Standards for Tax Court Review in Equitable Innocent Spouse Cases

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In a case pending in the Ninth Circuit, the government argues that the Tax Court has applied overly restrictive standards of review to IRS denials of equitable innocent spouse relief under section 6015(f). However, the government accepts that those standards of review are proper under the same grant of jurisdiction when applied to IRS denials of relief under section 6015(b) and (c). There is no satisfactory justification for this inconsistency. There is an equally unjustified inconsistency in the government's position that the Administrative Procedure Act (APA) dictates less restrictive standards of review for denials of relief under section 6015(f) than for denials under section 6015(b) and (c). Moreover, the government's APA argument is based on a fundamental misunderstanding of the provisions of APA section 559 on the relationship between the APA and other law.

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I. Introduction

Section 6015 provides for innocent spouse relief, under specified circumstances, from the joint and several liability that otherwise applies under section 6013 for joint income tax returns filed by married couples. Section 6015 was enacted in 1998 to replace rules that provided for innocent spouse relief under section 6013(e).[1]

Section 6015 establishes three different routes to innocent spouse relief under section 6015(b), (c), and (f). The similarities and differences among these three categories of relief have been the source of several controversies between taxpayers and the government, primarily focusing on section 6015(f).

One obvious difference is that section 6015(f) is a residual provision, providing in part that to obtain relief under section 6015(f), relief must not be available under section 6015(b) or section 6015(c).

Another less meaningful difference between the three subsections is that section 6015(f) is generally referred to as providing "equitable" relief, because to obtain relief under section 6015(f) it must be "inequitable to hold the individual liable" when taking into account all the facts and circumstances.[2] However, this requirement also applies under section 6015(b).[3] Consequently, the "equitable" nature of the relief under section 6015(f) is not a real distinction.

Unlike section 6015(f), 6015(b) and 6015(c) are applicable only if the amount of tax was understated on the return, resulting in a deficiency that potentially gives the Tax Court deficiency jurisdiction under section 6213(a). Although section 6015(f) applies to cases involving an understatement of tax on the return, section 6015(f) also applies when the amount of tax was correctly stated on the return but was not fully paid.

The government places considerable weight on another difference between the three section 6015 subsections, namely that relief under section 6015(b) and (c) is described in the statute as relief a taxpayer "elects,"[4] but section 6015(f) provides that

[1]P.L. 105-206, section 3201.
[2]Section 6015(f)(1).
[3]Section 6015(b)(1)(D).
[4]Section 6015(b)(1)(E) and (c)(1).

if the two requirements for application of this provision are satisfied, the IRS ''may relieve'' the individual of liability.

The government contends that because of this wording difference, relief under section 6015(f) is ''discretionary.'' However, this distinction is considerably less significant than the government contends.

In the summer of 2011 the IRS abandoned its position that the same two-year time limit for seeking relief that is statutorily prescribed for section 6015(b) and (c) should also be applied under section 6015(f), even though section 6015(f) contains no explicit time limit for seeking relief.[5] Nonetheless the IRS is now pursuing a different controversy over the degree to which section 6015(f) is subject to the same rules as section 6015(b) and (c).

This new controversy concerns the standards that apply to Tax Court petitions for relief under section 6015(f) and the provisions for review set forth in section 6015(e). The IRS contends that the standards for Tax Court review of IRS denials of relief under section 6015(f) should be different from the standards that apply to Tax Court review of IRS denials of relief under section 6015(b) and (c), even though Tax Court review of all three categories of IRS denials of relief is governed by the same broad provision in section 6015(e), which does not distinguish between section 6015(f) and section 6015(b) and (c).

In the now-abandoned two-year time limit controversy, the IRS took the position that differences in statutory language between section 6015(f) and section 6015(b) and (c) did not preclude identical results for the three subsections. In contrast, in the current controversy, the IRS takes the position that the same statutory language in section 6015(e) produces different results for section 6015(f) than for section 6015(b) and (c).

The current controversy is reflected in a case pending in the Ninth Circuit (*Wilson v. Commissioner*[6]) in which the IRS argues that the Tax Court has applied incorrect standards, under section 6015(e), in reviewing IRS denials of equitable innocent spouse relief under section 6015(f).

The Tax Court's position on the standards to apply in those cases has shifted in several respects since section 6015 was enacted, both in response to appellate decisions reversing Tax Court decisions and in response to statutory changes that overruled those appellate decisions. The Tax Court's current position is that its review of section 6015(f) denials of relief under section 6015(e) should be conducted through trials *de novo* on the law and the facts, without giving any special weight to the IRS determination that relief should be denied.[7] This trial *de novo* approach is consistent with the way Tax Court proceedings are conducted under section 6015(e) to review IRS denials of relief under section 6015(b) and (c) and is also consistent with the way the Tax Court conducts deficiency proceedings under section 6213(a).

In contrast, the government contends that in reviewing section 6015(f) denials of relief under section 6015(e), the Tax Court should limit its consideration to the facts already present in the administrative record.[8] The government also contends that the Tax Court should review an IRS denial of relief under section 6015(f) under the arbitrary and capricious standard set forth in section 706(2)(A) of the Administrative Procedure Act (APA),[9] a standard that is sometimes referred to as the abuse of discretion standard, rather than under the *de novo* review approach set forth in APA section 706(2)(F).[10]

My principal focus in this report is on the unjustified inconsistency between the government's position regarding Tax Court review of IRS denials of relief under section 6015(f) and the government's very different position concerning Tax Court review of IRS denials of relief under section 6015(b) and (c). In its briefs in the Ninth Circuit *Wilson* case, the IRS tries to avoid explicitly acknowledging this inconsistency, even though a significant part of the Service's argument is based on supposed distinctions between section 6015(f) and section 6015(b) and (c).

