

Sub-Holmes

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UNITED STATES TAX COURT

WASHINGTON, DC 20217

Lori A. Harris, Petitioner,)	
)	
and)	
)	
Kenneth Donnelly, Intervenor)	Docket No. 14290-12.
)	
v.)	
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to respondent a copy of the pages of the transcript of the trial in the above case before Judge Mark V. Holmes at San Diego, California, on January 10, 2014, containing his oral findings of fact and opinion rendered at the trial session at which the case was heard.

(Signed) Mark V. Holmes
Judge

January 28, 2014
Washington, D.C.

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1 Bench Opinion by Judge Mark V. Holmes
2 January 10, 2014
3 Lori A. Harris, Petitioner and Kenneth Donnelly,
4 Intervenor
5 Docket No. ¹⁴²⁹⁰~~23956~~-12

6 THE COURT: In the case of Lori A. Harris,
7 Petitioner, and Kenneth Donnelly, Intervenor v.
8 Commissioner, Docket Number 14290-12, the Court has
9 decided to render oral findings of fact and opinion,
10 and the following represents the Court's oral
11 findings of fact and opinion.

12 This bench opinion is made pursuant to the
13 authority granted by Section 7459(b) of the Internal
14 Revenue Code of 1986, as amended, and Rule 152 of the
15 Tax Court's Rules of Practice and Procedure.

16 This is an innocent spouse case in which
17 the record consists of the stipulation agreed to by
18 all three parties and their testimony. Both the
19 Petitioner and the Intervenor were California
20 residents when the Petitioner filed her petition.

21 The two parties at issue are Ms. Lori
22 Harris and Mr. Kenneth Donnelly. They were married
23 in 1991, had two children together, one born in 1994,
24 and one in 1995. The marriage dissolved in 2008, and
25 separation followed shortly thereafter.

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1 Seven months after the separation began, on
2 April 14th, 2009, Mr. Donnelly prepared and signed a
3 joint federal income tax return for the 2008 tax
4 year. On that return, he reported distributions from
5 his IRA accounts, and calculated the amount of tax
6 due. But he failed to also report the additional ten
7 percent tax on early distributions from his IRAs and
8 pensions imposed by IRC Section 72(t).

9 On April 15th, 2009, Mr. Donnelly e-mailed
10 his ex-spouse requesting her to meet him at 9:00 p.m.
11 that evening to sign their federal and state income
12 tax returns so that he could timely mail the returns
13 to avoid late fees and penalties. He said he would
14 write checks for the amounts owed for each return.

15 Ms. Harris was, because of the lateness of
16 the hour and the approaching midnight deadline,
17 unable to have those tax returns reviewed by a tax
18 service. So believing the returns to be okay because
19 the couple had not had any previous tax problems, she
20 signed the returns as Mr. Donnelly requested. She
21 was not aware that an additional ten percent tax was
22 due on the amount of the IRA and pension distribu-
23 tions that Mr. Donnelly was reporting on that report.
24 Mr. Donnelly did timely file the joint tax return,
25 and paid the tax shown as he computed it on that

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1 return.

2 The problem was that, because of the
3 failure of Mr. Donnelly to correctly compute the tax,
4 the IRS asserted a deficiency of \$6368, and a penalty
5 under 6662(a) of \$1273.60. Ms. Harris, when she
6 discovered this, then asserted that she was entitled
7 to innocent spouse relief under Section 6015. She
8 was initially denied that relief, and petitioned the
9 Tax court for review.

10 The Tax Court conducts a trial *de novo* in
11 determining whether a taxpayer is entitled to relief
12 under IRC Section 6015. We consider evidence outside
13 the administrative record, and use a *de novo* standard
14 of review. See Wilson v. Commissioner, 705 F.3d 980
15 (9th Circuit 2013), affirming T.C. Memo 2010-134;
16 Porter v. Commissioner, 130 T.C. 115, 117 (2008);
17 Porter v. Commissioner, 132 T.C. 203, 210 (2009). We
18 analyze the case using the evidence in the trial
19 record, and give no deference to the IRS's own
20 determination.

21 This is an unusual case in that, while the
22 case was being prepared for trial, the Government
23 reconsidered and decided that Ms. Harris was entitled
24 to relief from joint liability under Section 6015(f),
25 the so-called equitable relief provisions. Mr.

