Innocent Spouse Relief - Relief From the Sneaky Spouse

Corinna Marie Cicmanec

Available at: https://works.bepress.com/corinna_cicmanec/1/
Innocent Spouse Relief – Relief From the Sneaky Spouse

“In this world, nothing can be said to be certain, except death and taxes.” Benjamin Franklin

Marriage is supposed to be a happy time. Two people are joined in the celebration of love. However, as the saying goes, “love is blind.” When the happiness wears off, many spouses discover their loving spouse is actually a sneaky spouse, controlling finances without the other spouses’ involvement, and, in some cases, failing to report information on tax returns. It may not be until the letter arrives from the Internal Revenue Service that the spouse is even made aware that her husband failed to pay taxes or failed to report income. Because she signed the joint return that included that underpayment or incorrect income, she is going to be held just as responsible as her spouse to pay the deficiency to the IRS.

The IRS requires that every taxpayer “file timely and accurate returns and to pay the amounts shown as due on those returns.” All taxpayers have an implied duty of inquiry. This means that the taxpayer has a duty to ensure that all the information reported on their tax return is correct. In fact, the courts have held that a taxpayer is charged with constructive knowledge of the contents of the tax return when the taxpayer signs it. When spouses sign a joint tax return, both spouses are charged with constructive knowledge, which means the taxpayers are aware of all tax liabilities by signing the joint tax return. The taxpayers are verifying their own tax information is correct, and also the tax information of their spouse. Furthermore, under tax

---

2 The Internal Revenue Service will be abbreviated throughout this paper as “IRS” and “the Service.”
3 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
5 ROBERT B. NADLER, A PRACTITIONER’S GUIDE TO INNOCENT SPOUSE RELIEF: PROVEN STRATEGIES FOR WINNING SECTION 6015 TAX CASES 16 (2011).
6 NADLER, supra note 5, at 16.
8 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
law, each spouse has joint and several liability for the tax liability resulting from the joint tax return. Joint and several liability holds each spouse responsible for not just the tax liability on the joint return, but also for any tax liability that can result from incorrect or omitted information regarding either spouse’s taxes.

Innocent spouse relief, under Internal Revenue Code § 6015, is the IRS’s solution to the sneaky spouse problem. If one spouse fails to report information, or reports information incorrectly on the tax return, and the innocent spouse can prove that when the return was signed, she “did not know and had no reason to know” about the unreported or falsified information, the IRS may grant relief to the spouse. When this happens, the spouse is relieved of all tax liabilities, which then become the entire responsibility of the sneaky spouse.

THE SNEAKY SPOUSE

Who is the sneaky spouse? The common theme throughout innocent spouse relief cases is that the sneaky spouse is someone who was deceptive regarding financial matters, such as bank account balances, income (especially for self-employed taxpayers), spending habits. The sneaky spouse is especially deceptive regarding taxes, from concealing information to falsifying information. Oftentimes, one spouse (usually the husband) is controlling and handles the family

---

9 See id.
10 See id.
12 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
13 See id.
finances without the wife’s knowledge, despite requests for financial information.\footnote{Downs v. Comm’r., No. 20833-06, 2010 WL 2990297, at *2 (T.C. July 28, 2010) (Wife, a homemaker, was not privy to her husband’s income. He controlled the family’s finances and would not allow her to participate.); Sjodin v. Comm’r., No. 10704-03, 2004 WL 2039405, at *3 (T.C. Sept. 14, 2004) (Wife had absolutely no participation in the family finances and had no access to family records because husband kept them locked up.).} Other times, spouses maintain separate finances without the other’s knowledge or involvement.\footnote{Neal v. Comm’r., No. 8506-03, 2005 WL 2078539, at *4 (T.C. Aug. 22, 2005) (Husband and wife kept separate finances, separate checking accounts, and despite the wife’s requests for her husband’s business’ finances, he did not disclose that information to her.).}

But how is the other spouse supposed to know if the sneaky spouse is hiding information from them? Author Steve Johnson discussed the sneaky spouse, stating “[a] number of taxpayers complained that their spouses failed to tell them of material items (such as the existence of unreported income) and that they would not have signed the return had they known the truth.”\footnote{Steve R. Johnson, \textit{The Duress or Deception Defense to Joint and Several Spousal Liability}, 6 J. Tax Prac. & Proc. 15, 18 (2004-2005).} The situations range from the sneaky spouse participating in fraudulent activities that the other spouse is unaware of\footnote{In \textit{Neal v. Comm’r.}, the requesting spouse was a radiologist and her husband was a self-employed anesthesiologist. The couple had married in 1979 and had 3 children. The couple kept separate finances, and split the household financial obligations. The requesting spouse was unaware her husband failed to pay tax liabilities on his income until her wages were garnished in 1989. The couple filed for bankruptcy, where it came out that he had purchased a boat, a villa in Colorado, several cars, and valuable art. In 1996, the requesting spouse’s wages were garnished a second time. This time she discovered that her husband had been involved in several extramarital affairs, one resulting in a child. The requesting spouse filed for divorce. Neal v. Comm’r., No. 8506-03, 2005 WL 2078539 (T.C. Aug. 22, 2005).}; the sneaky spouse making large purchases without the other spouse’s knowledge; and supporting a separate family that the spouse did not know about.\footnote{Revenue Act of 1918, ch. 18, §223, 40 Stat. 1074.}

\textbf{HISTORY OF INNOCENT SPOUSE RELIEF, INTERNAL REVENUE CODE § 6015}

In 1918, joint tax return filing was established for married couples.\footnote{Revenue Act of 1918, ch. 18, §223, 40 Stat. 1074.} Historically, the male has been the head of the household, and the female was considered the male’s property. In the 1900s, with the increased participation and strength of the feminist movements, women
began to claim more rights, eventually gaining their own independence and more legal protections.

