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Section 6013(e): Congressional Response to Joint and Several Liabiliy and the Innocent Spouse

SECTION 6013(e): CONGRESSIONAL RESPONSE TO JOINT AND SEVERAL LIABILITY AND THE INNOCENT SPOUSE

INTRODUCTION

A husband and wife are granted an annual option of either filing separate tax returns or a joint tax return.[1] Since 1948, the tax savings obtained by filing joint returns[2] have realistically foreclosed the desirability of married couples filing separate returns. It is questionable, however, whether spouses who file joint returns fully comprehend the significance of this election. While such an election often produces a tax savings, it also imposes joint and several liability for any deficiency in the return.[3]

The imposition of joint and several liability is inconsequential to a large majority of couples who annually file joint tax returns. Such liability, however, is crucial to the wife[4] whose husband omits reportable income from their joint return and thereafter makes his whereabouts unknown.[5] Subsequently, the wife receives a notice[6] from the Internal Revenue Service that deficiencies have been assessed[7] against her for the tax due on the omitted funds. In similar situations the Internal Revenue Service has been successful in collecting such deficiencies from the wife, even when she is innocent of any wrongdoing and has no

1. INT. REV. CODE of 1954, § 6013; Treas. Reg. § 1.6016-1(a)(1) (1954).

2. The income tax due on a joint return filed after 1948 is "twice the tax which would be imposed if the taxable income were cut in half." INT. REV. CODE of 1954, § 2(a). This provision enables spouses to split their income and receive tax savings because of the progressive structure of the income tax rates. *See* notes 24-31 *infra* and accompanying text.

3. "[I]f 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." INT. REV. CODE of 1954, § 6013(d)(3). Such liability is imposed upon spouses for any "deficiencies" in the return. A deficiency is defined as the difference between the amount of liability as computed by the taxpayers on their return and the amount of tax liability as computed by the Internal Revenue Service. INT. REV. CODE of 1954 § 6211(a). Such liability may include not only the resulting tax and interest due on the omitted funds but also the various penalties imposed for negligent or fraudulent filing. INT. REV. CODE of 1954, §§ 6651, 6653. *See* 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 55.01 (1969).

4. A husband could also be held jointly and severally liable if his wife omitted reportable income from their joint return.

5. It is not uncommon for a husband to disappear under such circumstances and thereby prevent the Internal Revenue Service from collecting the tax deficiency from him. *See* Huelsman v. Commissioner, 416 F.2d 477 (6th Cir. 1969); H.R. REP. No. 1734, 91st Cong., 2d Sess. 1 (1970); S. REP. No. 1537, 91st Cong., 2d Sess. 1 (1970).

6. A notice of deficiency is sent by either certified or registered mail to the last known address of each spouse. INT. REV. CODE of 1954, § 6212.

7. For the method of assessment see INT. REV. CODE of 1954, §§ 6202-04.

knowledge of nor benefit from the omitted funds.[8] A wife under such circumstances will hereinafter be referred to as an "innocent spouse."

While the concept of joint and several liability has been consistently applied in situations involving an innocent spouse,[9] recent congressional legislation[10] has attempted to ameliorate this inequitable area of the tax law. The purpose of this note is to examine this legislation and to consider its potential value to the innocent spouse.

Historical Summary of Joint and Several Liability

A husband and wife were first permitted to file a joint income tax return under the provisions of the Revenue Act of 1918.[11] The first attempt to impose joint and several liability on these returns was made in a 1923 Revenue Ruling;[12] however, this concept did not receive judicial acceptance until 1933 in *Frida Hellman Cole.*[13] The Board of Tax Appeals in *Cole* sustained joint and several liability on the grounds that: 1) it was impossible to compute the separate liabilities of each spouse when a joint return is filed;[14] and 2) apportionment of tax liability according to the separate incomes of each spouse would be tantamount to allowing the filing of separate returns after a joint return had been filed.[15] The Court of Appeals for the Ninth Circuit reversed the Board of Tax Appeals in *Cole v. Commissioner,*[16] ruling that there

8. Horn v. Commissioner, 387 F.2d 621 (5th Cir. 1967); Moore v. United States, 360 F.2d 353 (4th Cir. 1966); Spanos v. United States, 323 F.2d 108 (4th Cir. 1963); Cirillo v. Commissioner, 314 F.2d 478 (3d Cir. 1963); Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958).

9. *See* cases cited note 8 *supra.*

10. Int. Rev. Code of 1954, § 6013(e). *See* notes 68-111 *infra* and accompanying text.

11. Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1074. The Revenue Act of 1921, ch. 18, § 223(b)(2), 42 Stat. 250, added the provision whereby the amount of tax due on a joint return was to be computed on the aggregate income so reported.

12. I.T. 1575, II-1 Cum. Bull. 144 (1923) held that "a single joint return is one return of a taxable unit and not two returns on one sheet of paper. Accordingly . . . they are individually liable for the full amount of tax. . . ."

13. 29 B.T.A. 602 (1933).

14. This rationale is based on the assumption that the administrative convenience of the Internal Revenue Service requires the imposition of joint and several liability when a joint return is filed since a joint return does not show the respective incomes and deductions of a husband and wife, and the tax is computed on the aggregate income reported. Revenue Act of 1921, ch. 18, § 223(b)(2), 42 Stat. 250.

15. It has previously been held that separate returns cannot be filed once a joint return has been submitted. Grant v. Rose, 24 F.2d 115 (N.D. Ga. 1928), *aff'd,* 39 F.2d 340 (5th Cir. 1930), *cert. dismissed,* 283 U.S. 867 (1931).

16. 81 F.2d 485 (9th Cir. 1935). Subsequent to this reversal, the Board of Tax Appeals abandoned the imposition of joint and several liability upon joint returns, holding that the liability on such returns was proportionate to the individual income of each spouse.

