2018 GL1 - Lesson 11
COLLECTION DUE PROCESS (CDP)
(June 2018)

CONTENTS

I. INTRODUCTION

Collection Due Process refers to the procedures enacted by Congress in 1998, and effective January 19, 1999, to provide notice, hearing, and court review regarding federal tax liens and levies. Prior to the enactment of the CDP provisions there was no requirement that the Service notify the taxpayer when a Notice of Federal Tax Lien (NFTL) had been filed and provide the taxpayer with a hearing. There was also no requirement that the Service provide a hearing to a taxpayer before levy.

II. OBJECTIVES

At the end of this lesson, you will be able to:

- Identify the Collection Due Process (CDP) provisions.
- Understand your role in the CDP process.
- Understand the meaning of the following CDP concepts:
- CDP Notice
    - CDP Request
    - CDP Hearing
    - Notice of Determination
    - Equivalent Hearing
    - Retained Jurisdiction
- Recognize the Appeals procedure and court review available to taxpayers who exercise their rights under those provisions.

III. BACKGROUND MATERIAL

Sections 6320 and 6330; Treas. Reg. § 301.6320-1, and Treas. Reg. § 301.6330-1; H.R. Rep. No. 105-599, 105 Cong., 2d Sess. 263-267 (1998); General Explanation of Tax Legislation Enacted in 1998 (Bluebook), Staff of the Joint Committee on Taxation (1998); and IRM chapters 5.1.9, 5.19.8 and 8.22.

A CDP Deskbook is also available on the P&A website that contains a summary of CDP law updated through December 2017. Litigation guidelines for CDP cases can be found in Part 35 of the CCDM; these provisions are listed on pages 5-6 of the Deskbook.

IV. COORDINATION OF CDP ISSUES

A. Coordination of CDP Cases with the National Office

Responsibility for CDP issues lie with Branches 3 and 4 (P&A). Contact Branch 3 (P&A), at 202-317-3600 and Branch 4 (P&A), at 202-317-6832.

Currently, pre-review is required for:

- Briefs, motions, defense letters, and other Tax Court documents, including motions for summary judgment, raising novel or significant issues. CCDM 31.1.1.1 and 35.11.1-1 provides a list of specific issues that are considered novel or significant.
- Requests for Sanctions under section 6673(a)(2).
- Responses to Requests for Sanctions against Chief Counsel attorneys.

B. Assisting Appeals

Each Associate Area Counsel, Small Business/Self-Employed, designates experienced attorneys to be available to provide prompt oral or written legal advice in resolving CDP issues. SBSE Division Counsel, in turn, coordinates complicated or novel issues with National Office CDP experts. In order to ensure the uniformity of advice being given, SBSE Division Counsel and Appeals should identify recurring legal issues, and SBSE Division Counsel should forward to Branches 3 & 4 (P&A), copies of any advice given on such issues.

V. OVERVIEW OF CDP

A. Notice of Federal Tax Lien – § 6320

Section 6320 provides that the Service must notify in writing the taxpayer against whom a NFTL has been filed and provide the taxpayer an opportunity for a CDP hearing before an impartial appeals officer. The post-lien filing notification (CDP Notice) under section 6320 may be given in person, left at the taxpayer's dwelling or usual place of business, or sent to the taxpayer by certified or registered mail to the taxpayer's last known address not more than five business days after the day the NFTL is filed. Among other things, the notification must inform the taxpayer of the right to request a hearing before the 31st day after the end of the five-business-day period following the filing of the NFTL. Treas. Reg. § 301.6320-1(c)(2) Q&A-C3. The date the NFTL is filed is the date the NFTL is received by the recording office to be added to the public index, not the act of indexing it in the local records. Tracey v. United States, 394 B.R. 635 (B.A.P 1st Cir. 2008). This notification is given by Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under I.R.C. § 6320. The taxpayer is entitled to one such hearing per tax period before an appeals officer who has had no prior involvement with respect to that tax period. CDP hearings with respect to liens may be held in conjunction with hearings under section 6330, involving levies. See Section B below. The period of limitations on collection with respect to that tax period is suspended while the CDP hearing and any appeal of that hearing are pending.

A taxpayer who does not request a CDP hearing under section 6320 within the 30-day period is not entitled to a CDP hearing, but is entitled to an equivalent hearing with

Appeals as described in Treas. Reg. § 301.6320-1(i). A taxpayer may judicially appeal a determination resulting from a CDP hearing. A taxpayer, however, may not appeal to a court any decisions made by an appeals officer at an equivalent hearing. Orum v. Comm'r, 123 T.C. 1 (2004); Moorhous v. Comm'r, 116 T.C. 263 (2001). Cf. Craig v. Comm'r, 119 T.C. 252 (2002).

CDP lien rights are only available for the taxpayer against whom a NFTL has been filed. Accordingly, CDP rights are not available for nominees or other third parties. See Greenoak Holdings Ltd. v. Comm'r, 143 T.C. 170 (2014); Kendricks v. Comm'r, 124 T.C. 69, 71 n.3 (2005); Gillum v. Comm'r, 676 F.3d 633 (8th Cir. 2012); see also United States v. Galletti, 541 U.S. 114 (2004) (addressing CDP notices to general partners for partnership liability); Littriello v. United States, 484 F.3d 372 (6th Cir. 2007) (addressing CDP notices to owners of single-member LLCs).

In Dalton v. Comm'r, 135 T.C. 393 (2010), the Tax Court held that it has jurisdiction to decide a nominee interest issue insofar as it pertains to the Service's rejection of an offer-in-compromise on the basis that the offer did not include taxpayer's nominee interest. Dalton was reversed by the First Circuit, however, which held that the Tax Court did not have jurisdiction to make the determination with respect to nominee interest de novo. Dalton v. Commissioner, 682 F.3d 149 (1st Cir. 2012).

B. Prior to Levy – § 6330

Section 6330 provides that (except in the case of jeopardy levies, levies on State tax refunds, disqualified employment tax levies, and federal contractor levies, all of which are discussed below) no levy may be made on any property or right to property of any taxpayer unless the Service sends the taxpayer a CDP Notice at least 30 days before the levy is made which provides the taxpayer with an opportunity for a CDP hearing. In jeopardy situations and in cases involving levies on a State tax refund, disqualified employment tax levies or federal contractor levies, a CDP Notice is not required to be given until the levy action has actually occurred. The CDP Notice under section 6330 may be given in person, left at the taxpayer's dwelling or usual place of business, or sent to the taxpayer by certified or registered mail, return receipt requested, to the taxpayer's last known address. Among other things, the CDP Notice must include a statement of the taxpayer's right to request a hearing during the 30-day period that commences the day after the date of the CDP Notice. This notification is given by Letter 1058 - Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing or LT 11- Final Notice, Notice of Intent to Levy and Your Notice of Right to a Hearing. See IRM 5.1.9 and 5.19.8 for a description of the letters used for post-levy CDP notification.
The taxpayer is entitled to one such hearing per tax period before an appeals officer who has had no prior involvement with respect to that tax period. CDP hearings with respect to levies may be held in conjunction with hearings under section 6320, involving liens. See Section A above.

A taxpayer who does not request a CDP hearing under section 6330 within the 30-day

period is not entitled to a CDP hearing, but is entitled to an equivalent hearing with Appeals as described in Treas. Reg. § 301.6330-1(i). A taxpayer may judicially appeal a determination resulting from a CDP hearing. A taxpayer, however, may not appeal to a court any decisions made by an appeals officer at an equivalent hearing. See Orum v. Comm'r, 123 T.C. 1 (2004).

CDP levy rights are only available to the taxpayer against whom the liability has been assessed. See Section A above regarding CDP rights for nominees and other taxpayer entities.

C. Post-levy – § 6330

1. Jeopardy levies and state income tax refunds

For jeopardy levies or levies on state income tax refunds, the requirement that the taxpayer be given a pre-levy hearing is not applicable. Instead, the taxpayer shall be given the opportunity for a CDP hearing "within a reasonable period of time after the levy." Section 6330(f). Thus, if the taxpayer has not previously been given CDP levy rights at the time of the levy, the taxpayer has a right to a hearing after the levy. A challenge to the reasonableness of the jeopardy determination is a challenge to the appropriateness of the levy under section 6330(c)(2)(A). See Prince v. Comm'r, 133 T.C. 270, 276 (2009). If Appeals sustains the levy in the post-levy hearing, the taxpayer may appeal that determination to the Tax Court. Bussell v. Comm'r, 130 T.C. 222 (2008); Clark v. Comm'r, 125 T.C. 108 (2005).

With respect to jeopardy levies for which section 7429 rights are available, the taxpayer may be entitled to hearing rights under section 7429, as well as under section 6330(f). See Ang v. Comm'r, 2014-53 (rejecting the argument that section 7429 precludes the Tax Court from reviewing the reasonableness of a jeopardy levy, and stating that the Court reviews Appeals' verification that the jeopardy levy was reasonable for abuse of discretion).

2. Disqualified employment tax levies

Under section 6330(f) the Service may levy to collect employment taxes without first giving a taxpayer a pre-levy CDP notice if the levy is a "disqualified employment tax levy" (DETL). If a DETL is served, then the taxpayer shall be given an opportunity for a CDP hearing "within a reasonable period of time after the levy." The taxpayer may seek judicial review in the Tax Court of the determination resulting from the section 6330(f) post-levy hearing. This addresses the problem of taxpayers who pyramid employment tax liabilities and use the CDP process to delay collection, by limiting their opportunity for pre-levy CDP hearings.

A "disqualified employment tax levy," as described in section 6330(h)(1), is a

levy to collect a taxpayer's employment tax liability if that taxpayer or a predecessor requested a CDP hearing under section 6330 for unpaid employment taxes arising in the two-year period prior to the beginning of the taxable period for which the levy is served.

The prior request for a CDP hearing refers to a timely CDP hearing request. Even if the request is subsequently withdrawn, it qualifies as a prior hearing request. Requests for an equivalent hearing or untimely requests for CDP hearings do not satisfy the prior-hearing-request requirement. Thus, if the taxpayer requests an equivalent hearing or submits an untimely request for a CDP hearing, those requests cannot be used as a basis for a DETL. A timely post-levy request for a CDP hearing made in response to a post-levy CDP notice may also constitute a prior CDP hearing request for the purposes of determining the availability of a DETL.

If appropriate, a DETL may be served during a CDP hearing or judicial review of such hearing to collect employment tax liabilities subject to the hearing. In other words, after the Service serves the first levy for a DETL period and the taxpayer requests a CDP hearing, the Service may serve subsequent levies on different levy sources for the same period while the CDP case is pending before Appeals or in the Tax Court. See also IRM 5.1.9.3.15.

3. Federal contractor levies

Section 6330(f) also provides that the Service may serve a federal contractor levy without providing pre-levy CDP rights. A federal contractor levy is any levy if the person whose property is subject to the levy (or a predecessor thereof) is a federal contractor. I.R.C. § 6330(h)(2). The federal contractor will instead receive a post-levy CDP hearing.

