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Novel Case Shows Social Media Might Jeopardize Tax Relief

by Hale E. Sheppard

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In this article, Sheppard explores the Tax Court's denial of a motion to strike in *Thomas*, an innocent spouse case in which the court determined that personal blog posts qualified as "newly discovered evidence" under section 6015(e)(7).

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I. Introduction

Warnings abound to use the internet with extreme caution because whatever is placed there never entirely disappears. The accuracy of that statement might be questionable, but what is certain is that taxpayers can be negatively affected in later tax disputes by what they say on social media. A recent Tax Court case, *Thomas*, provides a great example.[1] That case undoubtedly will be famous because it addresses an issue of first impression; that is, the type of evidence that parties can introduce during a trial about innocent spouse relief. It might also gain notoriety for another reason that is no less important: The case shows how the IRS might be able to use taxpayers' blog posts that were created several years after they filed the relevant tax returns to strengthen its positions at trial.

II. Overview of Innocent Spouse Relief

Readers must understand the fundamentals before turning to the case.

A. Joint Liability and Innocent Spouse Relief

Married individuals can elect to file a joint Form 1040, "U.S. Individual Income Tax Return," which creates certain advantages and disadvantages.[2] On the downside, individuals submitting joint Forms 1040 have joint and several liability. This generally means that if all the taxes associated with a Form 1040 are not paid in full and on time, the IRS can collect the entire amount from either spouse, regardless of who earned the income, who claimed the deductions, what the individual liabilities would have been if the spouses had filed separate Forms 1040, and so on.[3]

Exceptions exist, of course. A spouse who previously filed a joint Form 1040 can later try to escape liability by seeking innocent spouse relief.[4] One type is known as equitable relief. Section 6015(f) says that one spouse might be able to shirk the financial burden when "it is inequitable to hold the individual liable for any unpaid tax" after "taking into account all the facts and circumstances."[5]

The IRS has guidelines for equitable relief.[6] They indicate that several facts and circumstances should be taken into account when determining whether it is inequitable to hold the requesting spouse responsible for all or part of the unpaid tax liability.[7] These include whether:

- the requesting spouse is no longer married;
- imposing the tax obligation on the requesting spouse will cause economic

[1] *Thomas v. Commissioner*, 160 T.C. No. 4 (Feb. 13, 2023) (order denying motion to strike).

[2] Section 6013.

[3] Section 6013(d)(3).

[4] Section 6015; reg. section 1.6015-1.

[5] Section 6015(f)(1); reg. section 1.6015-4(a).

[6] Reg. section 1.6015-4; Rev. Proc. 2013-34, 2013-43 IRB 397, section 4.03.

[7] Rev. Proc. 2013-34, section 4.03.

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hardship, meaning that he or she will be unable to pay basic living expenses;
- as of the date that the coupled filed the relevant joint Form 1040, the requesting spouse knew or had reason to know that the non-requesting spouse would not or could not pay the tax liability then or within a reasonable period;
- the requesting spouse or non-requesting spouse has a legal obligation, such as a divorce decree, to pay the tax liability;
- the requesting spouse significantly benefited from the unpaid tax liability;
- the requesting spouse has made a good-faith effort to comply with the tax laws in all years after those for which he or she is seeking equitable relief; and
- the requesting spouse was in poor physical or mental health when the couple filed the joint Form 1040.[8]

B. Overview of Procedures

Taxpayers have several procedural avenues for requesting innocent spouse relief. One common way is to file Form 8857, "Request for Innocent Spouse Relief." A centralized IRS office reviews Form 8857 and issues a preliminary determination letter. If the IRS denies relief at this first level, the requesting spouse normally can submit a protest letter demanding reconsideration by the Appeals Office. In instances in which the Appeals Office is disinclined to grant relief, the requesting spouse will receive an unfavorable notice of final determination. He or she can then dispute this administrative rejection by lodging a timely petition with the Tax Court.

Now comes the important part. Applicable law, section 6015(e)(7), says the following about the standard and scope of judicial review by the Tax Court:

> Any review of a determination made under [section 6015] 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 [evidence]" *or* "previously unavailable evidence."[9] [Emphasis added.]