For a detailed case history of joint and several returns following *Cole* until 1938

was no provision in the Revenue Acts on which to base joint and several liability.[17] In addition, the court rejected the Commissioner's argument that administrative convenience justified the imposition of such liability by holding that the liability on a joint return is proportionate to the income of each spouse.[18]

The question of whether joint and several liability was to be imposed on joint returns was not settled until congressional action incorporated such liability provisions into the Revenue Act of 1938.[19] The only statement made by the House Committee on Ways and Means concerning this statutory enactment was that such action was "[n]ecessary for administrative reasons, [and] that any doubt as to the existence of such liability should be put at rest, if the privilege of filing such joint returns is continued."[20] Apparently the Committee reasoned that such liability was necessary to facilitate collections and, in addition, was the price to be paid for the tax benefits married persons received through the filing of a joint return. It is submitted that neither of these reasons provided a satisfactory explanation nor justification for imposing joint and several liability on joint returns prior to 1948.[21] The administrative convenience doctrine lacks validity when one considers that the Internal Revenue Service operated without such liability for a period of three years subsequent to *Cole*. Furthermore, the separation of the individual liabilities of spouses is also feasible as exemplified by the tax laws of of England.[22] The Committee's rationalization that the filing of a joint return is a privilege, and therefore the imposition of joint and several liability is justified because of the tax benefits granted, is also question-

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see Ritz, *The Married Woman and the Federal Income Tax,* 14 TAX L. REV. 437, 445 n.62 (1959).

17. 81 F.2d 485. Such a provision did not appear until 1938. Revenue Act of 1938, ch. 289, § 51(b), 52 Stat. 447.

18. 81 F.2d at 488. The Court reasoned that

> [m]atters urged to defeat a liberal view of the statute, for example, that "great additional labor would be required," etc., are (in varying degree) potent against the whole theory of revision, or against any comprehensive "system of corrective justice."

Id.

19. Revenue Act of 1938, ch. 289, § 51(b), 52 Stat. 447. These provisions were retained by the Revenue Act of 1948, ch. 168, §§ 301, 303, 62 Stat. 110, which are the predecessors of INT. REV. CODE of 1954, §§ 2(a), 6013(d)(3).

20. H.R. REP. No. 1860, 75th Cong., 3d Sess. 30 (1938).

21. For arguments that imposition of such liability was justified see Erwin, *Federal Taxes and the Family,* 20 S. CAL. L. REV. 243, 252 (1947); Comment, *Joint Income Tax Returns Under the Revenue Act of 1948,* 36 CALIF. L. REV. 289, 300 (1948).

22. Under the English system of taxation, either spouse may petition to have his separate liability apportioned according to his relative income. Finance Act of 1961, 14(3); Finance Act of 1957, § 14(2); I.T.A. 1952, § 358. *See also* 1965 B.T.R. 298; 1960 B.T.R. 285, 1955 B.T.R. 134.

able. The tax savings available by filing a joint return prior to 1948 were negligible and, furthermore, were limited to only a small percentage of the persons eligible to file joint returns. The only situation in which spouses could obtain a tax benefit at this time was when one spouse had considerable capital gains which he could offset against capital losses of the other spouse.[23] Spouses who were not in such a position obtained no benefit by filing a joint return and therefore should not have been jointly and severally liable prior to 1948.

The Revenue Act of 1948[24] introduced the "income-splitting" formula which resulted in substantial tax savings to spouses who elected to file joint returns. Before income-splitting was adopted, there existed a vast difference in the amount of tax owed by a husband and wife, depending upon whether they resided in a community property state[25] or one adhering to the common law.[26] This inequality existed because the Supreme Court in *Poe v. Seaborn*[27] held that for income tax purposes, a husband and wife living in a community property state were entitled to file separate returns, each treating one-half of their community income as his or her respective income.[28] This treatment allowed a reduction of their income tax because of the progressive structure of the tax rates. Persons residing in common law states did not enjoy this same advantage, and therefore, many states began adopting community property systems.[29] Income splitting was adopted by the Revenue Act of 1948[30] to remedy this situation. Since 1948, spouses in all states are able to obtain the income tax benefits of splitting their income by filing a joint return.[31]

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23. *See* 1 J. RABBIN & M. JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 5.01 (1970).

24. Revenue Act of 1948, ch. 168, §§ 301, 303, 62 Stat. 110.

25. Ownership of income is divided between spouses in community property states. United States v. Malcolm, 282 U.S. 792 (1931); 2 AMERICAN LAW OF PROPERTY § 7.20 (A.J. Casner ed. 1952).

26. For a detailed discussion of the treatment of joint income tax returns in community property and common law states see 3 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 19.01 (1965).

27. 282 U.S. 101 (1930).

28. This principle of taxation arises not out of any specific statutory language but rests on the determination by the United States Supreme Court that the statutory provision imposing a tax on the net income "of every individual" denotes ownership and the incidence of tax follows the ownership of income. 3 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 19.01, at 2-4 (1969).

29. H.R. REP. No. 1274, 80th Cong., 2d Sess. 21 (1948); S. REP. No. 1012, 80th Cong., 2d Sess. 22 (1948).

30. Revenue Act of 1948, ch. 168, §§ 301, 303, 62 Stat. 110.

31. The income tax due on a joint return filed after 1948 is ". . . twice the tax which would be imposed if the taxable income were cut in half." INT. REV. CODE of 1954, § 2(a), formerly Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110.

The savings produced by "income splitting" have been reduced after 1970 by the 1969 Tax Reform Act because of the disparity in tax rates between single and married

Although it could be argued that joint and several liability was not the price paid for the tax benefits obtained by filing a joint return prior to 1948,[32] such liability is presently justified because of the additional tax savings obtained by the majority of spouses who split[33] their incomes. Such savings benefit both spouses because both are a part of the same economic unit.[34] An innocent spouse, however, receives no tax benefit on the omitted income by filing a joint return and, therefore, should not be jointly and severally liable. Such a spouse receives only the tax liability for the omitted funds which she never possessed.