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1 Donnelly then intervened, as is his right, to
2 challenge this agreement between the Government and
3 Ms. Harris that she was entitled to relief.

4 Let me briefly review the framework of how
5 a court goes about deciding whether to grant one
6 spouse relief from joint liability. Pursuant to his
7 grant of authority under Section 6015(f), the
8 Commissioner has fashioned guidelines for determining
9 whether an individual qualifies for equitable relief.
10 These are in Revenue Procedure 2013-34. The Court
11 considers these guidelines in light of all the facts
12 and circumstances to determine whether equitable
13 relief is appropriate. But we're not bound by them.
14 See Pullins v. Commissioner, 136 T.C. 432, 438-439
15 (2011).

16 The guidelines begin by establishing
17 certain threshold requirements that at least the
18 Commissioner contends must be satisfied before
19 equitable relief should even be considered. The
20 procedure then sets forth a safe harbor condition,
21 which no one here asserted was met. Finally, there
22 is a non-exclusive list of factors that a court and
23 the Commissioner should consider in determining
24 whether relief under Section 6015(f) is proper.

25 I'm using today Revenue Procedure 2013-34,

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1 even though it was not in effect at the time that Ms.
2 Harris initially asked for innocent spouse relief
3 because Section 7 of that Revenue Procedure states
4 that:

5 "This Revenue Procedure is
6 effective...for requests for
7 equitable relief pending on
8 September 16, 2013, whether with
9 the Service, the Office of
10 Appeals, or in a case docketed
11 with a federal court."

12 Looking at the threshold factors first, the
13 first of those is whether the requesting spouse, here
14 Ms. Harris, filed a joint return. She did.

15 The second is whether relief is available
16 to her under Section 6015(b) or (c). The Service
17 denied relief under those sections, so I find that it
18 is not available to her.

19 The third threshold condition is whether
20 the claim for relief is timely filed. She seeks
21 relief from her '08 tax return, well within the ten-
22 year statute of limitations.

23 The fourth threshold condition is whether
24 assets were transferred between Ms. Harris and Mr.
25 Donnelly as part of a fraudulent scheme. There's no

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1 support for any such scheme, and nobody asserts that
2 one existed.

3 The fifth condition is whether the non-
4 requesting spouse transferred disqualified assets to
5 the requesting spouse. There were transfers of
6 assets between the spouses, but Section 6015(c)(4)(B)
7 (ii)(II) does not include as prohibited transfers
8 those that are incident to a divorce. And since that
9 what was going on between Ms. Harris and Mr.
10 Donnelly, she doesn't fail this threshold condition
11 either.

12 The sixth threshold condition is whether
13 the requesting spouse knowingly participated in the
14 filing of her fraudulent joint return. There is no
15 evidence or allegation of this either.

16 Finally, the seventh threshold condition is
17 whether the income tax liability from which the
18 requesting spouse seeks relief is attributable in
19 full or in part to an item of the non-requesting
20 spouse or an underpayment resulting from the
21 non-requesting spouse's income. Here it's a little
22 bit tricky because California is, of course, a
23 community property state. So that the withdrawal
24 that Mr. Donnelly made from his IRA and pension
25 accounts in his own name are attributable by force of

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1 law to be half for the benefit of Ms. Harris.
2 However, the threshold condition has an exception.
3 If the attribution is solely due to the operation of
4 community property law, then for purposes of this
5 Revenue Procedure, that item will be considered to be
6 attributable to the non-requesting spouse.

7 So in other words, my conclusion is that
8 all seven of the threshold conditions for innocent
9 spouse relief under Section 6015(f) are met here.

10 So on to the balancing test. The general
11 rule is that I have to look at all the factors and
12 all the facts and circumstances, and that I'm not
13 limited to any particular group of factors.

14 Nevertheless, as Tax Court has generally done, we
15 look at the Revenue Procedure in effect at the time.

16 This is particularly noteworthy in this
17 case, because the current Revenue Procedure in
18 Section 3.01 states that this Revenue Procedure
19 "gives greater deference to the presence of abuse
20 than [previous Revenue Procedures]. The Service
21 recognizes that the issue of abuse can be relevant
22 with respect to the analysis of other factors, and
23 can negate the presence of certain factors. This
24 change is entitled to give greater weight to the
25 presence of abuse when its presence impacts the

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1 analysis of other factors."