D. Validity of the Notice Given

A CDP Notice must be given in person, left at the taxpayer's dwelling, or delivered to his or her last known address by certified mail. The CDP levy notice must also be sent return receipt requested. In Minemyer v. Comm'r, T.C. Memo. 2012-325, the Tax Court dismissed the case for lack of jurisdiction because the CDP notice was not sent to the taxpayer's last known address. See also Trout v. Comm'r, 131 T.C. 239 (2008); Buffano v. Comm'r, T.C. Memo. 2007-32. But see Adolphson v. Comm'r, 842 F.3d 478 (7th Cir. 2016), where the Seventh Circuit held that in the absence of a notice of determination, the Tax Court has no jurisdiction to rule on the validity of the CDP notice.
If the CDP notice is invalid, the taxpayer is entitled to a substitute notice. Treas. Reg. §§ 301.6320-1(a)(2)Q&A-A12, 301.6330-1(a)(3)Q&A-A10. A section 6320 notice (Letter 3172) is valid even if given before the NFTL is actually filed, and the validity of the section 6320 notice does not depend upon the validity of the related NFTL. Graham v. Comm'r, T.C. Memo. 2008-129. Where the Service sends the lien notice before the

NFTL is actually recorded, and the taxpayer timely requests a hearing, the variance in the dates (the filing date listed on the lien notice, and the actual filing date), is at most harmless error. Miccousukee Tribe of Fla. v. Comm'r, T.C. Memo. 2015-216, at *8-9. The validity and priority of the NFTL is not conditioned on the taxpayer receiving a lien notice under section 6320. Id. Minor defects in the lien notice and the NFTL may be overlooked where the taxpayer knows of and pursues the right to administrative and judicial review. Id. A lien notice solely in the name of the deceased taxpayer is valid if the lien against the taxpayer as an individual is valid and if notice is sent to the decedent's last known address. Estate of Brandon v. Comm'r, 133 T.C. 83 (2009).

E. Procedures for Requesting a CDP or Equivalent Hearing

A taxpayer is entitled to one CDP lien hearing and one CDP levy hearing with respect to the tax and tax period covered by the post-lien filing CDP Notice and/or the pre-levy or post-levy CDP Notice provided the taxpayer. See Investment Research Assocs., Inc. v. Comm'r, 126 T.C. 183 (2006); Shirley v. Comm'r, T.C. Memo. 2014-10. The taxpayer must request such a hearing in writing within the periods discussed above. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C3, 301.6330-1(c)(2) Q&A-C3. The 30-day period in which a taxpayer may timely request a CDP hearing begins on the day after the date of mailing of the CDP Notice, not the date listed on the Notice. Weiss v. Commissioner, 147 T.C. No. 6 (2016). A premature CDP hearing request (e.g., made before issuance of the CDP notice) is not an effective request. Andre v. Comm'r, 127 T.C. 68 (2006).

A Form 12153, Request for a Collection Due Process Hearing, is included with the CDP Notice sent to the taxpayer. The Form 12153 requests the following information:

- The taxpayer's name, address, daytime telephone number, and taxpayer identification number (SSN, EIN, or ITIN).
- The type of tax involved.
- The tax period at issue.
- A statement that the taxpayer requests a hearing with Appeals concerning the proposed collection activity.
- The reason(s) why the taxpayer disagrees with the proposed collection action.

If the taxpayer's request for a CDP hearing is not within the required time frame to make a CDP hearing request, the taxpayer must be notified of the right to request an equivalent hearing. This request must also be in writing and must contain all of the same information described above. Treas. Reg. §§ 301.6320-1(i)(2) Q&A-I1; 301.6330-1(i)(2) Q&A-I1. A request for an equivalent hearing must be filed within the 1-year period commencing after the date of the CDP levy notice or, with respect to CDP lien cases, within the 1-year period commencing the day after the end of the 5-business-day period following the filing of the NFTL. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C7 and (i)(2) Q&A-I7; 301.6330-1(c)(2) Q&A-C7 and (i)(2) Q&A-I7.

Although taxpayers are encouraged to use Form 12153 to request a CDP hearing, the

regulations do not require it. However, the CDP or equivalent hearing request must include the information requested above. The regulations require that any request for a hearing be in writing, include the taxpayer's name, address, and daytime telephone number, and be dated and signed by either the taxpayer or the taxpayer's authorized representative. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C1; 301.6330-1(c)(2) Q&A-C1. If a timely written request for a CDP hearing or equivalent hearing is submitted that does not contain all of the required information, the Service will make a reasonable attempt to contact the taxpayer and give the taxpayer a reasonable time to provide the missing information. Id.; Treas. Reg. §§ 301.6320-1(i)(2) Q&A-I1; 301.6330-1(i)(2) Q&A-I1.

The Tax Relief and Health Care Act of 2006, among other changes, amended sections 6320(b)(1) and 6330(b)(1) to require taxpayers to include in their CDP hearing requests the written grounds for requesting the hearing. Sections 6330(g) provides that the Service may disregard any portion of a hearing request that is based on a position identified as frivolous by the Service in a published list or reflects a desire to delay or impede tax administration. If the entire hearing request meets one or both of these criteria, then the hearing request will be denied. Notice 2010-33, 2010-1 C.B. 609, contains the current list of frivolous positions. For a discussion of Tax Court review of the denial of a CDP hearing request under section 6330(g), see Section VII.B.1.

The regulations further provide that the written request for a CDP hearing must be sent or hand delivered to the Service office that issued the CDP Notice at the address indicated on the CDP Notice. If the address of that office does not appear on the CDP notice, taxpayers may obtain the address of the appropriate person to which the written request should be sent or hand delivered by calling, toll-free, 1-800-829-1040 and providing their taxpayer identification number (SSN, EIN or ITIN). Treas. Reg. § 301.6320-1(c)(2) Q&A-C6; 301.6330-1(c)(2) Q&A-C6. If the written request is postmarked within the applicable 30-day response period, the request will be considered timely under section 7502 even if it is not received by the Service office that issued the CDP Notice until after the 30-day response period. Section 7503 also applies, i.e., if the last day for a request falls on a Saturday, Sunday, or legal holiday, a request made on the next day which is not a Saturday, Sunday, or legal holiday is timely.

F. Effect of Bankruptcy on CDP Proceedings

The automatic stay in bankruptcy, 11 U.S.C. § 362, may affect the Service's ability to issue a notice for a CDP hearing, Appeals' ability to conduct a CDP hearing, and the court's ability to review a CDP determination. When a taxpayer files a bankruptcy petition, the automatic stay halts a range of collection activities, including proceedings to recover a prepetition claim against the debtor; acts to recover a prepetition claim against the debtor's property; acts to create, perfect or enforce a lien against property of the debtor or the estate; and the commencement or continuation of a proceeding in the Tax Court. See 11 U.S.C. § 362(a).

1. Issuance of a CDP Notice

No NFTL should be filed and no levies proposed if the automatic stay is in effect. If a NFTL is filed after the commencement of the stay, it should be withdrawn; if a levy is proposed after the commencement of the stay, it should be abandoned. Any CDP notices issued in connection with a NFTL may be rescinded, but only if the NFTL is withdrawn or the lien released and only if the rescission is accomplished both before the expiration of the time period for requesting a hearing and before a hearing is actually requested.

2. Holding a CDP Hearing

As a matter of policy, the Service generally does not conduct CDP hearings during the pendency of the automatic stay (e.g., when it is notified that a taxpayer has filed for bankruptcy protection). This is done for several reasons. First, the tax liabilities may be resolved in the bankruptcy. Additionally, many collection alternatives that otherwise may be addressed in CDP may not be considered while a taxpayer is in bankruptcy (e.g., an installment agreement or an offer in compromise). Moreover, to the extent a tax liability survives bankruptcy and requires further administrative or judicial collection, the Service's interests are generally protected. Finally, there may be an inadvertent violation of the stay in some other manner if a CDP hearing is conducted. Accordingly, to the extent that the Service is notified of a bankruptcy petition, pending CDP hearings are held in abeyance and NODs generally are not issued.

3. NOD and Tax Court Jurisdiction in a CDP-Levy Matter

In Smith v. Commissioner, 124 T.C. 36 (2005), the court held that a NOD involving a CDP-levy action that was issued during the period in which the bankruptcy automatic stay was in effect violated B.C. section 362(a)(1) and was void. The Service disagrees. However, it is less clear whether a Levy-NOD might violate B.C. section 362(a)(6). Cases in which this issue arises need to be coordinated with the National Office.

4. NOD and Tax court Jurisdiction in a CDP-lien Matter

A NFTL is effective when filed. Since the CDP hearing concerning the NFTL occurs after the collection action is complete, conducting the CDP hearing is less likely to be regarded as a violation of the stay. The issue would not be whether the collection action should go forward, but rather whether there was a problem with the now-completed collection action, or whether the liability may otherwise be resolved so that the taxpayer will become entitled to a release or discharge. However, the Tax Court nonetheless expanded the holding in Smith to a review of a CDP-lien matter in Yuska v. Commissioner, T.C. Memo. 2015-77. Cases in which this issue arises also need to be coordinated with the National Office.

5. Review of a CDP Determination

If a taxpayer files for bankruptcy after appealing a CDP determination to the Tax Court, the Tax Court's review of the CDP determination is stayed under 11 U.S.C. § 362(a)(8). 11 U.S.C. § 362(a)(8) prohibits the commencement or continuation of a Tax Court proceeding while the stay is in effect (for individual debtors, the prohibition only extends to pre-bankruptcy petition taxes). See Prevo v. Comm'r, 123 T.C. 326 (2004) (automatic stay bars petition for review of section 6320 determination).

Section 6330(d)(2), effective for petitions filed after December 18, 2015, provides that the period for filing a Tax Court petition is suspended for the period during which the automatic stay prohibits the filing, plus 30 days. Before amendment, there was no tolling provision that would allow for the filing of a timely Tax Court petition after the automatic stay is lifted or is no longer in effect. See Prevo, 123 T.C. at 331.

G. Effect of Requesting a CDP Hearing

1. Statute of Limitations

The limitation periods under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to suits) with respect to the taxes and periods listed on the CDP Notice are suspended beginning on the date the Service receives a timely hearing request. I.R.C. § 6330(e)(1); Treas. Reg. §§ 301.6320-1(g)(2)Q&A-G1, 301.6330-1(g)(2)Q&A-G1; Boyd v. Comm'r, 117 T.C. 127 (2001). The suspension period ends either on the date the Service receives a written withdrawal of the hearing request, when the determination resulting from the CDP hearing becomes final by expiration of the time for seeking review, or upon the exhaustion of any right of appeal following judicial review. Id.; see also United States v. Kollman, 774 F.3d 592 (9th Cir. 2014) (suspension period continues for 30 days after the issuance of the CDP determination during which the taxpayer may appeal to the Tax Court, even if an appeal is not filed); United States v. Giaimo, 854 F.3d 483 (8th Cir. 2017) (suspension period applied to government's lien foreclosure suit) .

Section 6330(e) further provides that in no event shall any of the limitation periods expire before the 90th day after the day on which there is a final determination with respect to such hearing. This provision means that if there are fewer than 90 days left in any limitations period after the suspension ends, the remaining limitations period will be 90 days. Treas. Reg. §§ 301.6320-1(g)(3), 301.6330-1(g)(3).

2. Levy Action

A timely CDP levy hearing request generally suspends any levy action to collect liabilities listed on the CDP Notice for the period during which the hearing and appeals therein are pending, plus 90 days. I.R.C. § 6330(e)(1). Levy action listed in section 6330(f), however, is not suspended. A levy will not be suspended while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Service has shown good cause not to suspend the levy. I.R.C. § 6330(e)(2). The Service must file a motion with the Tax Court requesting a good cause determination before proceeding with the levy.

The Tax Court has found "good cause" and granted section 6330(e)(2) motions in cases where the taxpayers are making solely frivolous arguments. See Burke v. Comm'r, 124 T.C. 189 (2005); Howard v. Comm'r, T.C. Memo. 2005-100; cf. Polmar Int'l, Inc. v. United States, 2002-2 USTC P. 50,636 (W.D. Wash.) (court found "good cause" where taxpayer corporation repeatedly failed to pay employment taxes on time). Counsel attorneys should generally file section 6330(e)(2) motions as a matter of course in all CDP cases involving taxpayers making solely frivolous arguments. A sample motion is in CCDM 35.11.1-231.

