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What You Earn is Yours, but You are Jointly and Severally Liable for His: A Proportionate Liability Proposal for Federal Income Taxes

I. INTRODUCTION

A husband and wife that file a joint income tax return are jointly and severally liable for the full amount of tax liability.¹ Joint and several liability, in federal income taxation, means that spouses are collectively or individually liable for the entire tax due on a joint return.² Consequently, if one spouse does not pay the tax due, the Internal Revenue Service may seek the whole amount from the other spouse. In 1995, the House Ways and Means Committee ordered the Treasury Department and the General Accounting Office to conduct a joint study to determine if joint and several liability should be repealed.³ In response, the Internal Revenue Service and the Treasury Department issued a request for public comment on the concept of replacing joint and several liability with a proportionate liability standard.⁴ The proposed proportionate liability standard would hold each spouse liable for only that portion of the tax attributable to a joint return that relates to that spouse's contribution to the aggregate joint return tax liability of both spouses.

The most difficult issue that arises under a proportionate liability standard concerns the allocation of items of income and deduction between the spouses. The issue is further clouded by the differences in determining the amount of each spouse's income depending on whether the spouses are domiciled in a community property state or a common law property state. Under the rule of *Poe v. Seaborn*,⁵ spouses domiciled in community property states must each report one-half of the community's income on their separate returns, while spouses domiciled in common law property states may choose between filing a joint return and splitting their income or filing separate returns on which each spouse reports only the income that the spouse earns.

This article will analyze the problems associated with joint and several liability and the implementation of a proportionate liability standard in both common law property states and community property states. Because of distinct property regimes, different problems may arise with respect to implementation of the proportionate liability standard depending on whether spouses are domiciled in community property states or common law property states. Part II of this article will explain the origin of joint and several liability for the tax

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1. I.R.C. § 6013 (1993).
2. Black's Law Dictionary 837 (6th ed. 1990).
3. Revenue Recognition Act, H.R. 2337, 104th Cong. § 13316 (1995).
4. I.R.S. Notice 96-19, 1996-1 C.B. 371.
5. 282 U.S. 101, 51 S. Ct. 58 (1930).

liability on a joint return and the allocation of income tax liability in common law property states and community property states. Part III will examine the problems created by joint and several liability and the allocation of liability for the tax on income earned by spouses in community property states under *Poe v. Seaborn*.⁶ Parts IV and V will consider the congressional remedies for the problems that result from joint and several liability and from the application of *Poe v. Seaborn*, respectively. Finally, Part VI will discuss the possible problems concerning the implementation of a proportionate liability standard.

II. ORIGIN OF JOINT RETURN LIABILITY

A. Introduction of the Joint Return

Joint returns were introduced in the United States after the Revenue Act of 1918.⁷ However, the wording of the act did not allocate the tax liability between spouses who filed a joint return.⁸ In the Revenue Act of 1921, Congress re-worded the section to state that a husband and wife may file individual returns or include their income "in a single joint return, in which case the tax shall be computed on the aggregate income."⁹ However, it seems Congress simply did not address the issue of joint return liability. Therefore, without any guidance from Congress, the Bureau of Internal Revenue¹⁰ drew its own conclusion.¹¹ In 1923, the Bureau made its first declaration on the subject of joint and several liability.¹² Office Ruling Income Tax 1575 states that "where a husband and wife file[d] a joint return they are individually liable for the full amount of the tax."¹³ The Bureau of Internal Revenue reasoned that "a single joint return is one return of a taxable unit and not two returns of two units on one sheet of paper."¹⁴ Not all courts, however, adopted the Bureau's position.

6. *Id.*

7. Act of Feb. 24, 1919, ch.18, § 223, 40 Stat. 1057, 1074.

8. *Id.* Section 223 stated:

That every individual having a net income for the taxable year of \$1,000 or over if single or if married and not living with husband or wife, or of \$2,000 or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this title. If a husband and wife living together have an aggregate net income of \$2,000 or over, each shall make such a return unless the income of each is included in a single joint return.

9. Act of Nov. 23, 1921, ch. 136, § 223(b)(2), 42 Stat. 227, 250.

10. Now known as the Internal Revenue Service.

11. I.T. 1575, II-1 C.B. 144 (1923).

12. *Id.*

13. II-1 C.B. 144 (1923).

14. *Id.*

*B. Federal Income Tax Liability in Both Common Law Property States and Community Property States*¹⁵

In 1933, the Board of Tax Appeals decided *Cole v. Commissioner*.¹⁶ In *Cole*, the Board of Tax Appeals stated that it was clear that the liability for the tax due on a joint tax return was joint and several.¹⁷ However, the United States Court of Appeals for the Ninth Circuit reversed, holding that the spouses were not jointly and severally liable for the deficiency that arose entirely out of the separate income of one of them.¹⁸ The court's reasoning was based on the Bureau of Internal Revenue's regulations dealing with capital gains and losses that state, "a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers."¹⁹ Congress overruled *Cole* in the Revenue Act of 1938, by providing that spouses are jointly and severally liable for the tax due on a joint return.²⁰ During this era, a distinct standard of liability for spouses residing in community property states was also created.

In 1921, the Attorney General issued an opinion stating that the wife in all community property states, except California, had proprietary rights in the community's property equal to that of the husband.²¹ Consistent with the Attorney General's opinion, the United States Supreme Court, in *Poe v. Seaborn*,²² allowed a husband and wife in Washington to each report one-half of the community's income on their separate returns. The Court reasoned that, because any salaries or property received after marriage belonged to the community and each spouse had a vested interest in the community, each spouse was liable for one-half of the tax due on the community's income.²³ This decision mandates that each spouse in a community property state report one-half of the community's income when filing separate federal income tax returns.

By the end of 1931, the *Poe v. Seaborn* rule was extended to all community property states, including California.²⁴ *Poe v. Seaborn* made the community

15. The Internal Revenue Service recognizes the following nine states as community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. 32 Op. Att'y Gen. 435 (1921) and Rev. Rul. 87-13, 1987-1 C.B. 20.

16. 29 B.T.A. 602 (1933).

17. *Id.* at 605.

18. 81 F.2d 485, 489 (9th Cir. 1935).

19. *Id.* at 487.

20. Act of May 28, 1938, ch. 289, § 51(b), 52 Stat. 447, 476.

21. 32 Op. Att'y Gen. 435, 458 (1921); "The California courts have held that under the law as it stood prior to 1917 the wife had no vested interest in community property prior to the dissolution of the marriage. . . ." *Id.* at 461.

22. 282 U.S. 101, 51 S. Ct. 58 (1930).

23. *Id.* at 115, 51 S. Ct. at 60.

24. See *Goodell v. Koch*, 282 U.S. 118, 51 S. Ct. 62 (1930) (Arizona); *Hopkins v. Bacon*, 282 U.S. 122, 51 S. Ct. 62 (1930) (Texas) and *Bender v. Pfaff*, 282 U.S. 127, 51 S. Ct. 64 (1930) (Louisiana). The Treasury Department extended the *Seaborn* rule to the remaining four states. *Mim*, 3853, X-1 C.B. 139 (1931). After California amended its community property laws to give the wife

property regimes more appealing than the common law property regime because spouses living in a community property regime could split their income by filing separate returns. Because of the progressive tax rates, splitting the spouses' income reduced the couple's tax liability. The reduction in tax liability is a result of lower tax rates being applied to a greater portion of the couple's income. Spouses are able to divide their aggregate income before it is taxed; therefore, it is being taxed at a lower tax rate. For example, assuming A and B file a joint tax return, and A's income was \$70,000 and B's income was \$0. Without income splitting, their combined tax liability is \$12,387 (15% x \$40,000 + 28% x \$29,900).²⁵ However, with income splitting, their combined tax liability is \$11,040 (15% x \$35,000 + 15% x \$35,000).²⁶ In response to cases like *Poe v Seaborn*, common law property states began to adopt community property regimes to take advantage of the income splitting rule.

To slow down this conversion and to obtain geographical equalization, Congress passed the Revenue Act of 1948,²⁷ which authorized married couples residing in common law property states to split their income by filing a joint return, hereinafter referred to as "income splitting."²⁸ "Income splitting" allows couples filing a joint return to divide their aggregate income into two equal parts that are taxed separately.²⁹ As shown above, progressive tax brackets combined with "income splitting" enables spouses with disproportionate incomes to lower their taxes when filing a joint return, because part of the higher earner's income is taxed at a lower rate. While Congress stopped the common law property states from converting to the community property regime, it failed to equalize the tax liability of spouses living under separate regimes.

As a result of *Poe v. Seaborn*, a spouse in a community property state is prevented from filing a separate return that reports only the income that the individual spouse earns. On the other hand, spouses in common law property

more than a "mere expectancy" in community property, the Supreme Court applied the *Seaborn* rule to California in *United States v. Malcolm*, 282 U.S. 792, 51 S. Ct. 184 (1931).

25. The tax brackets come from the Internal Revenue Service, 1996 Instructional Booklet for Federal Income Tax Form 1040, at 53 (1996).

26. These tax brackets also come from the Internal Revenue Service, 1996 Instructional Booklet for Federal Income Tax Form 1040, at 53 (1996).

