Duress Diverts Dual Tax Liability for Joint Returns

By
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Introduction

If a joint tax return[1] is filed by or on behalf of a husband and a wife, they are jointly and severally liable for the full tax liability. Internal Revenue Code Section 6013(d)(3) provides: "if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several." Such liability covers not only the basic tax but also any addition to the tax on account of fraud, notwithstanding that the wife may have signed the return in blank and that she was innocent of any fraud.[2] Furthermore such liability extends to the taxpayer with respect to a joint return even where that spouse failed to sign it, provided that it was intended to be a joint return.[3]

Each spouse is potentially liable for the full amount of the tax or any deficiency in tax and one spouse may not insist that the IRS first collect the tax or deficiency against the other.[4] The provision in a settlement agreement between the parties that one shall assume the sole responsibility for a tax as well as any deficiency subsequently determined will not insulate the other spouse from the IRS.[5]

I.R.C. § 6015, entitled "Relief from joint and several liability on joint returns," enacted in 1998, superseded the earlier provi-

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1 IRS form 1040.

2 *Furnish v. Comm'r*, 262 F.2d 727 (9th Cir. 1958).

3 *Kann v. Comm'r*, 18 T.C. 1032, 1044 (1952) *aff'd*, 210 F.2d 247 (3d Cir. 1953), *cert. denied*, 347 U.S. 967; *Howell v. Comm'r*, 10 T.C. 859, 866, 869 (1948), *aff'd*, 175 F.2d 240 (6th Cir. 1949).

4 See *Bloom v. United States*, 272 F.2d 215 (9th Cir. 1959) (involving responsible persons jointly and severally liable for the 100% penalty).

5 *Pesch v. Comm'r*, 78 T.C. 100 (1982) (it is clear that a taxpayer cannot avoid such liability through the simple medium of an agreement to which the IRS is not a party.)

sion for innocent spouse relief.[6] It provides three types of "innocent spouse" relief: (1) that which was similar to the preempted section of the Code, albeit easier to obtain, which the IRS labels as "innocent spouse relief," (2) "separation of liability," and (3) "equitable relief."[7]

One of the requisites for innocent spouse relief[8] is if in signing the joint return he or she did not know, and had no reason to know, that there was an understatement of tax.[9] Separation of liability relief is not available if the individual seeking this relief had actual knowledge, at the time that individual signed the return, of any item giving rise to a deficiency (or portion thereof).[10] However, the Code provides that actual knowledge will not disqualify an individual from separate liability relief where it is es-

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6 I.R.C. § 6013(e), which has been repealed.

7 Internal Revenue Serv., U.S. Dep't of the Treasury, Pub. No. 971 (revised Mar. 2004).

8 For discussions of relief under the current innocent spouse, see generally Frances D. Sheehy and Anthony J. Scalette *The Continuing Evolution of the "New" Innocent Spouse Rules as Implemented and Interpreted by the Internal Revenue Service and the Courts,* 76 Fla. B.J. Feb. 2002 at 41 and Mar. 2002 at 54*;* Robert S. Steinberg, *Three Bats Against Joint and Several Tax Liability: (1) Innocent Spouse (2) The Election to Limit Liability and (3) Equitable Relief: The Treasury and Courts Begin to Interpret IRC 6015 after Enactment of the IRS Restructuring and Reform Act of 1998,* 17 Am.Acad.Matrim.Law. 2001 at 403; Lily Kahng, *Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability*, 49 Vi.L.Rev. 261 (2004).

9 I.R.C. § 6015(b)(1)(C) (2004) provides for relief from liability if:

> (A) a joint return has been made for a taxable year;
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> (B) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return;
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> (C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement,
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> (D) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement, and
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> (E) the other individual elects (in such form as the Secretary may prescribed) the benefits of this subsection not later than the date which is 2 years after the date the Secretary had begun collection activities with respect to the individual making the election,

10 *Id*. § 6015(c)(3)(C) (2004).

tablished that the individual signed the return under duress.[11] In *In re Hinckley*,[12] the court observed that proving that the returns were signed under duress is the only avenue for relief where a court determines the spouse had actual knowledge at the time he or she signed the return of any item giving rise to a deficiency (or portion thereof).[13]

If an individual proves duress in the signing or acquiescence in the filing of a joint return, it is not a joint return. The IRS regulations for relief from joint and several liability on a joint return signed under duress[14] refer to Treasury Regulation § 1.6013-4(d), which reads:

> Return signed under duress. If an individual asserts and establishes that he or she signed a return under duress, the return is not a joint return. The individual who signed such return under duress is not jointly and severally liable for the tax shown on the return or any deficiency in tax with respect to the return. The return is adjusted to reflect only the tax liability of the individual who voluntarily signed the return, and the liability is determined at the applicable rates in section 1(d) for married individuals filing separate returns.