Innocent spouse relief appeared in tax law in 1971 as a protection from the sneaky spouse. In 1998, innocent spouse relief was reformed under the IRS Restructuring and Reform Act of 1998. The Act created innocent spouse relief in its present form. The purpose of innocent spouse relief was to “address the inequality that can occur” in situations where unreported and underreported tax liabilities are attributable to the sneaky spouse.23

In order for a taxpayer to file for Innocent Spouse Relief, the taxpayer must complete and file Form 8857, available through the IRS website. Once the IRS receives the claim, the IRS will then contact the nonrequesting spouse by sending a Form 12508, or the Questionnaire for Nonrequesting Spouse. Law requires contacting the nonrequesting spouse, who then notice and the opportunity to participate, or “intervene” in the proceedings. The IRS states that “[t]here are no exceptions, even for victims of spousal abuse or domestic violence.”27 Furthermore, the nonrequesting spouse is permitted to participate in the claim for relief, thereby becoming an intervenor.28 The Taxpayer Advocate Service (“TAS”) 2010 Annual Report showed that ten of the 36 litigated cases of Innocent Spouse Relief had an intervenor.29

---

24 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
26 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
27 See id.
28 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
29 While a nonrequesting spouse is not required to submit any information, it is important to note that any information submitted will be considered. Information that the IRS will consider includes:
   1. The legal status of the requesting and nonrequesting spouses’ marriage;
   2. The extent of the requesting spouse’s knowledge of the erroneous items or underpayment;
   3. The extent of the requesting spouse’s knowledge or participation in the family business or financial affairs;
After reviewing the information submitted by the taxpayer, the IRS will issue a preliminary determination letter. The preliminary determination letter has two purposes: first, it will state whether the IRS will grant Innocent Spouse relief. Next, this letter will “allow[s] the taxpayer to request consideration by the Appeals Office” in the event there is an unfavorable determination. It is the taxpayer’s responsibility to request a review of his or her account within the time period specified in the letter. If the taxpayer fails to request a review, a final determination letter will be issued by the IRS.\footnote{National Taxpayer Advocate’s 2010 Annual Report to Congress: Appendix #3 (Dec. 31, 2010), http://www.irs.gov/pub/irs-utl/appendices_2010arc.pdf.}

The final determination letter is the “jurisdictional ticket to the Tax Court,” which means it gives the Tax Court jurisdiction to hear the case.\footnote{NADLER, supra note 5, at 67.} The taxpayer has 90 days from the date of the final determination letter to petition the United States Tax Court\footnote{Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).} to review the claim for relief.\footnote{NADLER, supra note 5, at 73.} After that, the taxpayer can make a qualified offer to the IRS to settle the case.\footnote{NADLER, supra note 5, at 75.} If the offer is rejected, the case will go to trial in Tax Court.\footnote{“A trial de novo typically consists of independent factfinding and legal analysis unmarked by deference to the original factfinder.” Nihiser v. Comm’r., No. 19315-04, 2008 WL 2120983, at *5 (T.C. May 20, 2008).} The Tax Court will make a de novo\footnote{I will refer to the Commissioner of the Internal Revenue as “Commissioner.”} review of whether the Commissioner of the Internal Revenue\footnote{I will refer to the Commissioner of the Internal Revenue as “Commissioner.”} abused his discretion in denying

\begin{itemize}
\item[4.] The requesting spouse’s education level;
\item[5.] The extent to which the requesting spouse benefitted from the erroneous items;
\item[6.] Any asset transfers between the spouses;
\item[7.] Any indication of fraud on the part of either spouse;
\item[8.] Whether it would be inequitable, within the meaning of §§ 1.6015 2(d) and 1.6015 4, to hold the requesting spouse jointly and severally liable for the outstanding liability;
\item[9.] The allocation or ownership of items giving rise to the deficiency; and
\item[10.] Anything else that may be relevant to the determination of whether relief from joint and several liability should be granted.
\end{itemize}
relief to the petitioner. After the Tax Court makes a ruling, the decision can be appealed to the United States Court of Appeals.

A significant number of innocent spouse claims are filed every year. In fact, the amount of claims filed has steadily increased every year – 49,096 in 2008, 49,581 in 2009 and 50,149 in 2010. In the National Taxpayer Advocate’s Annual Report to Congress, encompassing June 1, 2009 through May 31, 2009, relief from joint and several liability for spouses ranked number ten in the ten most litigated tax issues in federal courts. In that time period, the courts litigated thirty-six cases involving joint and several liability. This is not that surprising considering 50% of marriages end in divorce, making the possibility of a sneaky spouse hiding financial information very high. While it is important to note that not all innocent spouse relief claims stem from divorce, there is a section of innocent spouse relief that is available only to divorced, separated or widowed taxpayers.

It would be unfair to generalize that women are the only victims requesting Innocent Spouse Relief because it is available to both men and women. However, women make up a majority of the innocent spouse claims. Unfortunately, the IRS does not collect innocent spouse relief statistics by gender, but the effect on women is apparent from this quote from the Tax Management Portfolio’s introduction:

---

39 FED. R. PRAC. & PROC. T.C. 190
40 E-mail from Ruth A. Schwartz, Statistics of Income Division, Internal Revenue Service (Nov. 29, 2011, 08:06 AM) (on file with author).
42 See id.
43 Paul G. Schloemer, Ph.D, CPA, Innocent Spouse Rules Provide Challenges and Opportunities, 87 Practical Tax Strategies, no. #1, Aug. 2010, at p. 69.
46 E-mail from Ruth A. Schwartz, Statistics of Income Division, Internal Revenue Service (Nov. 29, 2011, 08:06 AM) (on file with author).
It has become apparent over the years that strict adherence to the rule of joint and several liability may sometimes prove to be inequitable. This is particularly true in situations in which one of the spouses, usually the wife, is held liable for tax deficiencies for which she had no factual responsibility other than to sign a joint income tax return with the other.47

