

## LR #7 **FILING STATUS: Clarify the Definition of “Separate Return” in IRC § 6013 and Allow Taxpayers Who Petition the Tax Court to Change Their Filing Status to Married Filing Jointly in Accordance with the Tax Court’s Rules of Practice and Procedure**

### PROBLEM

Internal Revenue Code (IRC) § 6013 precludes a married taxpayer who filed a “separate return,” an undefined term, from filing an amended return electing Married Filing Jointly (MFJ) status for the same tax year once either spouse has filed a Tax Court petition in response to a statutory notice of deficiency (SNOD).<sup>1</sup> In *Glaze v. United States*, the Fifth Circuit Court of Appeals held that the term “separate return” in IRC § 6013(b) means only a return filed with a status of married filing separately (MFS).<sup>2</sup> The Court of Appeals for the Eleventh Circuit follows the reasoning in *Glaze*.<sup>3</sup> The Tax Court, however, interprets the term “separate return” to mean any return except for a MFJ return.<sup>4</sup> Thus, whether a taxpayer may change his or her filing status to MFJ depends on the location of the Court of Appeals that would hear an appeal of a Tax Court decision.<sup>5</sup>

In addition, taxpayers who are unaware that the Code allows for changes in filing status, but that limitations apply, may pay taxes at a higher effective rate and experience financial hardship. Taxpayer rights, including *the right to be informed, the right to pay only the amount of tax legally due, and the right to fair and just tax system are negatively affected*.<sup>6</sup>

- 1 IRC§ 6013(b)(1), (b)(2)(B), and Treas. Reg. § 1.6013-2(b)(3). IRC § 6213(c) provides, “... the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.” The SNOD currently does not inform taxpayers that they may file an amended return prior to filing a petition with the Tax Court. TAS is working with the IRS on updating the IRM and SNOD language to inform taxpayers about this rule and acting on TAS’s recommendation, the IRS has recently updated IRM 4.19.3.20.7.4 (6)(b), *Referrals*, (Nov. 4, 2014). The IRS updated the IRM adding that if taxpayers intended to change their filing status to Married Filing Jointly they must do so prior to filing their petition with the Tax Court. See Servicewide Electronic Research Program Alert 14U1560 (Nov. 04, 2014), available at <http://serp.enterprise.irs.gov/databases/irm.dr/current/4.dr/4.19.dr/4.19.3.dr/4.19.3.20.7.4.htm> (last visited Dec. 6, 2014).
- 2 *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981).
- 3 The 11th Circuit adopted all prior decisions of the Court of Appeals for the 5th Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).
- 4 See, e.g., *Currie v. Comm’r*, T.C. Memo. 1986–71; *Blumenthal v. Comm’r*, T.C. Memo. 1983–737; *Saniewski v. Comm’r*, T.C. Memo. 1979–337. The Tax Court does not follow *Glaze* for appeals that would lie with courts of appeal outside the Fifth and Eleventh Circuit under the *Golsen* rule. See *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971). See also *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981), *action on dec.*, 1981-140 (June 2, 1981); CC-2006-010 (Mar. 2, 2006). The IRS Office of Chief Counsel notice took the position that the *Glaze* holding was, “inconsistent with Tax Court cases that applied the limitations under § 6013(b)(2) when a married person has erroneously filed an earlier return as a single taxpayer or head of household, and later wishes to file an amended joint return.”
- 5 See IRC § 7482(a) and (b) for appellate jurisdiction and venue to review the decisions of the Tax Court. The venue for an appeal of the Tax Court’s decision would generally be in the court of appeals for the circuit in which the taxpayer resides. See IRC § 7482(b)(1)(A).
- 6 On June 10, 2014, the IRS formally adopted the TBOR. See IRS, *IRS Adopts “Taxpayer Bill of Rights;” 10 Provisions to be Highlighted on IRS.gov*, in Publication 1, IR-2014-72 (June 10, 2014), available at <http://www.irs.gov/uac/Newsroom/IRS-Adopts-Taxpayer-Bill-of-Rights;-10-Provisions-to-be-Highlighted-on-IRSGov,-in-Publication-1>.

## EXAMPLE

M and F, a married non-English speaking immigrant couple with limited education and tax knowledge reside in Massachusetts<sup>7</sup> and go to a return preparer to have their 2011 tax returns prepared. The couple prepared and filed timely returns. The preparer incorrectly advised M to elect “head of household” filing status and claim his two minor children as dependents.<sup>8</sup> M also claimed an earned income tax credit (EITC) resulting in a refundable credit, which M asked to be refunded.

