De Novo: Reviewing Tax Court Redressability Incongruities in Innocent Spouse Relief Sections 66(c) and 6015(f)

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AN ILLUSTRATIVE HYPOTHETICAL: PAT'S PLIGHT

Imagine the plight of Pat and Dana, a married couple residing in Washington State. Pat is a freelance software engineer, and Dana is a part-time barista at Moondoes, a local coffee shop. Pat makes $60,000 annually from freelance software engineering, and Dana makes $20,000 annually as a barista. Dana generally knew Pat had secured a contract in mid-July 2015 to work on a project for Macrodense, a multinational technology company. But, beyond general knowledge, Dana knew very little about Pat's Macrodense project because they rarely spoke about much anymore.

When the couple were wed in 2012, their relationship was rock-solid. However, after a year of marital bliss, the proverbial honeymoon was over. From 2013 to December 2015, Pat and Dana's relationship was fraught with bickering, arguing, yelling, and crying. Finally, in January 2016, Dana could no longer stand the pressures of their strained relationship and moved out of the couple's home.

Pat, enraged and upset by Dana's unwillingness to rectify the problems in their marriage, refused to speak to Dana anymore once Dana filed for divorce in late March of 2016. This lack of communication presented a serious problem for Dana in early April because Tax Day was quickly approaching. Having not received any response from Pat about their taxes, Dana chose to file a tax return with the filing status "married

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filing separately"[1] since Pat would not meet to sign a joint return and would not share 2015 financial information. Pat assumed, as most would, that "separate" meant separate—as in Pat's finances are Pat's and Dana's finances are Dana's; each are responsible for their own financial affairs. In fact, the front page of the tax form does not seem to indicate otherwise.[2] Pat's return was timely filed on April 18, 2016.[3] After the Internal Revenue Service (IRS) sent Pat's refund, Pat thought nothing, and received nothing, about his 2015 taxes until January of 2018.

In January of 2018, Dana received a "Notice of Deficiency" letter from the IRS alleging she owed the IRS tax on an additional $90,000 of income. How could this be? Dana had never missed a tax payment! After a little bit of investigating, Dana found the IRS alleged this additional money was owed because Pat failed to pay tax on $200,000 he earned in 2015, primarily from the Macrodense project. But Dana thought that "separate" meant separate, so why would Pat's income matter on Dana's return? Since Dana did not resolve the matter during an audit, the IRS aggregated the couple's income for the year ($20,000 plus $200,000, totaling $220,000), divided by two ($110,00), then issued Notices of Deficiency to each, respectively ($110,000 minus the $20,000 of income Dana already paid tax on). In Pat's case, "separate" did mean separate with regard to the filing but not with regard to the underlying tax liability.

In response, Pat filled out and submitted Form 8857 to the IRS requesting Innocent Spouse Relief. In preparing the Form 8857, Pat provided a significant, but non-exhaustive, amount of information to the IRS substantiating her claim. But, the IRS denied Pat's request.

Unfortunately, even if Pat timely petitions the Tax Court for redress in response to the Notice of Deficiency and has additional information substantiating the Innocent Spouse claim, the IRS still has a significant likelihood of prevailing given the undeveloped administrative record upon which the IRS relied in its denial. Notably, this significant likelihood is strengthened by the seemingly frivolous fact (in the context of federal taxation) that Pat was a Washington State resident in 2015. Based on this fact alone, it is unlikely the Tax Court will allow Dana to submit new evidence for it to review, even if the additional evidence is persuasive.

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1. *See* INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, FORM 1040, U.S. INDIVIDUAL INCOME TAX RETURN (2017), https://www.irs.gov/pub/irs-pdf/f1040.pdf [https://perma.cc/96VL-5QN9] (see "Filing Status" in Box Three for option to file separately).

2. *Id.*

3. The traditional April 15th filing deadline was extended to Monday, April 18th for tax year 2015 individual income tax filings because of Washington D.C.'s celebration of Emancipation Day on Friday, April 15th and the weekend immediately following. *See 2016 Tax Season Opens Jan. 19 for Nation's Taxpayers*, INTERNAL REVENUE SERV. (Dec. 21, 2015), https://www.irs.gov/uac/newsroom/2016-tax-season-opens-jan-19-for-nations-taxpayers [https://perma.cc/8YRR-8DXU].

INTRODUCTION

Although this is a fictional characterization, most modern Americans know a real-life example of Pat and Dana—with or without the resulting tax problem. Between 2010 to 2014, divorces and annulments occurred at a steady rate of approximately one for every two marriages annually.[4]

CDC Marriage and Divorce & Annulment Statistics: 2010–2014				
	Marriages (per 100,000 total population)	Divorces & Annulments (per 100,000 total population)	Divorces & Annulments per 100 Marriages[5]	Total Divorces & Annulments
2014	6.9	3.2	46.4	813,862
2013	6.8	3.3	48.5	832,157
2012	6.8	3.4	50	851,000
2011	6.8	3.6	52.3	877,000
2010	6.8	3.6	52.3	872,000

From 2010 to 2014, the number of returns filed under a "married filing separately" status has shown a slight, yet consistent, increase—approaching 3,000,000 in 2014.[6]

Internal Revenue Service[7] Statistics of Income: Form 1040 Married Filing Separately Status Returns Filed	
2014	2,949,371
2013	2,811,050
2012	2,663,017
2011	2,591,000
2010	2,532,292

4. *See National Marriage and Divorce Rate Trends*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 23, 2015), http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm [https://perma.cc/KUG3-Z3TM].

