

**Illinois Department of Revenue
Regulations**

Title 86 Part 100 Section 100.5040 Innocent Spouses

TITLE 86: REVENUE

**PART 100
INCOME TAX**

Section 100.5040 Innocent Spouses

- a) Spouses who file a joint return for a taxable year are each liable for the entire tax liability of the couple, regardless of which spouse earned the income reportable on the return. (See IITA Section 502(c).) However, spouses may be entitled to relief from some or all of a joint return liability under the Innocent Spouse provision in IITA Section 502(c)(4). An election under this Section to obtain such relief applies to every year for which a joint return was filed involving the same two individuals listed in the election.

- b) For tax liabilities arising and paid prior to August 13, 1999, a spouse shall, with respect to any taxable year to which the election applies, be relieved from liability for any Illinois tax, penalties, additions to tax, interest, or other amounts, to the same extent as the relief provided by the Internal Revenue Service under a Section 6013(e) determination. If there is no federal income tax liability at issue, a spouse shall be relieved from liability for any Illinois tax, penalties, additions to tax, interest, or other amounts, if:
 - 1) a joint return was filed for such taxable year;
 - 2) the amount of understatement of tax exceeds \$500 and is attributable to an omission by such person's spouse;
 - 3) the spouse did not know of, and had no reason to know of, such omission at the time of signing the return; and
 - 4) it is unfair to hold the spouse liable for the deficiency in tax for such omission.

- c) *For tax liabilities arising after August 13, 1999, or which arose prior to but remain unpaid as of August 13, 1999, any individual who makes an election under this Section shall be liable only for the amount of Illinois income tax that does not exceed the individual's separate return amount for that taxable year and the individual's liability for any deficiency assessed for that taxable year shall not exceed the portion of the deficiency properly allocable to the individual. (IITA Section 502(c)(4)(B))* If any portion of a liability for a tax year (including any portion of any interest or penalty) arising prior to August 13, 1999 remains unpaid as of that date, innocent spouse relief for that entire liability shall be determined pursuant to this subsection (c). (See *Flores v. United States*, 88 A.F.T.R.2d 2001-7020 (Ct. Fed. Cl. 2001).)

- d) Making the Election. There are two ways that an individual may elect the protection of the innocent spouse provision according to IITA Section 502(c)(4):

- 1) An individual who submits proof of an election made pursuant to Section 6015 of the Internal Revenue Code (by sending a copy of Form 8857 to the Department) automatically elects the innocent spouse provision (i.e., IITA 502(c)(4)). Any determination made under Section 6015 with respect to the validity of the innocent spouse election and/or the individual's separate return amount or portion of any deficiency attributable to the individual is conclusively presumed to be correct.
- 2) If no election has been made under Internal Revenue Code Section 6015, an innocent spouse must file Form IL-8857 and meet the following conditions:
 - A) a joint return was filed for the taxable year; and
 - B) the spouse seeking relief under this Section either has been assessed an amount of Illinois income tax for the taxable year in excess of his or her separate return amount or has had a deficiency asserted against him or her (whether or not assessed) that is properly allocable to the other spouse; and
 - C) no assets have been transferred between the spouses as part of a scheme by such individuals to avoid payment of Illinois income tax.
- e) **Limitations on the Innocent Spouses Election.** An innocent spouse election shall qualify as a claim for refund of any overpayment that results from the granting of innocent spouse relief. There is no limitations period for making an innocent spouse election. However, no refund of taxes paid by a spouse making the election will be made unless the election is filed within the applicable period for filing a claim for refund of income taxes.
- f) **Notice to Joint Return Spouse.** At the written request of the spouse making the election, the Department shall send a notice to the other spouse listed on the joint return for the tax years at issue, stating that a request for innocent spouse relief has been filed and inviting submission of any documentation or other information that may assist the Department in making a determination. Notice will be sent by regular mail to the joint return spouse's last known address. The notice shall state that it does not give the notified spouse any right to participate in the proceedings and that, although the notified spouse may provide documentation or other information at any time, the Department is not obligated to consider any submission made more than 60 days after the date of the notice. Another notice shall be sent after the determination is final stating the effects of the proceedings on the joint return spouse's liability.
- g) **Burden of Proof.** The individual seeking relief has the burden of proof with respect to all matters, except that the Department has the burden of proof with respect to disputes regarding a spouse's knowledge of an erroneous item or the existence of a scheme to avoid payment of tax under subsection (d)(2)(C) of this Section.
- h) **Collection Action.** Receipt by the Department of proof of an election under the Internal Revenue Code section 6015 or the filing of Form IL-8857 will only terminate Department collection activity against the spouse seeking relief; assessments will continue against both spouses. Collection activity will cease until a notice is sent to the electing spouse:
 - 1) stating that the election is invalid; or