JUDICIAL EXCEPTIONS TO THE IMPOSITION OF JOINT AND SEVERAL LIABILITY

Judicial application of the concept of joint and several liability subsequent to its statutory enactment[35] was, at first, consistent in holding spouses jointly and severally liable for any deficiencies on joint returns.[36] The congressional mandate of section 6013(d)(3)[37] was strictly interpreted to include even the innocent spouse who had no knowledge of, nor benefit from, the unreported funds on which deficiencies were assessed.[38] Such automatic imposition of liability on innocent spouses created not only harsh and inequitable case law,[39] but also prompted writers to propose the complete abolition of all joint and several liability.[40]

The judicial response[41] to the plight of the innocent spouse was the

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persons. INT. REV. CODE of 1954, § 1(a), as amended by the Tax Reform Act of 1969, § 803(a). The statute uses existing joint return rates but has reduced the rates for other individuals. However, some savings are still obtained by filing a joint return. *See* 1 J. RABBIN & M. JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 5.01 (1970).

32. *See* notes 21-23 *supra* and accompanying text.

33. *See* notes 24-31 *supra* and accompanying text.

34. For an excellent discussion that the comparative benefits accorded each spouse when a joint return is filed does not justify the imposition of joint and several liability, see Note, *The Joint Return and the Innocent Wife,* 29 U. PITT. L. REV. 351, 356 (1967).

35. Revenue Act of 1938, ch. 289, § 51(b), 52 Stat. 447.

36. *See generally* Horn v. Commissioner, 387 F.2d 621 (5th Cir. 1967); Moore v. United States, 360 F.2d 353 (4th Cir. 1966); Spanos v. United States, 323 F.2d 108 (4th Cir. 1963); Cirillo v. Commissioner, 314 F.2d 478 (3d Cir. 1963); Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958); Howell v. Commissioner, 175 F.2d 240 (6th Cir. 1949).

37. INT. REV. CODE of 1954, § 6013(d)(3).

38. *See* Myra S. Howell, 10 T.C. 859 (1948); Lucille Wenker, 25 CCH Tax Ct. Mem. 1237 (1966).

39. *See* Estate of Merlin H. Aylesworth, 24 T.C. 134 (1955).

40. Ritz, *The Married Woman and the Federal Income Tax,* 14 TAX L. REV. 437, 448 (1959); Note, *The Joint Return and the Innocent Wife,* 29 U. PITT. L. REV. 351, 364 (1967).

41. Although there has never been a widespread judicial movement to overturn joint and several liability as applied to the innocent spouse, particularly in the federal courts, the judicially created exceptions of the defenses of fraud and duress have

allowance of an exception to joint and several liability when a spouse's signature on a joint return was procured by fraud or duress.[42] The defenses of fraud and duress have not, however, provided adequate protection for the innocent spouse. The courts have had difficulty in developing satisfactory standards in applying these defenses and consequently the results have been unpredictable. One court has indicated that despite the failure of the revenue statutes and regulations to define duress, a spouse may be relieved of liability under circumstances where she was unwilling to sign a joint return but was forced to do so.[43] Another court has stated, however, that a long course of mental intimidation of a wife by her husband resulting in her signing a joint return is necessary to show duress.[44] These distinctions become meaningless when applied to factual situations. It is submitted that the success or failure of the defense of duress is predicated only upon a subjective determination of the voluntariness of a spouse's signature. *Merlin H. Aylesworth*[45] is illustrative of the inequity involved in such standardless determinations. The Tax Court found in *Aylesworth* that a wife's signature on a joint return was voluntary, despite her testimony that her husband had threatened to "destroy her father" and "mutilate her face" if she did not sign the return.[46]

The standards used in ascertaining the validity of a defense of fraud also vary according to the court making the determination. One court has suggested that the *Restatement of Contracts* definition of fraud should be used in determining whether a spouse was fraudulently induced to sign a joint return,[47] while another court has stated that local law

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provided some relief to the innocent spouse. A few courts have expressed dissatisfaction with this type of liability. *See* Huelsman v. Commissioner, 416 F.2d 477 (6th Cir. 1969); Scudder v. Commissioner, 405 F.2d 222 (6th Cir. 1968); Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958); Betty Bell Wissing, 54 T.C. 1428 (1970). *See also* Sharewell v. Commissioner, 419 F.2d 1057 (6th Cir. 1969).

42. Estate of Merlin H. Aylesworth, 24 T.C. 134 (1955); Ethel S. Hickey, 24 P-H Tax Ct. Mem. 457 (1955). Mistake may also be a defense. Payne v. United States, 247 F.2d 481 (8th Cir. 1957).

The bases for allowing the defenses of fraud and duress are that the necessary intent to file a joint return is not present when the signature is coerced, and, in addition, a coerced signature is equated to an involuntary act which is treated as never having occurred. Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958); Hazel Stanley, 45 T.C. 555 (1966); Estate of Merlin H. Aylesworth, 24 T.C. 134 (1955).

43. Hazel Stanley, 45 T.C. 555 (1966).

44. Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958).

45. 24 T.C. 134 (1955).

46. *Id.* at 145.

47. The court in *Betty Bell Wissing,* 54 T.C. 1428 (1970) stated that

> [c]ourts in resolving this issue [voluntariness] have naturally drawn upon the analysis and terminology developed under state law to deal with analogous problems. But the issue is one of Federal Law, . . . and uniform Federal Standards must control.

should be applied.[48]

Although the judicial exceptions of fraud and duress partially alleviated the harshness of imposing joint and several liability on an innocent spouse, the inability of the courts to develop uniform federal standards in applying these exceptions created confusion. Some courts appear to have refuted joint and several liability in these circumstances merely because they were sympathetic for the wife. It should be apparent from a brief survey of the case law in this area that the judicial attempts to eliminate the imposition of liability upon the innocent spouse were inadequate and inconsistent in their application, and therefore, congressional action was needed for her protection.

THE HUELSMAN LITIGATION

The movement to exempt the innocent spouse from the joint and several liability provisions of section 6013(d)(3)[49] gained momentum from the Sixth Circuit's decision in *Huelsman v. Commissioner.*[50] In *Huelsman,* the court disregarded what for thirty years had been held to be the congressional mandate of joint and several liability and created a new approach to the application of such liability in cases involving an innocent spouse. The court's liberal interpretation of section 6013(d)(3) reflected judicial dissatisfaction concerning the inequities which were present in this area of tax law,[51] and it is conceivable that the *Huelsman* litigation provided the impetus needed to prompt Congress to remedy the plight of the innocent spouse.