As to whether a return is joint, the burden of proof is upon the petitioner.[15] What constitutes sufficient acts that qualify as duress is discussed hereafter in this article. The cases dealing with duress are fact intensive and look to subjective criteria for the state of mind of the subject of the duress. More often than

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11 The last sentence of I.R.C. §6015(c)(3)(C)(2004) provides "This subparagraph shall not apply where the individual with actual knowledge establishes that such individual signed the return under duress."

12 256 B.R. 814 (Bankr. M.D. Fla. 2000).

13 The Internal Revenue Service, in its publication *Innocent Spouse Relief (and Separation of Liability and Equitable Relief)*, *supra* note 7, instructs:

> DOMESTIC ABUSE EXCEPTION. Even if you had actual knowledge, you may still qualify for relief if you establish that:
> - You were the victim of domestic abuse before signing the return, and
> - Because of that abuse, you did not challenge the treatment of any items on the return because you were afraid your spouse (or former spouse) would retaliate against you.
>
> If you establish that you signed your joint return under duress, then it is not a joint return, and you are not liable for any tax shown on that return or any tax deficiency for that return. However, you may be required to file a separate return for that year.

14 Treas. Reg. §#1.6015-1(b) (2004).

15 *Hughes v. Comm'r*, 26 T.C. 23 (1956).

not physical violence or the threat of physical violence is involved.

Definition of Duress

Duress is not defined in the Internal Revenue Code. Thus, attorneys must look to case law for guidance. The law concerning duress pre-dates the current innocent spouse provisions. On at least two occasions the Tax Court has applied case law analyzing former I.R.C. § 6013(e) to cases under the present innocent spouse provisions, I.R.C. § 6015.[16]

The federal courts reject applying state law rules for duress since a uniform set of standards should be utilized.[17] In analyzing the rules of duress the courts have likened the signing of a joint return under duress to that of signing a contract under duress, and have adopted[18] the following definition:

> Under the modern doctrine there is no standard of courage or firmness with which the victim of duress must comply at the risk of being without remedy; the question is merely whether the pressure applied did in fact so far affect the individual concerned as to deprive him of contractual volition; if it did there is duress, if it did not there is none.[19]

In its opinion in *Furnish v. Commissioner*, the Ninth Circuit stated that "duress may exist not only when a gun is held to one's head while a signature is being subscribed to a document. A long continued course of mental intimidation can be equally as effective, and perhaps more so, in constituting duress."[20]

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16 *Cheshire v. Comm'r*, 115 T.C. No. 15 (2002); *Charlton v. Comm'r*, 114 T.C. No. 22 (2000).

17 See *Stanley (Hazel) v. Commissioner,* 45 T.C. 555 (1966), *where the court stated:*

> We do not believe that Congress intended the meaning of the term "joint return" as used in section 6013, to vary from State to State according to the peculiarities of local rules about duress. Such local rules tends to involve artificial tests as to whether certain kinds of pressure are insufficient as a matter of law to result in duress, or whether the pressure applied need be so great as to overcome the will of a "reasonable man" or a "person of ordinary firmness."

18 *Furnish v. Comm'r*, 262 F.2d 727 (9th Cir. 1958).

19 *Id.* at 733.

20 *Furnish*, 262 F.2d at 733.

Thus, the standard, as developed, involves two critical elements: first, whether the taxpayer was unable to resist demands to sign the return; and second, whether the taxpayer would not have signed the return except for the constraint applied to the taxpayer's will.[21]

The inquiry is wholly subjective. The focus is on the mind of the individual at the relevant time in question, "rather than [on] the means by which the given state of mind was induced."[22] Cases on this issue are decided upon the peculiar factual situations involved.[23]

Finding of Duress

In *Hickey*[24] the Tax Court held that signing of a joint return by the wife was not her voluntary act and relieved her of any deficiency. There, the husband was severely ill from chronic congestive heart failure. The wife was under doctor's orders to comply with her husband's wishes and that she was not to excite or argue with him.[25] When the husband told her to sign the return she did so.[26]

While Hickey involved coercive forces external to the marriage *Frederick v. Commissioner* centered on coercion within the marriage. The wife's testimony was to the effect that she and her husband were married in 1930 and divorced in 1950; that they had marital difficulties; that six or more times during their married life the husband had knocked her down; that she had caused the husband's arrest on three occasions for assault; that at the time she signed the 1948 return her husband handed it to her in blank; and that when she protested signing it in that state because she was unacquainted with his business affairs he put his hands around her throat and "told me if I knowed when I was

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21 *Brown*, 51 T.C. 116 (1968).