This was recognized by Congress, and in 1998, the issue of innocent spouse relief was reported to the House of Representatives to determine how to deal with innocent spouse relief. During the Congressional Hearing for the current § 6015, Elizabeth Cockrell, an innocent spouse relief advocate, was quoted: “‘All they’ – that is, many of these women – ‘are guilty of is trusting their husbands and signing a joint tax return with him.’”49 Congress acknowledged that it was usually women who were victims of a sneaky spouse.50 With that in mind, the IRS Restructuring and Reform Act of 1998 included provisions that widened innocent spouse relief to its current form.51

**The Current § 6015**

The current version of § 6015 allows that “(1) an individual who has made a joint return may elect to seek relief under the procedures prescribed under subsection (b) and (2) if such individual is eligible … such individual may … elect to limit such individual’s liability for any

---

47 BROWN, *supra* note 45.
48 Elizabeth Cockrell was an advocate for the amended innocent spouse relief. Her ex-husband created a tax shelter. When the IRS rejected deductions, the couple was left with a joint tax liability of $650,000. Since the IRS could not collect from her ex-husband, the IRS held went after her for the tax liability. She was 23 years old when she married, the marriage lasted two years, and she had no idea what he was up to. Michelle Singletary, *A Break for ‘Innocent Spouses’: Wives Should Watch What They Sign*, WASHINGTON POST, January 17, 1999, available at http://www.washingtonpost.com/wp-srv/business/longterm/tax/jan99/columnists.htm.
51 NADLER, *supra* note 5, at 10.
deficiency with respect to such joint return.” These rules were enacted to give the taxpayer a way to relieve themselves of taxes attributable to the sneaky spouse.53

The first, most important requirement for a requesting spouse to file under § 6015 is that the spouses MUST have filed a joint tax return.54 Filing a joint return is purely at the election of the taxpayers, and it is myth that married taxpayers must file a joint tax return.55 However, the downside to filing separate returns is that taxpayers can be excluded from tax credits, including the earned income tax credit on children, which is only available when a joint return is filed.56 Unfortunately, this myth could be the reason that many spouses find themselves in a tax deficiency situation because of a sneaky spouse.

Under the current § 6015, there are three types of relief for claimants: § 6015(b); § 6015(c); and § 6015(f). Each provides a relief for erroneous items reported on a tax return attributable to the sneaky spouse.57

A. §6015(b) – Traditional Relief

The first type of relief, § 6015(b) is known as the “traditional” relief. Under § 6015(b), relief is granted for an understatement of tax, interest and penalties when the following factors are present:

(A) a joint return has been made for a taxable year;
(B) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return;

55 NADLER, supra note 5, at 2.
56 26 U.S.C.A. § 32 (c)(4)(d)
57 The Treasury Regulations define an erroneous item as “any item resulting in an understatement or deficiency in tax to the extent that such item is omitted from, or improperly reported (including improperly characterized) on an individual income tax return.” The regulation continues, stating that “ordinary income that is improperly reported as capital gain resulting in an understatement or deficiency in tax is also an erroneous item. In addition, a deduction for an expense that is personal in nature that results in an understatement or deficiency in tax is an erroneous item of deduction. An erroneous item is also an improperly reported item that affects the liability on other returns.” Treas. Reg. § 1.6015-1 (2006).
(C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement;

(D) taking into account all the facts and circumstances, it is inequitable\(^{58}\) to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement; and

(E) the other individual elects…the benefits of this subsection not later than the date which is 2 years after the date the Secretary has begun collection activities with respect to the individual making the [innocent spouse relief] election.\(^{59}\)

The burden for § 6015(b) relief is on the taxpayer to prove that she did not have knowledge of the understatement of tax.\(^{60}\) The tax court will consider whether a “requesting spouse has knowledge or reason to know of an understatement if he or she actually knew of the understatement, or if a reasonable person in similar circumstances would have known of the understatement.”\(^{61}\) This facts and circumstances analysis includes several factors listed in the Reg. 1.6015-2(c):

the nature of the erroneous item and the amount of the erroneous item relative to other items; the couple’s financial situation; the requesting spouse’s educational background and business experience; the extent of the requesting spouse’s participation in the activity that resulted in the erroneous item; whether the requesting spouse failed to inquire, at or before the time the return was signed, about items on the return or omitted from the return that a reasonable person would question; and whether the erroneous item represented a departure from a reoccurring pattern reflected in prior years’ returns.\(^{62}\)

---

\(^{58}\) According to the Treasury Regulations, “inequitable” in § 6015(b) involves a facts and circumstances analysis to determine whether to grant relief. Factors include determining “whether the requesting spouse significantly benefited, directly or indirectly, from the understatement. A significant benefit is any benefit in excess of normal support…Other factors that may also be taken into account, if the situation warrants, include the fact that the requesting spouse has deserted buy the nonrequesting spouse, the fact that the spouses have been divorced or separated, or that the requesting spouse received benefit on the return from the understatement.” Treas. Reg. § 1.6015-2(d) (2006). Although the factors are similar to the equitable relief in § 6015(f), the considerations taken under § 6015(b) are different than the considerations taken under § 6015(f).


\(^{60}\) Paul G. Schloemer, Ph.D, CPA, Innocent Spouse Rules Provide Challenges and Opportunities, 87 Practical Tax Strategies, no. #1, Aug. 2010, at p. 70.