The IRS audited M’s return, treated M’s return status as MFS, disallowed the claimed EITC, and issued a SNOD to M.<sup>9</sup> M was unaware that he and his wife could amend their filing status to MFJ before petitioning the Tax Court, which would make M and W eligible for the disallowed credits. M filed a petition in Tax Court and thus is precluded from changing his filing status to MFJ, even though there was no dispute that M was ineligible as “head of household” and is legally married. The Tax Court treated M’s return status as Married Filing Separately (MFS,) citing the limitations of IRC § 6013(b)(1) and 6013(b)(2)(B), resulting in a deficiency rather than a refund.

## RECOMMENDATION

To address the inconsistent application of IRC § 6013 by courts, the National Taxpayer Advocate recommends that Congress:

- Amend IRC § 6013(b)(1) by clarifying the term “separate returns” means any return that is not a joint return, and
- Amend IRC § 6013(b)(2)(B) to allow taxpayers the right to change their filing status to MFJ after filing a Tax Court petition in response to a SNOD, in accordance with rules of practice and procedure of the Tax Court or, in the alternative, eliminate IRC § 6013(b)(2)(B).<sup>10</sup>

## PRESENT LAW

In 1939, Congress added IRC § 51(b), which allowed a married couple that lived together to include their separate incomes “in a single return made by them jointly.”<sup>11</sup> At that time, a married couple could not file a joint return if one of the spouses had made a separate return and the time for filing the return for the other spouse had expired.<sup>12</sup> In 1948 and later years, Congress extensively revised IRC § 51(b), now IRC § 6013(b)(1), to balance the disparities between married and unmarried individuals, as well as concerns about surviving spouses of service members.<sup>13</sup> In 1951, Congress added IRC § 51(g), the

7 The taxpayers reside within the Court of Appeals for the First Circuit. The First Circuit includes the Districts of Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

8 Generally, married individuals are precluded from claiming head of household unless they meet certain exceptions not present here. See IRC § 2(b). See also IRS Pub. 504, *Divorced and Separated Individuals* 5-6 (Oct. 31, 2013).

9 The funds were never released to the taxpayer; however for the deficiency calculation the EITC amount is included creating a larger deficiency balance. MFS taxpayers cannot claim the EITC. See IRC § 32(d).

10 United States Tax Court, *Rules of Practice and Procedure*, available at <https://www.ustaxcourt.gov/notice.htm> (last visited Dec 5, 2014).

11 Internal Revenue Code of 1939, Pub. L. No. 76-1, § 51(b), 53 Stat. 27 (1939). The return filed had joint and several liability for the couple.

12 Revenue Act of 1948, Pub. L. No. 80-471, § 303, 61 Stat. 110, H.R. REP. No. 1274, at 50 (1049).

13 Revenue Act of 1948, Pub. L. No. 80-471, § 202(c)(1), 203, 303, 305, 61 Stat. 110 (1948); Revenue Act of 1951, Pub. L. No. 82-183, § 312(g), 65 Stat. 488 (1951); and Internal Revenue Code of 1954, Pub. L. No. 83-591, § 6013, 68 Stat. 730 (1954). The initial change occurred in 1948 and addressed the income splitting. Later changes in 1951 and 1954 address additional concerns of disparities and fairness as well as the estate and gift tax concerns.

current IRC § 6013(b)(2)(B), with no explanation for the exception created in limiting a change of filing status after a petition with the Tax Court has been filed.<sup>14</sup>

Married taxpayers who filed returns with a status of MFS, single, or head of household are allowed to change their filing status to MFJ subject to certain limitations of IRC § 6013.<sup>15</sup> Pursuant to IRC § 6013(b), married taxpayers who do not initially file a joint return may change their filing status to MFJ as long as:

- One of the spouses filed a “separate return,” which is not defined in the statute or applicable regulations;<sup>16</sup>
- The couple was eligible to file a joint return for the tax year in which the “separate return” was filed;<sup>17</sup>
- The time limit for filing a joint return has not expired;<sup>18</sup> and
- Neither spouse has filed a Tax Court petition in response to a statutory notice of deficiency.<sup>19</sup>

The courts have reached different conclusions as to the interpretation of IRC § 6013(b). In *Glaze v. United States*, the Court of Appeals for the Fifth Circuit held that only a return filed with a filing status of MFS is a “separate return” for purposes of IRC § 6013(b).<sup>20</sup> Thus, IRC § 6013(b), including the limitations of IRC § 6013(b)(2), were inapplicable.<sup>21</sup> The Court of Appeals for the Eleventh Circuit follows the reasoning of *Glaze*.<sup>22</sup> The Tax Court, however, interprets the term “separate return” to mean any filing status other than MFJ. Thus, the Tax Court does not follow the *Glaze* decision except in cases where an

14 Revenue Act of 1951, Pub. L. No. 82-183, § 312(g), 65 Stat. 488 (amended Internal Revenue Code of 1939, § 51(b), added new subsection 51(g)); H.R. REP. NO. 82-1179, at 71 (1951); S. REP. NO. 82-781, Part 2, at 25-27 (1951); H.R. REP. NO. 82-1213, at 72 (1951); and *Summary of the Provisions of the Revenue Act of 1951 (H.R. 4473) as Agreed by the Conferees*, Joint Committee on Internal Revenue Taxation, at 25, 82nd Cong. (1951).