22 *Stanley (Hazel) v. Comm'r*, 45 T.C. at 561.

23 *Stanley (Diane) v. Comm'r*, 81 T.C. No. 35 (1983).

24 *Hickey v. Comm'r*, T.C. Memo 1955-149.

25 The court noted that the wife, as petitioner "is an elderly woman, under a doctor's care, and could not attend the hearing." Could that "rachmones" factor (a cry for pity) have influenced the court?

26 The court observed that the facts were distinguishable from those present in *Aylesworth v. Commissioner*, 24 T.C. 134 (1955) discussed further in this article in the text at note 41.

well off, I would sign." Because of fear of bodily injury she then signed the return. The court found, on the facts, that the wife in *Frederick*[27] signed the return under duress and that the return was therefore not a joint return.

Brown v. Commissioner[28] entailed similar physical duress. After the returns were prepared, the husband gave them to the petitioner solely for the purpose of signing them. In each instance she requested an opportunity to look at the returns and inquired how the husband knew they were correct. He assured her that "the C.P.A. fixed them" and refused to allow her to read or study them. If the petitioner asked any questions about the return, the husband became enraged and demanded, "you sign it or else." He often hit petitioner, and as a consequence, she and the children suffered more. Because of the husband's size and his violent temper, the petitioner was on occasion put in fear of her life. She reluctantly signed the Federal income tax returns for each of the years 1956 through 1959 at the direction of her husband whose threats and physical abuse rendered her incapable of resisting his demands.[29] The court held that the petitioner wife's signature was procured by the husband through duress and "not the result of her voluntary act."[30]

The court found duress of a different variety in *Stanley (Diane)*.[31] It involved the wife's surrender to her husband of her W-2 so that he could file a joint return, albeit without her signature. He then signed her name without her authorization.[32] The husband, George, told the petitioner that if she, Diane, wanted to stay with her children she would have to give him her W-2 forms covering her wages. On one occasion he forced her into their car, drove at a speed in excess of 100 miles per hour and threatened to push her out of the car with his feet. When the husband asked the wife for her W-2 forms, she believed that she would have to surrender them if she wanted to stay with her chil-

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27 *Frederick v. Comm'r*, T.C. Memo 1957-225.

28 51 T.C. 116 (1968).

29 The court notes that the element missing in the proof in *Stanley (Hazel),* 45 T.C. 555 (1996), discussed further in this article in the text at note 46 "that she was reluctant to sign," was present in this case.

30 *Id.* at 121.

31 *Stanley (Diane) v. Comm'r,* 81 T.C. No. 35 (1983).

32 See discussion further in this article in the text at notes 71-80 of situations where returns are filed without the other spouse's signature.

dren. So, against her will, she relinquished her W-2 forms to her husband.

In *Stanley (Diane)*, the court observed that:

> While there is evidence that petitioner feared "physical bodily harm from [her] husband," which was the basis of the finding of duress in Brown v. Commissioner,[33] we recognize that the special bond between a mother and her children can be even more important to a mother than her physical safety. We believe petitioner's testimony that the threat of separation from her children induced her, against her will, to do what George told her to do and we find on these facts that this constituted duress. Under these circumstances we find neither petitioner's actions nor her inaction establish an intent to file jointly with George.