The inconsistency in the government's positions on the applicable standard of review cannot be justified. The same broad statutory language in section 6015(e) that gives the Tax Court jurisdiction

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[5]*See* Notice 2011-70, 2011-32 IRB 135, *Doc 2011-16118*, *2011 TNT 143-9*. The application of this two-year time limit under section 6015(f) was upheld by the three circuits that had issued opinions before the IRS announced its change in position. *See Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010), *Doc 2010-12604*, *2010 TNT 110-17*; *Mannella v. Commissioner*, 631 F.3d 115 (3d Cir. 2011), *Doc 2011-1183*, *2011 TNT 13-10*; *Jones v. Commissioner*, 642 F.3d 459 (4th Cir. 2011), *Doc 2011-12907*, *2011 TNT 114-9*.

[6]No. 10-72754 (9th Cir. 2011).

[7]*See, e.g.*, *Porter v. Commissioner*, 130 T.C. 115 (2008) (*Porter I*), *Doc 2008-10827*, *2008 TNT 96-12*; *Porter v. Commissioner*, 132 T.C. 203 (2009) (*Porter II*), *Doc 2009-9199*, *2009 TNT 77-8*. In *Commissioner v. Neal*, 557 F.3d 1262 (11th Cir. 2009), *Doc 2009-2978*, *2009 TNT 26-14*, the Eleventh Circuit upheld the Tax Court's use of a trial *de novo* in this category of cases.

[8]*See* Brief for the Appellant at 18-19, *Wilson v. Commissioner*, No. 10-72754 (9th Cir. 2011).

[9]5 U.S.C. section 706(2)(A).

[10]5 U.S.C. section 706(2)(F). *See* Brief for the Appellant, *supra* note 8, at 16.

"to determine the appropriate relief available to the individual under this section" governs Tax Court review of IRS denials of relief in all three subsections. Moreover, the difference between the supposedly "elective" nature of relief under section 6015(b) and (c) and the supposedly "discretionary" relief under section 6015(f) on which the government primarily relies is less significant than the government contends.

The unjustified inconsistency in the government's positions relates not only to the interpretation of section 6015(e) but also to the application of the provisions of the APA. The APA comes into play because the government contends that the APA supports its position regarding the proper standards for Tax Court review of IRS denials of relief under section 6015(f).

Although the same APA arguments that the government makes to support its position on the proper standard for Tax Court review under section 6015(e) of IRS denials of relief under section 6015(f) are equally applicable to the standard for Tax Court review of IRS denials of relief under section 6015(b) and (c), the government does not contend the APA requires the same result under the two sets of circumstances.

In addition to this unjustified inconsistency, the government's APA arguments reflect a misunderstanding of the APA provisions that govern the relationship between the APA and other law. Those provisions ensure that agencies are subject not only to the restrictions imposed by the APA but also to any requirements imposed by other law that are more restrictive of agency action. The government incorrectly relies on a provision in the APA that prevents legislation enacted after the APA from relaxing the requirements of the APA without a clear expression of congressional intent as support for its position that the APA precludes provisions like section 6015(e) from imposing greater restrictions on agency action or greater scrutiny in judicial review of agency action than might otherwise be imposed by the APA.

II. Interpretation of Section 6015(e)

A. Inconsistency With Section 6015(b) and (c)

Regarding IRS denials of relief under section 6015(b), (c), and (f), section 6015(e)(1)(A) provides that the Tax Court has jurisdiction "to determine the appropriate relief available to the individual under this section." But the government does not contend that its position on the standards of Tax Court review under section 6015(e), as that provision applies to Tax Court review of IRS denials of relief under section 6015(f), also applies to Tax Court review under section 6015(e) of IRS denials of relief under section 6015(b) and (c). Instead, the government cites contrasts between section 6015(f) and section 6015(b) and (c) as supporting differences in the standard of Tax Court review.

To understand the current provisions in section 6015(e) relating to Tax Court review of IRS denials of relief under section 6015(b), (c), and (f), it is necessary to understand how that Tax Court review provision has changed since it was enacted. When section 6015 was enacted in 1998, the section 6015(e) review provision expressly applied only to IRS denials of relief under section 6015(b) and (c).

However, as originally enacted, section 6015(e) did not explicitly provide that Tax Court review of IRS denials of relief applied only when there had been an understatement of tax on the return, even though both section 6015(b) and (c) are available only when the amount of tax was understated on the tax return. Based on the original terms of section 6015(e), the Tax Court held in a reviewed decision in 2000 that review under section 6015(e) was not just limited to denials of relief under section 6015(b) and (c), but also applied to denials of relief under section 6015(f).[11]

Two years after section 6015 was enacted, section 6015(e) was amended to provide that the Tax Court could only review a denial of innocent spouse relief if the IRS had asserted a deficiency against the individual seeking relief.[12] Nevertheless, the Tax Court held in a reviewed decision in 2002 that this amendment did not affect its jurisdiction to review denials of relief under section 6015(f).[13] However, four years later the Ninth Circuit reversed the Tax Court on this point in *Commissioner v. Ewing*,[14] holding the Tax Court did not have jurisdiction to review IRS denials of relief under section 6015(f) when no deficiency had been asserted.

The Ninth Circuit also suggested that another factor weighing against permitting Tax Court review under section 6015(e) of IRS denials of relief under section 6015(f) was that section 6015(e) referred only to review of IRS denials of relief under section 6015(b) and (c).[15] After the Ninth Circuit's

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[11]*Fernandez v. Commissioner*, 114 T.C. 324 (2000), *Doc 2000-13039*, *2000 TNT 92-10*.

[12]P.L. 106-554, section 313(a).

[13]*Ewing v. Commissioner*, 118 T.C. 494 (2002), *Doc 2002-13179*, *2002 TNT 106-9*.