15 IRC§ 6013(b)(1), (b)(2)(B). See also IRS Pub. 504, *Divorced and Separated Individuals 4* (Oct. 31, 2013).

16 See IRC § 6013(b)(1), 6013(b)(2)(B), and Treas. Reg. § 1.6013-2.

17 Either spouse has the option to change their status to MFJ after a separate return has been filed. IRS Pub. 504, *Divorced and Separated Individuals 5* (Oct. 31, 2013).

18 Taxpayers have three years from the due date (not including extensions) of the separate return or returns to amend their returns because the IRS cannot assess the taxpayer after three years. IRC § 6013(b)(2)(A), § 6501. See also IRS Pub. 504, *Divorced and Separated Individuals 5* (Oct. 31, 2013). Furthermore, the taxpayer will be unable to request a refund after three year under IRC § 6511(a), but the taxpayer could file Form 656-L, *Offer in Compromise (Doubt as to Liability)* (Feb. 2012) based on the correct filing status and compromise the tax based on the calculated amount of the tax as if the amended return were filed and offering the result as a compromise of debt.

19 IRC § 6013(b)(1), (b)(2)(B). Taxpayers may make this change by filing IRS Form 1040X, *Amended U.S. Individual Income Tax Return* (Dec. 2013).

20 *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981). In this case, a taxpayer filed a return as a single taxpayer in 1970 (she was cohabitating with a male partner) and in 1971 the executor of her decedent partners' estate filed a single return. The taxpayer sued in state court claiming a share of the decedent's estate as his common law wife. It was determined that she and the decedent were in a common law marriage and in 1974 the taxpayer amended her 1970 tax return with a filing status of MFJ and requested a refund.

21 *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981).

22 The 11th Circuit adopted all prior decisions of the Court of Appeals for the 5th Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

appeal would lie in the Fifth or Eleventh Circuits based on the *Golsen* rule.<sup>23</sup> The Court of Appeals for the Eighth Circuit is currently considering the same issue on appeal in *Ibrahim v. Commissioner*.<sup>24</sup>

## REASONS FOR CHANGE

Neither the IRC nor the regulations define “separate return,” and the case law is inconsistent as to the meaning of that phrase. Decisions differ depending on the Court of Appeals for the circuit in which an appeal from a Tax Court decision would lie, based upon the taxpayer’s legal residence.<sup>25</sup> Furthermore, the SNOD presently fails to clarify that taxpayers may change their filing status to MFJ by amending their returns prior to filing a petition with the Tax Court, which could reduce taxpayers’ confusion and burden.<sup>26</sup> The taxpayer’s *right to be informed* is impaired when taxpayers do not “know what they need to do to comply with the tax laws” and are unable to obtain “clear explanations of the laws and IRS procedures ...”<sup>27</sup> Inconsistent application of IRC § 6013(b) as to what constitutes a separate return and when the taxpayer may change filing status to MFJ, compounded by the lack of clear explanations in the SNOD, prevents taxpayers from obtaining this clear understanding of what they must do to comply with tax laws and procedures.<sup>28</sup>

The conflicts between some appellate courts and the Tax Court result in similarly situated taxpayers being treated disparately. Married taxpayers filing MFS may face certain disadvantages compared to those filing MFJ. For example, they may be generally:

- Subject to a higher tax rate;
- Entitled to a lower exemption amount for the alternative minimum tax (AMT) purposes;
- Not eligible for refundable credits, such as the child tax credit and the earned income tax credit;
- Not eligible for the exclusion or credit for adoption expenses in most cases;
- Not eligible for higher education expenses credits (*e.g.*, American opportunity and lifetime learning credits), the deduction for student loan interest, or the tuition and fees deduction; or
- Unable to exclude the interest from qualified savings bonds used for higher education expenses.