\(^{62}\) See id.
However, the IRS is not limited to just those factors listed in Reg. 1.6015-2(c) during their review of the taxpayers request for relief.\footnote{63 Treas. Reg. § 1.6015-2 (2006).}

**B. §6015 (c) – Separation of Liability Relief**

The second type of innocent spouse relief, § 6015 (c), is available only for individuals who are no longer married; widowed; are legally separated or not living together; or have not been living together for more than twelve months.\footnote{64 \textit{26 U.S.C.} § 6015 (2006).} This type of relief is called separation of liability relief.\footnote{65 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).} This relief is available “to allocate the liability for a deficiency between individuals who filed a joint return in approximately the same manner as if the individuals filed separate returns.”\footnote{66 \textit{NADLER}, \textit{supra} note 5, at 29.} The Internal Revenue Code provides that separation of liability relief is available only if:

(I) at the time such election is filed, such individual is no longer married to, or is legally separated from, the individual with whom such individual filed the joint return to which the election relates; or

(II) such individual was not a member of the same household as the individual with whom such joint return was filed at any time during the 12-month period ending on the date such election is filed.\footnote{67 \textit{26 U.S.C.} § 6015 (2006).}

The requester has “the burden of proof with respect to establishing the portion of any deficiency” that is the responsibility of the sneaky spouse.\footnote{68 \textit{See id.}} Like the other types of relief, the claim can be denied if the IRS can prove that the taxpayer requesting relief had “actual knowledge” of the deficiency.\footnote{69 \textit{NADLER}, \textit{supra} note 5, at 30.}

**C. § 6015 (f) – Equitable Relief**
The last type of relief available to taxpayers under innocent spouse relief is § 6015 (f) relief is known as equitable relief. If the taxpayer does not qualify for either traditional or separation of liability relief, the taxpayer may qualify for equitable relief if:

I. 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
II. relief is not available to such individual under subsection (b) or (c).

Fortunately for the claimant, when a claim for relief is requested under § 6015(b) and (c), the IRS will automatically consider a request for relief for equitable relief under § 6015(f).

However, there are seven threshold conditions that must be satisfied by the taxpayer before equitable relief will be considered. Revenue Procedure 2003-61 lists the factors:

I. The requesting spouse filed a joint return for the taxable year for which he or she seeks relief.
II. Relief is not available to the requesting spouse under section 6015(b) or (c).
III. The requesting spouse applies for relief no later than two years after the date of the Service’s first collection activity after July 22, 1998, with respect to the requesting spouse.
IV. No assets were transferred between the spouses as part of a fraudulent scheme by the spouses.
V. The nonrequesting spouse did not transfer disqualified assets to the requesting spouse.
VI. The requesting spouse did not file or fail to file the return with fraudulent intent.
VII. The income tax liability from which the requesting spouse seeks relief is attributable to an item of the individual with whom the requesting spouse filed the joint return.

---

70 Dept of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
72 NADLER, supra note 5, at 48.
73 NADLER, supra note 5, at 36.
74 The IRS recently changed this in July 2011, eliminating the two-year rule that applies to innocent spouse relief requests. I.R.S. Notice 2011-70 (July 25, 2011).
75 There are 4 exceptions to this factor listed in Rev. Proc. 2003-61:
   1. Attribution solely due to the operation of community property law.
   2. Nominal Ownership.
   3. Misappropriation of funds.
   4. Abuse not amounting to duress.
For the purposes of this paper, these exceptions will not be discussed, except for number 4, which will be discussed later in the paper Rev. Proc. 2003-61, 2003-32 I.R.N. 296
The IRS will then determine whether to grant relief using additional factors, which are discussed in Revenue Procedure 2003-61. These factors include, but are not limited to, marital status; economic hardship; knowledge or reason to know; the legal obligation of the sneaky spouse; significant benefit; income tax compliance; abuse; mental or physical health. The IRS points out that “[n]o single factor will be determinative of whether to grant equitable relief in any particular case. Rather, the Service will consider and weigh all relevant factors, regardless of whether the factor is listed in this section.” However, the last two factors, abuse and mental or physical health, can only “weigh in favor of equitable relief.” The Service acknowledges that these are factors that are not present in every case.

CHALLENGES WOMEN FACE WHEN REQUESTING INNOCENT SPouse RELIEF

How does innocent spouse relief affect women? As stated earlier, women make up a majority of innocent spouse relief requests. Innocent spouse relief affects only married women who have filed a joint tax return. The issues that women are facing apply not only when litigating the cases, but also issues faced when requesting relief in the preliminary stages of the requests. In 2010, 7,683 out of 50,149 applications were granted relief. 36 of those

---

77 See id.
78 See id.
79 See id.
80 The mental health factor is for situations when the requesting spouse is in poor mental health when the tax return is signed or when the requesting spouse is requesting relief. Factors considered include “the nature, extent, and duration of illness.” Rev. Proc. 2003-61, 2003-32 I.R.N. 296
82 See id.
84 In 2008, 6,543 out of 49,096 applications were granted relief. In 2009, 6,591 out of 49,581 applications were granted relief. E-mail from Ruth A. Schwartz, Statistics of Income Division, Internal Revenue Service (Nov. 29, 2011, 08:06 AM) (on file with author).
applications went to trial. Many requests are denied the first time, often because the IRS does not request the additional or missing information from the claimant, which would make her case stronger.

A. The Innocent Spouse and Abuse

The Service takes spousal abuse or domestic violence very seriously. In Publication 971, the Service states that “[i]f you establish that you signed your joint return under duress (threat of harm or other form of coercion), then it is not a joint return, and you are not liable for any tax shown on that return or any tax deficiency for that return.” The Tax Court defined duress in tax law as “any constraint of will so strong that it makes a person reasonably unable to resist demands to sign a return.” If the IRS finds that duress exists, then the joint return is treated as a single return and the requesting spouse must submit a single tax return for that year.

The courts use a two-part test to determine whether duress exists: “whether the spouse (1) was unable to resist the coercer’s demands, and (2) would not have signed the return except for the coercion.”

