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Tax Court Jurisdiction in Collection
Due Process Cases to Consider
Non-CDP Period Liability and Overpayment Issues

Effective until further
notice

Purpose

This notice provides guidance to Chief Counsel attorneys regarding the Tax Court's consideration of non-CDP liability and overpayment issues in Collection Due Process cases.

Discussion

A taxpayer may request, within the prescribed time period, a CDP hearing upon receipt of a CDP notice of lien filing or a CDP notice of intent to levy under sections 6320(a) and 6330(a), respectively. At the hearing, the taxpayer may raise any "relevant issue" relating to the unpaid tax or proposed levy. The taxpayer also may challenge the existence or amount of the "underlying tax liability" if the taxpayer did not receive a statutory notice of deficiency or did not otherwise have an opportunity to dispute the liability. The determination issued by the settlement officer conducting the CDP hearing addresses, inter alia, issues properly raised by the taxpayer.¹

The Tax Court has jurisdiction to review a CDP determination if the taxpayer timely files with the Tax Court an appeal of the settlement officer's determination. The Tax Court may review issues that were properly at issue in the CDP hearing, including challenges to the underlying liability.²

On occasion, a taxpayer asserts that a refund or credit is due from a year not covered by the CDP notice. The Tax Court does not have jurisdiction to determine a taxpayer's entitlement to a refund or credit for any non-CDP tax year or to consider the merits of any such refund claim made in a CDP case.³

The CDP process is not a venue for evaluating the substantive, underlying merits of a claim for refund or credit. A taxpayer may contest the existence or amount of a non-CDP period tax liability only through the long-established administrative or judicial refund claim process. This

¹ Section 6330(c)(2), (3).

² Section 6330; Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3; Giamelli v. Commissioner, 129 T.C. 107 (2007).

³ Greene-Thapedi v. Commissioner, 126 T.C. 1, 11 (2006).

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process requires the taxpayer to file an administrative refund claim with the Service and have that claim denied before filing a refund suit in a district court or the Court of Federal Claims.⁴ The post-payment refund claim process complements the pre-payment forum that Congress established for resolving tax disputes in the Tax Court. Congress has sought to maintain this pre-payment/post-payment division as much as possible. There is no evidence of congressional intent in section 6320 or 6330 to allow taxpayers to raise the merits of a refund claim in a CDP hearing before the Service's Office of Appeals or in a CDP review proceeding before the Tax Court.

The plain language of the Internal Revenue Code confirms that a taxpayer may not obtain a liability determination by Appeals or by the Tax Court for a period not subject to the CDP hearing. Section 6303 requires that, within 60 days of the assessment for a tax period, the Secretary "give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." The "unpaid tax" in section 6330(c)(2)(A) is the "unpaid tax" listed on the notice of the right to a CDP hearing, the tax the Service is attempting to collect.⁵ The term "underlying tax liability" in section 6330(c)(2)(B) includes "any amounts a taxpayer owes pursuant to the tax laws that are the subject of the Commissioner's collection activities."⁶ The inclusion of the word "underlying" to modify "liability" in section 6330(c)(2)(B) signifies that the liability permitted to be challenged is limited to the one the Service is attempting to collect. In other words, Appeals and the Tax Court may only determine the liability for the tax period or periods subject to the CDP hearing.

Taxpayers may not obtain a determination of liability for a period not subject to the CDP hearing by characterizing it as a "relevant issue" under section 6330(c)(2)(A). For example, in Freije v. Commissioner,⁷ the taxpayer made an undesignated payment that he later said was intended to satisfy a liability for the CDP year, but the Service applied the undesignated payment to late filing and late payment assessments for a non-CDP year. Because the liability for the CDP period remained unsatisfied, the Service instituted enforced collection action; Appeals affirmed the collection action; and the taxpayer petitioned the Tax Court. The court reviewed the non-CDP period liability as a section 6330(c)(2)(A) "relevant issue relating to the unpaid tax or the proposed levy" because the proposed levy action would be inappropriate if the undesignated payment had been applied to a non-CDP tax for which the taxpayer was not liable. Although the Freije court did not explicitly state that it was reviewing the merits of the late filing and payment penalties for the non-CDP period, the court considered evidence to reach the conclusion that the taxpayer did indeed untimely file and pay for that tax year and, thus, confirmed that the additions to tax were substantively correct.

