DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR JAMES E. CANNON
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CC:SB:5:KCY
Attn: Michael Boman

FROM: Curtis G. Wilson
Assistant Chief Counsel, Administrative Provisions and Judicial Practice CC:PA:APJP

SUBJECT: Innocent Spouse Claim After Offer in Compromise

This Field Service Advice responds to your memorandum dated November 6, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

DISCLOSURE STATEMENT

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LEGEND

W	=
H	=
W's Representative	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Year 6	=
Year 7	=
Year 8	=
Date 1	=
Date 2	=
Date 3	=
$ X	=

ISSUES

Whether an offer in compromise regarding a joint liability that was entered into as a result of a mutual mistake of material fact will prevent a taxpayer from being relieved of the joint liability at a later date?

Whether a mutual mistake of material fact has occurred when the spouse does not raise the issue of relief from liability under section 6013(e) or 6015 prior to the acceptance of an offer in compromise?

CONCLUSIONS

No. If a taxpayer entered into an offer in compromise with the Service as a result of a mutual mistake of material fact, the taxpayer may subsequently be relieved of joint and several liability under section 6013(e) or 6015.

No. A taxpayer must affirmatively raise the issue of relief from joint and several liability under section 6013(e) or 6015, and if the taxpayer fails to do so, the taxpayer is jointly and severally liable for the liability of both of the spouses under section 6013(d)(3).

FACTS

H and W were married from Year 1 through Year 7. H and W filed joint tax returns for years 2, 3, 4, and 5. On Date 1 of Year 6, a notice of deficiency was issued to H and W for Years 2, 3, 4, and 5. The total liability owed exceeded $ X. W and H

were separately represented during the examination of Years 2, 3, 4, and 5. The issue of relief from joint and several liability was not raised in the examination.

After the tax was assessed, W was represented by W's Representative. W alleges that W's Representative told her that she was not entitled to relief from joint and several liability under section 6013(e) because W filed a joint return. Instead, W's Representative assisted W in preparing an offer in compromise based on doubt as to collectability.

On Date 2, Year 7, the Service accepted an offer in compromise based upon W's ability to pay. On Date 3, Year 8, W submitted at Form 8857, Request for Innocent Spouse Relief, requesting relief from the liabilities for Years 2 through 6 under section 6015(b). The Service denied the request for relief because the liabilities in question had been settled by an offer in compromise on Date 2, Year 7. W appealed the denial of relief, alleging that there was a mutual mistake at the time the offer in compromise was signed. The alleged mutual mistake is that W and the Service mistakenly believed that W was liable for the tax, whereas, W was not liable for the tax under section 6013(e), as in effect at the time the offer in compromise was accepted.

LAW AND ANALYSIS

Section 301.7122-1(c) of the Regulations on Procedure and Administration is effective for compromises that were submitted before July 21, 1999. The closing agreement under these facts was entered into prior to that date. Therefore, section 301.7122-1(c) applies to the closing agreement at issue. Section 301.7122-1(c) provides, in relevant part, that a compromise agreement conclusively settles the liability for the year at issue, and neither the taxpayer nor the government may reopen the case after the compromise is accepted unless: (1) the taxpayer falsified or concealed assets; or (2) there was a mutual mistake of material fact sufficient to cause a contract to be reformed or set aside.[1]

Section 104.5.1.2.4.5 of the Internal Revenue Manual (I.R.M.) provides that if a taxpayer compromised his or her liability through an offer in compromise, the taxpayer is precluded by the terms of the offer to raise any issue related to the liability of the tax period compromised. The I.R.M. also references section 301.7122-1(c) of the Regulations on Procedure and Administration.

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[1]Section 301.7122-1 was replaced by section 301.7122-1T on July 19, 1999. The temporary regulations are effective for offers in compromise submitted on or after July 21, 1999, through July 19, 2002. Even though the temporary regulations do not apply to the offer at issue, section 301.7022-1T(d)(5)(iii) provides a similar exception to the finality of an accepted offer in compromise if there was a mutual mistake of material fact.

Although section 104.5.1.2.4.5 of the I.R.M. does not specifically provide that a mutual mistake of material fact is an exception to the finality of an accepted offer in compromise, the reference to Treas. Reg. § 301.7122-1(c) incorporates, by reference, that exception to the rule. Thus, if an offer in compromise was entered into as a result of a mutual mistake of material fact of both the taxpayer and the Service, then such an offer would not preclude the consideration of a claim for relief from joint and several liability at a later date.

A mistake of fact is generally when a party to a contract is either ignorant or forgetful of a fact material to the contract. See Black's Law Dictionary 1001 (6th ed. 1990). In contrast, a mistake of law is generally when a party analyzes all of the facts and comes to an erroneous legal conclusion. Id. Under Treas. Reg. § 301.7122-1(c), a mutual mistake of material fact may be an exception to the finality of an accepted offer in compromise. In addition, I.R.M. § 5.8.9.2.0(3) provides that the law in existence at the time the offer was entered into is part of the facts. Thus, a mutual mistake of law may also be grounds for rescinding an offer in compromise.