[14]439 F.3d 1009, 1013-1014 (9th Cir. 2006), *Doc 2006-3915*, *2006 TNT 40-8*, *rev'g Ewing v. Commissioner*, 118 T.C. 494 (2002). The Eighth Circuit reached the same conclusion. *Bartman v. Commissioner*, 446 F.3d 785 (8th Cir. 2006), *Doc 2006-8459*, *2006 TNT 85-14*. In *Billings v. Commissioner*, 127 T.C. 7 (2006), *Doc 2006-13996*, *2006 TNT 143-9*, the Tax Court agreed with the conclusion reached by the Eight and Ninth circuits.

[15]439 F.3d at 1013:

> The plain language of the statute clearly indicates that the Tax Court has jurisdiction over a petition only when a

(Footnote continued on next page.)

decision in *Ewing*, and a similar decision by the Eighth Circuit in *Bartman v. Commissioner*, the Tax Court accepted these appellate court reversals and changed its position on this issue. And, after these decisions, Congress amended section 6015(e) to extend Tax Court jurisdiction to review of denials of relief under section 6015(f), without regard to whether a deficiency had been asserted.[16]

The government claims that when section 6015(e) was amended to apply to denials of relief under section 6015(f), the language in section 6015(e)(1)(A) that now gives the Tax Court jurisdiction to ''determine the appropriate relief available to the individual under this section'' regarding IRS denials of relief under section 6015(b), (c), and (f), should not be interpreted as making *de novo* review appropriate when it comes to IRS denials of relief under section 6015(f). The government contends that this amendment making section 6015(e) explicitly applicable to IRS denials of relief under section 6015(f) was not significant because the statutory language in section 6015(e)(1)(A) ''was nothing new.''[17]

The extension of this language in section 6015(e)(1)(A) is significant because it makes review of section 6015(f) denials of relief subject to the same broad statutory language that properly leads to the conclusion that a *de novo* standard of review should be used in the Tax Court's review of IRS denials of relief under section 6015(b) and (c). The government might want to resist the consequences of this parallel by arguing that the use of trials *de novo* in section 6015(e) Tax Court review of IRS denials of relief under section 6015(b) and (c) is simply an application of the established principle that Tax Court deficiency proceedings under section 6213(a) are conducted as trials *de novo*.

But this argument is clearly not correct. Tax Court review under section 6015(e) of IRS denials of relief under section 6015(b) and (c) is distinct from the Tax Court's deficiency jurisdiction under section 6213(a). Even before the section 6015(e) review provision was extended to IRS denials of relief under section 6015(f), it was clear that the section 6015(e) review provision represented an expansion of Tax Court jurisdiction beyond its deficiency jurisdiction under section 6213(a).

This expansion of the Tax Court's jurisdiction resulted from the fact that even though both section 6015(b) and (c) apply only when the tax was understated on the return, Tax Court review under section 6015(e), as originally enacted and as currently in effect for section 6015(b) and 6015(c) (as well as section 6015(f)), is not limited to cases in which a Tax Court deficiency petition has been filed under section 6213(a). Instead, section 6015(e) made Tax Court review available when no deficiency petition had been filed under section 6213(a) but when the IRS had begun collection activities after the period for filing a section 6213(a) deficiency petition had expired.

This expansion of Tax Court jurisdiction under section 6015(e) is significant because it makes clear that the issue of the standard for Tax Court review under section 6015(e) is separate from the standard for Tax Court review under the court's section 6213(a) deficiency jurisdiction. As a result, the government cannot successfully contend that the standard for Tax Court review of section 6015(b) and (c) denials of relief under section 6015(e) is dictated by the standard of review for the Tax Court's section 6213(a) deficiency jurisdiction[18] and is therefore irrelevant to the issue of the standard for Tax Court review of IRS denials of relief under section 6015(f).

Consequently there is a discrepancy between the government's acceptance that the Tax Court applies a *de novo* standard to its section 6015(e) review of IRS denials of relief under section 6015(b) and (c) and the government's position that the Tax Court must apply an arbitrary and capricious standard, limited to the administrative record, to its section 6015(e) review of IRS denials of relief under section 6015(f). This discrepancy in the government's position is impossible to reconcile with the fact that the same broad language in section 6015(e)(1)(A) giving the Tax Court jurisdiction to ''determine the appropriate relief available to the individual under this section'' applies both to Tax Court review of IRS denials of relief under section 6015(f) and to Tax Court review of IRS denials of relief under section 6015(b) and (c).

B. Elective vs. Discretionary Relief

The government avoids explicitly acknowledging that there is any inconsistency in its position

deficiency has been asserted and the taxpayer has elected relief under subsection (b) or (c). The Tax Court, however, concluded that it had jurisdiction over the petition, despite the fact that no deficiency had been asserted against Ewing, and despite the fact that she had elected relief only under subsection (f), *i.e.*, not under subsection (b) or (c). We disagree and conclude that the Tax Court lacked jurisdiction because no deficiency had been asserted.

[16]P.L. 109-432, section 408(a).

[17]Brief for the Appellant, *supra* note 8, at 17.

[18]The government implies that section 6015(e) review of denials of relief under section 6015(b) and (c) is limited to deficiency proceedings, but the statute only requires that a deficiency has been asserted. *See* Brief for the Appellant, *supra* note 8, at 18 (''Deficiency proceedings, which are conducted upon trial *de novo*, were grandfathered upon enactment of the APA. And unlike the case with section 6015(b) and (c), relief under section 6015(f) does not necessarily imply a deficiency'').

regarding the standards for Tax Court review of denials of relief under section 6015(f) and under section 6015(b) and (c), because the government avoids explicitly acknowledging the propriety of using trials *de novo* in section 6015(e) review of denials of relief under section 6015(b) and (c). However, the government implicitly acknowledges the applicability of trials *de novo* in Tax Court review of IRS denials of relief under section 6015(b) and (c) by contending that divergence between the interpretation of section 6015(e)(1)(A) for review of IRS denials of relief under section 6015(f) and under section 6015(b) and (c) is warranted because section 6015(b) and (c) are supposedly elective, but application of section 6015(f) is supposedly discretionary.[19]

However, the broad language in section 6015(e)(1)(A) giving the Tax Court jurisdiction to ''determine the appropriate relief available to the individual under this section'' makes that distinction irrelevant. This language describing the Tax Court's role under section 6015(e) says nothing about the Tax Court's determining whether the IRS denial of relief was correct, justified, supported by the evidence, arbitrary and capricious, or an abuse of discretion.

