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INTERNAL REVENUE SERVICE
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OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR CONNECTICUT-RHODE ISLAND DISTRICT COUNSEL
(CC:NER:CTR:HAR)

FROM: Assistant Chief Counsel (Administrative Provisions and
Judicial Practice) CC:PA:APJP

SUBJECT: Filing of Joint Return after filing of a Separate Return

This Field Service Advice responds to your undated memorandum which we received on June 5, 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.

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LEGEND

Taxpayers =

H	=
W	=
State Court	=
Year 1	=
Year 2	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=
Date 10	=
Date 11	=
Date 12	=
<u>a</u>	=

ISSUES

(1) Whether the husband and wife's joint filing of an amended return (Form 1040X), subsequent to the husband's filing of a separate return reflecting married filing separate status, qualifies as a valid joint return election.

(2) Whether the wife's execution of the amended return was under duress, thereby making the purported joint return invalid and relieving the wife of joint and several liability.

CONCLUSIONS

(1) The amended return qualifies as a valid joint return. It was signed and filed by both spouses and was accepted by the IRS. Also, none of the limitations listed in section 6013(b)(2) that would prevent the filing of a joint return applied.

(2) The wife has not established that she signed the amended return reflecting joint filing status under duress.

FACTS

During the tax year in issue, Year 2, Taxpayers, H and W, were married to each other. However, on Date 1, approximately one year after the due date of the Year

2 tax return, W began divorce proceedings against H in the State Court. At this time, neither Taxpayer had filed a return for Year 2.

Later, on Date 2, a certified public accountant/preparer signed two versions of a Form 1040 for Year 2, one for joint filing and another for married filing separately for H. On Date 4, H executed the version of the Form 1040 for Year 2 that claimed married filing separate status and this return was filed on Date 5. W, who apparently had no income of her own during Year 2, did not file a tax return for Year 2.

On Date 6, the State Court, entered a judgment dissolving Taxpayers' marriage. Included in the judgment was the requirement that H shall be solely liable for payment of any past due state and/or federal taxes chargeable to the parties, or either of them. Further, W was ordered to cooperate with H or his representative in executing any documents which may bear on the tax liability and efforts to reduce the incidence thereof.

On Date 7, a certified public accountant/preparer signed a Form 1040X for Year 2 reporting increased income and increased tax liability. The Form 1040X was signed by H and W and filed on Date 9. The Form 1040X had boxes checked for "married filing joint return" for both the original return and the amended return. W placed an asterisk above her signature on the Form 1040X for Year 2 and supplied the following explanation:

I am signing this joint return to comply with the State Court's Memorandum of Decision dated Date 3 which orders me to "cooperate" with my exhusband in filing joint returns. I have no knowledge regarding the substance and accuracy of this 1040 or 1040X return. As you can see by the date of my exhusband's signature Date 8 that I have not had a chance to determine its accuracy. I am requesting innocent spouse status protection under IRS § 6013.

On Date 10, W appeared at the local Taxpayer Advocate's Office. At that time, she claimed that she signed the amended joint return under duress. W's psychologist in a letter dated Date 11, related that W had been under overwhelming physical and emotional distress during much of the time since Year 1.

On Date 12, W filed a Form 843, Claim for Refund and Request for Abatement, claiming that the Form 1040X she signed for Year 2 was executed under duress and that she is not liable for the tax shown thereon. The Form 843 asks for a refund or abatement of \$ and states that the proceeds from the sale of a residence jointly owned by Taxpayers belonged to W but were applied to H's separate liability for Year 2.

LAW AND ANALYSIS

Issue 1

Section 6013(a) provides generally that a husband and wife may make a single return jointly of income taxes. Section 6013(b)(1) provides that, except as provided in section 6013(b)(2), if an individual has filed a separate return for a tax year for which a joint return could have been made by that individual and his or her spouse, the individual and the spouse may, despite the fact that the time for filing the return has expired, make a joint return, but only if the following conditions of section 6013(b)(2) are satisfied:

- (1) The joint return must be filed within three years from the due date for filing the taxpayer's return for the taxable year (determined without regard to any extension granted to either spouse);
- (2) Neither spouse has filed a properly executed petition with the Tax Court pursuant to a notice of deficiency concerning the tax year.
- (3) Neither spouse has started a suit in any court for the recovery of any part of the tax for the taxable year;
- (4) Neither spouse has entered into a closing agreement under section 7121 with respect to the taxable year, and
- (5) No civil or criminal case arising against either spouse with respect to the taxable year has been compromised under section 7122.

In the instant case, H filed a return electing married filing separate status on Date 5. On Date 9, H and W filed an amended return electing a joint filing status for Year 2. In this case, the conditions of section 6013(b)(2) do not preclude H from changing his filing status. Also, the amended return was signed and timely filed by Taxpayers and accepted by the IRS. Thus, the amended return changed the filing status from separate to joint. The Taxpayers have joint and several liability for Year 2 unless W signed the joint return under duress.

