



LEGAL AID
OF NEBRASKA



Injured Spouse Claims and Innocent Spouse Relief



NOTE: This worksheet applies to "Married Filing Jointly" individual income tax returns only. Injured Spouse claims and Innocent Spouse relief may be available to you even if you are separated from your spouse or are no longer married to your spouse, so long as you filed a joint tax return for the year in question.

What is an Injured Spouse claim?

An Injured Spouse claim is a way for you to protect that portion of the refund that corresponds to your income, as reported on an individual income tax return filed by you and your spouse using the filing status "Married Filing Jointly", from being intercepted for a non-marital debt belonging to your spouse. An Injured Spouse claim can also be used to recapture part or all of your joint income tax refund from years when your joint income tax refund was intercepted for a non-marital debt belonging to your spouse.

Because married couples cannot get Earned Income Tax Credit if they file separate returns using the filing status "Married Filing Separately", the Injured Spouse claim can help married couples claim Earned Income Tax Credit and receive at least part of that refund free from interception.

How do I qualify for an Injured Spouse claim?

You qualify for an injured spouse claim if you meet all of the following three conditions:

1. You are not required to pay the past-due amount. This means that the debt that will be or was intercepted from your tax refund occurred before you got married OR your spouse is the only one who owes the debt.
2. You reported income on the joint tax return. This means some or all of the income on the tax return belongs to you. Income includes wages and self-employment.
3. You made and reported payments on the joint return. Payments include federal income tax withheld from your wages, estimated tax payments, or refundable credits, such as the earned income tax credit.

When should I file an Injured Spouse claim?

If you received a letter from an agency telling you that your tax refund would be withheld to pay your spouse's debt, you should file an Injured Spouse claim when you file your joint tax return.

You can also call the Financial Management Service of the Department of Treasury at **1-800-304-3107** to find out if your tax refund will be intercepted.

If you did not file an Injured Spouse claim with your tax return and your tax refund was intercepted, you have six years to file an Injured Spouse claim and get back your portion of the tax refund.

When can a tax refund be intercepted?

A tax refund, including Earned Income Tax Credit, can be intercepted (or, "offset") for a government debt, such as those listed below. A joint tax refund (a refund on an income tax return filed "Married filing jointly") can be intercepted for the debts of either spouse.

defaulted student loan child support and/or birthing expenses
federal tax debt state tax debt

Social Security overpayment Veterans Administration overpayment

If your all or part of your refund is intercepted, it is intercepted before the refund is ever sent to you.

How do I make an Injured Spouse claim?

You make an injured spouse claim by filling out IRS Form 8379. You can file Form 8379 with your income tax return or for up to six years after you file your income tax return.

-If you have not yet filed your joint tax return, attach Form 8379 behind your return and enter "Injured Spouse" in the upper left corner of the return. You can file Form 8379 electronically when you e-file your tax return.

-If you have already filed your joint tax return, sign the back page of Form 8379 and mail the form to the Internal Revenue Service Center where you lived when you filed the joint return.

What if I have a debt that was intercepted or will be intercepted from my joint refund?

Your spouse can file an Injured Spouse claim. If both you and your spouse have debts, you can each make Injured Spouse claims. You and your spouse can even use the same Form 8379 to make your Injured Spouse claims. The portions of the refund corresponding to your respective incomes will then be applied to your separate debts.

What is Innocent Spouse Relief?

Innocent spouse relief is relief from joint liability for a joint tax debt that you owe on a return you filed with your spouse using the filing status "Married Filing Jointly". If you qualify for innocent spouse relief, you may be relieved of responsibility for all or part of a joint tax debt.

There are two types of joint tax debt that you may be able to get relief from: Understatement of tax and underpayment of tax.

-An understatement of tax occurs when there has been an improper amount of tax reported on your return and the improper amount is lower than the amount of tax that should have been reported on your return. The amount of the understatement is the difference between the amount of tax reported and the amount that should have been reported. An understatement is the same as a deficiency.

-An underpayment of tax occurs when you and your spouse have not paid the amount of tax you properly reported on your return.

How do I qualify for Innocent Spouse Relief?

The term Innocent Spouse Relief really refers to three separate ways to qualify for relief from liability for joint tax debt:

1. Innocent Spouse Relief per se
2. Separation of Liability
3. Equitable Relief

1. Innocent Spouse Relief per se

-Innocent Spouse Relief takes away your liability for the tax debt from an **understatement** of tax on your joint return

when that understatement was due to the fault of your spouse.

If you qualify for Innocent Spouse Relief, you may be able to ask for a refund of payment you already made for the understatement of tax.