III. Case of First Impression

Thomas centers on a husband and wife, their joint Forms 1040 for 2012, 2013, and 2014, the corresponding unpaid tax liability, and who should be stuck with the bill.[10]

A. Summary of Relevant Facts

Sydney Ann Chaney Thomas's husband died not long after they filed the last of the relevant joint Forms 1040. She sought equitable relief from the IRS under section 6015(f) after his death. The IRS, unyielding, issued Thomas an adverse notice of final determination. She filed a timely petition with the Tax Court, the IRS refuted her allegations, and litigation ensued.[11]

Both the IRS and Thomas wanted the court to consider various items that were not part of the administrative record during the trial. For its part, the IRS proposed to introduce as evidence a series of posts from Thomas's personal blog that she created between November 2016 and January 2022. Consider the timing: The Forms 1040 at issue were from years past (that is, 2012, 2013, and 2014), Thomas's resolution efforts with the Appeals Office ended in September 2020, and the Tax Court trial took place in April 2022, merely four months after the last blog posts. In other words, the IRS wanted the Tax Court to scrutinize the blog posts by Thomas beginning years *after* she filed joint Forms 1040 with her deceased husband and ending shortly before the trial began.

The Tax Court determined that the posts were relevant from an evidentiary perspective because they featured information about Thomas's assets, lifestyle, and business — as well as her relationship with her late husband. Thomas discussed the blog posts during her direct

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[8] *Id.*

[9] Section 6015(e)(7); *see also* Taxpayer First Act, section 1203(a)(1).

[10] *Thomas*, 160 T.C. No. 4. All the information in this article about the case derives from the opinion of the Tax Court, along with logical assumptions to fill in any factual gaps.

[11] Thomas likely filed a "Petition of Determination of Relief From Joint and Several Liability on Joint Return." *See* Tax Court Rule 321(b).

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testimony, and the IRS presented related questions during cross-examination.

At some point, Thomas, who was representing herself at trial, expressed concern about whether the blog posts should be admitted as evidence. The court interpreted this as an objection, took the matter under advisement, and later issued an order accepting the blog posts as evidence but inviting the parties to file motions on the issue.

Recognizing that Thomas might be at a disadvantage given that she had no tax defense attorney advocating for her, the court stated in its order that "given the novelty and complexity" of the evidentiary issues concerning the blog posts, Thomas "may benefit from the assistance of counsel." She wisely took that judicial advice and enlisted the help of a highly competent attorney. The attorney then filed a motion to strike the blog posts from evidence, which the IRS disputed. Several nonparties that surely deal with innocent spouse issues on a regular basis filed an amici brief siding with the IRS, not Thomas.[12]

B. Positions of the Parties and Nonparties

The Tax Court began its ruling on the motion by underscoring the items on which the parties agreed. In particular, it explained that the IRS and Thomas acknowledged that (1) her blog posts did not form part of the administrative record, and (2) those posts are relevant from a legal perspective to the resolution of the case. Thus, the only issue, which the court indicated it had never tackled before, was whether the blog posts constituted "any additional newly discovered evidence" or "previously unavailable evidence" for purposes of section 6015.[13] If they did, then the IRS would prevail, and the Tax Court could consider the blog posts in making its decision on innocent spouse relief. If they did not, then Thomas would triumph, and the blog posts would be out of the picture, pun intended.[14]

C. Two Pivotal Authorities

Several of the positions advanced by the parties, as well as much of the reasoning of the Tax Court, center on the text of, and the differences between, the following two authorities:

- Section 6015(e)(7), which describes the "standard and scope of review" applicable to innocent spouse cases filed with the Tax Court. This provision states that any review of a determination by the IRS regarding innocent spouse relief "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.'"[15] (Emphasis added.)
- Federal Rule of Civil Procedure (FRCP) 60, which allows a court to correct, after the fact, a clerical error or a mistake arising from an oversight or omission in a judgment, order, or other part of the court record. The grounds for making a correction include "newly discovered evidence that, with reasonable diligence, could not have been discovered in time" to file a motion with the court seeking a new trial.[16]