3. Anti-Injunction Act

The Anti-injunction Act, found at section 7421, generally prohibits suits to restrain the assessment and collection of any tax. The beginning of a levy or a proceeding, however, may be enjoined by the proper court, including the Tax Court, during the time the suspension under section 6330(e)(1) is in force. The Tax Court cannot enjoin any action or proceeding unless a timely appeal of a notice of determination has been filed with the Tax Court and then only with respect to the unpaid tax subject to proposed levy. I.R.C. § 6330(e)(1); Davis v. Comm'r, T.C. Memo. 2008-238. As a result, only district courts may enjoin a levy occurring after a timely request for hearing and prior to the appeal of the notice of determination.

4. Permitted Collection Actions

Section 6330(e)(1) only prohibits levy if a proposed levy is the basis of the CDP hearing. Therefore, the Service may levy for taxes covered by a CDP lien notice if the CDP levy notice requirement for those taxes and periods has been satisfied. Treas. Reg. §§ 301.6320-1(g) (2) Q&A-G3, 301.6330-1(g)(2)Q&A-G3. However, the Service has administratively decided that it will generally not levy to collect taxes that are the subject of a CDP lien hearing unless Collection determines levy to be appropriate (e.g., collection is at risk because the taxpayer is dissipating assets). See IRM 5.1.9.3.5.1(2).

In addition, neither section 6320 nor section 6330 prohibits the filing of a notice

of federal tax lien. Beery v. Comm'r, 122 T.C. 184 (2004). Therefore, if a taxpayer requests a CDP hearing under section 6330, the Service may file an NFTL for the same tax and periods although the Service must also must provide notice and the right to a hearing under section 6320. If a taxpayer requests a CDP hearing under section 6320, the Service may file an NFTL for the same tax and periods in another recording office. The taxpayer would be precluded from getting another CDP hearing. See I.R.C. § 6320(b)(2); Treas. Reg. § 301.6320-1(b)(1). If a taxpayer requests a CDP hearing under either section 6320 or 6330, the Service may file an NFTL for tax periods or taxes not covered by the CDP Notice, but it must provide notice and the right to a hearing under section 6320.

Other non-levy collection actions are also permitted, including initiating judicial proceedings, offsetting overpayments from other periods, and accepting voluntary payments of the tax. See Boyd v. Comm'r, 451 F.3d 8 (1st Cir. 2006), aff'g 124 T.C. 296 (2005) (no CDP rights for offsets); Davis v. Comm'r, T.C. Memo. 2008-238 (no CDP rights for lock-in letter instructing taxpayer's employer to adjust taxpayer's withholding).

VI. CDP PROCEDURES

A. Conduct of CDP Hearing

1. In General

The Code does not define what constitutes a CDP hearing. The regulations provide that a CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications, or some combination thereof. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6; see also Olsen v. United States, 414 F.3d 144 (1st Cir. 2005); Katz v. Comm'r, 115 T.C. 329 (2000) (combination of telephone calls and written letters). Therefore, all communications between the taxpayer and the appeals officer between the time of the request for the hearing and the issuance of the notice of determination are part of the CDP hearing. While a correspondence-only or telephone hearing may be legally sufficient, the court will remand where the cumulative effect of defects such as failing to consider all issues raised by the taxpayer and failing to follow up with the taxpayer before issuing the Notice of Determination, results in the petitioner being deprived of a fair hearing. See Charnas v. Comm'r, T.C. Memo 2015-153, at *13-14. Where the taxpayer does not respond to the appeals officer, the appeals officer may rely on what is available in the administrative record to make a determination. D'Onofrio v. Comm'r, T.C. Memo. 2008-25; Bean v. Comm'r, T.C. Memo. 2006-88.

2. Location

A taxpayer who presents in the CDP hearing request relevant, non-frivolous reasons for disagreement with the NFTL or proposed levy will ordinarily be offered a face-to-face conference at the Appeals office closest to his or her residence or, if the taxpayer is a corporation, to its principal place of business. Treas. Reg. § 301.6320-1(d)(2) Q&A-D7, 301.6330-1(d)(2) Q&A-D7. See also Katz v. Comm'r, 115 T.C. 329 (2000); Lewis v. Commisioner, T.C. Memo. 2012-138 (abuse of discretion to not allow face-to-face conference to address complex bankruptcy issues); Parker v. Comm'r, T.C. Memo. 2004-226 (court remanded for new CDP hearing where original meeting was scheduled at an Appeals office 180 miles from taxpayer's residence, and there was a closer Appeals office). The regulations do not require Appeals to offer a face-to-face or telephone conference absent a request. But see Meyer v. Comm'r, 115 T.C. 417 (2000) (appeals officer erred in failing to offer a hearing either in person or by telephone), overruled on other grounds, Lunsford v. Comm'r, 117 T.C. 159 (2001).

The regulations set forth the circumstances under which the Appeals Office will hold face-to-face conferences. Specifically, in cases where the CDP hearing request raises only frivolous and groundless arguments, Appeals will contact the taxpayer to ask the taxpayer to state what relevant issues the taxpayer would like to address at the hearing. If the taxpayer fails to respond or responds with only additional frivolous and groundless arguments, Appeals will not offer the taxpayer a face-to-face conference. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D8; 301.6330-1(d)(2) Q&A-D8.

See also the prior discussion of section 6330(g), regarding the authority of the Service to disregard any portion of a CDP hearing request based on a position identified by the Service in a published list as frivolous or reflecting a desire to delay or impede tax administration. Where section 6330(g) applies, a taxpayer raising only frivolous or groundless arguments will not only be denied a face-to-face conference, but will be denied a CDP hearing.

A face-to-face CDP conference concerning a collection alternative, such as an installment agreement or an offer to compromise liability, will not be granted unless other taxpayers would be eligible for the alternative in similar circumstances. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8; 301.6330-1(d)(2) Q&A D8; Stockton v. Comm'r, T.C. Memo. 2009-186. A face-to-face conference need also not be granted if the taxpayer does not provide the required information in the CDP hearing request. Sullivan v. Commissioner, T.C. Memo. 2012-337. However, a taxpayer will be given the opportunity to do what is necessary to become eligible for a face-to-face conference (e.g., present relevant non-frivolous arguments). Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D8; 301.6330-1(d)(2) Q&A-D8.

The Tax Court has upheld Appeals' denial of a face-to-face conference in cases involving taxpayers raising frivolous arguments. See, e.g., Williamson v. Comm'r, T.C. Memo. 2009-188; Stockton v. Comm'r, T.C. Memo. 2009-186; Clough v. Comm'r, T.C. Memo. 2007-106. There is no abuse of discretion in the refusal of a face-to-face hearing when a taxpayer refuses to present nonfrivolous arguments, file past-due returns, and submit financial information. Toth v. Comm'r, T.C. Memo. 2010-227.

3. Recording

A CDP hearing is informal and the formal hearing requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. do not apply. Treas. Reg. §§ 301.6320-1(d)(2)Q&A-D6 and 301.6330-1(d)(2)Q&A-D6; see also Davis v. Comm'r, 115 T.C. 35 (2000). To the extent Mesa Oil, Inc. v. U.S., 2001-1 USTC P. 50,130 (D. Colo. 2000) held that CDP hearings must be recorded verbatim, we disagree. See 2001 AOD LEXIS 5. In Keene v. Comm'r, 121 T.C. 8 (2003), the Tax Court held that, under section 7521, a taxpayer must be permitted to make an audio recording of a section 6330 hearing. Since the Keene case, Appeals has allowed taxpayers to record their in-person CDP conference if they provide the required advance notice under section 7521. When a taxpayer is improperly denied the right to record, the Tax Court has held that it will not remand the case to Appeals for a new recorded hearing when such a remand would be unnecessary or unproductive. Lunsford v. Comm'r, 117 T.C. 183 (2001); Carrillo v. Comm'r, T.C. Memo. 2005-290. The Tax Court has also held that section 7521 does not apply to telephone CDP conferences. Calafati v. Comm'r, 127 T.C. 219 (2006). Videotaping of an Appeals hearing has never been allowed.

4. Witnesses

Taxpayers do not have the right to subpoena and examine witnesses. Treas. Reg. §§ 6320-1(d)(2)Q&A-D6 and 6330-1(d)(2)Q&A-D6; Robinette v. Comm'r, 123 T.C. 85, 98 (2004), rev'd on other grounds, 439 F.3d 455 (8th Cir. 2006). The appeals officer is not required to give the taxpayer a set of procedures governing the hearing. Lindsay v. Comm'r, T.C. Memo. 2001-285. Taxpayers do not have the right to subpoena documents, Barnhill v. Comm'r, T.C. Memo. 2002-116, Konkel v. Comm'r, 2001-2 USTC P. 50,520 (M.D. Fla. 2000), or examine them, Watson v. Comm'r, T.C. Memo. 2001-213. Section 6330(c)(1) does not require the appeals officer to provide the taxpayer with copies of the documents that the appeals officer obtains to verify that the requirements of any applicable law or administrative procedure were met. Robinette v. Comm'r, 123 T.C. 85 (2004); Nestor v. Comm'r, 118 T.C. 162 (2002). However, Appeals provides a MFTRA-X (literal) transcript to each taxpayer who requests one.

5. Impartial Appeals Officer

Sections 6330(b)(1), 6320(b)(3), and 6330(b)(3) require that the hearing be conducted by an officer or employee in the IRS Office of Appeals who has had no involvement with respect to the same unpaid tax prior to the first hearing under either section 6320 or 6330. The statute does not specify that any particular category of officer conduct the hearing; "an 'appeals officer' is any 'officer or employee' in the IRS Office of Appeals to whom is assigned the task of conducting a CDP hearing under section 6330(b)(3)." Tucker v. Comm'r, 135 T.C. 114, 155 (2010), aff'd, 676 F.3d 1129 (D.C. Cir. 2012), cert. denied, 133 S.Ct. 646 (2012). Further, such officers or employees are not inferior officers for purposes of the Appointments clause of the United States Constitution, and so are properly hired by the Commissioner of the Internal Revenue pursuant to section 7804(a). Id.

Prior involvement includes participation or involvement in an examination or collection matter (other than a prior CDP hearing) that the taxpayer may have with respect to the tax and tax period shown on the CDP notice. Prior involvement exists only when the taxpayer, the tax, and the tax period at issue in the CDP hearing also were at issue in the prior non-CDP matter, and the Appeals officer or employee actually participated in the prior matter. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D4; 301.6330-1(d)(2) Q&A-D4; Baber v. Comm'r, T.C. Memo. 2009-30; see also Moosally v. Comm'r, 142 T.C. 183 (2014) (holding that prohibited prior involvement includes a situation where the appeals officer considered the taxpayer's appeal from a rejection of an OIC). Where separate CDP hearings were conducted for the lien and levy for the same tax period, prior involvement does not include the prior CDP hearing. The prior involvement restriction only applies to the officer conducting the hearing, not the officer's manager who signed the notice of determination. See also Isley v. Comm'r, 141 T.C. No. 11 (2013) (chief counsel attorney who provided an opinion on an offer-in-compromise as required by section 7122(b) was not a de facto appeals officer subject to section 6330(b)(3)).

