



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SMALL BUSINESS/SELF-EMPLOYED)
CC:SB:5:STL

FROM: ALAN C. LEVINE
Chief, Branch 1 (Collection, Bankruptcy & Summonses)

SUBJECT: Taxpayer's Challenge to Underlying Tax Liability in Collection Due Process Proceeding Where Taxpayer Agreed to Assessment

This Chief Counsel Advice responds to your memorandum dated June 5, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer =
Tax Year A =
Tax Year B =

ISSUE

Whether a taxpayer in an appeal to the United States Tax Court from a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (notice of determination) may dispute the merits of an adjustment to the taxpayer's income resulting in additional tax, when the taxpayer agreed to the assessment of the tax following an examination by executing IRS Form 4549, *Income Tax Examination Changes*?

CONCLUSION

In an appeal to the Tax Court from a notice of determination, a taxpayer who has agreed to the assessment of liability by executing Form 4549 may not challenge that liability because the taxpayer had a prior opportunity to contest the liability and the executed form is a waiver of the right to Tax Court review of the liability.

FACTS

In an examination of the taxpayer's income tax returns for tax years A and B, the taxpayer's filing status was changed from head of household to married filing separately and exemptions for dependents were disallowed. The adjustments resulted in additional tax for both tax years.

The taxpayer signed an IRS Form 4549-CG, *1/ Income Tax Examination Changes*, listing the adjustments and his resulting liability. The form contains the following statement:

I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in the United States Tax Court the findings in this report. Therefore, I give my consent to the immediate assessment and collection of any increase in tax and penalties shown above, plus additional interest as provided by law. I accept any decrease in tax and penalties shown above.

I understand that this report is subject to acceptance by the appropriate IRS official.

The IRS assessed the additional tax and sent a notice of intent to levy to the taxpayer. Pursuant to the notice of levy, the taxpayer was given an opportunity for a collection due process (CDP) hearing before an appeals officer. The taxpayer requested a hearing but did not appear for one. The appeals officer issued a notice of determination finding that the proposed levy action was appropriate. The taxpayer then filed a petition for review with the Tax Court. In his petition, as well as his request for a CDP hearing, the taxpayer has argued the merits of the adjustments that resulted in the increases in tax.

LAW AND ANALYSIS

I.R.C. § 6330 provides taxpayers with the right to a CDP hearing prior to levy, if requested, and discusses the matters to be considered at a hearing. At the hearing, a taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy, including" the appropriateness of collection efforts, spousal de-

^{1/} "CG" is a defunct suffix standing for "computer generated."

fenses, and collection alternatives. I.R.C. § 6330(c)(2). The taxpayer's underlying liability may also be considered at the hearing if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or *did not otherwise have an opportunity to dispute such tax liability.*" I.R.C. § 6330(c)(2)(B) (emphasis added).

Neither the statute nor its legislative history defines what constitutes "an opportunity to dispute such tax liability." However, because the statute gives taxpayers CDP rights in the form of a hearing before an appeals officer and subsequent judicial review, it is consistent to limit the prior-opportunity restriction on those rights to a prior opportunity before either Appeals or a court. The regulation implementing I.R.C. § 6330 states that "[a]n opportunity to dispute a liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of liability." Treas. Reg. § 301.6330-1(e)(3)Q&A-E2. The regulation also provides that a "taxpayer may not raise an issue that was raised and considered at a previous CDP hearing . . . or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceeding." Treas. Reg. § 301.6330-1(e)(1).

The requirement that the prior opportunity have been one before Appeals or a court is satisfied in this case—the Form 4549 that the taxpayer signed is an acknowledgment that the taxpayer had "appeal rights with the Internal Revenue Service or . . . [before] the United States Tax Court" with regard to the liability listed on the form; the taxpayer could not waive rights that he did not have. Thus, he had an opportunity to contest liability prior to his request for a CDP hearing.

Moreover, the Tax Court has held that a signed Form 4549 bars the taxpayer from contesting underlying liability before the court. *Aguirre v. Commissioner*, 117 T.C. 324 (2001). The facts of the *Aguirre* case are virtually identical to the instant situation. The Aguirres filed joint returns for 1992 through 1994 that were examined and adjusted, and the petitioners signed a Form 4549, agreeing to the assessment of liability. In response to a Notice of Intent to Levy, the petitioners requested a CDP hearing. The record before the court did not indicate whether a hearing was held, but the petitioners requested the hearing only to challenge their underlying tax liability and their petition to the court was likewise solely a challenge to liability. The court found that the petitioners waived their right to the judicial review they sought, entitling the respondent to summary judgment. The court pointed out that although section 6330 provides an opportunity to contest liability where the taxpayer has not received a statutory notice of deficiency, this was of no benefit to the petitioners because they chose not to receive such notice by agreeing to the assessments.

Please call (202) 622-3610 if you have any further questions.