5. Although there exists an observable decline in divorces and annulments per one hundred marriages annually from 2010 to 2014, at no point dating back to 2000 has the number of divorces and annulments dipped below forty-five per one hundred marriages. *Id.*

6. *SOI Tax Stats - Individual Statistical Tables by Size of Adjusted Gross Income, All Returns: Number of Returns*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income [https://perma.cc/J3RD-ZPW6] (last visited Apr. 4, 2018). These statistics are published annually by the IRS. *See, e.g.*, I.R.S. News Release IR-2016-118 (Aug. 31, 2016); I.R.S. News Release IR-2015-104 (Aug. 26, 2015); I.R.S. News Release IR-2014-83 (Aug. 22, 2014); I.R.S. News Release IR-2013-67 (Aug. 13, 2013).

7. Hereinafter, "IRS."

The IRS has identified only two possible benefits for an otherwise married individual to file under a married filing separately status: (1) if the individual wants to be responsible for only tax attributable to her own earned income or (2) if it results in a lower tax bill than filing a joint return.[8] However, achieving a lower tax bill through filing a married filing separately tax return occurs in only the narrowest of cases; for example, an individual filer with substantial medical expenses.[9] Medical expense deductions are only allowed to the extent such expenses exceed ten percent of adjusted gross income (AGI).[10] By not combining AGI, an individual may qualify to deduct medical expenses where he otherwise may not have, particularly in marital circumstances where the non-deducting partner substantially outearns the other. But utilizing the married filing separately status comes with substantial restrictions and prohibitions and, ultimately, will result in a higher tax liability than filing jointly in most cases.[11]

Outside of the narrow instances where it may be tax beneficial to file separately, a married individual is likely to file separately only to shield herself from exposure to her spouse's tax liability. Robert Wood identified several instances where considering the separation of taxes may prove beneficial to shield an individual from marital liability: (1) where one or both individuals are exposed to high business or tax risk operations, (2) the potential "you never told me" problem,[12] or (3) if a divorce is looming.[13] Thus, it seems the most beneficial aspect of married filing separately is the ability to insulate oneself from his or her spouse's tax liability.

So, one may ask, what happened to Dana? She filed married filing separately but was still assessed tax for income received by Pat. Had Dana and Pat resided in a common law property state where a spouse is not individually liable for the debts of the other spouse, like Oregon,[14] Dana likely would have been insulated from Pat's tax liability. However, Dana and Pat were Washington State residents—a community property state.[15]

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8. INTERNAL REVENUE SERV., PUB. 17 CATALOG NO. 10311G, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 22 (2017) [hereinafter PUBLICATION 17], https://www.irs.gov/pub/irs-pdf/p17.pdf [https://perma.cc/KVD2-M7CT].

9. *See* I.R.C. § 213 (2012). All further references to "§" or "section" are to the 2012 bound version of Title 26 of the United States Code (the Internal Revenue Code (I.R.C.)), unless otherwise indicated.

10. *Id.*

11. PUBLICATION 17, *supra* note 8.

12. *See, e.g.*, *infra* note 78.

13. Robert W. Wood, *95% of Married Couples File Taxes Jointly, Should You Join the Other 5%?*, FORBES (Mar. 21, 2016, 8:44 AM), http://www.forbes.com/sites/robertwood/2016/03/21/irs-says-95-of-marrieds-file-taxes-jointly-should-you-join-the-5/#48595efa4bc6.

14. OR. REV. STAT. § 108.020 (West, Westlaw through 2018 Reg. Sess.).

15. WASH. REV. CODE § 26.16.030 (2016).

The initial liability protection function of married filing separately is only afforded to those taxpayers residing in common law jurisdictions.[16] Thus, Dana's appropriate amount of taxable income in 2015 equals one-half of Dana and Pat's combined income for the year—not simply the income earned through Pat's labor.

Congress codified a relief provision to protect individuals from their spouse's bad tax behavior in 1980[17] and greatly expanded the scope of relief in 1998[18] to address the lack of protection afforded to residents of community property states that file married filing separately returns.[19] Section 66 operates as a parallel to § 6015—a provision relieving individuals in certain circumstances from joint and several liability resulting from a jointly filed return[20]—for married filing separately filers who are residents of community property states.[21] Sections 6015 and 66 are similarly drafted and afford relief to taxpayers in similar circumstances. However, § 66 is severely limited in one respect compared to § 6015: redressability, particularly in the Tax Court.

Part One of this Note details the historical background of joint and several liability in federal income taxation. Part Two introduces, compares, and contrasts the two statutory provisions Congress has enacted to relieve "innocent spouses" from joint and several liability. Part Three discusses the incongruent standards of review applied by the Tax Court to these—§§ 66 and 6015—two substantially similar relief provisions. Finally, Part Four suggests remedies to alleviate this incongruity.

I. HISTORICAL BACKGROUND OF JOINT AND SEVERAL LIABILITY IN INCOME TAXATION

A. Joint and Several Liability: Married Filing Jointly

In federal personal income taxation, married spouses are subject to joint and several liability[22] for tax arising from earned income in two general ways: either by filing a return designated married filing jointly or by function of their resident state's community property laws.

16. *See* Poe v. Seaborn, 282 U.S. 101, 118 (1930) (holding that income is equally divisible between spouses in community property states).

17. *See generally infra* Part II(A).

18. *See generally id.*

19. I.R.C. § 66.

20. *Id.* § 6015.

21. *Id.* § 66.

22. Joint and several liability is "liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion." *Joint and Several Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014). For purposes of this Note, "parties" are each of the spouses individually in a marital union and "adversary" is the Commissioner of Internal Revenue.