In *Huelsman,* the petitioner filed joint income tax returns for the years 1963-65 with her husband which failed to report as income funds that he had embezzled from business associates. Petitioner's husband was convicted in 1965 for obtaining money under false pretenses and the Commissioner assessed deficiencies in the amount of $25,187.67 against the petitioner for the tax due on the unreported funds.[52] The petitioner sought review in the Tax Court of the Commissioner's deficiencies on

Id. at 1431. The Tax Court then applied the *Restatement of Contracts* §§ 475, 476 (1932) definitions of fraud in the inducement and fraud in the execution to determine if a spouse had been fraudulently induced to sign a joint return.

48. *See* Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958). *See generally* Nadine I. Davenport, 48 T.C. 921 (1967); Marie A. Dolan, 44 T.C. 420 (1965).

49. INT. REV. CODE of 1954, § 6013(d)(3).

50. 416 F.2d 477 (6th Cir. 1969).

51. *Id.* at 480.

52. The activities of petitioner's husband in obtaining these funds led to his conviction in November, 1965 for obtaining more than $100,000 under false pretenses. The Sixth Circuit noted that his whereabouts at the time of the Commissioner's assessment of deficiencies was apparently unknown. Shortly after her husband's conviction, the petitioner filed suit for divorce which was granted in February, 1967.

the ground that the placing of her signature on the joint returns was not a voluntary act because of the fraud of her husband.[53] The Tax Court found that the petitioner did not participate in the embezzlement and had no knowledge that her husband failed to report the illegal funds as income. Furthermore, the court found that although she obtained no benefit from the funds, she had signed the returns voluntarily.[54] The Tax Court, however, by virtue of section 6013(d)(3), held the petitioner liable for the tax due on the unreported funds. The court stated:

> We have no equitable power to grant relief to petitioner however distasteful the result herein may appear. . . . All we can do is emphasize what we said in Scudder: 'Although we have much sympathy for petitioner's unhappy situation and we are appalled at the harshness of this result in the instant case, the inflexible statute leaves no room for amelioration. It would seem that only remedial legislation can soften the impact of the rule of strict individual liability for income taxes on the married women who are unknowingly subjected to its provisions by filing joint returns.'[55]

On petition to review the decision of the Tax Court, the Sixth Circuit remanded the case for further development of all the conditions surrounding the petitioner's signing of the joint returns.[56] The significance of the Sixth Circuit's opinion is its indication that prior case law concerning fraud as a defense[57] should be extended to include one

53. There has been much confusion in the courts as to what constitutes a defense of fraud. *See* note 42 *supra* and accompanying text. At least one court had previously held that fraud is not present where one spouse merely fails to inform the other that funds have been illegally omitted from their joint return. Scudder v. Commissioner, 48 T.C. 36 (1967), *rev'd on other grounds,* 405 F.2d 222 (6th Cir. 1968), *aff'd,* 410 F.2d 686 (6th Cir. 1969). The petitioner in *Huelsman,* however, apparently argued that her husband's nondisclosure of the omitted funds should have been sufficient for a finding that her signature was procured by fraud and therefore was involuntary.

54. The Tax Court presumably reasoned that because the returns were voluntarily signed the defense of fraud was not applicable.

55. Betty Bell Huelsman, 37 P-H TAX CT. MEM. 486, 487 (1968) (citation omitted).

56. Huelsman v. Commissioner, 416 F.2d 477, 481 (6th Cir. 1969). Although the Tax Court had held that the petitioner signed the joint returns voluntarily, the Sixth Circuit determined that all the evidence surrounding the signing of the joint returns was not fully developed before the Tax Court. *Id.* at 479. The dissenting opinion, however, stated:

> [W]e are bound by that [the Tax Court's] finding of fact unless it is clearly erroneous. Allen Industries, Inc. v. Commissioner of Internal Revenue, 414 F.2d 983 (Sixth Cir. Aug. 29, 1969). We should not hold that it is [erroneous], because petitioner has admitted both by stipulation and by sworn testimony that her signature was voluntary.

Id. at 482.

57. *See* note 53 *supra* and accompanying text.

spouse's nondisclosure to the other that income had been omitted from the joint return.

> [P]etitioner was fraudulently induced to sign a return which she obviously would not have signed had the embezzled money been included in it; and, the presence of actual fraud has historically been considered as grounds for relief to the aggrieved party.[58]

The disposition of the case,[59] however, makes it uncertain whether the Sixth Circuit held that the petitioner's signature was procured by fraud because of her husband's nondisclosure. The court first unequivocally stated that the "petitioner was fraudulently induced to sign" and then decried the lack of findings by the Tax Court pertaining to the signing.[60] It is, therefore, unclear whether the court actually intended to extend the defense of fraud to include nondisclosure. The court stated that the petitioner was "fraudulently induced" to sign the returns but gave no reason for this conclusion and made no attempt to define what it meant by fraud. The only justification given for this conclusion was the court's impression that Congress could not have intended such a harsh result in cases involving an innocent spouse. The court stated:

> It is said by the Tax Court that it has no power to grant equitable relief and that only remedial legislation can soften the impact of the rule. Whatever may be the distinction between an equitable and legal defense, the Tax Court apparently recognized that an innocent spouse may avoid liability by proving duress or that the return was signed by mistake. Both of these are usually considered as equitable defenses. Relief from trickery and fraud could just as well rest on the same principle especially when it is shown that the innocent spouse did not benefit directly or indirectly from the stolen funds. On the subject of remedial legislation, it may be assumed we think, that Congress does not desire that the tax laws, as presently written, be interpreted so as to inflict an appallingly harsh result on an innocent person.[61]

Although the court's rationale concerning the defense of fraud was unclear, the opinion clearly portrayed the then existing difficulties inherent