Instead, section 6015(e)(1)(A) describes the Tax Court's role as being to ''determine the appropriate relief available.'' It is difficult to imagine statutory language more clearly prescribing a *de novo* determination by the Tax Court of ''the appropriate relief available.'' Although it is convenient shorthand to refer to the role of the Tax Court under section 6015(e) as a ''review'' of an IRS denial of relief, there is nothing in section 6015(e) that refers to the Tax Court's role as being a review of the IRS denial of relief or that suggests the Tax Court should give any weight to the Service's denial of relief.[20]

The government also significantly overstates the degree to which the mechanism for obtaining relief differs under section 6015(f) and under section 6015(b) and (c). In all three subsections, it is necessary to determine whether the individual seeking relief satisfies the statutory requirements for relief prescribed in the applicable subsection.

This is as true in the supposedly elective subsections, section 6015(b) and (c), as it is in the supposedly discretionary section 6015(f). The IRS is given no more discretion in making these factual determinations under section 6015(f) than under section 6015(b) and (c). Because it is necessary to make factual determinations regarding whether the statutory requirements of section 6015(b) and (c) have been satisfied before relief under these provisions is available, characterizing relief under these provisions as elective does not seem appropriate.

Another reason why the difference between section 6015(f) and section 6015(b) and (c) is not as great as the government claims is that the most important factual determination required under section 6015(f) is also required under section 6015(b). Section 6015(f)(1) requires a determination that, ''taking into account all the facts and circumstances, it is inequitable to hold the individual liable.'' Likewise, section 6015(b)(1)(D) requires a determination that, ''taking into account all the facts and circumstances, it is inequitable to hold the . . . individual liable.''

Those identical requirements to determine whether it is inequitable to hold the individual liable belie the government's emphasis on the distinction between elective relief under section 6015(b) and (c) and discretionary relief under section 6015(f).

Although the IRS formerly took the position that a nonstatutory two-year time limit for requesting relief under section 6015(f) could be imposed to deny requests made after that time limit, the Service has now abandoned that position.[21] Because the IRS can no longer invoke delay as a basis for denying

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[19]*See* Brief for the Appellant, *supra* note 8, at 34-38.

[20]The government argues that ''the notion that section 6015(e) does not involve 'mere review' is belied by its title, 'Petition for *review* by Tax Court.'" Reply Brief for the Appellant at 12, *Wilson v. Commissioner*, No. 10-72754 (9th Cir. Apr. 22, 2011). This argument violates section 7806(b), which provides: ''No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect.'' The title of a subsection clearly falls within the category of ''descriptive matter relating to the contents of this title'' that section 7806(b) prohibits from being ''given any legal effect.'' *See, e.g.*, *United States v. Reorganized CF&I Fabricators of Utah Inc.*, 518 U.S. 213, 222 (1996), *Doc 96-2822*, *96 TNT 20-37* (''The word 'excise' appears nowhere in section 4971 (whereas, by contrast, 26 U.S.C. section 4401 explicitly states that it imposes 'an excise tax'). And although there is one reference to 'excise taxes' that

(Footnote continued in next column.)

applies to section 4971 in the heading of the subtitle covering that section ('Subtitle D — Miscellaneous Excise Taxes'), the Government disclaims any reliance on that caption. Tr. of Oral Arg. 14, 17-20; see also 26 U.S.C. section 7806(b) ('No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title')''); *Alcoa Inc. v. United States*, 509 F.3d 173, 181 n.7 (3d Cir. 2007), *Doc 2007-26265*, *2007 TNT 230-10* (''Although generally 'the title of a statute or section can aid in resolving an ambiguity in the legislative text,' the Internal Revenue Code's rules of construction provide that no 'legal effect' should be given to descriptive matter in the Code. 26 U.S.C. section 7806(b)'') (citations omitted).

[21]*See* Notice 2011-70.

relief. It is difficult to imagine how the IRS could justify denying relief under section 6015(f), having determined in a particular case that it is inequitable, based on all the facts and circumstances, to hold the individual liable for the taxes at issue.

Finally, whatever discretion the IRS might have to deny relief under section 6015(f) does not extend to making the triggering factual determination of whether it is inequitable to hold the individual liable after taking into account all the facts and circumstances. The language in section 6015(f) on which the government relies as giving the IRS discretion, namely that ''the Secretary may relieve such individual of such liability,'' clearly comes into play only after it has been determined that it is inequitable to hold the individual liable.

Section 6015(f) does not say that ''the Secretary may determine that, taking into account all the facts and circumstances, it is inequitable to hold the individual liable.'' Instead, section 6015(f) says that ''if, taking into account all the facts and circumstances, it is inequitable to hold the individual liable,'' then ''the Secretary may relieve such individual of such liability.''

Presumably most IRS denials of relief under section 6015(f) are based on a determination that the requesting spouse did not meet the statutory factual test that it must be inequitable, taking into account all the facts and circumstances, to hold the individual liable. However, this determination is not discretionary, because the language in section 6015(f) that gives the IRS ''discretion'' comes into play only after this determination has been made.

Considering that the IRS may not deny relief under section 6015(f) if the requirements in both section 6015(f)(1) and (f)(2)[22] are satisfied, the government's heavy reliance on the distinction between elective relief under section 6015(b) and (c) and discretionary relief under section 6015(f) as justifying different standards for Tax Court review seems misplaced. This reliance does not support the government's position that the broadly worded section 6015(e)(1)(A) requirement that the Tax Court is to ''determine the appropriate relief available'' has a different meaning for Tax Court review of section 6015(f) determinations than it has for Tax Court review of determinations under section 6015(b) and (c).