Married taxpayers have had the option to elect to file a single joint return—rather than file two separate returns—since 1918.[23] The Revenue Act of 1918, the first of its kind to refer to a joint return, stated in relevant part, "If a husband and wife living together have an aggregate net income of $2,000 or over, each shall make such a return unless the income of each is included in a *single joint return*."[24] Use of the marital joint return was optional and it appears Congress introduced the option solely for taxpayer (and Treasury) administrative ease—not to impart joint and several liability upon spouses.[25]

Despite this, the IRS insisted for years following that filing of a joint return should result in imposition of joint and several liability among spouses for their collective tax liability.[26] In 1935, The Commissioner of Internal Revenue's (CIR) persistent challenge was ultimately struck down by the Ninth Circuit in *Cole v. CIR*, where it concluded that simply opting to utilize the joint return does not result in joint and several liability between spouses.[27]

However, the Ninth Circuit's holding in *Cole* did not stand for long. In 1938, Congress overruled *Cole* by enacting the Revenue Act of 1938, which read in relevant part:

> In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income, and *the liability with respect to the tax shall be joint and several*.[28]

Notably, Congress's only rationale put forth to justify implementing joint and several liability under a joint return filing was for "administrative necessity"[29]—the suspect argument relied upon by the CIR and rejected by the Ninth Circuit in *Cole*.[30]

Furthermore, holding individual spouses liable for tax resulting from their spouse's apportionable income appears contrary to the progressive taxation theory under which our federal income tax system was originally

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23. Richard C.E. Beck, *The Failure of Innocent Spouse Reform*, 51 N.Y.L. SCH. L. REV. 929, 933 (2007).

24. Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1057, 1074 (1919) (repealed 1921) (emphasis added).

25. Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should be Repealed*, 43 VAND. L. REV. 317, 333 (1990).

26. Beck, *supra* note 23, at 933.

27. Cole v. CIR, 81 F.2d 485, 489 (9th Cir. 1935) ("[S]pouses are not jointly and severally liable for a deficiency arising entirely out of the separate income of one of them. In the instant case, tax liability should have been apportioned between husband and wife in accordance with income.").

28. Revenue Act of 1938, ch. 289, § 51(b), 52 Stat. 447, 476 (emphasis added).

29. Beck, *supra* note 23, at 933–34.

30. *Id.* at 933.

established. In 1913, the United States followed a global progressive trend in matrimonial property law when it adopted an income tax system requiring mandatory filing of separate returns, regardless of marital status. This filing regime provided more freedom for women to manage their own property independent of their husbands.[31] Thus, Congress's adoption of an "opt in" joint return in 1918 was not offered to conform with the established progressive matrimonial property laws under which the tax system was established (quite the contrary, in fact), but to provide "administrative ease."[32] It appears the Treasury's theory of joint and several liability was developed independent of any established matrimonial property law conformity or supporting authority from Congress or in common law.[33]

The modern-day codification of joint and several liability in the joint filing context is found in § 6013: "[I]f a joint return is made, the tax shall be computed on the aggregate income and *the liability with respect to the tax shall be joint and several*."[34] As a result, joint and several liability grants the IRS the power to collect the full amount of any deficiency from either spouse[35]—a power that allows the IRS to go after the spouse who has assets more readily available for levy or lien, rather than the spouse who is actually responsible for the deficiency.[36]

B. Insulation from Joint and Several Liability: Married Filing Separately

As stated above, § 6013 subjects each spouse of a marital relationship to joint and several liability if they, as a couple, opt to file a joint return.[37] If, however, a couple does not opt in to filing a joint return,[38] each spouse

31. Beck, *supra* note 25, at 332–33.

32. *Id.* at 333.

33. *Id.*

34. I.R.C. § 6013(d)(3) (2012) (emphasis added).

35. Lily Kahng, *Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Liability*, 49 VILL. L. REV. 261, 264 (2004).

36. Beck, s*upra* note 25, at 363.

37. *Supra* Part I(A).

38. Both spouses are required to sign a joint return for the return to be valid. I.R.C. § 6061(a). The Tax Court has found a valid return by way of intent where a spouse otherwise did not sign the return. *See* Estate of Campbell v. Comm'r, 56 T.C. 1, 12 (1971) (holding "it has long been settled that where an income tax return is intended by both spouses as a joint return, the absence of the signature of one spouse does not prevent their intention from being realized."). However, a recent Tax Court ruling tightened this explicit signature requirement. *See* Reifler v. Comm'r, 110 T.C.M. (CCH) 360, at *27 (2015) (holding that petitioners did not timely file a valid joint return because the return lacked one of the essential—and easiest to satisfy—requirements for a valid joint tax return, the signature of both spouses, dismissing petitioner's reliance on the substantial consent compliance and tacit compliance doctrines).

must file a return with the filing status of married filing separately.[39] Unlike with joint return filers, Congress has never imposed statutorily mandated joint and several liability upon spouses filing separate returns. Thus, the spirit of *Cole* still rings true in separate returns (i.e., tax liability is apportioned between spouses in accordance with the individual's respective earned income for the year).[40]

By choosing not to opt in to joint filing status, an individual can successfully insulate herself from spousal tax liability; however, this insulation can come at a high price. Although the tax rates for individual spouses filing separately have consistently remained at half the rate for joint return filers since 1949,[41] separately filing spouses are prohibited from taking advantage of valuable tax deductions and credits. Individual spouses filing separately are prohibited from taking advantage of the earned income tax credit,[42] the Hope (American Opportunity) and Lifetime Learning credit,[43] the student loan interest deduction,[44] the child or dependent care expense credit,[45] the qualified adoption expense credit,[46] and exclusion of qualified U.S. savings bond interest income used for higher education.[47] Additionally, an individual spouse is prohibited from taking the elderly and disabled tax credit[48] and is required to include eighty-five percent of social security or tier one railroad retirement benefits into income[49] if the spouses live together at any time during the