58. 416 F.2d at 481.
59. *See* note 56 *supra.*
60. 416 F.2d at 481.
61. *Id.*

in absolving an innocent spouse from joint and several liability. In addition, the court's suggestion that a spouse's knowledge of and benefit from unreported funds should be the criterion in evaluating whether joint and several liability should be applied, provided a basis for subsequent congressional action in this area.[62]

On remand, the Tax Court found that the petitioner voluntarily signed the returns under no coercion from her husband, that she was not deceived as to what she signed, that she knew and intended the returns to be joint returns and that she would not have signed the returns if she had known them to be dishonest.[63] Although the Tax Court noted that the Sixth Circuit's opinion suggested that the nondisclosure by petitioner's husband was the equivalent of fraud, the petitioner was nevertheless held jointly and severally liable. The Tax Court reasoned that if the Sixth Circuit had ruled that the petitioner's signature procured by fraud, a judgment for the petitioner would have been rendered instead of remanding the case. In determining whether the petitioner's signature was procured by fraud, the Tax Court relied upon the *Restatement of Contracts* definition of fraud in the inducement and fraud in the execution.[64] The court reasoned that "[t]o hold that such nondisclosure rises to the level of fraud or trickery in the execution of the return would . . . open a Pandora's Box to avoidance of liability on joint returns."[65]

Although the Tax Court held the petitioner liable, it was reluctant to do so and apparently found some merit in the Sixth Circuit's suggestion that liability should not attach to a spouse who has no knowledge of nor benefit from the unreported funds. The Tax Court stated:

> We would welcome a rule which would grant relief to a victimized spouse who has no knowledge of, and does not benefit from, unreported income, at least where that income is the fruit of crime. But we regretfully see no way in which this Court can or should engraft such a "doing equity" rule on the language of section 6013(d)(3). We think such a result should be properly accomplished by ameliorating legislation.[66]

The court's recognition of the knowledge and benefit tests to evaluate the defense of fraud was proper and its request for a rule granting relief

62. INT. REV. CODE of 1954, § 6013(e).
63. Betty Bell Wissing, 54 T.C. 1428 (1970).
64. RESTATEMENT OF CONTRACTS § 475, 476 (1932). *See* note 47 *supra.*
65. Betty Bell Wissing, 54 T.C. 1428, 1431 (1970).
66. *Id.* at 1432.

to innocent spouses was quickly answered.[67]

SECTION 6013(e): THE CONGRESSIONAL RESPONSE

Strict judicial interpretation of section 6013(e), which for many years had held innocent spouses jointly and severally liable on joint income tax returns, finally prompted Congress to take action.[68] The result,[69] section 6013(e), which amends section 6013, states:

> (e) SPOUSE RELIEVED OF LIABILITY IN CERTAIN CASES.
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> (1) IN GENERAL.—Under regulations prescribed by the Secretary or his delegate, if—
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> (A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,
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> (B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

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67. The Tax Court's decision is presently on appeal to the Sixth Circuit for a second determination.

68. It is probable that the *Huelsman* litigation played an important role in focusing congressional attention on the inequities created by such strict interpretation. *See* notes 50-51 *supra* and accompanying text. The *Huelsman* litigation also aroused numerous commentaries which may also have prompted congressional action. *See* Note, *Innocent Spouses' Liability for Fraudulent Understatement of Taxable Income on Joint Returns,* 56 VA. L. REV. 1268 (1970); 22 ALA. L. REV. 591 (1970); 83 HARV. L. REV. 1449 (1970); 39 U. CIN. L. REV. 205 (1970).

A bill to relieve innocent spouses from joint and several liability was introduced into the House of Representatives on October 14, 1970. H.R. 19774, 91st Cong., 2d Sess. (1970). The bill was reported in the House of Representatives on December 14, 1970, and was passed on December 22, 1970. H.R. REP. No. 1734, 91st Cong., 2d Sess. (1970). The bill was reported in the Senate on December 30, 1970, and was passed on December 31, 1970. S. REP. No. 1537, 91st Cong., 2d Sess. (1970). It was signed into law by the President on January 12, 1971. Act of January 12, 1971, Pub. L. No. 91-679, §§1, 2, 3, 84 Stat. 2063.

69. Act of January 12, 1971, Pub. L. No. 91-679, §§ 1, 2, 3, 84 Stat. 2063. This Act contains three sections: 1) INT. REV. CODE of 1954, § 6013(e), *amending* INT. REV. CODE of 1954, § 6013; 2) INT. REV. CODE of 1954, § 6653(b), *amending* INT. REV. CODE of 1954, § 6653 providing that a spouse will not be held liable for the fraud penalty when there is an omission of reportable income if the omission was not due to her fradulent conduct (*see* Note, *Collateral Estoppel in Tax Fraud Litigation: The Elimination of Joint and Several Liability,* 5 VAL. U.L. REV. 636 (1971)); and section 3) providing that the amendments made by this Act apply to all taxable years to which the Internal Revenue Cade of 1954 applies. The third section of this Act could, therefore, provide relief to innocent spouses who presently have cases on appeal. *See* note 67 *supra.*

> (C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,
>
> then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.
>
> (2) SPECIAL RULES.—For purposes of paragraph (1)—
>
> (A) the determination of the spouse to whom items of gross income (other than income from property) are attributable shall be made without regard to community property laws, and
>
> (B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e)(1)(A).[70]

Although this addition to section 6013 provides clarification of the uncertainties[71] which previously existed, it is questionable whether the prior inequity[72] of holding an innocent spouse jointly and severally liable will be completely abolished.