If you have not yet paid the debt for the understatement of tax, you may not have to pay the debt for the understatement at all.

-You may qualify for Innocent Spouse Relief if all of the following are true:

- 1) During the year of the tax debt you filed your return using the status "Married Filing Jointly";
- 2) There was an *understatement of tax* on the tax return due to an *erroneous item or items*;

· *Erroneous Items* include unreported income of your spouse or an incorrect deduction, credit or property basis claimed by your spouse

- 3) When you signed the joint tax return, you *did not know* and had *no reason to know* that there was an understatement of tax;

Partial Innocent Spouse Relief

If you knew or had reason to know about the understatement of tax, but did not know or have reason to know the full extent of the understatement, you may qualify for partial innocent spouse relief

AND,

- 4) It would be *unfair* to hold you liable for the understatement of tax.

· The IRS will consider all the facts and circumstances of the case in order to determine whether it *unfair* to hold you responsible for the understatement. Two factors the IRS looks at are:

- 1) Whether you received a significant benefit from the understatement of tax, and
- 2) Whether you were later divorced from or deserted by your spouse

2. Separation of Liability

-Separation of Liability takes away your liability for that portion of the tax debt on your joint return that corresponds to your spouse's income.

If you had very little or no income, you may end up with no tax liability.

-Separation of Liability is available when there has been an **understatement** of tax due to the fault of your spouse.

If you qualify AND you have not yet paid the debt for the understatement of tax, you may not have to pay the debt for the understatement at all. However, when you request Separation of Liability you *cannot* request a refund of payment you have already made on the understatement of tax.

-You may qualify for Separation of Liability if all of the following are true:

- 1) You are either divorced or legally separated from your spouse at the time of your request;
- 2) You have lived apart at all times during the 12-month period prior to filing for Separation of Liability; and,
- 3) When you signed the joint tax return, you *did not know* that there was an understatement of tax.

3. Equitable Relief

-You may request that the IRS relieve you of responsibility for tax, interest and penalties for an **understatement** of tax OR an **underpayment** of tax. This means you can request Equitable Relief even when the tax debt was properly listed on the tax return.

-You may qualify for equitable relief if all of the following are true:

1. You are not eligible for Innocent Spouse Relief per se, Separation of Liability or Relief from Separate Return Liability for Community Income (in community property states – Nebraska is not a community property state);
2. You and your spouse did not transfer assets to one another as a part of a fraudulent scheme;

3. Your spouse did not transfer assets to you for the main purpose of avoiding tax or the payment of tax;

4. You did not file your return with the intent to commit fraud;

5. **You did not pay the tax;**

6. Taking into account all the facts and circumstance, it would be *unfair* to hold you liable for the understatement or underpayment of tax. You may be able to show that it would be unfair for you to be liable for the tax if you can show that some or all of the following factors are true:

- You are divorced, legally separated or physically separated from your spouse;
- You were abused by your spouse;
- You are unable to pay your bills;
- You did not know and had no reason to know about the items causing the understatement or the underpayment;
- Your spouse has a legal obligation under a divorce decree or agreement to pay the tax;
- The tax for which you are requesting relief is attributable to your spouse's income.
- English is your second language;
- Your spouse has a higher education level than you.

How do I request Innocent Spouse Relief, Separation of Liability or Equitable Relief?

You fill out IRS Form 8857, titled Request for Innocent Spouse Relief to request any or all of the three types of relief.

- Form 8857 was changed in September of 2010 so be sure to use the updated form.

-You may attach additional statements to show other factors you feel should be considered for granting relief. Be sure to include your name and Social Security number (SSN) or Individual Taxpayer Identification Number (ITIN) on all statements.

-If you are requesting innocent spouse relief for more than one year, you should file one IRS Form 8857, listing each tax year for which you are requesting relief. Attach a separate statement for each year explaining why you qualify.

When can I file Form 8857?

You should file form 8857 as soon as you become aware of the tax debt. You must file form 8857 no later than two years from date you get notice of the first IRS attempt to collect the tax debt. You will become aware of the tax debt when:

1. The IRS examines or audits your income tax return; OR,
2. The IRS sends you a notice; OR,
3. Your tax refund (for the same tax year or a later tax year) is withheld by the IRS to pay the debt.

Do not file form 8857 with your income tax return.

If you think your spouse has misrepresented income, deductions or another element of your joint return, *you should refuse to file a joint return.*

You can file "Married Filing Separately" and escape liability for your spouse's tax debts. Depending on your circumstances, you may even be able to file "Head of Household". If your spouse forces you to sign a joint return, you may be able to show it is not a valid joint return because you signed under duress.