39. I.R.C. § 1(d).

40. Cole v. Comm'r, 81 F.2d 485, 489 (9th Cir. 1935).

41. *U.S. Federal Individual Income Tax Rates History, Nominal Dollars, Income Years 1913-2013*, TAX FOUND., https://files.taxfoundation.org/legacy/docs/fed_individual_rate_history_nominal.pdf [https://perma.cc/GT3H-VJYH]. The Revenue Act of 1948 introduced a separate rate structure for joint filers for the first time. By granting "income splitting" to all married couples, this provided a tax advantage to couples living in common law property states that was previously only available to couples living in community property states. This separate rate structure provided a substantial geographical tax equalization between couples residing in the two types of states. Spencer Williams, Comment, *Joint Income Tax Returns under the Revenue Act of 1948*, 36 CAL. L. REV. 289, 291–92 (1948). Professor Lily Kahng argues that Congress's motivation for implementing the "income splitting" regime in 1948 was to render the stronger property rights of women in community property states meaningless for tax purposes and to quell the national movement towards adoption of community property laws—laws that, at the time, provided women stronger property rights compared to common law property laws—under the guise of the fictional 'marital unity' rationale. Kahng, *supra* note 35, at 272. For a further discussion on the fiction of marital unity, see generally Lily Kahng, *Fiction in Tax*, *in* TAXING AMERICA 25 (Karen B. Brown & Mary Louise Fellows eds., 1996).

42. I.R.C. § 32(d).

43. *Id*. § 25A(g)(6).

44. *Id*. § 221(e)(2).

45. *Id*. § 21(e)(2). However, a taxpayer may qualify for the credit if legally separated or living apart from their spouse. *Id*. § 21(e)(4).

46. *Id*. § 23(f)(1).

47. *Id*. § 135(d)(3).

48. *Id*. § 22(e)(1).

49. *Id*. § 86(c)(1)(C).

separate filing year. Finally, spouses are required to use the same deduction basis—standard or itemized—on their separate returns, which could be detrimental if a spouse with substantial available itemized deductions is forced to claim the standard deduction or if a spouse with little itemized deductions available is forced to claim itemized deductions.[50] Thus, although the joint return is technically an "opt in" mechanism, the steep penalties incurred by not opting in many cases may constructively present no option at all.

The litany of prohibitions imposed upon married filing separately filers coupled with the progressively incongruent tax rates of individual filers at higher income levels[51] may result in a heavy penalty on one seeking liability protection from their spouse's tax burden. Although spouses may choose to subject themselves to the heavy burden associated with separate filing, the filing spouses may not even receive the sought-after liability protection if they live in one of nine states.

C. Joint and Several Liability: Community Property State Residents

Currently, nine states—Arizona,[52] California,[53] Idaho,[54] Louisiana,[55] Nevada,[56] New Mexico,[57] Texas,[58] Washington,[59] and Wisconsin[60]—have community property statutes in their respective codes. Accordingly, the IRS recognizes these states as "community property states" for federal tax purposes.[61]

If spouses residing in a community property state file jointly, they are statutorily subjected to joint and several liability in the same way as spouses residing in common law states.[62] Unlike joint filing spouses in common law states, joint filing spouses in community property states have no mechanism by which to secure an initial presumption of separate

50. *Id*. § 63(c)(6)(A).

51. Although a separately filing spouse and individual (single) filer maintain identical tax rates for up to $75,950 of reportable income in 2016, the marginal rates diverge in favor of the individual filer on any income in excess of this threshold amount. Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

52. ARIZ. REV. STAT. ANN. § 25-211 (Westlaw through 2018 1st Special Sess.).

53. CAL. FAM. CODE § 760 (West, Westlaw through Ch. 13 of 2018 Reg. Sess.).

54. IDAHO CODE § 32-903 (West, Westlaw through 2d Reg. Sess.).

55. LA. CIV. CODE ANN. art. 2336 (West, Westlaw through 2018 1st Extraordinary Sess.).

56. NEV. REV. STAT. ANN. § 123.220 (West, Westlaw through 2017 Reg. Sess.).

57. N.M. STAT. ANN. § 40-3-8(B) (West, Westlaw through 2018 1st Reg. Sess.).

58. TEX. FAM. CODE ANN. § 3.001 (Vernon, Westlaw through 2017 Reg. Sess.).

59. WASH. REV. CODE ANN. § 26.16.030 (2016).

60. WIS. STAT. § 766.31 (West, Westlaw through 2017 Act 367).

61. *See* INTERNAL REVENUE SERV., PUB. 555 CATALOG NO. 15103C, COMMUNITY PROPERTY 2 (Feb. 22, 2016), https://www.irs.gov/pub/irs-pdf/p555.pdf [https://perma.cc/U7HG-HAVG].

62. I.R.C. § 6013(d)(3).

liability when filing a return.[63] But an individual common law state resident may secure an initial presumption of separate liability from her spouse by filing a separate return, as discussed above.[64] Unfortunately, this initial presumption of separate liability mechanism—nor any other mechanism—is made available to spouses residing in community property states by way of filing status.