27. Act of Apr. 2, 1948, ch. 168, § 301, 62 Stat. 110, 114.

28. S. Rep. No. 80-1013, at 25 (1948), states in relevant part:

Adoption of these income-splitting provisions will produce substantial geographical equalization in the impact of the tax on individual incomes. . . . In effect, these amendments represent the adoption of a new national system for ascertaining Federal income tax liability. The adoption of these amendments will extend substantial benefits to residents of both community-property and common-law [property] states.

29. SEC. 301. SPLITTING OF INCOME

(d) Tax in Case of Joint Return.—In the case of a joint return of husband and wife under section 51 (b), the combined normal tax and surtax under section 11 and subsection (b) of this section shall be twice the combined normal tax and surtax that would be determined if the net income and the applicable credits against net income provided by section 25 were reduced by one-half.

states have the advantage of being able to choose between filing a joint return and splitting their income or filing separate returns on which each spouse reports only the income of that spouse. The House of Representatives again attempted to equalize the treatment of couples in community property regimes and common law property regimes by making joint returns mandatory.³⁰ However, the bill was never enacted, and this distinction between the two systems remains today.

Regardless of a spouse's ability to pay or the spouse's control over the income, each spouse is jointly and severally liable for the entire tax due on the joint return. This problem was significantly compounded when the United States Supreme Court held that embezzled funds could constitute gross income to the embezzler in *James v. United States*.³¹ Consequently, a spouse could be liable for funds embezzled by the other spouse even if the spouse was unaware of the wrongdoing.

In *Scudder v. Commissioner*,³² the Tax Court held Mrs. Scudder liable for taxes plus interest and penalties on embezzled funds that her husband did not disclose in their joint return. Mr. Scudder was embezzling from a company in which Mrs. Scudder and her sisters were partners. When the unauthorized withdrawals were discovered, the partnership accepted partial payment, and Mr. Scudder remained liable for the balance. There is no evidence in the record that any formal charges were ever brought. Mrs. Scudder argued that she was tricked and defrauded by her husband into signing the joint return. However, the Tax Court rejected this argument, stating that the signature itself must be a product of the fraud, and Mrs. Scudder clearly signed the return voluntarily.³³ The United States Court of Appeals for the Sixth Circuit reversed the Tax Court's opinion and remanded it for further consideration, because both the partners and the Tax Court treated these withdrawals as unauthorized loans.³⁴ Therefore, the transactions did not constitute embezzlement, and were likewise not taxable income to the Scudders.

Had the partnership brought formal charges against Mr. Scudder, the transactions would have constituted embezzlement, and the court would not have been able to protect Mrs. Scudder from having to pay the deficiency. As a result, Mrs. Scudder would have suffered a double loss. As a partner she would have suffered a loss because of the embezzlement, and as a spouse she would have suffered a loss because of the tax liability. Cases like *Scudder* are illustrations of the inequities that may arise when spouses are held jointly and severally liable for the tax due on the joint return.

30. H.R. Rep. No. 77-1040, at 16-17 (1941), *reprinted in Misc.*, 1941-2 C.B. 413, 420 (1941).

31. 366 U.S. 213, 81 S. Ct. 1052 (1961).

32. 48 T.C. 36, 41 (1967).

33. *Id.* at 40.

34. *Scudder v. Commissioner*, 405 F.2d 222, 227 (6th Cir. 1968).

III. PROBLEMS WITH JOINT AND SEVERAL LIABILITY

A. *Marriage as an Economic Unit*

The imposition of joint and several liability for the tax incurred on a joint return is based on the theory that a married couple is a single economic and taxable unit (hereinafter referred to as the "unitary theory").³⁵ However, there is no requirement that the spouses actually share any portion of their income to qualify to file a joint return. In fact, it is not necessary that the couple even live together.³⁶ If the principle basis for joint and several liability is treating marriage as an economic unit, then why do spouses have the option of filing separate returns? Is a marriage an economic unit unless the couple chooses to file separate returns? Is there any justification for holding the non-earning or low-income spouse jointly and severally liable for the tax due on the joint return?

Most people argue that the low-income spouse should be liable for the taxes due on the income earned by the other spouse.³⁷ After all, the low-income spouse supposedly benefits from and enjoys the other spouse's income. Besides the advantage of an additional salary, the low-income spouse further benefits from the lower tax rates that apply when filing a joint return.³⁸ There is no denying that the low-income spouse typically benefits financially in some way from the marriage. However, this benefit should not be the basis for income tax liability. Even our present income tax system customarily attributes income to the taxpayer who controls it, not the one who enjoys it. For example, under Section 674 of the Internal Revenue Code, a taxpayer is considered owner of property placed in an irrevocable trust for the benefit of another, despite the fact that the taxpayer enjoys no monetary benefit from the property.³⁹ Likewise, in some situations taxpayers who give away income from property that they still own are taxed on that income.⁴⁰ Besides being compatible with past legislation, allocating liability to the one who controls the income is consistent with one of the fundamental principles of taxation, that the incidence of a tax should be based on one's ability to pay.⁴¹

35. Sol. Op. 90, 4 C.B. 144 (1923).

36. Congress repealed this requirement in 1944. See Individual Income Tax Act of 1944, ch. 210, § 11(a), 58 Stat. 231, 240 (1944) (amending § 51(b) of the 1939 Internal Revenue Code).

37. This is the most common argument that arises when I discuss this problem with others.

38. Internal Revenue Service, 1996 Instructional Booklet for Federal Income Tax Form 1040, at 53 (1996). If your filing status is single, your adjusted gross income from \$0 to \$24,000 is taxed at 15% and your adjusted gross income from \$24,000 to \$58,150 is taxed at 28%. However, if your filing status is married filing jointly, your adjusted gross income from \$0 to \$40,100 is taxed at 15% and your adjusted gross income from \$40,100 to \$96,900 is taxed at 28%.

39. I.R.C. § 674 (1993).

40. See, e.g., *Helvering v. Horst*, 311 U.S. 112, 61 S. Ct. 144 (1940). The court taxed an individual on income transferred from coupons when he retained the bonds. *Id.* at 118, 61 S. Ct. at 147.

41. See, e.g., *Cole v. Commissioner*, 81 F.2d 485, 487 (9th Cir. 1935).

The "unitary theory" seems to ignore this fundamental principle of taxation. Presumably, most spouses do pool their income in some form or another.⁴² However, pooling is not necessarily determinative of one's ability to pay. The income may be pooled in a joint account, but one spouse may have greater access to the account. One's control over the income governs his or her ability to pay, and likewise should govern his or her tax liability.⁴³ As a practical matter, the spouse who earns the income generally controls the income.⁴⁴ Even in community property states, which have equal management statutes, the spouse who earns community income will normally be able to control its disposition.⁴⁵ The spouse who earns the income often decides the spending patterns or lifestyle of the family. For example, a low-income spouse can be compared to a child who receives money from a parent to go to college. The child undoubtedly benefits from the financial help, yet the child does not incur any tax liability. Granted, a spouse may have more of a vested right in the other spouse's income, but it is still the earner who has the ultimate control over the disposition of the income. Therefore, as a general rule, earned income should be taxed to the person who earns it.⁴⁶

B. Why Do Spouses File Joint Returns?

Another question frequently asked is, if joint and several liability is so bad, then why do spouses not file separate returns? The driving force behind filing a joint return is the tax savings that can be achieved. The income tax rates that apply to income reported on a joint return are significantly lower than the tax rates that apply to income reported by a spouse on a separate return. The tax savings are easily illustrated in single income families. For example, A and B are married and their taxable incomes are \$30,000 and zero, respectively. If the couple files separately, their combined tax liability is \$5,872.⁴⁷ In contrast, the

42. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 *Hastings L.J.* 63, 86 (1993).

43. See, e.g., *Mazzochi Bus Co. v. Commissioner*, 14 F.3d 923, 931 and n.14 (3d Cir. 1994).

44. Kornhauser, *supra* note 42, at 104.

45. Susan Kalinka, *Federal Taxation of Community Income: A Simpler and More Equitable Approach*, 3 *Wis. L. Rev.* 633, 689 (1990).

46. See, e.g., *Lucas v. Earl*, 281 U.S. 111, 50 S. Ct. 241 (1930). In *Lucas*, the spouses entered into a contract which provided that any property or income they received during marriage would be owned by them jointly. The Supreme Court held that even though the contract was binding under state law, salaries are taxed "to those who earn them." *Id.* at 113-15, 50 S. Ct. at 241.

In *Poe v. Seaborn*, 282 U.S. 101, 117, 51 S. Ct. 58, 61 (1930), the Supreme Court distinguished *Lucas*, explaining that Mr. Earl's salary was his property, whereas under Washington community property law Mrs. Seaborn had a vested interest in her husband's salary.

47. If a taxpayer's status is married filing separately, the taxpayer's adjusted gross income from \$0 to \$20,050 is taxed at a rate of 15% and his or her adjusted gross income from \$20,050 to \$48,450 is taxed at a rate of 28%. See Internal Revenue Service, 1996 Instructional Booklet for Federal Income Tax Form 1040, at 53 (1996).

liability for \$30,000 reported on a joint return is \$4,504.⁴⁸ With such monetary incentives, Congress almost forces spouses to file jointly. Moreover, it is unlikely that many taxpayers even realize that a joint return imposes joint and several liability upon them, much less understand the intricacies of joint and several liability.⁴⁹ A taxpayer usually discovers the joint and several liability rule when he or she receives a letter from the Internal Revenue Service concerning a tax deficiency. There is no warning or notice of liability on the individual tax return Form 1040. The warning is placed in the instructional booklet for the Form 1040.⁵⁰ As a result, the spouse who prepares the return generally is the spouse who sees the warning.