Issue 2

A joint return form signed by both spouses does not constitute a joint return when the signature of either party is executed under duress. Brown v. Commissioner, 51 T.C. 116, 119 (1968). Where a spouse disavows the signing of a joint return, the spouse must show both (1) that he or she was unable to resist demands to sign the return, and (2) that he or she would not have signed the return except for the constraint applied to his or her will. Brown v. Commissioner, 51 T.C. at 119.

Further, a taxpayer's showing of a generalized fear toward his or her domineering spouse is insufficient to constitute duress. Rather, the taxpayer must produce specific evidence that he or she was indeed overcome by fear, threats, or other duress when the tax return was signed, and that absent such duress, the taxpayer would not have signed the return. Wiksell v. Commissioner, T.C. Memo. 1994-99, rev'd and remanded on another issue, 90 F.3d 1459 (9th Cir. 1996). In Wiksell, taxpayer claimed she signed tax returns under duress. Further, taxpayer's psychologist testified taxpayer had suffered through an abusive relationship with her husband. In rejecting taxpayer's claim of duress, the court concluded that taxpayer failed to establish a nexus between spousal abuse generally and duress in the specific instances when the tax returns were signed.

Although W's psychologist indicated that she had been under overwhelming physical and emotional distress much of the time since Year 1, this would not, by itself, establish duress in the filing of the joint return. There is no evidence to show a nexus or link between H's alleged abuse of W and W's signing of the joint return. Therefore, we conclude that W has not established that she signed the Form 1040X for Year 2 under duress by H.

We next consider whether W signed the joint return under duress because she signed the return pursuant to an order of the State Court. A similar issue arose in Berger v. Commissioner, T.C. Memo. 1996-76. In Berger, taxpayer and her husband entered into a settlement agreement providing that they would file a joint return and share in any resulting savings. That agreement became part of the court's judgment. Although taxpayer received some benefits under the settlement agreement, she did not sign the joint return until the Chancery Court ordered her to show cause why an order should not be entered directing her to sign it. When she appeared before the Chancery Court, the taxpayer was not able to persuade the court that she should not have to sign the return. In her belief that the Chancery Court had ordered her to sign the return, she signed it at the courthouse. However, she attached a statement to the return that she was signing a return that she believed to be incorrect under duress by court order.

The taxpayer in Berger argued that she signed the return under duress because the Chancery Court ordered her to sign the return and she feared the consequences of defying a court order. In concluding there was no duress, the Tax Court noted that, although the taxpayer signed the return at the courthouse, she did not appear to have signed it before a judge who was threatening improper or oppressive consequences. Further, it was unclear whether the taxpayer had signed the return based on her attorney's advice or on the Chancery Court's order. Assuming the Chancery Court ordered taxpayer to sign the return, such a signing would not be under duress. The Tax Court reasoned that without a showing of abuse of discretion or threat of improper sanction, it would be reluctant to impugn the Chancery Court's authority by construing its exercise to have been improper or

wrongful. The Tax Court further held although taxpayer attached a disclaimer to the return that she signed, she did not alter the preprinted jurat in such a way as to invalidate the return as a joint return. Thus, the court held that the return was a valid joint return.

Similarly, we conclude that W did not sign the joint return under duress. First, there is no evidence that the State Court exceeded its authority, or otherwise acted wrongfully or improperly, in requiring W to cooperate with H in executing tax returns or other documents. Second, in requiring W to cooperate with H, the State Court was not ordering W to sign the particular joint return that was prepared on Date 7 and later filed. Further, there is no evidence in this case as to the particular items on the return, if any, that W objected to. In this respect, W's argument for duress (or lack of consent to the filing of a joint return) is less persuasive than the argument in Berger. In Berger, the disclaimer attached to the return objected to a specific accounting method that was allegedly not approved by the IRS and that did not clearly reflect income. By contrast, in this case, the disclaimer was stated in general terms, i.e., that W lacked knowledge as to the substance and accuracy of the return. Finally, in this case, unlike Berger, W did not sign the return at the courthouse or in response to a court order requiring her to show cause why an order should not be entered directing her to sign the joint return. Thus, the degree of perceived compulsion to sign the return was, if anything, probably less in this case than in Berger.

Further, although W placed a disclaimer on the Form 1040X for Year 2 that she signed, she did not alter the preprinted jurat in such way as to invalidate the return as a joint return. Berger, supra. Thus, the Form 1040X for Year 2 was a valid joint return.

If you have any further questions, please call Willie E. Armstrong, Jr. at (202) 622-7920.

CURTIS G. WILSON
By: Michael L. Gompertz
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