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Of Counsel
John A. Lydick

November 3, 2009

Sent Via Federal Express

William Jarvis

Internal Revenue Service
Appeals Office
312 Elm Street, Suite 2330
Cincinnati, OH 45202-2763

Re: Taxpayer
SSN: **867-84-1260**
Taxpayer's husband, Deceased **5/16/2008**
SSN: **867-74-0533**
Tax Years: 2005 and 2006

Dear Mr. **Jarvis**:

Pursuant to our conversation today, I am enclosing for your review the Tax Court decision in *Nihiser v Comm'r*, TC Memo 2008-135 (2008).

The case is helpful in many respects to Taxpayer's case, not the least of which is the following:

1. The absence of a significant benefit is not a "neutral" factor in weighing whether or not to grant relief, but, instead, "should be a positive factor for petitioners." TC Memo 2008-135, at 20 n8.

2. A finding of abuse on this record, is unavoidable (see Dr. **Wright**'s letter of September 22, 2009; Exhibits 2 & 3 to Form 8857 submitted for 2007; Exhibit 3A to my letter to you of April 27, 2009, which is Taxpayer's spouse's death certificate showing the cause of death as "heroin intoxication"; Taxpayer's own testimony at the telephone conference, her statements made on Form 8857 for 2005 and 2006; Exhibit 13 (the cash withdrawal history of Taxpayer's spouse, and the Accounting submitted regarding the insurance proceeds showing debts Taxpayer's spouse left and evidence of him "keeping" his girlfriend(s)). In *Nihiser*, the Tax Court's discussion of "abuse," "duress," and the fact that proof of abuse does not have to rise to the level of duress is helpful. TC Memo 2008-135, at 25-33.

The record is sufficient to conclude Taxpayer was under duress when she signed

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the returns based on Taxpayer's spouse's threats. She feared him as evidenced by Dr. Wright's letter and her own testimony. However, the proof does not have to satisfy you there was duress, as long as there was abuse. A finding of abuse tilts the "knew or should have known" factor in favor of Taxpayer. TC Memo 2008-135, at 26-27, 42-43.

Further, the *Nihiser* decision lays out an non-exclusive list of conduct by the abusive spouse that assist the finding that abuse occurred. TC Memo 2008-135, at 30-31 & n12. Taxpayer's spouse displayed the majority of these factors and they are proved on this record.

The Tax Court also found that it is unnecessary to reject proof of abuse unless it is targeted to "moment the return is signed . . .":

But it's abuse as a factor by itself, not just as a relevant bit of evidence about one spouse's state of knowledge, that we're looking for in this case. This is an important point because it liberates us from focusing on the moment the return is signed—the relevant abuse precedes that moment, but *there's no suggestion in the Procedure or any other source of relevant law that limits our consideration of whether a spouse was abused only to abuse that causes a particular instance of noncompliance with the tax law.*

TC Memo 2008-135, at 27-28 (emphasis added). The Court then went on to find that abuse factor weighed in petitioner's favor. TC Memo 2008-135, at 33 & 42-43 ("*We therefore find on the peculiar facts of this case that Nihiser's knowledge of her husband's underpayment of their taxes is outweighed by the abuse she suffered and her utter lack of any benefit from the money. He kept her from seeing the broader state of the family's finances and spent the money on himself.*") (emphasis added). And this should be the finding here with Taxpayer even if you think she is charged with knowledge, a conclusion we dispute.

3. In weighing the factors, the Tax Court quoted the Third Circuit in *Bliss v Comm'r*, 59 F3d 374, 380 n3 (2d Cir 1995):

[T]he innocence we look for "within the meaning of this statute is innocent vis-a-vis a guilty spouse whose income is concealed from the innocent and spent outside the family."

TC Memo 2008-135, at 42 (emphasis added). As illustrated by the proofs, here, Taxpayer's spouse concealed his income from his wife (separate bank accounts, with Taxpayer's spouse's account statements sent directly to his office, not home; the ritual on April 15th of waiting until the last minute to obtain Taxpayer's signature, then concealing with his hands the substance of the return and commanding her to sign it; Taxpayer's spouse was responsible for all household

finances per Form 8857), his children (not providing his tax returns to one son to obtain a student loan until the last minute), the spending illustrated by Taxpayer's spouse's cash advances from his checking account, and the debts Taxpayer had to pay after Taxpayer's spouse's death that were his responsibility.

Taxpayer is clearly an innocent spouse within the meaning of section 6015(f).

4. While knowledge is the most important factor to weigh, Taxpayer's lack of it is a factor in her favor here. In *Nihiser*, the innocent spouse "suspected that her husband's continuing drug habit was contributing to their financial problems." TC Memo 2008-135, at 40. Taxpayer has stated that while they suspected Taxpayer's spouse abused alcohol, they had no idea he was a heroin addict or had a girlfriend(s) he supported. In fact, the latter factor was so far from her mind, after Taxpayer's spouse's death, as set forth in the Accounting, she paid DTE Energy bills oblivious they were to another address for a third party.

5. On the economic hardship factor, the Tax Court noted that Mrs. Nihiser was earning \$68,000 as a teacher at the time IRS Appeals considered her request. TC Memo 2008-135, at 37. She owed taxes in excess of \$200,000. TC Memo 2008-135, at 37. That is a ratio of 3 to 1, income to tax debt. Similarly, Taxpayer has earned as much as \$13,000 annually as a receptionist, but has a tax debt, including the sum claimed due for the deficiency in 2007 of about \$45,000. That's about a 3.5 to 1 ratio of income to tax debt. As the Tax Court noted, "it thus should have been screamingly obvious that she would not be able to meet her basic living expenses if she had to pay a tax liability of more than \$200,000." TC Memo 2008-135, at 37-38.

6. The Tax Court would review Taxpayer's economic hardship issues under the facts and circumstances presenting themselves at the time of trial. You would do the same, *i.e.*, weigh the facts and circumstances as of the time of this appeal. TC Memo 2008-135, at 38.

The Accounting for application of the insurance proceeds demonstrates that Taxpayer has spent these monies. None of the expenditures are unreasonable, including those made (about \$60,000 worth) to relieve her new husband from debts—debts reduced to judgments and for which creditors were threatening collection, including the garnishment of his own modest wages. The balance of the expenditures were for her sons, to pay Taxpayer's spouse's obligations he claimed he had paid while he was alive, a modest honeymoon, a modest vacation to upper Michigan, and the like.

Moreover, the Tax Court stated it

must also consider Nihiser's *future ability to earn her current salary and pay her basic living expenses. She restarted her*

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career late in life, and does not have a home or other assets to rely on after she retires. We find that if she is required to pay over \$200,000 in taxes she will not be able to pay her basic living expenses. We find that the economic-hardship factor weighs in favor of relief.

TC Memo 2008–135, at 39 (emphasis added). Taxpayer’s new husband has no obligation to pay for Taxpayer’s deceased husband’s tax debt. Taxpayer has a high school education no special skills that would allow her to earn more than \$13,000 annually in this economy, particularly the economy in Southeastern Michigan. She could lose her present receptionist position tomorrow and no one would be the least bit surprised. She has no IRA, pension, or other retirement fund to fall back on and, at her age, has little likelihood she ever will.

When the Tax Court decision in *Porter v Comm’r*, which is Exhibit 11, and *Nihiser* are read together, you must find that the facts presented on behalf of Taxpayer entitle her, after weighing all the factors, to relief under section 6015(f). I hope you will do the right thing under the law and facts of this case and grant her complete relief.

Very truly yours,

Marc E. Thomas

MET:vr

Enclosure

cc (w/ encl): Taxpayer