Assuming the low-income spouse was aware of the liability imposed and the problems accompanying it, he or she may still be hesitant to question his or her spouse's decision to file a joint return. Generally, a marriage is built on trust. This type of questioning is a sign of lack of trust in the other spouse's ability to properly compose the family's return. To ask one's spouse to change to a separate return to avoid joint and several liability is like telling the spouse, "I love you, but I just can't trust you." The overwhelming tax savings and the desire not to express distrust for one's spouse are evident in the fact that ninety-nine percent of couples who file tax returns elect to file jointly.⁵¹

C. Spouse that Bears the Burden

Not only is joint and several liability unfair to the low-income or non-earning spouse, but the results seem to be gender-biased as well. Women are more likely than men to be subject to collection actions for joint returns.⁵² As a result, women are more likely than men to seek protection from the "innocent spouse" rules.⁵³ Because there are no statutory requirements that the Internal

48. If a taxpayer's status is married filing jointly, then the entire \$30,000, up to \$40,100, is taxed at rate of 15%. *Id.*

49. Richard C. E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 Vand. L. Rev. 317, 325 (1990).

50. Internal Revenue Service, 1995 Instructional Booklet for Federal Income Tax Form 1040, at 20 (1995), which states in relevant part:

A husband and wife may file a joint return even if only one had income or if they did not live together all year. However, both must sign the return and both are responsible.

This means that if one spouse does not pay the tax due, the other may have to.

51. In 1985, 47,809,791 joint returns were filed and 895,789 returns for married persons filing separately were filed. I.R.S. Statistics of Income—1985 Individual Income Tax Returns, table 1.2, at 16 (1988). *Id.* table 1.3, at 19.

52. Lisa Edison-Smith, "If You Love Me, You'll Sign My Tax Return:" *Spousal Joint and Several Liability for Federal Income Taxes and the "Innocent Spouse" Exception*, 18 Hamline L. Rev. 102, 123 (1994).

53. For a thorough discussion of the "innocent spouse" rules see *infra* Part IV of this article. From 1971 until 1990 there were, "299 reported cases in which . . . § 6013(e) ["innocent spouse" rules] was an issue, for an average of some 18 cases per year. In 1987 there were 32 such cases. Using the cases reported during 1987 as a sample, only 2 out of 32 petitioners were men, both of

Revenue Service first seek collection from the earning spouse, the Internal Revenue Service usually goes after the easiest target. As one commentator opined, the Internal Revenue Service is interested in collection in the quickest least expensive way possible and will frequently collect from the available wife rather than bear the expense of pursuing the absent husband.⁵⁴ Since the Internal Revenue Service and the courts do not respect settlement agreements between spouses,⁵⁵ the only relief available to the spouse comes from the "innocent spouse" rules.⁵⁶ In an attempt to correct this problem, the Internal Revenue Service enacted a new policy which permits its field personnel to pursue the responsible spouse first before turning to the potential innocent spouse.⁵⁷ Under the new policy, field personnel are permitted to defer collection in potential "innocent spouse" situations.⁵⁸ However, this policy is discretionary rather than mandatory, and there are no means of enforcing it.

D. Problems With *Poe v. Seaborn*

In addition to the burdens created by joint and several liability, spouses residing in community property states have the additional burden of the rule of *Poe v. Seaborn*. The problems created by *Poe v. Seaborn* are illustrated by cases such as *United States v. Mitchell*⁵⁹ and *Bagur v. Commissioner*.⁶⁰ In *Mitchell*, Mrs. Mitchell had little knowledge of her husband's earnings and even less control over them. On several occasions she questioned him about the filing of a joint return and relied on his assurance that a return had been filed. As spouses often do, Mrs. Mitchell assumed that Mr. Mitchell was signing her name on the returns. In fact, Mr. Mitchell neither filed any returns nor paid any taxes for the years in question. For two of the years in question, Mrs. Mitchell was employed as a teacher and earned a total of \$4,200, from which taxes were withheld.⁶¹ In July of 1960, the Mitchells began to live separately and apart. They were divorced in 1962. However, before the final decree of divorce, Mrs.

whom lost; 21 out of the 30 women petitioners that year also lost." Beck, *supra* note 49, at 327. The "innocent spouse" rules are supposed to provide relief to spouses who are unjustly held liable for joint return deficiencies. The "innocent spouse" rules are discussed to a greater extent in Part IV of this article.

54. H.J. Cummins, *Catch 1040: Joint Returns Mean Joint Liability- And in Some Cases, That Means Trouble*, *Newsday*, Jan. 30, 1994, at 76 (quoting Sharon Stern Gerstman, one-time chairwoman of a tax subcommittee of the American Bar Association).

55. See, e.g., *Kogut v. Commissioner*, 63 T.C.M. (CCH) 2781, 2783 (1992) and *Winnett v. Commissioner*, 96 T.C. 802, 813 (1991).

56. For a thorough discussion of the "innocent spouse" rules see *infra* Part IV of this article.

57. Margorie A. O'Connell, *Innocent Spouse Rules Can Avoid Unexpected Liability on Joint Returns with Former Spouse*, 17 *Tax'n Law.* 226, 228 (1989).

58. *Id.*

59. 403 U.S. 190, 91 S. Ct. 1763 (1971).

60. 603 F.2d 491 (5th Cir. 1979), *rev'g and rem'g* 66 T.C. 817 (1976).

61. *Mitchell*, 403 U.S. at 192, 91 S. Ct. at 1765.

Mitchell took advantage of then-existing Louisiana Civil Code article 2410, and formally renounced the community in September of 1961.⁶² As a result, she was insulated under state law from the community creditors. However, because she had renounced the community, she received neither a distribution of community property nor a property settlement upon dissolution of her marriage. Even so, the Supreme Court held that Mrs. Mitchell's renunciation was ineffective against the federal tax collector. Therefore, Mrs. Mitchell was held liable for one-half of the taxes her husband failed to pay during the years in question.⁶³

In *Bagur v. Commissioner*,⁶⁴ the Bagurs maintained separate domiciles in Louisiana from 1962 until 1968, when Mrs. Bagur obtained a divorce. Mrs. Bagur's quality of life during these years is described by the appellate court as follows:

Mrs. Bagur lived in grinding poverty, often with the utilities cut off, sometimes with not enough to eat. Her three school-age children gave her a little financial assistance from time to time. Mrs. Bagur's health was poor; she was arthritic, anemic, and undernourished. Grounded down but attempting to keep her head up, she worked sporadically in 1962, 1963, 1965, 1966.⁶⁵

During these years, Mrs. Bagur received no support from her husband. Nevertheless, the Tax Court held her liable for the taxes on one-half of her husband's taxable income.⁶⁶ The United States Court of Appeals for the Fifth Circuit attempted to relieve Mrs. Bagur of this liability by allowing her to claim a theft loss deduction under Internal Revenue Code section 165(c)(3) for the portion of her husband's earnings to which she had a legal ownership claim but to which her husband never gave her possession.⁶⁷

In Louisiana, a theft occurs when anything of value which belongs to another is taken or misappropriated without his consent or by means of fraudulent conduct, practices, or representations.⁶⁸ The definition of theft also

62. La. Civ. Code art. 2410:

Both the wife and her heirs or assigns have the privilege of, being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

63. *Mitchell*, 403 U.S. at 206, 91 S. Ct. at 1772.

64. 66 T.C. 817 (1976).

65. *Bagur v. Commissioner*, 603 F.2d 491, 495 (5th Cir. 1979).

66. She was also held liable for the full amount of taxes on her earned income for the years in question. *Id.* at 495-96.

67. *Id.* at 501-03.

68. La. R.S. 14:67 (1997) states in relevant part:

Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

includes the intent to deprive another permanently of whatever is the subject of the taking. Therefore, to qualify for a theft loss deduction, the spouse seeking relief must prove that the other spouse possessed the requisite fraudulent intent to take or misappropriate the funds. In *Bagur*, the Fifth Circuit remanded the case to determine whether Mrs. Bagur was entitled to claim a theft loss deduction.⁶⁹

This Fifth Circuit decision creates no real relief from the *Poe v. Seaborn* rule. A theft loss deduction can only be claimed in the year in which it was discovered,⁷⁰ and a refund can only be claimed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later.⁷¹ Therefore, not only must the spouse must file for a refund in the year of discovery, but the refund must also be filed before the statute of limitations for refunds run. However, the real problem is proving the requisite fraudulent intent. As reflected in subsequent cases, proving that there has been a theft can be an impossible burden for the spouse seeking relief.⁷² As a result, the theft loss deduction provides no relief from the *Poe v. Seaborn* rule.

IV. INNOCENT SPOUSE RULES

Realizing the injustices created by joint and several liability and by the *Poe v. Seaborn* rule, Congress enacted Section 6013(e) and Section 66 of the Internal Revenue Code (hereinafter referred to as the "innocent spouse" rules) to grant relief to spouses who were not responsible for the tax deficiencies.⁷³ As

69. The case was subsequently settled; no further findings of fact or opinions were rendered on the issue of a theft loss deduction. See *Schmidt v. Commissioner*, 41 T.C.M. (CCH) 793, 796 (1981).