Therefore, based on our position that the section 6672 penalty and employment taxes are separate and distinct liabilities, we do not agree with the district court's holding in MRCA Info. Servs., Inc. v. Comm'r, 145 F. Supp. 2d 194 (D. Conn. 2000), that an appeals officer who was assigned to hear a CDP case involving a corporation's employment tax liability was not impartial because he had presided at a hearing involving the section 6672 penalty assessed against the sole shareholder of that corporation for the same tax periods. See Treas. Reg. §§ 301.6320-1(d)(3) ex. 3, 4; 301.6330-1(d)(3) ex. 3, 4; see also Harrell v. Comm'r, T.C. Memo. 2003-271 (appeals officer is not rendered impartial for purposes of section 6330(b)(3) just because another employee in the same appeals office was involved with the same taxpayer, type of tax, and tax years at issue in CDP).

We also disagree with the Tenth Circuit's opinion in Cox v. Comm'r, 514 F.3d 1119 (10th Cir. 1008), rev'g 126 T.C. 237 (2006), non-acq. AOD 2009-01, 2009-22 I.R.B. 1, and will not follow it outside of the Tenth Circuit. In Cox, the Tenth Circuit held that prior involvement includes conducting a CDP hearing involving an earlier tax period where the existence of the tax liability for the later years was a material factor in the decision involving the earlier year. Thus, where an officer conducted a CDP hearing for the 2000 income tax liability, and considered the taxpayer's noncompliance for 2001 and 2002 income taxes at that hearing, he was precluded from conducting a subsequent CDP hearing for 2001 and 2002. The Tenth Circuit reversed the opinion of the Tax Court that merely reviewing the compliance history of the 2001 and 2002 years in a CDP proceeding involving 2000 is not disqualifying prior involvement.

There is no prohibition on the same Appeals personnel who worked on the original CDP hearing working on the supplemental hearing on remand. Medical Practice Solutions, LLC v. Comm'r, T.C. Memo. 2010-98. The hearing on remand is treated as a continuation of the original hearing.

6. Prohibition of Ex Parte Communications

RRA 1998, section 1001(a) directed the Service to develop a plan to prohibit ex parte communications between Appeals employees and other employees of the Service. To ensure an independent Appeals function, ex parte communications between Appeals employees and other Service employees are prohibited to the extent that such communications appear to compromise the independence of the appeals officers. Rev. Proc. 2012-18, 2012-10 I.R.B. 455. The term "ex parte communications" is defined in Rev. Proc. 2012-18 as the communications between Appeals and other Service functions without the taxpayer or the taxpayer's representative being given the opportunity for participation. Rev. Proc. 2012-18, Section 2.01(1). Not all communications between Appeals employees and other personnel are prohibited; for example, communications regarding ministerial, administrative or procedural matters are permissible. Section 2.02(5).

Specific guidelines for CDP cases are provided in section 2.03(10) of Rev. Proc. 2012-18. Counsel can give legal advice to Appeals, including assistance in handling a case remanded from the Tax Court, without violating the ex parte rules. The legal advice should be carefully tailored to answer the legal question posed by Appeals and should not opine on the ultimate issues to be addressed by Appeals in making the CDP determination. Hinerfeld v. Comm'r, 139 T.C. 277 (2012) (Appeals' ex parte communication with Counsel regarding an offer in compromise was not prohibited because section 7122 requires Counsel review and Appeals exercised independent judgment). See also Chief Counsel Notice CC-2012-010, Ex Parte Communications Between CC Attorneys and Employees of Appeals; Isley v. Comm'r, 141 T.C. No. 11 (2013) (ex parte prohibitions did

not apply to Counsel communications with revenue officer and special agent). Any questions regarding application of the ex parte guidelines in CDP cases should be directed to Branch 3 or 4 (P&A).

B. Verification Requirements

Sections 6320(c) and 6330(c)(1) require the appeals officer, at the hearing, to obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. Thus, the appeals officer must verify that any actions required by the Code, regulations, and the Internal Revenue Manual prior to collection have occurred. See, e.g., Mason v. Comm'r, 132 T.C. 301 (2009) (Appeals must verify the Letter 1153 was sent to taxpayer prior to assessment of the section 6672 trust fund recovery penalty); Michael v. Comm'r, 133 T.C. 237 (2009); Ron Lykins, Inc. v. Comm'r, 133 T.C. 87 (2009); Trout v. Comm'r, 131 T.C. 239 (2008) (Marvel, concurring) (when offer in compromise was terminated, Appeals should verify that the IRM administrative procedures for termination were followed); Hoyle v. Comm'r, 131 T.C. 197 (2008) (addressing verification requirements for validity of deficiency assessment); Medical Practice Solutions, LLC v. Comm'r, T.C. Memo. 2009-214 (addressing verification requirements for assessments from returns).

Sections 6320(c) and 6330(c)(1) do not require the appeals officer to rely on any particular document for verification. Roberts v. Comm'r, 118 T.C. 365, 371 n.10 (2002). Verification is obtained by the Appeals Officer from the Service through its computer records and paper administrative files. The Automated Collection System or Field Compliance is responsible for providing Appeals with all the information necessary to conduct the verification required by section 6330(c)(1).

The Tax Court has held that it can review the appeals officer's verification under section 6330(c)(1) regardless of whether the issue of verification was raised at the CDP hearing. Hoyle v. Comm'r, 131 T.C. 197 (2008). If a taxpayer alleges in Tax Court that the Appeals Officer failed to obtain the requisite verification, the taxpayer has the burden of going forward with a prima facie case and has the burden of proof on that contention. Dinino v. Comm'r, T.C. Memo. 2009-284.

1. Computer Transcripts

Section 6330(c)(1) does not require the Appeals office to rely on any particular document for verification. Craig v. Comm'r, 119 T.C. 252, 261-62 (2002); Best v. Comm'r, T.C. Memo. 2014-12. Most (but not necessarily all) of the legal and administrative procedural requirements can be verified by reviewing computer transcripts. The Form 4340 and the underlying TXMOD-A transcripts currently provide verification of assessment of the liability and the sending of collection notices. The Form 4340 is a computer-generated list of assessments, payments, and other activity on a taxpayer's account that appears in the official records of the Service. See Oropeza v. Comm'r, T.C. Memo. 2009-244.

Unless the taxpayer can identify an irregularity in the assessment procedure or other information contained in a Form 4340, it is not an abuse of discretion for an appeals officer to rely on a Form 4340 to verify that legal and administrative requirements have been satisfied. See McLaine v. Comm'r, 138 T.C. 10 (2012); Roberts v. Comm'r, 118 T.C. 365 (2002); Craig v. Comm'r, 119 T.C. 252, 261-63 (2002). An appeals officer may rely on a Form 4340 to verify the validity of an assessment. Nestor v. Comm'r, 118 T.C. 162 (2002). An appeals officer may rely on a Form 4340 to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Craig v. Comm'r, 119 T.C. 252 (2002).

Similarly, unless the taxpayer can identify an irregularity in the assessment procedure, or procedures related to other information contained in the computer transcript (other than Form 4340), the appeals officer does not abuse his or her discretion by relying on such transcript to verify certain requirements, if the transcript relied upon contains the information required in Treas. Reg. § 301.6203-1. See, e.g., Williams v. Comm'r, T.C. Memo. 2005-94; Cipolla v. Comm'r, T.C. Memo. 2004-6. An appeals officer may rely on a computer transcript to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Kun v. Comm'r, T.C. Memo. 2004-209; Schaper v. Comm'r, T.C. Memo. 2002-203.

Even in cases where the taxpayer does not identify an irregularity, sections 6320(c) and 6330(c)(1) require that the appeals officer determine whether the assessment was properly made. If the tax liability was incorrectly assessed under the math error procedures, the resulting tax assessment is invalid and must be abated. See I.R.C. § 6213(b)(1). Similarly, if the statutory notice of deficiency was not sent to the taxpayer's last known address, the resulting assessment is invalid. Such issues will often require the appeals officer to examine underlying documents in addition to tax transcripts, such as the taxpayer's return, a copy of the notice of deficiency, and the certified mailing list for the notice of deficiency. See Hoyle v. Comm'r, 131 T.C. 197 (2008) (remanding to Appeals to clarify the record as to what it relied upon in determining that the notice of deficiency was properly sent). See also Clough v. Comm'r, T.C. Memo. 2007-106; Butti v. Comm'r, T.C. Memo. 2008-82; cf. Casey v. Comm'r, T.C. Memo. 2009-131; Butti v. Comm'r , T.C. Memo. 2009-198 (Butti II); Clayton v. Comm'r, T.C. Memo. 2009-114.

The Notice of Determination must expressly state that appeals verified the timeliness of assessments and other matters, specifically what transcripts and transcript information appeals relied upon, and include those transcripts in the administrative record. Medical Practice Solutions, LLC v. Comm'r, T.C. Memo. 2009-214 (remand where copies of transcripts not in the record).

2. Other Methods

Verification of other requirements may be satisfied by review of the examination or collection files, or entries in the Integrated Collection System or Automated Collection System screens.

C. Relevant Issues

1. Spousal Defenses

A taxpayer may raise any appropriate spousal defense at a CDP hearing. Section 6330(c)(2)(a)(i). A taxpayer is precluded from requesting relief under section 66 and 6015 if the Commissioner has already made a final determination as to spousal defenses in a statutory notice of deficiency or final determination letter. Treas. Reg. §§ 301.6320-1(e)(2), 301.6330-1(e)(2); Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E4, 301.6330-1(e)(3)Q&A-E4. If the taxpayer raised a spousal defense under section 66 or 6015 in a prior judicial proceeding that has become final, the doctrine of res judicata and the exception contained in section 6015(g)(2) prevent the taxpayer from raising the defense in a subsequent CDP hearing or judicial review proceeding. I.R.C. § 6330(c)(4); Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E5, 301.6330-1(e)(3)Q&A-E5; Treas. Reg. § 1.6015-1(e).

2. Appropriateness of the Collection Action

A taxpayer may also challenge whether the collection action is appropriate, including the following:

a) Bankruptcy discharge

Taxes not discharged in bankruptcy may be collected from the taxpayer personally and from his or her property. If a taxpayer received a bankruptcy discharge and his or her tax liabilities are dischargeable, the taxpayer is no longer personally liable for the taxes and the Service is enjoined from collecting the liability from the taxpayer personally. See 11 U.S.C. § 524(a). See also In re Rivera Torres, 309 B.R. 643, 647 (B.A.P. 1st Cir. 2004). If, however, the Service filed a NFTL before the bankruptcy petition date, then the lien continues to attach to prepetition property of the taxpayer that was exempt or abandoned from the estate after the bankruptcy. 11 U.S.C. § 522(c)(2)(B); Wadleigh v. Comm'r, 134 T.C. 280 (2010). A lien remains attached to property excluded from the estate, such as an ERISA-qualified pension plan, even if a NFTL was not filed before the petition date. United States v. Rogers, 558 F.Supp.2d 774 (N.D. Ohio 2008).

b) Currently not collectible

The taxpayer may seek to have his or her liabilities administratively classified as currently not collectible. See Vinatieri v. Comm'r, 133 T.C. 392 (2009) (court held it was abuse of discretion to deny taxpayer currently not collectible status due to noncompliance with filing requirements where levy would create economic hardship and would have to be immediately released under section 6343(a)(1)(D)). For guidance in CDP cases in which an economic hardship argument is raised, see CC Notice 2011-005, *Considering Economic Hardship in Determining the Appropriateness of a Levy*. See also Lantz v. Comm'r, 607 F.3d 479 (7th Circuit 2010) (in dicta, court states that where levy would cause taxpayer to be unable to pay his or her reasonable basic living expenses, taxes must be declared as currently not collectible and levy should not proceed); Wadleigh v. Comm'r, 134 T.C. 280 (2010).

c) Collection from other sources

The Service has no obligation to first collect employment taxes from the employer or from its bankruptcy estate before assessing and collecting the TFRP from a responsible officer under section 6672. See Bishay v. Comm'r, T.C. Memo. 2015-105, at *20-21.

