

the spousal notification requirements set forth in regulations under section 6015 and discusses similar notification requirements under section 66. If the IRS grants relief under section 66, the liability of the requesting spouse will shift to the nonrequesting spouse. Thus, notification and participation requirements similar to those applicable in section 6015 cases are also appropriate for section 66 cases. In addition, information provided by a nonrequesting spouse may help to determine the appropriate amount of relief for the requesting spouse, if any.

Similarities between the guidance set forth in the regulations under section 6015 and the regulations under section 66 are due to the similarities in the elements required, or factors considered, in determining relief under these statutes. The analysis set forth in proposed § 1.66-4(a)(2) and (3) regarding knowledge or reason to know and benefit is similar to that contained in § 1.6015-2(c) and (d). The final regulations modify this analysis and adopt commentators' suggestions to the extent that the suggestions are consistent with the statute, legislative history, and case law under section 66(c). These changes are more fully discussed in the comments and explanation under § 1.66-4 below.

2. Section 1.66-1

One commentator stated that § 1.66-1 of the proposed regulations failed to expressly require each of the spouses to report those items of separate income that are attributable to each spouse under applicable state community property laws. Generally, community income is reportable half by each spouse pursuant to *Poe v. Seaborn*, 282 U.S. 101 (1930), and section 61. Whether income is separate or community is determined under state law and the income is included in gross income under section 61. The final regulations do not include guidance on how to report income that is not community income under state law, as this would be outside the scope of section 66.

The final regulations clarify in § 1.66-1(a) that the general rule of community property applies to married individuals domiciled in community property states. A taxpayer should report income in accordance with the laws of the state in which he or she is domiciled. *United States v. Mitchell*, 403 U.S. 190, 197 (1971); *Commissioner v. Wilkerson*, 368 F.2d 552, 553 (9th Cir. 1966). For example, a taxpayer who is domiciled in State A, a community property state, should report income in accordance with the community property laws of State A, although she may be living in

State B temporarily, due to a work detail, military assignment, etc.

One commentator noted that under § 1.66-1(b), the limitation of the scope of the regulations to married taxpayers was too restrictive. The commentator noted that income earned during a marriage, but received after the dissolution of the marital community, was community income under the laws of the commentator's state. The commentator suggested that section 66 should apply to this income, as it is community income under state law. The final regulations frame the issue in terms of application of section 66 to community income, rather than in terms of marital status.

The final regulations state that section 66 applies only to community income, as defined by state law. The final regulations, however, make a distinction between community income and income from property that was formerly community property but, in accordance with state law, is converted to a form of property that is not community property, such as separate property or property held by joint tenancy or tenancy in common.

Under the laws of certain community property states, property that was community property during the marriage ceases to be community property after the dissolution of the marital community. Conversely, some state laws treat property that was not community property as community property for the limited purpose of dividing assets upon divorce. See *Estate of Mitchell v. Mitchell*, 76 Cal. App. 4th 1378 (Cal. Ct. App. 1999). Income from such property is not community income subject to the provisions of section 66. The determination as to whether income from such property is community income may be confusing due to the fact that sometimes courts will refer to the property, using "universally recognized shorthand," as community property. See *Bouterie v. Commissioner*, 36 F.3d 1361 (5th Cir. 1994) (in which the court found that the wife did not have community income from community property and the IRS improperly relied on a state court's imprecise use of the term "community property" in referring to property that was formerly community property), *rev'g* T.C. Memo. 1993-510.

Thus, in determining whether section 66 applies to income, it is first necessary to determine whether the income is community income under state law. The marital status of the parties likely will be relevant to this initial determination.

3. Section 1.66-2

One commentator noted that it may be difficult to determine whether a transfer of income is a transfer of *earned* income under § 1.66-2(a)(5). A transfer of earned income precludes the reporting of income in accordance with § 1.66-2, even if a taxpayer meets the other requirements of § 1.66-2. The commentator suggested that there should be a presumption under § 1.66-2 that any transfer of income or property is a transfer of earned income. The final regulations adopt this recommendation with respect to transfers of income. It is a logical presumption that income is more likely to be earned than unearned, and that a taxpayer who has unearned income is likely to have earned income as well.

Another commentator suggested that the final regulations clarify the requirement of § 1.66-2 that spouses live apart. The final regulations adopt this recommendation by cross-referencing the definition of members of the same household in § 1.6015-3(b).

The final regulations clarify that, when reporting income in accordance with section 66(a), an individual must report all income in accordance with section 66(a). Section 66(a) does not apply on an item-by-item basis.

4. Section 1.66-3

One commentator recommended that the final regulations emphasize that the IRS may disallow the Federal income tax benefits of any community property law under section 66(b) on an item-by-item basis. Because the proposed regulations already reference "item of community income" in every sentence of § 1.66-3, however, the final regulations do not adopt this recommendation.

One commentator suggested that the IRS should assert section 66(b) sparingly, only if "the * * * spouse had no knowledge whatever of the income * * * and did not benefit from the income in a division of marital assets." Section 66(b) allows the IRS to deny the Federal income tax benefits of community property law only when a taxpayer acted as if solely entitled to the income and failed to notify the taxpayer's spouse of the income. The final regulations do not impose additional requirements on the IRS.

Commentators also recommended that the final regulations provide examples of what constitutes treating income as solely one's own and how specific a taxpayer must be when notifying his or her spouse of the nature and amount of the income. The final regulations adopt this recommendation.