C. Section 6330 Cases Not Controlling

The government emphasizes that several circuits have held that Tax Court review of IRS levy determinations under section 6330, generally referred to as collection due process determinations, is limited to the administrative record, rather than being conducted as a trial *de novo*.[23] However, the government's reliance on these section 6330 authorities ignores the disparity between the statutory language providing for Tax Court review in section 6330 and the very different statutory language providing for Tax Court review of IRS denials of innocent spouse relief in section 6015(e).

Section 6330(d)(1) provides as follows regarding Tax Court review of collection due process determinations:

> The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

This grant of Tax Court jurisdiction in section 6330(d)(1) is very different from the grant of jurisdiction in section 6015(e)(1)(A):

> In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section.

Section 6330(d)(1) contains no language resembling the language in section 6015(e)(1)(A) granting the Tax Court jurisdiction ''*to determine the appropriate relief* available to the individual under this section'' (emphasis added). Instead, section 6330(d)(1) says only that the affected person may ''appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).'' This substantial difference in the relevant statutory language governing Tax Court review makes the cases interpreting section 6330 completely irrelevant for purposes of interpreting section 6015(e).

D. Other Factors

The taxpayer in *Wilson* argues that in some cases when the Tax Court has jurisdiction under section 6015(e) there may in fact be no IRS denial of relief for the Tax Court to review because section 6015(e)(1)(A)(i)(II) authorizes the taxpayer to file a Tax Court petition six months after seeking relief from the IRS under section 6015(b), (c), or (f), even

[22]As noted earlier, section 6015(f)(2) provides that relief is available under section 6015(f) only if relief is not available under section 6015(b) and (c).

[23]*See Robinette v. Commissioner*, 439 F.3d 455, 459-461 (8th Cir. 2006), *Doc 2006-4491*, *2006 TNT 46-11*; *Murphy v. Commissioner*, 469 F.3d 27, 31 (1st Cir. 2006), *Doc 2006-23555*, *2006 TNT 224-11*; *Keller v. Commissioner*, 568 F.3d 710, 718 (9th Cir. 2009), *Doc 2009-4282*, *2009 TNT 37-17*.

if the IRS has not yet denied relief or even considered whether relief is appropriate.[24] In those circumstances, it is clearly impossible for the Tax Court ''review'' to either be based on a nonexistent administrative record or be conducted under the arbitrary and capricious standard.

In arguing that although section 6015(e)(1)(A) gives the Tax Court jurisdiction to determine the appropriate relief available the Tax Court is not authorized to conduct trials *de novo*, the government focuses too narrowly on the meaning of the word ''determine'' in section 6015(e)(1)(A). The government contends ''the word 'determine' simply does not connote *de novo* review on an amplified record.''[25] The government's attempt to interpret ''determine'' without considering the statutory context (section 6015(e)(1)(A)) in which the word appears (''determine the appropriate relief available'') violates the basic principle of statutory construction that statutory language must always be interpreted in its statutory context, and not in isolation.[26]

The government's disregard of relevant statutory context leads it to argue that ''determine'' in section 6501(e)(1)(A) should be given the same meaning as in section 6404(h)(1), in which ''Congress has directed 'the Tax Court *** to *determine* whether *the Secretary's* failure to abate interest under this section was an abuse of discretion.'''[27] However, any comparison between section 6501(e)(1)(A) and section 6404(h)(1) actually harms the government's position. There is a stark contrast between giving the Tax Court jurisdiction to determine the appropriate relief available and giving the Tax Court jurisdiction ''to determine whether the Secretary's failure to abate interest . . . was an abuse of discretion.'' If Congress had meant to impose the same standard in section 6015(e) for review of section 6015(f) denials of relief that it so clearly imposed under section 6404(h)(1), Congress could easily have expressed that intention using the same words it employed in section 6404(h)(1).

The government relies considerably, although wrongly, on the principle of *stare decisis* to criticize the Tax Court's change of position about the proper standard of review under section 6015(e) of IRS denials of relief under section 6015(f). Having persuaded the Ninth Circuit, the Eighth Circuit, and the Tax Court itself that the Tax Court had previously erred in interpreting section 6015(e) as permitting any review under any standard for IRS denials of relief under section 6015(f), it is anomalous for the government now to argue that the Tax Court should continue to apply the standard of review that the court had applied in those cases that erroneously held section 6015(e) was applicable to authorize review of section 6015(f) denials of relief before section 6015(e) was amended explicitly to authorize that review.

III. APA Argument

The government contends the Tax Court's use of trials *de novo* in cases involving section 6015(e) review of section 6015(f) denials of relief violates section 559 of the APA. To evaluate that argument, it is necessary to understand APA section 559 and the nature of the APA requirements. APA provisions fall into two categories. First, the APA imposes requirements for procedures that agencies must use in taking action. Second, the APA prescribes rules for judicial review of that agency action.

As I discussed in a previous article,[28] APA section 559 contains two important provisions concerning the relationship between the APA and provisions of other laws that deal differently with the same issues addressed in these two categories of APA provisions. The first of these two provisions in APA section 559 states that the provisions of the APA ''do not limit or repeal additional requirements imposed by statute or otherwise recognized by law.'' The second provision in APA section 559 states that a ''subsequent statute may not be held to supersede or modify'' the provisions of the APA ''except to the extent that it does so expressly.''

The government's argument under APA section 559 is based on the general principles that informal agency adjudications are subject to review under the arbitrary and capricious standard of APA section 706(2)(A) and that judicial review of those adjudications is limited to the administrative record. The government contends that these two

[24]*See* Brief for the Appellee at 7, 19-20, *Wilson v. Commissioner*, No. 10-72754 (9th Cir. Mar. 22, 2011).