Pirnia v. Commissioner[34] presented a similar case of imminent violence as duress. Dr. Pirnia both physically and emotionally intimidated petitioner. The court remarked that "Dr. Pirnia's unconventional sexual habits contributed to matrimonial disharmony."[35] Here the court found that:

> Petitioner suffered 'a long continued course of mental intimidation' by Dr. Pirnia. He ruled all aspects of petitioner's life. His reign of terror over her was both mental and physical. Forced to obey him, petitioner led an isolated and subjugated life.
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> We believe petitioner signed the 1984 return that Dr. Pirnia presented to her under duress. The first critical element of duress (that the spouse claiming duress must show that she was unable to resist demands from the coercer spouse to sign the return) has been met. We further believe that petitioner has met the second element, namely that she would not have signed the return except for the constraint applied to her will by Dr. Pirnia. The facts herein clearly indicate that petitioner signed the 1984 return only because she was fearful that Dr. Pirnia would carry out his threat to take away their children if she did not sign the return.[36]

The *Pirnia* court concluded there was duress by the husband, Dr. Pirnia, who had a violent temper.

In re Hinckley[37] has an excellent discussion of the role of duress in relieving a spouse from joint liability for a joint return. Among other observations the court said "While proof of specific

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33 *Brown* is discussed *supra* at note 28.

34 T.C.M. (P-H) ¶90.444.

35 The court did not further elucidate.

36 *Id*. at 90-2151.

37 256 B.R. 814 (Bankr. M.D. Fla. 2000).

incidents at the time of the signing of the returns is not required to show duress, in the absence of a stated reason for reluctance, proof of specific incidents becomes increasingly relevant," although it is not the only proof a taxpayer must offer to prove duress.[38] In *Hinckley*, the court found duress notwithstanding the fact that Mr. Hinckley never physically attacked his wife, nor did he threaten to physically harm her.

The court rejected the IRS's arguments in *Hinckley* that the wife did not prove duress because she failed to offer sufficient evidence of specific threats or incidents at or near the moment she signed the returns. Dismissing Mr. Hinckley's rages as shouting and arm waving, the IRS asserted that a continued course of mental intimidation is required for mental intimidation to rise to the level of duress. The court then concluded:

> Unlike the spouse in *Stanley*[39] the Debtor articulated a very specific reason for her reluctance to sign the returns in question - - she thought his theory was very likely incorrect. Additionally, she testified she would not have signed the returns were she not afraid of what her husband would do, either to her, or to himself, if she refused. Thus, the signing of these returns took place at a time when the Debtor was in fear, and was reluctant to participate. She capitulated only to avoid further verbal and mental assaults from a strong willed, well-educated husband. At the time in question, Mr. Hinckley's unpredictability and volatility are reaching a peak that will ultimately end in his entering a nursing home. Under these conditions, the Court concludes, the Debtor's acts were not voluntary and were the product of duress.[40]

Finding No Duress

In a number of cases, courts have concluded that pressure did not rise to the level of coercion sufficient to undermine voluntariness.

The court concluded that the wife's signature to the joint return in *Aylesworth v. Commissioner*[41] was not produced by duress. The court was not convinced that her signature was not voluntary, regardless of her reluctance to sign and regardless of the domestic violence that occurred about the time. The Court

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38 *Id.* at 825.

39 Stanley (Hazel) v. Commissioner, 45 T.C. 555 is discussed further in this article in the text infra at note 46.

40 *Id.* at 828.

41 24 T.C. 134 (T.C. 1955).

was of the opinion that her signature was voluntary "although perhaps distasteful."[42] The returns in issue were for 1948 through 1951. The court wrote:

> The record contains evidence suggesting numerous ugly incidents which occurred between the Aylesworths. In connection with the 1948 return she testified:
> He told me if I did not sign it, that I would be very, very sorry. He told me that he would destroy my father. He told me that he would mutilate my face, and when I told him I would divorce him rather than sign it, he said, "You haven't got a chance. I will go to Bruce Bromley and see — I will go anywhere, to everyone, and your word against Merlin Aylesworth's will never stand." And I think he was probably right.[43] She testified that when she signed the 1949 return she was 'just a wreck' and was still being threatened. She made no similar statement as to the threats made or the state of her mind when she signed the 1950 return, except that, in response to a question, whether the signing of that return was "a free act on (her) part", she replied "It was not."[44]

A similar episode occurred regarding the 1951 return, during which the inebriated husband "was abusive, he tore her clothes, and pulled her hair so severely that some came out. She, on the other hand, countered with a hat pin, and summoned police assistance."[45]

What apparently sunk the wife in *Aylesworth* was the fact that she continued to live with the husband. She never disavowed her signature on any returns within a reasonable time and she filed no separate return of her own.