Depending on the jurisdiction, similarly-situated taxpayers may pay different amounts of tax based solely on which Circuit Court of Appeals the Tax Court is required to follow. This may force taxpayers to accept and pay the amount in the SNOD, which may be more than they would otherwise owe, but for the conflict in interpretation. Thus, taxpayers who fail to change their filing status prior to filing a petition

23 *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981), *action on dec.*, 1981-140 (June 2, 1981). See, *e.g.*, *Currie v. Comm’r*, T.C. Memo.1986-71; *Blumenthal v. Comm’r*, T.C. Memo.1983-737; *Saniewski v. Comm’r*, T.C. Memo.1979-337. See *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971) (the Tax Court follows its own precedent unless the Court of Appeals for the circuit to which the case would be appealable has ruled to the contrary).

24 T.C. Memo. 2014-8, *appeal docketed*, No. 14-2070 (8th Cir. 2014). The issue is whether the interpretation of “separate” applies to all types of returns filed or is it limited to Married Filing Separately (MFS) filers.

25 See IRC § 6013(b)(1), 6013(b)(2)(B), and Treas. Reg. § 1.6013-2. See also *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981) and *Ibrahim v. Comm’r*, T.C. Memo. 2014-8, *appeal docketed*, No. 14-2070 (8th Cir. 2014). IRC § 7482(b)(1)(A) provides that in cases where a petitioner, other than a corporation, seeks redetermination of a tax liability, venue for review by the United States Court of Appeals lies with the Court of Appeals for the circuit based upon the taxpayer’s legal residence.

26 See IRC § 6013(b)(1), 6013(b)(2)(B), and Treas. Reg. § 1.6013-2.

27 IRS, *Taxpayer Bill of Rights*, <http://www.irs.gov/Taxpayer-Bill-of-Rights> (last visited Oct. 20, 2014). *The Right to Be Informed* states, “Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.”

28 *Id.*

with the Tax Court may end up paying more than the correct amount of tax, resulting in a violation of the *right to pay only the amount of tax legally due*.<sup>29</sup>

By adopting the National Taxpayer Advocate’s legislative recommendation to clarify the term “separate return” as any return that is not a joint return, and allow taxpayers to change their filing status to MFJ after a petition has been filed with the Tax Court in accordance with rules of practice and procedure of the court, Congress would:

- Reduce burden for taxpayers unwary of the complex IRC § 6013(b)(2)(B) rule that precludes taxpayers petitioning the Tax Court in response to a SNOD from changing their filing status to MFJ;
- Achieve consistent application of the change in filing status rules across the country; and
- Provide meaning to the taxpayer’s right to a fair and just tax system, specifically, that taxpayers “have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely.”<sup>30</sup>

## EXPLANATION OF RECOMMENDATION

The proposal would amend IRC § 6013(b)(1) and clarify that “separate returns” include any filing status (except MFJ). The proposal would also amend IRC § 6013(b)(2)(B) to allow taxpayers who petition the Tax Court in response to a SNOD to change their filing status to MFJ in accordance with the practices and procedures of the Tax Court.<sup>31</sup> This proposal may also resolve filing status issues such as the eligibility for certain credits, exemptions, and deductions for which the taxpayer would not otherwise be eligible; thus reducing litigation.

This legislative change will also clarify and simplify the change in filing status rule, reduce taxpayer burden, and enhance the taxpayer’s *right to pay no more than the correct amount of tax and to a fair and just tax system*.<sup>32</sup> Finally, the legislative recommendation will result in consistent application of the change in filing status rules across the country.<sup>33</sup>

29 IRS, *Taxpayer Bill of Rights*, <http://www.irs.gov/Taxpayer-Bill-of-Rights> (last visited Oct. 20, 2014). *The Right to Pay No More than the Correct Amount of Tax* states, “Taxpayers have the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly.”

30 IRS, *Taxpayer Bill of Rights*, available at <http://www.irs.gov/Taxpayer-Bill-of-Rights> (last visited Oct. 20, 2014). *The Right to Fair and Just Tax System*, “Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.”

31 Changing the language of IRC § 6013(b)(2)(B) or deleting it has the same result in our recommendation. See United States Tax Court, *Rules of Practice and Procedure*, available at <https://www.ustaxcourt.gov/notice.htm> (last visited Dec 5, 2014).

32 See IRS, *2013 Tax Table* (Oct. 10, 2014), available at <http://www.irs.gov/pub/irs-pdf/i1040tt.pdf>. As the IRS Sample Table shows a married couple with combined income of \$25,300 that file MFJ have taxable income of \$2,906; however, if the couple filed MFS their taxable income would be \$3,353, a difference of \$447.

33 Cf. *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981) and *Ibrahim v. Comm’r, T.C.* Memo. 2014-8, *appeal docketed*, No. 14-2070 (8th Cir. 2014).