[25]Brief for the Appellant, *supra* note 8, at 46.

[26]*See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (''The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'''') (citations omitted). The government acknowledges this principle, but overlooks the principle's application by interpreting ''determine'' in isolation from its context. *See* Reply Brief for the Appellant, *supra* note 20, at 7-8 (''In interpreting statutes, of course, this Court 'do[es] more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole'''') (quoting *Christensen v. Commissioner*, 523 F.3d 957, 960 (9th Cir. 2008), *Doc 2008-8854*, *2008 TNT 78-8*).

[27]Brief for the Appellant, *supra* note 8, at 46 (emphasis and alterations in original).

[28]*See* Patrick J. Smith, ''The APA's Reasoned-Explanation Rule and IRS Deficiency Notices,'' *Tax Notes*, Jan. 16, 2012, p. 331, *Doc 2011-24403*, or *2012 TNT 11-10*.

general principles represent provisions of the APA. Based on the contention that these general principles constitute APA provisions, the government argues that the general principles are governed by the provision in APA section 559 that a ''subsequent statute may not be held to supersede or modify'' the provisions of the APA ''except to the extent that it does so expressly.''

The government contends that because section 6015(e) was enacted after the 1946 enactment of the APA, section 6015(e) is a ''subsequent statute'' under APA section 559. Further, the government contends, because section 6015(e) does not expressly supersede or modify the APA, the general principles of arbitrary and capricious review based solely on the administrative record govern Tax Court review under section 6015(e) of denials of relief under section 6015(f).[29]

There are several problems with the government's contentions, namely: Its position on section 6015(f) and its position on section 6015(b) and (c) are inconsistent; the government seems to misunderstand the relationship between the two provisions in APA section 559; and the government mistakenly asserts that the general principles of judicial review of administrative action represent provisions of the APA that are subject to section 559.

A. Inconsistency on the Effect of the APA

The government's argument that the APA dictates the Tax Court's standard of review under section 6015(e) of IRS denials of relief under section 6015(f) would, if the argument were correct, be equally applicable to Tax Court review under section 6015(e) of denials of relief under section 6015(b) and (c) outside the context of deficiency petitions.

Section 6015(e) was enacted after the 1946 enactment of the APA. However, the government accepts that Tax Court review under section 6015(e) of IRS denials of relief under section 6015(b) and (c) is properly conducted in trials *de novo*, even though the government's APA argument, if it were correct, would lead to the same standard of review for denials of relief under section 6015(b) and (c) that the government contends should apply to Tax Court review of IRS denials of relief under section 6015(f).

There is nothing in section 6015(e) that would provide a basis for distinguishing between Tax Court review of section 6015(f) denials of relief and Tax Court review of denials of relief under section 6015(b) and (c) for purposes of APA section 559. The government's reliance on the supposed elective/discretionary distinction in its argument regarding the interpretation of section 6015(e), apart from the APA, although incorrect even in that context, does not apply to the government's APA argument. This supposed elective/discretionary distinction does not create the type of express reference to the APA regarding reviews of denials of relief under section 6015(b) and (c), but not in the case of reviews of section 6015(f) denials of relief, that would, under the government's position, be necessary to satisfy the provision in section 559 for overriding the requirements of the APA.

B. Relation Between Rules in APA Section 559

The government also seems to misunderstand the relationship between the two different provisions in section 559, apparently believing that the first provision (stating that the provisions of the APA ''do not limit or repeal additional requirements imposed by statute or otherwise recognized by law'') applies only to ''additional requirements'' in existence before the 1946 enactment of the APA. Although pre-APA requirements are likely a major component of the additional requirements covered by the ''limit or repeal'' provision in APA section 559, this provision is not restricted to pre-APA requirements.

Obviously the word ''repeal'' in the limit or repeal provision in APA section 559 applies only to the effect of the APA on ''additional requirements'' that were in effect before the enactment of the APA. However, the word ''limit'' in the limit or repeal provision is not similarly restricted. Therefore, this limit or repeal provision authorizes post-APA statutory provisions that impose ''additional requirements'' more restrictive on agency action than are the provisions of the APA or that impose more restrictive judicial review requirements than those imposed by the APA.

This conclusion is supported by the Fifth Circuit's decision in *United States v. Menendez*,[30] holding that a provision of the Endangered Species Act, enacted in 1973 — many years after the 1946 enactment of the APA — was an ''additional requirement'' that was properly applied under APA

[29]Brief for the Appellant, *supra* note 8, at 32, 60. The government's reliance on APA section 559 in this context is in striking contrast with its attempt to avoid the effect of APA section 559 regarding whether temporary regulations are subject to the notice and comment requirements of APA section 553. In that context, the government relies on the references to temporary regulations in section 7805(e) as overriding the APA's notice and comment requirements, even though section 7805(e) makes no reference to the APA and does not represent the type of comprehensive alternative regulatory scheme that the Supreme Court has held sufficient to override the APA absent an explicit reference.

[30]48 F.3d 1401, 1409 (5th Cir. 1995).

section 559, even though it imposed a greater degree of judicial scrutiny in review of agency action than would otherwise have applied under APA section 706.

The government might have been confused about the scope of this limit or repeal provision in APA section 559 because the Supreme Court decision addressing its application, *Dickinson v. Zurko*,[31] involved an additional requirement that was claimed to have applied *before* the 1946 enactment of the APA. But, apart from this, nothing in *Zurko* suggests that the limit or repeal provision in APA section 559 is restricted to additional requirements that predated enactment of the APA.[32]

Because the limit or repeal provision in APA section 559 is not restricted to pre-APA additional requirements, the other provision in APA section 559, the supersede-or-modify provision, cannot apply to all post-APA legislation that deals with the same subjects as the APA (that is, required procedures for agency action and the standards for judicial review of agency action). Instead, to operate sensibly together with the limit or repeal provision, the supersede-or-modify provision must be interpreted as applying only to post-APA legislation that has the opposite effect from the additional requirements to which the limit-or-repeal provision applies. Consequently, the supersede-or-modify provision must be interpreted as applying only to post-APA legislation that relaxes the rules for required agency procedures or for judicial review of agency action compared with the requirements imposed by the APA.