The IRS recognizes that abuse is often a significant factor in preventing a spouse from questioning the contents of a tax return. For cases where abuse does not amount to duress, the requesting spouse must establish that abuse existed before she signed the return, and that because

---

85 National Taxpayer Advocate’s 2010 Annual Report to Congress (Dec. 31, 2010).
86 Mr. Nadler states “if the Form 8857 fails to convince the employee that relief is warranted, the employee may simply deny the claim rather than take the time to request additional information.” NADLER, supra note 5, at 66.
87 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
88 The IRS releases Publications for the general public, which provides guidance and additional information on a variety of issues. The Publications are available in print through the IRS, or in PDF form on the IRS website (www.irs.gov).
89 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
91 See id.
93 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
of this history of abuse, she did not question the joint tax return because she was afraid of being abused. 94 If abuse is established, it is more likely that the IRS will grant relief. 95

The Internal Revenue Service, in Publication 971, states that it will consider spousal abuse or domestic violence, even if the requesting spouse had actual knowledge. 96 The revenue procedure expands, acknowledging “[a] history of abuse by the nonrequesting spouse may mitigate a requesting spouse’s knowledge or reason to know.” 97 In order for the IRS to consider spousal abuse or domestic violence, the requesting spouse must establish:

- You were the victim of spousal abuse or domestic violence before signing the return, and
- Because of that abuse, you did not challenge the treatment of any items on the return because you were afraid your spouse (or former spouse) would retaliate against you. 98

Furthermore, Rev. Proc. 2003-16 discusses abuse as a factor favoring equitable relief. 99

Proving abuse can be a very difficult burden for the taxpayer. With a staggering 50,149 claims in 2010, it is important to have as much information as possible in order to prove the elements of the relief requested. 100 Although there no statistics available that state why 42,466 claims were denied, 101 it has been suggested that it is due to not enough information. 102

Even the Tax Court struggles with exactly what to take into consideration when abuse is present. 103 The Court in Nihiser v. Comm’r. discusses this: “there’s no suggesting in the

---

95 See id.
96 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
98 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
100 E-mail from Ruth A. Schwartz, Statistics of Income Division, Internal Revenue Service (Nov. 29, 2011, 08:06 AM) (on file with author).
101 See id.
102 Practitioner Robert Nadler contends that oftentimes the IRS will deny a claim rather than requesting additional information. NADLER, supra note 5, at 67.
Procedure or any other source of relevant law that limits our consideration of whether a spouse was abused only to abuse that causes a particular instance of noncompliance with the tax law.”

Despite all of these discussions about abuse, there is no guidance on what exactly constitutes abuse, and what is required to document abuse. In June, the National Taxpayer Advocate commented on the difficult burden for taxpayers in regards to proving abuse. In the Fiscal Year 2012 Objectives Report to Congress, she said:

[R]ecent cases demonstrate that the IRS may have difficulty in evaluating claims of domestic violence or abuse raised by taxpayers seeking innocent spouse relief. In partnership with a Washington, DC coalition for the prevention of domestic violence, TAS [Taxpayer Advocate Service] will produce training materials and a video to assist IRS public-contact employees in recognizing domestic violence and abuse and the special needs and issues these taxpayers may present in cases throughout the IRS. The training will include a case study and will address a wide range of issues, such as how to avoid interpreting a taxpayer’s survival techniques, which may involve denial, inconsistent statements, or evasiveness, as a lack of truthfulness. Because traditional forms of documentary evidence are often unavailable, the training will explore the acceptability of alternative forms of substantiation, such as testimony and third-party affidavits. The confidentiality of taxpayer information, especially current whereabouts, may be of paramount importance to the taxpayer, and the training will suggest tactics for discussing disclosure rules, and for maintaining contact with elusive or transient taxpayers.

This is a problem that the IRS is aware of, and will hopefully be offering more guidance in the future. Spousal abuse and domestic violence is a very real problem. The United States Department of Justice’s most recent Family Violence Statistics: Including Statistics on Strangers

---

104 See id.
105 In Nihiser v. Comm’r., the court stated “[t]he revenue procedure doesn’t actually define ‘abuse.’” No. 19315-04, 2008 WL 2120983, at *8 (T.C. May 20, 2008). Instead, the court looks to Black’s Law Dictionary, which defines abuse as “physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury.” BLACK’S LAW DICTIONARY 10 (9th ed. 2009). The United States Department of Justice website recognizes physical, sexual, emotional, economic and psychological abuse as domestic abuse. Domestic Violence, THE UNITED STATES DEPARTMENT OF JUSTICE (last updated May 2011), http://www.ovw.usdoj.gov/domviolence.htm. However, under tax law, the only guidance is that the Service will consider spousal abuse or domestic violence. Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
107 See id.
and Acquaintances stated that “[f]amily violence\textsuperscript{108} accounted for 11% of all reported and unreported violence between 1998 and 2002. Of these roughly 3.5 million violent crimes committed against family members, 49% were crimes against spouses.”\textsuperscript{109} Of the 49% of the crimes against spouses, females accounted for 84% of victims.\textsuperscript{110}

Not all family violence is reported. The US Department of Justice reported that only “60% of family violence victimizations were reported to police between 1998 and 2002.” The most common reason for not reporting a crime was that “the incident was a ‘private/personal matter’ (34%). Another 12% of non-reporting family violence victims did not report the crime in order to ‘protect the offender.’”\textsuperscript{111}

Currently, the only guidance for abuse is through case law. The Court in Nihiser v. Comm’r. “recognized that a nonrequesting spouse can engage in mental, emotional, and verbal abuse sufficiently severe to incapacitate a requesting spouse in the same manner as a physically abusive spouse.”\textsuperscript{112} The Service, and Tax Court look for specific instances of abuse when making a determination.\textsuperscript{113}

Proving there was abuse in a relationship presents a challenge for women. In A Practitioner’s Guide to Innocent Spouse Relief, author Robert Nadler impresses the importance of telling a persuasive story when submitting a request for innocent spouse relief. He illustrates his point by telling the stories of Taxpayer A and Taxpayer B, both abused by their spouses. In

\textsuperscript{108} “Family violence” is defined by the US Department of Justice as “family violence includes all types of violent crime committed by an offender who is related to the victim either biologically or legally through marriage or adoption. A crime is considered family violence if the victim was the offender’s current or former spouse.” FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES (2005) available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=828.