This incongruity is not borne out of a statutory rule, but judicially determined in 1930. In *Poe v. Seaborn*,

> Seaborn and his wife, citizens and residents of the State of Washington, made for the year 1927 separate income tax returns as permitted by the Revenue Act of 1926 . . . .
>
> During and prior to 1927 they accumulated property comprising real estate, stocks, bonds and other personal property. While the real estate stood in his name alone, it is undisputed that all of the property real and personal constituted community property and that neither owned any separate property or had any separate income.
>
> The income comprised Seaborn's salary, interest on bank deposits and on bonds, dividends, and profits on sales of real and personal property. *He and his wife each* [reported on separate returns] *one-half the total community income as gross income and each deducted one-half of the community expenses to arrive at the net income returned.*
>
> The [CIR] determined that all of the income should have been reported in the husband's return, and made an additional assessment against him.[65]

The Supreme Court found (and the CIR conceded) that "the answer to the question [of whether spouses residing in community property states were able to equally divide spousal income between themselves for tax purposes] . . . must be found in the provisions of the law of the State . . . ."[66] After an analysis of Washington state statutes and decisions interpreting them, the Court found:

> Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and *in the income of the community*, *including salaries or wages* of either husband or wife, or both.[67]

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63. *Id.* Section 6013(d)(3) does not distinguish between community property and common law property state residents; the statute explicitly refers to joint filers generally.

64. *Supra* Part I.B.

65. Poe v. Seaborn, 282 U.S. 101, 108–09 (1930) (emphasis added) (citations omitted).

66. *Id.* at 110.

67. *Id.* at 111 (emphasis added).

Thus, the Court ultimately held that treatment of spousal income for tax purposes is based upon an individual spouse's ownership interest in that income, not which spouse actually earned that income.[68] For married residents of common law property states, *Poe* has no effect on spouses filing separate returns because their respective property interest[69] and assumed liability[70] is aligned with their respectively earned income alone—not their spouse's. Spouses residing in community property states, however, have a proprietary interest—and by virtue, a taxable obligation—in half of the aggregate income of the spousal community.[71] Essentially, Congress has provided an insulating mechanism to common law property state spousal residents seeking preemptive severance from potential liability resulting from their spouse's income for federal tax purposes.[72] By contrast, however, Congress has failed to provide any mechanism to spouses in community property states seeking identical insulation, short of never marrying,[73] entering into some form of contractual property settlement agreement, or subjecting oneself to audit or litigation.[74]

II. THE INNOCENT SPOUSE PROVISIONS

A. Introduction

In 1971, Congress enacted the first iteration of "innocent spouse" relief.[75] The Act provided relief to innocent spouses from tax liability arising from the omission of an item of gross income if: (1) a joint return was made; (2) the item of income in question was properly attributable to one spouse and exceeded twenty-five percent of the income stated on the return; (3) the innocent spouse did not know of, and had no reason to know of, such omission; and (4) taking into account whether the innocent spouse significantly benefited directly or indirectly from the omitted item and all other facts and circumstances, it is inequitable to hold the innocent spouse liable for the resulting tax.[76] Congress pinned this new legislation to the end of the Internal Revenue Code of 1954's version of § 6013.[77]

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68. *See id.*

69. *See, e.g.*, OR. REV. STAT. ANN. § 108.060 (West, Westlaw through 2018 Reg. Sess.).

70. *See, e.g.*, *id.* § 108.050.

71. *See supra* notes 52–60.

72. *See supra* Part 1.B.

73. *See* I.R.C. § 1(c) .

74. The only way to elicit the protections provided in § 66 is to request innocent spouse relief during audit or as a defense during trial.

75. Act of Jan. 12, 1971, Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063.

76. *Id.*

77. *Id.*

Congress was moved by judicial decisions holding to the detriment of the newly dubbed "innocent spouses"[78]—primarily the decision in *Scudder v. CIR*.[79] Congress specifically noted the decision in *Scudder*,[80] evoking the words of the Tax Court:

> Although we have much sympathy for petitioner's unhappy situation and are appalled at the harshness of this result in the instant case, the inflexible statute leaves no room for amelioration. It would seem that only remedial legislation can soften the impact of the rule of strict individual liability for income taxes on the many married women who are unknowingly subjected to its provisions by filing joint returns.[81]

The Tax Court went on to acknowledge the severe risk assumed in agreeing to be bound by joint and several liability for tax purposes:

> This case is an extreme one to be sure, but it illustrates the degree of risk assumed by filing joint returns. It seems extremely harsh that petitioner should be liable for a tax based on money embezzled from the partnership which she and her sisters owned. However, under the terms of the statute, petitioner stands in the shoes of her husband and therefore is individually responsible for any tax deficiency legally applicable to the husband. No other interpretation of the statute is rationally permissible if the phrase "liability with respect to the tax shall be joint and several" is to be given its usual and long-accepted meaning in the law.[82]

Although the statutory requirements for receiving relief were extremely rigid,[83] the Act represented the first acknowledgment and action by Congress to address the potentially harsh and risky reality that joint and several liability presents for tax purposes. The statute mentioned that community property laws shall be disregarded when determining to whom

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78. *See* STAFF OF JOINT COMM. ON TAXATION, 105th CONG., PRESENT LAW AND BACKGROUND RELATING TO TAX TREATMENT OF "INNOCENT SPOUSES" n.15 (Comm. Print 1998).

79. A case involving a husband who embezzled funds for his own personal use from the liquor store he managed, which was owned by his wife and her five sisters. The wife and her five sisters were unaware of the husband's embezzlement. The embezzled funds far exceeded the reported income of him and his wife. The Tax Court reluctantly held that the wife was liable for the tax arising from the unreported embezzled funds. Scudder v. Comm'r, 48 T.C. 36, 37, 41 (1967), *rev'd and remanded*, 405 F.2d 222 (6th Cir. 1969).

80. *See* STAFF OF JOINT COMM. ON TAXATION, *supra* note 78, at n.15.

81. *Scudder*, 48 T.C. at 41.