70. I.R.C. § 165(e) (1993).

71. I.R.C. § 6511(a) (1993).

72. See *Rassa v. United States* I.R.S., 634 F. Supp. 83 (D. Md. 1986) and *Schmidt v. Commissioner*, 41 T.C.M. (CCH) 793 (1981).

73. The text of I.R.C. § 6013(e) (1997) as originally enacted read as follows:

(e) Spouse Relieved Of Liability In Certain Cases

(1) In General—Under regulations prescribed by the Secretary or his delegate, if—

(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 includible 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,

(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

(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.

Act of Jan. 12, 1971, Pub. L. No 91-679, § 1, 84 Stat. 2063 (1971).

originally enacted, Section 6013(e) provided an innocent spouse relief from liability: (1) if items were omitted from gross income; (2) if he or she did not know of, and had no reason to know of, these omissions; and (3) if it would be inequitable to hold the spouse liable for the tax on such items, taking into account whether or not the spouse significantly benefited directly or indirectly from the items omitted. However, the 1971 legislation did not provide protection from erroneous or fraudulent deductions or credits. In 1984, Congress liberalized the "innocent spouse" rules to include relief from any "grossly erroneous" items.⁷⁴

Currently, the relief provisions under Section 6013(e) are not triggered unless the spouse claiming relief establishes the following: (1) that a joint return was filed for the taxable year(s) in question; (2) that the substantial understatement of tax is attributable to grossly erroneous items of the other spouse; (3) that the spouse seeking relief did not know, and had no reason to know, of the understatement; and (4) that it would be inequitable to hold the spouse seeking relief liable for the deficiency.⁷⁵ In addition, the deficiency must meet a predetermined amount set by certain dollar-based thresholds.⁷⁶ It is very

74. The 1984 amendment to I.R.C. § 6013(e) states in relevant part:

(2) Grossly erroneous items—For purpose of this subsection, the term "grossly erroneous items" means, with respect to any spouse—

(A) any item of gross income attributable to such spouse which is omitted from gross income, and

(B) any claim of a deduction, credit, or basis by such spouse in an amount for which there is no basis in fact or law.

I.R.C. § 6013(e) (1997).

75. *Id.*

76. The dollar-based thresholds of I.R.C. § 6013(e) (1997) read as follows:

(3) Substantial understatement.—For purposes of this subsection, the term "substantial understatement" means any understatement (as defined in section 6662(d)(2)(A)) which exceeds \$500.

(4) Understatement must exceed specified percentage of spouse's income.—

(A) Adjusted gross income of \$20,000 or less.—If the spouse's adjusted gross income for the preadjustment year is \$20,000 or less, this subsection shall apply only if the liability described in paragraph (1) is greater than 10 percent of such adjusted gross income.

(B) Adjusted gross income of more than \$20,000.—If the spouse's adjusted gross income for the preadjustment year is more than \$20,000, subparagraph (A) shall be applied by substituting "25 percent" for "10 percent".

(C) Preadjustment year.—For purposes of this paragraph, the term "preadjustment year" means the most recent taxable year of the spouse ending before the date the deficiency notice is mailed.

(D) Computation of spouse's adjusted gross income.—If the spouse is married to another spouse at the close of the preadjustment year, the spouse's adjusted gross income shall include the income of the new spouse (whether or not they file a joint return).

(E) Exception for omissions from gross income.—This paragraph shall not apply to any liability attributable to the omission of an item from gross income.

Id.

difficult for a spouse to obtain relief under the "innocent spouse" rules.⁷⁷ These requirements are conjunctive. Failure to satisfy any one will prevent the spouse from obtaining relief.⁷⁸ To complicate matters even further, the spouse claiming innocence has the burden of proving that he or she met all of the requirements.⁷⁹ Moreover, there are no uniform interpretations of these provisions, leaving a range of diverse standards and unpredictable results in case law.⁸⁰ Each of the requirements under the "innocent spouse" rules will be discussed in turn.

A. *The Joint Return*

The first requirement for relief under the "innocent spouse" rules is that a joint return must have been filed for the year(s) in question.⁸¹ This requirement will obviously be satisfied if the spouse is relying on the "innocent spouse" rules. If there was no joint return filed, the spouse would not be liable in the first place and would not have to rely on the "innocent spouse" rules.

B. *Grossly Erroneous*

The requirement that the understatements are attributable to "grossly erroneous" items excluded by the other spouse was one of the changes introduced in the 1984 revisions.⁸² The inclusion of the words "grossly erroneous" broadened the rules to include relief for deficiencies resulting from fraudulent claims of deductions, credits, or basis, but only if they are "in an amount for which there is, no basis in law or fact."⁸³

The phrase "in an amount for which there is, no basis in law or fact" has been difficult for the courts to interpret. For example, in *Shenker v. Commissioner*,⁸⁴ Mr. Shenker held securities on account with White & Company, a brokerage firm in which he was a shareholder. To enable White & Company to meet the capital requirement of the Securities Exchange Commission, Mr. Shenker executed an agreement in April of 1971 declaring that he would not withdraw his stock from his account before April of 1972. Mr. Shenker's efforts to aid White & Company were unsuccessful, and by March of 1972 the Securities Investor Protection Corporation initiated proceedings to liquidate the

77. See *supra* note 53.

78. See, e.g., *Kappenberg v. Commissioner*, 67 T.C.M. (CCH) 3132, 3133-35 (1994) and *Stevens v. Commissioner*, 872 F.2d 1499, 1504 (11th Cir. 1989).

79. See, e.g., *Allen v. Commissioner*, 514 F.2d 908, 912 (5th Cir. 1975).

80. Examples of these unpredictable results will be given in the following subsections of this article.

81. I.R.C. § 6013(e)(1) (1997).

82. I.R.C. § 6013(e)(2) (1997).

83. *Id.*

84. 48 T.C.M. (CCH) 164 (1984), *rev'd*, 804 F.2d 109 (8th Cir. 1986).

company. On their 1971 joint return, Mr. and Mrs. Shenker claimed a loss with respect to the stock held on account with White & Company. The Tax Court found that because White & Company remained viable in 1971 and Mr. Shenker did not formally demand return of the stock until 1972, no loss had occurred in 1971.⁸⁵ However, the Tax Court held that a loss did in fact occur; thus, the issue was merely one of timing, resulting in a "basis in fact."⁸⁶ As a result, Mrs. Shenker was not afforded the protection of the "innocent spouse" rules, and was found liable for the taxes due on the fraudulent deduction.

The United States Court of Appeals for the Eighth Circuit reversed the Tax Court on the theory that not only must there be some basis that the loss occurred, but that it occurred during the taxable year in question.⁸⁷ The court held that since the loss was not sustained in the year in question, there was no basis for claiming the loss, and thus Mrs. Shenker did meet the "innocent spouse" requirement.

A contrary view was taken by the Sixth Circuit in *Purcell v. Commissioner*,⁸⁸ when it affirmed the Tax Court's decision holding that there was some basis in law or fact for the Purcell's deductions. In 1977 and 1978, Mr. and Mrs. Purcell claimed deductions for non-business bad debts with respect to International Demolition, a corporation in which they were both shareholders. The returns were prepared by a certified public accountant who testified that he believed the deductions were correct. International Demolition was in dire financial straits during 1977 and 1978, but did not actually fail until several years after the deductions were taken. Although the losses were not deductible in the years in question, both the Tax Court and the Sixth Circuit found that some factual and legal basis existed for claiming the losses. The standard, therefore, was not met. Although the Tax Court's position on this issue remains the same, the opinions of the Sixth and Eighth Circuits are inconsistent. In fact, in the concurring opinion in *Purcell*, the Sixth Circuit outwardly rejects the Eighth Circuit's interpretation of the "innocent spouse" rules in *Shenker*.⁸⁹

Such broad and varying interpretations of "basis in law or fact" make it more difficult for a spouse seeking relief to meet the "innocent spouse" requirements. The burden is also heightened simply because the evidence needed to meet the standard may not be readily available to the spouse claiming relief. As one commentator pointed out, if the innocent spouse is able to prove the lack of basis for the disallowed deduction, then he or she may be caught in the "proverbial Catch-22."⁹⁰ The Internal Revenue Service may argue that because

85. *Id.* at 167.

86. *Id.* at 167.

87. *Shenker v. Commissioner*, 804 F.2d 109, 115 (8th Cir. 1986), *cert. denied*, 481 U.S. 1068, 107 S. Ct. 2460 (1987).

88. 826 F.2d 470, 476 (6th Cir. 1987).

89. *Id.* at 476.

90. Jerome Borison, *Innocent Spouse Relief: A Call for Legislative and Judicial Liberalization*, 40 Tax Law 819, 854 (1987).

the taxpayer is able to prove the erroneous deduction now, he or she should have done so in the year in question. Therefore, the taxpayer would have had reason to know of the understatement and, accordingly, relief should be denied on that ground.⁹¹

C. Know or Reason to Know

The third requirement of the innocent spouse rules is that the spouse seeking relief did not know and had no reason to know of the understatement.⁹² Once again, courts have had trouble interpreting this standard, and have increased the burden of proof placed on the spouse claiming relief. A taxpayer is considered to have knowledge of the substantial understatement when a reasonably prudent taxpayer in the same position could be expected to have knowledge of the substantial understatement.⁹³ The Tax Court as well as several of the United States Courts of Appeals have held that the knowledge contemplated by the "innocent spouse" rules is knowledge of the transaction giving rise to the taxable income and not knowledge of the actual tax consequences.⁹⁴ However, the Fifth Circuit in *Reser v. Commissioner*⁹⁵ and the Ninth Circuit in *Price v. Commissioner*⁹⁶ have held that knowledge of the transaction itself does not bar the taxpayer from receiving "innocent spouse" protection.