\textsuperscript{110} See id.

\textsuperscript{111} See id.

\textsuperscript{112} Nihiser v. Comm’r., No. 19315-04, 2008 WL 2120983, at *9 (T.C. May 20, 2008).

\textsuperscript{113} The court ruled “the abuse factor is neutral in this case because petitioner failed to provide ay detailed or corroborating evidence with respect to her generalized claim that intervenor was physically and emotionally abusive.” Knorr v. Comm’r., No. 7440-01, 2004 WL 2094759, at *7 (T.C. Sept. 21, 2004).
his scenario, Mr. Nadler explains the importance of back-up documentation stating Taxpayer B “explains how her husband physically attacked her when she asked a question about how the taxes would be paid. She also provides a police report that was issued on the day the return was signed and describes the attack by the nonrequesting spouse, and an order of protection signed by a domestic relations judge.” In his scenario, Taxpayer A does not include any documentation, which is why it is more likely that Taxpayer B’s claim will be approved.114

But what exactly is needed to prove abuse? Although a witness is helpful, the court requires more specific instances to be presented in court.115 When one requesting spouse stated that there was verbal abuse in her relationship in her initial request for relief, she was denied because, as the letter stated, it was not a strong enough factor.116 The IRS Publications and case law do not offer any definite guidance on what is required to prove abuse.

In addition to the difficulty in proving abuse, it can be very difficult for any spouse, not to mention an abused spouse, to appear in Tax Court. The law requires the IRS to contact the sneaky spouse, whether you are still married or separated from the spouse. There are no exceptions, even for victims of spousal abuse or domestic violence.117 At this point, the sneaky spouse will be allowed to become a participant in the process.118 If the sneaky spouse participates, he will be given the opportunity to testify, and it is very possible that the sneaky spouse will “try to undermine the credibility of the requesting spouse.”119 If the requesting spouse is representing herself pro se, it is imaginable that this will be a challenge for her. There

114 NADLER, supra note 5, at 66.
115 Collier v. Comm’r., No. 1570-01, 2002 WL 1284802 at *11 (T.C. June 10, 2002) (Court rejected abuse argument because the requesting spouse’s witness was “conclusory and lacking in any specificity as to the facts she bases her conclusion.”).
117 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011) (emphasis in text).
118 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 971 (2011).
119 NADLER, supra note 5, at 86.
would definitely be the opportunity for it to be her word versus his word in whether the abuse, and other factors, existed.

**B. Innocent Spouse and Education**

The requesting spouse’s education level is relevant in many ways. First, § 6015(b) and § 6015(c) require the IRS to show “the taxpayer had actual knowledge of the item resulting in the tax deficiency.”

In addition, knowledge or reason to know is one of the factors the courts will consider when evaluating a § 6015(f) claim. This factor is going to become more and more difficult for women to prove since educational levels have increased in women. The courts look at whether a “reasonably prudent person,” in a situation similar to the requesting spouse would have known about a deficiency on a tax return. As more women obtain higher education levels, it is expected that “the spouse will both have and perceive that she has more options in preventing or responding to pressure or [trickery].” It is probable that the courts will have a higher standard for higher educated women, therefore making it harder to obtain relief.

The less the requesting spouse knows about the family’s finances, the more likely she will be granted relief. Generally speaking, many couples rely on an accountant to prepare their tax return. In 2008, there were 1.3 million accountants and auditors. It can be inferred from those numbers that many people hire accountants to prepare their tax returns. In many cases, the wife relied on an accountant to prepare the tax documents, and oftentimes it was the

---

120 Paul G. Schloemer, Ph.D, CPA, Innocent Spouse Rules Provide Challenges and Opportunities, 87 Practical Tax Strategies, no. #1, Aug. 2010, at p. 71.
126 Accounting, BUREAU OF LABOR STATISTICS (last updated March 2010), http://www.bls.gov/k12/money01.htm.
husband’s accountant.\textsuperscript{127} For most situations, it would be imprudent for both spouses to have separate accountants, and most people would have faith that their accountant prepares the forms accurately. Furthermore, if the sneaky spouse is hiding information, most likely the accountant is also not privy to that information.

With a more advanced degree comes the benefit of obtaining a higher wage. With an increased salary oftentimes comes a more extravagant lifestyle. Especially for educated and well-compensated women, one of the challenges women face when requesting relief is proving economic hardship. Courts will not only take into consideration the requesting spouse’s present compensation, but also whether she has the “ability to earn a living.”\textsuperscript{128}

Economic hardship “generally involves an inability to pay reasonable basic living expenses.”\textsuperscript{129} If a requesting spouse is making over the recommended guidelines for the I.R.S., the Service may deny a claim for relief.\textsuperscript{130} In fact, it appears the courts are more willing to grant relief to when the taxpayers are living at a level near or at the poverty line.\textsuperscript{131} To find the “reasonable amount for basic living expenses,” the Service will consider the following information:

\begin{itemize}
  \item[(A)] The taxpayer’s age, employment status and history, ability to earn, number of dependents, and status as a dependent of someone else;
  \item[(B)] The amount reasonably necessary for food, clothing, housing (including utilities, home-owner insurance, home-owner dues, and the like), medical expenses (including health insurance), transportation, current tax payments (including federal, state, and local), alimony, child support, or other court-ordered payments, and expenses necessary to the taxpayer’s production of income (such
\end{itemize}