To qualify for the congressional exemption, a spouse must meet three conditions simultaneously[73] in order to be held innocent and therefore relieved of joint and several liability. A spouse must establish that: 1) the omitted income is attributable to the "other" spouse and that such omission is greater than 25 percent of the total gross income stated on the return;[74] 2) in signing the return he or she had no knowledge nor any reason to know of the omitted income;[75] and 3) he or she

70. INT. REV. CODE of 1954, § 6013(e).
71. *See* notes 41-48 *supra* and accompanying text.
72. *See* note 55 *supra* and accompanying text.
73. That such a spouse must meet all three conditions is apparent from both the structure of section 6013(e)(1) and the House Committee on Ways and Means report which states: "First, the bill provides that when these conditions exist, the 'innocent spouse' is to be relieved of liability. . . ." H.R. REP. No. 1734, 91st Cong., 2d Sess. 3 (1970). *See* INT. REV. CODE of 1954, § 6013(e)(1).
74. INT. REV. CODE of 1954, § 6013(e)(1)(A).
75. *Id.* § 6013(e)(1)(B).

received no significant benefit from the omitted funds.[76]

The first condition which a spouse must meet to be found innocent is separated into three parts: first, that there must be an omission of reportable income from the joint return; second, that the omitted income must be attributable to the other spouse; and third, that such income must total more than 25 percent of the total gross income stated on the return.[77] The first part of section 6013(e)(1)(A) only applies to situations involving the *omission of reportable income.*[78] Therefore, this section will not allow a spouse to become innocent if the tax deficiency is caused by improper or illegal deductions. It is submitted that such a distinction may be unwarranted. Since it is possible for a wife to have no knowledge of omissions of reportable income, it is equally possible that she could be unaware of improper deductions. Therefore, one writer has suggested that

> some may regard it more appropriate to accord relief in situations involving items not appearing on the face of the return than in situations involving items appearing thereon and subject to the analysis of a questioning spouse. And yet it is a rare wife who, when presented with a return prepared by her husband, raises any questions save one concerning the proper place for her signature.[79]

The committee reports[80] contain no rationale for the limitation of this section to omissions and it is probable that Congress simply overlooked the possible tax liability for illegal deductions which may be imposed upon innocent spouses.[81] It is suggested, therefore, that Congress should reconsider section 6013(e)(1)(A) and incorporate a provision which would allow an innocent spouse to be exonerated from liability in situations involving improper deductions.

Not only must a spouse's potential liability be predicated upon omitted income, but such income must also be attributable to the other

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76. *Id.*

77. *Id.* § 6013(e)(1)(A).

78. Although the *Huelsman* decision involved a fraudulent omission, Congress did not qualify the word "omission" in section 6013(e)(1)(A) with the adjective "fraudulent." Therefore, it seems that both fraudulent and nonfraudulent omissions are within the meaning of the section.

79. Emory, *New Law Alleviates Innocent Spouse—Joint Return Problem on Omitted Income,* 34 J. TAXATION 154 (1971).

80. *See* H.R. REP. No. 1734, 91st Cong., 2d Sess. (1970); S. REP. No. 1537, 91st Cong., 2d Sess. (1970).

81. Such an oversight may have been caused by the cases involving only omissions of reportable income which focused congressional attention on the plight of the innocent spouse. *See* note 68 *supra.*

spouse. The second part of section 6013(e)(1)(A) requires that the omitted income must not be earned or owned by the spouse seeking exemption from liability. This requirement stems from the concept that income denotes economic control or benefit and one who obtains such control or benefit may be validly taxed thereon.[82] Apparently, if the wife who is seeking exemption from liability has economic control over the omitted income, this section will be inapplicable to her. Such a result is proper because when the omitted income is attributable to the spouse it is probable that she would have knowledge of the omission.[83] In connection with the tests of economic control and benefit, the special rule of section 6013(e)(2) interprets section 6013(e)(1) as follows:

> [T]he determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws. . . .[84]

Community property income is attributable to both spouses under community property law;[85] however, for purposes of section 6013(e)(1), a husband's wages will be attributable *only* to him, regardless of whether he resides in a community property state or one which adheres to the common law.[86]

In addition to the requirement that the omitted income be attributable to the "other spouse," section 6013(e)(1)(A) also imposes the condition that the sum of the omitted funds be "in excess of 25 percent of the amount of gross income stated in the return." This provision is unwarranted and unrelated to the dilemma of the innocent spouse. The only explanation given by the House Committee on Ways and Means for this provision is that it

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82. INT. REV. CODE of 1954, § 61(a). *See* 1 J. MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 5.01-03 (1969).

The requirement that the omitted income must be attributable to the other spouse is similar to the benefit test of INT. REV. CODE of 1954, § 6013(e)(1)(C). If the omitted income is attributable to the innocent spouse, she will be presumed to have benefited from it and, therefore, be jointly and severally liable.

83. Emory, *New Law Alleviates Innocent Spouse—Joint Return Problem on Omitted Income,* 34 J. TAXATION 154 (1971).

84. INT. REV. CODE of 1954, § 6013(e)(2).

85. *See* note 25 *supra* and accompanying text.

86. Innocent spouses residing in community property states have previously been held jointly and severally liable for omissions on joint returns partially because they are considered owners of one-half of the omissions. *See* Gertrude Abrams, 53 T.C. 24 (1969); Carmen Ramos, 38 P-H Tax Ct. Mem. 840 (1969). *See also* Emory, *New Law Alleviates Innocent Spouse—Joint Return Problem on Omitted Income,* 34 J. TAXATION 154 (1971).

> is intended to limit the relief provided in the bill to those cases where the income omitted represents a *significant* amount relative to the reported income. Whether or not an omission meets this test is to be determined in a manner similar to the test applied under existing law in determining, for purposes of the 6 year statute of limitations, when an omission in excess of 25 percent of gross income exists.[87]

Under this provision an otherwise innocent spouse would be held jointly and severally liable if her husband omitted to report as income $25,000 which he had embezzled and the gross income stated on their joint return is in excess of $100,000. Such liability would attach because the amount *omitted* is less than 25 percent of the couple's *stated* gross income and therefore would be deemed *insignificant*. This standard contains two variables which are arbitrary and capricious in their differing applications. First, liability is predicated upon the amount of gross income *stated* on the couple's joint return. If, for instance, the husband omits to report as income $25,000 which he had embezzled and falsely states on their joint return that their gross income was $110,000 rather than the true amount of $90,000 (excluding the omission), the wife would be held liable as the stated amount was falsely inflated and therefore the omitted amount would not meet the 25 percent excess requirement. Second, liability is predicated upon the amount of *omitted* income which is not reported on their joint return. Therefore, if the husband embezzled $24,900 and correctly stated on their joint return that their gross income was $100,000 (excluding the omission), the mere fact that he was not considerate enough to embezzle another $100 will be sufficient to hold the wife liable according to the 25 percent excess requirement. Since both of these variables are outside of the wife's control, any protection she may receive via section 6013(e)(1)(A) is only fortuitous. Fate will often be the exclusive factor in determining whether an otherwise innocent spouse will be liable for the omission.

