

CC-2014-002

May 5, 2014

Subject: Proper Standard of Review for
Collection Due Process
Determinations

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notice

PURPOSE

This notice alerts Chief Counsel attorneys to the Internal Revenue Service's long-standing position that a determination by the IRS Office of Appeals in a Collection Due Process (CDP) case that the Service has complied with all applicable legal and administrative procedural requirements, including any statutes of limitations, is subject to review by the Tax Court only for abuse of discretion. Chief Counsel attorneys should also take the position that abuse of discretion is the proper standard of review for a determination by Appeals about payments and overpayment credits and their proper application.

DISCUSSION

I. Introduction

Internal Revenue Code section 6330(c)(2)(B) provides that in limited circumstances a taxpayer may challenge the existence or amount of the underlying tax liability in a CDP hearing before the Office of Appeals. If the existence or amount of the underlying tax liability is properly at issue, the Tax Court will review the issue de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). The court reviews Appeals' determinations of other issues for abuse of discretion. Jones v. Commissioner, 338 F.3d 463, 466 (5th Cir. 2003); Craig v. Commissioner, 119 T.C. 252, 260 (2002); H.R. Rep. No. 105-599, at 266 (1998). Tax Court opinions reflect differing views regarding whether the "existence or amount of the underlying tax liability" in section 6330(c)(2)(B) includes issues relating to the validity of an assessment and the expiration of the assessment or collection statutes of limitation, and relating to payments and overpayment credits and their proper application.

Some opinions have interpreted "existence or amount of the underlying tax liability" to include the validity of an extension of the collection statute of limitations, expiration of the assessment or collection statute of limitations, and the validity of an assessment due to a failure to issue a notice of deficiency or to obtain a signed waiver of restrictions on assessment of a deficiency. See Jordan v. Commissioner, 134 T.C. 1, 8 (2010); Hoffman v. Commissioner, 119 T.C. 140, 150 (2002); Boyd v. Commissioner, 117 T.C. 127, 130 (2001); Marlow v. Commissioner, T.C. Memo.

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2010-113; MacElvain v. Commissioner, T.C. Memo. 2000-320. Other opinions have held that the phrase in section 6330(c)(2)(B) does not encompass these procedural issues. See Hoyle v. Commissioner, 131 T.C. 197, 201-202 (2008)(Hoyle I); Freije v. Commissioner, 125 T.C. 14, 36-37 (2005); Beeler v. Commissioner, T.C. Memo. 2009-266, vacated and remanded on other grounds, 434 Fed.Appx. 41, 108 A.F.T.R.2d 2011-6745b (2d Cir. 2011); Crites v. Commissioner, T.C. Memo. 2012-267; Roberts v. Commissioner, T.C. Memo. 2004-100.

Tax Court opinions also have held that a determination relating to the amount of payments and credits, whether section 6511 et seq. bars the use of an overpayment credit or whether payments and overpayment credits are properly applied falls within section 6330(c)(2)(B). See Landry v. Commissioner, 116 T.C. 60, 62 (2001); Dysle v. Commissioner, T.C. Memo. 2004-285. Other opinions have found these determinations are not covered by section 6330(c)(2)(B). See Freije v. Commissioner, 125 T.C. 14, 26 (2005); Kovacevich v. Commissioner, T.C. Memo. 2009-160. Recently, the Court declined to decide whether application of payments is a section 6330(c)(2)(B) issue. See Dixon v. Commissioner, 141 T.C. No. 3, *18-19 (Sept. 3, 2013). See also Isley v. Commissioner, 141 T.C. No. 11, *32-36 (November 6, 2013).