3. Offers of Collection Alternatives

Section 6330(c)(2)(A)(iii) and Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E6, 301.6330-1(e)(3)Q&A-E6, list the following examples of collection alternatives:

- posting of a bond
- substitution of other assets
- an installment agreement
- an offer-in-compromise
- withholding collection action to facilitate future payment

In addition, Treas. Reg. §301.6320-1(e)(3) Q&A-E6 provides that collection alternatives in lien cases include a proposal to withdraw the NFTL in circumstances to facilitate the collection of the tax liability, subordination of the NFTL, and discharge of specific property from the NFTL. See Green v. Comm'r, T.C. Memo. 2014-180. A collection alternative is not available unless it would be available to other taxpayers in similar circumstances. Note that acceptance of a collection alternative in a CDP lien case does not necessarily affect the NFTL filing. For example, when an installment agreement is accepted as a collection alternative, the NFTL generally remains filed. See I.R.C. § 6323(j). For discussion of the procedures for consideration of collection alternatives such as installment agreements or offers-in-compromise in CDP

cases, see IRM 8.22.7.5 and 8.22.7.10. See also Isley v. Comm'r, 141 T.C. 349 (2013) (referral of taxpayer tax liability to DOJ for potential prosecution precluded unilateral acceptance of offer-in-compromise by Appeals in CDP); Reed v. Comm'r, 141 T.C. 248 (2013) (respondent not required to reopen offer-in-compromise for doubt as to collectability that was returned to petitioner as unprocessable before the CDP hearing began); Thompson v Comm'r, 140 T.C. 173 (2013) (appeals officer determination that tithing and college expenses were not necessary expenses for purposes of an offer-in-compromise analysis was not a violation of the Constitution or Religious Freedom Restoration Act).

4. Consideration of Non-CDP Years During CDP Hearing

The Tax Court has held that it has jurisdiction under section 6330(d)(1) to consider facts and issues in non-CDP years when the facts and issues are relevant in evaluating a claim that all or part of the tax for a CDP year has been paid. See Weber v. Commissioner, 138 T.C. 348 (2012) (no credit available from a non-CDP year which could be applied to the CDP period); Brady v. Comm'r, 136 T.C. 422 (2011) (taxpayer not entitled to credit from non-CDP year where the taxpayer did not file a timely refund suit for that year); Freije v. Comm'r, 125 T.C. 14, 27 (2005). See also Kovacevich v. Comm'r, T.C. Memo. 2009-160; Perkins v. Comm'r, T.C. Memo. 2008-103 (remanding for consideration of whether taxpayer is entitled to credit for non-CDP years).

Counsel's position is that 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 claims made in a CDP case. Taxpayers also 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). The application of an overpayment from a non-CDP period as a source of payment for 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. See Chief Counsel Notice 2011-021 for further discussion of Tax Court jurisdiction over liability and overpayment issues for non-CDP periods.

A taxpayer is permitted to seek review of a non-CDP year if such review is necessary to determine an adjustment to the liability subject to the CDP hearing. For example, review of a non-CDP year would be permissible if the taxpayer is seeking the application of a net operating loss or credit carryover from a non-CDP year to a CDP year. This inquiry is necessary to determine the "existence or amount" of the liability subject to the hearing under section 6330(c)(2)(B), as further discussed below.

5. Liability

Section 6330(c)(2)(B) provides that a taxpayer may challenge the existence or

amount of the underlying tax liability at the CDP hearing if the taxpayer did not receive a statutory notice of deficiency for the tax liability or did not otherwise have an opportunity to dispute the tax liability. Underlying tax liability means the tax imposed by the I.R.C. Kovacevich v. Comm'r, T.C. Memo. 2009-160. Underlying tax liability has also been defined by the Tax Court as "the tax on which the Commissioner based his assessment." Robinette v. Comm'r, 123 T.C. 85, 93 (2004), rev'd on other grounds, 439 F.3d 455 (8th Cir. 2006). The term "underlying tax liability" means the total amount of tax (including interest and penalties) assessed for a particular tax period, including tax assessed under the deficiency procedures, tax reported on a tax return, or a combination of both. Callahan v. Comm'r, 130 T.C. 44 (2008); Montgomery v. Comm'r, 122 T.C. 1, 7-8 (2004).

Underlying tax liability under section 6330(c)(2)(B) includes penalties and additions to tax. See Gray v. Comm'r, 138 T.C. 295 (2012); Farhoumand v. Comm'r, T.C. Memo. 2012-131. The taxpayer can challenge interest assessed on a deficiency if the amount of interest properly assessable was not (and could not have been) considered in the taxpayer's prior deficiency case. Creditguard of America, Inc. v. Comm'r, 149 T.C. No. 17 (2017).

The Tax Court has held that underlying liability includes the expiration of statutes of limitations. See Hoffman v. Comm'r, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject to de novo review); Boyd v. Comm'r, 117 T.C. 127 (2001) (claim that collection statute of limitations has expired is a liability challenge subject to de novo review, as is the claim that the taxpayer had already paid the liabilities at issue); Olender v. Comm'r, T.C. Memo. 2008-205. In Kindred v. Comm'r, 454 F.3d 688 (7th Cir. 2006), the Seventh Circuit states that it is "well settled law" that a challenge to the statute of limitations for making an assessment under section 6501 constitutes a challenge to the underlying liability, citing numerous Tax Court decisions including Hoffman. But cf. Crites v. Comm'r, T.C. Memo. 2012-267 (assessment statute of limitations is a verification issue under section 6330(c)(1)).

Chief Counsel's position, however, is that statute of limitations issues are non-liability issues and so are not subject to preclusion under section 6330(c)(2)(B) and are subject to abuse of discretion review. For more information, see Chief Counsel Notice CC-2014-002, Proper Standard of Review for Collection Due Process Determinations, which states the Office of Chief Counsel's longstanding position that issues involving whether the Service has complied with all applicable legal and administrative procedural requirements involve nonliability issues

The Tax Court has not definitively held whether application of payment issues are liability issues. In Dixon v. Comm'r, 141 T.C. 173 (2013), the Tax Court noted

that there is uncertainty in its precedent over whether the de novo or abuse of discretion standard of review applies to the issue of the proper application of credits and overpayments or remittances. It declined to address that issue because the Service's proposed collection action was impermissible under either standard. Compare Landry v. Comm'r, 116 T.C. 60 (2001) (applying de novo standard of review to challenge to application of overpayment credits) with Kovacevich v. Comm'r, T.C. Memo. 2009-160 (applying abuse of discretion review to challenge to application of tax payments), Concert Staging Servs., Inc. v. Comm'r, T.C. Memo. 2011-231 (same), and Orian v. Comm'r, T.C. Memo. 2010-234 (same). Chief Counsel's position is that application of payment issues are non-liability issues, as explained in the Chief Counsel Notice cited above.

D. Precluded Issues

1. Liability Challenges Barred by § 6330(c)(2)(B)

Under section 6330(c)(2)(B), a taxpayer is not permitted to challenge his or her liability in a CDP hearing if he or she received a notice of deficiency or otherwise had an opportunity to dispute the liability. If a taxpayer is precluded from challenging his or her liability in a CDP hearing, he or she is also precluded from doing so in the judicial review proceeding under section 6330(d). Goza v. Comm'r, 114 T.C. 176 (2000).

In Montgomery v. Comm'r, 122 T.C. 1 (2004), acq., action on dec. 2005-03, 2005 WL 3451063, the Tax Court construed the term "underlying tax liability" under section 6330(c)(2)(B) to encompass the tax reported due on a self-filed tax return. The court accordingly held that the taxpayers could challenge the amount of the tax reported on their 2000 return in the CDP proceeding.

Note: In cases where the taxpayer is precluded from disputing the underlying liability, but is raising a legitimate liability issue, Appeals and Counsel should make every attempt to resolve that issue, in or out of CDP. The goal of Appeals and Counsel should always be to ensure that the correct amount of tax liability is collected even where consideration of the liability is barred by section 6330(c)(2)(B).

a) Receipt of a statutory notice of deficiency

Receipt of a statutory notice of deficiency means receipt in time to petition the Tax Court for a redetermination of the deficiency. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E2, 301.6330-1(e)(3)Q&A-E2; Kuykendall v. Comm'r, 129 T.C. 77 (2007) (receipt within 12 days of petition due date insufficient); Butti v. Comm'r, T.C. Memo. 2009-198. In CDP cases, the Service has the burden of proving by a preponderance of the evidence that the receipt requirement of section 6330 has been satisfied.

b) Presumptions of official regularity and delivery

For the presumptions of official regularity and delivery to arise in the CDP context, it must be shown that the statutory notice of deficiency was sent by certified mail to the taxpayer's last known address. Sego v. Comm'r, 114 T.C. 604 (2000); see also Meyer v. Comm'r, T.C. Memo. 2013-268; Campbell v. Comm'r, T.C. Memo. 2013-57; Buffano v. Comm'r, T.C. Memo. 2007-32. Such proof is established by presenting a copy of the statutory notice and a certified copy of USPS Form 3877, certified mail list. O'Rourke v. United States, 587 F.3d 537 (2nd Cir. 2009); Crain v. Comm'r, T.C. Memo. 2012-97; see also United States v. Zolla, 724 F.2d 808 (9th Cir. 1984). The USPS Form 3877 must be stamped or initialed by the Post Office. Cf. Massie v. Comm'r, T.C. Memo. 1995-173. The presumption of delivery includes the presumption that the Postal Service attempted delivery of the certified mail to the taxpayer. Carey v. Comm'r, T.C. Memo. 2002-209.

c) Rebuttal of presumptions

Once the presumptions of official regularity and delivery arise, the burden is on the taxpayer to prove non-receipt. Conn v. Comm'r, T.C. Memo. 2008-186. The presumptions are rebutted if the certified mail is returned as undeliverable. Lehmann v. Comm'r, T.C. Memo. 2005-90. In addition, the presumptions can be rebutted by credible testimony denying receipt. Tatum v. Comm'r, T.C. Memo. 2003-115. However, the presumptions are not rebutted by testimony denying receipt where sufficient contrary evidence exists that the taxpayer refused to accept delivery of the notice of deficiency. Sego v. Comm'r, 114 T.C. 604 (2000); Lehmann v. Comm'r, T.C. Memo. 2005-90. The presumptions are also not rebutted where the taxpayer has declined to retrieve his mail when he was able to do so. Onyango c. Comm'r, 142 T.C. 425 (2014); Kupersmit v. Comm'r, T.C. Memo. 2014-157; see also Campbell III v. Comm'r, T.C. Memo 2013-57; Klingenberg v. Comm'r, T.C. Memo 2012-292; Rivas v. Comm'r, T.C. Memo. 2012-20; Cyman v. Comm'r, T.C. Memo. 2009-144; Figler v. Comm'r, T.C. Memo. 2005-230.

d) Frivolous challenges to liability

Counsel should consider whether the section 6330(c)(2)(B) preclusion issue should be conceded if a taxpayer is only making frivolous arguments regarding his tax liabilities and proof of receipt of the statutory notice of deficiency will be difficult. Under such circumstances, defeating the frivolous challenge may be easier than proving receipt.

e) Waiver of receipt of notice of deficiency

If a taxpayer signs a form (e.g., Form 4549), consenting to the immediate assessment and collection of the underlying tax liability, the taxpayer makes a choice not to receive a notice of deficiency and, therefore, is precluded from contesting the tax liability. Potts v. Commissioner, T.C. Memo. 2017-228 at *10-11 (Form 870-AD); Aguirre v. Comm'r, 117 T.C. 324 (2001) (Form 4549); Perez v. Comm'r, T.C. Memo. 2002-274 (Form CP-2000).

f) Opportunity to dispute liability

Other than receipt of a deficiency notice, the Code does not define what constitutes an "opportunity to dispute" the tax liability. The opportunity to dispute a tax liability includes the opportunity to challenge the liability in an administrative hearing before Appeals or in a judicial proceeding. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E2; 301.6330-1(e)(3)Q&A-E2.