The second condition a spouse must meet to be found innocent is that she had no knowledge that income was omitted from the return nor any reason to know of such an omission.[88] This requirement appears to be a codification of the Sixth Circuit's opinion in *Huelsman v. Commissioner*[89] which inferred that the nondisclosure of one spouse to the

87. H.R. REP. No. 1734, 91st Cong., 2d Sess. 2 (1970) (emphasis added). The statute of limitations provision is INT. REV. CODE of 1954, § 6501(e)(1)(A).

88. INT. REV. CODE of 1954, § 6013(e)(1)(B).

89. 416 F.2d 477 (6th Cir. 1969).

other that income had been wrongfully omitted from a joint return is the equivalent of fraud which will negate the innocent spouse's joint and several liability.[90] It is submitted that this requirement seems proper, for if a spouse has knowledge that income has been omitted from a joint return, he or she is also guilty of fraud[91] unless his or her signature is obtained by duress.[92] However, the desirability of the requirement of a spouse's knowledge will to some extent depend upon the standards which courts will use in its application. Although a spouse will have the burden of establishing that he or she had no knowledge by a preponderance of the evidence,[93] exactly how lack of knowledge must be proven is unclear. This uncertainty is caused by the requirement that a spouse must have "no reason to know"[94] that income has been omitted from the joint return. Certain rhetorical questions are inescapable: must a wife prove that she made inquiries of her husband concerning the omitted income or that she had an accountant evaluate the records of her family and her husband's business and thereby detemine that no income was omitted? Perhaps such a searching inquiry on the part of the wife is unnecessary in light of the recent Tax Court decision in *O. D. Cain.*[95] The court, confronted with the knowledge requirement of section 6013(e)(1)(B), stated:

> We have carefully examined the *testimony* of both these petitioners [the wives were joint petitioners with their husbands] and conclude that they have established that in signing the returns they neither knew of, nor had any reason to know of, the omissions from gross income.[96]

Apparently, the court reasoned that proof of the knowledge requirement can be satisfied with mere testimony. The favorable result of this case may be somewhat illusory to subsequent innocent spouses since the

90. *Id.* at 481. *See* notes 56-58 *supra* and accompanying text.

91. *See* INT. REV. CODE of 1954, § 6653.

92. *See* notes 41-46 *supra* and accompanying text. It is submitted that section 6013(e) does not foreclose the possibility that a defense of duress under prior law can still be properly raised in factual situations where the spouse is not innocent as defined by section 6013(e).

93. H.R. REP. No. 1734, 91st Cong., 2d Sess. 3 (1970).

> The second condition imposes on the innocent spouse the burden of showing that he or she did not know of, and had no reason to know of, the omission from income. It is intended that the spouse, in such a situation, will have the usual burden of proof (preponderance of the evidence) on this issue and not the higher burden required of the government in civil fraud cases.

Id.

94. INT. REV. CODE of 1954, § 6013(e)(1)(B).

95. P-H TAX CT. REP. & MEM. DEC. ¶ 71,045, 40 P-H Tax Ct. Mem. 207 (1971).

96. *Id.* at 218 (emphasis added).

petitioner's husbands were available to the Internal Revenue Service for collection of deficiencies and penalties. One can only speculate as to the result the court would have reached had the wives been the only sources of collection. In cases where the wife is the sole source of collection, it is suggested that the most stringent requirement consistent with the "spirit"[97] of section 6013(e)(1)(B) should be the "reasonable man" criterion. The congressional intent of section 6013(e), as evidenced by the Committee reports,[98] is to provide relief for the innocent spouse. It would appear, therefore, that such intent will be best facilitated by an objective determination of the amount of knowledge a reasonable spouse should have had under the circumstances.

The third condition which a spouse must meet is that he or she must have no *significant* benefit, either directly or indirectly, from the omitted income.[99] If such a spouse receives economic benefit from the omitted income, the income should be attributable to him or her.[100] The Committee reports[101] are helpful in determining whether a spouse has received benefit from the omitted income.

> The third condition requires a factual determination (by either the Internal Revenue or the courts) as to whether the spouse seeking relief from liability significantly benefited, directly or indirectly, from the items omitted from gross income. It is not intended that the term "benefit" as used here include ordinary support of the innocent spouse. Unusual support or transfers of property to the spouse would, however, constitute "benefit" and should be taken into consideration. . . . Such "benefit" may be received by the spouse several years after the year in which the omitted item should have been included in gross income. For example, if a spouse receives an inheritance of property or life insurance proceeds, and such receipt is traceable to items omitted from gross income by the other spouse in earlier years, that spouse will be considered to have benefited from those items. A mere finding that the spouse "benefited" from the items omitted from gross income will not be sufficient, however, to prevent that spouse from

97. *See generally* H.R. REP. No. 1734, 91st Cong., 2d Sess. (1970); S. REP. No. 1537, 91st Cong., 2d Sess. (1970).

98. H.R. REP. No. 1734, 91st Cong., 2d Sess. (1970); S. REP. No. 1537, 91st Cong., 2d Sess. (1970).

99. INT. REV. CODE of 1954, § 6013(e)(1)(C).

100. *See* 82 *supra* and accompanying text.