This interpretation is supported by the word ''supersede,'' which suggests that the subsequent statutes to which the supersede-or-modify provision applies are only those that would eliminate restrictions on agency action imposed by the APA. When paired with ''supersede,'' the word ''modify'' should be interpreted consistently with the meaning of supersede, so that the modifications covered by the supersede or modify provision are only those that modify the requirements of the APA in the same direction as provisions that supersede the provisions of the APA, namely, by relaxing the restrictions on agency action imposed by the APA.

Thus, the distinction between the types of situations covered by the two provisions in APA section 559 is not between pre-APA and post-APA requirements that are merely different in some way from those in the APA. Instead, the distinction between the two provisions in APA section 559 is between additional requirements that are more restrictive on agency action than those imposed by the APA (and are permitted under the limit-or-repeal provision in section 559, whether or not those additional requirements predate or postdate enactment of the APA), and post-APA statutes that supersede or modify the provisions of the APA to reduce restrictions on agency action, or reduce the degree of judicial scrutiny of agency action, compared with what would otherwise apply under the APA.[33] Only those statutory provisions in this second category are prohibited under the supersede-or-modify provision in section 559 unless the express statement requirement, or something equivalent, is satisfied.

The principal Supreme Court decision interpreting the supersede or modify provision in APA section 559, *Marcello v. Bonds*,[34] is consistent with the foregoing understanding of this provision, because the case involved a challenge to a subsequent statute on the grounds that the later statute provided fewer restrictions on agency action than were imposed by the APA. The Supreme Court held that congressional intent was sufficiently clear to satisfy the requirements of the supersede-or-modify provision, so that the subsequent statute was given effect, despite imposing less restrictive requirements on the agency than the APA. Under this understanding of the difference between the two provisions in section 559, the government errs in relying on the supersede-or-modify provision to argue against permitting section 6015(e) to impose a requirement more stringent than would be imposed by the APA.

Thus, because the supersede or modify provision in APA section 559 was intended to be a protection only against subsequent statutes that relaxed restrictions on agency action, the supersede or modify rule simply does not apply to statutory provisions that impose greater restrictions on agency action than are imposed by the APA. Those greater restrictions are instead permitted under the limit or repeal provision of section 559.

C. Choice Between Standards of Review

The government's more specific reliance on *Zurko* as being relevant to how section 6015(e) applies to Tax Court review of section 6015(f) denials of relief is misplaced because the issue in *Zurko* was substantially different from the issue

[31]527 U.S. 150 (1999).

[32]The Court's reference to ''grandfathered common-law variants,'' *id.* at 155, simply reflects that this was the type of additional requirement that was at issue in *Zurko*.

[33]The view that both provisions of APA section 559 impose a greater-of test was clearly expressed by the three dissenting justices in *Zurko*, but nothing in the majority opinion is inconsistent with that view. The majority simply concluded that the evidence for a pre-APA standard that was more restrictive than the APA was not sufficiently persuasive.

[34]349 U.S. 302 (1955).

here. The significant difference between the issue in *Zurko* and the issue here is that the alternative standard of judicial review at issue in *Zurko* was a standard that is not recognized by the APA, but the alternative standard of review here — the use of trials *de novo* in judicial review of agency action — is clearly and explicitly recognized by the APA.[35]

The alternative standard of judicial review that was rejected in *Zurko* was the ''clearly erroneous'' standard that applies to appellate review of trial court fact-finding. The clearly erroneous standard of review is not among the six standards of review enumerated in APA section 706(2).

In contrast, the alternative standard in *Wilson*, conducting a trial *de novo* as a way for a court to review agency action, is clearly and explicitly recognized in section 706(2)(F) of the APA. Under APA section 706(2)(F), ''the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.'' Thus, in the present case, the choice is not, as it was in *Zurko*, between applying one or more of the judicial review standards explicitly set forth in APA section 706 and applying a different judicial review standard not recognized by the APA, but rather between the application of two alternative standards of review that are both explicitly recognized by APA section 706.

Based on APA section 559 the government contends that this choice between alternative standards of judicial review that are both explicitly set forth in APA section 706 — namely, the arbitrary and capricious standard set forth in APA section 706(2)(A) and the use of a trial *de novo* set forth in APA section 706(2)(F) — is a choice dictated by the APA itself. Thus this choice, according to the government, is a provision of the APA itself. The government contends that therefore this choice is subject to the rule in APA section 559 that an express reference to the APA is required for a subsequent statute to supersede or modify the provisions of the APA.

The government's position not only reflects an incorrect understanding of the meaning of the supersede-or-modify provision, but also reflects an incorrect understanding of the terms of the APA regarding the choice among the different standards of review set forth in section 706(2).

The government's contention that the APA prescribes the rule for making this choice between two alternative standards of review set forth in APA section 706(2)(A) is clearly not correct. Although provisions of the APA explicitly state, for example, when the substantial evidence standard of APA section 706(2)(E) applies,[36] no APA provision explicitly prescribes when the trial *de novo* standard in section 706(2)(F) applies.

APA section 706(2)(F) says only that agency action ''unwarranted by the facts'' will be set aside ''to the extent that the facts are subject to trial *de novo* by the reviewing court.'' This provision does not explicitly address how to determine when ''the facts are subject to trial *de novo* by the reviewing court.''