\textsuperscript{127} Neal v. Comm’r., No. 8506-03, 2005 WL 2078539 (T.C. Aug. 22, 2005) (Wife relied on husband’s accountant to prepare tax documents); Levy v. Comm’r., No. 12846-02, 2005 WL 950116 at *2 (T.C. Apr. 2005) (Wife was not involved in tax return preparation, but relied on her husband and his accountant.).
\textsuperscript{128} Collier v. Comm’r., No. 1570-01, 2002 WL 1284802 at *10, nn.21 (T.C. June 10, 2002).
\textsuperscript{129} Knorr v. Comm’r., No. 7440-01, 2004 WL 2094759, at *8 (T.C. Sept. 21, 2004).
\textsuperscript{130} Neal v. Comm’r., No. 8506-03, 2005 WL 2078539 (T.C. Aug. 22, 2005) (claimant initially denied relief because she “enjoy[ed] an upper middle income standard of living’ based on her salary of $129,000 per year and child support payments of $36,000 per year.” The amount of unpaid taxes was $278,996.).
as dues for a trade union or professional organization, or child care payments which allow the taxpayer to be gainfully employed); (C) The cost of living in the geographic area in which the taxpayer resides; (D) The amount of property exempt from levy which is available to pay the taxpayer’s expenses; (E) Any extraordinary circumstances such as special education expenses, a medical catastrophe, or natural disaster; and (F) Any other factor that the taxpayer claims bears on economic hardship and brings to the attention of the director. 132

With more women attaining higher degrees, 133 this factor has the potential to hold women who were not involved in their family’s household finances responsible just because they have the ability to pay the taxes, even if the tax deficiency was attributable to the sneaky spouse.

There are many reasons a spouse may not be as involved in family finances. One spouse may be very controlling when it comes to the finances of the family. 134 Additionally, with many women balancing work responsibilities with family responsibilities, the finances may be delegated to the husband. It is very common for spouses, especially with children, to split household duties. To put it bluntly, there are only 24 hours in the day, and a woman can only do so much. It is very possible that, even with a higher education, a woman would not be entirely involved in the family’s finances.

**How can the problem of the sneaky spouse be fixed?**

133 In 2000-01, women received 58.5% of the master’s degrees, 38.6% of the dentistry degrees, 43.3% of the medicine degrees, 47.3% of the law degrees and 44.9% of the doctoral degrees. This is compared with 1969-70, where women made up 39.7% of the masters degrees, .09% of the dentistry degrees, 8.4% of the medicine degrees, 5.4% of the law degrees and 13.3% of the doctoral degrees conferred. CATHERINE E. FREEMAN, TRENDS IN EDUC. EQUITY OF GIRLS & WOMEN: 2004 82 (2004).
134 See supra text accompanying note 14.
The National Taxpayer Advocate recognizes that innocent spouse relief is an area of law that needs more clarification.\textsuperscript{135} There are several ways the IRS can provide remedies to this area of tax law.

\textit{A. The IRS Needs To Eliminate The Joint Return}

Is there a way to eliminate the need for innocent spouse relief entirely? Yes. The IRS can abolish the joint tax return, thereby requiring each spouse to file a single return and split up the available tax credits equally. In fact, “[t]he National Taxpayer Advocate has proposed legislation that would eliminate joint and several liability for joint filers and would tax each spouse only on his or her own income. Adoption of such a proposal would eliminate the need for innocent spouse relief in most instances, as well as the attendant inquiry into a spouse’s knowledge.”\textsuperscript{136} This idea was proposed during the 1998 Congressional Hearing, but was dismissed because of the burden processing additional tax returns would place on the IRS.\textsuperscript{137} However, it is the only way to entirely eliminate the joint and several liability, thereby making each taxpayer responsible for the accuracy of her tax return.

\textit{B. The IRS Needs to Be Diligent About Requesting Additional Information from Taxpayers}

The IRS needs to be diligent in requesting additional information from taxpayers during the preliminary review of the request for relief. Attorney Robert Nadler, in his book \textit{A Practitioner’s Guide to Innocent Spouse Relief}, states that:

\begin{quote}
[T]he IRS will rarely request specific information regarding individual factors such as abuse, economic hardship, illness, or knowledge. In the absence of such specific requests, it is difficult, if not impossible, for the representative or
\end{quote}


\textsuperscript{136} National Taxpayer Advocate’s 2010 Annual Report to Congress (Dec. 31, 2010).

the unrepresented taxpayer to provide a meaningful response. Without additional information, the examiner will conclude his or her review of the case. This author believes that the system would be improved and the interests of the taxpayer would be better served if the IRS notified taxpayers of the areas in which the taxpayer failed to provide sufficient information in the preliminary determination letter.\footnote{NADLER, supra note 5, at 67.}

Requesting additional information from the taxpayer at this preliminary stage would make it easier for the average taxpayer, who most likely has basic education and no business experience, to obtain relief. Even an educated taxpayer would most likely not be proficient in the tax laws when requesting relief, let alone in presenting her case in front of the Tax Court. In 2010, 42,466 claims for innocent spouse relief were denied.\footnote{E-mail from Ruth A. Schwartz, Statistics of Income Division, Internal Revenue Service (Nov. 29, 2011, 08:06 AM) (on file with author).} Between June 1, 2009 and May 31, 2010, 20 of the 36 litigated joint and several liability cases had a \textit{pro se} taxpayer litigant.\footnote{National Taxpayer Advocate’s 2010 Annual Report to Congress (Dec. 31, 2010).}

It is inferred from the amount of litigated cases that only a small percentage of the claimants who are denied actually pursue their claim past the initial IRS determination. Why is this? It is possible that these claimants are already in a financial bind, and therefore the possibility of hiring an attorney will just be an additional expense that they cannot afford. Furthermore, if the claimant is a single, working parent, the preparation for a case in Tax Court can be an additional hassle that the claimant does not have time for.