Notwithstanding the severe treatment by the husband of the wife in *Stanley (Hazel) v. Commissioner*[46] the court could not find that her signing of the joint return was due to duress because she did not prove she would not have signed the returns "except for the constraint applied to her will through her fear" of her husband.[47]

The evidence in *Stanley* showed that during the years Hazel was married she received several beatings. He frequently criticized her and accused her of various inadequacies and

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42 *Id*. at 146.
43 *Id.* at 145.
44 *Id*. at 146.
45 *Id*.
46 45 T.C. 555 (1966).
47 *Id.* at 562.

threatened to kill her, to break her legs and to have her committed to a mental institution. He told her he intended to subjudicate her to his will. Her psychologist concluded that the husband was a psychopathic personality with violent paranoid tendencies and that he feared that the husband under stress might go berserk and possibly kill her and the children. The psychologist told the wife that he would continue to treat her only if she agreed not to argue with her husband or to disobey him, or do anything else that might upset or anger him. When the husband presented the tax returns to her she signed each without question and without examining them.

The court stated that "We are satisfied that if [the wife] had felt any reluctance about signing the returns in question when they were presented to her by [her husband], she might nevertheless have signed them out of fear of the consequences or angering her husband. But petitioner was required to prove such reluctance."[48] She failed to prove the necessary causal relationship between her fear of her husband and her signing of the returns. The court observed:

> Proof that a starving man was ordered at gunpoint to eat a piece of bread would not, standing alone, be satisfactory proof that it had been eaten involuntarily. . . . Not only must fear be produced in order to constitute duress but the fear must be a cause inducing entrance into a transaction, and though not necessarily the sole cause, it must be one without which the transaction would not have occurred.[49]

Another factor, the court said, which indicated that the wife did not sign the return involuntarily, was her failure to raise the issue until shortly before the trial, rather than in her original petition.

The absence of physical violence seemed important to one court assessing the sufficiency of evidence regarding duress. In *Allen v. Commissioner*[50] the wife testified that the husband was short tempered, however he never hit her or in any way physically abused her or the children and never threatened to do so. He did once say to his oldest son that should the son make him mad enough, he might have to kill him. The wife testified that the husband had the type of personality that liked to control

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48 *Id.* at 562.

49 *Id.*

50 T.C. Memo 1986-125.

transactions in which he was involved. The court, in ruling that the wife did not make a sufficient showing of duress, concluded:

> Judged by the standards set forth in the Brown[51] case and cases cited therein, we find no duress to have been established in the instant case. The record is clear that petitioner did not cross her husband but let him direct her activities in most regards. However, there is no showing in this record that Mr. Allen ever physically abused her or threatened her or even insisted that she follow his directions. It was her determination not to question her husband but to do as he asked. Furthermore, it is clear that Mrs. Allen has not shown that she would not have signed the returns except for Mr. Allen's insistence. She actually prepared one of the returns. Her income was reported on the return for each year involved. She filed no separate return. Had she not signed the joint return, she would have been obligated to file a separate return.

Know or Reason to Know

Affected by Domestic Violence

Under innocent spouse rules, relief is afforded a spouse only if he or she, at the time of signing the joint return, did not know and had no reason to know, that there was an understatement of tax.[52] Under the rules for separation of liability, entitlement to relief is not available if the Internal Revenue Service establishes that he or she actually knew of the item giving rise to the understatement.[53]

While not rising to the level of duress, thus disqualifying a return as joint, domestic violence has impacted the elements required for both innocent spouse relief and separate liability.

An IRS regulation explains the abuse exception:[54]

> If the requesting spouse establishes that he or she was the victim of domestic abuse prior to the time the return was signed, and that, as a result of the prior abuse, the requesting spouse did not challenge the treatment of any items on the return for fear of the nonrequesting spouse's retaliation, the limitation on actual knowledge in this paragraph (c) will not apply.[55]

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51 *Brown (Lola) v. Commissioner*, 51 T.C. 116 (1968), cited *supra* at notes 21 and 28.

52 I.R.C. §6015(b)(1)(C), 2004.

53 I.R.C. §6015(c)(3)(C), 2004.

54 Treas. Reg. § 1.6015-3(c)(2)(v) (2004).

55 Treas. Reg. § 1.6015-3(c)(2)(i) (2004) provides, in part:

Courts have applied cases analyzing the former innocent spouse code to the present provisions.[56] Repeated physical abuse by the husband of the wife and a threat to kill her was sufficient in *Brown v. Commissioner*[57] to free the wife of the not knowing or having no reason to know requirement of the innocent spouse code. The court found that Mr. Brown often forced his wife to sign important documents, including tax returns, without allowing her the opportunity to review such documents. She always complied with his demands, for fear that she would be beaten if she refused.