82. *Id.*

83. Compare the threshold relief requirement that the omitted item of income must represent in excess of twenty-five percent of the reported income to the current accuracy-related penalty provided in § 6662. Section 6662 imposes a penalty equal to twenty percent of any underpayment resulting from a "substantial underpayment," which can be defined as ten percent of the tax required to be shown on the return. Compared to § 6662, an item of income had to be two-and-a-half times greater than "substantial." I.R.C. § 6662(d)(1)(a)(I) (2012).

the item of income in question was attributable.[84] However, the statute failed to provide relief for separate filers in community property states.[85]

The first example of relief for community property filers appeared in 1980.[86] In the Miscellaneous Revenue Act of 1980, Congress introduced § 66, which provided an alternative apportionment of otherwise community income between spouses who filed separate returns.[87] The provision assisted taxpayers of this type who were married at any point during the tax year in question; who did not live together at any point during that year; and where no transfer, directly or indirectly, occurred between the two spouses.[88] Under the newly drafted § 66, this was the only "relief" provision provided;[89] yet, it was another first.

In 1998, Congress stepped in again to aid innocent spouses.[90] The Internal Revenue Service Restructuring and Reform Act of 1998 promulgated § 6015: Relief from Joint and Several Liability on Joint Return.[91] In addition to § 6015's promulgation, Congress added an equitable relief provision to § 66. The 1998 version of § 6015, although slightly altered over the years, closely resembles the current form of § 6015.[92] Similarly, Congress has not amended § 66 since 1998.

B. Sections 66 and 6015: Statutory Language Compared

The language of §§ 66 and 6015 are remarkably similar in two specific sections. First, both statutes provide what is known as "traditional" innocent spouse relief.

Language of § 6015(b)	Language of § 66(c)
1. In general.—Under procedures prescribed by the Secretary, if— 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;	Spouses relieved of liability in certain other cases.—Under regulations prescribed by the Secretary, if— a. An individual does not file a joint return for any taxable year, b. Such individual does not include in gross income for such

84. Act of Jan. 12, 1971, Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063.

85. *Id.*

86. Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, § 101, 94 Stat. 3521, 3521.

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3201, 112 Stat. 685, 734–41.

91. *Id.*

92. I.R.C. § 6015 (2012).

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 to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement**; e. . . . Then the other individual shall be relieved of liability for tax . . . for such taxable year to the extent such liability is attributable to such understatement.	taxable year an item of community income properly includible therein which, in accordance with the rules contained in section 879(a), would be **treated as the income of the other spouse**, c. The individual establishes that **he or she did not know of, and had no reason to know of, such item of community income**, and d. **Taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual's gross income**. Then, for purposes of this title, such item of community property shall be included in the gross income of the other spouse (and not in the income of the individual).

Second, both statutes provide what is known as "equitable" relief.

Language of § 6015(f)	Language of § 66(c) (continued)
Equitable relief.—Under procedures prescribed by the Secretary, if— 1. **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 2. Relief is not available to such individual under subsection (b) or (c), **The Secretary may relieve such individual of such liability.**	Under procedures prescribed by the Secretary, if, **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)** attributable to any item for which relief is not available under the preceding sentence, **the Secretary may relieve such individual of such liability.**

However, the two statutes do not share a fairly significant provision. Congress provided the Tax Court with express jurisdiction to review § 6015 challenges.[93] Section 66, by contrast, does not have a parallel jurisdictional provision. A provision of this type is perhaps necessary for Tax Court review because the Tax Court is an Article I[94] court of limited jurisdiction and may exercise power only to the extent authorized by Congress.[95] However, the Tax Court worked around this presumption in this context.

III. STANDARD OF REVIEW INCONGRUITIES IN EQUITABLE RELIEF CASES

Although a jurisdictional provision does not exist in § 66, the Tax Court has held that it in fact does have jurisdictional authority to review § 66 equitable relief cases in its interpretation of the last sentence of § 66(c).[96] In *Beck*, the Tax Court applied its previous holding in *Butler v. CIR*—a § 6015(f) case—to assert its jurisdictional authority under § 66(c).[97]

In *Butler*, the Tax Court noted that the petitioner raised her claim for innocent spouse relief in a petition for redetermination of deficiency pursuant to § 6213(a)[98]—also known as a "deficiency case" where the Tax Court traditionally holds jurisdiction.[99] In deficiency cases, the Tax Court may consider all facts and circumstances, including innocent spouse claims, which historically have been considered affirmative defenses.[100] Accordingly, a taxpayer is entitled to raise an affirmative defense to the CIR's deficiency determination.[101]

The Tax Court in *Beck* noted, having determined that it holds jurisdiction over § 66(c) equitable relief deficiency cases, that both §§ 66(c) and 6015(f)'s equitable relief provisions were enacted in "the same section of the same legislation," exemplifying the statutes' close nature and Congress's like-mindedness in promulgation.[102] However, although the Tax Court took the "same section of the same legislation" congruent approach in determining jurisdictional authority, it has not taken

93. *Id.* § 6015(e)(1)(A).
94. U.S. CONST. art. I, § 8, cl. 9.
95. Block v. Comm'r, 120 T.C. 62, 65 (2003).
96. Beck v. Comm'r, 2001 T.C.M. (RIA) ¶ 2001-198, at 1546.
97. *Id.*
98. Butler v. Comm'r, 114 T.C. 276, 287 (2000).
99. *Beck*, 2001 T.C.M. (RIA) at 1546.
100. *Butler*, 114 T.C. at 287–88.
101. *Id.* at 288.
102. *Beck*, 2001 T.C.M. (RIA) at 1546.

the same approach in determining the appropriate standard of review in these cases.

