was timely. Although the taxpayer could have filed the petition at any time through Dawson, the court's electronic filing system, the court concluded that, because "a fling location" was inaccessible on November 25, 2022, "the availability of the Court's electronic filing system is immaterial."

F. Liens and Collections

G. <u>Innocent Spouse</u>

1. Better clean up those social media posts featuring sailboats or ski vacations before filing a petition in the Tax Court seeking innocent spouse relief. Such posts are "newly discovered evidence" within the meaning of § 6015(e)(7) and therefore admissible even if they existed before the taxpayer requested innocent spouse relief. Thomas v. Commissioner, 160 T.C. No. 4 (2/13/23). The Taxpayer First Act, Pub. L. No. 116-25, § 1203, enacted in 2019, amended Code § 6015 to clarify the scope and standard of review in the Tax Court of any determination with respect to a claim for innocent spouse relief, i.e., any claim for relief under § 6015 from joint and several liability for tax liability arising from a joint return. Among other changes, the legislation added § 6015(e)(7), which provides:

> Any review of a determination made under this section shall be reviewed de novo by the Tax Court and 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.

The amendment was generally consistent with the Tax Court's holding in *Porter v. Commissioner*, 132 T.C. 203 (2009), but resolved conflicting decisions in cases in which the taxpayer sought equitable innocent spouse relief under § 6015(f), some of which had held that the Tax Court's review was limited to the administrative record and that the Tax Court's standard of review was for abuse of discretion.

Procedural history. In this case, the taxpayer filed joint returns with her husband for the years 2012, 2013, and 2014 but some of the tax liability reported on those returns remained unpaid. Her husband died in 2016. The taxpayer submitted to the IRS a request for innocent spouse relief for those years, which the IRS denied. The taxpayer responded by filing a petition in the Tax Court seeking review pursuant to § 6015(e) and asking the court to determine that she was entitled to innocent spouse relief under § 6015(f). At trial, the IRS sought to introduce into evidence Exhibit 13-R, which consisted of a series of blog posts from the taxpayer's personal blog. These posts ranged in date from November 2, 2016, to January 5, 2022. The taxpayer moved to strike all blog posts that existed before September 8, 2020, the date on which the taxpayer submitted her administrative request for innocent spouse relief, on the ground that the posts had not been in the administrative record and were not "newly discovered evidence" within the meaning of § 6015(e)(7).

Tax Court's analysis. In a unanimous, reviewed opinion by Judge Toro, the Tax Court concluded that the blog posts were "newly discovered evidence" within the meaning of § 6015(e)(7). The court began with the language of the statute and concluded that § 6015 does not define the term "newly discovered evidence." Accordingly, the court reasoned, "[w]e must therefore discern the ordinary meaning of that phrase in 2019." The court turned to the dictionary definition of the phrase "*newly discovered*" and concluded that the ordinary meaning of the phrase as of 2019 "was 'recently obtained sight or knowledge of for the first time.'" The court concluded that the blog posts the IRS sought to introduce into evidence were "newly discovered evidence" because the IRS had first discovered them by searching the internet after the taxpayer had filed her petition in the Tax Court. In reaching this conclusion, the court rejected the taxpayer's argument that § 6015(e)(7)(B) should be read to incorporate an additional limitation similar to that in Federal Rule of Civil Procedure (FRCP) 60(b)(2). Rule 60(b)(2) provides that a court can relieve a party from a final judgement, order, or proceeding on the basis of "newly discovered evidence *that, with reasonable diligence, could not have been discovered in time to move for a new trial.*" (emphasis added). The taxpayer argued that the IRS could have discovered the blog posts that existed before September 8, 2020, once she had submitted her administrative request for innocent spouse relief on that date and that they therefore should not be considered "newly discovered evidence." The court rejected this argument. The court reasoned that Congress had not included a reasonable diligence standard in the language of § 6015(e)(7)(B) and, in fact, the statute's use of the phrase "*any* additional newly discovered evidence" counseled against reading such a limitation into the statute. The court also observed that the statute's specification that the Tax Court's standard of review of an IRS determination concerning innocent spouse relief is de novo (rather than an abuse-of-discretion standard) supported "the conclusion that evidence unknown to a participant in the innocent spouse administrative proceeding should be admissible if that participant (now a party in our Court) offers it in the proceedings before us." Finally, the court noted that § 6015(e)(7) applies in a context entirely different from that of FRCP 60(b)(2). When a party moves for relief from a judgment under FRCP 60(b)(2), both parties have had an opportunity to conduct discovery and introduce evidence at trial. In contrast, "in the context of section 6015(e)(7), the Court considers a case for the first time following a relatively limited administrative proceeding." Accordingly, the court concluded that the blog posts offered into evidence by the IRS were admissible.