> Appeals hearing - Three courts of appeals have upheld the Treasury regulations at sections 301.6320-1(e)(3) Q&A-E2 and 301.6330-1(e)(3) Q&A-E2 providing that a prior opportunity to dispute a liability includes an opportunity for a conference with Appeals offered either before or after assessment of the liability, even where there is no opportunity for judicial review from the conference. Our Country Home Enterprises, Inc. v. Commissioner, 855 F.3d 773 (7th Cir. 2017); Keller Tank Services II, Inc. v. Commissioner, 854 F.3d 1178 (10th Cir. 2017); Iames v. Commissioner, 850 F.3d 160 (4th Cir. 2017). All three of these decisions involve cases where the taxpayer received an actual hearing by Appeals to address the taxpayers' objections to the imposition of the section 6707A penalty. These decisions also uphold the Tax Court's holding in Lewis v. Commissioner, 128 T.C. 48 (2007), that a prior appeals conference gives rise to liability preclusion under section 6330(c)(2)(B.
>
> The Tax Court limited its holding in Lewis to situations in which the taxpayer has actually had a conference with Appeals about the liability in question. The court reserved judgment on the question of whether the mere opportunity to contest a liability in Appeals is sufficient to prevent the taxpayer from raising the liability during CDP. Please coordinate with Branch 3 or 4, P&A, if you have a case raising this issue. Also see the discussion below on section 6330(c)(4) as an alternative basis for precluding a taxpayer from raising underlying liability.

The taxpayer or his or her representative must receive the letter that provides the opportunity for a hearing with Appeals (or actually have participated in such a hearing) in order to preclude the taxpayer from contesting the liability at the CDP hearing. Prior opportunity does not include a separate Appeals conference that was held concurrently with the CDP hearing. Mason v. Comm'r, 132 T.C. 301 (2009); Perkins v. Comm'r, 129 T.C. 58 (2007).

30-day letter in deficiency case - receipt of a 30-day letter preceding a notice of deficiency is not an opportunity to dispute a tax under section 6330(c)(2)(B). If it were, it would render meaningless the requirement that the taxpayer receive a statutory notice of deficiency before being barred from disputing the liability in a CDP hearing.

Other pre-assessment letters - an opportunity to dispute a tax under section 6330(c)(2)(B) includes an opportunity to dispute in Appeals taxes to which deficiency procedures do not apply (e.g., employment tax, excise tax (except those in Chapters 41-44), the trust fund recovery penalty). The following are examples of an opportunity to dispute the liability because the notice received by the taxpayer informs him or her of the right to go to Appeals:

- notice of a proposed excise tax assessment (Letter 955). Lee v. I.R.S., 2002-1 USTC P. 50,365 (M.D. Tenn.).
- notice of a proposed trust fund recovery penalty assessment (Letter 1153(DO)). Mason v. Comm'r, 132 T.C. 301 (2009); Orian v. Comm'r, T.C. Memo. 2010-234.
- notice that a section 6682 penalty will be assessed. Adams v. United States, 2002-1 USTC P. 50,295 (D. Nev.).
- notice of proposed employment tax assessment (Letter 950).
- notice of proposed return preparer penalty assessment (Letter 1125(DO)).

Letter disallowing refund claim - a letter (e.g., Letter 105C) notifying a taxpayer that his or her refund claim is disallowed would be a prior opportunity to dispute the tax if the letter gives the taxpayer an opportunity to dispute the disallowance in Appeals. See, e.g., Farley v. Comm'r, T.C. Memo. 2004-168.

Interest abatement - if the taxpayer has been issued a preliminary determination letter with the right to go to Appeals on the same

interest abatement claim asserted in the CDP hearing, then the taxpayer has had a prior opportunity to dispute the interest.

Prior CDP notice - if the taxpayer received a prior CDP notice under section 6320 or 6330 for the same tax and period, the taxpayer has had an opportunity to dispute the existence and amount of the tax liability. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E7, 301.6330-1(e)(3)Q&A-E7; Lewis v. Comm'r, 128 T.C. 48 (2007); Daniel v. Comm'r, T.C. Memo. 2009-28.

Math error notice - a notice of a math error does not constitute an opportunity to dispute the tax liability, because the ability of the taxpayer to obtain abatement of the increase under section 6213(b)(2)(A) is not mentioned in the form notice and is alluded to only in one of the enclosures sent with the notice.

2. Judicial proceedings

An opportunity to dispute the tax liability may also include the opportunity to contest the tax in a prior judicial proceeding.

Bankruptcy proceedings - the taxpayer may be precluded from contesting the tax liability if he or she has filed a petition for protection under the Bankruptcy Code. The extent to which a taxpayer is precluded under section 6330(c)(2)(B) depends on the filing of a proof of claim by the Service, the taxpayer's standing to contest the liability in the bankruptcy proceeding, and the likelihood the bankruptcy court would exercise jurisdiction. See Everett Assocs., Inc. v. Comm'r, T.C. Memo. 2012-143; Salazar v. Comm'r, T.C. Memo. 2008-38; Kendricks v. Comm'r, 124 T.C. 69, 77 (2005).

District court cases - a tax lien foreclosure suit and/or a suit to reduce assessments to judgment involving the tax liability covered by the CDP hearing would be a prior opportunity under section 6330(c)(2)(B), because the taxpayer was entitled to challenge the liability in the suit. See MacElvain v. Comm'r, T.C. Memo. 2000-320; see also Summers v. Comm'r, T.C. Memo. 2006-219.

3. Issues Barred By § 6330(c)(4)

Section 6330(c)(4)(A) provides that an issue may not be raised at a CDP hearing if: (1) the issue was raised and considered at a previous CDP hearing or in any other previous administrative or judicial proceeding; and (2) the person seeking to raise the issue participated meaningfully in such hearing or proceeding. Section 6330(c)(4)(B) provides that a taxpayer is precluded from raising issues identified as frivolous in a list published by the Service or reflecting a desire to delay or

impede tax administration. See Notice 2010-33, 2010-1 C.B. 609; see also Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1). Section 6330(c)(4) also applies to CDP judicial review proceedings and precludes a taxpayer from relitigating a statute of limitations defense that was previously raised and adjudicated in a district court proceeding. Magana v. Comm'r, 118 T.C. 488 (2002). Similarly, if a bankruptcy court has determined that the taxpayer did not receive a discharge of the taxes to be collected, section 6330(c)(4) would preclude the taxpayer from raising the discharge issue in the CDP proceeding.

Three courts of appeals have held that section 6330(c)(4)(A) may be asserted as a basis for issue preclusion with respect to both liability and non-liability issues. Thus, a prior appeals hearing on the merits of the section 6707A penalty precluded taxpayers from challenging liability for the penalty in the CDP hearing. Our Country Home Enterprises, Inc. v. Commissioner, 855 F.3d 773 (7th Cir. 2017); Keller Tank Services II, Inc. v. Commissioner, 854 F.3d 1178 (10th Cir. 2017); Iames v. Commissioner, 850 F.3d 160 (4th Cir. 2017). In all three cases, the courts held that section 6330(c)(2)(B) could also be asserted as a basis for preclusion. See also Isley v. Comm'r, 141 T.C. No. 11 (2013) (sections 6330(c)(2)(B) and (c)(4) were alternate bases for preclusion of offset issue which petitioner had an opportunity to raise in a prior bankruptcy proceeding and refund suit).

Section 6330(c)(4) does not preclude consideration during CDP of an issue raised and considered in a Collection Appeals Program (CAP) hearing where CDP and CAP are requested simultaneously. The Appeals officer can adopt the CAP decision as part of the CDP determination.

Section 6330(c)(4) does not apply to spousal defenses under sections 66 and 6015. Treas. Reg. §§ 301.6320-1(e)(2), 301.6330-1(e)(2).

4. Consideration of Precluded Issues by Appeals

An appeals officer may, in his or her sole discretion, consider issues precluded under sections 66, 6015(g)(2), 6330(c)(2)(B), or 6330(c)(4). Any determination, however, made by the appeals officer with respect to such precluded issue shall not be treated as part of the Notice of Determination issued by Appeals and will not be subject to judicial review. Even if a decision concerning a precluded issue is referenced in a Notice of Determination, it is not reviewable by the Tax Court. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E11, 301.6330-1(e)(3)Q&A-E11; Behling v. Comm'r, 118 T.C. 572 (2002); Tiffany Wei Ding v. Comm'r, T.C. Memo. 2015-20, at *10-11.

E. Notice of Determination

Section 6330(c)(3) requires Appeals, in making its determination, to take into

consideration the "Big Three" issues: (A) the verification that the requirements of any applicable law or administrative procedure have been met; (B) consider issues validly raised under section 6330(c)(2); and (C) determine whether the proposed 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. See Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E1, 301.6330-1(e)(3)Q&A-E1); see also Wadleigh v. Comm'r, 134 T.C. 280 (2010); Trout v. Comm'r, 131 T.C. 239 (2008). The determination, sent by certified or registered mail and entitled "Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330," is issued as a dated letter (Letter 3193), which informs the taxpayer of his or her right to judicial review by the Tax Court. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E8, 301.6330-1(e)(3)Q&A-E8. The notice of determination should be sent to the taxpayer's last known address, consistent with the requirements for sending notices of deficiency. See Weber v. Comm'r, 122 T.C. 258 (2004). The letter provides a summary of the determination and includes an enclosure containing a complete description by the appeals officer of the basis of his or her determination.

VII. JUDICIAL REVIEW/JURISDICTION

A. Subject Matter Jurisdiction

A taxpayer has 30 days from the date of the notice of determination in which to appeal the determination to the Tax Court. I.R.C. § 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1). Courts also have jurisdiction to review a notice of determination issued pursuant to section 6330(f) after a jeopardy levy, levy on a state income tax refund, disqualified employment tax levy, or federal contractor levy. See Dorn v. Comm'r, 119 T.C. 356 (2002).

The Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 780, enacted on August 17, 2006, amended section 6330(d)(1) to provide the Tax Court with exclusive jurisdiction to review CDP determinations. This amendment applies to all CDP determinations issued on or after October 17, 2006, regardless of the type of underlying tax. Prior to amendment, section 6330(d)(1) provided for judicial review in district court in cases where "the Tax Court does not have jurisdiction of the underlying tax liability….", e.g. employment tax cases and the frivolous return penalty. Pursuant to the amendment, the Tax Court now has jurisdiction over CDP cases previously within the sole jurisdiction of the district courts, and can determine liability issues for taxes that are not otherwise subject to Tax Court jurisdiction. See Callahan v. Comm'r, 130 T.C. 44 (2008) (frivolous return penalty); Harry v. Comm'r, T.C. Memo. 2009-206 (section 6700 penalty); Salazar v. Comm'r, T.C. Memo. 2008-38 (employment taxes).

