

5. Section 1.66-4

The proposed regulations describe relief granted under the first sentence of section 66(c) as “specific relief.” The final regulations adopt the term *traditional relief* to describe relief granted under this provision. The final regulations retain the term “equitable relief” to describe the relief granted under the second sentence of section 66(c).

The proposed regulations require that a spouse requesting relief under § 1.66-4 file a separate return for the taxable year relating to the request. One commentator noted that section 66(c)(1) requires only that an individual not file a joint return. The legislative history of section 66(c) confirms that Congress did not intend to require an individual to file a return to be eligible for relief under this provision. The House Report uses the phrase “at the time the return was filed (if a return is filed).” H.R. Rep. No. 98-432, pt. 2, at 1503 (1984). In earlier cases regarding relief under section 66(c), the Tax Court implies that a requesting spouse must file a separate return. See, e.g., *Roberts v. Commissioner*, T.C. Memo. 1987-391, *aff’d* 860 F.2d 1235 (5th Cir. 1988). More recent cases, however, specifically state that not filing any return meets the requirement of not filing a joint return. See, e.g., *Ollestad v. Commissioner*, T.C. Memo. 1996-139; *Costa v. Commissioner*, T.C. Memo. 1990-572. The final regulations adopt the recommendation to limit the requirement to not filing a joint return.

One commentator suggested that the discussion of knowledge and reason to know of an item of community income in § 1.66-4 ignores the low probability that a requesting spouse would have access to accurate information or knowledge regarding what the nonrequesting spouse reported or did not report for Federal income tax purposes. Under section 66(c), a requesting spouse is required to prove, among other things, that “he or she did not know of, and had no reason to know of, such item of community income” to obtain traditional relief. The final regulations include a discussion of knowledge and reason to know, as this is an element required by section 66(c)(3). The facts and circumstances considered in making the determination of knowledge or reason to know are consistent with the knowledge and reason to know analysis set forth in case law determining relief under section 66(c).

Additionally, the final regulations include new language regarding the knowledge standard under section 66(c).

To more closely track the language of section 66(c), the phrase *item of community income* replaces the term *understatement* when referring to the item about which the requesting spouse has knowledge or reason to know. Finally, the final regulations clarify that knowledge of the source of community income or the income-producing activity, without knowledge of the specific amount of income, is sufficient knowledge to preclude relief under section 66(c). This is consistent with the knowledge and reason to know analysis set forth in case law under section 66(c). See, e.g., *McGee v. Commissioner*, 979 F.2d 66, 70 (5th Cir. 1992), *aff’g* T.C. Memo. 1991-510.

Two commentators questioned whether the standard of significant benefit in excess of normal support, which is used in determining whether it is equitable to grant relief under section 6015, is the applicable standard under section 66. One commentator noted that under community property laws, each spouse generally is entitled to half of the income of the other spouse. Under section 66, a requesting spouse essentially is seeking relief for half the income of both spouses, which may have been used to provide normal support to both spouses. Contrast this situation to that under section 6015, which permits a requesting spouse to seek relief from joint and several liability for the tax on all of the income of the nonrequesting spouse. This commentator suggested that the tax liability should be shifted to the nonrequesting spouse only if the nonrequesting spouse has treated the income in a manner inconsistent with the community property regime, for example, has not allowed use of the income for normal support or has transferred no part of the income to the requesting spouse.

A majority of cases decided under section 66(c) make the determination of whether it is equitable to grant relief based on the “benefit” received by the requesting spouse, as opposed to the “significant benefit” standard applied by courts in determining relief under former section 6013(e) and section 6015(b). See *Beck v. Commissioner*, T.C. Memo. 2001-198, *acq.* 2002-49 I.R.B.; *Hardy v. Commissioner*, T.C. Memo. 1997-97. The court in *Beck* and *Hardy* cited the legislative history of section 66(c) when discussing benefit under section 66. The legislative history provides that, in determining whether it is equitable to grant relief under section 66(c), the standard is “whether the [requesting] spouse benefitted from the untaxed income.” H. Rep. No. 98-432,

pt. 2, at 1503 (1984). The final regulations adopt this standard.

One commentator suggested that the time limitations set forth in § 1.66-4 for requesting relief under section 66(c) are not supported by the language of section 66(c). Although the statute itself does not set forth time limitations on the filing of a request for relief, the time limitations in the proposed regulations are supported by the legislative history of the traditional relief provision of section 66(c). Specifically, the House Report explaining traditional relief under section 66(c) states that, in making the determination as to relief, the IRS should consider (among other things) “whether the defense was promptly raised so as to prevent the period of limitations from running on the other spouse.” H.R. Rep. No. 98-432, pt. 2, at 1501 (1984). Thus, the final regulations retain the time limitations set forth in the proposed regulations. In contrast, § 1.66-4(j)(2)(ii) sets forth timing requirements for requesting equitable relief that are broader than the requirements applicable to traditional relief because the legislative history of the equitable relief provision does not contain similar timing requirements. Therefore, a requesting spouse who does not meet the time limitations to request traditional relief may be eligible to request equitable relief.

Another commentator noted that perhaps the timeliness of the requesting spouse’s request should be only one factor in determining whether to grant traditional relief under section 66(c), as opposed to a threshold requirement. This comment was not adopted because a requesting spouse who does not meet the timing requirements for traditional relief still may receive equitable relief under section 66(c).

One commentator urged that no request for relief under section 66 should be considered premature. There must be some indication that the IRS may determine a deficiency prior to the filing of a request for relief from a deficiency under section 66(c). Thus, the final regulations retain the timing limitations set forth in the proposed regulations regarding premature requests.

The final regulations incorporate an item-by-item approach to relief from the Federal income tax liability resulting from the operation of community property law under section 66(c). If a requesting spouse receives relief under section 66(c), the proposed regulations provide for treatment of *any* community income of the spouses in accordance with the rules provided by section 879(a), which is consistent with the statutory rule under section 66(a). The