- *Concurring opinion of Judge Buch*. In a concurring opinion joined by Judges Ashford and Copeland, Judge Buch emphasized that, although the court's holding was faithful to the language of § 6015(e)(7), that language "may not have captured what Congress intended." Specifically, Judge Buch reasoned that the statute's language permitting the introduction of "newly discovered or previously unavailable evidence" might be a one-way street that benefits only the government. Judge Buch gave an example of a spouse who is abused by her husband, posts about the abuse on social media, and submits an administrative request for innocent spouse relief that does not mention the social media posts. Such a spouse might be precluded from introducing the social media posts at trial in a subsequent Tax Court proceeding because she created the posts and therefore it might be difficult for her to establish that the posts were "newly discovered or previously unavailable" to her. This problem, he observed, is not limited to social media posts but could apply to "a vast array of evidence" that could be helpful to a requesting spouse to prove entitlement to innocent spouse relief.

a. When the court's findings of fact refer to trips to New York for a birthday celebration, trips to Rome, Paris, and Florence, a trip to Napa for wine tastings, purses from Dior and Kate Spade, a 5-carat diamond ring, a home in an affluent suburb of San Francisco, and a vacation home in Lake Tahoe, you don't need to read further to know that the court denied the taxpayer's request for innocent spouse relief. Thomas v. Commissioner, 162 T.C. No. 2 (1/30/24). As discussed above, the taxpayer filed joint returns with her husband for the years 2012, 2013, and 2014 but some of the tax liability reported on those returns remained unpaid. Her husband died in 2016. The taxpayer submitted to the IRS a request for innocent spouse relief for those years, which the IRS denied. The taxpayer responded by filing a petition in the Tax Court seeking review pursuant to § 6015(e) and asking the court to determine that she was entitled to innocent spouse relief under § 6015(f). Following a trial, the Tax Court (Judge Toro) issued this opinion, which addresses two basic issues: (1) whether certain letters from third parties that the taxpayer submitted to the IRS as part of her administrative request for innocent spouse relief had to be excluded from evidence as inadmissible hearsay, and (2) whether the taxpayer was entitled to innocent spouse relief under § 6015(f).

Whether portions of the administrative record were excluded as hearsay. With respect to the first issue, the court held that the letters the taxpayer had submitted to the IRS with her administrative request for innocent spouse relief were admissible and rejected the Service's argument that the letters were inadmissible hearsay. The letters the taxpayer submitted had been written by two of her friends. The court began with the proposition that "[t]he rule against hearsay applies only when it is not supplanted by federal statute, other rules of the Federal Rules of Evidence, or any rules prescribed by the Supreme Court." In this case, the court reasoned, a federal statute, § 6015(e)(7), supplanted the rule against hearsay. Section 6015(e)(7) provides:

> Any review of a determination made under this section shall be reviewed de novo by the Tax Court and 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.

Because § 6015(e)(7) directs the court to base its determination on the administrative record, and because the administrative record included the letters the taxpayer had submitted, the court concluded, "[t]o apply the rule against hearsay to exclude these documents from our consideration would undermine Congress's clear direction as articulated in section 6015(e)(7)." The court reviewed analogous situations in which statutes override the rule against hearsay and in which courts reviewing administrative records to determine whether there was an abuse of discretion have admitted evidence that otherwise would have been inadmissible hearsay. Nevertheless, the court cautioned that, "as in a case we review for abuse of discretion, here (where we review de novo) there may be questions as to whether evidence in the administrative record is probative and reliable" and that, in determining the probative value and reliability of evidence, it would "consider indicia of reliability such as whether a document is or contains hearsay."

Eligibility for innocent spouse relief under § 6015(f). Section 4.01 of Rev. Proc. 2013-34, 2013-2 C.B. 297, sets forth seven threshold requirements that apply to all requests for equitable relief under § 6015(f). The parties agreed that the taxpayer satisfied the threshold requirements. Section 4.02 of Rev. Proc. 2013-34 sets forth the conditions under which the IRS will make streamlined determinations granting equitable relief under § 6015(f). A streamlined determination is available if (1) the requesting spouse is no longer married to the non-requesting spouse, (2) the requesting spouse would suffer economic hardship if relief were not granted, and (3) in underpayment cases such as this one, the requesting spouse "did not know or have reason to know that the non-requesting spouse would not or could not pay the underpayment of tax reported on the joint income tax return." The IRS asserted that the taxpayer had not established that she would suffer economic hardship if relief were not granted, and the court agreed. The court reviewed her sources of income and her assets, including a house in an affluent suburb of San Francisco and a vacation home near ski resorts in Lake Tahoe, and concluded that she had not established that she would suffer economic hardship if relief were not granted. Accordingly, the court concluded that she was not eligible for a streamlined determination without reaching the question of whether she knew or had reason to know that the non-requesting spouse would not pay the underpayment of tax. Section 4.03 of Rev. Proc. 2013-34 provides a nonexclusive list of factors for consideration in determining whether a spouse who does not qualify for streamlined relief is nevertheless relieved under § 6015(f) of federal income tax liability resulting from the filing of a joint return. Although Rev. Proc. 2013-34 lists seven equitable factors, the only factors in dispute were whether the taxpayer would suffer economic hardship absent relief, whether she knew or had reason to know that her former husband would not or could not pay the income tax liabilities, and whether she significantly benefited from the underpayment of tax. The court concluded that the taxpayer had not established that she would suffer economic hardship if relief were not granted and that, even if the taxpayer knew or had reason to know that her former husband would not or could not pay the income tax liabilities, this factor was outweighed by the significant benefit to her of the unpaid tax liabilities. In reaching the conclusion that the taxpayer had significantly benefitted from the underpayment of tax, the court took into account her purchase of a luxury vehicle (a 2013 Land Rover), several vacations she took with her daughters to New York, Europe, and Napa Valley, and her blog posts about a green Dior bag she purchased for her daughter's 18th birthday as well as several designer bags she owned herself and about paying a business coach $220 an hour for private sessions.

H. Miscellaneous

XI. WITHHOLDING AND EXCISE TAXES

XII. TAX LEGISLATION

XIII. TRUSTS, ESTATES & GIFTS