1. No overpayment jurisdiction

The Tax Court only has jurisdiction over the unpaid tax liability the Service is trying to collect. The court has no jurisdiction in CDP to determine an overpayment for the tax year at issue or to order a refund of any amounts paid. Wilson v. Comm'r, 805 F.3d 316 (D.C. Cir. 2015); Weber v. Comm'r, 138 T.C. 348 (2012); Greene-Thapedi v. Comm'r, 126 T.C. 1 (2006). However, if the CDP case involves innocent spouse relief or interest abatement, and the notice of determination addresses and rejects innocent spouse relief or interest abatement, the Tax Court has overpayment jurisdiction with respect to such relief or abatement under sections 6015(g)(1) and 6404(h)(2)(B), subject to the rules provided by sections 6511 and 6512(b). See King v. Comm'r, T.C. Memo. 2015-36, at *15-17 (abatement of interest jurisdiction).

2. Jurisdiction over non-CDP years

See the discussion at section VI.C.4.

3. Bankruptcy Discharge

In Washington v. Comm'r, 120 T.C. 114 (2003), the Tax Court determined that it has jurisdiction in a CDP case to decide whether tax liabilities subject to the CDP proceeding have been discharged in bankruptcy. See also Swanson v. Comm'r, 121 T.C. 111 (2003).

4. Jurisdiction Over Nominee Issues

The Tax Court has held that it has jurisdiction to determine whether a third party holds property of the taxpayer as a nominee insofar as the nominee issue pertains to respondent's rejection of an offer-in-compromise on the basis that the offer did not include the nominee interest. Dalton v. Comm'r, 135 T.C. 393 (2010), rev'd on other grounds, 682 F.3d 149 (1st Cir. 2012) (Tax Court used an improper standard of review when it considered de novo the nominee issue; a more deferential review is required and Appeals' determination should have been sustained as long as it was reasonable). On the other hand, third parties such as nominees have no right to request CDP hearings. Treas. Reg. §§ 301.6320-1(a)(2) Q&A-A7, 301.6330-1(a)(3) Q&A-A2, 301.6320-1(b)(2) Q&A-B5, 301.6330-1(b)(2) Q&A-B5; Greenoak Holdings Limited et. al. v. Commissioner, 143 T.C. 170 (2014) (dismissing for lack of jurisdiction Tax Court petition filed by entities claiming an interest in property subject to levy); Gillum v. Commissioner, 676 F.3d 633 (8th Cir. 2012) (Tax Court does not have jurisdiction over alter-egos and nominees).

5. Equitable Jurisdiction

The Tax Court has exercised equitable authority to order the Service to return property to the taxpayer that was improperly levied upon, and to credit the taxpayer with the value of property that was seized but not sold as required by section 6335(f). See Chocallo v. Comm'r, T.C. Memo. 2004-152; Zapara v. Comm'r, 124 T.C. 223 (2005), reconsideration denied, 126 T.C. 215 (2006), aff'd, 652 F.3d 1042 (9th Cir. 2011); Greene-Thapedi v. Comm'r, 126 T.C. 1, n. 13 (2006). Chief Counsel's position, however, is that the taxpayer's remedies in such situations are limited to those provided by the Internal Revenue Code such as seeking damages under section 7433. Zapara v. Comm'r, AOD 2012-6; 2013-12 I.R.B. 657.

B. Notice of Determination Required

Jurisdiction under section 6320 or 6330 is contingent upon both a timely petition for review and the issuance of a "valid notice of determination." Boyd v. Comm'r, 451 F.3d 8 (1st Cir. 2006); Offiler v. Comm'r, 114 T.C. 492, 498 (2000).

1. No Notice of Determination

If a notice of determination has not been issued to the taxpayer, the court does not have jurisdiction over the taxpayer. See Kennedy v. Comm'r, 116 T.C. 255 (2001); Davis v. Comm'r, T.C. Memo. 2008-238 (lock-in letter instructing employer to adjust taxpayer's withholding is not a CDP notice of determination). If the notice of determination does not include a particular tax and period listed in the petition, the court does not have jurisdiction over said tax, unless the taxpayer timely requested a CDP hearing for that tax and period and it was listed on the CDP notice.

In Thornberry v. Comm'r, 136 T.C. 356 (2011), the Tax Court held that it has jurisdiction to review Appeals' determination that a taxpayer is not entitled to a CDP hearing, pursuant to section 6330(g). See also Ryskamp v. Comm'r, 797 F.3d 1142 (D.C. Cir. 2015) (upholding Thornberry and holding that the Tax Court's jurisdiction to review determinations under section 6330(d) includes the jurisdiction to review determinations under section 6330(gAs explained in Chief Counsel Notice CC-2016-008, Disregarding Frivolous CDP Hearing Requests Under Section 6330 (April 4, 2016) (superseding Chief Counsel Notice CC-2012-003), counsel disagrees with these jurisdictional holdings but will not generally file a motion to dismiss to dispute these holdings.

A court lacks jurisdiction to review a decision letter (which is issued following an equivalent hearing). Orum v. Comm'r, 123 T.C. 1 (2004); Moorhous v. Comm'r, 116 T.C. 263 (2001). If a taxpayer shows that he was entitled to a CDP hearing because his hearing request was timely, the decision letter will be treated as a

notice of determination for the purpose of granting jurisdiction. See Craig v. Comm'r, 119 T.C. 252 (2002); cf. Graham v. Comm'r, T.C. Memo. 2008-129 (where Appeals failed to consider accuracy of assessment, hearing not equivalent to CDP hearing so decision letter not treated as notice of determination). Where no notice of determination was issued, the question will arise whether a proper CDP notice was ever mailed to the taxpayer. If a proper CDP notice was not mailed, the court will dismiss the case for lack of jurisdiction on that ground rather than because no notice of determination was issued. See, e.g., Graham v. Comm'r, T.C. Memo. 2008-129; Buffano v. Comm'r, T.C. Memo. 2007-32. The Seventh Circuit, however, in Adolphson v. Commissioner, 842 F.3d 478 (7th Cir. 2016), rejected the Buffano line of cases as improperly expanding the scope of the Tax Court's jurisdiction. The Seventh Circuit held that in the absence of a notice of determination, the Tax Court has no jurisdiction to rule on the validity of the CDP notices and levies.

2. Invalid Notice of Determination

A court lacks jurisdiction over a notice of determination that is invalid. An invalid determination is one that is inadequate to provide a basis for the reviewing court's jurisdiction. It is not a determination that reflects an erroneous disposition of a particular issue or omits discussion of a required issue.

A notice of determination mistakenly issued to a taxpayer who filed a late request for CDP hearing would be invalid. Wilson v. Comm'r, 131 T.C. 47 (2008). The taxpayer is not legally entitled to a CDP hearing if his or her request for hearing is late. Treas. Reg. §§ 301.6320-1(i)(1), 301.6330-1(i)(1). The mere fact that the taxpayer was issued a notice of determination, rather than a decision letter, cannot bestow jurisdiction on the Tax Court. But see Soo Kim v. Comm'r, T.C. Memo. 2005-96 (court won't look behind a facially valid notice of determination).

Similarly, the portion of a notice of determination with respect to taxes and periods for which no CDP notice was ever issued would not be valid. If a taxpayer includes in his or her request for hearing taxes and periods that are not listed on the CDP notice, only the portion of the notice of determination with respect to collection of the liabilities listed on the CDP notice is valid. Any determination with respect to the liabilities not listed on the CDP notice is not subject to judicial review. Finally, a notice of determination sent to the wrong address may not be valid. Cf. King v. Comm'r, 857 F.2d 676 (9th Cir. 1988) (notice of deficiency invalid if it was sent to the incorrect address and not actually received by the taxpayer). However, a notice of determination sent to an address other than the last known address would be valid if received in sufficient time to file a petition for review in Tax Court.

C. Timely Petition

A petition for review of a notice of determination must be filed within 30 days from the notice date. I.R.C. § 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1); Duggan v. Comm'r, 879 F.3d. 1929 (9th Cir. 2018) (30 day period is jurisdictional and not subject to equitable tolling); Guralnik v. Comm'r, 146 T.C. 230 (2016) (plain language reading of section 6330(d)(1) requires finding that 30 day period is jurisdictional); Gray v. Comm'r, 140 T.C. 163 (2013) (30 days applies regardless of whether underlying tax liability is at issue; the disputed assessed liability in a CDP case is not a "deficiency" subject to the 90-day petition period); Stein v. Comm'r, T.C. Memo. 2004-124, n.7. The 30 days are 30 calendar days, not 30 business days, and an appeal filed beyond the 30-calendar day period will be dismissed for lack of jurisdiction. Guerrier v. Comm'r, T.C. Memo. 2002-3. The statutory period cannot be extended by the filing of a request for reconsideration with Appeals or the taxpayer's failure to pick up his or her mail. McCune v. Comm'r, 115 T.C. 114 (2000). An untimely filing cannot be excused because the taxpayer is pro se.

1. Tax Court

If the Tax Court petition, as reflected by the postmark, is mailed within the 30 days, the "timely mailing/timely filing" rule set forth in section 7502(a) applies, and the petition is timely even if filed after the 30-day period. See, e.g., Montgomery v. Comm'r, 122 T.C. 1, 4 n.2 (2004). The "timely mailing/timely filing" rule does not apply if the petition's postmark is a foreign postmark. Sarrell v. Comm'r, 117 T.C. 122 (2001). Section 7503 applies if the last day of the 30-day period falls on a weekend or legal holiday.

a) Section 6015(e) exception

If a taxpayer seeks review of a notice of determination that includes a denial of relief under section 6015(e), he or she must file an appeal within 30 days if the taxpayer also seeks review of other issues raised in the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2)Q&A-F2, 301.6330-1(f)(2)Q&A-F2. If, however, a taxpayer seeks review only of the denial of relief under section 6015, the taxpayer must file an appeal with the Tax Court within 90 days of the notice of determination. See id.; I.R.C. § 6015(e)(1)(A). See also Gray v. Comm'r, 138 T.C. 295 (2012).

b) Section 6404(h) exception

Similarly, if a taxpayer seeks review of a notice of determination that includes a determination not to abate interest under section 6404(h), the taxpayer must file an appeal within 30 days if the taxpayer also seeks review of other issues raised in the CDP hearing. If, however, a taxpayer seeks review only of the denial of the request for abatement of interest,

and that request for review is filed with the Service on or before December 18, 2015, the taxpayer must file an appeal with the Tax Court within 180 days after the notice of determination is mailed. See I.R.C. § 6404(h)(1) (pre-PATH Act amendment); see also Gray v. Comm'r, 138 T.C. 295 (2012). If a taxpayer seeks review only of the denial of the request for abatement of interest, and that request for review is filed with the Service after December 18, 2015, the taxpayer may file an appeal with the Tax Court after the earlier of (1) the date the Service mails its determination not to abate interest, or (2) the date that is 180 days after the date the taxpayer files an interest-abatement claim with the Service. See § 6404(h) (post-PATH Act amendment); see also CC Notice 2016-006, *PATH Act Legislative Amendments: Appellate Venue for CDP and Innocent Spouse Cases, Tax Court Jurisdiction and S-case Status for Interest Abatement Cases, and Applicability of Federal Rules of Evidence to the Tax Court*.

D. Standard of Review

Where the liability is not properly at issue, the appeals officer's determinations should be reviewed for an abuse of discretion. H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at p. 266 (1998); see also Olsen v. United States, 414 F.3d 144, 150 (1st Cir. 2005). If liability is properly at issue, and the taxpayer contests both liability and the appeals officer's other determinations, the court reviews the liability challenge de novo and the other determinations for an abuse of discretion. Jones v. Comm'r, 338 F.3d 463, 466 (5th Cir. 2003).