While violence may satisfy the exception, extreme deference will not. The Eleventh Circuit Court of Appeals has held that an alleged innocent spouse's role as a homemaker and complete deference to the other spouse's judgment concerning the couple's finances, standing alone, are insufficient to establish that a spouse had no "reason to know."[58]

However, in *Kistner* the record indicates a history of physical abuse between Kistner and Weasel [Mrs. Kistner's former husband] over many years. Although Mrs. Kistner was fearful of angering Mr. Weasel, she did not claim that she was coerced into signing the return or that she did so under duress.[59]

The court held that "a reasonable prudent taxpayer under the Kistner circumstances: living an affluent life for many years, fearful of physical violence, and uninvolved in the financial affairs of the business, at the time of signing the return could not be expected to know that the tax liability stated was erroneous, or that further investigation was necessary."

The wife's (petitioner's) limited inquiry of the husband's source of income to support the party's lifestyle was excused in

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Actual knowledge — (i) In general. If, under section 6015(c)(3)(C), the Secretary demonstrates that, at the time the return was signed, the requesting spouse had actual knowledge of an erroneous item that is allocable to the nonrequesting spouse, the election to allocate the deficiency attributable to that item is invalid, and the requesting spouse remains liable for the portion of the deficiency attributable to that item.

56 *See supra* text at note 16.

57 T.C. Memo 1988-297.

58 *Kistner v. Comm'r*, 18 F.3d 1521 (11th Cir. 1994).

59 *Id*. at 1526.

Makalintal v. Commissioner.[60] Citing *Kistner*[61] and noting that "physical or mental abuse may also be a factor in considering a claim for innocent spouse relief," the court held:

> [I]n light of the frequent physical abuse by Mr. Makalintal and Mr. Makalintal's general refusal to discuss his business and financial affairs with petitioner, we believe that petitioner's inquiry was reasonable and sufficient to satisfy her duty of inquiry with regard to the taxable income reported on Mr. Makalintal's and her joint Federal Income tax returns.[62]

The facts revealed that throughout their marriage, petitioner lived in fear of Mr. Makalintal, that he repeatedly physically abused her and that on numerous occasions he threatened to kill her with a gun. Mr. Makalintal also physically abused his children.

Abuse was applied as a factor as to why the wife did not know nor have reason to know in *Aude v. Commissioner.*[63] Citing *Kistner*,[64] *Makalintal*[65] and *Brown (Estate of)*[66] the court ruled that:

> While petitioner was not coerced or physically threatened into signing the returns, she was intimidated by Mr. Aude because she feared being physically abused if she refused. Petitioner testified that she didn't have "any right" to question Mr. Aude, and if she did, she feared she "would be physically attacked." From this, she learned that she had to skirt issues with Mr. Aude, or face his wrath. Petitioner testified that if she "had not felt intimidated by [Mr. Aude], [she] might have had the option of going through" the returns. We find this to be a factor explaining why petitioner did not review or inquire about the returns.[67]

The *Aude* court distinguished the Ninth Circuit's holding in *Wiksell v. Commissioner*[68] which rejected the taxpayer's argument that duress clouded her perception, thus concluding that she had a reason to know of the understatement. In reaching its decision in *Wiksell* the court noted that the taxpayer had asked her husband "why there was no income on the returns reflecting

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60 T.C.M. (RIA) 96,009.
61 Discussed *supra* in text at note 58.
62 *Id.* at 54-96.
63 T.C.M. (RIA) 97,478.
64 Discussed *supra* in text at note 58.
65 Discussed *supra* in text at note 60.
66 Discussed *supra* in text at note 57.
67 *Id.* at 3192-97.
68 90 F.3d 1459 (9th Cir. 1996).

the money that [they] had been living off."[69] She stated that he gave her a bizarre explanation that did not make sense to her. Prior to signing the return, the taxpayer had learned of a restraining order preventing her husband from soliciting investments, and she read an article that purportedly explained the sham in which her husband was involved. At the very least, the court stated that the taxpayer "knew something was awry, but refused to go further."[70] In light of extremely small sums of income reported, the evidence of excessive spending, and the large sums of money on hand, the court held the evidence of an understatement was overwhelming and the taxpayer could not hide from it. In light of this overwhelming evidence, any abuse did not provide an adequate explanation for her behavior.