2 This is an extremely important factor in
3 this case in particular. "Abuse" is a little defined
4 term in tax law. None of the Revenue Procedures,
5 including the one relevant in this case, have defined
6 "abuse" with a great deal of specificity. But they
7 have all said, including the current Revenue
8 Procedure, that abuse takes into consideration proof
9 that the requesting spouse was abused by the non-
10 requesting spouse, but that such abuse did not amount
11 to duress.

12 This obviously lets me infer that abuse is
13 at least sometimes, somehow, lesser than duress.
14 Duress is a concept that Tax Court has had a lot to
15 say about. Courts have long considered duress to be
16 a reason to relieve a taxpayer from joint liability
17 where her spouse coerces her to sign a tax return.
18 See, for example, Furnish v. Commissioner, 262 F.2d
19 727, 733 (9th Circuit 1958).

20 Duress is a subjective analysis where the
21 focus is on the mind of the individual at the
22 relevant time in question. An extreme case is, of
23 course, sign the return or I pull the trigger. But
24 in tax law, duress means any constraint of will so
25 strong that it makes a person reasonably unable to

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1 resist demands to sign a return.

2 When that happens, innocent spouse relief
3 is actually unavailable, because duress means the
4 return is not treated as joint. See Raymond v.
5 Commissioner, 119 T.C. 191, 195-96 (2002).

6 Now, there are a good number of cases
7 analyzing abuse not amounting to duress in
8 considering whether one spouse knew or should have
9 known about the other's wrongdoing. A classic
10 instance is when abuse helps explain a spouse's
11 failure to inquire about non-compliance with tax law.
12 See, for example, Aude v. Commissioner, T.C. Memo
13 1997-478.

14 But it's abuse as a factor by itself, and
15 not just as a relevant bit of evidence about one
16 spouse's state of knowledge, that I'm looking for in
17 this case. It's an important point because it
18 liberates me from focusing on the moment the return
19 is signed. The relevant abuse here precedes that
20 moment. And there's no suggestion in any of the
21 Revenue Procedures, including the current one, or any
22 other source of relevant law that limits my
23 consideration to whether a spouse was abused only to
24 abuse that causes a particular instance of non-
25 compliance with the tax law.

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1 This leads to the heart of my inquiry on
2 this particularly important factor. What is abuse
3 for purposes of innocent spouse relief? If there was
4 verifiable physical harm, that would likely be
5 sufficient. And here, in fact, there was verifiable
6 physical harm to the two daughters, albeit not Ms.
7 Harris, caused by Mr. Donnelly.

8 That leads to a somewhat related question:
9 Under what circumstances can psychological
10 mistreatment in the absence of physical harm -- and
11 here Ms. Harris admitted that she was never harmed by
12 Mr. Donnelly -- constitute abuse? One has to be
13 aware of the danger that requesting spouses, in
14 trying to escape financial liability, may easily
15 exaggerate the level of non-physical abuse. Innocent
16 spouse cases often spring from the dissolution of
17 troubled marriages, and there's an obvious incentive
18 to vilify the non-requesting spouse.

19 Our cases usually require substantiation,
20 or at least specificity in allegations of abuse.
21 See, for instance, Fox v. Commissioner, T.C. Memo
22 2006-22.

23 We've hesitated to find abuse where marital
24 conflict is understandably distressing, but doesn't
25 significantly alter a requesting spouse's behavior.

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1 See, for example, Krasner v. Commissioner, T.C. Memo
2 2006-31.

3 So what I'm looking for from a psycho-
4 logical perspective is whether one spouse has abused
5 the other through isolation, encouragement of
6 exhaustion, for example, intentionally limiting food
7 or interrupting sleep, behaving in an obsessive or
8 possessive manner, threatening to commit suicide, to
9 murder the requesting spouse, or to cause the death
10 of family or friends, the use of degrading language,
11 including humiliation, denial of victim's talents and
12 abilities, and name-calling, drug abuse, alcohol
13 abuse, undermining the victim's ability to reason
14 independently, occasionally indulging in positive
15 behavior in order to keep hope alive that the abuse
16 will cease. Some of these are present in this case.
17 And indeed there's corroborated evidence that Mr.
18 Donnelly physically abused his daughters twice. It's
19 not a pattern of extreme abuse of the sort that the
20 Court has unfortunately occasionally seen, leading to
21 hospitalizations and incarceration. And it's not
22 characterized by alcohol, drug abuse, threats of
23 suicide or murder. But it is consistent. A couple
24 of examples of physical abuse, one of which caused a
25 permanent shoulder injury to one of his daughters,

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1 was accompanied throughout the marriage, it appears,
2 at least in the later years, by emotional abuse that
3 was much more constant. There was a lot of anger in
4 this family coming from Mr. Donnelly. There was a
5 lot of belittling.