To the credit of the IRS, it has been somewhat pro-active in trying to streamline the process for filing for innocent spouse relief. By automatically considering all § 6015(b) and §6015(c) requests for relief under § 6015(f), the IRS is making it easier for claimants to initially qualify for relief.\footnote{NADLER, supra note 5, at 48.} However, the IRS needs to request additional information to make sure
relief is granted in situations where the spouse is unfairly responsible for the sneaky spouse’s liability.

C. The IRS Needs to Engage in Taxpayer Awareness and Education of Joint and Several Liability

One of the easiest ways to lessen the problem of the sneaky spouse is through awareness and education. Awareness and education of the tax laws should be included in every high school student’s education. As the Benjamin Franklin quote from the beginning of this paper stated, taxes are inevitable. Yet school systems are not including tax education in high school education. To the credit of the IRS, their website has pages especially for high school students and students in general. The IRS has even developed an interactive program for high school and community college students, which includes lesson plans and simulations. Unfortunately, in the lesson plan, the only information given about married filing statuses is:

Married Filing Jointly filing status - You are married and both you and your spouse agree to file a joint return. (On a joint return, you report your combined income and deduct your combined allowable expenses.)
Married Filing Separately filing status - You must be married. This method may benefit you if you want to be responsible only for your own tax or if this method results in less tax than a joint return. If you and your spouse do not agree to file a joint return, you may have to use this filing status.

Included in the brief section about joint filing, the materials state “If a husband and wife file jointly, each is equally responsible for filing” and “both husband and wife are responsible for any tax owed”. However, there is no mention of joint and several liability. Nor is there any discussion of possible situations or consequences of joint and several liability. How is the average taxpayer supposed to know what this liability is without an explanation? The IRS needs

---

145 See id.
146 See id.
to include more information, defining joint and several liability and explaining the consequences, in the materials that most taxpayers will use.

Reviewing the interactive materials, it seems that the IRS encourages joint filing by providing incentives in the form of tax credits for joint filers. Perhaps it promotes efficiency. However, the consequences of the sneaky spouse are very serious. Students should be made aware that married taxpayers are not required to file joint tax returns, and especially made aware of the possible situations where you would not want to file jointly.

The IRS currently publishes Publication 17 as the one-stop guide to tax preparation for the average taxpayer. The guide outlines how to determine your filing status. For married persons, the Publication gives the option to file jointly or file separately. There are two sentences explaining joint liability, and a brief overview of relief from joint liability. Under the “Married Filing Separately” heading, the Publication outlines all of the credits the taxpayer is not eligible for when deciding to file separately. The Publication states that two separate returns can be amended to a joint return, but a joint return cannot be amended to two separate returns. There is no discussion regarding why a couple would want to file separately. To the average taxpayer, it would appear that filing separately would not be an equitable option. If the taxpayer is not aware of the implications of the joint and several liability (the “everyone else files

---

147 Publication 17 is available on the IRS website for download. It is titled “Tax Guide 2011” and provides all the information the average taxpayer should need. Dep’t of the Treasury, Internal Revenue Serv. Publ’n 17 (2011).
148 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 17 (2011).
149 See id.
150 See id.
151 The taxpayer would, in most cases, be excluded from taking a credit for child and dependent care expenses, limited under an employer’s dependent care assistance program, excluded from the earned income credit, education credits or deduction for student loan interest, unable to take credit for adoption expenses, unable to exclude any interest income from qualified U.S. saving bonds used for higher education expenses, and excluded from the elderly or disabled credit. The taxpayer would also receive reduced credits for child tax credit and retirement savings contributions. The taxpayer’s capital loss deduction is limited, the first-time homebuyer credit is limited, and if the other spouse itemizes deductions, then the taxpayer “cannot claim the standard deduction.” It makes sense that many taxpayers, if they look at this list of exclusions they would be ineligible for if they file jointly, would decide to file jointly. Dep’t of the Treasury, Internal Revenue Serv. Publ’n 17 (2011).
152 Dep’t of the Treasury, Internal Revenue Serv. Publ’n 17 (2011).
jointly, so should I’ mentality), or is not aware that it is option to file jointly, the taxpayer would be uninformed. In the hectic lifestyle that most married people live, especially with a family, how is a spouse supposed to make an informed decision when she is handed a Publication that is over 270 pages? The education regarding taxes needs to start earlier.

Some states encourage a premarital course when applying for a marriage license. Viewing the Pinellas County, Florida “Family Law Handbook,” there is no information included about filing taxes. Although state law governs the marriage requirements, inclusion of tax issues in premarital courses could promote awareness of the joint and several liability implied when filing jointly.

CONCLUSION

The sneaky spouse presents a problem for both the taxpayer and the government. It would be nice to believe that every person is honest, especially a spouse, but this is not so. The reality is that over 50,000 innocent spouse relief claims were filed in 2010, showing that many people were effected, or believed they were effected, by a sneaky spouse.

The IRS needs to fix the problem of the sneaky spouse. The best option would be to eliminate the joint tax return altogether. However, the IRS seems hesitant to do that because of the amount of additional work this would produce. Therefore the IRS needs to do more to protect the (mostly) women that are affected by the sneaky spouse through innocent spouse relief. By gathering additional information at the initial request stage from taxpayers who are not

156 E-mail from Ruth A. Schwartz, Statistics of Income Division, Internal Revenue Service (Nov. 29, 2011, 08:06 AM) (on file with author).
fluent in the interworking of the tax system, more eligible taxpayers would be relieved of tax liabilities that are not their fault. By increasing the awareness of the consequences of joint and several liability, taxpayers would be able to make informed decisions regarding their filing status of tax returns. These changes could only help the taxpayer, by promoting conversations about finances within marriages and urging more women to be involved in the family’s finances.