In *Porter I*, a § 6015(f) case, the Tax Court denied the CIR's motion in limine, which sought to preclude evidence proffered by the taxpayer that was not previously included in the administrative record compiled during audit.[103] It appears the CIR, in the context of a preliminary matter, sought review in *Porter* under an abuse of discretion standard of review rather than under a de novo standard. In doing so, it analyzed statutory use of the word "determine" in § 6015(e), contrasting it with the language of "redetermination" in § 6214(a).[104] The Tax Court concluded that Congress drafted the language of § 6015(e) in 1998 under "full awareness of [the Tax Court's] long history of de novo review."[105] In broader strokes, the Tax Court partitioned itself from applicability of the Administrative Procedure Act (APA), thus relieving itself of an abuse of discretion review in § 6015 deficiency cases.[106] The Tax Court noted:

> Since its enactment in 1946 the APA has generally not governed proceedings in this Court . . . . The U.S. Court of Appeals for the Fourth Circuit, the Court to which an appeal in this case would lie, has held that *"The Tax Court is a court in which the facts are triable de novo"* and *"the Tax Court is not subject to the Administrative Procedure Act."* This long-established practice comports with the provisions of the APA and its history.
>
> As a statute of general application, the APA does not supersede specific statutory provisions for judicial review. "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies."
>
> The Code has long provided a specific statutory framework for reviewing deficiency determinations of the Internal Revenue Service. Section 6015 is part and parcel of the same statutory framework. Our de novo review procedures emanate from that statutory framework.[107]

Unsurprisingly, the CIR did not agree with the Tax Court's conclusion that it may review § 6015(f) cases de novo. Accordingly, the CIR instructed the Chief Counsel's Office to continue raising evidentiary objections if taxpayers attempted to proffer evidence not contained within

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103. Porter v. Comm'r, 130 T.C. 115, 116 (2008).
104. *Id.* at 119.
105. *Id.*
106. *Id.* at 118.
107. *Id.* at 117–18 (emphasis added) (internal citations omitted).

the administrative record and provided the Chief Counsel's Office with alternative arguments to be made on brief.[108] Additionally, Chief Counsel attorneys were instructed to submit all briefs with this issue to the National Office for review.[109]

But, after *Wilson v. CIR*, where the Tax Court, again, struck down the CIR's argument that an abuse of discretion standard of review should apply in § 6015(f) cases,[110] the CIR acquiesced to the Tax Court's decision, stating:

> Although the Service disagrees that section 6015(e)(1) provides both a de novo standard and a de novo scope of review, the Service will no longer argue that the Tax Court should review section 6015(f) cases for an abuse of discretion or that the court should limit its review to the administrative record.[111]

However, in § 66(c) deficiency cases, the Tax Court consistently applies an abuse of discretion standard of review with very little explanation as to why it has come to that conclusion.[112] In fact, in the 2009 decision in *Felt v. CIR*, the Tax Court acknowledged that there exists a potential problem in this discrepancy in light of *Porter*, but sidestepped the issue stating that it will "figure out *Porter's* effect on section 66(c) [with regard to deciding the appropriate standard of review] in some later case."[113] But, it has yet to do so.

This presents a marked disadvantage to taxpayers seeking review from the Tax Court of the CIR's denial of their equitable innocent spouse relief under § 66, compared to taxpayers seeking similar review under a substantively similar statute.[114] It is conceivable that taxpayers with identical cases could receive different results in the Tax Court—undeniably illustrated in the words of the Tax Court in *Wilson*[115]—simply because one taxpayer filed a joint return and one taxpayer filed a separate

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108. OFFICE OF CHIEF COUNSEL, INTERNAL REVENUE SERV., NOTICE CC-2009-021, 2 (June 30, 2009), https://www.irs.gov/pub/irs-ccdm/cc-2009-021.pdf [https://perma.cc/N3CP-Q27G].

109. *Id.*

110. Wilson v. Comm'r, 2010 T.C.M. (RIA) ¶ 2010-134, at 806. The Tax Court conceded it would not have found the CIR abused his discretion in determining the petitioner failed the economic hardship factor of equitable relief had it not looked beyond the administrative record. However, "[o]n *de novo* review, the result is different." *Id.* at 810–11.

111. I.R.S. Action on Decision, I.R.B. 2013-25 (June 17, 2012).

112. *See, e.g.*, Bernal v. Comm'r, 120 T.C. 102, 107 (2003).

113. Felt v. Comm'r, 2009 T.C.M. (RIA) ¶ 2009-245, at n. 15.

114. *See supra* Part II.B.

115. *See* Wilson v. Comm'r, 2010 T.C.M. (RIA) ¶ 2010-134, at 808–10 (concluding that the weight of five factors turn in favor of the plaintiff upon review of the trial record where they would otherwise weigh against the plaintiff if judicial review was constrained merely to the administrative record).

return in a community property state while seeking out the same safeguard: preemptory insulation from joint and several liability.

IV. PROPOSED REMEDIES

A. Congress Should Amend § 66 to Include a "Petition for Review by the Tax Court" Provision Like the Provision Under § 6015

Congress sought to provide protection to innocent spouses almost fifty years ago. Through several iterations of innocent spouse relief mechanisms, Congress has expanded and liberalized its reach towards granting innocent spouse relief.

However, the incongruity discussed above could potentially render an otherwise innocent spouse liable based upon a standard of review technicality that seems to have no rational justification for existing. Regardless of which reporting mechanism an innocent spouse filed—i.e., separate or joint return—that led them to Tax Court litigation, an innocent spouse deserves the same opportunity for redress as any other innocent spouse.