D. Arguments by Thomas

Thomas argued that the blog posts were not "newly discovered evidence." She started by noting that neither section 6015 nor its legislative history defines this key term. Therefore, she reasoned that the Tax Court should look to other sources — namely, the FRCP. Thomas pointed out that FRCP Rule 60 says that a court can relieve a party from a judgment or order after a trial based

[12] *Thomas*, 160 T.C. No. 4, at 3-4. It is unclear whether the groups filed one unified brief or separate ones. In all events, the authors were the Center for Taxpayer Rights, Community Law Project, University of California Hastings Low-Income Taxpayer Clinic, and Villanova University Federal Tax Clinic.

[13] Section 6015(e)(7).

[14] Actually, the issue was even narrower because the Tax Court only needed to address whether the first standard was met — that is, whether the blog posts were "any additional newly discovered evidence." *See Thomas*, 160 T.C. No. 4, at 7 n.3.

[15] Section 6015(e)(7); *see also* Taxpayer First Act, section 1203(a)(1).

[16] FRCP 60(b)(2).

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on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time."[17]

Thomas had to concede that the ordinary meaning of the term "discover" is "to obtain sight of or knowledge of for the first time." However, she minimized this by suggesting to the court that applying the ordinary meaning in her case would set a very low bar. She suggested, moreover, that it would run counter to what Congress likely intended when enacting the standard for judicial review because it would allow the IRS to freely reopen the record to submit new evidence at trial upon a mere showing that it did not previously know about it, "without any consideration" for the IRS's earlier efforts to identify or obtain it.[18]

Thomas further contended that all the blog posts that existed before the Appeals Office issued its notice of final determination should be off limits because they were publicly available and the IRS could have readily found them via a simple internet search. Thus, Thomas concluded, the blog posts during that period were not "previously unavailable" to the IRS.

E. Arguments by the IRS

The IRS countered, as one would expect. It argued that absolutely all the blog posts, regardless of their dates, constituted "newly discovered evidence" and thus should be part of the record for the Tax Court. Harkening to the traditional rules of statutory construction, the IRS urged the court to apply the ordinary meaning of the phrase "newly discovered evidence." Under that definition, the IRS suggested it would prevail because it did not gain awareness of the blog posts until after Thomas had filed the petition and initiated the Tax Court case.

The IRS made the following observations in support of its position. First, from the perspective of the IRS, its role during the administrative process of innocent spouse claims is that of an arbiter between the requesting spouse and non-requesting spouse, not that of an advocate. Thus, it had no duty to gather evidence to challenge a claim, such as the blog posts. Second, the requesting spouse has the burden of proving during the administrative stage that he or she is entitled to relief, so the IRS would be wasting resources if it were to collect additional evidence at that early point to refute an inadequate claim. Third, because the relationship between the requesting spouse and the IRS does not become adversarial until Tax Court litigation starts, the IRS has no obligation to gather potential evidence until then. Fourth, the fact that section 6015(e)(7) first states that the Tax Court's review must be based on the administrative record shows an effort by Congress to ensure that the requesting spouse exhausts his or her administrative remedies before seeking intervention by the Tax Court. The IRS went on to suggest that taxpayers "should not be incentivized to hide information from the IRS during the administrative phase." Finally, the IRS presented several rationales for why the specific judicial standard stated in the relevant provision, section 6015, should apply instead of the general provision championed by Thomas, FRCP 60.[19]

F. Arguments by Nonparties

As mentioned earlier, various nonparties filed an amici brief, or perhaps multiple ones, nudging the Tax Court to look at the bigger picture and decide in favor of the IRS on this one. They suggested, in essence, that the Tax Court expansively interpret the concepts of "any additional newly discovered evidence" or "previously unavailable evidence" for purposes of section 6015. They believed that this was appropriate given the nature of the IRS's unique administrative procedures for handling innocent spouse requests, the specific circumstances of the requesting spouse in this case, and the *de novo* review that the Tax Court conducts.[20]

G. Analysis by the Tax Court

The Tax Court emphasized that *Thomas* offered it a chance to address an issue of first impression — namely, the proper judicial standard in innocent spouse cases. Because the question turned on the interpretation of a statute,

[17] FRCP 60(b)(2).