In cases such as *Wiksell*, the abuse was not all pervasive, although the indicia of tax understatment was. Abuse will not assist a spouse that does not cloud a perception of obvious tax cheating.

Joint Return Not Signed By Spouse

Generally, a joint return must be signed by both spouses.[71] However, where an income tax return is intended by both spouses to be a joint return, the absence of the signature of one spouse will not prevent their intention from being realized. The issue of intent is one of fact, with the burden of proof resting upon petitioner.[72] The intent to file jointly may be inferred from the acquiescence of the nonsigning spouse.[73]

Spousal intent to file a joint return may be "tacit" as opposed to express. The tacit consent rule is applicable in circumstances where the existence of certain factors indicate the spouse

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69 *Id.* at 1462.

70 *Id.* at 1463.

71 Treas. Reg. § 1.6013-1(a)(2) (2004).

72 The Tax Court noted in *Heim v. Commissioner*, 27 T.C. 270 (1956) that "No great help can be obtained from prior decisions in deciding a difficult case like this, since each such case must be decided upon its own facts and differences in the facts distinguish the cases."

73 *Crew v. Commissioner*, T.C. Memo 1982-535 (Concluding that the fact that the couple had a history of filing joint returns and that petitioner relied entirely upon her husband to prepare and file the returns is evidence that returns filed as joint returns were intended as such).

has implicitly provided consent to the filing of a joint return. The spouse's conduct rather than the signature establishes the necessary intent. Relevant factors include a failure to object, a lack of a valid reason to refuse to file jointly, the delivery of tax data to the other spouse, and an apparent advantage in filing a joint return.[74]

Courts have held that returns signed solely by the husband and the tax preparer,[75] by the husband signing both his and wife's name,[76] and by the husband alone[77] were all joint returns.

In *Malkin v. United States*[78] the federal district court considered four factors when assessing whether the intent to file a joint return exists: (1) whether the couple has a history of filing joint returns; (2) whether the wife relied on the husband to handle financial matters; (3) whether the wife's income was reported on the joint return; and (4) whether the wife filed a separate return.

However, abuse of a spouse reflects on intent. In *Snyder v. Commissioner*[79] the husband, Alvin, who was involved with criminal and gambling elements, made threats against his wife, Evelyn, and unreasonably harassed her. Alvin threatened to leave Evelyn penniless and he entered the marital home late at night and harassed her by, among other things, making a great deal of noise, setting off alarms, and turning the furnace up above comfortable levels. She refused to sign a joint tax return for fear of being responsible for her husband's potential tax liability. She was concerned that since she was proceeding with the divorce, to which her husband objected, he would not assume full responsibility for any joint tax liability. The return filed by the husband was signed only by him. The court held that no joint return was filed.

Duress in *Stanley (Diane)*[80] precluded a finding that a joint return was intended. The wife gave the husband her W-2 be-

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74 *In re Lois Rutigliano*, 77 A.F.T.R. 2d 96-525 (Bankr. E.D. Pa. 1995).

75 *Harnesworth v. United States*, 936 F.2d 583 (10th Cir. 1991).

76 *Gorham v. United States,* 61 A.F.T.R. 2d 88-800 (E.D. Pa. 1988); *Federbush v. Comm'r*, 34 T.C. 740 (1960).

77 *Kann v. Comm'r*, 18 T.C. 1032 (1952).

78 3 F.Supp.2d 493 (D.N.J. 1998).

79 T.C.M. 1983-75.

80 81 T.C. No. 35, discussed *supra* in text at note 31.

cause he threatened separation of her from her children. She did not sign the joint return.

Thus, the same measure of abuse that defeats liability when both spouses in fact sign the joint return is applicable to overcome the liability where the spouse did not sign but the Internal Revenue Service seeks to construe an intent of filing a joint return.

Conclusion

Allegations of duress and spousal abuse can be a valuable defense against the liability of a joint tax return. However, the duress must be directly connected with the signing of, or, if not signed, the refusal to sign, a joint return. This duress then can free a taxpayer of knowing or having a reason to know of a deficiency. The more allegations, the greater number of incidents, the worse the parade of horribles the better - but they must be related to the signing or refusal to sign. If duress or spousal abuse exists it must be brought up early and often, and the joint return must be disavowed as soon as possible.