As I discussed in a previous article, the committee reports on the APA suggested judicial review of agency action would take the form of trials *de novo* whenever the standard of review set forth in APA section 706(2)(E) (the substantial evidence standard) did not apply.[37] Nevertheless, *Citizens to Preserve Overton Park Inc. v. Volpe*[38] announced a very different rule, under which trials *de novo* would occur only in more limited circumstances.

The rule announced in *Overton Park* has not prevented the conduct of trials *de novo* in Tax Court deficiency proceedings, and does not prevent the government from accepting that trials *de novo* are proper under section 6015(e) for review of IRS denials of relief under section 6015(b) and (c),[39]

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[35]An additional notable difference is that the alternative standard asserted in *Zurko* was evidenced only by case law, whereas the alternative standard in *Wilson* is evidenced by a statutory provision. An alternative standard that is embodied in a statutory provision provides a much clearer focus for analysis than was provided in *Zurko* by a large number of cases decided over an extended period of time using a variety of verbal formulations of the standard being applied. *Zurko* held it was impossible to view these cases as having clearly established a single standard of review prior to the enactment of the APA. In contrast, no comparable difficulty is presented when the applicable rule is provided by a statutory provision such as section 6015(e).

[36]APA section 706(2)(E) provides: ''The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.''

[37]*See* Smith, *supra* note 28.

[38]401 U.S. 402 (1971).

[39]The government relies on *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193-1194 (9th Cir. 2000), to support the view that the application of the arbitrary and capricious standard of review in APA section 706(2)(A) is governed by APA section 559, but this opinion did not recognize that trials *de novo* represent a standard of judicial review of agency action explicitly contemplated by APA section 706(2)(F). Moreover, the Ninth Circuit in *Ninilchik* misread *Zurko* as meaning that the arbitrary and capricious standard of review in APA section 706(2)(A) ''functions as a default judicial review standard.'' 227 F.3d at 1194. In fact, *Zurko* explicitly refrained from deciding which standard of judicial review in APA section 706(2)(A) applied in place of the clearly erroneous standard. 527 U.S. at 158 (''Indeed, it apparently remains disputed to this day (a dispute we need

(Footnote continued on next page.)

even though section 6015(e) as it applies to IRS denials of relief under section 6015(b) and (c) is a post-APA enactment no less than section 6015(e) as it applies to IRS denials of relief under section 6105(f). Consequently, the rule announced in *Overton Park* should not be an obstacle to the conduct of trials *de novo* in Tax Court review of IRS denials of relief under section 6015(f).

Thus, the government is incorrect in its fundamental premise that the choice among standards of review set forth in APA section 706(2)(A) is a provision of the APA governed by the supersede or modify provision in APA section 559.

D. Other Factors

The government arbitrarily divides the issue of what standard of review should apply to Tax Court review of IRS denials of innocent spouse relief into two issues, namely, whether to apply the arbitrary and capricious review standard and whether to restrict review to the administrative record. But deciding the standard for Tax Court review is really a single issue: Should Tax Court review under section 6015(e) of IRS denials of relief under section 6015(f) be conducted using a trial *de novo*? The reference to the trial *de novo* standard in APA section 706(2)(F) makes clear that these two supposedly different standard of review issues are really one and the same.

APA section 706(2)(F) provides that the reviewing court will set aside agency action that is ''unsupported by the facts to the extent that that the facts are subject to trial *de novo* by the reviewing court.'' This single standard of review in section 706(2)(F) incorporates both points that the government treats as separate issues.

Agency action is set aside under APA section 706(2)(F) if unwarranted by the facts, rather than only if the agency action is arbitrary and capricious, ''to the extent that the facts are subject to trial *de novo* by the reviewing court,'' rather than based solely on the administrative record. Thus, APA section 706(2)(F) makes clear that a trial *de novo* necessarily carries with it the principle that agency action will be set aside if unwarranted by the facts.

By dividing this single issue into two issues, the government makes it possible to argue that it would be anomalous for a reviewing court to consider evidence that was not presented to the agency in deciding whether the agency's action was arbitrary and capricious. Of course that situation would be anomalous, but that argument assumes the arbitrary and capricious standard, not the trial *de novo* standard, applies.[40]

The government's argument assumes that it has already been decided that a trial *de novo* standard does not apply. This argument is circular. The only conclusion this argument supports is that the scope of review and the standard of review should be consistent. The argument says nothing about what those consistent standards should be. It says nothing about whether a trial *de novo* standard should apply.

IV. Conclusion

The government's contention that the Tax Court has erroneously applied a trial *de novo* approach under section 6015(e) to reviewing IRS denials of relief under section 6015(f) is inconsistent with the government's acceptance that a trial *de novo* approach is appropriate under section 6015(e) when the Tax Court is reviewing IRS denials of relief under section 6015(b) and (c), because the same broad statutory language granting the Tax Court jurisdiction applies to all three subsections. The differences between section 6015(f) and section 6015(b) and (c) on which the government relies do not warrant the differential result the government advocates under section 6015(e).

The government's contention that this trial *de novo* approach for Tax Court review of IRS denials of relief under section 6015(f) is barred by the APA is similarly inconsistent with the government's belief that a trial *de novo* approach is appropriate for Tax Court review of IRS denials of relief under section 6015(b) and (c), because the government's APA argument for section 6015(f) is equally applicable for section 6015(b) and (c). The government's APA argument is also based on an incorrect understanding of the provisions of the APA on which the government relies.

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not settle today) precisely which APA standard — 'substantial evidence' or 'arbitrary, capricious, abuse of discretion' — would apply to court review of PTO [Patent and Trademark Office] fact-finding'').

[40]As I argued in a previous article, the fact that judicial review of agency action takes the form of a trial *de novo* in a particular case does not mean the arbitrary and capricious standard is therefore inapplicable in similar cases. Because the arbitrary and capricious standard applies to any judicial review of agency action, it also applies when a trial *de novo* occurs. *See* Smith, *supra* note 28.