- 2) identifying the portion of tax liability or deficiency that has been allocated to the electing spouse.
- i) **Written Protests.** An electing spouse who receives a notice stating either that the election is invalid or that the relief granted is less than the relief the electing spouse believes is warranted may file a written protest to the notice within 60 days (or 150 days if outside the United States) from the date of the notice. If a written protest is filed, the electing spouse will be granted a hearing according to IITA Section 908. Further administrative review shall be allowed in accordance with IITA Section 1201. Once the Department is in receipt of a written protest that is properly filed, no collection action shall be taken by the Department until the decision regarding the protest becomes final under Section 908(d), or if administrative review of the Department's decision is requested under Section 1201, until the decision of the court becomes final. Assessment is not affected by the filing of a written protest.
- j) **Claims in Addition to the Innocent Spouse Provision.** Alternative grounds for the individual's claim of reduced liability or no liability shall be consolidated, if possible, with the election of the innocent spouse provision and any outstanding Notice of Deficiencies in order to enhance administrative efficiency.
- k) **Definitions.**
 - 1) "Separate return amount" means an amount equal to the excess (if any) of:
 - A) the tax liability of the individual based on the items shown on the joint return for the taxable year if the individual had filed a separate return, over
 - B) the aggregate payments of such tax properly allocable to such individual, net of any refund or credit allowed for any overpayment of tax for the taxable year.

In determining the tax liability that the individual would have incurred had he or she filed a separate return, any item of income, deduction, exemption credit, or payment that is not clearly allocable to either spouse shall be divided equally between the spouses. In determining the payments of tax allocable to an individual for a taxable year, any payment of estimated tax made on behalf of both spouses, any credit allowed on a return for an overpayment reported on the preceding taxable year's joint return by the same spouses, and any refund or credit allowed for an overpayment shown on the return for the taxable year will be allocated in proportion to the separate return amount of each spouse for the taxable year, as determined without regard to such estimated tax payment, credit or overpayment refunded or credited.

Example 1. Interest earned on a joint bank account, the exemptions allowed for dependent children, the credit for property taxes paid with respect to the spouses' principal residence, and any payment of estimated tax made from a joint bank account will be divided equally between the spouses in the absence of evidence that such amounts should be allocated in a different manner.

Example 2. Husband and Wife file a 1999 Illinois income tax return, reporting an overpayment of \$500 that they elect to have credited against their joint estimated

tax liability for 2000. They make joint estimated tax payments of \$200 in 2000 and file a joint return for 2000, and Wife subsequently requests innocent spouse relief. For 2000, Husband's separate return amount, as determined without regard to the \$500 credit or the \$200 in estimated tax payments, is \$2,000. The tax on Wife's separate return items is less than the amount of Illinois income tax withheld from her wages by her employer. Accordingly, the entire \$700 in credit and estimated tax payments are allocable to Husband. If Wife's separate return amount, determined without regard to the credit or the estimated tax payments, were \$1,000, one-third of the \$700 would be allocable to her and two-thirds would be allocable to Husband.

- 2) For purposes of this Section, "deficiency" means the difference between the total amount of tax that should have been shown on the return and the amount of tax that was actually shown on the return. The portion of a deficiency properly allocable to an individual will be determined by allocating the erroneous items of income, deduction or credit whose correction generates the deficiency between the spouses in the same manner as would be used to allocate such items between the spouses for purposes of determining the separate return amounts for the spouses; provided that the amount of any deficiency resulting from an erroneous item shall be allocated to each spouse who had actual knowledge of the erroneous item.

Example 3. Husband and Wife file a joint return for 2000 that omits \$5,000 in compensation earned by Husband from a temporary job. Wife knew that the \$5,000 was improperly omitted at the time she signed the return. In determining the deficiency allocable to Husband, the \$5,000 will be allocated to him because it is his income. However, in determining the deficiency allocable to Wife, the \$5,000 will be allocated to her because it is an erroneous item of which she had actual knowledge. Note that the Department has the burden of proof to show that Wife had actual knowledge of the erroneous item.

- 3) "Erroneous items" means any unreported income and any deductions or credits reported incorrectly on a return.

(Source: Amended at 32 Ill. Reg. 10170, effective June 30, 2008)