The courts consider a number of factors when determining whether the taxpayer had reason to know of the substantial understatement. The relevant factors are: "(1) The relief-seeking spouse's level of education, (2) his or her involvement in the financial and business activities of the family, (3) any substantial unexplained increase in the family's standard of living, and (4) the culpable spouse's evasiveness and deceit about the family's finances."⁹⁷ These factors are considered together.⁹⁸ No single factor is dispositive.⁹⁹

The Tax Court has also imposed a duty on the spouse claiming innocence to review the tax return and inquire about items that should cause a reasonable

91. *Id.*

92. I.R.C. § 6013(e)(3) (1997).

93. *See, e.g., Price v. Commissioner*, 887 F.2d 959, 965 (9th Cir. 1989).

94. *See, e.g., Purcell v. Commissioner*, 826 F.2d 470, 472 (6th Cir. 1987); *Quinn v. Commissioner*, 524 F.2d 617, 626 (7th Cir. 1975); *Kapenberg v. Commissioner*, 67 T.C.M. (CCH) 3132 (1994); *Hayman v. Commissioner*, 992 F.2d 1256, 1261 (2d Cir. 1993); *McCoy v. Commissioner*, 57 T.C. 732 (1972); *Langberg v. Commissioner*, 67 T.C.M. (CCH) 2981 (1994) and *Meyer v. Commissioner*, 72 T.C.M. (CCH) 546 (1996).

95. 112 F.3d 1258, 1267 (5th Cir. 1997).

96. 887 F.2d 959, 963 (9th Cir. 1989).

97. *See, e.g., Langberg v. Commissioner*, 67 T.C.M. (CCH) 2981 (1994) and *Bokum v. Commissioner*, 94 T.C. 126, 148 (1990).

98. *See, e.g., Langberg v. Commissioner*, 67 T.C.M. (CCH) 2981 (1994) and *Bokum v. Commissioner*, 94 T.C. 126, 148 (1990).

99. *See, e.g., Langberg v. Commissioner*, 67 T.C.M. (CCH) 2981 (1994) and *Bokum v. Commissioner*, 94 T.C. 126, 148 (1990).

person to be suspicious under the circumstances.¹⁰⁰ In *Langberg v. Commissioner*,¹⁰¹ the Tax Court held that large deductions generally put a reasonable taxpayer on notice that there may be an understatement of tax liability. This duty of inquiry has even been interpreted to include more than mere reliance on an accountant's assurance that everything was in order.¹⁰² Likewise, a spouse is not excused when he or she relies on the other spouse to handle the family's finances.¹⁰³

*Cohen v. Commissioner*¹⁰⁴ is another case where the Tax Court denied relief on the basis that the spouse failed to inquire into the tax return. The basis of the deficiency was Mr. Cohen's investment in the Barker Company, a fraudulent tax shelter. None of the investors, including Mr. Cohen, a certified public accountant and partner in the tax department of Peat, Marwick, Mitchell & Co., knew that the shelter was fraudulent. Nevertheless, Mrs. Cohen was denied "innocent spouse" relief based on the fact that a reasonable person under similar circumstances would have inquired into the deficient joint return. One must question the court's reasoning. If relying on the validity of a return prepared by a tax specialist in one of the world's largest accounting firms is not considered reasonable, then what is?

On the other hand, there are cases where the courts seem to impose little or no duty of inquiry. For example, in *Reser v. Commissioner*,¹⁰⁵ the Fifth Circuit reversed the Tax Court's decision and held that Mrs. Reser, a successful attorney, was entitled to relief under the "innocent spouse" rules. The foundation of the deficiency was Mr. Reser's (an attorney with a degree in accounting) fraudulent deduction of losses from his professional real estate brokerage corporation.¹⁰⁶ The court stated that "in the 1980's, it was common knowledge that investors could legally obtain large tax benefits through clever investment strategies."¹⁰⁷ Also, despite her educational background, albeit advanced, the court stated that it in no way provided her with special knowledge of complex tax issues.¹⁰⁸ Therefore, Mrs. Reser had no duty to inquire, and reliance on her husband's assurance as well as their CPA's assurance was sufficient.

Another example of the courts' failing to impose a duty of inquiry is *Guth v. Commissioner*.¹⁰⁹ In *Guth v. Commissioner*, decided the same year as

100. Edison-Smith, *supra* note 52, at 115.

101. 67 T.C.M. (CCH) 2981 (1994) (citing *Hayman v. Commissioner*, 992 F.2d 1256, 1262 (2d Cir. 1993)).

102. *Kappenberg v. Commissioner*, 67 T.C.M. (CCH) 3132 (1994). See also *Hayman v. Commissioner*, 992 F.2d 1256 (2d Cir. 1993) and *Silverman v. Commissioner*, 67 T.C.M. (CCH) 2631 (1994).

103. See, e.g., *Steven v. Commissioner*, 872 F.2d 1499, 1507 (11th Cir. 1989).

104. 54 T.C.M. (CCH) 944 (1987).

105. 112 F.3d 1258 (5th Cir. 1997).

106. He had an insufficient basis in the corporation to take these deductions.

107. *Reser*, 112 F.3d at 1267.

108. *Id.* at 1268.

109. 54 T.C.M. (CCH) 878 (1987), *aff'd*, 897 F.2d 441 (9th Cir. 1990).

Cohen, the Tax Court granted relief to a wife whose husband invested in a fraudulent tax shelter. Mr. Guth founded his own congregation of the Universal Life Church and used it to create various fraudulent deductions. Mrs. Guth was the treasurer of the church and had personally signed large checks, at her husband's request, to her husband on the church's account. Nevertheless, the court found that she had no reason to know of the fraudulent deductions. The Tax Court did not mention a duty of inquiry. Had a duty been imposed, Mrs. Guth may have been denied relief. The actual or constructive knowledge requirement, based as it is on a factual inquiry, can lead to non-uniform results, violating one of the principle goals of tax law: treating similarly-situated taxpayers similarly.¹¹⁰

D. Equity Test

Under the equity test, the taxpayer seeking relief must prove that it would be inequitable under all the facts and circumstances to hold the taxpayer liable for the tax. Prior to the 1984 amendments, the language of the statute explicitly stated that the court should consider whether or not the spouse significantly benefited from the erroneous items.¹¹¹ Although this language was eliminated from the statute, the courts still use the benefit test to determine the equity of imposing the tax liability on the taxpayer.¹¹² Courts determine whether the taxpayer significantly benefited, either directly or indirectly, from the items omitted from gross income, exclusive of ordinary support.¹¹³ As stated in *Sanders v. United States*, this test can be quite ambiguous because "one person's luxury can be another's necessity, and the lavishness of an expense must be measured from each family's relative level of ordinary support."¹¹⁴ In reality, this test is not very different from the knowledge test. If the taxpayer is found to have benefited from lavish expenses, it would be difficult for that taxpayer to turn around and prove he or she did not have reason to know of the transaction. Ordinarily, if a spouse is found to have a reason to know, he or she is found to have benefited.¹¹⁵

110. Beck, *supra* note 49, at 352.

111. Pub. L. No. 91-679, § 1, 84 Stat. 2063 (1971).

112. H.R. Rep. No. 98-432, at 1502 (1984). The committee report explained:

The bill does not specifically require that the determination of whether it would be inequitable to hold the innocent spouse liable include the consideration of whether such spouse benefited from the erroneous item, but that factor should continue to be taken into account.

113. See, e.g., *Terzian v. Commissioner*, 72 T.C. 1164, 1172 (1979) (citing S. Rep. No. 91-1537 (1970), 1971-1 C.B. 606, 608).

114. *Sanders v. United States*, 509 F.2d 162, 168 (1975).

115. See, e.g., *Terzian v. Commissioner*, 72 T.C. 1164 (1979) and *Wright v. Commissioner*, 64 T.C.M. (CCH) 1482 (1992).

E. Dollar-Based Thresholds

Along with the inconsistent and burdensome jurisprudence, which makes the attainment of relief from the "innocent spouse" rules nearly impossible, Congress also created certain dollar-based thresholds as a rule of administrative convenience which must be satisfied before relief can be granted.¹¹⁶ Unless the "grossly erroneous" items exceed five hundred dollars, excluding interest and penalties, the understatement is not considered substantial and does not qualify for "innocent spouse" relief.¹¹⁷

For items such as erroneous claims of deductions, credits, or basis to qualify for "innocent spouse" relief, they must exceed a certain percentage of the spouse's income.¹¹⁸ These dollar limits do not apply to the portion of liability attributable to the omission of an item from gross income.¹¹⁹ When the spouse seeking relief has an adjusted gross income for the preadjustment year of twenty thousand dollars or less, the understatement must exceed ten percent of the spouse's adjusted gross income for that year.¹²⁰ If the spouse's adjusted gross income for the preadjustment year is greater than twenty thousand dollars, then the understatement must be greater than twenty-five percent of the spouse's adjusted gross income for that year to qualify.¹²¹ The preadjustment year is the most recent tax year of the spouse ending before the date the deficiency notice is mailed.¹²²

If the spouse has remarried by the close of the preadjustment year, he or she must include the new spouse's income in his or her adjusted gross income even if they do not file a joint return together.¹²³ Since this new spouse is not obligated personally to pay the deficiency, his or her income should not be a factor in calculating the innocent spouse's ability to pay. As a result, the spouse's adjusted gross income will be incorrectly inflated, thus raising the threshold that the deficiency must meet.