1. Abuse of Discretion

Review by a court of a CDP determination under the abuse of discretion standard is deferential. Dalton v. Comm'r, 682 F.3d 149 (1st Cir. 2012) (the proper means of conducting an "abuse of discretion" review in CDP cases is to determine whether Appeals' factual and legal conclusions are reasonable in light of the administrative record, not whether they are correct); Fifty Below Sales & Mktg., Inc. v. United States, 497 F.3d 828 (8th Cir. 2007); Kindred v. Comm'r, 454 F.3d 688 at n.16 (7th Cir. 2006); Robinette v. Comm'r, 439 F.3d 455, 459 (8th Cir. 2006); Olsen v. Comm'r, 414 F.3d 144, 150 (1st Cir. 2005); Orum v. Comm'r, 412 F.3d 819, 821 (7th Cir. 2005); Living Care Alts. of Utica, Inc. v. United States, 411 F.3d 621, 631 (6th Cir. 2005).

The Tax Court has described the abuse of discretion standard in CDP cases as "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law." Robinette v. Comm'r, 123 T.C. 85, 93 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006); see also Blondheim v. Comm'r, T.C. Memo. 2006-216 (Tax Court, in consideration of Appeals' determination to reject an offer-in-compromise, does not substitute its judgment for that of Appeals, nor does it decide independently what would be an acceptable offer amount), aff'd in part, rev'd in part, Keller v.

Comm'r, 568 F.3d 710 (9th Cir. 2009); Murphy v. Comm'r, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Salazar v. Comm'r, T.C. Memo. 2008-38, aff'd, 2009-2 USTC P. 50,518 (2nd Cir. 2009).

a) Administrative record

Chief Counsel's position is that abuse of discretion review is limited to the administrative record. The Treasury Regulations provide that the administrative record for Tax Court review is the case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3). Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F4, 301.6330-1(f)(2) Q&A-F4.

The Tax Court has held that it is not required to limit its abuse of discretion review in CDP cases to the administrative record. Robinette v. Comm'r, 123 T.C. 85, 93 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006). The Tax Court in Robinette held that general administrative law principles and the Administrative Procedure Act (APA) do not apply to Tax Court proceedings, so the court is permitted to conduct a trial de novo in connection with its abuse of discretion review.

The Tax Court has been reversed on this position by three circuits, however. In Robinette v. Comm'r, 439 F.3d 455 (8th Cir. 2006), the Eighth Circuit agreed with the Commissioner that general administrative law principles and the APA require abuse of discretion review in Tax Court CDP cases to be limited to the administrative record (the record rule). See also Keller v. Comm'r, 568 F.3d 710 (9th Cir. 2009); Murphy v. Comm'r, 469 F.3d 27 (1st Cir. 2006). While the Tax Court will follow the law of the circuit, it has not changed its holding on the administrative record and so will not generally apply the record rule in cases arising in circuits other than the First, Eighth and Ninth Circuits. See Jewell v. Commissioner, T.C. Memo 2016-239 at *12-13. . Counsel should advocate adoption of the record rule as enunciated by the First, Eighth and Ninth Circuits in Tax Court cases arising in other circuits.

Note that the Tax Court in Murphy, 125 T.C. 301, 313 n.6 (2005), aff'd on different grounds, 469 F.3d 27 (1st Cir. 2006), while rejecting the argument that the record rule was applicable, held that it would not admit testimony with respect to facts that were not presented to the appeals officer, since such testimony would not be relevant to the issue of whether

the appeals officer abused her discretion. The taxpayer in Murphy had the opportunity to present the appeals officer with such information but failed to do so. See also Speltz v. Comm'r, 124 T.C. 165, 176-77 (2005); Blondheim v. Comm'r, T.C. Memo. 2006-216, aff'd in part, rev'd in part, Keller v. Comm'r, 568 F.3d 710 (9th Cir. 2009). Counsel should raise relevance as an alternate ground for exclusion of evidence or testimony, where applicable.

b) Determinations subject to abuse of discretion review

Determinations under section 6330(c)(3) - Verification by the appeals officer under section 6330(c)(1) is subject to an abuse of discretion review. Nicklaus v. Comm'r, 117 T.C. 117 (2001). Rejection by Appeals of collection alternatives, such as an installment agreement or offer in compromise, is subject to abuse of discretion review. Blondheim v. Comm'r, T.C. Memo. 2006-216; Schulman v. Comm'r, T.C. Memo. 2002-129; Estate of Doster v. Comm'r, T.C. Memo. 2002-2. The application of the balancing test is also subject to abuse of discretion review.

Interest abatement - The determination not to abate interest in a CDP proceeding is reviewed under the abuse of discretion standard. Downing v. Comm'r, 118 T.C. 22 (2002).

2. De Novo

The legislative history of sections 6320 and 6330 states that a court reviews the underlying liability de novo. See section VI.C.5, for a discussion of the Tax Court's holdings and Chief Counsel's position on what issues are liability issues.

A taxpayer may submit new evidence to the court on liability issues even if that evidence was not submitted to Appeals, as long as the issue was properly raised during the CDP hearing. Giamelli v. Comm'r, 129 T.C. 107 (2007). The reviewing court also makes a de novo determination with respect to the following:

- Whether section 6330(c)(2)(B) precludes a taxpayer from challenging his or her liability. Sego v. Comm'r, 114 T.C. 604 (2000).

- Whether hearing procedures are required by law. See, e.g., Keene v. Comm'r, 121 T.C. 8 (2003) (holding that section 7521(a)(1) authorizes taxpayers to audio record in-person CDP conferences); Cox v. United States, 345 F. Supp.2d 1218, 1220 n.1 (W.D. Okla. 2004) (issues of sufficiency of CDP telephone conference and impartiality of appeals officer under section 6330(b)(3) are procedural issues reviewed de novo).

- What constitutes the content of the administrative record. See, e.g., Mesa

Oil, Inc. v. United States, 2001-1 USTC P. 50,130 (D. Colo. 2000).

- The Tax Court has held that denial of equitable relief under section 6015(f) is reviewed de novo (both standard of review and scope of review). Porter v. Commissioner, 132 T.C. 203 (2009). In Wilson v. Commissioner, 705 F.3d 980 (9th Cir. 2013), aff'g T.C. Memo 2010-134, the Ninth Circuit agreed, relying on the specific language in section 6015(e)(1)(A) giving the Tax Court the authority to "determine" the appropriate relief available. The Service acquiesced in this decision in Action on Decision 2012-07, I.R.B. 2013-25 (June 17, 2013).

E. Issues Not Raised with Appeals

In seeking Tax Court review of the notice of determination, the taxpayer can only request that the court consider an issue, including a liability issue, that was raised in the taxpayer's CDP hearing. An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence. Treas. Reg. §§ 301.6320-1(f)(2)Q&A-F3 and 301.6330-1(f)(2)Q&A-F3; see also Pough v. Comm'r, 135 T.C. 344 (2010); Giamelli v. Comm'r, 129 T.C. 107 (2007). In Magana v. Comm'r, 118 T.C. 488 (2002), the Tax Court held that, in reviewing a CDP case for abuse of discretion, it will generally consider only arguments, issues, and other matters that were raised at the collection hearing or otherwise brought to the attention of the Appeals Office. The court cannot find an abuse of discretion where there no evidence that the appeals officer exercised any discretion. However, the court will review whether Appeals verified compliance with applicable law under section 6330(c)(1) without regard to whether the taxpayer raised the issue at the administrative hearing. Hoyle v. Comm'r, 131 T.C. 197 (2008). The court will not, however, consider verification where raised for the first time in petitioner's answering brief, resulting in prejudice to respondent. See Ambawalage v. Comm'r, T.C. Memo. 2015-229.

F. Res Judicata and Collateral Estoppel

The provisions of sections 6330(c)(2)(B) and 6330(c)(4) are similar to the judicial doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion), respectively. Sections 6330(c)(2)(B) and 6330(c)(4) are independent of the judicial doctrines and should be made as averments, where appropriate (in addition to affirmative allegations made for judicial doctrines), when answering an appeal of a notice of determination. Section 6330(c)(2)(B) does not displace the doctrine of res judicata as to liability determinations. See Goodman v. Comm'r, T.C. Memo. 2006-220.

G. Remand

When Appeals has abused its discretion, the taxpayer was not given a proper hearing, or the administrative record is insufficient for the Tax Court to properly evaluate the case, the Tax Court will remand the case to Appeals to hold a new hearing, where such hearing would be necessary and productive. See Wadleigh v. Comm'r, 134 T.C. 280 (2010); Kelby v. Comm'r, 130 T.C. 79 (2008); Lunsford v. Comm'r, 117 T.C. 183 (2001); Kehoe v. Comm'r, T.C. Memo. 2013-63. The Tax Court has also held that it has authority to remand a CDP case even when Appeals has not abused its discretion, where there has been a material change in a taxpayer's factual circumstances after the determination was issued and remand would be helpful, necessary, or productive. Churchill v. Comm'r, T.C. Memo. 2011-182; cf. Trainor v. Comm'r, T.C. Memo. 2013-14 (no remand where taxpayer could have brought the matter to the attention of Appeals during the CDP hearing); Van Camp v. Comm'r, T.C. Memo. 2012-336 (no changed financial circumstances to justify remand even if authorized to do so). For further guidance on when remand based upon material change in circumstances may be appropriate, see CC Notice 2013-002, *Remands to Appeals in CDP Cases When There is a Post-Determination Change in Circumstances.*

H. Appellate Venue

Section 7482(b) was amended by section 423 of the Protecting Americans from Tax Hikes Act of 2015, P.L. 114-113, on December 18, 2015, to add new section 7482(b)(1)(G) to clarify that appellate venue for CDP cases is for individuals in the circuit of the petitioner's legal residence, or for entities other than individuals, the principle place of business or principal office or agency. Pursuant to section 423(b), the amendment is effective for petitions filed after the date of enactment, but should not be construed to create any inference with respect to petitions filed on or before the date of enactment. The amendment has the effect of overruling Byers v. Commissioner, 740 F.3d 668 (D.C. Cir. 2013) (holding that under section 7482(b)(1), non-liability CDP cases are appealable to the D.C. Circuit and not the regional circuits). See also CC Notice 2016-006, PATH Act Legislative Amendments: Appellate Venue for CDP and Innocent Spouse Cases, Tax Court Jurisdiction and S-case Status for Interest Abatement Cases, and Applicability of Federal Rules of Evidence to the Tax Court.

VIII. RETAINED JURISDICTION OF APPEALS

Under section 6330(d)(2), after the CDP hearing is concluded, Appeals retains jurisdiction to review collection actions taken or proposed under section 6330, but only if the taxpayer claims a change in circumstances after she has exhausted all administrative remedies (attempted to resolve the matter with Compliance). I.R.C. § 6330(d)(2); Treas. Reg. §§ 301.6320-1(h)(1), 301.6330-1(h)(1). Appeals will not exercise retained jurisdiction while the notice of determination is subject to judicial review. If another hearing is held under section 6330(d)(2) and Appeals issues a decision, the taxpayer may not seek judicial review of the decision. Treas.

Reg. §§ 301.6320-1(h)(2)Q&A-H2, 301.6330-1(h)(2)Q&A-H2.

2018 GL-1 Instruction Assigned to Christopher Jones (CC:PA)

Previous Instruction: Micah A. Levy; Laurence (“Larry”) K. Williams