Accordingly, Congress should amend § 66 to include a provision with language similar to § 6015(e) so the Tax Court may determine a § 66 case under the same de novo standard of review as it would a similarly situated § 6015 case. This will provide equitable congruity between those spouses residing in common law states and community property states in innocent spouse Tax Court proceedings.

B. Alternatively, Congress Should Amend § 66(c) to Provide a Stand-Alone Equitable Relief Provision Expressly Granting De Novo Review to the Tax Court

If Congress does not provide an entire Tax Court jurisdictional provision[116] to § 66, it should consider amending § 66(c) to delineate "traditional innocent spouse" relief and "equitable" relief from each other in separate subsections and specifically provide the Tax Court with a de novo standard of review under § 66 equitable relief deficiency cases.

In its current drafting, § 66(c) is unnecessarily cumbersome. It purports to provide two distinguishable forms of relief within a single subsection. The Tax Court has already segregated these two types of relief by granting review in deficiency cases for equitable relief. The statute's cumbersome nature is best illustrated when the Tax Court in *Beck* had to

116. Presumably to not afford de novo review to the "traditional innocent spouse" provision in the first half of § 66(c). But this will further perpetuate incongruity between §§ 66 and 6015.

refer to "the last sentence" of the statute to identify what verbiage it was identifying as § 66's equitable relief provision.[117] Generally, the two provisions are distinguishable and should be segregated for administrability purposes as it stands already.

In segregating the two, Congress could rectify the incongruity identified in this Note at the same time. Accordingly, § 66(d)[118] should be amended to read as follows:

> (d) Equitable relief—Under procedures prescribed by the Secretary, if,
>
> (1) 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),
>
> (2) attributable to any item for which relief is not available under section (c) of this section,
>
> The Secretary may relieve such individual of such liability.
>
> (3) If the Secretary denies relief under this section, the individual may, in addition to any other remedy provided by law, petition the Tax Court (and the Tax Court shall have jurisdiction) to determine, de novo, the appropriate relief available to the individual under this subsection if such petition is filed—
>
> (i) at any time after the earlier of—
>
> (I) the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual, or
>
> (II) the date which is 6 months after the date such election is filed or request is made with the Secretary, and
>
> (ii) not later than the close of the 90th day after the date described in clause (i)(I).[119]

C. The Tax Court Should Heed Its Own Words

If Congress is unwilling to provide a statutory remedy to this unnecessary and fruitless incongruity, the Tax Court should consider its words in *Porter I* and determine it has the authority to review § 66(c) deficiency cases de novo.

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117. *See* Beck v. Comm'r, 2001 T.C.M. (RIA) ¶ 2001-198, at 1546.

118. The current § 66(d) provision (Definitions) should be amended to § 66(e).

119. I have not included parallel language to §§ 6015(e)(1)(B) and 6015(e)(2)–(6) for brevity's sake, not because they are not vital portions of a workable provision granting Tax Court jurisdiction.

The Tax Court in *Porter I* took great strides to state that, generally, the APA does not apply in deficiency cases.[120] It even went to great lengths to invoke the words of other courts that found that the APA does not apply.[121] In *Porter I*, the Tax Court did not confine its analysis of the nonapplicability of the APA to just § 6015, but also broadly to §§ 6213 and 6214—the provisions granting it jurisdiction in all tax deficiency cases—by stating, "the Code has long provided a specific statutory framework for reviewing deficiency determinations of the Internal Revenue Service . . . . Section 6015 is part and parcel of the same statutory framework. Our de novo review procedures emanate from that statutory framework."[122]

However, is § 66 not part and parcel of the same statutory framework as well? Did the Tax Court not find this to be true when it found jurisdiction authorization over § 66 deficiency equitable relief cases in *Beck*?[123] If Congress is unwilling to amend § 66, the Tax Court should apply its holding in *Porter I*[124] to § 66(c) deficiency cases, as it applied its holding in *Butler* to *Beck*.[125]

CONCLUSION

Sections 6015 and 66 provide valuable relief to taxpayers who desperately need it. Congress should not be in the business of stymying relief to innocent spouses. This Note has presented an incongruity in the application of standards of review in the Tax Court in equitable relief deficiency cases. Nothing distinguishes petitioners in the Tax Court under §§ 6015(f) and 66(c) other than the mechanism of filing they chose[126] and the state in which they live. Our federal code should not dictate different results based upon arbitrary distinguishing facts such as these.[127] Adjudication should be based on all relevant facts in a case, not merely the ones available in an administrative record. The Tax Court should be allowed to review § 66(c) deficiency cases either through

120. Porter v. Comm'r, 130 T.C. 115, 117–18 (2008).

121. *See id.*

122. *See id.*

123. Beck v. Comm'r, 2001 T.C.M. (RIA) 2001-198, at 1546; Butler v. Comm'r, 114 T.C. 276, 287 (2000).

124. *Porter*, 130 T.C. at 117–18.

125. *Beck*, 2001 T.C.M. (RIA) at 1546; *Butler*, 114 T.C. at 287.

126. In the case of separate filers, taxpayers may not have had the option to choose had the taxpayer's spouse refused to sign a joint return. *See supra* text accompanying note 38.

127. *See* Wilson v. Comm'r, 2010 T.C.M. (RIA) ¶ 2010-134, at 808–10. Had the petitioner filed as married filing separately, rather than married filing jointly, the Tax Court may not have granted her innocent spouse relief on one-half of the $540,000 marital community tax debt merely by virtue of her California residency. *See id.* at 804–06.

Congressional mandate or through the Tax Court's own proper application of § 6213, or else this incongruity of justice will continue.