Although these dollar-based thresholds avoid insignificant claims, they can make satisfying the "innocent spouse" rules even more burdensome. The poorer taxpayers who really need the relief are denied it simply because it would be inefficient for the Internal Revenue Service to process these claims.

In conclusion, the inconsistencies and inadequacies of the "innocent spouse" rules, combined with the conjunctive nature and heavy burden of each requirement, prevent the "innocent spouse" rules from providing sufficient relief to spouses in need.

116. I.R.C. § 6013(e) (1997).

117. I.R.C. § 6013(e)(3) (1997).

118. I.R.C. § 6013(e)(4) (1997).

119. I.R.C. § 6013(e)(4)(E) (1997).

120. I.R.C. § 6013(e)(4)(A) (1997).

121. I.R.C. § 6013(e)(4)(B) (1997).

122. I.R.C. § 6013(e)(4)(C) (1997).

123. I.R.C. § 6013(e)(4)(D) (1997).

V. SECTION 66

In 1980, Congress attempted to provide spouses protection from *Poe v. Seaborn* by enacting Section 66 of the Internal Revenue Code, which grants relief to taxpayers in community property states.¹²⁴ The original purpose of Section 66 was to "provide relief for abandoned spouses who are presently taxed on a portion of the income earned by the other spouse but [who] have received no benefit from that income."¹²⁵ In 1984, Section 66 was amended to better protect spouses from tax liability on income from which they did not benefit.¹²⁶

124. Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, §101, 94 Stat. 3521.

125. S. Rep. No. 96-1036, at 8 (1980), *reprinted in* 6 U.S. Code Cong. & Admin. News 7299.

126. Deficit Reduction Act, Pub. L. No. 98-369, § 424 (b), 98 Stat. 494, 802-03 (1984). I.R.C.

§ 66 (1993) provides:

§ 66. Treatment of community income

(a) Treatment of community income where spouses live apart.

If—

(1) 2 individuals are married to each other at any time during a calendar year;

(2) such individuals—

(A) live apart at all times during the calendar year, and

(B) do not file a joint return under section 6013 with each other for a taxable year beginning or ending in the calendar year;

(3) one or both of such individuals have earned income for the calendar year which is community income; and

(4) no portion of such earned income is transferred (directly or indirectly) between such individuals before the close of the calendar year,

then, for the purposes of this title, any community income of such individuals for the calendar year shall be treated in accordance with the rules provided by section 879(a).

(b) Secretary may disregard community property laws where spouse not notified of community income.

The Secretary may disallow the benefits of any community property law to any taxpayer with respect to any income if such taxpayer acted as if solely entitled to such income and failed to notify the taxpayer's spouse before the due date (including extensions) for filing the return for the taxable year in which the income was derived of the nature and amount of such income.

(c) Spouse relieved of liability in certain other cases

Under regulations prescribed by the Secretary, if—

(1) an individual does not file a joint return for any taxable year,

(2) such individual does not include in gross income for such taxable year an item of community income properly includible therein which, in accordance with the rules contained in section 879(a), would be treated as the income of the other spouse,

(3) the individual established that he or she did not know of, and had no reason to know of, such item of community income, and

(4) taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual's gross income, then, for purposes of this title, such item of community income shall be included in the gross income of the other spouse (and not in the gross income of the individual).

(d) Definitions

For purposes of this section—

(1) Earned income

A. Section 66(a)

To obtain relief under Section 66(a) the taxpayer must prove: (1) that the spouses lived apart at all times during the calendar year; (2) that the spouses did not file a joint return with each other for a taxable year beginning or ending in the calendar year; (3) that one or both of the spouses have earned income for the calendar year which is community income; and (4) that no portion of such earned income is transferred, directly or indirectly, between the spouses before the close of the calendar year.¹²⁷

If these conditions are met, then the income is taxed to each spouse in accordance with Section 879(a). Section 879(a) provides that the income is taxed to the spouses as follows: (1) earned income is taxed to the spouse who rendered the personal services;¹²⁸ (2) trade or business income, and a partner's distributive share of partnership income, is treated as income of the spouse who exercises substantially all of the management and control of the business, or who is the partner;¹²⁹ (3) community income from separate property of a spouse is taxed to that spouse;¹³⁰ and (4) all other income is taxed in accordance with community property laws.¹³¹

Many spouses live together or have made some transfer of community income at some time during the year. Thus, many spouses fail to meet the technical requirements of Section 66(a). Consequently, Section 66(a) offers little relief from *Poe v. Seaborn*. In fact, according to one commentator, there has only been one case where a spouse has obtained relief under Section 66(a).¹³² Realizing the limited usefulness of Section 66, Congress added Subsections (b) and (c) in 1984.

B. Section 66(c)

When a spouse fails to meet the requirements of Section 66(a), he or she might still be able to obtain relief by satisfying Section 66(c). Under Section

The term "earned income" has the meaning given to such term by section 911(d)(2).

(2) Community income

The term "community income" means income which, under applicable community property laws, is treated as community income.

(3) Community property laws

The term "community property laws" means the community property laws of a State, a foreign country, or a possession of the United States.

127. I.R.C. § 66(a) (1997).

128. I.R.C. § 879(a)(1) (1997).

129. I.R.C. § 879(a)(2) (1997) and I.R.C. § 1402(a)(5) (1997).

130. I.R.C. § 879(a)(3) (1997).

131. I.R.C. § 879(a)(4) (1997).

132. John A. Miller & Jeffrey A. Maine, *Tax Consequences of Community Income: Problems and Planning Opportunities During Divorce*, 30 Fam. L.Q. 173, 184 (1996).

66(c), the spouse seeking relief must establish that: (1) the spouse did not file a joint return for the taxable year;¹³³ (2) the spouse did not include in gross income for the taxable year an item of community income which would be treated under Section 879(a) as the income of the other spouse;¹³⁴ (3) the spouse did not know of, and had no reason to know of, such item of community income;¹³⁵ and (4) taking into account all the facts and circumstances, it would be inequitable to include that item of community income in the spouse's gross income.¹³⁶ If a spouse meets these requirements, he or she will not have to include in gross income the omitted item. Instead, the omitted item of income will be included in the gross income of the other spouse.

The usefulness of Section 66(c) is limited by its technical requirements. Of the four requirements, the requirement that the spouse did not know and had no reason to know of the community income creates the largest obstacle to obtaining relief under Section 66(c). The lack of knowledge requirement has been interpreted to preclude application of Section 66(c) in cases where a spouse had knowledge of the income-producing activity instead of knowledge of the specific income.¹³⁷ The factual test applied by the Tax Court is that the taxpayer must "prove that a reasonably prudent person with her knowledge of the surrounding circumstances would not and should not have known of the understatement, keeping in mind her level of intelligence, education, and experience."¹³⁸ This is the same burdensome requirement as the "know or reason to know" requirement of the "innocent spouse" rules.

*Roberts v. Commissioner*¹³⁹ is one example of how difficult the actual-or-constructive-knowledge burden is to satisfy. In 1975, Mrs. Roberts and her former husband, Mr. Morgan, were residents of the community property state of Texas, where Mr. Morgan had received several kickbacks from certain real estate transactions. Mrs. Roberts did not know how much her husband earned for the year in question, nor was she aware of the illegal kickbacks. Although the couple enjoyed a lavish lifestyle, Mrs. Roberts was told by her husband that they were living beyond their means. The United States Court of Appeals for the Fifth Circuit upheld the Tax Court's ruling that Mrs. Roberts was liable for one-half of the tax on the unreported kickbacks.¹⁴⁰ The Tax Court reasoned that Mrs. Roberts' knowledge of the existence of the real estate deal, which gave rise

133. I.R.C. § 66(c)(1) (1997).

134. I.R.C. § 66(c)(2) (1997).

135. I.R.C. § 66(c)(3) (1997).

136. I.R.C. § 66(c)(4) (1997).

137. See, e.g., *McGee v. Commissioner*, 62 T.C.M. (CCH) 976 (1991) (quoting *Costa v. Commissioner*, 60 T.C.M. (CCH) 1178, 1191 (1990), *aff'd*, 979 F.2d 66 (5th Cir. 1992).

138. See, e.g., *Porter v. Commissioner*, 62 T.C.M. (CCH) 1217 (1991).

139. 54 T.C.M. (CCH) 94 (1987), *aff'd*, 860 F.2d 1235 (5th Cir. 1988).

140. *Roberts v. Commissioner*, 860 F.2d 1235 (5th Cir. 1988).

to the kickback, and her general familiarity with the real estate business disqualified her from attaining relief under Section 66(c).¹⁴¹

Section 66(c) most often precludes relief when a taxpayer in a community property state suspects that the other spouse is not filing income tax returns properly. In a common law property state, the taxpayer could file a separate return. Yet, in community property states, even when filing separately, the taxpayer is still liable for the tax on one-half of the other spouse's income unless the taxpayer qualifies for Section 66 relief. However, a spouse's suspicion is evidence that the spouse knew or had reason to know of the omission. Accordingly, a suspicious spouse may be disqualified from obtaining Section 66 relief.