[18] *Thomas*, 160 T.C. No. 4, at 6.

[19] *Id.* at 7-8.

[20] *Id.* at 8-10.

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the Tax Court began, as usual, with the express language of the relevant provision, section 6015(e)(7). Moreover, because neither that provision nor its legislative history defined the pivotal phrase "any additional newly discovered evidence," the court looked to its ordinary meaning and swiftly resolved this matter. It concluded, without opposition from the IRS or Thomas, that the ordinary meaning of "newly discovered" is "recently obtained sight or knowledge of for the first time."[21]

The Tax Court then moved to the blog posts. It noted that the IRS discovered the posts by searching the internet only after Thomas filed her petition with the Tax Court. It determined, with relative ease, that the blog posts, including those that Thomas made before the Appeals Office issued its notice of final determination, were admissible evidence because they constituted "any additional newly discovered evidence" for purposes of section 6015. As a nod to overall fairness and the breadth of its holding, the court clarified that its conclusion would be the same regardless of whether the requesting spouse, non-requesting spouse, or IRS sought to introduce the blog posts as evidence.[22]

The Tax Court next devoted substantial attention to distinguishing section 6015(e)(7), the specific standard for innocent spouse cases advanced by the IRS, and FRPC 60, the general evidentiary standard on which Thomas relied. The Tax Court first noted that section 6015(e)(7) does not contain any language suggesting that the IRS must exercise "reasonable due diligence" for an item to qualify as "newly discovered evidence." Next, the court underscored that FRPC 60 was introduced decades ago, so it was "widely known" and "available as a model" when Congress enacted section 6015(e)(7). Congress, however, used different language, which should be interpreted as an intentional choice. The court then pointed out that the language of section 6015(e)(7) encourages an "expansive" interpretation, not a limited one, as advocated by Thomas. It explained in this regard that section 6015(e)(7) not only does not require the IRS to conduct "reasonable due diligence," it blesses the acceptance of "any additional" evidence. Adding to the list, the court said that the *de novo* standard of review granted in section 6015(e)(7) suggests that it should broadly construe its authority to consider information beyond the earlier administrative record because that standard "typically goes hand-in-hand with a fresh record." Had Congress wanted to limit its review, reasoned the court, it could have inserted a standard of abuse of discretion by the IRS as opposed to a *de novo* one. Finally, the Tax Court emphasized that section 6015(e)(7) and FRCP 60 apply in completely different contexts. Parties that file a motion for relief from a judgment or order under the latter have already had a prior opportunity to conduct pretrial discovery and present evidence at trial; therefore, in that situation, "a reasonable due diligence requirement makes perfect sense." On the other hand, when it comes to innocent spouse cases involving section 6015(e)(7), the Tax Court considers a case for the first time after a limited administrative proceeding. A more expansive interpretation of section 6015(e)(7), therefore, is warranted.[23]

IV. Conclusion

The Tax Court denied Thomas's motion to strike the blog posts because they qualified as newly discovered evidence, but it still must decide whether, or to what extent, she should be equitably relieved of the liabilities associated with the joint Forms 1040 at issue. *Thomas* has already made a significant contribution to legal discourse regardless of the outcome, given its ruling on the novel issue of the scope of Tax Court review in innocent spouse trials. *Thomas* might acquire additional importance in the context of other tricky legal questions, too. As the use of social media continues to increase at a fast clip, battles over whether blog posts and similar items are relevant to Tax Court proceedings, constitute "newly discovered evidence," were "previously unavailable," have been properly authenticated, and other procedural and evidentiary issues surely will increase. ■

[21] *Id.* at 10-11.

[22] *Id.* at 12 n.5, and 14-15.

[23] *Id.* at 12-14.

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