Section 6330(c)(2)(B) and its direct reference to the "existence or amount of the underlying tax liability" is the source of authority for Appeals and the Tax Court to determine liability, not section 6330(c)(2)(A) and its reference to "relevant issue." If a taxpayer is permitted to obtain a liability determination under section 6330(c)(2)(A) as a relevant issue, the taxpayer would be able to avoid the restrictions of section 6330(c)(2)(B) barring liability challenges when the taxpayer has received a notice of deficiency or otherwise had an opportunity to dispute the tax liability. Moreover, as discussed above, a taxpayer may only challenge the liability for a period subject to

⁴ Sections 6511(a) and 7422(a); see also United States v. Clintwood Elkhorn Mining Company, 553 U.S. 1 (2008).

⁵ Section 6330(a)(1) and (3)(A); Treas. Reg. § 301.6320-1(b)(1), (d)(1); Treas. Reg. § 301.6330-1(b)(1), (d)(1).

⁶ Callahan v. Commissioner, 130 T.C. 44, 49 (2008) (citing Katz v. Commissioner, 115 T.C. 329, 338-39 (2000)).

⁷ 125 T.C. 14 (2005).

the CDP hearing. Freije is incorrectly decided to the extent it holds that a non-CDP period liability is a relevant issue in a CDP hearing and that the Tax Court has jurisdiction to determine or otherwise review the taxpayer's liability for a non-CDP period.⁸

The availability of an overpayment from a non-CDP period as a source of payment of the unpaid tax for the CDP period, however, may be raised as a relevant issue under section 6330(c)(2)(A) when the Service has already agreed that the taxpayer is entitled to the overpayment. The settlement officer may review the taxpayer's account transcript to verify that an overpayment does indeed exist and determine whether the overpayment, under the applicable period of limitations, may be credited against the CDP period liability. If the settlement officer addresses that issue, the Tax Court has jurisdiction to review the settlement officer's determination regarding the availability of the non-CDP period overpayment under an abuse of discretion standard.⁹

In Brady v. Commissioner,¹⁰ Appeals determined that the taxpayer was not entitled to a refund of an overpayment from a prior year to satisfy his CDP year liability. The Tax Court in Brady held that there was no abuse of discretion because "refunds and credits that do not comply with the applicable limitations period 'shall be considered erroneous.'" Although the taxpayer's administrative refund claim was timely under section 6511, he failed to pursue that claim further by filing a refund suit in the proper court. Section 6514(a) provides that any credit or refund is void if it is made after the period for filing an administrative refund claim has expired (unless a claim is filed), or after the period for filing a refund suit has expired (unless a suit is filed).

In Perkins v. Commissioner,¹¹ Appeals determined that, because a claim for refund or credit was barred by the section 6511 limitations period, the overpayment arising in a non-CDP period could not be applied to the CDP period. The Tax Court remanded the determination to Appeals for reconsideration of the taxpayer's claim that his financial disability suspended the section 6511 limitations period.

The Tax Court has jurisdiction to review a determination by Appeals about whether a refund claim is timely or whether the time period under section 6514 for allowing a credit or refund is open. These are relevant issues under section 6330(c)(2)(A). Under an abuse of discretion standard, the court reviews the factual findings by Appeals and its application of the law to the facts. If the fact findings by Appeals are inadequate or unreasonable, or the legal conclusion by Appeals is erroneous, the court should remand the determination to Appeals for reconsideration. The taxpayer, however, does not have the right to raise the underlying merits of a non-CDP

⁸ A taxpayer may, however, raise the existence of an "adjustment" arising in a non-CDP period that may be used to reduce the taxable income for the period at issue in the CDP hearing. The term adjustment is used in a specific way in this context – an adjustment actually reduces the tax liability imposed by the Code for the CDP period rather than merely satisfying the CDP period tax liability. An adjustment only encompasses net operating losses and "credit carryovers" arising with respect to non-CDP periods; these items actually reduce the liability imposed with respect to the CDP period. Because the adjustment affects the amount of tax imposed by the Code for the CDP tax period, the determination of the adjustment is part of the liability determination under section 6330(c)(2)(B). Appeals and the Tax Court, therefore, have jurisdiction under section 6330(c)(2)(B) to determine the existence and amount of the adjustment if the issue of liability may be properly raised before the court under section 6330(c)(2)(B). Attorneys should note that the term "credit carryover" as used above relates to business credits allowed by section 38. In this context, credit means a tax credit (or amount subtracted from tax owed) rather than a "credit" to the taxpayer's account that reduces the amount of the unpaid tax.

⁹ Section 6330(d)(1).

¹⁰ 136 T.C. No. 19 (2011).

¹¹ T.C. Memo. 2008-103.