C. Section 66(b)

Section 66(b) allows the Secretary to disregard community property laws, such as allocation of half of the couple's community income to the other spouse, where one spouse acts as if he or she is solely entitled to certain community income and fails to notify the other spouse of the community income before the return date.¹⁴² However, Section 66(b) is not mandatory because it merely states that the Secretary "may" disregard community property laws and, therefore, it is subject to selective enforcement. As a result, Section 66(b), like Sections 66(a) and 66(c), provides minimal relief from the inequities caused by *Poe v. Seaborn*.

VI. PROPORTIONATE LIABILITY STANDARD

Over the years, there have been several proposals for amending the "innocent spouse" rules and Section 66.¹⁴³ This section will analyze the most recent proposal, the enactment of a proportionate liability standard, and discuss its implementation in both common law states and community property states. Under the proportional liability proposal, each spouse would be liable for "only that portion of the tax attributable to a joint return that relates to that spouse's contribution to the aggregate joint return tax liability of both spouses."¹⁴⁴

A. Repeal of Joint and Several Liability

To implement a proportionate liability standard, joint and several liability must be repealed. The joint return itself would be retained; only the method of

141. The Fifth Circuit held that the Tax Court's reasoning was not clearly erroneous. *Id.* at 1239.

142. I.R.C. § 66(b) (1997).

143. For a thorough discussion of the expansion and liberalization of the "innocent spouse" rules, see generally Borison, *supra* note 90 and Edison-Smith, *supra* note 52. For a thorough discussion of the enactment of a strictly separate return system, see Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. Cal. L. Rev. 339 (1994) and Kornhauser, *supra* note 42.

144. I.R.S. Notice 96-19, 1991-1 C.B. 371.

allocating the liability would be replaced. The allocation of liability is a wholly separate issue from tax rates and is independent of the majority of forms and calculations of a return. Surprisingly, joint and several liability may be repealed without making any other changes in the tax system.¹⁴⁵ However, Congress may be hesitant to make this leap for two reasons: (1) the administrative difficulties of identifying each taxpayer's individual liability on a joint return;¹⁴⁶ and (2) the potential for fraudulent transfers between spouses in order to avoid taxes.¹⁴⁷ Neither of these reasons poses a valid argument for preventing the repeal of joint and several liability and eliminating the grave injustices that it creates.

B. Administrative Difficulties

Actually, a proportionate liability standard may not create such significant administrative difficulties. Under a proportionate liability standard, each spouse would be liable for that portion of the tax attributable to that spouse's contribution to the aggregate tax liability of both spouses. There are currently several situations where the determination of an individual's liability on a joint return is required. When one spouse is a United States citizen or resident and the other is a nonresident alien residing in a community property state, their individual income must be identified and taxed accordingly.¹⁴⁸ It is also necessary to determine the amount of each spouse's tax liability when each spouse is due a refund with respect to a joint return,¹⁴⁹ and to determine, for estate tax purposes, the amount of income tax that may be deducted with respect to a decedent spouse's income tax liability.¹⁵⁰ The service has adopted a formula for making the determination. That formula is:

$$\text{spouse's liability} = \frac{(\text{spouse's taxable income}) (\text{aggregate tax liability})}{\text{aggregate taxable income}}$$

Considering that the service already has adopted a mechanism for determining the tax due on each spouse's income that is reported on a joint return, there should be little problem in adopting a proportionate liability standard. The major problem, however, is not with creating a formula, but determining the component parts of the formula. More specifically, how does one determine each spouse's taxable income. This problem will be addressed under the subsequent sections entitled "allocation of income" and "allocation of deductions."

145. Beck, *supra* note 49, at 393.

146. Edison-Smith, *supra* note 52, at 127. See also H.R. Rep. No. 75-1860 (1938), reprinted in 1939-1 C.B. (Part 2) 728, 749.

147. See Cummins, *supra* note 54, at 76.

148. I.R.C. § 879 (1997).

149. See Rev. Rul. 80-6, 1980-1 C.B. 296 (applying the separate tax method of allocation in computing the refund).

150. See Treas. Reg. § 20.2053-6(f) (1958).

C. Interspousal Property Transfers

A proportionate liability standard may create the opportunity for abuse of interspousal property transfers. A spouse could, pursuant to a separation or divorce agreement, acquire property that is derived from income that was unreported or fraudulently sheltered. Under a proportionate system, only the earner or transferor would be liable for the tax due on that property. Therefore, if the transferor was insolvent, the transferee would be able to enjoy untaxed income. The Internal Revenue Service, however, may rely on state law of fraudulent conveyances or federal bankruptcy law to set aside such transfers.

The law of fraudulent conveyances allows the Internal Revenue Service to set aside the transfer when it can prove that the transferor was insolvent at the time of the transfer or that he or she later became insolvent because of a transfer that was made without adequate consideration.¹⁵¹ In situations where the Internal Revenue Service can prove that the transferee was aware of or participated in the fraud, there is no need to show that there was inadequate consideration.¹⁵² By setting aside these transfers, the potential abuse may be remedied. In fact, a proportionate liability standard would create more beneficial results in this area because the Internal Revenue Service would be pursuing the earner of the income and not the low-income or non-earning spouse. A proportionate liability standard would lift the unjustified burdens placed primarily on the low-income or non-earning spouse, and they would no longer need to rely on protection from the "innocent spouse" rules.

D. How Will It Work?

To truly appreciate the proposal, one must understand how a proportionate liability standard will affect the basic workings of the current federal income tax system. Under the current joint return system, the spouses' individual items of income and deduction need not be determined to compute their tax liability. However, a proportionate joint return system, like the current separate return system, will require the determination of the spouses' individual incomes and deductions to compute their individual taxable income. Because of the similarities, a proportionate liability standard may have to borrow some techniques from the separate return system.

151. Beck, *supra* note 49, at 402.

152. Under the Uniform Fraudulent Transfer Act, a transfer from a husband to a wife may be presumptively fraudulent without regard to the amount of consideration. Unif. Fraudulent Transfer Act § 4(b)(1), 7A U.L.A. 653 (1985).

E. Allocation of Income

The calculation of income is the first step in determining a taxpayer's taxable income. This section will analyze the affects of a proportionate liability standard on the allocation of income and deductions. The allocation of earned income is generally not very difficult. The majority of spouses can merely rely on their W-2 forms. Yet, as one commentator pointed out, in a separate return system there may be some incentive for artificial allocation of income in family-owned businesses.¹⁵³ Couples may try to shift income from the high-earner spouse to the low-earner spouse by decreasing the former's salary and inflating the latter's salary. As a result, part of the high-earner's salary would be taxed at the low-earner's rate, resulting in less tax due. Although proportionate and separate return systems are similar in that they require the determination of each individual's income, a proportionate system will actually lessen this incentive for fraud. Under a proportionate system, the current joint tax rates will be retained and the total tax due will be the same; only the allocation of tax will be changed. Therefore, shifting the income will not decrease the tax due. For example, assume A and B are married to each other and have taxable incomes of \$30,000 and \$10,000, respectively. If they choose to file separately, their tax liabilities are \$5,800 ($30,000 - 20,050$) \times 28% + 3,000) and \$1,500 (15% \times 10,000), respectively, for a combined tax liability of \$7,300.¹⁵⁴ If A shifted 10,000 of his income to B their combined tax liability would be \$6,000 (15% \times 20,000 = 3,000 for each spouse), resulting in a \$1,300 tax savings.¹⁵⁵ However, under a proportionate liability system, A's and B's total tax liability would remain the same, as any shifting would merely change the allocation of the tax.

Tracing and allocating income from property, although the majority of couples do not live off of income from property,¹⁵⁶ may present a greater obstacle. Simply stated, "there is more opportunity to manipulate a rule that taxes property income to the owner than there is to abuse a rule that taxes earned income to the owner."¹⁵⁷ In common law property states, taxes on income derived from property owned by one of the spouses individually could be assessed solely to the owner. On the other hand, in community property states, income derived from property owned individually by one of the spouses is

153. Zelenak, *supra* note 143, at 382.

154. If the taxpayer's status is married filing separately, the taxpayer's adjusted gross income from \$0 to \$20,050 is taxed at a rate of 15%. The taxpayer's adjusted gross income from \$20,050 to \$48,450 is taxed at a rate of 28%. The tax rates are taken from the Internal Revenue Service, 1996 Instructional Booklet for Federal Income Tax Form 1040, at 53 (1996).

155. If the taxpayer's status is married filing jointly, the taxpayer's adjusted gross income from \$0 to \$40,100 is taxed at a rate of 15%. The tax rates are taken from the Internal Revenue Service, 1996 Instructional Booklet for Federal Income Tax Form 1040, at 53 (1996).

156. Income from property constitutes only about 10% of all adjusted gross income. Zelenak, *supra* note 143, at 384 n.216.

157. *Id.* at 384.

generally considered community income.¹⁵⁸ Therefore, the community will be taxed on the income derived from the property, even if it is individually owned. Currently, when spouses file separate returns, income from community and jointly owned property is divided equally between the spouses.¹⁵⁹ A proportionate system could adopt this approach or create a new standard.