II. Statutory Scheme

Section 6320(c) and 6330(c)(3) require Appeals to consider three things when making a final collection determination: (1) verification under section 6330(c)(1) that the Service has satisfied all applicable legal and administrative procedural requirements necessary for the filing of a notice of federal tax lien or the making of an administrative levy or seizure, (2) issues raised by the taxpayer under sections 6330(c)(2)(A) and 6330(c)(2)(B), and (3) whether the collection action balances the need for efficient collection of taxes with the taxpayer's legitimate concern that the collection action be no more intrusive than necessary. Examples of the procedural requirements that must be verified are the making of a valid assessment upon which collection is based (including that a notice of deficiency was properly issued or the assessment was made before the expiration of any applicable assessment statute of limitations), the issuance of a section 6303 notice and demand, and that the collection statute of limitations has not yet expired. See Hoyle, 131 T.C. at 201-202; Perkins v. Commissioner, 129 T.C. 58, 69-70 (2007); Freije, 125 T.C. at 36-37; Crites v. Commissioner, T.C. Memo. 2012-267; Medical Practice Solutions, LLC v. Commissioner, T.C. Memo. 2010-98. Verification by Appeals under section 6330(c)(1) is reviewed for abuse of discretion. Jones, 338 F.3d at 466; Meyer v. Commissioner, T.C. Memo. 2013-268, at *11-12.

During a CDP hearing, a taxpayer may raise "any relevant issue relating to the unpaid tax" or the collection action (section 6320(c) (filing of notice of federal tax lien) or 6330(c)(2)(A) (proposed levy)) including spousal defenses, challenges to the appropriateness of collection actions, and collection alternatives. A taxpayer is permitted to challenge the existence or amount of the underlying tax liability if the taxpayer did not receive a notice of deficiency or otherwise have an opportunity to dispute the liability (section 6330(c)(2)(B)). The term "tax liability" is not defined in section 6320 or 6330, or their legislative history. Montgomery v. Commissioner, 122 T.C. 1, 7-8 (2004). "Underlying tax liability" "includes any amounts a taxpayer owes pursuant to the tax laws that are the subject of the Commissioner's collection activities." Callahan v. Commissioner, 130 T.C. 44, 49-50 (2008). See also Meyer, T.C. Memo. 2013-268, at *8. The phrase "existence or amount" modifies the term "tax liability." Under the common usage of the terms "existence" and "amount," taxpayers may challenge whether they are subject to a tax imposed by the Code (and, thus, whether the tax exists) and, if so, the correct amount of that tax.

III. Section 6330(c)(1) Verification

A taxpayer's liability exists independently of its assessment or collection. For example, section 6501 requires that "a tax imposed by this title" be assessed within the periods of limitation specified therein. Section 6501(a) also permits a collection suit for a tax liability even if the liability has not been assessed. *Goldston v. United States*, 104 F. 3d 1198, 1201 (10th Cir. 1997). Proper assessment of a tax and its collection within the collection statute of limitations establishes the parameters of the Service's ability to collect administratively but does not affect the taxpayer's underlying liability for the tax. The existence or amount of an underlying tax liability, an issue the taxpayer may raise in appropriate circumstances in a CDP hearing, does not encompass procedural requirements, such as assessment, necessary for administrative collection.

These requirements instead are subject to the verification requirement of section 6330(c)(1). *Hoyle*, 131 T.C. at 202-203. Their satisfaction must be independently verified by Appeals in every CDP hearing, even if the taxpayer does not raise them. *Id.* Treating procedural requirements necessary to administrative collection as a challenge to the underlying tax liability under section 6330(c)(2) would deprive taxpayers of the protections provided by section 6330(c)(1). Appeals would not be required to verify the satisfaction of these procedural requirements unless they were raised by the taxpayer. If the taxpayer fails to raise an issue, then the taxpayer may not obtain Tax Court review of the issue. *Giamelli v. Commissioner*, 129 T.C. 107, 113-114 (2007). Additionally, if a procedural issue falls within the definition of "existence or amount of underlying liability," then the receipt of a notice of deficiency or other opportunity to dispute the liability could prevent the taxpayer from obtaining Appeals' review. This result is logically inconsistent with the conclusion in *Hoyle I* that Appeals must verify the Service's compliance with the procedural requirement in every CDP case.