101. H.R. REP. No. 1734, 91st Cong., 2d Sess. (1970); S. REP. No. 1537, 91st Cong., 2d Sess. (1970).

> obtaining relief from liability for the tax. For the spouse to be prevented from obtaining relief there must be a finding that the benefit was "significant" and that "taking into account all other facts and circumstances," it is not "inequitable to hold the . . . spouse liable for the deficiency in tax."[102]

These guidelines for the determination of benefit, if adopted by the courts, will provide fairness to the innocent spouse in most circumstances. The criterion of "significant benefit," however, may prove troublesome. For example, if $100,000 is omitted and a wife benefits from only $5,000, will this amount be significant and therefore impose upon her the liability for the entire amount? The Committee would leave such a determination to the court's finding of inequity.[103] It is suggested that a better alternative would be an apportionment of liability according to the benefit received by the wife. Using this method, the amount of tax liability in the above illustration would be predicated upon the benefited $5,000, and therefore, the court's discretion in determining the equities of each situation would be eliminated.

Another shortcoming of section 6013(e)(1)(C) is that it is unclear whether the Government has the burden of establishing that the taxpayer benefited from the omitted funds. In *O. D. Cain*,[104] the Tax Court stated that

> [i]t is . . . our opinion that their testimony [wives], in effect, is sufficient to *establish* that they did not significantly benefit from the items which we have found their husbands omitted from gross income.[105]

The court's reasoning seems to indicate that the burden was placed on the petitioners. Section 6013(e)(1)(C), however, unlike the explicit provisions of section 6013(e)(1)(B)[106] is silent concerning upon whom the burden of proof should be placed. It is fair to suggest that if the burden properly belongs upon the petitioner, the statute would have expressed this as in the knowledge requirement section. Since the statute is silent, the Government should have the burden of proving that the spouse, in fact, did benefit from the omitted funds.

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102. H.R. REP. No. 1734, 91st Cong., 2d Sess. 3 (1970); S. REP. No. 1537, 91st Cong., 2d Sess. 4 (1970).

103. H.R. REP. No. 1734, 91st Cong., 2d Sess. 3 (1970); S. REP. No. 1537, 91st Cong., 2d Sess. 4 (1970).

104. P-H TAX CT. REP. & MEM. DEC. ¶ 71,045, 40 P-H Tax Ct. Mem. 207 (1971).

105. *Id.* at 218 (emphasis added).

106. *See* note 93 *supra* and accompanying text.

The following statement in the Committee reports is helpful in the interpretation of section 6013(e)(1)(C).

> Other factors which could also be taken into account in appropriate situations, in determining whether it is inequitable to hold the spouse liable for the deficiency include the fact of whether the spouse in question is deserted or is divorced or separated.[107]

Such language probably stems from the Committee's study of cases similar to *Huelsman,*[108] where the Commissioner was unable to collect the tax deficiencies from the husband because his whereabouts were unknown.[109] However, factors such as divorce or separation could prove detrimental to the understanding or forgiving spouse who does not want a divorce, and therefore, the Committee's suggestion should not be strictly adopted by the courts. A more logical interpretation of the Committee's statement is that the judiciary may consider additional factors in determining joint and several liability other than those expressly included in section 6013(e).

The combined effect of the three conditions which a spouse must meet appears, at this early date, to severely limit the situations in which a spouse will be exonerated from joint and several liability. Perhaps these limitations were placed in this section because of the statement made by the Tax Court in *Betty Bell Wissing* that "[t]o hold that . . . nondisclosure rises to the level of fraud or trickery in the execution would, in our opinion, open a Pandora's box to avoidance of liability on joint returns."[110] Whatever validity may be found in such an argument has been recognized in the three conditions a spouse must meet in order to be found innocent. Judicial interpretation of section 6013(e) should be liberal if adequate relief is to be provided the innocent spouse. Section 6013(e), if so interpreted, could appease those who have advocated the complete abolition of joint and several liability[111] and provide the amelioration needed in this area.

CONCLUSION

Section 6013(e) may partially eliminate the tax inequity which is inherent in imposing joint and several liability upon an innocent

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107. H.R. REP. No. 1734, 91st Cong., 2d Sess. 4 (1970); S. REP. No. 1537, 91st Cong., 2d Sess. 5 (1970).
108. 416 F.2d 477 (6th Cir. 1969).
109. *See* note 52 *supra.*
110. 54 T.C. 1428, 1432 (1970).
111. *See* note 40 *supra* and accompanying text.

spouse. Its success, however, will depend to a large extent upon the interpretation and application adopted by the judiciary. Strict judicial construction of the requirements of "significant omissons,"[112] "reasonable knowledge"[113] and "substantial benefit"[114] would easily circumvent the congressional intent[115] behind section 6013(e). It is suggested, therefore, that the judiciary apply the "reasonable man" criterion in interpreting section 6013(e)(1)(B)[116] and apportion the tax liability according to the actual benefit received by the innocent spouse in interpreting section 6013(e)(1)(C).[117] These suggestions, if followed by the judiciary, would eliminate two of the adverse restrictions of section 6013(e).

Since the judiciary is limited in latitude to only interpretation, Congress should reduce or eliminate the 25 percent excess requirement of "significant omissions"[118] and also consider whether illegal deductions should be included in section 6013(e)(1)(A).[119] Although one writer has stated that "[t]he statute is . . . a commendable and valid congressional response to what was a most serious problem,"[120] it is the opinion of this writer that the amendment as enacted is too narrow in its approach and, therefore, inadequate in its protection. There are too many restrictive and fortuitous conditions within the amendment which may impose unwarranted liability on otherwise innocent spouses. The ultimate tax liability of a spouse should not be predicated upon events which are outside of her control.

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112. INT. REV. CODE of 1954, § 6013(e)(1)(A).
113. *Id.* § 6013(e)(1)(B).
114. *Id.* § 6013(e)(1)(C).
115. *See generally* H.R. REP. No. 1734, 91st Cong., 2d Sess. (1970); S. REP. No. 1537, 91st Cong., 2d Sess. (1970).
116. *See* notes 88-98 *supra* and accompanying text.
117. *See* notes 99-106 *supra* and accompanying text.
118. *See* note 87 *supra* and accompanying text.
119. *See* notes 77-81 *supra* and accompanying text.
120. Emory, *New Law Alleviates Innocent Spouse—Joint Return Problem on Omitted Income,* 34 J. TAXATION 154, 156 (1971).