6 I base this finding mostly on the fact that
7 the children have been in therapy rather consistently
8 over the last several years as the marriage began to
9 head towards its end, and especially by Exhibit 11-J,
10 which was an attachment to the judgment of
11 dissolution in the California State Court, in which
12 the Superior Court judge noted that:

13 "The minor children have not had
14 a relationship with their father
15 since September 2008. They have
16 returned the Christmas and
17 birthday presents that husband
18 has sent them. They refuse to
19 communicate with him, except to
20 tell him that they do not wish
21 contact."

22 Testimony of the parties clearly
23 demonstrated the cause of the breakdown of husband's
24 relationship with both children had its roots prior
25 to the breakup of his marriage, both in the conflict

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1 that existed between the parties over parenting, and
2 the husband's inappropriate use of physical
3 discipline on at least two occasions. And here I'm
4 not quoting directly, because it mentions the name of
5 the then minor child.

6 Resuming the quote:

7 "Since the parties' separation,
8 this parent-child relationship
9 has been further damaged by
10 husband's actions towards his
11 daughters. When the couple
12 returned to the community
13 residence with wife in July 2009
14 for the purpose of retrieving
15 their clothing and personal
16 items, the door to [...]s room was
17 locked. Husband did not allow
18 her into the room, indicating his
19 girlfriend's children had
20 possession of the room. The
21 girlfriend's children were also
22 allowed to wear his own
23 children's clothing. When items
24 were finally returned, they were
25 badly damaged by mold or were

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1 unusable...husband's relationship
2 with his children has also been
3 damaged by his inaction during
4 the pendency of these
5 proceedings."

6 Resuming the quote, the court then went on
7 and said that, based on his observations -- this is
8 the therapist's observations -- of the changes in the
9 children's body language during their sessions, the
10 therapist indicated that neither child was ready for
11 contact with husband outside of a therapeutic
12 setting.

13 The judge in the Superior Court went on to
14 find that it is in the best interests of the children
15 for the wife to have sole legal and physical custody
16 of both children, and finally concluded that pending
17 further court order or agreement of the parties,
18 husband's contact with the children shall be in a
19 therapeutic setting only. This is all in Exhibit
20 11-J at pages 3 to 5.

21 In the applicable Revenue Procedure, the
22 Commissioner has instructed his employees -- and I
23 think it's a good thing, and the Court will do it as
24 well in this case -- that abuse of the requesting
25 spouse's child or other family members living in the

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1 household may constitute abuse of the requesting
2 spouse, depending on the facts and circumstances. In
3 this case, given the close relationship between Ms.
4 Harris and her daughters, and the extreme estrange-
5 ment of the daughters ^{from} ~~relationship with~~ their
6 father, I have to find that abuse exists in this
7 situation. Again, it's not extraordinary physical
8 abuse, but I don't want to belittle the extent of the
9 emotional abuse, and the anger, and the carryover
10 that this has had, given that Mr. Donnelly also kept
11 Ms. Harris largely isolated from the financial facts
12 of the marriage.

13 So the emotional abuse of children who Ms.
14 Harris clearly loved, combined with Mr. Donnelly's
15 intentional maintenance of Ms. Harris's ignorance of
16 the family's financial position, amounts to an abuse
17 that I will take into account in weighing the other
18 factors in accordance with the Revenue Procedure that
19 is currently in effect.

20 Moving on to those factors, the first of
21 them is whether the requesting spouse is no longer
22 married to the non-requesting spouse. That's true.
23 They've been divorced. This weighs in Ms. Harris's
24 favor.