IV. Section 6330(c)(2)(A) Relevant Issue Relating to Unpaid Tax

Beside the three items expressly enumerated in section 6330(c)(2)(A), relevant issues relating to an unpaid tax include issues concerning whether the taxpayer has made payments or has overpayment credits available to pay his or her tax liability, whether section 6511 et seq. bars the use of an overpayment credit, and whether payments and overpayment credits have been properly applied to the liability subject to the CDP hearing. These issues are not challenges to the existence or amount of the underlying tax liability under section 6330(c)(2)(B). "Since an 'unpaid tax' is sine qua non of the Commissioner's authority to levy, we believe a claim directed at the status of a tax as 'unpaid' is 'a relevant issue relating to the unpaid tax or the proposed levy'." *Frieje*, 125 T.C. at 26. "Unpaid tax" refers to that part of the underlying tax liability not paid by the taxpayer. Whether the Service's records accurately show the payments made and overpayment credits available to the taxpayer, whether section 6511 et seq. bars the use of an overpayment credit, or whether the Service has properly applied the payments and overpayment credits affects the amount of the unpaid tax. Payments and overpayment credits and their proper application have no effect on how much tax is imposed by the Code. See *Kovacevich*, T.C. Memo. 2009-160, at *16. A determination about the amount or availability of payments and overpayment credits or whether a payment or credit was incorrectly applied is subject to abuse-of-discretion review. *Id.* See also *Weber v. Commissioner*, 138 T.C. 348, 356 n. 5 (2012) (assuming that review of the Service's decision regarding crediting of overpayments is for abuse of discretion).¹

¹ Unlike determinations by Appeals about other "relevant issues" under section 6330(c)(2)(A), spousal defenses are subject to "de novo" review. See *Treas. Reg. §§ 301.6320-1(e)(2), 301.6330-1(e)(2)*; *Wilson v. Commissioner*, 705 F.3d 980 (9th Cir. 2013), *aff'g* T.C. Memo 2010-134, *acq.* Action on Decision 2012-07, I.R.B. 2013-25 (June 17, 2013); *Porter v. Commissioner*, 132 T.C. 203 (2009).

V. Procedures for Handling Pending and Future Tax Court Cases

Counsel attorneys should argue in Tax Court CDP cases that a determination by Appeals about the validity of an assessment, the expiration of the assessment or collection statutes of limitation, or other procedural requirements for administrative collection are determinations under sections 6320(c) and 6330(c)(1) reviewable for abuse of discretion. Counsel attorneys should also argue in Tax Court CDP cases that a determination about payments and overpayment credits and their proper application are determinations under section 6330(c)(2)(A) reviewable for abuse of discretion. **If the settlement officer includes in the administrative file sufficient evidence to support his or her determination and adequately describes the reasons for the determination,** Counsel attorneys should rely on the administrative record without introducing any extra-record evidence and should object to petitioner's attempted introduction of any evidence outside of the administrative record. If the administrative file does not contain sufficient evidence or an adequate explanation, then a motion to remand the case may be appropriate.

Counsel attorneys should not argue that a taxpayer who received a notice of deficiency or had some other opportunity, such as receipt of a section 6320 or 6330 notice for the same tax period, is precluded under section 6330(c)(2)(B) from raising statute of limitations or other procedural challenges that could have been raised in a deficiency or other judicial proceeding, or in a hearing with Appeals. **Legal and administrative procedural requirements related to assessment and collection are not issues relating to the existence or amount of the underlying tax liability. Similarly, Counsel attorneys should not argue that receipt of a deficiency notice or other prior opportunity precludes the taxpayer from raising an issue about payments or overpayment credits or their proper application.**

On the other hand, if the taxpayer was a party to litigation with the government permitting the challenge of the assessment or collection of the tax liability or its payment, Counsel attorneys should consider asserting the doctrines of collateral estoppel or res judicata to preclude litigation in appropriate cases. For example, if the Tax Court issued a decision determining a deficiency, the Counsel attorney should assert the doctrine of res judicata with respect to the assessment statute of limitations. In addition, section 6330(c)(4) precludes the taxpayer from raising an issue at a CDP hearing if the issue was raised and considered at a previous CDP hearing or at any other administrative or judicial proceeding in which the taxpayer meaningfully participated. For example, if the taxpayer had a prior hearing with Appeals and raised the same issue about payments or overpayment credits or their proper application, then Counsel attorneys should consider asserting that the taxpayer is precluded from raising the issue by section 6330(c)(4).

All briefs and other documents filed with the Tax Court addressing the issue whether a determination about verification or payment, as defined herein, is a "liability issue" for purposes of determining standard of review and liability preclusion should be coordinated with Branch 3 or 4 of Procedure & Administration. Questions regarding this notice or related issues should be directed to Branch 3 or 4 of Procedure & Administration at (202) 317-3600 or (202) 317-6832, respectively.

_____/s/_____
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