Instead of dividing the income equally, the income could be allocated in proportion to each spouse's ownership interest in the property.¹⁶⁰ However, under community property law, each spouse has an undivided one-half ownership interest in each item of community property.¹⁶¹ To compensate for community property law, a better standard may be to allocate the property income in proportion to each spouse's control over the property and income from the property. Determining a spouse's control may be a difficult task. Does the main wage earner always control all the couple's property and its income? The main wage earner may not always control the property or its income, but arguably he or she did at the time the property was purchased. The decision to allow the lower-income spouse to control the property or its income can be seen as control in itself. On the other hand, in the situation where the spouses have comparable incomes, it may be impossible to determine who controls the property or its income. The best gauge for measuring control may be looking to see in whose name the property is titled. If a stock dividend is issued on stocks owned by the community, but titled under the name of only one of the spouses, the dividend check will be issued to the named spouse. Although the spouse who controls the income may not retain it solely for himself or herself, he or she is in a better position to pay taxes on it.

F. Allocation of Deductions

The next step in determining a taxpayer's taxable income is to subtract the deductions allocated to the taxpayer from the income allocated to him or her. Under the current federal income tax system, spouses who file a joint return are entitled to claim a standard deduction or itemize their deductions.¹⁶² The

158. See La. Civ. Code art. 2339 which states in relevant part:

The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged.

See also Tex. Fam. Code Ann. § 5.02 (West 1997) which states in relevant part, "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property. The degree of proof necessary to establish that the property is separate property is clear and convincing evidence."

159. See, e.g., *Finney v. Commissioner*, 35 T.C.M. (CCH) 1504 (1976).

160. *Zelenak*, *supra* note 143, at 390.

161. For example, La. Civ. Code art. 2336.

162. I.R.C. § 63(c)(6)(A) (1997).

standard deduction is based on the presumption that the couple has itemized deductions equal in size.¹⁶³ Therefore, the standard deduction should be treated the same as the rest of the personal deductions. Under a proportionate liability standard, deductions associated with earned income could be allocated to the spouse reporting that income, and personal deductions could be allocated between the spouses. Again, a proportionate system could incorporate rules used in the separate return. Generally, when filing a separate return, deductible items paid out of community or jointly owned funds are divided equally between the spouses unless one spouse can prove the funds were his or her's individually.¹⁶⁴ For example, where medical expenses are paid out of a joint checking account, there is a rebuttable presumption that each spouse pays one-half of the expenses.¹⁶⁵ However, under this rule, the spouse who controls the income would be taxed on the full amount while he or she would only be allowed to claim half of the deduction. There are two recent proposals to solve this problem in a proportionate system: (1) allocate deductions between the spouses in proportion to their respective adjusted gross income;¹⁶⁶ or (2) allocate deductions entirely to the higher-income spouse until the deductions have equalized their taxable incomes, and after that allocate deductions evenly between the spouses.¹⁶⁷ If the spouses fail to cooperate in disclosing their incomes, each would be allocated fifty percent of the deductions. While each of these proposals present plausible solutions, perhaps the best solution would be to allocate deductions to the spouse who has control over the funds.

Concerning the deduction of items paid out of separately-owned funds, a proportionate liability system could adopt the rules currently used on a separate return. Items paid out of separately owned funds are usually deductible only by the payor, regardless of whose obligation it was.¹⁶⁸ When the source of the funds is indeterminable, the courts have divided the deduction equally between the spouses.¹⁶⁹ On the other hand, certain items are deductible only by the spouse who both incurs and pays the expense. Mortgage payments are not deductible unless paid by the obligor.¹⁷⁰ Charitable donations are only deductible by the owner of the property donated.¹⁷¹ Casualty losses and investment losses are only deductible by the owner of the property lost.¹⁷²

163. Zelenak, *supra* note 143, at 394.

164. Rev. Rul. 55-479, 1955-2 C.B. 57.

165. Rev. Rul. 59-66, 1959-1 C.B. 60.

166. Beck, *supra* note 49, at 399.

167. Zelenak, *supra* note 143, at 395.

168. See, e.g., *Jolson v. Commissioner*, 3 T.C. 1184 (1944).

169. See, e.g., *Finney v. Commissioner*, 35 T.C.M. (CCH) 1504, 1508 (1976).

170. See, e.g., *Johnson v. Commissioner*, 39 T.C.M. (CCH) 868 (1980), *aff'd*, 652 F.2d 54 (2d Cir. 1981).

171. See, e.g., *Stewart v. Commissioner*, 35 B.T.A. 406, 411, (1937), *aff'd*, 95 F.2d 821 (5th Cir. 1938).

172. *Loewenstein v. Commissioner*, 27 T.C.M. (CCH) 1112 (1968).

Medical expenses are deductible by the spouse who paid them.¹⁷³ However, rules pertaining to the allocation of deductions can not be converted to a proportionate liability system without some new problems.

The most obvious problem associated with allocating deductions vis-à-vis a proportionate liability standard is the necessity of detailed recordkeeping. Since the majority of married couples file joint returns,¹⁷⁴ couples are not accustomed to keeping track of whose income paid which deductions. Requiring them to do so will create a heavy burden. However, this burden seems justified when weighed against the problems created by the joint and several liability standard.

In conclusion, the proportionate liability standard would hold each spouse liable for only that portion of the tax attributable to a joint return that relates to that spouse's contribution, taxable income,¹⁷⁵ to the aggregate joint tax liability of both spouses.

G. *Fraudulent Deductions and Credits*

As explained in Part II of this article, the "innocent spouse" rules provide little relief to a taxpayer whose spouse fraudulently claims deductions or credits or has omitted income entirely. A proportionate liability standard, if correctly written, would eliminate the need for the innocent spouse rules. By developing a method that recalculates each spouse's portion of the aggregate joint return tax each time a fraudulent deduction, credit, or omission is discovered, each spouse would remain liable for only his or her share of the tax. This recalculation only requires the employment of simple math and would not be complex or difficult to administer. Such a procedure would insure predictable and equitable results that a spouse, who actually is innocent, could rely on.

H. *The Effects of a Proportionate Liability Standard in Community Property States*

A proportionate liability standard, despite its advantages, may not have any effect on the allocation of tax liability in community property states. The reasoning of *Poe v. Seaborn* is not based on joint and several liability, but on the principle that both spouses have equal rights to community property.¹⁷⁶ In *Poe v. Seaborn*, the United States Supreme Court held that each spouse had to report one-half of the community's income on their separate individual returns. Therefore, the implementation of a proportionate liability standard will not correct the inequities created by *Poe v. Seaborn*. As long as *Poe v. Seaborn*

173. Rev. Rul. 55-479, 1955-2 C.B. 57.

174. See Internal Revenue Service, *supra* note 51, at 16.

175. Based on property controlled by that spouse.

176. 282 U.S. 101, 111, 51 S. Ct. 58, 59 (1930).

remains good law, spouses in community property states will continue to be liable for one-half of the community's income. Most commentators as well as this author agree that overruling *Poe v. Seaborn* is an essential step in the reform of community property income tax laws.¹⁷⁷ However, even if *Poe v. Seaborn* is overruled, proportionate liability may still not have the desired effect of allocating tax liability solely to the earner.

In a proportionate liability system, only the earning spouse would be liable for the tax due on his or her income. However, according to state community property laws, debts incurred by either spouse during the marriage for the benefit of the community are community debts.¹⁷⁸ Thus, community creditors may seek satisfaction of these debts from all community property. The individual tax liability of the spouses would be classified as a community debt, and the Internal Revenue Service could enforce the earning spouse's federal tax obligation against the community's property. Although the other spouse would not be personally liable for the earning spouse's taxes, he or she would be liable for his or her share of the community's debt. Therefore, the non-earning or low-income spouse would still be subjected to tax liability on income he or she did not earn. To resolve this problem, the proportionate liability standard created would have to intentionally preempt community property law. Without this preemption, a proportionate liability standard would unjustly discriminate against spouses in community property states. However, Congress may be hesitant to preempt state law in this field. Why should the Internal Revenue Service be placed in a position different from any other creditor of the community?

VII. CONCLUSION

A proportionate liability standard could be fashioned so as to resolve some of the major problems created by joint and several liability. By allocating the income and deductions from property in proportion to each spouse's control over the property, innocent spouses, such as the ones mentioned in this article, would not be held liable for taxes on income over which they had little or no control. A proportionate liability standard would also be consistent with the principle that the incidence of tax is based on the taxpayer's ability to pay. However, if the search is for a system that is fair to all taxpayers no matter what property regime they reside in, then the enactment of a proportionate standard is not enough. Along with the implementation of a proportionate liability standard, *Poe v. Seaborn* would have to be overruled and Congress would have to preempt state community property laws. In conclusion, a proportionate liability standard may

177. See, e.g., John A. Miller, *Federal Income Taxation and Community Property Law: The Case for Divorce*, 44 Sw. L.J. 1087, 1133 (1990); Kalinka, *supra* note 45, at 704 and Zelenak, *supra* note 143, at 378.

178. W.S. McClanahan, *Community Property Law in the United States* § 10:4, at 484 (1982).

not solve all the problems of the current system, but it would undoubtedly be the lesser of the two evils.

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