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November 30, 2012

Remands to Appeals in CDP Cases
When There Is a Post-Determination
Subject: Change in Circumstances

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Purpose

This notice provides guidance regarding remands of collection due process cases to Appeals based on a post-determination change in circumstances in light of the Tax Court's opinion in Churchill v. Commissioner, T.C. Memo. 2011-182.

Background

In Churchill, the taxpayer had outstanding liabilities for tax years 1992 through 2004. He married in 2001, and resided with his wife in California, a community property state. The Service filed notices of federal tax lien and issued notices of intent to levy. The taxpayer made a timely request for a CDP hearing under sections 6320 and 6330. At the hearing, the taxpayer submitted an offer in compromise of \$2,500 to settle the outstanding tax liability totaling more than \$250,000.

Because the taxpayer resided in a community property state, the Settlement Officer determined the petitioner's ability to repay his tax debt by taking into account his wife's income. The Settlement Officer informed the taxpayer that the minimum amount the Service would accept far exceeded the taxpayer's offer, sustained the notices of federal tax lien and proposed levy, and issued a notice of determination from which the taxpayer timely petitioned to the United States Tax Court. After the petition was filed, but before the trial, the taxpayer and his wife divorced.

The Tax Court held that the Settlement Officer did not abuse her discretion in including the community property assets in determining the taxpayer's ability to pay and in upholding the Service's collection activities. The court, however, remanded the case to Appeals to consider the change in the taxpayer's financial circumstances because of the post-hearing divorce, i.e., that his wife's income is no longer available for collection. The court held that remand may be appropriate when there is a material change in factual circumstances between the time of the CDP hearing and the trial.

Discussion

Sections 6320 and 6330 do not provide an on-going and open-ended court review of Service

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collection actions. Instead, taxpayers are permitted one hearing before Appeals per tax period: one hearing to challenge a notice of federal tax lien filing and one hearing to challenge a notice of intent to levy. Sections 6320(b)(2) and 6330(b)(2), and Treas. Reg. §§ 301.6320-1(b)(1) and 301.6330-1(b)(1).

The general rule is that changed circumstances occurring after the CDP hearing that might affect the outcome of the taxpayer's case must be dealt with outside of the CDP process. The taxpayer may submit a new offer in compromise based on changed circumstances directly to the Collection function of the Service or obtain a new hearing before Appeals pursuant to its retained jurisdiction authority under section 6330(d)(2). Any subsequent new determination by Collection or Appeals would not entitle the taxpayer to a new CDP hearing or to Tax Court review. Insofar as Appeals exercises retained jurisdiction to reconsider a collection alternative or other matter under section 6330(d), any new determinations by Appeals are not part of the CDP hearing and are not subject to Tax Court review. Treas. Reg. §§ 301.6320-1(h)(2) Q&A-H2 and 301.6330-1(h)(2) Q&A-H2.

The Tax Court may, under certain circumstances, retain jurisdiction while remanding a CDP cases to Appeals in order to conduct a supplemental hearing and issue a new determination. Remand is generally only available if Appeals abused its discretion, such as when the taxpayer was not given a proper hearing or the administrative record is insufficient for the Tax Court to evaluate the case properly. Wadleigh v. Commissioner, 134 T.C. 280, 298 (2010); Lunsford v. Commissioner, 117 T.C. 183, 189 (2001). Remand may also be appropriate in rare, unusual situations when there has been a change in circumstances even though the hearing was conducted properly and the record is sufficient. These remands should **only** occur when there has been a change in circumstances that is material and affects the core issues in the case that, if known at the time of the Appeals hearing, would likely have altered Appeals' determination. Limiting these remands to rare, unusual circumstances supports the one-hearing rule under sections 6320 and 6330 and the need for finality in CDP proceedings.

Remands based on material changes affecting the core issues in the case should be limited to those cases in which the taxpayer fully cooperated at the first Appeals hearing and submitted all requested and available evidence within the taxpayer's control (including filing all tax returns and submitting all financial information necessary for consideration of collection alternatives). Taxpayers are expected to provide all relevant information requested by Appeals during a CDP hearing. Treas. Reg. §§ 301.6320-1(e)(1) and 301.6330-1(e)(1). If the taxpayer fails to cooperate during the hearing or provide the information requested by Appeals, or otherwise fails to raise an issue during the hearing, the taxpayer may be precluded from raising the issue for the first time at trial. See Treas. Reg. §§ 301.6320-1(f)(2) Q&A F3 and 301.6330-1(f)(2) Q&A F3; Giamelli v. Commissioner, 129 T.C. 107 (2007). Consistent with these principles, remands for changed circumstances should not be available when the taxpayer raises issues or submits evidence for the first time in court that could have been raised or submitted to the Office of Appeals, but which the taxpayer failed to present.

The Tax Court's function in CDP cases is "to decide whether the IRS's subsidiary factual and legal determinations are reasonable and whether the ultimate outcome of the CDP proceeding constitutes an abuse of the IRS's wide discretion." Dalton, 682 F.2d 149, 156 (1st Cir. 2012); see also INS v. Ventura, 537 U.S. 12, 16 (2002) (the reviewing court is not to make new findings, but rather it should remand the case to the agency for reconsideration). As a result, in those cases in which it is determined that the criteria for remand due to change circumstances are met, the Tax Court should remand the case to Appeals for new findings rather than address the merits itself.

All motions for remand based on changed circumstances must be submitted for pre-review to the