Under section 6013(d)(3), spouses who execute a joint Federal income tax return are jointly and severally liable for the aggregate income tax liability of both spouses. Section 6015 provides relief from the joint and several liability for certain spouses for liabilities that were unpaid as of, or arose after, July 22, 1998. Section 6013(e), which was in effect prior to July 22, 1998, and remains effective for liabilities that were paid as of July 22, 1998, also provides relief from the joint and several liability for certain spouses. However, relief under sections 6013(e) and 6015 is not automatic. To be relieved of joint and several liability under section 6013(e) or 6015, a spouse must raise the issue and establish that he or she qualifies for relief. I.R.C. § 6013(e)(1)(C); Feldman v. Commissioner, 20 F.3d 1128, 1134-1135 (1994); I.R.C. §§ 6015(b)(1)(C) and (E); 6015(c)(1) and (2). If a spouse who files a joint return does not raise the issue of relief from joint and several liability under section 6013(e) or 6015, then the spouse remains jointly and severally liable for the aggregate tax liability of both of the spouses under section 6013(d)(3).

In this case, W did not raise the issue of relief under section 6013(e) before her offer in compromise was accepted by the government. Therefore, W remained jointly and severally liable for the aggregate joint tax liability for the years addressed by the offer in compromise. The government was not mistaken in law or fact regarding W's joint and several liability because W filed a joint return, and W did not raise the issue of relief from the liability under section 6013(e) at or before the time the offer in compromise was accepted.[2] In addition, neither W nor the government were mistaken as to any facts. Therefore, there was no mutual

[2]The grounds upon which the offer in compromise was entered into (either doubt as to liability or doubt as to collectability) are immaterial.

mistake of law or fact in this case. The offer in compromise cannot be set aside in this case, and it precludes any subsequent innocent spouse relief.[3]

If W had a misconception regarding the availability of relief under section 6013(e), then that was a unilateral mistake of law. A unilateral mistake is a "belief that is not in accord with the facts." Restatement (Second) of Contracts § 151 (1981). National Rural Utils. Coop. Fin. Corp. v. United States, 14 Cl. Ct. 130, 141 (1988). Unilateral mistake by one of the parties is generally not a basis for setting aside a contract. See Restatement (Second) of Contracts § 153 (1981). See, e.g., Quinn v. Briggs, 565 P.2d 297 (1977). However, a unilateral mistake of fact may be grounds for setting aside an offer in compromise if the mistaken party does not bear the risk of the mistake. See Buesing v. Commissioner, 47 Fed. Cl. 621, 638 (2000) (material misrepresentation by taxpayer may be grounds for setting aside a contract if the government relies upon that misrepresentation when accepting an offer).

In this case, W had full knowledge of, and was not mistaken about, the facts. Rather, W was mistaken about the law regarding relief from joint and several liability under section 6013(e). Even if an agreement could be set aside for a unilateral mistake of law, W bore the risk of that mistake because W had only limited understanding of the law regarding relief from liability, and she still chose to enter into an offer in compromise.[4] By not raising the issue of relief under section 6013(e), W remained jointly and severally liable for the joint liability. Because W's alleged mistake was a unilateral mistake of law, there are no grounds for setting aside the offer in compromise in this case.

Although there is some case law regarding the setting aside of offers in compromise when there is a mutual mistake of law,[5] the mistake in this case was

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[3]This is consistent with the recently published proposed regulations under section 6015. See Prop. Reg. § 1.6015-1(c). The proposed regulations were published in the Federal Register on January 17, 2001, but are not effective until published in final form.

[4]Section 154 of the Restatement (Second) of Contracts provides that a party bears the rise of mistake when: (1) both parties agree to allocate the risk to that party; (2) at the time the contract was made, the party knew that he or she had only limited knowledge of the facts to which the mistake relates, but the party found his or her limited knowledge sufficient; or (3) the risk is allocated to the party by a court because it is reasonable under the circumstances to do so. Restatement (Second) of Contracts § 154 (1981). Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20, 91 (2000).

[5]See Staten Island Hygeia Ice & Cold Storage Co. v. United States, 85 F.2d 68 (2d Cir. 1936) (offer in compromise executed after the expiration of the statute of

not mutual, but unilateral. W allegedly believed that relief under section 6013(e) was not available if a joint return was filed. Indeed, a joint return must be filed in order for a taxpayer to receive relief from liability under section 6013(e). I.R.C. § 6013(e)(1)(A).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Please call if you have any further questions.

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limitations on collection set aside when both taxpayer and Service mistakenly believed that the statute of limitations on collection had not expired).