25 The second is whether the requesting spouse

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1 will suffer economic hardship if relief is not
2 granted. The Revenue Procedure goes on to state
3 that:

4 "This factor will weigh in favor
5 of relief if the requesting
6 spouse's income is below 250
7 percent of the federal poverty
8 guidelines, unless the requesting
9 spouse has assets out of which
10 the requesting spouse can make
11 payments towards the tax
12 liability, and still adequately
13 meet the requesting spouse's
14 reasonable basic living
15 expenses."

16 Those federal poverty guidelines in effect
17 as of last year for a family of three have a federal
18 poverty line of \$19,530, 250 percent of which is
19 north of \$40,000. Even if the daughters, both of
20 whom are going to college, are no longer living in
21 the household, Ms. Harris's current income, including
22 alimony, is less than \$23,000 a year. She would meet
23 this factor. It weighs in her favor, in other words.

24 The third factor is knowledge or reason to
25 know. This is a little bit peculiar here, because

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1 given that the deficiency resulted from the failure
2 to correctly compute taxes, probably neither spouse
3 knew that they were understating the taxes. It's
4 also a little bit hard to talk about knowledge or
5 reason to know of the item giving rise to the
6 understatement. Here I have to say that I guess the
7 item is properly computing the tax owed on withdrawal
8 from an IRA or a pension account. It's clear that
9 Ms. Harris didn't know that they were understating
10 it. Although, again, this is a little bit of a
11 square peg in a round hole situation, inasmuch as
12 it's a computational or mathematical problem rather
13 than an understatement or a hiding of an item of
14 income or exaggeration of a deduction.

15 I take into consideration this factor, the
16 line in the Revenue Procedure that says, if the
17 requesting spouse abused by the non-requesting
18 spouse, or the non-requesting spouse maintained
19 control of the household finances by restricting the
20 requesting spouse's access to financial information"
21 -- both of these sub-factors present in this case, as
22 I've said -- this knowledge factor also is at least
23 lightly weighing in favor of granting Ms. Harris
24 relief.

25 The next factor is abuse by the non-

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1 requesting spouse, which I've already found is
2 present in this case, given Mr. Donnelly's abuse of
3 his daughters.

4 The next factor is legal obligation. This
5 factor is neutral, because the couple's divorce
6 instrument did not provide one way or the other as to
7 who should pay on the joint liability.

8 The fifth factor is significant benefit,
9 whether the requesting spouse significantly benefited
10 from the unpaid income tax liability or under-
11 statement. Here all the parties stipulated that she
12 did not. That weighs in her favor.

13 The next one is compliance with income tax
14 laws, whether Ms. Harris has made a good faith effort
15 to comply with the income tax laws in the tax years
16 following the tax year to which the request for
17 relief relates. Here I have to find against her.
18 She hasn't filed. She has something of a reason for
19 that, namely, that she's in a refund posture, and she
20 doesn't want the various refundable credits that she
21 would otherwise be entitled to seized by the Federal
22 Government pending the outcome of this case. It's
23 not really a good excuse, but she at least had a
24 reason other than just pure neglect. Nevertheless,
25 this weighs against relief.

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1 And then, finally, the last factor is
2 whether the requesting spouse was in poor physical or
3 mental health. Ms. Harris was not, so this factor is
4 neutral.

5 Toting them up, although always noting that
6 we don't just tote them up, most of these factors
7 weigh in favor of relief for Ms. Harris, as indeed
8 the Government lawyer recognized in suggesting that
9 she was entitled to relief. Indeed in balancing
10 these factors, I look to whether it's more likely
11 than not that Ms. Harris in this case, as the
12 requesting spouse, should have been moving away from
13 relying on Mr. Donnelly to be filing joint tax
14 returns, should've known better than to sign the
15 joint tax return, should've been establishing an
16 independent financial presence. Given her extreme
17 lack of income, she's kept afloat only it appears by
18 the sufferance of her parents and other relatives.
19 Given the demands on her emotionally from Mr.
20 Donnelly's bad relationship with their daughters, and
21 given his seemingly continuous effort to keep her
22 ignorant of the family's financial conditions, I
23 agree with the Government counsel in this case, and
24 find that she's entitled to relief from joint tax
25 liability for the tax year 2008 under Section

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1 6015(f). Decision will be entered in her favor.

2 That concludes this bench opinion and this

3 session. Thank you all.

4 (Whereupon, at 1:16 p.m., the above-

5 Entitled matter was concluded.)

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